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TEXAS INSURANCE LAW NEWSBRIEF

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IN A CASE OF FIRST IMPRESSION IN TEXAS, THE UNITED STATES DISTRICT COURT CONCLUDES THAT INSURER'S POLICY EXCLUSION DID NOT EXCLUDE BODILY INJURIES TO A FETUS CAUSED BY A PUNCH TO THE MOTHER'S STOMACH

Last week, the United States District Court for the Southern District of Texas, Houston Division, concluded that a policy provision excluding claims of bodily injury to a child that occur "as a consequence" of bodily injury to his or her parent, did not exclude bodily injuries to a fetus caused by a punch to the mother's stomach. In *Colony Ins. Co. v. Hearts with Hope Foundation*, No. H-17-886, 2018 WL 1089225 (S.D. Tex. [Houston Division] February 28, 2018, mem. op.), Karen Anderson worked for Hearts with Hope Foundation, an organization that provides childcare for mentally and emotionally disturbed children. At work, Ms. Anderson, pregnant at the time, was punched in her stomach by one of the children. As a result, her baby was born prematurely and suffered severe physical and emotional injuries. Ms. Anderson and her husband brought suit on behalf of their child, VA, against Hearts with Hope. Their petition stated that the hit to the stomach caused Anderson's amniotic sac to rupture and caused VA to be injured. In turn, Hearts with Hope tendered the claim to its insurer, Colony Insurance Company ("Colony"). However, Colony denied coverage and sought a declaratory judgment that it did not owe a duty to defend Hearts with Hope.

Colony's policy excluded claims of bodily injury to the spouse, child, parent, brother or sister as a consequence of bodily injury to an employee of the insured arising out of and in the course of employment by the insured. Thus, the main issue before the Court was whether VA's bodily injuries occurred "as a consequence" of Ms. Anderson's bodily injury (her rupture of amniotic sac), in which case the policy exclusion would apply, or whether VA's injuries were direct injuries, in which case the exclusion would not apply.

The Court, after noting that there was a "dearth of cases on point" and analyzing two out-of-state cases, concluded that the exclusion did not apply and that Colony had a duty to defend Hearts with Hope. The Court reasoned that Andersons' "petition did not preclude a direct injury as it alleges that the hit caused Anderson's amniotic sac to rupture *and* caused VA to be injured." The Court further reasoned that"[u]nder a liberal reading of the petition, VA would have been injured even if Anderson's amniotic sac did not rupture."

TEXAS COURT OF APPEALS REVERSES JURY'S FINDING OF GROSS NEGLIGENCE AND AWARD OF EXEMPLARY DAMAGES.

Last week, the Austin Court of Appeals held that the evidence in the trial court was legally insufficient to support the jury's finding of gross negligence, and reversed the portion of the judgment awarding exemplary damages. In *Williams and Loomis Armored US, LLC v. Crawford*, No. 03-16-00696-CV, 2018 WL 1124306, (Tex. App. —Austin, March 02, 2018, mem. op.), Crawford was stopped at a red traffic light when his vehicle was rear-ended by an armored truck driven by Williams, an employee of Loomis Armored. Crawford subsequently sued Williams and Loomis Armored for negligence and gross negligence. At trial, the undisputed evidence showed that Williams was driving his 14,000-pound armored truck in the rain and while eating sunflower seeds. Further, Williams looked away from the road and down to the floorboard as he approached the traffic light where Crawford's vehicle was stopped. When he looked up and noticed Crawford's vehicle, he applied the truck's brakes but was unable to avoid colliding with Crawford's vehicle. Williams acknowledged that he was distracted and not looking ahead just before the accident. Additionally, he admitted that he knew that driving while distracted is unsafe.

At the conclusion of the trial, the jury found Williams grossly negligent and awarded Crawford $5,000 in exemplary damages (in addition to various compensatory damages). On appeal, however, the Court of Appeals concluded that there was insufficient evidence to support the jury's finding. In reversing the jury's finding, the court noted the well-settled law that "an act or omission that is merely thoughtless or careless . . . cannot be grossly negligent." The court reasoned that there was "[n]othing in the record . . . to suggest that Williams was speeding as he approached the intersection or that he was driving at an unsafe distance, aggressively, or erratically before looking down."

TEXAS COURT OF APPEALS STRIKES EXPERT'S CONCLUSORY OPINION ON CAUSATION

Last week, the Austin Court of Appeals held that a testifying expert's opinion on the issue of accident-to-injury causation was not supported by a reliable basis. In *Williams and Loomis Armored US, LLC v. Crawford*, No. 03-16-00696-CV, 2018 WL 1124306, (Tex. App. —Austin, March 02, 2018, mem. op.), Crawford was injured when he was rear-ended by an armored truck. Among the several injuries that Crawford complained of at trial was a synovial cyst (which necessitated a surgery and cost approximately $27,000). At trial, Dr. Robert Josey testified that Crawford's synovial cyst was caused by the accident. However, he also testified that (1) a synovial cyst is most often, though not always, caused by degeneration; and (2) Crawford's synovial cyst did not develop until 2015 or 2016, three to four years after the accident. Additionally, Dr. Josey failed to explain how he had concluded the accident caused the cyst. Quickly and without much effort, the Court of Appeals concluded that Dr. Josey's testimony "constitute[d] no evidence that the accident was a proximate cause of [the complained-of injury]."