Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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PUBLIC ADJUSTER DEALT A $475,000 LOSS FROM HIS OWN CONTRACT

Last Thursday, the Texas Second District Court of Appeals in Fort Worth upheld a trial court's construction of a contract, and in doing so allowed an insured to keep $475,000 in interpleaded settlement funds. In *CCPA Enterprises, Inc. v. Bedford Hospitality Investments, LLC*, No. 02-17-00382-CV, 2019 WL 5608230 (Tex. App.—Fort Worth Oct. 31, 2019, no pet. h.), a public hailstorm insurance adjuster sought interpleaded funds as a matter of law, from his client's settlement with its real property insurer.

In April of 2007, a hailstorm damaged Bedford Hospitality's hotel property in Bedford, Texas. The damage resulted in catastrophic roof damage, additionally, several rooms flooded. At the time of the storm the structure was covered under an insurance policy with Colony Insurance ("Colony"). Bedford Hospitality contracted with CCPA Enterprises, Inc. ("CCPA") to adjust the loss for damages caused by the hail in exchange for 10% of specific damages recovered by Bedford Hospitality after trial or settlement with Colony. After over four years of litigation, without reciting any liability or damages, Colony agreed to settle with Bedford Hospitality for $4,275.000 and to interplead an additional $475,000 into the court's registry for a potential claim by CCPA. Notably, the settlement agreement did not allocate specific amounts to any damage categories.

After removing several claims, Bedford Hospitality and CCPA had dueling breach-of-contract claims for the $475,000 in interpleaded funds. The trial judge reviewed the contract and determined that because the specific damage types listed in the contract between Bedford Hospitality and CCPA had not been laid out in Bedford's settlement agreement with Colony, Bedford had not breached the adjusting contract with CCPA. And based in part on Colony's settlement language disclaiming admissions to "any fact or contention of law," the trial court ruled none of the payment represented "structural loss, personal-property loss, business interruption, loss of use, or extra expense" damages as listed in the contract by CCPA. Thus, the trial court awarded the $475,000 worth of interpleaded funds to Bedford Hospitality. CCPA appealed the Court's ruling.

The Second District Court of Appeals agreed with the lower court, holding that Bedford Hospitality was not required to "slice and dice any settlement it might enter into with Colony" in order to pay CCPA for the damages specifically listed in the contract. Notably, CCPA drafted and had counsel review the adjusting contract before executing it. For all these reasons, the appellate court refused to rewrite the contract, and upheld the trial court's ruling awarding the interpleaded funds to Bedford Hospitality.

PREMISES OWNER NOT LIABLE FOR WRONGFUL DEATH IN CHRISTMAS LIGHTS FALL

Recently, a Houston court of appeals found that a premises owner was not liable under negligence or premises-liability theories of recovery for the death of invitee who fell from a tree and died while removing Christmas lights. In *Ledezma v. Turner*, No. 01-18-00700-CV, 2019 WL 4774094, (Tex. App.—Houston Oct. 1, 2019, mem. op.), Abdon Leyva fell to his death when a tree limb broke while he was removing Christmas lights for Sean Tuner in a tree at Turner's residence. Subsequently, Mr. Leyva's widow and children sued Turner for wrongful death, asserting negligence and premises liability claims. The Leyvas contended, among other things, that a recent freeze, the occurrence of which was known to Turner but not Mr. Leyva, caused the tree branch to die in between the time Mr. Leyva hung the Christmas lights and removed the lights.

In response to the lawsuit, Turner moved for summary judgment, which the trial court granted.

On appeal, the court analyzed the threshold issue in a premises-liability claim: whether the premises owner had actual or constructive knowledge of the allegedly dangerous condition. Under Texas law, "an owner or occupier is not liable for deterioration of its premises unless it knew of or by reasonable inspection would have discovered the deterioration."

The Court of Appeals concluded that, assuming the branch had died because of the recent freeze, there was no evidence that Turner had actual or constructive knowledge of the allegedly dangerous condition—that the branch was dead and could break—at the time of Mr. Leyva's accident. Further, there was no evidence that a reasonable inspection would have discovered that the branch was dead and could break.

The Court of Appeals also affirmed summary judgment dismissing the Leyvas' negligence claims. In regard to the Leyvas' first negligence allegation—that Turner failed to warn Mr. Leyva of the dangerous condition on the property—the court concluded that the allegation was based on an allegedly dangerous condition of the property, not a negligent activity, and was therefore limited to a premises-liability theory of recovery. In regard to the Leyvas' second negligence allegation—that Turner directed Mr. Leyva to perform work in a dangerous manner without regard to his safety (i.e. "to go as high as you can go"—the court concluded there was no evidence that Turner was engaged in any activity when Mr. Leyva fell from the tree, as it was undisputed that Turner was not present

when Mr. Leyva was removing the lights.

Editor's Note: Be careful hanging or taking down those lights!

DALLAS COURT OF APPEALS SAYS NO WAY TO ACCIDENT-OBSERVING PRO SE WITNESS

A Dallas court of appeals recently upheld a motion to dismiss against a third-party witness to an accident. In *Bitten v. State Farm*, No. 05-18-01296-CV, 2019 WL 4686517 (Tex. App.—Dallas Sept. 26, 2019, no pet. h.), a third-party witness to an auto accident, Terrell E. Bitten, attempted to sue the insurer directly for benefits under the policy.

State Farm filed a motion to dismiss under well-established Texas law arguing that a witness to an accident cannot enforce the policy directly against the insurer until it has been established, by judgment or agreement, that the insured has a legal obligation to pay damages to the injured party. In response, Bitten filed a motion arguing State Farm did not have all the facts and he was the reason 911 was called from the accident scene. Despite Bitten's response, the trial court granted State Farm's motion to dismiss. Bitten then appealed to the Dallas court of appeals.

Bitten's original appellate brief was filed on December 31, 2018. Unfortunately, the brief failed to comply with appellate rule 38 in at least four ways—including failing to contain a succinct, clear and accurate statement of arguments or a concise statement of facts. Bitten was given two extensions to file an amended brief, and eventually filed an amended brief on March 19, 2019. However, the amended brief still failed to present any specific issue for review supported by citation to any legal authority.

In ruling, the Dallas appellate court recognized that Bitten was pro se; however, he was required to adhere to the rules of evidence and procedure, including the appellate rules of procedure. The appellate court then upheld the dismissal. Despite his best efforts, Mr. Bitten, had indeed bitten off more than he could chew.

SAN ANTONIO COURT HOLDS DECLARATORY ACTION ON PUNITIVE DAMAGES IS MOOT

The San Antonio court of appeals recently refused to vacate a prior opinion denying punitive damages, but still held a declaratory action appeal was moot and vacated the trial court's judgment (including punitive damages). In *Zuniga v. Farmers Ins.*, No. 04-18-00899-CV, 2019 WL 4647717 (Tex. App.—San Antonio Sept. 25, 2019, no pet. h.), the San Antonio court of appeals held Zuniga's appeal was moot due to the Supreme Court of Texas's ruling that Zuniga take nothing on her gross-negligence claim, which was the only basis for punitive damages.

At the trial court, a jury returned a judgment in Zuniga's favor, awarding Zuniga $93,244.91 in actual damages and $75,000.00 in punitive damages. Farmers' insured appealed the finding that he was grossly negligent. The appellate court originally held there was enough evidence to support the gross-negligence claim. However, on June 11, 2019, the supreme court reversed and rendered judgment that Zuniga take nothing on her gross-negligence claim. In the interim, prior to the supreme court's ruling, Farmers brought a declarative action seeking to establish their policy did not cover punitive damages, the San Antonio court of appeals agreed in a ruling in 2017. On remand, the trial court agreed Farmers' insurance policy did not over punitive damages and Farmers had met its contractual duties to defend and indemnify their insured. Zuniga timely made this appeal.

Farmers moved to dismiss Zuniga's appeal, due to the supreme court having recently issued their opinion eliminating Zuniga's right to recover the punitive damages award for gross negligence. The San Antonio court of appeals agreed that the case should be dismissed as moot and granted Farmers' motion to dismiss. The appellate court also vacated the trial court's previous judgment, but notably let their opinion stand that the Farmers' policy did not include punitive damages due to losing authority over that appeal in 2017. Meaning, there may be another trial in this case, but there is still appellate precedent that Farmers' insurance policy does not cover punitive damages.