

TEXAS INSURANCE LAW NEWSBRIEF

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COURT REJECTS ARGUMENT THAT MEDICAL BILLS ARE ADMISSIBLE TO PROVE NON-ECONOMIC DAMAGES - AFFIRMS TRIAL COURT'S EXCLUSION

Last week, the Court of Appeals, El Paso, rejected the defendant's argument that the plaintiff's medical bills were admissible for the jury's consideration of non-economic damages, and affirmed the trial court's exclusion of the medical bills. In *Press Energy Svcs., LLC and Nissley v Ruiz*, No. 08-19-00179-CV, 2021 WL 3013313 (Tex. App.—El Paso, July 16, 2021), Nissley and Ruiz, both commercial truck drivers, were involved in a collision. Ruiz subsequently filed suit against Nissley alleging negligence and gross negligence. Ruiz initially sought recovery for medical expenses and non-economic damages (pain and suffering, mental anguish, physical impairment, and disfigurement), but he later amended his petition and removed his claim for medical expenses. During trial, the court excluded evidence of Ruiz's medical bills, despite Nissley's efforts to admit the bills into evidence. The jury ultimately returned a unanimous verdict of negligence and gross negligence against Nissley.

On appeal, Nissley contended that the trial court erred in excluding evidence of Ruiz's medical bills, arguing that the medical bills were tethered to Ruiz's claims of noneconomic damages, and the bills were admissible as a guidepost for the jury's determination of noneconomic damages. Nissley also contended that the evidence to support a finding of gross negligence was legally and factually insufficient. The Court of Appeals rejected Nissley's guidepost argument and held that the trial court did not err in excluding Ruiz's medical bills. Relying on *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011), the court concluded that the probative value of the medical charges as related to the jury's ability to gauge the seriousness of Ruiz's injuries for the purpose of awarding noneconomic damages was substantially outweighed by the confusion it would generate.

On the issue of gross negligence, the Court of Appeals concluded that the evidence was sufficient to support a finding of gross negligence. To that end, the testimony established that the ABS lines of Nissley's truck had been cut and fastened to the truck, the ABS warning lights inside the cab had been disabled by the removal of the light fuse, and the truck had mismatched brake chambers. Additionally, Nissley admitted that he checked the truck's ABS system and brake chambers as part of his pre-trip inspection. As such, the court reasoned that "the jury was permitted to reach a reasonable inference through circumstantial evidence that Nissley knew his brakes were defective and could cause serious harm or death, and nonetheless, he chose to drive the vehicle anyway."

APPEALS COURT CONCLUDES ATTORNEY'S FEES ARE RECOVERABLE IN UM/UIM CASES BROUGHT PURSUANT TO UDJA

Last week, the Court of Appeals, Fort Worth, concluded that attorney's fees are recoverable in UM/UIM cases brought pursuant to the Uniform Declaratory Judgments Act ("UDJA"). In *Allstate County Mutual Ins. Co. v. Hill*, No. 02-20-00174-CV, 2021 WL 2978746 (Tex. App.—Fort Worth, July 15, 2021), Hill brought suit against Allstate County Mutual Insurance Company ("Allstate") to recover underinsured motorist (UIM) benefits, pursuant to the UDJA. Ultimately, the jury determined that Hill was entitled to damages in excess of the at-fault driver's insurance policy limits. The jury also awarded \$42,668.75 in reasonable and necessary attorney's fees and costs incurred by Hill.

On appeal, Allstate argued that the trial court erred in allowing an award for attorney's fees. The Court of Appeals quickly rejected this argument in light of the Texas Supreme Court's recent decision in *Allstate Ins. Co. v. Irwin*, No. 19-0885, 2021 WL 2021446, at *1, *6 (Tex. May 21, 2021), that use of the UDJA to establish entitlement to UM/UIM policy benefits is proper, and that trial courts have discretion under the UDJA to award reasonable and necessary attorney's fees.

COURT OF APPEALS AFFIRMS SUMMARY JUDGMENT IN ASBESTOS-RELATED WRONGFUL-DEATH CLAIM

Last week, the Court of Appeals, Houston, concluded that the plaintiff did not establish that the asbestos exposure was a substantial factor in causing the decedent's mesothelioma and death. Thus, the court affirmed the trial court's grant of summary judgment. In *Mullins v. Atlantic Richfield Company*, No. 01-20-00013-CV, 2021 WL 2931355 (Tex. App.—Houston, July 13, 2021), Mullins filed a wrongful death and survivor suit against Atlantic Richfield Company ("ARCO"), alleging that her deceased husband was exposed to asbestos while working at ARCO's petrochemical plant, which caused her husband to develop mesothelioma, which led to his death. In response, ARCO filed a no-evidence motion for summary judgment, arguing that Mullins failed to produce evidence to show that her husband's exposure to asbestos at ARCO's plant was a substantial factor in causing his mesothelioma.

Mullins' summary-judgment evidence included the following: (1) work history sheets showing her husband's work history from 1965

to 1983, including the location of his worksites and the type of asbestos materials used at the worksites; (2) opinions of an expert pathologist, including that the husband's asbestos exposure was the cause of his mesothelioma and death; and (3) opinions of an occupational epidemiologist, including that the husband had frequent, regular exposure to asbestos dust products at ARCO, and that these exposures were of such a dose that they were a substantial factor in the cause of his mesothelioma and death.

The trial court granted ARCO's motion, which Mullins appealed.

The Court of Appeals began its analysis by thoroughly discussing Texas law governing asbestos-related claims: "Although evidence of the frequency, regularity, and proximity of exposure is required to establish causation, it is not alone sufficient to establish causation. To establish causation, the plaintiff must offer quantitative evidence about the dose or level of asbestos exposure. A plaintiff must produce defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease. In the absence of direct proof of causation, establishing causation in fact against a defendant in an asbestos-related disease case requires scientifically reliable proof that the plaintiff's exposure to the defendant's product more than doubled his risk of contracting the disease. A more than doubling of the risk must be shown through reliable expert testimony that is based on epidemiological studies or similarly reliable scientific testimony."

The Court of Appeals affirmed the trial court's judgment. "Because [Mullins] offered no direct evidence of causation, she was required to offer scientifically reliable expert testimony that her husband's asbestos exposure more than doubled his risk of contracting mesothelioma", which she did not. "Although harsh, this result is compelled by the asbestos-liability framework established by the Supreme Court of Texas, which has been recognized as 'the most stringent' of any state."

U.S. DISTRICT COURT FOLLOWS LINE OF CASES DISMISSING COVID-19 BUSINESS-INTERRUPTION CLAIMS

Last week, the United States District Court for the Northern District of Texas dismissed a restaurant's COVID-19 business-interruption claim, concluding that the restaurant did not adequately allege that COVID-19 caused physical damage or loss. In *Vandelay Hospitality Group v. The Cincinnati Ins. Co.*, No. 3:20-CV-1348-C, 2021 WL 2936066 (N.D. Texas [Dallas Division], July 13, 2021), Vandelay sued its insurer, The Cincinnati Insurance Company ("Cincinnati"), alleging that the shut-down orders issued in connection with COVID-19 forced it to cease its operations, resulting in business interruption and loss of business income. Vandelay alleged that such losses were covered under its policies with Cincinnati, and that Cincinnati's denial of its claim was a breach of contract.

In response, Cincinnati filed a motion to dismiss, arguing that Vandelay failed to adequately allege that the presence of COVID-19 caused any distinct, demonstrable, physical alteration of the property so as to trigger coverage under any provision of the policy.

The U.S. District Court granted Cincinnati's motion to dismiss. The District Court followed three previous district court decisions where the courts concluded that COVID-19 and related civil authority orders did not qualify as a "physical loss of or damage to property" under property insurance policies. In doing so, the District Court rejected Vandelay's arguments that COVID-19 (1) is a physical pathogen, attaches to surfaces, and alters the composition of surfaces; (2) caused direct physical loss to the property by making the premises unusable in the way that it had been used before contamination; (3) caused physical contamination of the entire insured premises; (4) infected Vandelay's employees and customers; and (5) caused a necessary suspension of operations during a period of restoration. The District Court concluded that although Vandelay may have sufficiently alleged that COVID-19 was present in its restaurant, it did not adequately allege that COVID-19 caused physical damage or loss.