Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

DEC 23, 2021

LYFT MEETS STATUTORY REQUIREMENTS FOR INDEPENDENT CONTRACTOR STATUS – SUMMARY JUDGMENT GRANTED

Last week, the Dallas Court of Appeals reviewed a trial court's summary judgment in favor of Lyft, Inc. and concluded that Lyft was not responsible for a passenger's injuries sustained while riding in a car driven by a Lyft driver, as a matter of law. In *Freyer v. Lyft, Inc.* 0221 WL 5879188 (Tex.App. – Dallas December 13, 2021), Molly Freyer used Lyft's smartphone app to secure a ride from DFW Airport. During transit, the driver became ill, lost consciousness and Freyer then attempted to get out of the slow-moving vehicle. Her body got pinned between the back door and a concrete barrier and her foot was dragged along the concrete barrier for over 150 feet before the car stopped. Freyer sustained permanent foot, ankle and leg injuries and part of her right foot and big toe were amputated.

Freyer filed suit against the driver and Lyft, alleging a variety of negligence-based claims (e.g. hiring, supervision, training). Freyer settled with the driver and Lyft filed a traditional and no evidence motion for summary judgment seeking summary judgment as a matter of law in part because the driver suffered an unforeseeable incapacity and, the Transportation Network Companies (TNC) statute mandates that drivers are independent contractors. In response, Freyer argued that Lyft failed to comply with the TNC statute as needed to qualify the driver as an independent contractor. And fact issues precluded summary judgment on the negligence-based claims. The trial court disagreed and granted summary judgment in favor of Lyft. This appeal followed.

In its opinion, The Dallas Court of Appeals provides an excellent review of TNC statute, legislative intent, compliance requirements, related implications, and related case law. The court concluded that Lyft complied with the TNC's statutory requirements and thus triggered the independent contractor provision as a matter of law. The opinion also provides a good analysis of the negligence-based claims asserted in the TNC context but ultimately concluded that "regardless of whether the statute abrogates common law negligence claims, Freyer, under the facts of this case, failed to raise genuine issues of material fact defeating summary judgment." Accordingly, the trial court's summary judgment was affirmed.

FIFTH CIRCUIT VACATES AND REMANDS DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT ON CLAIM OF FAILURE TO PROVIDE PROPER WORK EQUIPMENT

Recently, the United States Court of Appeals, Fifth Circuit, concluded that there was a genuine issue of material fact as to whether Home Depot had a duty to provide a back brace to its employee. Therefore, the court vacated and remanded the district court's grant of summary judgment on the employee's claim of negligent failure to provide proper equipment. In *Molina v Home Depot*, No. 21-20128, 2021 WL 5830819 (5th Cir., Dec. 9, 2021), Molina was working in the Home Depot lumber department when he was injured while "flat stacking" pieces of timber (rearranging building materials disheveled by customers). As Molina lifted a piece of timber and attempted to move it to its designated shelf, he experienced pain in his lower back, causing him to drop to the ground. Molina subsequently filed suit against Home Depot, alleging that Home Depot breached its duty to provide him with the proper assistance, equipment, and training to safely perform "flat stacking." Home Depot moved for summary judgment, arguing that it owed no duty to provide additional assistance to Molina. The district court granted summary judgment to Home Depot on all three claims, and Molina appealed.

The Fifth Circuit Court of Appeals began its analysis by summarizing the relevant law: "[E]mployers are not insurers of their employees' safety—they have no duty to warn employees about hazards that are commonly known or already appreciated. Nor do employers have a duty to provide equipment or assistance that is unnecessary to the job's safe performance. In other words, an employee's injury at work alone is not enough to prevail on a negligence claim. Specifically, an employer is not liable if the employee is injured doing the work typical for his position, unless that work is especially perilous."

Next, the Fifth Circuit concluded that there was no factual dispute as to whether Home Depot had a duty to train Molina on "flat stacking." To that end, the Fifth Circuit reasoned that the alleged danger was "commonly known." That is, Home Depot customers often moved lumber, indicating that the potential cause of injury was not disguised. Further, employees routinely performed "flat stacking." Lastly, Molina acknowledged that he completed computer training on how to lift properly, and he also admitted that he did not need additional training to "flat stack" safely.

The Fifth Circuit concluded that there was also no factual dispute as to whether Home Depot had a duty to provide assistance to Molina. To that end, the Fifth Circuit reasoned that Molina admitted that he did "flat stacking" nearly every day for a year leading up to the incident—and so did every other employee in the lumber department. He also admitted that "flat stacking" was not necessarily a two-man job. Additionally, Molina never asked for help "flat stacking". Thus, "flat stacking" was typical for his position. Further, it

was not especially perilous, as customers regularly moved the same materials.

But, the Fifth Circuit concluded that there was a genuine issue of material fact as to whether Home Depot had a duty to provide a back brace to Molina. To that end, the Fifth Circuit reasoned that Molina had asked for a back brace on many occasions before the incident occurred, but his requests were denied. Also, Home Depot admitted that a back brace may be necessary for employees in the lumber department to avoid injury.

In sum, the Fifth Circuit affirmed summary judgment for Molina's claims of inadequate assistance and training but vacated and remanded the grant of summary judgment on Molina's claim for inadequate equipment.

COURT OF APPEALS CONCLUDES DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MOTION TO DISMISS BASED ON STATUTE OF LIMITATIONS

The Court of Appeals, Austin, recently concluded that the district court abused its discretion in denying motion to dismiss based on statute of limitations. In *In re the Springs Condominiums,* No. 03-21-00493-CV, 2021 WL 5814292 (Tex. App.—Austin, Dec. 8, 2021, mem. op.), Caitlin Donovan began experiencing health problems after she moved into her apartment-home at Springs Condominiums. She saw her physician on March 27, 2019, for a visual contrast sensitivity test that screened for an illness called Chronic Inflammatory Response Syndrome (CIRS). On April 9, 2019, Donovan and her physician reviewed the results of her visual contrast sensitivity test, which were suggestive of a diagnosis of CIRS due to mold. Donovan's physician also provided her with an environmental relative moldiness index test kit to test for mold in her apartment. On May 3, 2019, Donovan received test results indicating toxic mold in her apartment.

On April 20, 2021 (two years and ten days after Donovan and her doctor reviewed the test results indicating a CIRS diagnosis due to mold, but less than two years after Donovan received the results indicating toxic mold in her apartment), Donovan filed suit against Springs Condominiums alleging a claim of negligence and damages resulting from mold exposure in her apartment. In response, Springs Condominiums filed a motion to dismiss contending that Donovan's claims had no legal basis because they were filed after the expiration of the statute of limitation. The district court denied the motion to dismiss, and Springs Condominiums filed a petition for writ of mandamus.

On mandamus, the Court of Appeals concluded that the district court abused its discretion in denying Springs Condominiums' motion to dismiss. The court reasoned that "Donovan had knowledge of her injury—and the limitations period for her personal-injury claims began—on April 9, 2019, the date that she and her physician reviewed her test results attributing her CIRS diagnosis to exposure to mold and that she was provided with the kit to test for mold in her apartment." "Once the defendant's wrongful conduct causes a legal injury, the injured party's claims based on that wrongful conduct accrue—and the limitations period begins to run—even if ... the claimant does not yet know the specific cause of the injury or the party responsible for it."

The Court of Appeals rejected Donovan's argument that the motion to dismiss could not be granted because the contention that her claim was time-barred required the district court to look beyond her original petition to determine whether Springs Condominiums had raised the affirmative defense of the statute of limitations in its answer. The court reasoned that "Rule 91a limits the scope of the court's factual inquiry—the court must take the allegations as true—but does not limit the scope of the court's legal inquiry in the same way." "When deciding a Rule 91a motion, a court may consider the defendant's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court."

FIFTH CIRCUIT COURT OF APPEALS DECLINES TO ADOPT "FRAUDULENT MISJOINDER" DOCTRINE

The U.S. Court of Appeals for the Fifth Circuit recently ruled that diversity jurisdiction will not be found when the underlying lawsuit contains plausible claims against a non-diverse party, even if such plausible claims should be severed. *Williams v. Homeland Ins. Co. of N.Y., et al.*, No. 20-30196 (5th Cir. Nov. 30, 2021). Instead, the Court held that litigants should address the alleged fraudulent misjoinder (i.e., when a party joins a non-diverse party to a lawsuit for the purpose of defeating diversity jurisdiction) in the state court action. If the party alleging fraudulent misjoinder successfully has the non-diverse party's plausible claims severed from the lawsuit, such party will have 30 days from the date of the severance to remove the lawsuit to federal court.

Copy attached for your further review.

View Document(s):

Williams - 5th Circuit Fraudulent Joinder

CLAIMANT FAILED TO SUBMIT A REQUIRED PROOF OF LOSS, SUMMARY JUDGMENT IN FAVOR OF INSURER UPHELD

The U.S. Court of Appeals for the Fifth Circuit recently affirmed a district court's summary judgment in favor of an insurer in a dispute involving an insurance claim for flood damage to the claimant's home. *Nguyen v. Tex. Farmers Ins. Co.*, No. 21-40266, 2021 WL 5579268 (5th Cir. Nov. 29, 2021). In August 2017, the claimant filed an insurance claim seeking additional reimbursements for flood damage sustained to her home following Hurricane Harvey. She had coverage under a Standard Flood Insurance Policy (SFIP) purchased though Texas Farmers Insurance Company ("Texas Farmers").

After Hurricane Harvey affected Texas with widespread and catastrophic flooding, the Federal Emergency Management Agency ("FEMA"), who sets the terms of the SFIP, exercised its authority to modify the terms of the SFIP. In so doing, FEMA waived the normal 60-day proof of loss deadline requirement and extended the deadline to 365 days (one year) from the date of loss. As such, the claimant here was required to submit the proof of loss by August 2018, which she admittedly failed to do. However, the claimant argued that the Bulletin issued by FEMA also waived the requirement to file a proof of loss when seeking additional reimbursements.

A review of the clear language of the Bulletin did not support the claimant's interpretation and, indeed, clearly stated that the condition waiver did not alter a policyholder's ability to submit a proof of loss seeking supplemental payments. Additionally, the sample payment letter attached to the Bulletin explicitly stated that policyholders requesting additional payments were required to submit a proof of loss within one year following the date of loss. As a result, the appeals court affirmed the district court's summary judgment in favor of Texas Farmers.

DISTRICT COURT GRANTS INSURER'S MOTION FOR SUMMARY JUDGMENT - INSURER OWES NO DUTY TO DEFEND OR INDEMNITY INSURED IN SHOOTING DEATH AT CONCERT VENUE

Recently, a federal district court in Tyler granted an insurer's cross-motion for summary judgment and issued a declaratory judgment that the insurer did not owe a duty to defend or a duty to indemnity its insured in a state court action. The dispute in *Penn-America Ins. Co. v. Dominguez, et al.*, Case No. 6:21-cv-211-JDK, 2021 WL 5578684 (E.D. Tex. Nov. 30, 2021) arose out of a state court action involving the insured ("Dominguez") and a person who sued him for damages arising out of the death of Key'Undta Barrett at the hands of Treyvon Dewayne Maddox, who discharged a firearm at Dominguez's music venue and killed Barrett.

After being served with the lawsuit, Dominguez filed a claim with Penn-America under his policy's Commercial General Liability Coverage. In response, Penn-America informed Dominguez that the insurer would not pay for his legal defense because the petition in the underlying suit alleged a "battery," which the policy excluded from coverage.

Within a week, Penn-America filed suit in federal court seeking a declaratory judgment that it did not owe a duty to defend or a duty to indemnify Dominguez, and Dominguez filed a declaratory judgment seeking the opposite finding.

Upon review of the policy and the petition at issue (i.e., applying the Eight Corners Rule), the Court concluded that the policy's Assault and Battery General Liability Exclusion foreclosed a duty to defend because the policy excluded from coverage "liability for damages because of 'bodily injury' . . . arising out of an 'assault' or 'battery,'" and defined battery as "any use of force against a person . . . whether or not the actual injury inflicted is intended or expected." Moreover, the petition only alleged that Maddox attended an event at Dominguez's venue and, "unknown to Barrett," "possessed and/or obtained a firearm" on the premises," and "discharged' the firearm, which "direct[ly] result[ed]" in "Barrett's death." The petition also claimed that Dominguez was negligent in failing to secure the premises and protect Barrett from injury.

In arriving at its decision, the Court dismissed Dominguez's interpretations of the policy and petition, including Dominguez's assertion that the term "battery" should be interpreted with its meaning in tort law, which requires intentional conduct, stating that the Court was tasked with interpreting the term as provided by the policy. Once the Court held no duty to defend existed, the Court turned to the duty to indemnify.

Applying the *Griffin* standard, which stands for the proposition that a declaratory judgment as to the duty to indemnify is proper before liability is established when (1) the insurer has no duty to defend; and (2) the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify, the Court concluded that no additional facts could be developed in the underlying suit to take this action out of the battery exclusion and, in fact, the allegations in the petition affirmatively foreclosed facts that could do so. As such, the Court held Penn-America also had no duty to indemnify Dominguez and granted its motion for summary judgment.

FEDERAL DISTRICT COURT GRANTS INSURER'S MOTION FOR SUMMARY JUDGMENT - "HOPES" IT IS ONE OF THE LAST FIRST-PARTY INSURANCE DISPUTES ARISING FROM HURRICANE HARVEY

Recently, a federal district court in Houston began its opinion by stating, "[t]his may be among the last of the many first-party property insurance disputes from Hurricane Harvey. The court hopes so[,]" and then agreed with an insurer who argued that it was entitled to judgment as a matter of law. *Laurence v. State Farm Lloyds, et al.*, Civil Action No. H-19-4314, 2021 WL 5587815 (S.D. Tex. Nov. 29, 2021) involved a dispute between State Farm Lloyds ("State Farm") and its insured ("Laurence") over whether the damages suffered by Laurence's property were from flooding, and therefore excluded, or from water intrusion coming from wind or hail damage to the buildings, and therefore covered.

Laurence held a homeowner's insurance policy issued by Liberty Insurance Corporation and a contractor insurance policy for his plumbing business issued by State Farm. After Hurricane Harvey hit, Laurence made a claim for damage to his property. State Farm investigated and concluded that all but a small amount of damage was from flooding, and the damage was below Laurence's deductible, so it did not pay his claim. Laurence followed with a suit alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code.

State Farm responded by filing a motion for summary judgment, arguing that Laurence cannot show he was covered by the policy

because the policy did not cover damage to buildings, only to business personal property, and the evidence showed no damage over the $1,000 deductible from wind-or hail-driven water (as opposed to flood water). Such evidence included the declaration of State Farm's retained engineer, who stated that his inspection showed no conditions consistent with the effects of wind and revealed flood debris lines that were about 7 feet above the finished floor. State Farm also provided photographs showing the height of floodwater outside the property. Laurence, on the other hand, could not point to any evidence in the record showing that his business personal property was not damaged by flood water that exceeded his deductible. Once the Court concluded no coverage existed, it summarily dismissed Laurence's extra-contractual claims and granted State Farm's motion for summary judgment.

MDJW WISHES YOU ALL A VERY MERRY CHRISTMAS AND A HAPPY AND PROSPEROUS 2022! TEXAS INSURANCE LAW NEWSBRIEF TO RESUME MONDAY JANUARY 10, 2022

Our law firm takes this opportunity to wish you all a very Merry Christmas and Happy and Prosperous New Year! Our offices will be closed December 23 and 24 for the Christmas Holiday and December 30 and 31 to celebrate the New Year. Our Texas Insurance Law Newsbrief research and writing team will also be taking time off to celebrate with family and friends but Newsbrief will resume January 10, 2022. Thank you for your friendship and the trust placed in our firm in handling your legal matters throughout the year. And we look forward to working with you in 2022!