Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAR 28, 2022

DALLAS FEDERAL COURT CONCLUDES PLAINTIFF'S ALLEGATIONS FELL OUTSIDE OF POLICY EXCLUSION FOR CONDO PROJECTS & HOLDS INSURER HAS DUTY TO DEFEND

Last week, the United States District Court for the Northern District of Texas concluded that the plaintiff's allegations fell outside the policy provision excluding coverage for condominium projects that exceed 25 units, and held that the insurer had a duty to defend. In *Certain Underwriters at Lloyd's v. Keystone Development, LLC*, No. 3:21-CV-336-L, 2022 WL 865891 (N.D. Tex. [Dallas Division] March 23, 2022), Keystone Development built a construction project known as Cityscape Plaza. Cityscape Plaza Owners Association managed and maintained Cityscape Plaza. Cityscape commenced an action in District Court in Dallas County against Keystone, seeking monetary damages because of alleged construction defects and physical damage to Cityscape Plaza. Cityscape alleged in its petition: "Cityscape Plaza is a common interest community which was constructed as two separate projects. The first project, located at 1717 Annex Avenue in Dallas, Texas, is comprised of four buildings with 24 three-story condominiums. The second project, located at 1801 Annex Avenue in Dallas, Texas, is comprised of two buildings with 15 three-story condominiums."

Certain Underwriters at Lloyd's filed a declaratory judgment action in federal court, and sought summary judgment contending that it did not have a duty to defend Keystone, its insured, in the Underlying Lawsuit. Lloyd's relied on the policy provision excluding coverage for work incorporated into a condominium or townhouse project for projects that exceed 25 units. Lloyd's argued that Cityscape Plaza had 39 units, which clearly exceeded 25 units and therefore fell within the exclusion.

The Federal Court in Dallas disagreed with Lloyds and concluded Cityscape's petition alleged facts that *possibly implicated coverage* under the policy and did not allege facts which clearly fell within the exclusion. The Court noted: "Indeed, the petition outline[d] two separate projects neither of which include[d] more than 25 units." Further, "[b]ecause it [was] unclear if "project" as used in the Policy mean[t] the overall completed condominium or, instead, mean[t] each project taken individually, the court . . . interpreted "project" to mean each individual project; therefore, Cityscape's allegations that one project consisted of 25 units and the other consisted of 15 units [fell] outside of the exclusion provision within the Policy."

The Court also rejected Lloyd's argument that the court should consider extrinsic evidence about the number of units involved in the project, concluding that this "impermissibly engages the truth or falsity of the facts alleged in the petition."

WAL-MART IS DENIED SUMMARY-JUDGMENT IN PREMISES-LIABILITY SUIT

Last week, a Federal District Court in El Paso denied Wal-Mart's motion for summary judgement, concluding that the plaintiff established that a genuine dispute existed as to whether Wal-Mart had knowledge of the allegedly dangerous condition on its premises. In *Paez v Wal-Mart Stores, Texas, LLC,* No. EP-20-CV-00321-DCG, 2022 WL 847311 (W.D. Tex. [El Paso Division] March 22, 2022), Paez was leaving a Wal-Mart store in Socorro, Texas, when she tripped over exposed rebar on the parking lot's pedestrian crosswalk and fell to the ground. Paez subsequently filed a premises-liability claim against Wal-Mart.

To prevail on a premises defect claim, a plaintiff must establish:(1) the property owner had actual or constructive knowledge of the condition causing injury; (2) the condition posed an unreasonable risk of harm; (3) the property owner failed to take reasonable care to reduce or eliminate the risk; and (4) the property owner's failure to use reasonable care to reduce or eliminate the risk was the proximate cause of injuries to the invitee.

Wal-Mart filed a motion for summary judgment, contending that Paez could not establish the first element, i.e., that there was no evidence that Wal-Mart had actual or constructive knowledge of the exposed rebar.

The Court denied Wal-Mart's motion. The Court concluded that Paez established that a genuine dispute existed as to whether Wal-Mart had actual or constructive knowledge of the exposed rebar. "First, the rebar was permanent, unlike a substance or item that is the typical culprit of a slip-and-fall, which, Paez contends, suggests that Wal-Mart itself (or someone under its control) created the condition. Second, the rebar was in the crosswalk, suggesting, as Paez would put it, that a Wal-Mart employee would have seen it at some point. Third, a Wal-Mart employee walked in close proximity to the rebar at least three times in the hour prior to Paez's fall. Fourth, Wal-Mart was able to locate and photograph the rebar without Paez present. Fifth, and finally, Paez retained an expert who expresses the opinion that, among other things, the rebar was likely installed by Wal-Mart or at the direction of Wal-Mart; the rebar was painted white, like the stipes in the crosswalk, which the expert suggests is evidence that Wal-Mart knew or should have known about the exposed rebar; the white paint was weathered and worn, indicating that the rebar had been exposed for a while; and the presence of the rebar in the crosswalk would be readily visible and obvious to a properly trained individual performing a proper

regular periodic inspection."

COURT OF APPEALS DENIES MEDICAL PROVIDER'S MOTION FOR PROTECTIVE ORDER & HOLDS PROVIDER'S NEGOTIATED RATES ARE DISCOVERABLE

In *In re Thomas Teran,* No. 04-21-00436-CV, 2022 WL 849764 (Tex. App.—San Antonio, March 23, 2022, mem. op.), Thomas Teran was driving a tractor-trailer owned by Ruiz and Sons, Inc. and was acting in the course and scope of his employment with Ruiz and Sons, when he collided with a vehicle driven by Victor Galvan. Subsequently, Galvan sued Teran and Ruiz and Sons (collectively "Defendants"). Galvan sought $250,000 in medical expenses incurred as a "private pay patient" from treatment received from Foundation Surgical Hospital of San Antonio ("Foundation").

Defendants served Foundation with a deposition on written questions and a subpoena duces tecum seeking information on the negotiated rates Foundation charged private insurers and government payors for the services it provided to Galvan. Specifically, Defendants sought:

- A copy of all contracts in which Foundation is a party with Aetna, Blue Cross Blue Shield, Humana, United Healthcare, Cigna, Medicare, and Medicaid;
- An annual cost report that Foundation is required to provide to a Medicare Administration Contractor as a Medicare certified institutional provider for 2020;
- The Medicare and Medicaid reimbursement rates for each of the services Foundation provided to Galvan; and
- The reimbursement rates Foundation would have been paid for the services it provided to Galvan pursuant to Foundation's contracts with Aetna, Blue Cross Blue Shield, Humana, United Healthcare, and Cigna.

In response, Foundation filed a motion for protective order, arguing that the information sought was immaterial, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence; and was sensitive, private, confidential, proprietary, and protected business information.

The trial court granted Foundation's motion. In turn, Defendants filed a petition for writ of mandamus, which the Court of Appeals granted.

On mandamus, the Court of Appeals began its analysis by noting that "[e]vidence of a medical provider's negotiated rates for private insurers and public payers is relevant, though not dispositive, when considering the reasonableness of the [full or list rates charged to uninsured patients]" The Court concluded Defendants' discovery requests tracked those that the supreme court approved in *K & L Auto* (627 S.W.3d 239) *and North Cypress* (559 S.W.3d 128). Accordingly, the discovery sought was relevant and not overbroad as a matter of law.

The Court of Appeals also rejected Foundation's argument that Defendants did not need the requested discovery because they could instead hire experts to opine that Foundation's chargemaster rates are unreasonable (pursuant to section 18.001 of the Texas Civil Practice & Remedies Code). The Court reasoned that an opinion on reasonableness must be based on relevant facts and data and that denial of the requested discovery would limit Defendants to offering speculative evidence rather than the providers' actual agreed rates with insurers and other payors.

The Court of Appeals also concluded that "when a tortfeasor challenges the reasonableness of a medical provider's chargemaster rates for the plaintiff's treatment, certain discovery on the provider's negotiated rates for the same treatment is necessary for a 'fair adjudication of that challenge.'" Thus, permitting the discovery "is consistent with existing trade secret jurisprudence." Further, "when a medical provider resists discovery of information regarding its negotiated rates on the basis that the information is confidential, proprietary, or a trade secret, it must show that an appropriate protective order will not address its concerns."