

THE COLANERI FIRM, P.C.

A PROFESSIONAL CORPORATION

2021 E. Lamar Boulevard, Suite 100
Arlington, Texas 76006

Telephone (817) 640-1588
Fax (817) 640-1680

JANET K. COLANERI*^

*Board Certified in Civil Trial Law
and Personal Injury Trial Law
Texas Board of Legal Specialization
^ Also licensed in Arkansas

JOHN D. WHITE
PAIGE ANDERS LEWIECKI

If you have any questions or comments please feel free to contact us at the numbers above or via e-mail at paige@colanerifirm.com. FYI letters are also available at www.colanerifirm.com.

FYI **May 2008**

A Note to Our Subscribers – If you would like to receive our FYI letters and other firm bulletins via e-mail please send an e-mail request to paige@colanerifirm.com and we'll be happy to add you to the electronic distribution list.

Trial Court Has Broad Discretion Regarding Whether or Not a Member of the Jury Panel is Biased. *Murff v. Pass.* In a health care liability case, following a confusing line of questioning about the burden of proof, a member of the jury panel stated that he would hold the plaintiff to a clear and convincing standard of proof (as opposed to a preponderance of the evidence as required). Additional panel members raised their hands, indicating that they agreed. Believing that the panel members were confused, and after informing the panel of the proper standard, the trial court judge refused to disqualify these panel members. Texas Supreme Court reversed; the Court found that the trial court did not abuse its discretion in refusing to disqualify the challenged jurors. A person is disqualified from serving on a jury if the person has a bias or prejudice in favor of or against a party or claim, or if the person is unable or unwilling to follow the trial court's instructions. Bias, prejudice, or inability to follow the court's instructions may not be discernible from a single

statement or response to a general question. Statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely loose words spoken in the course of conversation and do not necessarily establish disqualification. When a panel member expresses bias or confusion, the trial court has the discretion to stop the line of questioning in order to clarify that person's response. Trial judges, because they are in the best position to evaluate the sincerity and attitude of individual panel members, are given wide latitude in both conducting voir dire proceedings, and in determining whether a panel member is impermissibly partial. The reviewing court must consider the entire examination in reviewing whether a trial court abused its discretion in deciding that a juror was or was not disqualified.

Uninsured Motorist Coverage – What is an “Accident”? *Nationwide Insurance Co, v. Elchehimi.* Breach of contract suit arising from the denial of coverage by Nationwide Insurance Company on a claim arising from a collision between insured's vehicle and an axle-wheel assembly that became separated from an unidentified semi-trailer truck. The Texas Supreme Court rendered that the insured take nothing. A drive axle with two tandem wheels attached on one side lacks an

engine or other means of propulsion; therefore, it is neither a self-propelled vehicle nor a vehicle propelled by electric power from overhead wires. This wheel assemblage is not capable of carrying a load and cannot be towed down a road by a self-propelled vehicle other than being dragged by or mounted underneath one, a fact the insured's expert conceded. The axle-wheel assembly is therefore not a trailer or semi-trailer designed for use with a self-propelled vehicle and is not a motor vehicle under Texas Transportation Code Chapter 601. Applying the common usage of the term and the definition in Chapter 601, physical contact with a detached axle and tandem wheels is not actual physical contact with a motor vehicle under the unidentified motor vehicle provision of the uninsured motorist policy and the insured was not entitled to coverage.

Dog Owner Required to Stop Non-Vicious Dog From Attacking After Attack Has Begun. *Bushnell v. Mott*. The owner of a dog, not known to be vicious, owes a duty to attempt to stop the dog from attacking a person, after the attack has begun. While the owner of a vicious animal can be strictly liable for harm, the owner of a non-vicious animal can be subject to liability for his negligent handling of such an animal.

Negligent Entrustment - Plaintiff Failed to Prove Cab Driver Was Reckless or Incompetent. *Houston Cab Co. v Fields*. Plaintiff sued cab company and its driver (and independent contractor) for injuries that occurred while he was attempting to enter Defendants' cab. Plaintiff alleged that the cab accelerated before he was completely in the vehicle. Defendant driver said the cab never moved, and that Plaintiff stumbled either over his feet or off the curb. Plaintiff had knee surgery to repair torn cartilage. A jury found

Defendant driver negligent and found that the cab company negligently entrusted the cab to the driver. Jury awarded \$418,806 in damages, jointly and severally against both Defendants. The Court of Appeals reversed and ordered that Plaintiff take nothing from the cab company and affirmed the judgment as to the driver. Although the cab company did not obtain an accurate driving record from DPS, evidence of the driver's previous citations and suspension for failure to maintain liability insurance did not prove she was a reckless or incompetent driver.

What is an Appearance? *Ibrahim v. Young*. Defendant, who was served with citation and sent a letter to district court clerk's office which identified the parties, the case, and Defendant's current address was deemed to have made a general appearance and waived any defenses based on deficiencies in Plaintiff's citations and the return of service.

Insurance Agent Liable for Negligent Selection of a Policy. *Insurance Network of Texas v Kloesel*. Plaintiffs have owned operated a steakhouse since 1970. In 1993 they decided to change insurance and consulted Defendant, an independent insurance agency, regarding coverage. Although they requested a policy that would provide "100% coverage" and that covered "if a customer got sick or if there was anything wrong with the food," Defendant procured a policy with Burlington Insurance Co. that did not provide coverage for communicable diseases. During the 1997-1998 policy year, over 90 customers contracted Hepatitis A at Plaintiff's restaurant, most likely from an infected food handler. Two patrons successfully sued Plaintiffs and Burlington denied coverage. Plaintiffs sued Defendant agent under several theories and recovered on their negligence claim. This verdict was

affirmed on appeal. The jury found that Plaintiffs were not contributorily negligent for failing to take affirmative steps to familiarize themselves with the communicable disease exclusion contained in their policy.

Libel Claim Fails if Newspaper Report Is Fair and Accurate. *Goss v Houston Community Newspapers.* Defendant newspaper ran a story written by its reporter (who was also a Defendant) based on a news release from the sheriff's department. The story stated that Plaintiff and another man had been arrested after a deputy felt they appeared to be racing in their vehicles. The story reported that Plaintiff was taken into custody for possession of a controlled substance and the other man was charged with racing on a highway. Plaintiff denied he was racing and claimed he had a prescription for the controlled substance. P was not charged with racing and the controlled substance charge was eventually dismissed. Plaintiff sued the newspaper and the reporter for libel. The trial court granted summary judgment for both Defendants. The Court of Appeals affirmed summary judgment for both Defendants finding that as long as the publication fairly and accurately reported the contents of the law enforcement statement without embellishment, the publication is privileged, even if the underlying facts being reported on are untrue or defamatory.

First Party Claim Based on Failure to Provide Defense to Third Party Claims. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.* The Texas Supreme Court held that the prompt payment provision of the Texas Insurance Code (formerly Section 21.55, now Sections 542.051 – 542.061) may be applied when an insurer wrongfully refuses to promptly provide and pay for a defense owed on a third party claim made against the

insured. In this case, insured homebuilder was sued for construction defects. After he requested a defense from his insurer and the insurer denied coverage he filed this first party claim for failure to promptly provide and pay for the defense.

DID YOU KNOW...ODD LAWS THAT ARE ACTUALLY ON THE BOOKS:

- In a law enacted during Prohibition, the entire Encyclopedia Britannica is banned in Texas because it contains a formula for making beer at home.
- It is illegal to shoot a buffalo from the second story of a hotel in Texas.
- In Houston, Texas, beer may not be purchased after midnight on Sunday, but it may be purchased any time on Monday (isn't after midnight on Sunday actually any time on Monday?)
- It is illegal to take more than three sips of beer at a time while standing in Texas.
- It is illegal to milk another person's cow in Texas.
- In New York State it is illegal to shoot a rabbit from a moving trolley car.
- In Chicago, Illinois it is illegal to fish while wearing pajamas
- And last but not least... Monkeys are forbidden from smoking cigarettes in South Bend, Indiana.

SEE YOU NEXT MONTH!!!