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### **Directed Verdict in Auto Accident Case Not Supported By Conclusive Evidence.**

*Gore v Gore.* Plaintiff, who was a passenger in a vehicle driven by Defendant, filed suit over a one-vehicle accident resulting from Defendant's alleged loss of control in a heavy rainstorm. Defendant, though represented by counsel, did not personally appear at trial. At the close of evidence, Plaintiff's motion for directed verdict on liability was granted; only damages (totaling approximately \$180,000) were submitted to the jury. The Court of Appeals reversed and remanded, finding that the directed verdict was not supported by conclusive evidence. Although Plaintiff testified she had asked Defendant to slow down once or twice before the accident, there was no specific evidence regarding why Defendant lost control of the vehicle. The fact that Defendant lost control and struck a wall was probative evidence that he was not driving safely, but did not conclusively establish that he was driving in an unsafe manner. As such, the jury could have found that Plaintiff failed to prove that excessive speed caused the accident. The Court noted that the jury could have also found that Defendant failed to maintain a single lane because of water on the road, which would not conclusively indicate a failure to exercise ordinary care during the rainstorm.

### **Awards of Pain and Suffering, Mental Anguish and Future Medical Expenses Not Appropriate For Summary Judgment.**

*Rivera v White.* Court of Appeals reversed and remanded portions of a summary judgment rendered in favor of Plaintiff in an auto accident case. The Court held that awards for pain and suffering, mental anguish, and future medical expenses were unliquidated damages and could not be proven with the necessary degree of certainty for a summary disposition. The Court of Appeals also held there were no pleadings or summary judgment evidence to support an award for lost income or attorney's fees. However, summary judgment regarding the proven damages of the value of the vehicle and Plaintiff's medical expenses were upheld.

### **Reservation of Rights Letter is Work Product and Therefore Not Discoverable.**

*In Re: Madrid.* Auto accident case in which Plaintiff sued the driver of a rented car for negligence as well as Hertz, the rental company, for negligent entrustment. Defendant driver filed a mandamus proceeding challenging the trial court's order that Defendant driver disclose to Plaintiff the reservation of rights letter his attorney sent to his insurance carrier. The Court of Appeals found that that Plaintiff's receipt of a copy of

the insurance policy and the application was sufficient, and conditionally granted mandamus, finding that Defendant did not have to turn over the reservation of rights letter itself.

**Allegations of Unintended Construction Defects May Constitute an “Accident” or “Occurrence” under a Commercial General Liability (CGL) Policy, and Loss of Use May Constitute Damage.** *Lamar Homes, Inc. v. Mid-Continent Casualty Co.* In response to certified questions, the Fifth Circuit held that an insurer, under a CGL policy, has a duty to defend its insured homebuilder against a buyer’s claims of defective construction. Therefore, when a homebuyer sues his general contractor for construction defects and alleges only damage to, or loss of use of, the home, these allegations constitute an “accident” or “occurrence” sufficient to trigger the duty to defend or indemnify under the CGL policy. Also, when a homebuyer sues his general contractor for construction defects, and alleges only damage to, or loss of use of, the home itself, these allegations constitute “property damage” sufficient to trigger the duty to defend or indemnify under the CGL policy. The prompt payment provisions of Sections 542.051-.061 of the Texas Insurance Code (formerly Article 21.55) apply to a CGL insurer’s breach of the duty to defend.

**Insurer’s Contract-Based Subrogation Rights Trumped Equitable Considerations.** *Osborne v Jauregui, Inc.* Defendant was the architect and builder of Plaintiffs’ home. The home was discovered to contain numerous defects that, among other problems, eventually led to mold contamination. State Farm, Plaintiffs’ homeowners’ carrier, intervened in Plaintiffs’ suit against several defendants regarding the defects; the suit

alleged damages in excess of \$2,000,000. At the time of trial, all parties other than Defendant architect/builder had settled for a total of \$1,260,500. After a jury verdict awarding Plaintiffs damages in the amount of \$835,000, the trial court applied a settlement credit in the remaining Defendant’s favor and entered judgment that Plaintiffs take nothing. The trial court also refused to award attorney’s fees to Plaintiffs or to grant State Farm any of the proceeds from Plaintiffs’ settlement with the subcontractors under its subrogation claim. The Court of Appeals reversed the trial court’s order regarding the denial of attorney’s fees and State Farm’s subrogation claim and remanded to the trial court. Court of Appeals ordered that on remand, Plaintiffs, as prevailing parties on their Texas Deceptive Trade Practices Act claim, have a duty to segregate their attorney’s fees into recoverable and non-recoverable claims. With regard to State Farm’s subrogation claim, the trial court must reconsider it in light of the Texas Supreme Court decision *Fortis Benefits v Cantu* (holding the “made whole” doctrine does not preclude a carrier’s right to subrogation under the plain terms of the insurance policy and that parties are free to negate the “made whole” doctrine contractually). Although the trial court’s equitable decision to deny subrogation to State Farm was not an abuse of discretion based on law at the time judgment issued, *Fortis* established a right of subrogation because equitable considerations must give way to the language of the policy.

SEE YOU NEXT MONTH!