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**Employee Handbook Did Not Create Binding Contractual Rights.** *Drake v Wilson N. Jones Medical.* Plaintiff, a nurse, claimed she was injured while moving a patient however; she refused medical treatment in order to avoid a drug test. As a result of her refusal, her employer (Defendant) requested a for-cause drug screen. Plaintiff resigned before the drug test results were obtained, which revealed marijuana and a narcotic agent. Plaintiff sued claiming damages from her fall and for \$2,458 she claimed Defendant owed her for the cash value of accrued paid time off (PTO). Summary judgment was affirmed for Defendant finding that an employer is not liable when sufficient help is nearby and available and the employee does the work alone without seeking assistance (in this case, both another employee and Plaintiff's supervisor were near the room when Plaintiff fell yet she did not ask for assistance before moving the patient). Also, the PTO policy

was voluntary and could be altered, amended, modified, or terminated at any time.

**Insurance Endorsement Provided Limited Coverage For Sewage Overflow.** *For Kids Only Child Development Center, Inc. v Philadelphia Indemnity Insurance Co.* Plaintiff daycare center was flooded with 4 to 6 inches of sewage, caused by a stoppage in a city sewer main. At the time of the flood, Plaintiff was insured by Defendant under a policy that specifically excluded coverage for damage caused by such an event but contained an endorsement providing coverage up to \$25,000. Plaintiff sued to recover for lost business and expenses in addition to the \$25,000, making claims for breach of contract, violations of the Texas Insurance Code and Deceptive Trade Practices Act as well as breach of the duty of good faith and fair dealing. Summary judgment in favor of Defendant-Insurer was affirmed limiting Plaintiff's recovery to the \$25,000 limit under the endorsement.

**Injury Constituted Only Physical Impairment, Not Disfigurement.** *Kroger Co. v Brown.* Suit based on an improperly filled prescription (a steroid prescription for an ear infection was filled at a lower dose than prescribed). Following a jury verdict in

favor of Plaintiff, Defendant appealed the portion of the judgment awarding damages for past disfigurement. On appeal the judgment was modified to delete the award for disfigurement finding that Plaintiff having to turn his head downward to engage in conversation constitutes physical impairment but not disfigurement.

**Negligent Entrustment Suit Frivolous - Attorney Sanctioned.** *Robson v Gilbreath.*

Attorney appealed the trial court's order sanctioning him \$10,000 for failure to conduct a reasonable inquiry prior to filing a negligent entrustment claim. Attorney X represented Plaintiffs in a lawsuit against Defendant and his son, a second Defendant, in a suit regarding an auto accident. At the time of the accident vehicle driven by the son struck and killed wife and mother of Plaintiffs. Plaintiffs filed claims against the driver for negligence and his father for negligent entrustment. Plaintiffs eventually non-suited their claims against the father and the only issue on appeal was the trial court's order sanctioning Plaintiffs' attorney \$10,000 for failure to conduct a reasonable inquiry prior to filing the negligent entrustment claim. The Court of appeals upheld the sanctions holding that although discovery led the attorney to believe that prescription medication may have impaired the son's driving and that the father may have known of this impairment, the attorney did not allege these facts as the basis for the negligent entrustment claim. Instead, the attorney filed the claim on the basis that the father entrusted his large vehicle to an inexperienced driver, a claim which had no basis in law or fact.

**Duty to Defend in Occurrence Based (CGL) Policy.** *Don's Building v. OneBeacon.* On August 29, 2008, the Texas

Supreme Court decided the following with regard to occurrence based CGL policies:

- (1) "Is an insurer's duty to defend triggered where damage is alleged to have occurred during the policy period but was inherently undiscoverable until after the policy expired? As to this policy, which focuses on when damage comes to pass, not when damage comes to light, we answer "yes"—the insurer's duty is triggered under Texas law; the key date is when injury happens, not when someone happens upon it."
- (2) "Under the rule identified in the answer to the first question, have the pleadings in lawsuits against an insured alleged that property damage occurred within the policy period of an occurrence-based commercial general liability insurance policy, such that the insurer's duty to defend and indemnify the insured is triggered, when the pleadings allege that actual damage was continuing and progressing during the policy period, but remained undiscoverable and not readily apparent for...until after the policy period ended because the internal damage was hidden from view by an undamaged exterior surface?"

As to the duty to defend, we answer this question 'yes.'"

**No Duty to Warn of a Commonly Known Danger.** *Brookshire Grocery Co. v. Goss.* A grocery store employee who was injured when she attempted to maneuver around a loaded cart sued her employer. Following a jury verdict finding that her employer's negligence proximately caused the incident,

which was upheld by the Court of Appeals, the Texas Supreme Court reversed and ordered that the employee take nothing. This finding reasoned that since it was commonly known there was danger in stepping around carts, the employer had no duty to warn employees of the risk, or to provide specialized training to avoid that hazard.

**Requirements for Recovery of Damages for Loss of Inheritance.** *Columbia Medical Center of Las Colinas, Inc. v. Hogue.* On August 29, 2008, the Texas Supreme Court addressed the issue of recovery for loss of inheritance, finding that loss of inheritance damages may be recovered in appropriate circumstance. When such damages are recoverable, a plaintiff must prove that the decedent's earnings, less his expenditures, would have left an estate for his beneficiaries to inherit, and that the beneficiaries would have outlived the decedent. If a plaintiff proves loss of inheritance damages, the beneficiary is entitled to the present value of the beneficiary's share of what the decedent's estate would have been, if the decedent had died a natural death. The Court also went on to make several other pertinent points:

- The claimant must provide some evidence that he/she would have outlived the decedent if they had died a natural death, and asking a jury to ascertain the claimant's health based on his/her age and from simply observing him/her in court is not sufficient.
- In arriving at the present value of the decedent's estate, the figures used in the analysis must be specific to the decedent and not calculations based on the "average person" and based on standard expectancy tables.

**New Judge Not Subject to Mandamus for Actions of the Former Judge.** *In Re: Baylor Medical Center at Garland.* Mandamus will not issue against a new judge for what a former one did. In this medical malpractice case, the jury found for the defendant hospital. The trial judge granted a new trial, allegedly based on juror affidavits, which is prohibited by the rules. Since a new judge now presides over the trial court, Texas Rule of Appellate Procedure 7.2 requires abatement of this original proceeding, to allow the new judge to reconsider the order. The new judge, upon reconsideration, may "ungrant" the new trial. **\*\*\*KEEP THIS IN MIND AS WE APPROACH ELECTION SEASON\*\*\***

**Foreseeability and Duty a Landowner Owes to a Murdered Patron.** *Trammell Crow Central Texas, Ltd. v. Gutierrez.* Luis Gutierrez was shot at the Quarry Market shopping mall as he left a movie theatre. He subsequently died as a result of his injuries. Plaintiffs filed suit against the property manager of the mall, alleging that the owner was negligent in failing to provide adequate security at the mall. At the trial court level the jury returned a verdict in favor of Plaintiffs and the trial court entered a judgment accordingly. The Court of Appeals affirmed. The Texas Supreme Court reversed and rendered a judgment that Plaintiffs take nothing. Based on the evidence at trial, the property manager could not have reasonably foreseen or prevented the crime, and subsequently owed no duty to the deceased. The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care; otherwise, a person who controls property would be subject to a universal duty to protect against third-party criminal conduct. A landowner is not the insurer of crime victims.

Considering the five factors (proximity, publicity, recency, frequency, and similarity) together, the Supreme Court concluded that the murder was NOT foreseeable. While the property manager had knowledge of violent crimes that were committed at the mall within a reasonable time prior to the murder, because the attack on was so extraordinarily unlike any crime previously committed at the mall, the property manager could not have reasonably foreseen or prevented the crime, and thus owed no duty to the murder victim. To determine whether the risk of criminal conduct is foreseeable, a court weighs the evidence of prior crimes using five factors: proximity, publicity, recency, frequency, and similarity. The evidence is not considered in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred.

**Claims-Made Policy Cannot Be Expanded to Cover a Claim Not Made During the Policy Period.** *Ulico Casualty Co. v. Allied Pilots Assn.* An insurer's contractual coverage, under a claims-made policy, cannot be expanded by the doctrines of waiver and estoppel to cover a suit against the insured that was not reported until after the policy expired. However, if an insurer's actions prejudice its insured, the insurer may be barred from denying benefits that would be payable under its policy, as if the risk had been covered.

If an insurance policy covers certain risks, contains exclusions or limitations of coverage, when the insured makes a claim for loss from a covered risk, the insurer must assert any applicable exclusion or limitation to avoid liability. When a policy covers risks for a certain time period, the time of the event allegedly triggering coverage is a precondition to coverage, and is not

considered a defensive matter that must be plead and proven by the insurer. The insurer has neither a right nor a burden, to assert non-coverage of a risk or loss until the insured shows that the risk or loss is covered by the terms of the policy. Once the insured shows the risk is covered under the policy, then it the burden shifts to the insurer to assert any exclusions or limitations as affirmative defenses.

In other words, the insurer does not bear the burden of showing that it does not have a policy in place to cover a particular risk; the insured bears the burden to show that a policy is in force, and that the risk comes within the policy's coverage. An insurer's actions can result in it being estopped, or barred, from refusing to make its insured whole for prejudice the insured suffers because the insurer assumed the insured's defense, but estoppel does not work to create a new insurance contract that covers a risk not agreed to by the contracting parties. Thus there is no "right" of non-coverage that is waived by the insurer. This is true even in cases where the insurer assumes of the insured's defense with knowledge of facts indicating non-coverage and without obtaining a valid reservation of rights or non-waiver agreement

**Responses to Requests for Admissions...Denials Must Be Timely Served On The Opposite Party.** *Unifund CCR Partners v. Weaver.* Unifund CCR Partners sued Weaver to recover an unpaid credit card debt. Unifund served requests for disclosure and admissions on Weaver with its Petition. Shortly after he was served, Weaver (acting pro se), filed a letter answer with his responses to the requests attached. Weaver's response to each request for admission was identical: "DEFENSE: TEXAS CIVIL

PRACTICE & REMEDIES {SECTION 16.004{A}{3}" (which is the four-year statute of limitations on debt collection actions). The face of the response shows a copy was sent to Unifund's attorney, and Weaver's signature appears underneath the text, "CERTIFICATE OF SERVICE." However, the record did not show that Weaver actually served Unifund with his responses. Unifund filed a motion for summary judgment asserting that the facts set out in its request for admissions were automatically admitted when Weaver failed to file timely responses. Along with its motion, Unifund filed an affidavit from its attorney supporting its claim that Weaver failed to serve counsel with a response to its requests for admissions. Weaver did not file a response to the summary judgment motion, which was granted by the trial court. Weaver appealed, asserting in his brief that he had served his responses in a timely manner. The court of appeals reversed the trial court's judgment, basing its decision on the fact that Weaver's responses to Unifund's request for admissions were on file when the summary judgment motion was granted. The Texas Supreme Court reversed and entered judgment rendered in favor of Unifund finding that Weaver failed to raise a fact issue regarding his claim that he timely served his responses. Although Weaver's certificate of service raised a presumption of service under Texas Rule of Civil Procedure 21a, Unifund rebutted that presumption with the affidavit asserting that it was not timely served within the fifty days prescribed by Rule 198.2(a). Additionally, a party who fails to expressly present to the trial court any written response in opposition to a motion for summary judgment waives the right to raise any arguments or issues post-judgment.

The Court went on to find that Weaver's responses, even if they could be considered,

were not proper objections to the requests. To constitute a valid objection, a party "must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request." Texas Rule of Civil Procedure 193.2(a). Citing the four-year statute of limitations on debt actions was not a proper objection. A limitations defense is an affirmative defense, which must be asserted in a pleading and not in response to a Request for Admissions.

**Insurance for Bodily Injury Potentially Covers Biological Injury from Cell Phone Use.** *Zurich American Insurance Co. v. Nokia, Inc.* A wireless telephone manufacturer, sued in a number of class actions alleging that radiation emitted by the phones caused biological injury, turned the claims over to its insurers, who had agreed to defend claims seeking damages arising from bodily injury. After initially providing a defense, the insurers later sought a declaration that they had no duty to do so. It was held that the biological injuries alleged by the plaintiffs potentially state a claim for bodily injuries under the policies, much like the sub-clinical injuries alleged by plaintiffs who have been exposed to asbestos. The Court was clear that it was expressing no opinion on the merits of the underlying claims.

**TDI had No Authority to Initiate Enforcement Action Against Insurer Pending Appeal.** *State Farm Lloyds v. Geeslin* The Texas Dept. of Insurance (TDI) initiated an enforcement action against State Farm Lloyds seeking to prevent it from charging its current rates, which, according to TDI, were excessive; to require State Farm to pay restitution to affected policyholders; and to impose sanctions on State Farm. On appeal, summary judgment in favor of TDI was reversed and summary judgment was

entered in favor of State Farm. During an appeal regarding the excessiveness of their rates, insurers may opt to charge their initial rates, subject to the remedy of a refund if the insurer ultimately loses.

finding that the relationship between the conduct and sanction was appropriate.

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**Driver's License Suspension Reversed Due to Unjustified Traffic Stop.** *Texas Department of Public Safety v Gonzales.* The Texas Dept. of Public Safety (DPS) appealed the trial court's judgment reversing an administrative order that suspended Defendant's driver's license for refusing to provide a breath specimen. The Court of Appeals affirmed the trial court finding that the fact that Defendant was driving 45 mph in a 65 mph zone on a highway did not support the administrative finding that there was reasonable suspicion to stop Defendant's vehicle.

**Dismissal With Prejudice for Failure to Appear at Depositions was Appropriate Sanction.** *Teate v CBL/Parkdale Mall, L.P.* Plaintiffs-commercial lessees filed a request for injunctive relief when Defendant-lessor advised them their lease would not be renewed and asked them to vacate the premises. Plaintiffs claimed they would suffer irreparable harm without a month's notice and later added a claim for tortious interference of contract due to Defendants refusal to negotiate with them because of their race. The trial court denied the requested temporary injunction and heard evidence that Defendant had offered Plaintiffs a five year lease, which they refused. After failing to appear at depositions, even after the trial court entered an order to do so in response to Defendant's motion to compel Plaintiffs' attendance, the trial court sanctioned Plaintiffs by dismissing the cause with prejudice. The Court of Appeals affirmed