Goldman & Associates, PLLC

THE DEFENSE

INSIDE THIS ISSUE:

Plaintiff claimed water remediation work was faulty in this action against the repair company and his insurer, Allstate Texas Lloyds, defended by Larry J. Goldman and Michelle M. Copeland of Goldman & Associates, PLLC.

***Perry L. Berryhill v. Allstate Texas Lloyds, Blackmon Mooring of Midland-Odessa Inc., and Corgill Enterprises Inc., d/b/a Bee Gee Construction,* No. B-124, 295 (Ector County District Court, February 28, 2014).**

Demand: **$150,000** **Offer: $50,000**

Trial Facts: **Trial Length: 4 days** **Jury Deliberations: 25 minutes**

Results: **Plaintiff took nothing on the verdict.**

Jury did not find breach of contract, DTPA violations, or breach of the duty of good faith and fair dealing by Allstate with respect to the 2006 claim. Jury found that the negligence of Bee Gee, but not Blackmon Mooring, proximately caused the occurrence in question as it relates to the 2006 incident. Jury did not find that Blackmon Mooring's breach of warranty, if any, was a producing cause of damages to plaintiff as it relates to the 2006 incident.

FACTS & ALLEGATIONS

On August 28, 2006, a plumbing leak occurred in the home of plaintiff, owner of a company that produces corporate videos and other media. Plaintiff reported the claim to Allstate in November 2006. The leak made the house unlivable. Plaintiff's homeowners' carrier, Allstate Texas Lloyds, hired Blackmon Mooring of Midland-Odessa Inc. for the water remediation, and plaintiff hired Cargill Enterprises Inc., operating as Bee Gee Construction, for the other repairs. In January 2007, plaintiff was notified that all the work was complete, but when he returned to inspect the house, he found another major plumbing leak. He filed another claim with Allstate, and Blackmon Mooring remediated the water from the 2007 leak. Plaintiff claimed that the work of both Blackmon Mooring and Bee Gee was defective as to the 2006 leak. In 2009, plaintiff and Allstate entered into the appraisal process, pursuant to the insurance

agreement. Allstate paid plaintiff the agreed appraisal award, but plaintiff claimed that that award was for the 2007 claim only, and not the 2006 claim.

Plaintiff filed suit seeking over $1,000,000 in damages. Plaintiff sued Allstate for breach of the insurance agreement, DTPA violations, and bad faith as to the 2006 claim, and sued Blackmon Mooring for negligence and breach of warranty. Plaintiff also sued Bee Gee, but that company did not file an answer, and plaintiff obtained a default against Bee Gee for over $230,000 in July 2011. Plaintiff never collected this judgment and sought the same damages from Allstate. According to plaintiff, Blackmon Mooring failed to remediate the water properly after the 2006 leak, causing the hardwood floors to buckle. Blackmon Mooring argued that it performed the work properly. Allstate denied breach of contract, DTPA violations, and bad faith, maintaining that the appraisal award covered both the 2006 claim and the 2007 claim.

INJURIES/DAMAGES

Due to the damage to the property, Plaintiff claimed that Blackmon Mooring failed to remediate, or abate, the water properly after the 2006 leak, causing the hardwood floors to buckle. He moved out of the house and never moved back in. He claimed that the leak also caused him health problems, ruined his relationship with his fiancée, and ruined his business. He sought $37,200 in rent, $25,000 in displacement expenditures, $250 in medical bills, and $38,750 in past lost earning capacity. He sought unspecified amounts for moving expenses, storage fees, and past and future mental anguish.

He testified that, although he lived in a house owned by his father and did not pay rent, he promised to pay his father the rent in the future. He sold the house about four months before trial. Because he sold the house, he could not recover repair costs.

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Court confirms that Stowers Demands must be unconditional and must offer full releases in order to trigger an insurer's duty to settle.

***Marcus B. Patterson v. Home State County Mutual Insurance Company,* 2014 WL 1676931 (Tex.App.-Hous. (1 Dist.)). Decided April 24, 2014.**

BACKGROUND

Patterson filed suit in 2006 against Charles Hitchens, Brewer Leasing, and Texas Stretch for the wrongful death of his wife. Hitchens, an employee of Texas Stretch, was driving a truck owned by Brewer Leasing when he collided into the car driven by Diane Patterson.

Brewer had a policy with Home State providing policy limits of $1,000,004 for liability and physical damage. Patterson sent two letters to Home State proposing settlement in 2007. Home State declined both proposals.

In 2008, Home State filed a petition for interpleader offering to deposit the policy limits into the registry of the Court for the trial court to distribute once it determined the respective rights of the parties. Patterson objected, claiming Homes State was negligent in declining his proposals for settlement. Subsequently, Patterson made a third proposal for policy limits to which Home State replied that disbursement of the funds was subject to the pending interpleader action. Interpleader was granted and Home State was dismissed from all but the *Stowers* causes of action.

At trial, claimants were awarded over $5,000,000 in damages. Patterson then sued Home State for the excess judgment based on the *Stowers* doctrine. The trial court ruled in favor of Home State on a motion for summary judgment and Patterson appealed.

OPINION

The Court found that under Texas law, there are a minimum of three elements necessary to trigger the Stowers duty to settle: (1) a claim within the scope of the coverage; (2) a demand within policy limits; and (3) the terms are such that an ordinary prudent insurer would accept it. The most basic of these terms is that the demand "must propose to release the insured fully in exchange for a stated sum of money."

The Court found that the 2007 demands did not offer full releases and the 2008 demand was not unconditional. Further, the insured had communicated to Home State that he did not want the offers accepted that did not include a release of all claims against all parties.

RESULT

Summary judgment in favor of insurer affirmed.

When no damages are assessed, a contingency fee method cannot support the award of attorney's fees and the attorney must then provide legally sufficient evidence to support the award under the lodestar method.

Long v. Griffin, 2014 WL 1643271, 57 Tex. Sup. Ct. J. 470, Decided April 25, 2014.

BACKGROUND

In this oil and gas trust case, a trial court in 2003 found for the Griffins and awarded $35,000 in attorney's fees. On appeal, the Supreme Court in 2006 reversed the judgment in part and since that decision modified the Griffins' recovery, it was also remanded to the trial court to redetermine the attorney's fees. In 2009, the trial court awarded the Griffins $30,000 in attorney's fees with post-judgment interest. Long petitioned for a review asserting in part that the amount of the attorney's fees lacked legally sufficient evidence.

OPINION

The Court agreed with Long and found that there was not legally sufficient evidence to support to attorney's fees awarded by the trial court.

The attorney's fees affidavit provided by the Griffins included two methods of calculating the attorney's fees. One method cited the contingency fee agreement which the Griffins had entered into with their attorneys that provided a 35% contingency arrangement. However, this was not applicable since the trial court's award because the final judgment did not include any monetary relief from which the contingency could be calculated.

The second method was the calculation that the two attorneys who had worked the case spent 644.5 hours on the suit, which when multiplied by their hourly rates, totaled $100,000 in total fees. This portion of the affidavit included a breakdown of the time spent on each claim, with 30% of that time spent on the assignment claim, for which the trial court awarded the recovery.

The Court cited the case of *El Apple I, Ltd. v. Olivas,* 370 S.W.3d 757 (Tex.2012), in which the Court stated that when using the lodestar method of calculating attorney's fees (number of hours reasonably spent multiplied by reasonable hourly rate) the hours claimed must be backed by sufficient evidence, which at the very least includes, "evidence of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id.* at 764.

RESULT

Remanded to the trial court to redetermine the attorney's fees award.

The Court noted that if the evidence required does not exist, that the attorneys may reconstruct their billing to provide sufficient evidence to support their fee application.

IMPLICATIONS

In the past two years, the Texas Supreme Court has struck down an attorney's fee award three times over lack of specificity in the supporting evidence - *El Apple I, Ltd. v. Olivas,*370 S.W.3d 757 (Tex. 2012); *City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013); and the *Long* case (see page 6).

Over the course of these cases, the Court has stated that if the contingency fee method cannot apply, then the attorneys must present sufficient records to support their time claimed. Some are concerned that this is foreshadowing the end of contingency fee contracts in Texas but a closer examination reveals that what it really means is that even if an attorney has a contingency fee contract, she or he should still keep contemporaneous records to support a claim for attorney's fees in the event that the award from the trial court will not support a contingency fee award.

The ruling in *Long* specifically states that if there are no contemporaneous records, the attorneys may reconstruct their billing, but that is a onerous task, especially in cases that are several years old. This may motivate more attorneys to voluntarily keep contemporaneous records and therefore end up making them less inclined to enter into contingency fee agreements.

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A Dimmit County jury awarded a verdict of $281,000,000.00 in a wrongful death trial resulting from a trucking accident in the Eagle Ford Shale region. The big question which remains unanswered is whether media coverage of mega-verdicts like this will lead to an increase in litigation in the Eagle Ford Shale region?

Jose Luis Aguilar, et al. v. Heckmann Water Resources, Inc., et al., Case No. 12-06-1697-DVCLM (293rd District Court, Dimmit County, January 7, 2014).

BACKGROUND

On May 29, 2012, Heckmann Water Resources employee Ruben Osorio Hernandez was driving a tractor-trailer on FM 133 in Dimmet County at approximately 67 miles per hour. Carlos Aguilar was a passenger in a truck traveling in the opposition direction. According to pleadings on file, a 20-pound u-joint and driveshaft separated from the 18-wheeler driven by Hernandez, bounced off the road, and crashed through the windshield of the other truck, killing Mr. Aguilar.

The family of the decedent, including his parents, his wife, and his seven children, filed suit against Heckmann Water Resources, an environmental services company that provides disposal, treatment, and transportation of oilfield produced saltwater, their subsidiary companies, and their driver Ruben Osorio Hernandez for the wrongful death of Carlos Aguilar, also including causes of action for negligence and gross negligence. It was alleged that the drive shaft broke because the defendants failed to properly maintain the tractor-trailer.

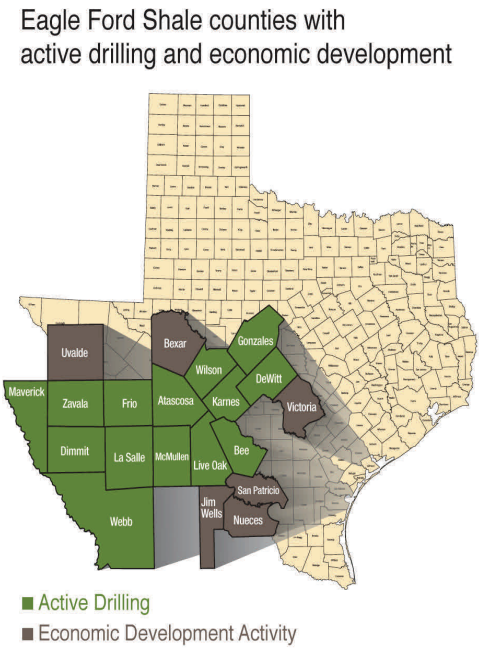
After an 11 day trial and four hours of deliberation, the jury returned a verdict finding no negligence on the part of driver Ruben Osorio Hernandez, but finding that the negligence of Heckmann Water Resources was the proximate cause of the occurrence in question. The jury found unanimously for the plaintiffs and awarded $281 million in damages, including $100 million in exemplary damages.

VERDICT BREAKDOWN

Note that before the Court submitted its Charge to the Jury, Plaintiffs nonsuited, without prejudice several parties. The remaining defendants were Heckmann Water Resources (CVR), Inc. and Ruben Osorio Gonzalez.

After the Court applied Chapter 41 of the Texas Civil Practice and Remedies Code, the Court reduced the exemplary damages. After the application of the reduction and the addition of pre-judgment interest, it was found that the total judgment for the decedent's parents came to $7,468,869.86 each; for his seven children came to $18,206,641.76 each; for his wife came to $10,532,268.58; and for his estate came to $11.067.067.59.

Is the Eagle Ford Shale Oil Boom creating a litigation boom?



(Map from http://tpr.org/post/face-eagle-ford-shale-san-antonio)

Type "Eagle Ford Shale" into your favorite search engine and you are bound to turn up a variety of advertisements for attorneys - from traffic accidents to work-place injuries, reports show that litigation is picking up in the Eagle Ford Shale region due in large part to the continuing oil boom.

Not long after the verdict in *Aguilar v. Heckmann* (see article facing) was made public, articles appeared in the *San Antonio Express News*, and the remainder of a series was aired on Texas Public Radio regarding developments in the Eagle Ford Shale region. These news stories covered a wide variety of topics, but they share a theme - that the boom is both a blessing and a burden to the communities involved.

One article in the San Antonio Express News on Sunday, March 2, 2014, noted that the increase in traffic alone had lead to an increase in litigation ("$281M Verdict Puts Shale on Notice," *San Antonio Express News* - Section D, March 2, 2014). The article went on to note that, "[i]ncreased traffic and deteriorating roads have made driving in South Texas more perilous," resulting in 2013's recorded "3,430 crashes that resulted in serious injuries or fatalities - a 26 percent jump from 2012."

The Texas Public Radio series about the Eagle Ford Shale, (available online at tpr.org) primarily focuses on the impact in local Texas towns where growth has been the greatest. It was noted that due to rising infrastructure costs, the Texas Department of Transportation proposed a plan to replace some of the paved roads with gravel roads. The counties involved have stepped in to take some of the financial burden of maintaining the paved roads off the state, but the agreement only lasts for the next five years or until energy-related traffic declines.

What does all this mean for litigation? The media exposure of a large verdict like that in *Aguilar v. Heckmann* can certainly lead to an increase in interest in litigation in the region that produced it. The combined factors of increase in traffic and problems with infrastructure most certainly lead to more accidents and more accidents are also likely to cause an increase in litigation. As we move forward in the post-*Aguilar v. Heckmann* era, we will be keeping a close eye on the counties in the Eagle Ford Shale region to determine if the record-setting verdict will stand alone, or if it is only the leading-edge of a wave of new high-end jury verdicts.