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OCTOBER 2019 TEXAS INSURANCE LAW UPDATE

Fifth Circuit Court of Appeals affirms dismissal of lawsuit to add claims against non-diverse insurers for purely mental anguish damages.

In *Petty v. Great West Cas. Co*., No. 18-11600, 2019 U.S. App. LEXIS 32806 (5th Cir. Oct. 31, 2019) (unpublished), the Fifth Circuit affirmed the district court's dismissal of the Plaintiff's motion seeking leave to amend his complaint. Petty, a commercial truck driver, contends that, as a result of his involvement in two accidents involving fatalities, he suffers ongoing mental trauma that prevents him from being able to operate a commercial truck. Consequently, he sought monetary relief for lost business earnings and mental distress/anguish. Petty, appearing pro se, filed or attempted to file numerous amended complaints in the district court, however, the lower court denied Petty's last proposed amendment on grounds of futility, and, finding no viable claim had been stated, dismissed Petty's action with prejudice. Petty appealed.

The Fifth Circuit stated that while Petty's experience is unquestionably tragic, on the record before it, the district court did not err in rejecting Petty's final motion for leave to amend his complaint, and dismissing the action. The originally named defendant, Great West Casualty Company, was the commercial automobile liability insurer for Petty's trucking company. The

two accidents are alleged to have been caused by the negligence of the *other* drivers, however, not a Great West insured.

The court stated that adding the nondiverse insurers as defendants would have destroyed diversity jurisdiction. The court noted that Texas law generally does not authorize an injured third-party to sue a liability insurer directly in lieu of suing the tortfeasor. Rather, the tortfeasor's liability must first be finally determined by agreement or judgment. In this particular case, the record relative to the rejected proposed amendment did not indicate that the liability of the other two drivers—the alleged insureds of the non-diverse insurance companies that Petty sought to add as additional defendants—had been finally determined by judgment or agreement.

And, finally, the court stated the rule that under Texas law, "a motorist owes no special duty to avoid inflicting [purely] mental anguish damages on other users of the highway" and that Petty's proposed amendment alleged only mental anguish damages, not physical bodily injury accompanied by mental anguish damages. Because Texas does not recognize a general legal duty to avoid negligently inflicting mental anguish, but rather, "mental anguish damages are recoverable when certain other legal duties are breached and the plaintiff offers a minimum quantity of proof," and Petty's proposed amended complaint included none of these special circumstances, the court found no abuse of discretion in the district court's decision to dismiss with prejudice.

Federal court grants insurer's summary judgment on extra-contractual claims but denies it with regard to breach of contract and prompt payment claims.

In *Kee v. Safeco Ins. Co*., No. 3:18-CV-2776-N, 2019 U.S. Dist. LEXIS 189789 (N.D. Tex. Oct. 31, 2019), the insured (Kee) sought coverage under her homeowner's insurance policy for damage to her home by a storm. Her insurer, Safeco, inspected the property and reported damage falling below her policy's deductible. Kee filed suit against Safeco alleging a breach of contract claim, Texas Prompt Payment of Claims Act ("TPPCA") claim, and extracontractual claims under the Texas Insurance Code. Safeco then pursued a binding appraisal process, provided under the insurance policy; the resulting appraisal award was significantly higher than Safeco's initial damage assessment. Upon payment of the appraisal award, Safeco sought summary judgment on all Kee's claims.

The court denied Safeco's motion with regard to Kee's breach of contract claim finding that it had not met its burden of proof because it had not provided evidence establishing timeliness of payment. While Safeco asserted it timely paid the entirety of the appraisal award in compliance with Texas Insurance Code provisions, the court held that these requirements govern timeliness for TPPCA claims and were insufficient to establish timeliness of payment for purposes of estoppel. Because Safeco had not produced the parties' insurance contract or any other evidence of appraisal requirements set forth in the contract that would show timeliness, Safeco's motion was denied with respect to the breach of contract claim.

With regard to Kee's TPPCA claim, the court stated that (1) payment of an appraisal award alone does not as a matter of law bar a TPPCA claim and neither establishes nor forecloses liability for the underlying claim and (2), TPPCA claims are not derivative claims, and therefore a TPPCA claim may survive summary judgment even if a breach of contract or extracontractual claim does not. In addressing Kee's TPPCA claim, Safeco argued only that it timely paid the appraisal award "in accordance with the prompt payment provisions" and that there was no breach of contract. The court held that pursuant to recent Texas Supreme Court caselaw (citing *Barbara Techs. Corp. v. State Farm Lloyds*, 2019 Tex. LEXIS 687, 2019 WL 2710089 (Tex. 2019)), this was insufficient to show it was entitled to judgment against Kee's TPPCA claim as a matter of law.

Finally, applying the *Menchaca*[1] case, because Kee was seeking policy benefits as the sole measure of actual damages for her extracontractual claims, the court found she has suffered no loss of those policy benefits proximately caused by the alleged statutory violations because the summary judgment evidence established that policy benefits were paid via the appraisal award. Kee did not contend that the appraisal award was insufficient, nor did she request any other form of actual damages. Accordingly, the court found there was no genuine dispute of material fact as to the extracontractual claims, granting judgment to Safeco.

Federal District Court denies Travelers' Res Judicata argument, holding that insured's prior non-suit of lawsuit seeking an appraisal under their homeowner's policy did not bar second suit against Travelers for breach of contract and prompt payment of claims.

In *Randel v. Travelers Lloyds of Tex. Ins. Co*., No. 4:19-CV-2885, 2019 U.S. Dist. LEXIS 188029 (S.D. Tex. Oct. 30, 2019), the underlying insurance claim was based on damages sustained to the plaintiff's residence following a fire that emanated in their garage. The plaintiffs had a homeowners' policy issued by Travelers covering the real property. After the fire, plaintiffs filed a claim with Travelers requesting coverage for the damages caused by the fire and smoke, together with additional living expenses associated with their displacement due to the fire. Travelers estimated the plaintiffs' damages to be $126,720.86. The plaintiffs felt that Travelers' assessment significantly undervalued their actual damages and hired a third party to conduct an indoor environmental quality assessment of their property.

The plaintiffs advised Travelers of their concerns regarding its underestimation of their claim, including its refusal to permit allowances for replacement of drywall and/or wall insulation in the rooms impacted by the fire and/or smoke. Thereafter, plaintiffs retained another third party to inspect the property and provide an estimate as to the amount of damages sustained to the property. Upon receipt of this estimate, Travelers sent an adjuster to inspect the plaintiffs'

[1] *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2019).

property. Afterwards, Travelers denied the plaintiffs' claim for additional structural damages and further advised that its payments for additional living expenses would be terminated.

Subsequently, the plaintiffs sought an appraisal to resolve the disputed loss amount, but Travelers rejected their appraisal request, maintaining that there was no covered damage to appraise. Plaintiffs instituted an action against Travelers in the 281st Judicial District Court of Harris County, Texas seeking a declaratory judgment as to whether the Policy requires Travelers to proceed to appraisal and requesting that the Court compel Travelers to participate in an appraisal. Travelers eventually agreed to send the claim to appraisal. Thereafter, the plaintiffs filed a Notice of Nonsuit with Prejudice and the state court entered an Order dismissing their declaratory judgment action with prejudice.

Plaintiffs later filed this action against Travelers in the 295th Judicial District Court of Harris County, Texas alleging claims for breach of contract and noncompliance with the Texas Insurance Code's prompt payment of claims provision because the appraisal still had not been completed. Travelers removed the action to federal court and moved for judgment on the pleadings, arguing that the plaintiffs' claims were barred by the *res judicata* doctrine.

In Texas, the elements of claim preclusion, or *res judicata*, are as follows:

> (1) the parties in the subsequent action are identical to, or in privity with, the parties in the prior action; (2) the judgment in the prior case was rendered by a court of competent jurisdiction; (3) there has been a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits.

Travelers' argued that because the plaintiff's claim for declaratory relief was part of a prior lawsuit involving the same parties, the same claim, and arising out of the same nucleus of operative facts, the *res judicata* doctrine bars the plaintiffs' current lawsuit. The federal court disagreed. It found that plaintiffs previously sought a declaratory judgment as to whether the Policy required Travelers to proceed to appraisal and also requested that the state court compel Travelers to participate in the appraisal process. Travelers eventually conceded that issue, thereby obviating the need for adjudication. Thus, the plaintiffs' subsequent voluntary dismissal of their first lawsuit pursuit to a Notice of Nonsuit with Prejudice did not bar the second action because their declaratory judgment action had not been adjudicated.

State Court of Appeals reverses trial court's judgment for injured workers' heirs and against employer's workers' compensation insurer because there were genuine issues of material fact on whether employee was in "course and scope" of employment.

In *Am. Home Assur. Co. v. De Los Santos*, No. 04-18-00906-CV, 2019 Tex. App. LEXIS 9472 (Tex. App. – San Antonio, Oct. 20, 2019), Juan De Los Santos was employed by Ram Production Services, Inc. when he was killed in a motor vehicle accident while driving from his

residence to the ranch where he was assigned to work. In the underlying cause, Juan's wife Noela sought judicial review of the Texas Department of Insurance, Division of Workers' Compensation appeals panel's decision that Juan was not in the course and scope of his employment at the time of the accident.

After the parties filed competing motions for summary judgment, the trial court denied Ram Production's insurance carrier's motion. The trial court concluded as a matter of law that Juan was in the course and scope of his employment at the time of the accident, reversed the appeals panel's decision, and granted summary judgment for Juan's wife, Noela.

American Home Assurance Company, Ram Production's workers' compensation insurance carrier, appealed the trial court's judgment. The sole issue presented on appeal was whether the truck Juan was driving at the time of the accident was gratuitously furnished by Ram Production rendering him outside the course and scope of his employment? Finding that there were disputed material facts, the court of appeals reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

The court noted that the Labor Code's definition of "compensable injury" requires that the injury "arise[] out of and in the course and scope of employment." "Course and scope of employment" is defined as "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." The course and scope of employment definition contains two elements: (1) the injury must "relate to or originate in . . . the employer's business" and (2) the injury must "occur in the furtherance of[] the employer's business." In this case, only the first element was in dispute. The court stated the rule that an employee's "travel to and from work generally [does] not originate in the employer's business because '[t]he risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers.'" "However, a distinction can be made if 'the relationship between the travel and the employment is so close that it can fairly be said that the injury had to do with and originated in the work, business, trade or profession of the employer.'" "This inquiry is satisfied if the employee's travel was 'pursuant to express or implied conditions of his employment contract.'" "Courts have generally employed a fact-intensive analysis to determine whether an employee's travel originated in the employer's business, focusing on the nature of the employee's job, the circumstances of the travel, and any other relevant facts."

The summary judgment evidence showed that (1) De Los Santos worked on a gas lease located on a large piece of fenced ranchland; (2) De Los Santos did not have an office or central location as a fixed place of employment; (3) De Los Santos spent a significant period of his work time traveling to wells and job sites within the ranch; (4) at the time of the accident De Los Santos was traveling from his home in Orange Grove, Texas to the ranch, which was located near Hebronville; (5) at the time of the accident De Los Santos was driving a truck owned by his employer; (6) the truck was furnished as part of De Los Santos's employment contract and was not for personal use; and (7) the employer paid for work-related fuel expenses. In addition, both parties presented conflicting affidavits. While one affidavit described the lease as being located

in a rural area, the other stated the truck was not provided to Juan because the work site was remote. Although one affidavit stated Juan would not have continued the job absent the provision of the truck, the other stated he did not need to furnish the truck to Juan to induce him to work on the lease. Thus, there was a genuine issue of material fact on whether the truck was an integral part of Juan's employment contract which Ram Production was required to furnish in order to secure Juan's services, thereby establishing the truck was a necessity and that Juan's travel in the truck originated in Ram Production's business and a genuine issue of material fact on whether the truck was merely gratuitously provided as an accommodation, thereby establishing that Juan's travel in the truck did not originate in Ram Production's business. For this reason, the court of appeals reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

The *De Los Santos* case is a good illustration of the highly fact-specific inquiry that a court will engage in to determine the "course and scope of employment" which is a frequent issue in many insurance coverage cases.

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