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Texas Court of Appeals Denies Summary Judgment Due to Temporary Suspension of Statute of Limitations in Misbranded Drug Case

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on common carriers to exercise the utmost care and diligence toward patrons. However, common carriers do not act as insurers of their passengers' safety and must only exercise care consistent with the practical operation of the carrier's business.

Squaw Valley asserted four reasons why it was not responsible for the heightened level of care. First, Squaw Valley argued that it was not a common carrier under the state liability statute. Second, even if Squaw Valley was a common carrier, a California utilities statute exempted it from common carrier status. This statute exempted ski lift operators from the definition of a common carrier for regulation by the California Public Utilities Commission. Third, Squaw Valley asserted that it was not liable because the carrier-passenger relationship had not commenced at the time of the accident. Finally, Squaw Valley argued that public policy dictates that chair lift operators be exempt from common carrier status.

The trial court held that Squaw Valley was a common carrier and that the state utilities statute exempted ski lift operators from common carrier status for public utilities regulation purposes only. Squaw Valley appealed this ruling to the California Court of Appeals for the Third District.

Common Carrier Status Applies

The California liability statute, Civil Code section 2168, defines a common carrier as any entity that holds itself out to the public as transporting goods or persons from place to place for profit. The appellate court reasoned that Squaw Valley fit this definition because it offered the ski lift facilities to the public for a fixed charge.

Squaw Valley, however, argued that it did not offer its lift facilities to the general public because use of the lift was restricted to persons who used the proper equipment and who purported to have the ability to ski. The court rejected this argument, stating that an offering to the public does not mean an offering to everyone at all times; an enterprise need only be available to the extent that members of the

general public may use it if they choose to. The Squaw Valley requirements were merely conditions required by the sport of skiing. Any person complying with the necessities of the sport could avail themselves of the service, therefore, the court ruled that Squaw Valley offered its facilities to the public.

No Exemption From Common Carrier Status

Squaw Valley argued that because ski lift operators are exempted from common carrier status under the California utilities statute, they are also exempted from common carrier status for purposes of tort liability. The appellate court rejected this argument, stating that the legislature not only enacted the utilities and liabilities laws as part of distinctly different statutory schemes but also for different purposes.

Prior to enactment of the utilities statute, the California Public Utilities Commission rendered an administrative opinion that ski lift facilities were not common carriers subject to its regulatory jurisdiction. The court found that the legislature's purpose in enacting the utilities statute was merely to codify this decision and not to further exempt ski lift operators from common carrier status for tort liability. If the legislature intended the further exemption it would have directly amended or referred to the liability statute. Therefore, the court held that the California utilities statute did not exempt Squaw Valley from common carrier status for determining tort liability.

Carrier-Passenger Relationship Had Begun

Squaw Valley further argued that common carrier status did not apply because Bowles had not actually boarded the ski lift at the time of the accident, and therefore, the carrier-passenger relationship had not yet commenced. The court disagreed, stating that the carrier-passenger relationship commences when a person goes to the place of departure intending in good faith to become a passenger and the carrier takes some action in accep-

tance. Bowles paid for her lift ticket and was attempting to board the chair lift at the boarding area at the time of injury. The court ruled that the carrier-passenger relationship had commenced and therefore held that the common carrier status applied to Squaw Valley.

Public Policy Argument Fails

Finally, Squaw Valley claimed that public policy demands ski lift facilities be exempted from common carriers status for tort liability purposes. Boarding a moving ski lift, Squaw Valley asserted, involves inherent risks that cannot be eliminated. Ski lifts, therefore, differ significantly from typical common carriers such as taxicabs or buses and holding ski lift operators to a higher standard of care was impractical. The court, however, refused to consider the public policy argument, holding that the legislature, not the court, was the proper forum for these considerations.

Scott R. Anderson

Texas Court of Appeals Denies Summary Judgment Due To Temporary Suspension of Statute of Limitations In Misbranded Drug Case

In *Parker v. Yen and Revco Discount Drug Centers, Inc.*, 823 S.W. 2d 359 (Tex. App. Dallas 1991), the Texas Court of Appeals for the Fifth District held that summary judgement could not be granted in a case involving medical malpractice, negligence, and the Deceptive Trade Practices Act while there were genuine issues of fact as to the statute of limitations and proximate cause.

Background

Charles A. Parker ("Parker") sued on behalf of himself and Mrs. Rosalie C. Parker, alleging that Garry Robert Yen ("Yen"), a pharmacist employed by Revco Discount Drug Centers, Inc. ("Revco"), misfilled a prescription for

(continued on page 106)

Denied Judgment

(continued from page 105)

Sinequan on May 7, 1987. Instead, Yen gave Mrs. Parker another drug, Dalmane, a fast-acting sleeping aid used for the treatment of insomnia. Parker further contended that, because she ingested Dalmane on May 9, 1987, Mrs. Parker fell asleep while operating a car and collided with another vehicle. As a result of this accident, Mrs. Parker suffered serious injuries and is now an invalid requiring continuous care.

On April 27, 1989, Parker sent Yen and Revco notices of a health care liability claim. On July 11, 1989, Parker sued Yen and Revco asserting causes of action against both based on negligence per se, medical malpractice, and the Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com. Code Ann. §§ 17.01 *et seq.* (1991), and against Revco only for common law negligence.

Both Yen and Revco moved for summary judgement, arguing that the two-year statute of limitations barred the lawsuit. Revco also alleged that the Dalmane prescription did not proximately cause Mrs. Parker's accident. Yen filed a supplemental motion, contending that a recovery against him was prohibited because Texas only allows recovery if the injured party's percentage of responsibility is less than or equal to fifty percent. The trial court granted summary judgement to both Yen and Revco.

Parker appealed, contending that genuine issues of material fact existed as to whether the statute of limitations had expired, whether proximate cause existed, and whether the summary judgements were granted upon claims not set out in the motions. On appeal, Parker was required by Texas law to show that each of the independent arguments alleged in the summary judgement motions were insufficient to support the trial court's order.

DTPA Discovery Rule Not Negated

Parker's DTPA claim has a discovery rule that requires the individual seeking summary judgment, here Yen and Revco, to prove as a

matter of law that the opposing party, here the consumer, discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice more than two years before suit was filed. Parker argued that Yen and Revco failed to negate the DTPA discovery rule in their motions for summary judgement. The appellate court found that whether the Parkers knew or should have known of the alleged deceptive acts was material to whether the DTPA claim was barred by the limitations period, and therefore, summary judgement was improper on this point.

Questions Exist as to Statute of Limitations

Parker also alleged that the trial court erred in holding that the statute of limitations had run on the medical malpractice and negligence claims. Parker claimed that section 4.01 of the Medical Liability and Insurance Improvement Act provides that if a written notice of a claim of health care liability is given, the applicable statute of limitations tolls, or is temporarily suspended, for a period of seventy-five days following the notice. Parker gave the required notice to Yen on April 27, 1989. The seventy-five day tolling period ended on July 12, 1989, and Parker filed suit on July 11, 1989. The appellate court agreed and held that the limitations statute was tolled on the medical malpractice claim against Yen for seventy-five days, due to Parker's written notice.

With respect to the claims of common law negligence and negligence per se, Parker contended that Mrs. Parker's disability tolled the running of the limitations period. Revco argued that because the wrongful conduct was separate in time from the harm caused, the Parkers' cause of action accrued when the prescription was misfilled.

The appellate court concluded that Yen's conduct gave the Parkers two causes of action, one for the economic interest and one for bodily injury. The economic interest protected, the right to seek a properly filled prescription or the

return of their money, accrued at the time the prescription was misfilled on May 7, 1987. Alternatively, the bodily injury claim arose when Mrs. Parker ingested the Dalmane and drove a car under its effects on May 9, 1987. Also, the appellate court concluded that Yen and Revco did not controvert Mrs. Parker's proof as to mental disability. Thus, the court held that a genuine issue of material fact existed as to whether the statute of limitations was tolled for the negligence causes of action when the bodily injury occurred.

Proximate Cause Unclear

Yen contended that recovery against him was prohibited because Texas only allows recovery if the injured parties' percentage of responsibility is less than or equal to fifty percent. In the case at hand, Yen argued that Mrs. Parker's negligence was greater than his because she had the last opportunity to avoid taking the drug. Furthermore, she voluntarily drove a motor vehicle under the drug's effects. The court held that there was no evidence that Mrs. Parker knew she was taking Dalmane rather than Sinequan. She had no reason to avoid the effect of the drug by not taking it or driving under its influence. Therefore, Yen had not proven as a matter of law that Mrs. Parker's percentage of responsibility was more than fifty percent.

Parker asserted that interrogatory questions regarding the drugs Mrs. Parker took raised issues of fact barring summary judgement. Yen and Revco argued that no evidence established that the misfilled prescription of Dalmane proximately caused the accident. The appellate court concluded that the varying interpretation and answers to the interrogatories raised fact issues barring summary judgement.

The appellate court reversed the trial court's grant of summary judgement with respect to Yen, and affirmed the trial court's awarding Revco summary judgement on the medical malpractice claim. However, the court reversed the summary judgement with respect to Revco for all other claims, and remanded the case to the trial court.

Gregory R. Bockin