The Non-Subscriber Case Law Update

A Bi-Monthly Publication Dedicated to Detailing Recent Cases Pertaining to Non-Subscription Issues.

August, 2006

NOTEWORTHY RECENT NEGLIGENT CASES FROM TEXAS COURTS OF APPEAL.

Many Plaintiff's attorneys, and some Defense attorneys, believe that negligence is presumed in the non-subscriber context; that all the Plaintiff need do is show 1% negligence on the part of the employer and he will recover his damages. Here are some cases to counter that theory.

The Texas Supreme Court addressed the issue of negligence in the non-subscriber realm in Kroger v. Elwood, 49 Tex. Sup. J. 623 (2006). Mr. Elwood, a grocery sacker for Kroger, was unloading a cart of groceries for a customer. The cart was parked on a sloped portion of the store's parking lot. The location of the cart necessitated Mr. Elwood using his leg to hold the cart in place while placing his hand in the door jam of the customer's vehicle. The customer was so grateful for his assistance in loading her vehicle that, rather than giving him a tip, she slammed his hand in the door (unintentionally, of course). The court began its analysis setting forth the all too common elements of negligence: (1) Duty; (2) breach of the duty (3) which proximately causes the Plaintiff's damages. Then, the Supreme Court recited several propositions that non-subscribing employers hold dear and true. An employer is not an insurer of its employees' safety. There is no duty to warn of hazards which are of common knowledge. An employer is not liable when the character of the work is the same as always required and there is no evidence that the work at issue is unusually precarious. The Court also addressed many of the arguments that the Plaintiff's bar argues preclude summary judgment. The court found that loading a grocery cart on a slope was a usual activity and not unusually dangerous. The court found that even though there were occasions at this store where the carts had rolled into customer's cars, this was not evidence from which the employer could foresee a risk of injury. Finally, the Court stated that the failure to provide carts with wheel locks did not amount to failure to provide sufficient equipment. Employers should plan to quote this case often in Motions for Summary Judgment and Post-Verdict motions.

The Fourteenth District Court of Appeals out of Houston addressed an employer's failure to provide certain security measures after an employee was shot during a robbery. Cheo Jea was closing the convenience store when the store was held up. In the robbery, Mr. Jea was shot in the arm. Mr. Jea brought suit against his employer, Mi Rea Cho for failing to provide adequate lighting outside the front of the convenience store, failing to provide him with a key to lock the front door and not staffing the store with another employee at night. The jury found in favor of Mr. Jea. However, the trial judge set aside the verdict. The Court of Appeals' affirmed the Judge's ruling finding there was no evidence that the measures Mr. Jea asserts should have been implemented (key to the front door, additional lighting, and another employee on duty) would have prevented the robbery and his gunshot wound. This case can be found at Jea v. Cho, 183 S.W.3d 466 (Tex. App. – Houston [14th Dist.] 2005).

Sanchez v. Marine Sports, Inc., 2005 Tex. Lexis 10327 (Tex. App. – Houston [14th. Dist.] 2005) involved an employee who had been hired to detail boats for Marine Sports. This case is a prime example of how omissions in the training program may be negligence, but that negligence is not always the proximate cause of the employee's injuries. Mr. Sanchez was descending down a ladder on the boat when his foot slipped and he fell to the ground. The employer did not have any safety meetings, a safety manual, a Spanish language operations manual or provide boots. The case was tried to the Judge who granted an instructed verdict at the close of the Plaintiff's case. The appeals court held that, at most, these omissions created a situation where an injury was possible, but that there was no evidence that these omissions were a substantial factor in bringing about the employee's injury.

Comment: These three cases should teach employers the following with regard to assessing liability for accidents:

1. *Is the accident a result of a risk which is inherent in the employee's duties?*
2. *Is the alleged negligence asserted by the Plaintiff the proximate cause of the accident?*
3. *Is there a reasonable step which the employer could have taken to avoid this accident?*
4. *Is there equipment which could have reasonably been provided that would have made a substantial difference and prevented the incident?*

Favorable answers to these questions does not lead to the conclusion that a court or jury will not find the employer liable. Favorable answers suggest that the accident at issue may be the type that an employee is unable to meet the necessary legal elements to prove negligent as a matter of law.

Fenley & Bate, L.L.P.

ATTORNEYS AT LAW

224 E. Lufkin Avenue ▪ P.O. Box 450 ▪ Lufkin, Texas 75902-0450
TELEPHONE (936) 634-3346
TELEFAX (936) 639-5874

415 N. Washington, Ste B, Livingston, Texas 77351
TELEPHONE (936) 327-1100
TELEFAX (936) 327-1107

EMAIL OFFICE@FENLEY-BATE.COM