CTH&G Quarterly

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INSIDE THIS ISSUE

In the spirit of new beginnings and also an appreciation for things remembered, CTH&G is pleased to publish our quarterly newsletter. The updated styling and online version of these materials was intentional. CTH&G keeps pace with the ever-changing world in which we all exist. The ability to make valuable, considered, and well-researched legal information available necessitated we develop a platform that would reach our readers. While holding true to our convictions and belief in tradition, CTH&G continues to print on actual paper (for those of us who appreciate tangible items) as well as make the information available in digital format for our readers.

We continue to explore recent court decisions and analyze how these rulings might affect you. CTH&G believes in the saying "knowledge is power," and wants to ensure our clients and readers are equipped with these tools. In this issue, we explore a recent Texas Supreme Court case that fine-tunes an action brought for Gross Negligence, raising the threshold inquiry from mere carelessness to an extreme degree of risk. We also analyze the 11th District Court of Appeals' ruling on wills, which involve mineral interests. With the boom of the Permian Basin still pounding a strong rhythm, oil and gas production and ownership is an ever-increasing legal need CTH&G is tasked with handling and resolving.

We hope you also enjoy the new addition featuring how our attorneys impact our community. This quarterly edition features Bud Grossman, a Partner of CTH&G who manages to multi-task a personal injury and insurance defense practice with the firm, and giving back to the legal profession and his alma mater Texas Tech University School of Law.

We welcome any suggestions you may have for how we might improve our publication or address any areas that are of interest to you personally or our clients and readers. Please email suggestions to budg@cthglawfirm.com.

Sincerely,
Craig, Terrill, Hale & Grantham

THE TEXAS SUPREME COURT FINE-TUNES THE STANDARD OF GROSS NEGLGIENCE

On a Sunday morning, high school student Christopher Medina went to his school to feed livestock as part of the school's agricultural program. Jennifer Zuniga, mother of another student in the ag program, dropped her daughter off for the same purpose and went for a jog.

Upon finishing, Medina proceeded to drive through the horseshoe-shaped drive, which provided access to parking spaces, before emptying back out onto the public street from which he originally entered the lot. Evidence showed Medina accelerated rapidly through the parking lot, reaching a speed of up to 24 miles per hour. According to an accident Reconstructionist this would have required Medina to press the accelerator almost to the floorboard.

Medina decreased his speed as he approached the exit of the horseshoe drive and prepared to turn right onto the roadway. At the same time, Zuniga was jogging across the egress headed towards the sidewalk directly across from the exit way. There was no stop sign posted, and Medina admitted that he did not stop. He looked left before exiting, but failed to look right. He momentarily saw Zuniga before he struck her exiting the lot. Evidence showed Medina attempted to slam on his brakes immediately before impact. Zuniga sued Medina for both negligence and gross negligence as a result of the accident.

Gross negligence is considered in light of both an objective standard (would a reasonable person know the actions taken involved an extreme degree of risk of injury to others) and a subjective standard (was the person taking the actions aware of the risk but took it regardless of the risk of injury to others).

The Texas Supreme Court made clear that the objective standard of gross negligence had to remain separate and distinct from ordinary negligence. To constitute gross negligence, there must be "an extreme degree of risk" as a threshold matter, which is significantly higher than the objective standard for negligence of "would a reasonable person know their actions involved any or some risk to others?"

In essence, there must be risk of such extreme degree that an injury is substantially likely to occur for a party to prevail on a claim for gross negligence.

See *Medina v. Zuniga*, No. 17-0498, 2019 Tex. LEXIS 387 (Tex. April 26, 2019) for the full opinion.

Recreational Use Statutes Limit the Ability to Waive Sovereign Immunity Under the Texas Tort Claims Act.

On Wednesday April 15, 2015, April Garner was biking through the Colorado Apartments to meet a friend at Eilers Park to ride the trail. As Garner biked on the road through the apartment complex owned by UT, Angel Moreno, a UT employee, was backing out of a parking spot. Moreno's view to the northwest was partially blocked due to a car that was parked to his right. As Moreno was backing out, he saw a flash of pink and then hit Garner on her bicycle. Garner fractured her wrist, received facial cuts and bruises, among other injuries.

Garner sued UT for negligence under the Torts Claim Act. The Torts Claim Act allows individuals to file lawsuits against governmental units if a government employee causes injuries, within the scope of their employment, by the use of a motor-driven vehicle, and the employee would be personally liable under Texas law. Essentially, this act waives the governments' sovereign immunity.

UT argued that Garner was trespassing on the property; therefore, UT only owed a duty to not injure intentionally or with gross negligence. However, even if Garner was allowed on the property, a statute called the Recreational Use Statute would classify Garner as a "trespasser." When an individual is considered a "trespasser" on property, the owner of the land only has a duty to not injure intentionally or with gross negligence.

The Recreational Use Statute allows the landowners to limit their liability to other individuals who use the property for recreational use. Essentially, this statute stops the Torts Claim Acts' ability to waive sovereign immunity if the individual is using the property for recreational use. A recreational user is then referred to as "trespassers" and a negligence claim requires proof of gross negligence, malicious intent, or bad faith.

The court found that Garner was using the university property for recreational use and therefore, she would be considered a trespasser. This means UT can use the recreational use statute to prevent to waiver of their sovereign immunity.

Additionally, the Recreational Use Statute provides that if an owner permits another to enter the premises for recreation, the owner does not: assure to users that the premises are safe for the recreational purpose; owe a great degree of care than that of a trespasser; or assume responsibility for injury to individuals caused by the person who was given permission. This essentially means that if a person owns private property as defined under the statute (and with other contingencies) and permits individuals to use the property for recreational use like hunting or fishing, then the property owner may only owes a duty of care to not act with gross negligence, malicious intent, or bad faith.

See *Univ. of Tex. at Austin v. Garner*, No. 18-0740, 2019 WL 5275579 (Tex. Oct. 18, 2019) for the full opinion.

11TH COURT OF APPEALS SHOWS US THAT "DO IT YOURSELF" ESTATE PLANNING AND MINERAL RIGHTS DO NOT MIX.

In 1990, Mildred Etheridge typed out her "will" on a single sheet of paper without consulting an attorney. In this document she wrote:

"I, MILDRED L. ETHERIDGE, of Midland County, Texas for the purpose of distribution of my entire estate, real, personal and mixed [property]… hereby appoint and name Fred. D. Davis, Jr., as Independent Executor and trustee of my estate, to serve without bond. I give Fred D. Davis, Jr. all my personal effects to clear my estate after my death."

Mildred passed away in 1994 and her will was probated that same year. At her death, Mildred owned mineral royalty interests which were neither specifically devised under the terms of her will, nor included in her probate inventory.

After her will was probated, Enterprise Crude Oil, LLC began making her royalty payments to Mildred's estate. Mr. Davis, believing he was entitled to the entire estate, opened an account to receive the royalty payments and then disbursed these funds into his personal account. He spent the funds on items which were unrelated to the estate.

In 2010, members of Mildred's family who were not named beneficiaries under the probated will discovered royalty payments were being made to Mildred's estate. In 2014, they filed suit against Davis, as executor, and demanded an accounting and removal as executor. They asserted as lineal heirs, they were entitled to the royalty payments via intestacy as those mineral interests did not pass under the terms of the will.

The trial court found in favor of the heirs and against Davis. On appeal, Davis argued the definition of "personal effects" was too narrowly defined the clause immediately preceding that which devised unto him Mildred's personal effects stated she intended the will to distribute her entire estate, therefore the mineral interests should be considered personal effects to effectuate the intent of her will.

The 11th Circuit disagreed with Davis finding that customarily the term personal effects has almost always been defined narrowly as a subset of personal property, such as jewelry, luggage, and apparel. Additionally, mineral interests are not even classified as personal property until they have been produced from the real property.

Davis was found to have misapplied funds properly belonging to the estate which he must reimburse and that the mineral interests properly passed to Mildred's heirs via the laws of intestacy. Lesson to be learned- a quick fix is rarely the best, and watered-down versions of do-it-yourself wills and oil don't mix!

See *In re Estate of Etheridge*, No. 11-17-00291-CV, 2019 Tex. App. LEXIS 9564 (Tex. App.—Eastland Oct. 31, 2019) for the full opinion.

Legislative Update

Landlord, Tenants & Guns;

Surprise Healthcare Billing;

Hacking & Data Security Breaches

The state legislature of Texas only meets on odd-numbered years for roughly 140 days in a general session. Because the Texas Constitution limits the legislature to working only those days, there are a numerous proposed bills filed. Every bill must be introduced by a sponsor, read aloud, assigned to a committee and subcommittee, fiscally analyzed, reported out of committee, re-read to the entire chamber, and voted on in one chamber (ether the House or the Senate).

If a vote is successful, the bill is then sent to the other chamber who did not vote on the bill and all these steps are again repeated. Assuming there are no changes it then proceeds to the Governor to be signed into law or meets its end of days. While the process may seem excessive to some, it was carefully orchestrated to ensure the Lonestar State continues in its traditions of setting high standards.

After another legislative session packed with meetings, committee reports, live testimony, and ultimately seeing bills become law, several new laws deserve our attention from this past legislative session.

HB 302: Amendments to Texas Property Code Sections 82, 92, & 94.

This bill did not create new law, but added to existing provisions governing leasing of residential properties, including manufactured homes. The amendments prevent a landlord or property owner from prohibiting a tenant from carrying, transporting, or storing ammunition or firearms as a term of the lease agreement unless the tenant is prohibited by state or federal law from possessing a firearm.

This prohibition includes not only the leased unit, but also vehicles parked in a parking area provided for the unit. It also applies to any part of the property owned by the landlord such as entrances, exits, driveways, sidewalks, yards, lawns, and other common areas. Additionally, the prohibition applies both to tenants and tenant's guests.

"Landlords and landowners now <u>cannot</u> prohibit the carrying, transporting, storing, or ammunition of a firearm as part of a lease…" HB 302

SB 1264: Amendments to Section 20.05 of the Texas Business & Commerce Code

To combat "surprise billing" in healthcare, this amendment prohibits out of network providers from billing patients for amounts unpaid by their insurance company. The patient is responsible for the applicable co-payment, co-insurance, or deductible amount, but not for any amounts disputed between the provider and the insurance company.

The amendment was designed to protect consumers from receiving unexpected bills for amounts involved in disputes over insurance payments to healthcare providers (the "covered" amount). This amendment takes effect for medical services rendered after January 1, 2020.

"A business that knows… that personal information has been lost must notify the individuals affected within sixty days…" HB 4390

SB 1264: Requirements for Disclosing Data Security Breaches

One of the unintended consequences from the advancement in technology is the parallel advancement of people trying to manipulate that technology for nefarious purposes. Attempts to steal electronically stored personal information and data is becoming almost commonplace. The legislature has previously put Texas business on notice they must divulge when a hack or another breach of their system has occurred. The last legislative session amended this provision and established deadlines and additional reporting requirements in the event of an online breach which poses a security risk to its customers.

Any person who conducts business in the State of Texas that owns or maintains electronically stored data, including personal information, is required to disclose any hack or breach within 60 days after determining a breach has in fact occurred. If a business owner knows or reasonably believes that personal information has been lost they must notify those individuals who have been or may be affected. It is not mandatory to notify the Attorney General as well. The notice must include the nature and circumstances of the breach, the number of Texas residents affected, any measures to be taken after notification, and if law enforcement is investigating the breach. This amendment to Section 521.053 of the Texas Business & Commerce Code takes effect starting January 1, 2020.

"A patient is responsible for the applicable co-payment, co-insurance, or deductible but not the amount disputed between the provider and insurance." SB 1264

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CRAIG, TERRILL, HALE & GRANTHAM LLP

Quarterly Partner Spotlight

LEONARD R . (BUD) GROSSMAN

Leonard R. (Bud) Grossman has been a member of the firm for over 25 years when it was formed. He continually dedicates his time and gives back to the community and the legal profession. Bud's service and impact extends beyond the South Plains and throughout the State of Texas.

Bud proudly serves as the President of the Texas Association of Defense Counsel, and as the President of the Texas Tech University School of Law American Inn of Court. He is a an Advocate of the American Board of Trial Advocates, a Life Fellow of the Texas Bar Foundation and a Fellow of the State Bar College of Texas, Defense Research Institute, Association of Defense Trial Attorneys, International Association of Defense Counsel and the Lubbock County Bar Association. Bud is also Board Certified by the Texas Board of Legal Specialization in Personal Injury Law.

Bud is actively involved with the Texas Tech School of Law. As a proud alumnus, Bud helps foster relationships between the law school and the local legal community. He assists graduating law students pursuing legal careers in Lubbock and other areas across the State of Texas. Bud cultivates mentorship opportunities between those in our local legal community and young professionals. He is an active participant in Texas Tech School of Law Chapter of the American Inn of Court where he has serves as President and Master of the Bench.

Bud has received awards for his pro-bono work and for outstanding service in the legal profession. These distinctions have been recognized both at the state and local level. Bud was the recipient of "Boss of the Year," an award of which he is extremely proud. Bud believes it is the quality of the team to which success is attributed. Accolades for and from his team is how Bud ultimately measures his successes.

Bud is licensed to practice in Texas, New Mexico, Oklahoma, and Colorado. His practice is primarily devoted to the areas of personal injury, transportation and insurance defense. He graduated from Texas Tech School of Law and was admitted to the Texas State Bar in 1992.

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Based in Lubbock, the largest city on the South Plains, the firm's attorneys represent a broad range of clients, from local companies and individuals to large national and international corporations, in all levels of state and federal courts, and are dedicated to providing their clients with the highest caliber of legal representation at fair and reasonable rates.

The ***CTH&G Quarterly*** reviews recent decisions by the Texas courts and current trends in civil litigation. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

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