

Articles

"Texas Update -- A Flurry Of Year-End Activity, And Then Some"

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On December 31, 2004, the court issued a flurry of opinions, many of considerable importance. A couple are outlined below, with more to come in the future.

When Is Evidence Sufficient To Find By "Clear And Convincing" Standard?

Texas law requires the predicates to exemplary damages to be proved by "clear and convincing" evidence. But, how does one argue that there was "no evidence" or "legally insufficient evidence" to support a finding by the clear and convincing standard? The Court answered the question in ***Southwestern Bell Telephone Co. v. Garza***, ___, **S.W.3d** ___, **2004 WL 3019205** (Tex. Dec. 31, 2004). Logically, a higher standard of proof requires a higher standard of review, and the court found as much.

The result is a new "test," but one already being applied in cases involving the termination of parental rights:

"In reviewing the legal sufficiency of evidence to support a finding that must be proved by clear and convincing evidence, an appellate court must 'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'"

Applying the standard under the Texas Anti-Retaliation law, the court found that "viewing all of this evidence—as well as the evidence we have detailed earlier along with the entire record—in the light most favorable to the verdict, we cannot conclude that a reasonable trier of fact could form a firm belief of conviction that [Southwestern Bell] acted toward Garza with ill will, spite, evil motive, or purposeful injury. While there are some indications that it might have done so, there are a great many others that it did not. At most, the record reflects that Southwestern Bell] mishandled the situation; it does not produce a reasonable conviction that [Southwestern Bell] intended to punish Garza without cause."

Landowner Not Liable To Traveler On Adjoining Highway

The Supreme Court's last word on landowner duties to individuals injured after deviating from an adjoining roadway onto the land was *City of McAllen v. De La Garza*, 898 S.W.2d 809, 810 (Tex. 1995). Now, ten years later, the supreme court again refused to impose a duty in ***Military Highway Supply Corp. v. Morin***, __ **S.W.3d** ___, **2005 WL 119933** (Tex. Jan. 21, 2005) (per curiam).

Key to determining whether a possessor of land has a duty is whether the traveler on the roadway is "in the ordinary course of travel." Under Section 368 of the Restatement (Second) of Torts, "a traveler is not 'in the ordinary course of travel' unless the deviation from the road is a normal incident of travel." No duty exists if the deviation "is one not reasonably to be anticipated . . . or is for a purpose not normally connected with travel."

In *Morin*, the question was "whether Morin and Bautista's deviation from FM 732, after hitting a horse while traveling fifty to fifty-five miles per hour, was a normal incident of travel—an occurrence that Military Highway could have reasonably anticipated." In short, no. Morin and Batista traveled over 500 feet from the point of impact with the horse, "careening" from the northbound lane to the southbound lane, across a sixteen-foot unimproved shoulder, and onto the abutting land. Too much distance and too much "careening" were involved to hold the landowner liable for the condition of the property where the plaintiffs came to rest.

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