



"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Joanna Salinas

"You're on mute." This might have been the most utilized sentence of 2020; up from never being said in 2019. While starting 2021 is not a switch bringing us back to where we were one year ago, there is at least light at the end of the tunnel. Going back to somewhat normal is in our foreseeable future—albeit out a ways. Interacting with counsel, clients, carriers and the Court across the screen can sometimes be efficient and effective, but it is not the same. While there are a few attorneys on the other side of the docket who I would like to place and keep on "mute," here's to hoping 2021 will ultimately bring more face-to-face time with our family, friends, and colleagues, and far fewer meetings with a mute button. Happy 2021 from Fletcher Farley!



Texas Supreme Court's 33rd Emergency Order

On January 14th, the Texas Supreme Court entered its 33rd Emergency Order Regarding the COVID-19 State of Disaster. Pursuant to this order, there will be no widespread jury trials in Texas state courts until April 1. Courts that want to hold a jury trial before April 1st will have to meet stringent health and safety requirements and obtain approval of their proposed procedure from the Office of Court Administration. This Order also gives trial courts the discretion to modify or suspend deadlines until April 1. While not an explicit tolling of the statute of limitations, this language giving trial courts discretion will potentially be used by litigants who miss their statute of

Congratulations!

Kristi Kautz and Jeff Smith Promoted to Partnership

We are pleased to announce that [Kristi Kautz](#) and [Jeff Smith](#) were elected to partnership in the firm effective January 1, 2021.



You can also view our announcement card by [clicking here](#).

Speaking Engagements

[Joanna Salinas](#) presents *Deal or No Deal: Strategies and Tactics for Settlement Negotiations in a Virtual World* hosted by Dallas Claims Association (DCA)

limitations deadline to attempt to avoid summary judgment.

Fifth Circuit Issues Important *Stowers* Opinion

Kristi Kautz

On December 21, 2020, the Fifth Circuit Court of Appeals issued its opinion in the case of *American Guarantee and Liability Insurance Company versus ACE American Insurance Company*. The case arose from an underlying suit involving a wrongful death claim asserted by the spouse, mother, and minor children of Mark Braswell against the Brickman Group, LLC claiming that Mark Braswell, a road cyclist, sustained catastrophic injuries and died after colliding with a stopped Brickman truck. ACE was the primary insurer of Brickman with a \$2 million limit policy. American Guarantee (AGLIC) was the excess insurer with a \$10 million limit policy. Liability was disputed and defense counsel's pre-trial reports did not indicate that a verdict in excess of \$2 million was likely. On the eve of trial, ACE rejected a \$2 million settlement demand based on defense counsel's assessment and their own evaluation. During trial, several evidentiary rulings went against the defense such that the case manager for AGLIC, observing the trial, communicated that a verdict in excess of \$2 million was possible. Before the jury reached a verdict, the Plaintiffs again offered to settle, this time for a high/low of \$1.9 million to \$2 million with costs. This demand was also rejected by ACE, believing it was outside its limits due to the inclusion of costs. Finally, the Plaintiffs' counsel offered, while the jury was deliberating, to settle all claims for the policy limits of \$2 million. ACE declined this offer. The case proceeded to verdict and the jury awarded nearly \$40 million which was reduced to \$28 million for comparative negligence.



After the trial, the case was settled for nearly \$10 million with ACE paying \$2 million and AGLIC paying nearly \$8 million. AGLIC then sued ACE for violating its duty under *Stowers* to accept one of the three of settlement offers. Without addressing the first demand, as the district court had found that ACE's rejection was reasonable as to that pre-trial offer, the Fifth Circuit determined that ACE's rejection of the second offer was reasonable but its rejection of the third offer was not and was a violation of *Stowers*. In reaching this conclusion, the Fifth Circuit agreed that the second offer was

on Wednesday, January 20th, at 12:00pm.

DCA members and guests are welcome to attend the webinar. [Click here](#) to register.

Holiday Celebration

We hope you had a wonderful holiday season. We celebrated with Santa, our favorite ugly sweaters and a socially distanced parade around the office. We are finding way to keep the joy in our offices and we hope you are too.



DJ Hardy looks very festive while he works hard for our clients.



Lane Farley keeps spirits bright with his *Elf* sweater ... complete with Buddy on the back.

ambiguous because it included costs which were neither defined in the offer nor a certain sum. However, the Fifth Circuit found that the rejection of the third offer was not reasonable because it met all *Stowers* elements including that an excess judgment against the insured had become likely at that time, it sought a certain sum of \$2 million which was within the policy limits, and it was expressly unconditional. In attempting to defend their rejection of this offer, ACE argued that this third offer could not be unconditional because the Plaintiff was offering to settle both for herself and for her minor children and there was therefore a requirement for Court approval.

The Fifth Circuit points out that no Texas court has ever explicitly determined whether the uncertainty of judicial approval for a settlement including a minor renders a settlement offer conditional and therefore precludes a *Stowers* duty. In this case, the Fifth Circuit emphasized that there was no proposed distribution of the settlement offer and therefore no evidence that the mother would have placed maximizing her own compensation over her children such that a trial court would likely reject the settlement. Since there was no clear adverse interest between the mother and her children in this case, the Fifth Circuit held that her children would be bound by the settlement and that it was therefore not conditional.

Finally, ACE argued that it did not violate its *Stowers* duty as to the third offer because it was made after the trial court had made evidentiary rulings which ACE considered erroneous and likely to be overturned on appeal. Although the Fifth Circuit notes that ACE did not fully brief this argument, the Court ruled that even if rulings had been made which the insurer disagreed with, there was enough indication in the trial as a whole that its insured was facing a higher likelihood of excess exposure than was previously thought such that the settlement offer should have been accepted.

Conflicts Resolved

Fletcher Farley Obtains Summary Judgment on Premises Liability and Waiver Theories

A Lamar County judge granted multiple summary judgments filed by [Fred Arias](#) and [DJ Hardy](#) in a complicated premises liability involving several defendants in Lamar County, Texas. The Plaintiff, who had signed a waiver upon entering the clients' recreational premises, allegedly stepped into a hole covered by water. Evidence indicated that it was well known water would run off the pavement and onto the



Ryan Curry and Fred Arias take a break to show off their sweater game.



Pam Mitchell from our Austin office was voted one of the top choices in the sweater contest.



And, finally, the holiday wouldn't be complete without Santa, AKA Ed

area where the incident occurred. This resulted in the Plaintiff falling to the ground and, subsequently, undergoing surgery to his fractured leg. The Court considered three issues: (1) ownership of the property, which had changed between the date of loss and the date suit was filed; (2) enforceability of the waiver; and (3) whether any of the defendants had notice of the allegedly dangerous condition. Plaintiff's counsel, a highly regarded Dallas lawyer, argued that both the waiver, specifically whether it was sufficiently conspicuous, and the premises issues were fact questions for the jury to decide. The Firm was pleased the Judge listened to Fred Arias's arguments, applied the law, and dismissed all claims against all Defendants.

Dallas Court of Appeals Affirms Dismissal Obtained by Fletcher Farley

[Fred Arias](#) and [DJ Hardy](#) are pleased to report that the Fifth Court of Appeals in Dallas, Texas affirmed the lower's court's ruling dismissing all claims against one of the Firm's clients. The Plaintiff (or Appellant) had filed suit against a well-established charity providing relief for law enforcement families and other defendants for defamation for an article published in the local newspaper. Taking the lead for a number of the Defendants, a detailed motion to dismiss was filed. After considering the pleadings and motions, the Federal Judge dismissed Plaintiff's claims in their entirety. Plaintiff then appealed, arguing that the District Judge abused her discretion and erred in issuing her Judgment. The Fifth Court of Appeals affirmed the trial court's order, effectively dismissing all claims.

Velez, to wish everyone Season's Greetings!

We hope to see you all in this new year!

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