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## **UNKNOWN RESPONSIBLE THIRD PARTY HAS TO COMMIT A CRIME**

In a recent Court of Appeals' decision, the Fourteenth Court of Appeals reversed and remanded a trial court's ruling wherein the trial court allowed an unnamed party to be designated as a responsible third party, when the unknown person did not commit a crime. *Cao v. Hardy*, No. 14-10-01113-CV, 2011 Tex. App. WL 4389840 (Tex. App.--Houston [14th Dist.] September 22, 2011, no pet. h.).

In this case, the Court of Appeals held that the unnamed party designated as a responsible third party must have committed a crime if the designation is to be proper.

## **FACTS OF THE CASE**

During morning rush hour, Cao slowed his truck as he approached a disabled vehicle. A car driven by Hardy rear-ended Cao. There was some dispute as to why the disabled vehicle had its hood up. Its hazard lights were not flashing when the accident occurred. As a result of the accident, Cao was injured and received medical attention.

Cao sued Hardy and Hardy moved to designate the unnamed owner of the disabled vehicle as a responsible third party based on his negligent failure to use his hazard lights. The trial court granted that motion. Cao responded by moving to strike the responsible third party designation, arguing that section 33.004 of the Texas Civil Practices and Remedies Code allows unnamed parties to be designated as responsible third parties *only* when they commit a crime. Cao's motion was denied.

After the trial, the jury found Hardy 60% at fault and the unnamed owner of the disabled vehicle 40% at fault. The jury awarded Cao past medical expenses and apportioned damages based on the percentage of fault.

Cao moved for a Judgment Notwithstanding the Verdict on the grounds that it was error to designate the unnamed owner of the disabled vehicle as a responsible third party. Cao also moved for a new trial on the same grounds. The trial court upheld the jury verdict and denied the Motion for New Trial. Cao appealed.

## THE COURT OF APPEALS' DECISION

The Court of Appeals began by observing that the Texas Civil Practices and Remedies Code governs the designation of responsible third parties. Tex. Civ. Prac. & Rem. Code § 33.004. It noted that whether a responsible third party designation was proper was a question of statutory construction and is reviewed *de novo*. See *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *Flack v. Hanke*, 334 S.W.3d 251, 261, (Tex. App-San Antonio 2010, pet dism'd).

It further commented that when it construes a statute, it begins with its language. The primary objective is to determine the legislature's intent which, when possible, will be discerned from the plain meaning of the words chosen. The Court of Appeals also noted that it may consider other matters in ascertaining legislative intent, including the objective of the law, its history, and the consequences of a particular construction. *Shumake*, 199 S.W.3d at 284.

In reviewing Chapter 33 of the Texas Civil Practices and Remedies Code, the Court of Appeals analyzed section (j) which states:

Notwithstanding any other provision of this section, if, not later than sixty (60) days after the filing of Defendant's Original Answer, the Defendant alleges in an answer filed with the Court that an unknown person committed a criminal act that was the cause of the loss or injury that is the subject of the lawsuit, the Court shall grant a Motion for Leave to Designate the unknown person as a responsible third party if:

(1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal,

(2) the Defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and

(3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.

Hardy argued the subsection (j) of § 33.004 was irrelevant because it applies only to cases involving criminal act, and urged that the general provisions of § 33.004 applied.

He argued these subsections expressly limit themselves to known person, and they should apply to both known and unknown persons. The Court of Appeals determined that Hardy's argument was unpersuasive and against the findings in other cases.

The Court of Appeals concluded that because the owner of the disabled vehicle was unknown, the pleading requirements of subsection (j) in § 33.004 – including the allegation that the driver of the unknown vehicle has committed a crime - apply. Hardy failed to show those requirements. Thus, it was error to designate the owner of a disabled vehicle as a responsible third party.

## WHAT DOES THIS MEAN?

Many times Defendants designate unknown responsible third parties in their Answer when an accident is involved. It is clear from this Court of Appeals' ruling that if you have a case where an unknown Defendant may be a responsible third party, that individual must commit a crime for them to be designated. Otherwise, it may be reversible error. As a Defendant, you should be aware of this and draft your Answer accordingly.

Defendants often forget about designating responsible third parties (and in particular, unknown responsible third parties) in a timely manner. Timing is everything. As a Defendant, designation of a responsible third party should be considered at a very early date. This is important because a trial court can deny a Motion to Designate a Responsible Third Party just because it was not filed in time. Most importantly, if a trial court denies a Motion for Leave to Designate a Responsible Third Party, mandamus may not be a remedy, and the case may be submitted to the jury without any reference to responsible third parties in the jury questions. This could be a very costly mistake.

But remember, the statute does not require the crime be a felony or a serious crime. A traffic violation may be sufficient. Just make sure you plead sufficient facts and identify all characteristics of the unknown person in a timely manner, so that you don't have to deal with scrutiny down the appellate road.