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AMERICAN NATIONAL INS. CO. V. ARCE UNMISTAKABLE CLARITY FOR PROVING A MISREPRESENTATION DEFENSE

With unquestionable clarity and an emphasis on the principle of *stare decisis*, the Texas Supreme Court has reinforced the elements and burden of proof for a misrepresentation defense to a claim brought under an insurance policy. In *American National Insurance Company v. Arce*[1], the Court reaffirmed over a century of well-settled law for a misrepresentation defense, and specifically, that *an insurer must prove an intent to deceive by the insured to prevail on a misrepresentation defense,* including for a life insurance policy.

The road leading to this recent decision was not due to any uncertainty in Texas state courts. Rather it is a direct consequence from an unforced error originating from dicta in a single federal district court opinion stating that the 2003 non-substantive recodification of the Texas Insurance Code eliminated the intent to deceive element for a misrepresentation defense for a life insurance policy, and *Tex. Ins. Code* § 705.051, the recodified statute, was the exclusive basis for a misrepresentation defense during the contestability period. Unfortunately, this misanalysis by a federal district court was subsequently adopted by a "handful" of other federal district courts[2], creating some unnecessary substantive discord between a few federal district courts, longstanding precedent in Texas courts and almost all federal courts.

When a state district court in Hardeman County decided to adopt this outlier federal district court opinion rejecting over 100 years of precedent, the stage was set for a likely showdown before the Texas Supreme Court on whether well-settled law would give way to a handful of federal district courts who mis-analyzed and misconstrued both recodification and consistent precedent. The result in the Texas Supreme Court was not close—113 years of precedent and *stare decisis* was legally overwhelming and would not be abandoned, particularly because of misanalysis and an apparent subjective belief that a century of consistency was wrong.

A. Intent to Deceive

Intent to deceive is one of the five elements that an insurer must prove to establish a misrepresentation defense to any type of insurance policy, including a life insurance policy.[3] This element is often the most difficult to prove, and very often is inherently a fact question that can rarely be proven as a matter of law.[4]

The significance of the intent to deceive element begins with an understanding of its meaning. "Intent to deceive" means deceiving an insurer for the purposes of obtaining an insurance policy, including a life insurance policy.[5] Intent to deceive focuses on the insured's state of mind at the time of securing an insurance policy, which the Court labeled as the "common law scienter" requirement.[6] Intent to deceive may also involve the insurance agent if the agent is complicit in deliberately deceiving the insurer for purposes of obtaining an insurance policy or colluding with an applicant to do so.[7]

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A classic example of intent to deceive can involve an applicant diagnosed with cancer who learns from his physician that he only has a few weeks to live. The applicant, obviously aware his death is imminent and wanting to provide some protection for his family, drives straight from the doctor's office after receiving the bad news to a life insurance agent's office for the specific purpose of obtaining a life insurance policy. In answering questions on the life insurance application, the applicant with terminal cancer answers "no" to various health questions, including no history and diagnosis of cancer. The life insurer issues the policy a few days later but the insured, predictably, dies of cancer very shortly after the policy is issued.

Following the applicant's death and during the two-year contestability period, the life insurer commences an investigation and learns the insured had not answered the application questions accurately, and specifically regarding cancer, misrepresented that he was cancer free. Through its investigation, the insurer also learns the insured went straight from the doctor's office to secure the life insurance policy because of the terminal cancer diagnosis. From a witness statement, a close friend of the applicant reveals to the life insurer that the insured purposely misrepresented—lied—to secure life insurance; the applicant purposely deceived the agent/insurer to obtain life insurance to protect his family.

The life insurer, believing this evidence substantiates a misrepresentation defense, including the element of intent to deceive, institutes a declaratory judgment action and a claim for rescission because it would not have issued the policy had the applicant given accurate answers regarding a cancer diagnosis. Although intent to deceive is considered a fact issue, these facts, if proven, could likely establish a misrepresentation defense.

Courts have defined and discussed intent to deceive as "utterance of a *known* false statement, made with intent to induce action . . ."[8] Intent to deceive is not part of a negligence standard such as "knew" or "should have known."[9] As one court of appeals described, an intent to deceive means that material misrepresentations were made "willfully and with design to deceive or defraud."[10]

As previously noted, establishing intent to deceive as a matter of law is, for nearly all practical purposes, highly unlikely; this element is very usually inherently a fact question for the factfinder except in the narrowest of circumstances as Texas state courts have held for decades.[11] Mere differences between answers in a policy application and the applicant's medical records are not proof of intent to deceive as a matter of law.[12]

In contrast to Texas state courts, a few federal courts have held that intent to deceive can be established as a matter of law when the applicant warrants that the representations are true and when the applicant colludes with the insurance agent, but such circumstances are rare.[13] Federal courts acknowledge that misrepresentations alone in a policy application cannot establish intent to deceive by an insured as a matter of law.[14]

Proof of intent to deceive as a matter of law has become even more implausible since Texas adopted the Interstate Insurance Product Regulation Compact ("IIPRC") requiring an applicant's answers on a life insurance application be based on "knowledge and belief." In 2005, Texas joined 45 other states in adopting the IIPRC—*Tex. Ins. Code* § 5001.001. The adoption of the IIPRC meant applying uniform standards to certain insurance products and forms. As part of IIPRC standards, answers to questions on a life insurance application are made "to the best of [the applicant's] knowledge and belief" in contrast to certifying the answers as factually true.[15]

The factual and legal distinction between averring answers are "true" versus based on "knowledge and belief" are legally significant, particularly for purposes of rescission. When the IIPRC language is used, intent to deceive must be proven to succeed on a misrepresentation defense and is likewise difficult to establish as a matter of law.[16]

B. No Change in Longstanding Law

1. A Century of History

For over a century, Texas courts, including the Texas Supreme Court, have regularly held that in order to avoid a policy based on misrepresentation, and particularly for a life insurance policy during the contestability period, the insurer must prove that the insured (decedent) intended to deceive the insurer for purposes of obtaining a life insurance policy. Beginning in 1888, the Texas Supreme Court required proof of an insured's intent to deceive, based on common law, to avoid a policy based on misrepresentation.[17] Before an insured's rights under an insurance policy could be forfeited, the Texas Supreme Court required proof the applicant's conduct was "willful, and not the result of inadvertence or mistake."[18] This view persisted and in 1926, one Texas appellate court remarked that it was established Texas law that a misrepresentation defense—grounded in common law—required proof of: (1) an untrue statement; (2) made willfully; (3) with intent to deceive; (4) was material; and (5) was relied on by the insurer.[19]

Also early in the 1900s, Texas joined a nationwide reform movement regarding insurance regulation and began

passing and implementing insurance regulations, including protecting consumers from unscrupulous insurers. As part of that reform, the 1909 Texas Legislature passed Chapter 108, Section 28, which provided:

> No recovery upon any life, accident, or health insurance policy should be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed.[20]

The legislative purpose of this statute was to protect beneficiaries/insureds from being denied benefits because of an applicant's immaterial misrepresentation(s).

In 1951, the statute was codified in the Texas Insurance Code as article 21.18 with no substantive change in wording.[21] In 2003, as part of the Texas Legislature's non-substantive recodification, article 21.18 was recodified as *Tex. Ins. Code* § 705.051 with no substantive change in wording (along with other related statutes**).**[22] This statute, for nearly 113 years, has been referred to as the Immaterial Misrepresentation Statute.[23]

In the 100-plus years of the existence of the statute, whether as originally codified or through recodification, no Texas court held that it operated as the exclusive basis for avoiding a life insurance policy based on a misrepresentation defense. Neither Section 705.051 nor the prior versions have operated as the exclusive grounds for a misrepresentation defense. On the contrary, a misrepresentation defense for an insurance policy, and particularly a life insurance policy during the contestability period, is grounded in common law, though Section 705.051 sets out some minimum conditions, or a "floor," for doing so.[24]

Case law demonstrates this legal consistency well. In 1941, an insurer unsuccessfully attempted to convince the Texas Supreme Court that the intent to deceive requirement should be eliminated because Texas was in the minority of states requiring such proof.[25] The Court rejected the overture and affirmed the intent to deceive requirement, noting that intent to deceive meant false statements willfully made and with the design to deceive or defraud.[26] Six years later, the Texas Supreme Court reaffirmed the intent to deceive requirement in another case where this element was questioned.[27]

In 1964, ANIC made its first direct effort to eliminate the intent to deceive element in *Allen v. American National Insurance Company*.[28] ANIC, like other insurers before it, met outright rejection, with the Texas Supreme Court holding "false statements must have been made willfully and with design to deceive or defraud" to succeed on a misrepresentation defense.[29]

Sixteen years later, yet another insurer sought to eliminate "intent to deceive" as part of a misrepresentation defense for a life insurance policy. In *Mayes v. Massachusetts Mutual Life Insurance Company*, the Texas Supreme Court reaffirmed the common law test for proving a misrepresentation defense to an insurance policy: (1) the making of a representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation.[30] This five-part test was not new, going back to 1926 in an El Paso Court of Appeals case.[31]

In 1994, the Texas Supreme Court decided *Union Bankers Insurance Company v. Shelton*, framing the primary issue to be decided as:

> whether an insured's intent to deceive must be proved in order for an insurance company to successfully raise a defense of misrepresentation to a breach of contract action in connection with the cancellation of an individual health insurance policy within two years of the date of its issuance when the cancellation is based upon the insured's misrepresentation in the application for insurance[.][32]

The insurer in *Shelton* argued that the Texas Insurance Code (article 21.16) permitted cancellation during the contestability period based on an insured's unintentional misrepresentation in the insurance application.[33]

The Court rejected the insurer's argument, holding that even though article 21.16 (now Section 705.003) was limited to a material misrepresentation and made no mention of intent to deceive, "[t]he proposition that an insured's intent to deceive is likewise required is well established in the common law of this state."[34] The Court in *Shelton* reconfirmed that the *Mayes* test for a misrepresentation defense applied to all types of insurance— life, auto, fire, health, auto dealers, theft and/or liability.[35]

2. 2003 Recodification

In 2003, as part of the Legislature's effort to recodify Texas statutes for easier reference and consistency, the Legislature passed H.B. 2922, recodifying significant parts of the Texas Insurance Code, including article 21.18 into Section 705.051.[36]

Section 705.051 states:

> Sec. 705.051. IMMATERIAL MISREPRESENTATION IN LIFE, ACCIDENT, OR HEALTH INSURANCE APPLICATION.
>
> A misrepresentation in an application for a life, accident, or health insurance policy does not defeat recovery under the policy unless the misrepresentation:
>
> (1) is of a material fact; and
>
> (2)affects the risks assumed.

Tex. Ins. Code § 705.051.

Article 21.18, the prior statute, provided:

> No recovery upon any life, accident or health insurance policy shall ever be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed.

Tex. Ins. Code, art. 21.18.

This recodification expressly provided that no substantive changes were made or intended.[37] Indeed, a comparison of article 21.18 and Section 705.051 confirms that no substantive changes were made, just like numerous other related statutes, including articles 21.16-21.20 and 21.35, all now found in Chapter 705 of the recodified statute. Thus, the Immaterial Misrepresentation Statute was merely renumbered without any substantive change. The substantive consistency between article 21.18 and Section 705.051 did not depend on any special legal scholarship; it was obvious and easily verifiable.

3. The Advocation of the Theory of No More Intent to Deceive

Despite no obvious substantive change in Section 705.051 and related statutes, in 2004 (just one year following recodification), one Texas attorney, whose practice involved representing insurers, wrote several legal articles advocating the theory that recodification resulted in a substantive change in law regarding a misrepresentation defense, highlighting former article 21.18 and Section 705.051.[38] Specifically, this theory rested on the premise that intent to deceive was no longer required for a misrepresentation defense for life, health, and accident policies because recodification had not included this element and the failure to do so created a substantive change in the statute which required courts to reject common law in favor of the recodified statute.[39] This theory further relied on the proposition that the Legislature was aware of the five *Mayes* common law elements for a misrepresentation defense when recodification occurred but it declined to include that element in Section 705.051, the recodified version of article 21.18. Relying on *Fleming Foods*[40], the proponent of this theory reasoned that despite the Legislature's express intent of no substantive change in law from recodification, the omission of intent to deceive in Section 705.051 meant a substantive change occurred, the common law could not trump the statute, and Section 705.051 was the exclusive basis for avoiding a life policy during the contestability period based on a misrepresentation.[41]

The flaws in this analysis included: (1) there was no substantive change between article 21.18 and Section 705.051; and (2) article 21.18 and prior statutes had never operated as the exclusive requirement for rescinding a life, health or accident insurance policy based on a misrepresentation, and Texas courts consistently relied on five common law elements, including an intent to deceive.[42] Equally significant, statutory interpretation principles provide that common law rights and remedies are not eliminated by a subsequent statute unless it is clear the statute did so and the Legislature intended that result.[43]

Proponents of this exclusivity theory (relying solely on Section 705.051) declined to acknowledge that: no substantive change had occurred; recodification expressly provided that no substantives changes were a part of the recodification; and a misrepresentation defense was common law based, not exclusively dependent on statute, particularly Section 705.051. This theory received no acceptance in Texas or federal courts, but the theory continued to be advocated in writings such as the Journal of Texas Insurance Law and a Baylor Law Review article.

In 2013, this theory was tested and rejected in *Medicus Insurance Company v. Todd*,[44] involving a medical malpractice insurance policy and a claim of misrepresentation by the insurer against the insured physician in securing the policy. In *Medicus*, the insurer argued that the 2003 recodification had resulted in dual remedies for an insurer's misrepresentation defense.[45] Specifically, Medicus argued that the common law misrepresentation defense, which included the intent to deceive requirement that had existed for over a century remained, but as a consequence of recodification, a statutory remedy pursuant to Section 705.004 had also been created.[46]

The Dallas Court of Appeals, in an opinion tracing the origins and history of a misrepresentation defense over

a century old, demonstrated that no substantive change resulted from the 2003 recodification, a misrepresentation defense remained grounded in common law, and there was no alternate statutory remedy for a misrepresentation defense as a result of recodification.[47] Perhaps foreshadowing the Texas Supreme Court's analysis in *Arce*, the Dallas Court of Appeals observed that although the Texas Insurance Code statutes regarding avoidance of an insurance policy based on a misrepresentation did not include any intent to deceive requirement, the Texas Supreme Court "has continued" for over a century "to impose that requirement."[48] The court of appeals held: "there is only one cause of action for rescinding a policy due to misrepresentations in the application; that is, by application of both the relevant statutes and the common law, which includes the insured's intent to deceive."[49]

Medicus declined to seek review before the Texas Supreme Court. Its choice to do so perhaps necessitated the *Arce* opinion almost ten years later.

4. Several Federal District Courts Adopt Elimination of the Element of Intent to Deceive

For nearly 15 years following recodification, no courts—state or federal—adopted, much less acknowledged, any theory that the intent to deceive element had somehow been eliminated until 2019, when a single federal district court, through *dicta*, gave the theory temporary life. In *Colonial Penn Life Insurance Company v. Parker*,[50] the life insurer sued the beneficiaries to determine whether policy benefits were owed. In *Parker*, the decedent had a long history of substance abuse, but answered "no" to the question regarding substance abuse on the application for life insurance.[51] The policy was issued but the policy lapsed for nonpayment of premiums.[52] Parker subsequently died as a result of a motor vehicle accident during the two-year contestability period—seven months after the policy was issued.[53] The life insurer's investigation revealed Parker's long history of substance abuse.[54] Colonial Penn claimed it would not have issued the policy had Parker answered "yes" to questions regarding substance abuse as it contended he should have.[55]

Colonial Penn sought summary judgment.[56] The insurer's initial summary judgment ground was that it had no obligation to pay because of a lapse in premiums.[57] The federal district court agreed, granting it a case dispositive summary judgment.[58]

But, despite granting a case dispositive summary judgment on the basis of a lapse in premiums where the beneficiaries provided virtually no resistance, the federal court nevertheless discussed the insurer's second basis for summary judgment—no obligation to pay based on a misrepresentation by Parker in the life insurance application.[59] In embarking on its analysis, the district court referenced a 2015 article in the Journal of Texas Insurance Law, advocating the theory that intent to deceive for a life insurance policy was eliminated by the 2003 recodification.[60]

In accepting this theory, the federal court focused on Section 705.051, describing it as the "requirements for rescission" for a life insurance policy, but asserting such requirements varied with the type of policy at issue.[61] Despite no substantive change in law, this court held an "amendment" through recodification had occurred resulting in Section 705.051, which eliminated the intent to deceive requirement.[62] In doing so, the district court adopted the insurer's argument that recodification eliminated the five-part *Mayes* test but the new recodified statute, Section 705.051, incorporated four of the five elements (intent to deceive being eliminated).[63] The federal court concluded that Section 705.051 was the exclusive basis for rescinding a life insurance policy based on misrepresentation during the contestability period.[64]

In rejecting the *Mayes* test, the federal court noted there are no cases that clearly reconcile the inconsistency between the intent element from *Mayes* and the lack of an explicit intent requirement in parts of the updated legislation.[65] The district court cited to and relied on *Fleming Foods* for the proposition that prior law and legislative history cannot be used to disregard a statute's express terms when its meaning is clear, and that in *adopting the amendment*, the Legislature intended to make some change in existing law, requiring effect to be given to the amendment.[66] The federal district court reasoned that the Legislature was aware of the *Mayes* test but decided *not* to include it in the recodification.[67]

Additionally, the district court reasoned that including an intent to deceive element for a misrepresentation defense would make Section 705.104 dealing with life policies beyond the contestability period "superfluous."[68] Section 705.104 provides an insurer cannot contest a life policy after two years unless a misrepresentation was material and intentionally made.[69] This superfluous argument rested on the basis that if an intent to deceive was a required element for a life policy during the contestability period, then Section 705.104 would have no meaning—there would be no distinction between contestable and uncontestable policies.[70]

Lastly, the district court held that even if intent was required, Parker's medical records proved his intent to deceive as a matter of law.[71] But this holding is in direct conflict with other courts that have held an application and medical records alone cannot establish an intent to deceive.[72] The district court held in this summary judgment proceeding that Parker's medical records reflected that he admitted to

having a substance abuse issue, that he was asking for and receiving treatment for substance abuse during the time period of the application, and therefore, Parker intended to deceive the insurer to obtain a life insurance policy.[73]

Parker depends on a number of erroneous assumptions, flawed premises, and *dicta*. First, because the district court ruled that no policy was in effect, no further reasoning was necessary, specifically given the beneficiaries' failure to demonstrate the policy was in effect on the date of Parker's death. Given this holding, the discussion regarding Section 705.051, recodification, and a misrepresentation defense was *dicta* and legally unnecessary.

Second, the federal court: (1) did not trace or acknowledge that for over 100 years, a misrepresentation defense has been grounded in common law, not statute, including the *Mayes* test; (2) recodification was expressly intended and shown to be non-substantive; (3) a comparison between Section 705.051 (the recodified version) and article 21.18 (the prior statute) shows they are substantively the same; (4) there was no amendment from article 21.18 to Section 705.051; (5) the Texas Supreme Court has dealt with the language in Section 705.104 (including its predecessor statute) and the common law test, including in *Union Bankers Ins. v. Shelton*, rejected the superfluous argument involving the prior statutes to Section 705.051 and 705.104 (which were substantively consistent with these recodified statutes);[74] (6) no mention or discussion of *Medicus* is provided which the federal court was *Erie* bound to at least consider since it was a post-recodification decision dealing with intent to deceive; and (7) intent to deceive is often a fact issue. The result was an erroneous analysis and conclusion that spread to a handful of other courts.

Several other district courts adopted its reasoning, including that Section 705.051 was the exclusive basis for rescission of a life insurance policy during the contestability period, and rejecting intent to deceive as a required element for avoiding a life policy based on a misrepresentation. Several months following *Parker*, another judge in the Southern District of Texas adopted its analysis and conclusion. In *Landeros v. Transamerica Life Ins. Co.*, Judge Crane followed the *Parker* reasoning, relying on the premise that Section 705.051 was a product of substantive change, that Sections 705.051 and 705.104 should be considered in tandem, that the enactment of Section 1101.006 of the Texas Insurance Code affected Section 705.104 to give it its plain meaning, Section 705.051 is the exclusive basis for rescission of a life policy during the contestability period, and intent to deceive can no longer be required because it would make Section 705.104 meaningless.[75] Curiously, *Landeros* applied the *Mayes* common law test for a misrepresentation defense minus intent to deceive despite the *Parker* opinion eliminating common law for seeking rescission based on a misrepresentation defense.[76]

Following *Landeros* came *Guzman v. Allstate Assur. Co.*[77] *Guzman* mimicked the reasoning of *Parker* in finding intent to deceive was not a necessary element for a misrepresentation defense, failing to address the substantive consistency between article 21.18 and Section 705.051, ignoring over 100 years of well-settled law and the application of common law for a misrepresentation defense, and declining to confront the apples and oranges comparison between Sections 705.104 and 705.051, including prior Texas decisions rejecting such comparisons. Relying on *Parker*, the *Guzman* court granted summary judgment to the insurer based on the *Mayes* common law elements (invalidated by recodification), minus intent to deceive.[78] However, the Fifth Circuit reversed the *Guzman* district court on the basis that a fact question existed on whether the decedent made a misrepresentation at all, but noted whether the five-part *Mayes* test still applied following recodification was not being answered and expressed no opinion on the district court's reliance on *Parker*.[79]

About six months later, another federal district court held, in very brief language, that intent to deceive was no longer a required element for a misrepresentation defense for a life insurance policy during the contestability period.[80]

Thus, over a short three-year period (2019-2021), just a few district courts rejected the *Mayes* test, and specifically, the intent to deceive element on the basis of recodification. Then along came *Arce.*

5. *Arce v. ANIC* in the Texas Supreme Court

The facts in *Arce* are noteworthy, particularly regarding consideration of the intent to deceive element. Sergio Arce ("Sergio"), who had an elementary school education, had a chance encounter of sorts with an ANIC agent while visiting the business of a friend.[81] Sergio was not in the market or looking for life insurance but was pitched a policy by a relatively new ANIC agent who just happened to also be a friend of the business owner (also a prior ANIC agent).

The ANIC agent asked Sergio various questions and allegedly recorded his answers.[82] Based on the application, Sergio had a history of high blood pressure.[83] According to Sergio's medical records obtained after his death, he had been diagnosed and treated for hepatitis, but the application reflected a "no" answer to the question where hepatitis might be covered. This answer was part of the electronic life insurance application filled out by the agent.[84]

Testimony from ANIC's own representatives revealed that the questions posed to Sergio were confusing and hard to understand. Specifically, the agent admitted Sergio may have not understood the questions she was verbally asking and even ANIC's organizational representative admitted she was unsure what the question that allegedly included hepatitis meant or whether she herself understood it.[85] The ANIC agent also gave conflicting testimony regarding whether she permitted Sergio to review his answers before he allegedly electronically executed the application.

Other testimony from the ANIC agent reflected a number of irregularities on her part as well as with ANIC and the issuance of the policy. Among other things, the policy was issued without the accidental death benefit promised by the agent and also at double the premium quoted. Further, the initial premium may have been paid by the agent or other person supposedly contrary to ANIC's own policy.

Sergio died shortly after the policy was issued as a result of an automobile accident, which had nothing to do with hepatitis.[86] Because Sergio died during the contestability period, ANIC commenced an "investigation" consisting exclusively of gathering Sergio's medical records and comparing same to the application and questionnaire completed by the ANIC agent. The ANIC agent's answers to the questionnaire requested by ANIC stated that Sergio had not disclosed any negative health history though she subsequently confessed this was untrue, especially given Sergio's disclosure of high blood pressure.

Bertha Arce's ("Bertha"), Sergio's mother and the beneficiary, claim for the life insurance benefits was denied on the basis ANIC would not have issued the policy had Sergio disclosed his hepatitis diagnosis,[87] though the denial letter was not clear that ANIC was relying on a misrepresentation defense. Testimony from ANIC's organizational representative revealed it was a company-wide practice at ANIC to deny a claim where medical records were inconsistent with an application for life insurance, and she followed that practice in denying Bertha's claim. In addition, the undisputed evidence established that ANIC's claims representatives: receive no formal training involving the investigation, adjustment, analysis, evaluation, and determination of claims dealing with life insurance policies; were unlicensed to adjust claims; do not attend seminars or other continuing education regarding adjustment and handling of life insurance claims; and handle claims mostly by observing what others may do. In the case of the ANIC representative for Bertha's claim, she learned claims handling by typing letters dealing with claims during her role as a secretary.

Bertha filed suit against ANIC alleging breach of contract, prompt pay violations, and violations of Section 541.060.[88] ANIC answered and later moved for summary judgment, relying on *Parker* and the theory that Section 705.051 was the exclusive basis for rescission – intent to deceive was not an element of proof.[89] Following the deposition of the ANIC organizational representative, Bertha amended her petition, adding claims under Section 541.061 and also seeking class relief.[90]

The trial court granted ANIC summary judgment, accepting ANIC's argument that Section 705.051 was the exclusive basis for a misrepresentation defense for a life insurance policy during the contestability period, and intent to deceive had been eliminated by recodification.[91] The trial court declined to give legal significance to the 100-plus years of well-settled law, including the intent to deceive requirement, finding that there was no substantive difference between article 21.18 and Section 705.051.[92]

Bertha appealed, making the same arguments that she did in the trial court and ANIC reverted to its reliance on *Parker* – that recodification resulted in a change in law, and intent to deceive was no longer a required element of proof.[93] The Amarillo Court of Appeals reversed, holding, among other things, that recodification did not result in any change in law and no amendment to the prior statute had resulted, Section 705.051 was not the exclusive basis for rescission of a life insurance policy during the contestability period, the *Mayes* elements continue to be the exclusive basis for a misrepresentation defense, and intent to deceive must be proven to rescind a life policy falling within the contestability period.[94]

6. *ANIC v. Arce* in the Texas Supreme Court

ANIC sought review in the Texas Supreme Court but abandoned its argument made in the trial court and court of appeals that recodification resulted in a change in law and intent to deceive had been eliminated by recodification; ANIC continued to assert that Section 705.051 and the predecessor statutes thereto were the exclusive basis for proving a misrepresentation defense and entitlement to rescission.[95] ANIC also added a new argument: that the injection of common law, including the *Mayes* test as well as any intent to deceive requirement for a misrepresentation, was a product of "judicial drift" and for 113 years, the courts, including the Texas Supreme Court, have had it wrong.[96] ANIC asked the Court to wipe out 100-plus years of precedent, decree that there is no intent to deceive requirement and a plain reading of Section 705.051 provides the only requirements for rescission of a life insurance policy during the contestability period.[97]

The Texas Supreme Court accepted review to directly address and reflect its legal disagreement and analysis with *Parker*, *Landeros*, *Guzman*, and *Brown*.[98] "We granted ANIC's petition to resolve an incipient conflict between Texas state cases, *which consistently apply the common-law rule*, and a handful of federal district court cases that have recently departed from it."[99]

Initially, the Court observed ANIC's abandonment of its arguments in both the trial court and the court of appeals regarding a change in law as a result of recodification.[100] The Court observed that in the trial court and court of appeals, ANIC contended that recodification resulted in a change in law – eliminating the intent to deceive element – but now, ANIC conceded there was no substantive difference between Section 705.051 and the prior statute, article 21.18.[101] This confession acknowledged the obvious but ANIC provided no explanation why it had made this argument in the first place.

ANIC continued to argue that Section 705.051 was the exclusive test for rescission of a life insurance policy during the contestability period and prior statutes provided this same exclusivity; ANIC also insisted that any common law elements, and particularly the intent to deceive element, were the product of "judicial drift" which could not be reconciled with statutory interpretation principles.[102] "ANIC insists that – no matter how entrenched in our jurisprudence – the intent requirement cannot be squared with the statutory language and must therefore yield." ANIC unabashedly requested the Court to eliminate 113 years of consistent and well-settled jurisprudence because ANIC proclaimed it is wrong.[103]

In a wholesale rejection of ANIC's "judicial drift" argument and firm adherence to *stare decisis*, the Court refused ANIC's effort to rewrite well-settled, consistent, and identifiable law, undisturbed by any legislative action, regarding the elements to prove a misrepresentation defense, grounded in common law for well over a century that included the intent to deceive requirement. In a 9-0 decision with a powerful concurrence from Justice Young honoring *stare decisis*, the Court expressly disapproved of "a handful of federal district courts" that reasoned a change in law occurred; that Section 705.051 is the exclusive basis for rescission of a life policy during the contestability period; and that prior decisions over the last 113 years were a product of "judicial drift." In unmistakably unambiguous language, the Court reaffirmed the five-part common law *Mayes* test for a misrepresentation defense, that includes intent to deceive, and which applies to a life insurance policy during the contestability period or after.[104]

In its opinion, the Court first rejected the proposition that Section 705.051 is "effectively encompassing all the common-law rescission elements, except intent to deceive."[105] The Court characterized ANIC's interpretation as a "preferred reading," and forcefully rejected ANIC's plea for an abandonment of over 100 years of consistent decisions holding that "Section 705.051 is not discordant with the common law, either expressly or by necessary implication."[106]

Elaborating on its reasoning, the Court noted that a misrepresentation defense is governed by statutory and common law.[107] Further, the Court observed that Section 705.051 is limited to certain conditions that are necessary, but "not sufficient" to defeat a beneficiary's recovery.[108] Using the analogy "my car does not function unless it has gas and motor oil," the Court reasoned that while gas and motor oil are necessary for a vehicle to run, it is not all that is needed, including an engine, tires, and keys.[109]

According to the Court, Section 705.051 does not guarantee to defeat a recovery if both conditions in Section 705.051 are met; rather because the section is a consumer protection statute, it operates as "a floor" which cannot be avoided by contract or common law.[110] The Court made clear that Section 705.051 does not "grant insurers a rescission defense at *all*, let alone on exclusive terms."[111]

In post-submission briefing, ANIC attempted to elaborate on its Section 705.051 exclusivity argument, focusing on the term "unless" in the statute which it argued meant "except if."[112] The Court again rejected ANIC's reading, holding that the insurer's preferred interpretation might work if the statute was rewritten to change "does not defeat" to "does defeat" and "unless" to "if" in Section 705.051.[113] But the Court concluded that even taking "unless" to mean "except if" as ANIC urged, it did not alter the plain meaning of Section 705.051.[114]

Additionally, relying on the few federal court *Parker*-like decisions, ANIC contended that requiring an intent to deceive element for rescission during the contestability period would make Section 705.104 superfluous, and Section 705.104 cannot be reconciled with an intent to deceive requirement for a policy during the contestability period.[115] Having dealt with and rejected this same argument previously in *Shelton*, the Court was unpersuaded, holding that Section 705.104 involves a different set of circumstances (a different floor) – a misrepresentation defense for an uncontestable policy.[116] Specifically, Section 705.104 deals with a life insurance policy that is non-contestable – after two years from issuance – and prescribes the limited circumstances where that category of policy can be rescinded.[117]

A second but more specific reason for rejecting ANIC's "superfluous" contention is based on statutory history. In particular, the predecessor statute to Section 705.104, article 3096e passed in 1903, and included an intent element because prior to that time, a life insurance policy during the incontestability period could only be cancelled for a specific reason stated in a policy, which was strictly construed to avoid a forfeiture.[118] By allowing rescission during the incontestability period through proof of intent to deceive, the Legislature made the elements for misrepresentation for contestable and incontestable policies consistent.[119]

As a consequence, the Court rejected ANIC's contention that requiring intent to deceive be proven for a policy involving the contestability period would make Section 705.104 meaningless.[120] In an extensive footnote regarding this issue, the Court acknowledged two different federal district court decisions employing different rationales that concluded that Section 705.104 was substantively changed (or reversed) in light of Section 1101.006 of the Texas Insurance Code, which limited avoidance only to nonpayment of premiums.[121] Regardless of these two decisions, the Court concluded that whether Section 705.104 was rendered superfluous in 1909 or was effective by its plain language, it is relevant only to the extent it informed Section 705.051's construction, which the Court assumed it did.[122] Either way, Section 705.104 did not eliminate the intent to deceive element for policies during the contestability period, and the superfluous argument regarding Section 705.104 did not change the longstanding requirements for a misrepresentation defense.

The Court next turned to ANIC's plea to abandon the "intent to deceive" (referred to as "scienter") requirement "bemoaning the common-law rule as a product of 'judicial drift' that has placed Texas in the minority."[123] In unmistakably strong language, the Court refused to allow ANIC's efforts to "destabilize[] a body of jurisprudence that is not in conflict with the statutory scheme."[124]

While the Court noted that its early decisions regarding a misrepresentation defense, including intent to deceive, may have been "more conclusory than explanatory," the Court pointed out such opinions were not unlike other opinions during that era.[125] But from 1941 on, there could be no mistake regarding the law on a misrepresentation defense (the five *Mayes* elements) and its application as well as the acknowledgment that Texas was in the minority on this issue.[126] Underscoring the principle of *stare decisis*, the Court held that intent to deceive must be pled and proven "to avoid contractual liability based on a misrepresentation in an application for life insurance, whether the policy is contestable or not."[127] "Proof of material inaccuracy is not enough."[128] The Court further observed that the Legislature had not contested the common law approach to misrepresentation based on over 100 years of consistent judicial authority.[129] The Court concluded there has been no judicial drift by Texas courts who have remained consistent; equally important, the Court noted that the Legislature has consciously refused to interfere or modify this well-settled law. Accordingly, the Legislature's refusal to enact a statutory change means there is no judicial drift but a validation of 100-plus years of well-settled law.

In summary, the Court rejected any notion of a controversy and reaffirmed that a misrepresentation defense or for rescission of an insurance policy based on a misrepresentation, and particularly a life insurance policy, must include pleading the five *Mayes* elements and proof of intent to deceive.[130] The Court's opinion unambiguously disapproves of the holdings of *Parker* and its progeny, removing any temporary uncertainty that the intent to deceive requirement applied to life insurance policies whether contestable or not.[131] And finally, there can be no judicial drift when the Texas courts have remained consistent and the Legislature has accepted over a century of these consistent decisions.

7. Justice's Young Concurrence

While the unanimous opinion in *Arce* left no doubt on the elements of proof for a misrepresentation defense and an unequivocal rejection of the few *Parker*-like cases, Justice Young's concurrence represents a powerful affirmation of the importance and role of *stare decisis*, particularly here, involving 113 years of judicial consistency with no Legislative disagreement. Justice Young's concurring opinion, in polite terms, highlights ANIC's extreme positions and refusal to confront sound *stare decisis*. Justice Young criticizes ANIC's plea to wipe out 113 years of consistency without any regard for *stare decisis*, as well as ANIC's labeling of a century of consistency as a product of judicial error or drift.

Justice Young's concurring opinion reflects a reasoned and authoritative discussion of the importance of *stare decisis*, here in the case of insurance law. Not mincing words, Justice Young advocates and demonstrates a solid and credible case for the unequivocal rejection of ANIC's insistence that longstanding law should be overruled because of its judicial drift theory in the face of a consistent judicial history with no Legislative intervention.

Particularly significant, Justice Young discredits ANIC's claim that Section 705.051 and common law are incompatible and cannot exist – noting the two, for over a century, have not changed in any material way, and Section 705.051 is not exclusive or the last word on a misrepresentation defense.[132] Observing the Court was not writing on a blank slate, Justice

Young pronounces ANIC's analysis as D.O.A. – "that ship sailed long ago."[133] Stated succinctly, the compatibility of Section 705.051 (including the predecessor statutes) and the common law "was settled long ago.[134]

In recognizing the significance of *stare decisis*, Justice Young identified the traditional guideposts for overruling precedent – efficiency, fairness, and legitimacy – and none of those factors support a change in law with regard to the application of Section 705.051.[135] First, efficiency was no reason to overrule precedent simply because insurers might find intent to deceive difficult to prove.[136] Second, fairness did not support discarding precedent because *stare decisis* is especially important in statutory construction cases and there was no compatible conflicts between the statute and common law.[137] Third, legitimacy did not support overruling 100-plus years of law, especially in this circumstance when Section 705.051 and the common law have existed "in comparative quietude for so long . . . ."[138] None of these three guideposts supported overruling precedent.

Reasoning further, Justice Young pointed out nothing had changed – no intervention by the Legislature and no other intervening events have taken place to support changing longstanding law – and overruling precedent would create a destabilizing effect in the law, undoing what courts have been deciding for 100 years.[139] Justice Young concluded that if change was what ANIC wanted, it needed to come from the Legislature, not from the Texas Supreme Court.[140] In a telling demonstration of judicial candor, Justice Young observed that had the Court overruled longstanding law in these circumstances, it "would be an aggressive flexing of judicial muscle."[141] More bluntly, overruling precedent in these circumstances would be purely arbitrary with destabilizing consequences.

Justice Young's concurring opinion not only establishes the soundness of validating the requirement of pleading and proving the element of intent to deceive but the critical importance of *stare decisis*, not only in this appeal but where the Legislature has not intervened to change longstanding common law. The thoughtfulness and scholarship provided by Justice Young in his concurring opinion is remarkable, helpful, and reassuring, especially for an insurance case, but equally applicable to other types of cases.

Not only did the Court erase any doubt about the interpretation and limited application of Section 705.051 along with all misrepresentation requirements, but Justice Young affirmed the importance of consistency and *stare decisis*, which should not give way to a bald and self-serving claim that courts have had it wrong for over 100 years and asking the Court to arbitrarily reject well-settled law. Justice Young's concurring opinion certainly makes the Court's opinion more than ordinary.

C. There Is No Uncertainty or Wiggle Room

The *Arce* opinion provides courts, litigants, and the public clear guidance, reaffirming the requirements for a misrepresentation defense regarding any insurance policy, which is founded in common law with a statutory floor, at least for life, health and accident policies. Any reliance on the *Parker*-related rationale to support a change in law has been thoroughly discredited. The importance of *stare decisis* in Texas jurisprudence cannot be overstated and Justice Young's concurrence provides a fundamental analytic framework for any litigant seeking to overrule precedent.

Overall, the majority and concurring opinions reflect a measured and logical approach to the Legislature's deference to judicial interpretation of statutes in conjunction with a century-plus of common law and a conscious decision not to change longstanding common law. The result in *Arce* is not surprising, but perhaps the emphatic tone of the Court's opinion, along with Justice Young's concurring opinion, is. The message to accident, health, and life insurers (as well as other insurers) is unambiguous–prove the five *Mayes* elements. There is no wiggle room or uncertainty.

[1] 672 S.W.3d 347 (Tex. 2023).

[2] *Id.* at 352.

[3] *Id.* at 353–54.

[4] *Id.* at 361 (Young, J. concurring); *Flowers v. United Ins. Co.*, 807 S.W.2d 783, 784-86 (Tex. App.—Houston [14th Dist.] 1991, no writ).

[5] *Id.* at 349.

[6] *Id.*

[7] *Hinna v. Blue Cross Blue Shield of Tex.*, No. 4:06-cv-810-A, 2007 WL 3086025, at *4 (N.D. Tex. Oct. 22, 2007).

[8] *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 282 (Tex. 1994); *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 608 (Tex. 1964).

[9] *Allen*, 380 S.W.2d at 608; *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 756 (Tex. App.—Corpus Christi 1989, no writ) (". . . false statements which are made negligently, carelessly or by mistake are not sufficient to avoid a life insurance policy where the defense is based upon the insured's misrepresentation of a material fact.").

[10] *Haney v. Minnesota Mut. Life Ins. Co.*, 505 S.W.2d 325, 328 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (quoting *Clark v. National Life & Accident Ins. Co.*, 145 Tex. 575, 579, 200

S.W.2d 820, 822 (1947)).

[11] *Cartusciello v. Allied Life Ins. Co. of Tex.*, 661 S.W.2d 285, 288 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Estate of Diggs v. Enterprise Life Ins. Co.*, 646 S.W.2d 573, 575-76 (Tex. Civ. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

[12] *Adams v. John Hancock Mut. Life Ins. Co.*, 797 F.Supp. 563, 567 (W.D. Tex. 1992), *aff'd*, 49 F.3d 728 (5th Cir. 1995); *Flowers*, 807 S.W.2d at 784–86.

[13] *Hinna*, 2007 WL 3086025, at *4; *see also American Family Life Assurance of Columbus v. Moran*, No. SA-09-CA-0876-FB, 2011 WL 13237549, at *4 (W.D. Tex. Mar. 30, 2011).

[14] *Hinna*, 2007 WL 3086025, at *4; *Kirk v. Kemper Investors Life Ins. Co.*, 448 F. Supp.2d 828, 834–36 (S.D. Tex. 2006); *Adams*, 797 F.Supp. at 569.

[15] Sergio Arce's answers to American Life Insurance Company's ("ANIC") application were based on Sergio's "knowledge and belief." This significant fact is discussed in greater detail, *infra.* However, the *Arce* opinion does not address this distinction, perhaps because it makes no difference in light of well-settled law.

[16] 6 Couch on Insurance § 81.39 (3rd ed. 2012); *Shelton*, 889 S.W.2d at 285 (Phillips, J. concurring).

[17] *Lion Fire Ins. Co. v. Starr*, 12 S.W. 45, 46 (Tex. 1888).

[18] *Id.*

[19] *National Life & Accident Ins. Co. v. Kinney*, 282 S.W. 633, 634 (Tex. Civ. App.—El Paso 1926, no writ).

[20] Acts 1909, 31st Leg., Ch. 108 § 28.

[21] Acts 1951, 52nd Leg. Ch. 491.

[22] *Arce*, 672 S.W.3d at 352-53.

[23] *Id.* at 355–56.

[24] *Id.*

[25] *See Great S. Life Ins. Co. v. Doyle*, 151 S.W.2d 197, 201 (Tex. 1941).

[26] *Id.*

[27] *Clark*, 200 S.W.2d at 822.

[28] 380 S.W.2d 604 (Tex. 1964).

[29] *Id.* at 607.

[30] 608 S.W.2d 612, 616 (Tex. 1980).

[31] *Kinney*, 282 S.W. at 634.

[32] 889 S.W.2d at 279.

[33] *Id.*

[34] *Id.* at 281. Critics of *Shelton* often argue that it is a plurality opinion. While this is technically accurate, no justice dissented from the view that intent to deceive is a required element of proof.

[35] *Id.* at 282. In a concurring opinion, Chief Justice Phillips observed that when an applicant signs an application, his answers are being made "to the best of [the applicant's] knowledge and belief," and proof of intent to deceive must be demonstrated. *Id.* at 286 (Phillips, C.J. concurring); *see also* Couch on Insurance 2d (Rev. Ed.) §§ 35:149-150, 36:35. As previously noted, this legal distinction, and how it could affect Section 705.051, is not discussed in the *Arce* opinion. But given the language in Section 705.051, and particularly the term "misrepresentation," which is not defined, a persuasive argument can be made that when an applicant attests that the answers in the application are made to the best of their knowledge and belief, versus that the answers are true and correct, proof of scienter is necessary. A statement based on knowledge and belief is nothing but an opinion and is not a representation of fact. *Roberts v. Davis*, 160 S.W.3d 256, 262 (Tex. App.—Texarkana 2005, pet. denied); *Bicknell v. Wells Fargo*, No. 11-08-00203-CV, 2010 WL 1635832, at *2 n. 1 (Tex. App.—Beaumont Apr. 22, 2010, no pet.); *Bifano v. Econo Builders, Inc.*, 401 S.W.2d 670, 676 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *see also Winnard v. J. Grogan Enters., LLC*, No. 05-10-00802-CV, 2012 WL 1604907, at *2 (Tex. App.—Dallas Apr. 30, 2012, no pet.). *Arce* likewise holds that the elements of a misrepresentation defense apply to all types of policies. 672 S.W.3d at 353-54. However, most reported opinions related to a misrepresentation defense involve life insurance policies.

[36] Acts 2003, 78th Leg., Ch. 1274 § 2, eff. April 1, 2005.

[37] *Id.* at § 27.

[38] Whitaker, A. "Update on Texas Law On The Rescission of Insurance Policies," 13 Journal of Tex. Ins. Law 23 (Spring 2015); Whitaker, A., "Rescission of Life Insurance Policies In Texas—Time to Correct Some Old Error," 59 Baylor L. Rev. 139, 156 (2007); Whitaker, A., "Rescission of Life, Accident, and Health Insurance Policies in Texas—The Rules Have Changed," 9 Journal of Tex. Ins. Law 2 (Spring 2008).

[39] *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

[40] *See* note 39, *supra*.

[41] *Id.* at 283-84.

[42] Compare *Tex. Ins. Code* art. 21.18 with *Tex. Ins. Code* § 705.051; *Shelton*, 889 S.W.2d at 281.

[43] *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998); *see also Energy Serv. Co. of Bowie v. Superior Snubbing Servs.*, 236 S.W.3d 190, 195 (Tex. 2007).

[44] 400 S.W.3d 670 (Tex. App.—Dallas 2013, no pet.).

[45] *Id.* at 676.

[46] *Id.*

[47] *Id.* at 677–78.

[48] *Id.* at 678.

[49] *Id.* at 679 (citing *Shelton*, 889 S.W.2d at 281–82, referencing the *Mayes* test).

[50] 362 F.Supp.3d 380, 384–85 (S.D. Tex. 2019).

[51] *Id.* at 384–85.

[52] *Id.* at 383.

[53] *Id.* at 382.

[54] *Id.* at 384–85.

[55] *Id.*

[56] *Id.* at 382.

[57] *Id.* at 383.

[58] *Id.*

[59] *Id.* at 384–402.

[60] *Id.* at 401 n. 11.

[61] *Id.* at 399; *but see Arce*, 672 S.W.3d at 353-54 (holding that this is not accurate because the requirements are the same).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 401–02.

[65] *Id.* at 402.

[66] *Parker*, 362 F.Supp.3d at 402 (citing *Fleming Foods*, 6 S.W.3d at 284).

[67] *Id.* This conclusion is quite contrary to recodification and a century of well-settled law.

[68] *Id.* at 403.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* note 10, *supra.*

[73] *Parker*, 362 F.Supp.3d at 403.

[74] 889 S.W.2d at 281.

[75] No. 7:17-cv-00475, 2020 WL 3107795, at *7 (S.D. Tex. May 8, 2020).

[76] *Id.* at *8.

[77] No. 2:19-cv-187-BR, 2020 WL 7868100 (N.D. Tex. Dec. 3, 2020), *rev'd*, 18 F.4th 157 (5th Cir. 2021).

[78] *Id.* at **6, 15.

[79] *Guzman*, 18 F.4th at 159–60 n. 4. One of the authors of this article, Mark Ticer, wrote an amicus brief in favor of Guzman, arguing the five *Mayes* elements still applied. The Fifth Circuit made clear it was not deciding that issue.

[80] *Brown v. Bankers Life and Cas. Co.*, No. 4:20-CV-00136, 2021 WL 2325448, at *3–4 (S.D. Tex. Mar. 29, 2021).

[81] *American Nat'l Ins. Co.v. Arce,* 672 S.W.3d, 347, 350 (Tex 2023).

[82] *Arce v. American Nat'l Ins. Co.*, 633 S.W.3d 228, 230 (Tex. App. – Amarillo 2021), *aff'd in part, revs'd in part*, 672 S.W.3d 347 (Tex. 2023).

[83] *American v. Arce*, 672 S.W.3d at 350.

[84] *Id.* at 349–50.

[85] *Id.*

[86] *Id.* at 350.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id. at 351.*

[92] *Id.*

[93] *Arce v. American Nat'l Ins. Co.*, 633 S.W.3d 228, 234 (Tex. App. – Amarillo 2021), *aff'd in part, revs'd in part*, *American Nat's Ins Co v. Arce*, 672 S.W.3d 347 (Tex. 2023).

[94] *Id.* at 235.

[95] *American v. Arce*, 672 S.W.3d at 352.

[96] *Id.* at 358.

[97] *Id.* at 351–53.

[98] *Id.* at 352.

[99] *Id.* (emphasis supplied).

[100] *Id.* at 353–54.

[101] *Id.*

[102] *Id.* at 353–54, 358.

[103] *Id.*

[104] *Id.* at 352–58.

[105] *Id.* at 355–56.

[106] *Id.* at 356.

[107] *Id.* at 354-58. This follows the analysis of the Dallas Court of Appeals in *Medicus Ins. v. Todd*.

[108] *Id.* at 355–56.

[109] *Id.* at 356.

[110] *Id.* at 357–58.

[111] *Id.* at 356 (emphasis in original).

[112] *Id.*

[113] *Id. See* Section 705.051 provided herein, p. 10.

[114] *American v. Arce*, 672 S.W.3d at 356.

[115] *Id.*

[116] *Id.* at 357.

[117] *Id.* at 357–58.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 357-58.

[121] *Id.* at 356.

[122] *Id.*at 357.

[123] *Id.* 358–59.

[124] *Id.* at 359.

[125] *Id.* at 358–59.

[126] *Id.*

[127] *Id.* at 359.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 352–59.

[131] *Id.*

[132] *Id.* at 361 (Young, J. concurring).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 361–62.

[139] *Id.*

[140] *Id.* at 366.

[141] *Id.* at 367.