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Overview of the State of Texas Court System

A. Trial Courts

1. District Courts

a) District Courts are the primary Texas trial courts and have jurisdiction over all proceedings except those reserved exclusively to other courts. These courts are established by Article 5, Section 8 of the Texas Constitution and each county in Texas is served by at least one district court.

b) Residual Jurisdiction

District courts have original jurisdiction over all types of claims which justice courts and constitutional county courts do not have jurisdiction, regardless of amount in controversy. *See* TEX. GOV. CODE §§ 26.043, 27.031(b).

2. Constitutional County Courts

a) Constitutional county courts are established pursuant to the Texas Constitution, Article 5, Section 16, but are implemented by statutes contained in the Government Code which vary jurisdiction by county. Usually, these courts have jurisdiction in which the amount in controversy is $200.01 through $10,000.

b) A constitutional county court does not have jurisdiction in: (1) a suit to recover damages for slander or defamation; (2) a suit for the enforcement of a lien on land; (3) a suit in behalf of the state for escheat; (4) a suit for divorce; (5) a suit for the forfeiture of a corporate charter; (6) a suit for the trial of the right to property valued at $500 or more and levied under a writ of execution, sequestration, or attachment; (7) eminent domain case; or (8) a suit for the recovery of land. *See* TEX. GOV'T CODE § 26.043.

c) A constitutional county court has original concurrent jurisdiction over civil actions:

(1) With the justice courts in which the amount in controversy exceeds $200 but does not exceed $10,000, exclusive of interest; and

(2) With the district courts in which the amount in controversy exceeds $500 but does not exceed $10,000, exclusive of interest. *See* TEX. GOV'T CODE § 26.042.

d) Generally, constitutional county courts have appellate jurisdiction over cases arising in the justice courts or small claims court when the judgment rendered exceeds $250, exclusive of costs. Review is by trial de novo. *See* TEX. CIV. PRAC. REM. CODE § 51.001.

3. Statutory County Courts

a) Statutory county courts are sometimes referred to as "county courts at law" or "legislative county courts," are courts created by the Texas Legislature, as authorized by Article 5, Section 1 of the Texas Constitution. This power enables the Legislature to create statutory district courts with limited jurisdiction. However, the Legislature has great leeway to change a "statutory" court into a constitutional district court by increasing its jurisdiction to constitutional proportions. For example, the Legislature has created statutory county courts with concurrent jurisdiction to district courts.

b) There are some general jurisdictional rules for the jurisdiction of statutory county courts, which may be altered by specific statute. *See* TEX. GOV'T CODE § 25.0003. The maximum jurisdiction for statutory county courts, unless changed by statute, is $200,000. *Id.*

4. Justice Courts

a) Justice Courts have exclusive original jurisdiction over civil cases when the amount in controversy is $200 or less. Texas Constitution, Art. 5, § 19.

b) Justice Courts share concurrent original jurisdiction with the county courts in civil cases with amount in controversy exceeds $200 but does not exceed $10,000, exclusive of interest. TEX. GOV'T CODE § 27.031(a)(1).

c) They have original jurisdiction over forcible entry and detainer cases. TEX. GOV'T CODE § 27.031(a)(2), (b)(4).

d) They do not have jurisdiction of: (1) a suit in behalf of the state to recover a penalty, forfeiture, or escheat; (2) a suit for divorce; (3) a suit to recover damages for slander or defamation; (4) a suit for the trial of title to land; or (5) a suit for the enforcement of a lien on land.

5. Small Claims Courts

a) They have concurrent jurisdiction with justice courts in any action for the recovery of money in which the amount involved, exclusive of costs, does not exceed $10,000. TEX. GOV'T CODE § 28.003.

B. Appellate Courts

1. Texas Government Code § 22.201 establishes fourteen (14) judicial court of appeals districts. Each county is assigned to a judicial district as specified in this statute. The number of counties in Texas are too numerous to be listed here.

2. The First and Fourteenth Districts serve the same counties and share responsibilities for handling appeals in this geographic area. Cases are equally divided between each district in an alternating basis. See local rules of the First and Fourteenth Court of Appeals.

3. Each court of appeals has at least three judges. *See* TEX. GOV'T CODE § 22.222. There are now 80 judges serving the 14 intermediate courts of appeals. However, the Legislature is empowered to increase the number of judges whenever the workload of an

individual court requires additional judges.

4. If more than one panel of judges is used, the court of appeals must establish rules to rotate the judges among the panels. *See* TEX. GOV'T CODE § 22.222. A majority of a panel constitutes a quorum, and the concurrence of a majority of a panel is necessary for a decision.
5. The chief justice of each court of appeals may convene the court en banc. A majority of the court constitutes a quorum and the concurrence of a majority of the court sitting en banc is necessary for a decision.
6. Appeals court judges are elected to terms of six (6) years. Texas Constitution, Article 5, § 6.
7. The Courts of Appeals have appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $100, exclusive of interest and costs. *See* TEX. GOV'T CODE § 22.220. Also, the courts of appeals have appellate jurisdiction over all criminal cases within its district, except those cases with a death penalty.
8. The Court of Criminal Appeals is the highest state court for criminal appeals, including exclusive appellate jurisdiction over death penalty cases.
9. The Supreme Court of Texas has final appellate jurisdiction in most civil and juvenile cases. *See* TEX. GOV'T CODE § 22.001. However, the Texas Supreme Court has discretionary review. *Id*.
10. The Supreme Court of Texas shall consist of a Chief Justice and eight Justices. Texas Constitution, Article 5, § 2. The justices shall be elected to terms of six (6) years.
11. An appeal does not suspend enforcement of a judgment. A judgment debtor wishing to appeal and avoid enforcement during the pendency of an appeal must post security. To suspend collection on a money judgment, the security on appeal will ordinarily have to be in an amount covering compensatory damages (not punitive), interest, and costs. *See* TEX. R. APP. P. 24.2. This amount is capped at the lesser of (a) $25 million or (b) 50% of the judgment debtor's current net worth. *Id*.; *see* TEX. CIV. PRAC. & REM. CODE § 52.006.
12. To suspend a judgment for the recovery of property (real or personal) the trial court will determine the type of security that the judgment debtor must post. *See* TEX. R. APP. P. 24.2. The amount of the security must be at least: (a) the value of the property interest's rent or revenue; or (b) the value of the property interest on the date when judgment rendered. *Id*.
13. For any other type of judgment, the trial court must set the amount and type of security. *Id*.

Procedural

A. Venue

1. General Venue Rule:

Texas law has a general venue rule which will ordinarily govern choice of venue:

Except as otherwise provided by this subchapter [general rule] or Subchapter B [mandatory venue exceptions] or C [permissive venue exceptions], all lawsuits shall be brought:

(1) In the county in which all or a substantial part of the events or omissions giving rise to the claim covered;
(2) In the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
(3) In the county of the defendant's principal office in the state, if the defendant is not a natural person;
(4) If subdivisions (1), (2) and (3) do not apply, in the county in which plaintiff resided at the time of the accrual of the cause of action.

TEX. CIV. PRAC. & REM. CODE § 15.002

2. Exceptions to General Venue Rule:

Texas statutes contain numerous exceptions to the general rule above. Some of the exceptions overlap and many are contained in Chapter 15 of the Texas Civil Practices and Remedies Code. These statutory exceptions may be mandatory or permissive. Permissive exceptions do not override the general rule, and provide alternative venue choices to plaintiffs. If mandatory venue applies, venue is not proper elsewhere, if a defendant chooses to challenge venue by a proper motion to transfer venue.

"Proper venue" means:
(1) The venue required by mandatory provisions of Subchapter B or another statute prescribing mandatory venue; or
(2) If subdivision (1) does not apply, the venue provided by this subchapter [general rule] or Subchapter C [permissive venue provisions].

TEX. CIV. PRAC. & REM. CODE § 15.001.

Generally, if venue is proper as to one of several claims made against the same defendant, other claims against that defendant that are properly joined can be litigated in the same venue. *Middlebrook v. David Bradley Mfg. Co*., 26 S.W.935 (Tex. 1894).

If venue is proper as to one defendant it is proper for all defendants who are properly joined. TEX. CIV. PRAC. & REM. CODE § 15.005.

In a lawsuit in which two or more defendants are joined, any action or omission by one defendant in relation to venue, including a waiver or venue by one defendant, does not operate to impair or diminish the right of any other defendant to properly challenge venue. TEX. CIV. PRAC. & REM. CODE § 15.0641.

B. Statue of Limitations

Texas statutes provide limitations periods for many causes of actions:

1. Many tort actions are governed by the two-year statute of limitations in Texas Civil Practices and Remedies Code § 16.003. (personal injury, conversion, wrongful death, forcible entry and detainer) These claims must be made not later than two years after the

day the cause of action accrues.

2. Many actions based in contract are governed by the four-year statute of limitation in Texas Civil Practices and Remedies Code § 16.004. This also governs actions for debt collection, and fraud.

A number of governmental units are statutorily exempt from many limitations periods. TEX. CIV. PRAC. & REM. CODE §16.061(a).

A limitations period can be tolled on any one of the following grounds: (1) plaintiff's disability, (2) plaintiff's military service, (3) party's death, (4) defendant's absence from the state, (5) original court's lack of jurisdiction, and (6) plaintiff misnaming of defendant in petition. *See* TEX. CIV. PRAC. & REM. CODE §§16.001, 16.022, 16.062, 16.063, 16.064.

C. Time for Filing An Answer

Defendants must file its answer by 10:00 a.m. on the first Monday after the expiration of 20 days from the date the defendant was served with citation. TEX. R. CIV. P. 99(b). If the 20th day after service falls on a Monday, the answer is due on the next Monday. If the first Monday after 20 days is a legal holiday, the answer is due on Tuesday. TEX. R. CIV. P. 4. To calculate the 20 days, count every day after the first day-including weekends and legal holiday-until the last day. TEX. R. CIV. P. 4. An answer is timely if the defendant puts it in the custody of the USPS before 10:00 a.m. on the due date, as long as the clerk receives it no later than 10 days after the due date.

An answer may contain a general denial. *See* TEX. R. CIV. P. 92.

If a defendant wants to rely on an affirmative defense, it must be specifically pled. TEX. R. CIV. P. 94. Texas Rule of Civil Procedure 93 contains a list of defenses, pleas, and other matters that must be verified.

D. Dismissal Re-Filing of Suit

A plaintiff has a right to non-suit the moment it makes a timely oral or written request of non-suit. A defendant may non-suit its counterclaims. The motion to non-suit should state whether the party requests a dismissal with or without prejudice. If the case is dismissed with prejudice, the order is a final adjudication on the merits and the lawsuit cannot be refilled. If the case is dismissed without prejudice, the order is not a final adjudication on the merits and the parties are merely placed in the positions they would have been if the suit had not been brought.

In most cases, a plaintiff can re-file the same suit, after an order dismissing the suit without prejudice. However, statute of limitations may bar a second suit if the limitations period has run.

Liability

A. Negligence

1. Common Law Negligence

The elements of negligence are that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty of care, and (3) the breach of duty proximately caused the plaintiff's injury or damages. *Nabors Drilling, U.S.A., Inc. v. Escoto,* 288 S.W.3d 401, 404 (Tex. 2009).

In deciding whether there is a common law duty, courts apply the risk-utility test and consider whether there was a special relationship between the parties. The factors the courts use when applying the risk-utility test are the risk, forseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995). The most important factor is the forseeability of the risk. *City of Waco v. Kirwan*, 298 S.W.3d 618, 623-24 (Tex. 2009). Forseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable. *Madison v. Williamson*, 241 S.W.3d 145, 152 (Tex.App.-Houston [1st Dist.] 2007, pet. denied.)

An ordinary defendant breached its duty of care to plaintiff when the defendant fails to exercise the degree of care that a person of ordinary prudence would or would not have done under the same or similar circumstances. *Colvin v. Red Steel Co*., 682 S.W.2d 243, 245 (Tex. 1984). When a duty requires the defendant to exercise a "high degree of care," the defendant's standard of care is defined as what a very cautious and prudent person would or would not have done under the same or similar circumstances. *Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210, 212 (Tex. 2003). A high degree of care applies to activities conducted by a common carrier. *Id*. A "common carrier" is those in the business of carrying passengers and goods who hold themselves out for hire by the public. *Id.*

The components of proximate cause are (1) cause-in-fact and (2) forseeability. *Western Invs. V. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). The test for cause-in-fact is whether the negligent act or omission was a substantial factor in bringing about injury and whether the injury would have occurred without the act or omission. *Del Lago Partners v. Smith*, 307 S.W.3d 762, 774 (Tex.2010).

2. Contributory/Comparative Negligence

In Texas, contributory and comparative negligence are governed by Texas Civil Practice and Remedies Code §§ 33.001-33.017. Chapter 33 applies to any cause of action based in tort. *Id*. at § 33.002. The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers for each claimant, defendant, settling person and designated responsible third party with respect to each persons causing or contributing to cause in any way the harm for which recovery of damages is sought. *Id*. at § 33.003. A claimant may not recover damages if his percentage of responsibility is greater than

50%. *Id*. at § 33.001. If the claimant is not barred from recovery, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility. *Id*. at § 33.012. A liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility. *Id*. at § 33.013.

B. Negligence Defenses

1. Assumption of Risk

Assumption of the risk has been abolished as an affirmative defense to negligence actions in most situations in Texas and now is only used as a factor in determining proportionate responsibility. *Del Lago Patners v. Smith*, 307 S.W.3d 762, 772 (Tex. 2010.) However, assumption of the risk is still an affirmative defense in thre instances: (1) in strict-liability cases; (2) cases in which there is a knowing and express oral or written consent to the dangerous activity or condition and (3) when the plaintiff si committing a felony or attempting to commit suicide. *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); Tex. Civ. Prac. & Rem. Code § 99.001.

2. Last Clear Chance

The last clear chance doctrine has been abolished in Texas by adoption of the proportionate responsibility statutes. *French v. Grisby*, 571 S.W.2d 867 (Tex. 1978.)

3. Sudden Emergency Doctrine.

Under the "sudden emergency doctrine," if a person is confronted by an emergency arising suddenly and unexpectedly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time for deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he acts as a person of ordinary prudence would have acted under the same or similar circumstances. *Matbon, Inc. v. Gries*, 288 S.W.3d 471. 479 (Tex. App.-Eastland 2009, no pet.). An act of nature is not a necessary prerequisite for a sudden emergency; actions by other vehicles can cause a sudden emergency. *Jordan v. Sava, Inc*., 222 S.W.3d 840 (Tex. App. Houston [1st Dist.] 2007, no pet.)

A number of courts have submitted a sudden emergency instruction when an act of nature was a factor in a collision. *Id*. at 848. However, an act of nature is not a necessary prerequisite for a sudden emergency. Actions by other vehicles can cause a sudden emergency. *Id*. Moreover, even in cases involving acts of nature, the emergency condition is not said to be the act of nature, but rather the driver's encountering another vehicle under sudden and unexpected circumstances not created by his own wrongful actions, whether it is a stopped car, a car slowing down, or an oncoming car in the same lane of traffic. *Id*. The sudden emergency doctrine is applicable in cases involving rear-end collisions when the defendant's negligent actions are a *result* of emergency conditions, but not when the defendant's actions *prior* to the emergency are negligent. *Id*. at 849-50. In *Jordan*, the Court held that defendant coming upon stopped or slow-moving vehicles on the blind side of an overpass on a freeway was a sudden emergency that prevented

liability. *Id.*

4. Unavoidable Accident

An occurrence may be an 'unavoidable accident,' that is, an event not proximately caused by the negligence of any party to it. *Dillard v. Texas Elec. Co-Op*., 157 S.W.3d 429, 432 (Tex. 1995). Unavoidable accident ordinarily applies to causes such as "fog, snow, sleet, wet or slick pavement, or obstruction of view," or to resolve a case involving "a very young child [who is] legally incapable of negligence. *Id.* unavoidable accident allows the jury to determine that no party was negligent in causing the accident, a far easier burden than showing that other parties were negligent. *Id.*

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

In order to make a claim for exemplary damages, a plaintiff must show that the injury resulted from the Defendant's gross neglect or malice. Tex. Civ. Prac. Rem. Code Ann. §41.003(a)(Vernon 2012). Malice is defined as specific intent by the Defendant to cause actual harm to the claimant. Tex. Civ. Prac. Rem. Code Ann. §41.001(7) (Vernon 2012). Gross neglect is defined as follows:

(B) An act or omission:

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. Rem. Code Ann. §41.001(11)(Vernon 2012).

D. Negligent Hiring and Retention

An employer owes a duty to its other employees and to the general public to ascertain the qualifications and competence of the employees it hires, especially when the employees are engaged in occupations that require skill or experience and that could be hazardous to the safety of others. *Morris v. JTM Materials, Inc*. 78 S.W.3d 28, 49 (Tex.App.-Fort Worth 2002, no pet.) Therefore, an employer is liable for negligent hiring, retention, or supervision if it hires an incompetent or unfit employee whom it knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others. I*d.*

Negligent hiring, retention, and supervision claims are all simple negligence causes of action based on an employer's direct negligence rather than on vicarious liability. *Id*. The elements of a negligence action are a duty, a breach of that duty, and damages proximately caused by the breach. *Id*. A motor carrier has a duty to take steps to prevent injury to the driving public by determining the competency of a job applicant to drive one of its trucks. *Id*. The purpose of this duty is to promote highway safety and prevent motor vehicle accidents. *Id.* In order for an employer to be liable for negligent hiring, the employee must commit an actionable

tort. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 (Tex. 2010.

The plaintiff must establish that the employer's breach proximately causes the plaintiff's injuries. *LaBella v. Charlie Thomas, Inc*., 942 S.W.2d 127, 137 (Tex.App.-Amarillo 1997, writ denied.) The risk of harm that caused the hiring to be negligent must be the same risk hat proximately caused the plaintiff's injuries. *TXI Transp. v. Hughes*, 306 S.W.3d 2330, 240 (Tex. 2010)

E. Negligent Entrustment

To prove a claim of negligent entrustment, the Plaintiff must show that: (1) Defendant entrusted the vehicle to the driver; (2) the driver was an unlicensed, incompetent, or reckless driver; (3) at the time of the entrustment, Defendant knew or should have known that driver was an unlicensed, incompetent, or reckless driver; (4) driver was negligent on the occasion in question; and (5) driver's negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.,* 744 S.W.2d 595, 596 (Tex.1987).

Whether an owner has a duty to inquire about a driver's driving history is a question of law. Bartley v. Budget Rent-A-Car Corp., 919 S.W.2d 747, 752 (Tex.App.-Amarillo 1996, writ denied). If driver exhibits a valid, unrestricted driver's license to Defendant, this is prima facie evidence of his competency to drive a motor vehicle and, absent any evidence to the contrary, conclusively negated the element that Budget then knew or should have known that Robertson was an incompetent or reckless driver. *Id.*

The plaintiff must establish that the driver was negligent. *Goodyear Tire & Rubber Co., v. Mayes*, 236 S.W.3d 754, 758 (Tex. 2007). In matter involving a common carrier, a driver is held to duty of a high degree of care. *Durham Transp. v. Valero*, 897 S.W.2d 404, 408-09 (Tex.App.-Corpus Chirsit 1995, writ denied).

F. Dram Shop

The Texas Legislature enacted the Dram Shop Act to "deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public. *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 684 (Tex. 2007). The elements of a dram shop action are:

(1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was *obviously intoxicated* to the extent that he presented a *clear danger* to himself and others; and

(2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

- Tex. Alco. Bev. Code. § 2.02

A liable defendant must be a "provider. *Id*. at § 2.03. A "provider" is a person who sells or serves alcoholic beverages. *Id*. at § 2.01. A social host who serves alcoholic beverages

to adult guests is not a provider if the beverages area served without charge. *Smith v. Merrit*, 940 S.W.2d 602, 605 (Tex. 1997).

An individual is obviously intoxicated if a reasonably prudent person would have a recognized an individual as intoxicated. *Fay-Ray Corp. v. Tex. Alcoholic Bev. Comm'n*, 959 S.w.2d 362, 366 (Tex.App.-Austin 1998, no pet.). An individual's obvious intoxication can be shown by direct evidence, i.e. proof of amount of alcohol he was served, or circumstantial evidence, i.e. blood alcohol level of individual after accident. *Venetoulias v. O'Brien*, 909 S.W.2d 236, 240 (Tex.App.-Houston [14th Dist.] 1995, writ dism'd); *Bruce v. K.K.B., Inc*., 52 S.W.3d 250, 256 (Tex.App.-Corpus Christi 2001, pet. denied).

G. Joint and Several Liability

A defendant is jointly and severally liable if:

(a) defendant's percentage of responsibility is 51% or more; or,
(b) defendant specifically intended to do harm, the defendant acted in concert with another person to engage in criminal conduct and the plaintiffs damages were caused by the criminal conduct.

- Tex. Civ. Prac. & Rem. Code § 33.013(b)(1);

Joint and several liability is covered by the proportionate responsibility statutes of the Texas Civil Practice and Remedies Code § 33. Each defendant is liable only for a percentage of damges equal to the defendant's percentage of responsibility. *Id*. at § 33.012(a). If the defendant is not jointly and severally liable, the defendant is liable only for the percentage of damages equal to to that defendant's own percentage of responsibility. *Id*. at § 33.013 (a). If the defendant is jointly and severally liable, the defendant is liable for the entire amount of damages regardless of that defendant's percentage of responsibility. *Id*. at § 33.015. A jointly and severally liable defendant who paid more than its share of the plaintiff's damages can seek contribution from another defendant that paid less than its own share. Id. at 33.015.

H. Wrongful Death and/or Survival Actions

1. Wrongful Death

Suits for wrongful death are brought under the Texas Wrongful Death Act, Texas Civil Practice and Remedies Code §§ 71.001-71.012. The survign souse, children and parents of the deceased may bring the action. Id. at § 71.004. If none of these individuals have brought an action within three months after the death of the injured individual, than the executor or administrator shall bring the action. Id.

A person is liable for damages arising from an injury that causes an individual's death if the injury was caused b y the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfullness, or default. Id. at §71.002.

2. Survival Actions

Suits for survival actions for personal injuries to a decedent are brought under the Texas Survival Statute, Texas Civil Practice and Remedies Code § 71.021. A survival action is a cause of action for personal injury to the health, reputation or person before the individual died and that the person would have been entitled to bring the action for the injury had she lived. Id. Survival actions may be brought by either the personal representative of the estate or an heir of the decedent. *Id*. at 71.021(b).

I. Vicarious Liability

1. Principal-Agent Liability

A principal can be held vicariously liable for the contracts and torts of its agents acting within the scope of the agent's actual or apparent authority. *Celtic Life Inc Co. v. Coates*, 885 S.W.2d 96, 98 (Tex. 1994)(actual) An agent has actual authority if the principal intentionally confers authority to the agent or allowed the agent to believe he had authority through intentional acts or lack of due care. *Texas Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 352 (Tex.App.-Fort Worth 2007, pet dism'd). An agent has apparent authority if the defendant affirmatively held the agent or nonagent out as having authority to act on the defendant's behalf, knowingly permitted the agent or nonagent to hold itself out as having authority; or acted with such a lack f ordinary care as to clothe the agent or nonagent with the indica of authority. *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 948-49 (Tex.1998).

2. Respondeat Superior

Under the theory of respondeat superior, an employer is vicariously liable for the torts of an employee acting within the scope of employment even though the employer did not personally commit the tort. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007). An individual is an employee of the defendant f the defendant the principal or employer has the right to control the means and methods of the agent or employee's work. *Baptist Mem'l*, 969 S.W.2d at 947. An employee is acting within his/her scope of employment if the act was within the employee's general authority, in furtherance of the defendant's business and for the accomplishment of the object for which the employee was hired. *Minyard Food Stores v. Goodman,* 80 S.W.3d 573, 577 (Tex. 2002).

3. Independent Contractor Doctrine

Generally, an employer is not liable for the negligence of an independent contractor. Central Ready Mix Concreete Co. v. Islas, 228 S.W.3d 649, 651 (Tex. 2007). An employer can be liable for an independent contractor's actions under theories of negligent hiring, negligent control, and nondelegable duty. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791. To prove negligent control, the employer must have retained control over the contractor's work and did not exercise reasonable care in the control of the work. *Fifth Club*, 196 S.W.3d at 791. A nondeleable duty is a duty that is imposed on a party by law and cannot be delegated to an independent contractor, i.e duty to provide safe workplace, duty to provide rules and regulation

for employees and duty to select careful and competent employees. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397 401 (Tex. 1934).

J. Exclusivity of Workers' Compensation

Under well-established Texas law, recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation coverage or by a legal beneficiary of the employee for the death of a work-related injury sustained by the employee. TEX. LAB. CODE § 408.001(a) (Vernon's 2011).

As provided above, § 408.001(a) of the Texas Labor Code provides that workers' compensation benefits constitute the exclusive remedy for an employee's work related injuries. However, Art. XVI, § 26 of the Texas Constitution and § 408.001(b) of the Texas Labor Code carves out a small exception to the general rule of exclusivity. Specifically, this body of law allows a small class of individuals to recover exemplary damages from a subscribing employer for the death of an employee. TEX. CONST. ART. XVI, § 26; TEX. LAB. CODE § 408.001(b). Article XVI, § 26 of the Texas Constitution defines this small class of designated individuals as follows:

> Every person, corporation, or company, that may commit a homicide, through willful act or omission, or gross negligent, shall be responsible, in exemplary damages, *to the surviving husband, widow, heirs of his or her body,* or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

McKethan v. McKethan, III, 728 S.W.2d 856, 857 (Tex. App.—Houston [1st Dist.] 1987) (emphasis added). The Texas Labor Code defines the class identically. Specifically, § 408.001 provides that: This section [making worker's compensation benefits the exclusive remedy against an employer for death or work-related injury of an employee] does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence. TEX. LAB. CODE § 408.001. Thus, although the Texas Constitution establishes an exception to the general rule of exclusivity, the exception applies *only* to the employee's spouse and "heirs of the body." *Id.* "Courts have consistently interpreted 'heirs of the body' to include only children 'begotten by the person.'" *Id., citing Houston & Tex. Central Railway Co. v. Baker*, 57 Tex. 419, 425 (Tex. 1882).

Where a Defendant was a subscriber to a valid policy of Texas Workers' Compensation Insurance at the time of the incident at issue, and where the Decedent was working in the course and scope of his employment with Defendant at the time of the subject incident, the case is governed by the Texas Labor Code. Under this section, the only cause of action which may be brought against such a Defendant is one which seeks exemplary damages for acts of "gross neglect" committed by the employing company. TEX. LAB. CODE § 408.001(b) (Vernon 2011). The Labor Code statute reads, in pertinent part, as follows:

(a) Recovery of workers' compensation benefits is the exclusive remedy of an

employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

(b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.

(c) In this section, "gross negligence" has the meaning assigned by Section 41.001, Civil Practice and Remedies Code.

TEX. LAB. CODE ANN. § 408.001 (Vernon 2012).

The Texas Workers' Compensation Act is the exclusive remedy for an employee who is injured while in the course and scope of his employment, when the employer is covered by workers' compensation insurance. S*ee also Rodriguez v. Naylor Indus., Inc.*, 763 S.W.2d 411, 412 (Tex. 1989) (emphasis added); *Jones v. Legal Copy, Inc.*, 846 S.W.2d. 922 (Tex. App.--Houston [1st Dist.] 1993, no writ.) (emphasis added). This remedy afforded to such plaintiffs is to the exclusion of all negligence causes of action. *Id*.

The court may award exemplary damages to a claimant only if the claimant proves by "clear and convincing evidence" that the harm for which the claimant seeks recovery of exemplary damages results from an act of "malice", or "gross neglect". *See* TEX. CIV. PRAC. & REM. CODE ANN. §41.003(a)(3) (Vernon 2009). **An act or omission that is merely thoughtless, careless, or not inordinately risky cannot be grossly negligent.** *Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 20 (Tex.1994.) (emphasis added). **Evidence of simple negligence is not enough to prove either the objective or subjective elements of gross negligence**. *See Universal Servs. Co., Inc. v. Ung*, 904 S.W.2d 638, 641 (Tex.1995) (emphasis added). The Supreme Court has explained that what separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care. *La.-Pac. Corp. v. Andrade*, 19 S.W.3d 245, 246 (Tex.1999).

An individual's beneficiaries may only bring an action if the individual injured would have been entitled to bring an action for the injury if he had lived. *See* TEX. CIV. PRAC. & REM. CODE ANN. §71.003 (Vernon's 2009). Because of this provision, the Decedent would not have been able to bring any of these claims against Defendant, his or her employer had he lived, because such claims would have been barred under the exclusive remedies provisions of the Texas Workers' Compensation Act. *See* TEX. LAB. CODE, ANN. § 408.001 (Vernon's 2009). Again, the only grounds for recovery against Defendant in the case at bar are those for exemplary damages by the surviving spouse or heirs of the body. *See Id.* (emphasis added).

Moreover, "a decedent's parents are not 'begotten by him' and are not included in the class constitutionally permitted to recover exemplary damages . . ." against the employer under Section 408.001. *Id.*, *citing Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Baker*, 57 Tex. at

305; *Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153 (5th Cir. 1984); *Glisson v. Gen. Cinema Corp.*, 713 S.W.2d 694 (Tex. App. — Dallas 1986, writ ref'd n.r.e.). Accordingly, parents may not recover exemplary damages from an employer pursuant to the death of an employee. *Id.*

An Executor of the Decedent's, Estate, does not have a cause of action for gross neglect to recover damages for the death of the Decedent. *See Chagolla v. O.T. Dunlap Const.,* 838 S.W.2d 943, 947 (Tex.App. – Houston [14th Dist.] 1992, no writ).

Wrongful death and survival actions are wholly derivative of the Decedent's rights. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343 (Tex. 1992); *Sowell v. Dresser Indus., Inc.*, 866 S.W.2d 803, 813 Tex. App.—Beaumont 1993, writ denied). An individual's beneficiaries may only bring an action if the individual injured would have been entitled to bring any action for the injury if he had lived. TEX. CIV. PRAC. & REM. CODE §71.003. (Vernon's 2009) Because of this provision, whereas the Decedent would not have been able to bring any of these claims had he lived (because his claims would have been barred by the exclusive remedy provisions of the Texas Workers' Compensation Act), therefore the wrongful death and survival claims of any alleged statutory beneficiary and the wrongful death and survival claims of any alleged Executor of the Estate of the Decedent are also barred against the subscribing employer as a matter of law. *See* TEXAS LAB. CODE ANN. §408.001 (Vernon 2009). *Maderazo v. Archem Co.*, 788 S.W.2d 395, 397 (Tex. App.—Houston [14th Dist.] 1990, no writ); see also *Chagolla v. O.T. Dunlap Const.*, 838 S.W.2d 943.

A corporation may be liable in punitive damages for gross negligence only if the corporation itself commits gross negligence, as opposed to its employees. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex.1997.) Because a corporation can "act only through agents of some character," the Texas Supreme Court has developed tests for distinguishing between acts that are solely attributable to agents or employees and acts that are directly attributable to the corporation. See *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex.1997); *Fort Worth Elevators, Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397, 406 (1934), overruled on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712 (Tex.1987). A corporation may be liable only if it commits gross negligence through the actions or inactions of a vice principal. *See Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex.1998) "Vice principal" encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of non-delegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business. *Id*.

Co-employees are exempt by the exclusionary rule form negligence actions brought by an injured employee covered by worker's compensation insurance, and the immunity of the employer extends to co-employees. See Tex. Lab.Code Ann. § 408.001 (Vernon 2012); Burkett v. Welborn, 42 S.W.3d 282, 286 (Tex.App.-Texarkana 2001, no pet.); Long v. Turner, 871 S.W.2d 220, 223 (Tex.App.—El Paso 1993, writ denied); Porter v. Downing, 578 S.W.2d 460, 461 (Tex.Civ.App.—Texarkana 1979, writ ref'd n.r.e.).Recovery of worker's compensation benefits as the exclusive remedy of an injured employee against the employer also applies to the actions against the co-employer or "employee of the employer" for conduct which the employer is legally responsible under the doctrine of respondeat superior. *Id*.

Damages

A. Statutory Caps on Damages

1. Texas has no statutory cap on actual damages.

2. "Actual" damages are awarded to repair a wrong or to compensate for an injury. *Robertson Cty. V. Wymola*, 17 S.W.3d 334, 343-44 (Tex.App. – Austin 2000, pet. Denied).

3. "Actual" damages are classified as either economic or non-economic. Tex. Civ. Prac. & Rem. Code §41.001(8).
   a. Economic Damages are those intended to compensate a claimant for actual economic or pecuniary loss. Tex. Civ. Prac. & Rem. Code §41.001(4).
   b. Noneconomic damages are to compensate a claimant for physical pain & suffering, mental or emotional pain & anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation and all other nonpecuniary losses other than exemplary damages. Tex. Civ. Prac. & Rem. Code §41.001(12).

B. Compensatory Damages for Bodily Injury

1. The basic general damage question to be submitted to a jury is:

   What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for his injuries, if any, that resulted from the occurrence in question?

2. Each element of damage is to be considered separately and includes:
   a. Physical pain and mental anguish sustained in the past.
   b. Physical pain and mental anguish that, in reasonable probability, Plaintiff will sustain in the future.
   c. Loss of earning capacity sustained in the past.
   d. Future loss of earning capacity.
   e. Disfigurement sustained in the past.
   f. Future disfigurement.
   g. Physical impairment sustained in the past.
   h. Future physical impairment.
   i. Medical care expenses sustained in the past.
   j. Future medical care expenses.

C. Collateral Source

1. Under the collateral-source rule, payments made to or benefits conferred on the plaintiff from sources other than the defendant are not credited against the defendant's liability, even if they cover all or some of the damage for which the defendant is liable. The rule has been applied in both tort and contract actions. *Taylor v. American Fabritech, Inc.,* 132 S.W.3d 613, 628 (Tex. App. – Houston [14th Dist.] 2004, pet. Denied).

2. This is an evidentiary rule which prevents the defendant from introducing evidence of

benefits the plaintiff received from outside sources. An exception to the rule applies when evidence of a collateral source is offered for impeachment purposes. *J.R. Beadel & Co. v. De La Garza,* 690 S.W.2d 71, 74 (Tex. App. – Dallas 1985m writ ref'd n.r.e.).

3. However, a plaintiff's recovery of medical expenses is limited to the expenses actually paid or incurred by or on behalf of the plaintiff. Tex. Civ. Prac. & Rem. Code §41.0105.

4. In the UIM/UM context, the defendant is entitled to an off-set for loss already paid as PIP or by other insurance. *Mid-Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 256 (Tex. 1999).

D. Pre-Judgment/Post Judgment Interest

1. Prejudgment interest is compensation for the lost use of money owed as damages.
   a. It is computed from the accrual of the plaintiff's claim to the date of judgment. *Brainard v. Trinity Univ'l Ins.*, 216 S.W.3d 809, 812 (Tex. 2006).
   b. It can be recovered by statute or under general principles of equity. *Johnson & Higgins v. Kenneco Energy, Inc.,* 962 S.W.2d 507, 528 (Tex. 1998).
   c. It is not recoverable on:
      i. Treble damage awards under the DTPA. Tex. Bus. & Com. Code §17.50(f)(2).
      ii. Exemplary damages. Tex. Civ. Prac. & Rem. Code §41.007.
      iii. Future damages. Tex. Fin. Code §304.1045.
      iv. Attorneys' fees awards. *Carbona v. CH Med., Inc.,* 266 S.W.3d 675, 688 (Tex. App. – Dallas 2008, no pet.).
      v. Interpleaded funds. *State Farm Life Ins. V. Martinez,* 216 S.W.3d 799, 808 (Tex. 2007).
      vi. Double recovery; not awarded under both statute and common law. *Amx Enters. V. Master Rlty. Corp.,* 283 S.W.3d 506, 513-14 (Tex. App. – Fort Worth 2009, no pet.).
   d. Prejudgment interest in computed as simple interest, not as compound interest. *Johnson& Higgins v, Kenneco Energy, Inc. .,* 962 S.W.2d 507, 532 (Tex. 1998).
   e. The interest rate is the same as for postjudgment interest. Tex. Fin. Code §304.103.

2. Postjudgment Interest is compensation for the use or detention of money.
   a. It is computed from the date of judgment until the date the judgment is satisfied. *Sisters of Charity of the Incarnate Word v. Dunsmoor,* 832 S.W.2d 112, 119 (Tex. App. – Austin 1992, writ denied).
   b. It can be recovered on any state-court money judgment. Tex. Fin. Code §304.001.
   c. Postjudgment interest is compounded annually. Tex. Fin. Code §304.006.
   d. The interest rate for postjudgment interest is either set by statute or by contract.
      i. The postjudgment interest rate set by statute is the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation. Tex. Fin. Code. §304.003(c)(1).
      ii. If the prime rate is less than 5%, the postjudgment rate is 5% per year.

Tex. Fin. Code §304.003(c)(2). If the prime rate is more than 15%, the postjudgment rate is 15% per year. Tex. Fin. Code §304.003(c)(3).

iii. If the judgment is on a contract that provides for interest or a time-price differential, the postjudgment interest rate is either the contract rate or 18% per year, whichever is less. Tex. Fin. Code §304.002.

E. Damages for Emotional Distress

1. A plaintiff may recover mental anguish damages in the following types of cases: *City of Tyler v. Likes,* 962 S.W.2d 489, 494-96 (Tex. 1997).
   a. Cases in which the plaintiff was physically injured.
   b. Cases involving intentional or malicious conduct even without physical injury.
      i. Examples include: Assault & Battery, Defamation, Invasion of Privacy, Abduction of a child, knowing violation of statute.
   c. Cases involving the breach of a duty arising from a special relationship.
      i. Examples include: Physician-Patient, Insured-Insurer, Special Contracts.
   d. Cases involving particularly disturbing events.
      i. Examples include wrongful death and bystander injury. (A bystander is defined as someone (a) present at or near the scene of the accident, (b) who suffered shock as a result of a direct emotional impact from perceiving the accident as it happened or immediately afterward and (c) was closely related to the victim of the accident. *Boyles v. Kerr,* 855 S.W.2d 593, 598 (Tex. 1993).

2. In Texas, the claim of Intentional Infliction of Emotional Distress is to be a "gap-filler". The claim is available only when a person intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004).
   a. Remedies for the plaintiff include actual damages, exemplary damages, pre and postjudgment interest and court costs.

3. There is no cause of action for Negligent Infliction of Emotional Distress in Texas. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993).

F. Wrongful Death and/or Survival Action Damages

1. In a wrongful death action plaintiffs recover damages for their own injuries. In a survival action plaintiffs recover damages for the injuries suffered by the decedent. Both causes of action are recognized in Texas.

2. The elements of a Survival Action are:
   a. The plaintiff is the legal representative of the decedent's estate.
   b. The decedent had a cause of action for personal injury to her health, reputation or person before she died.
   c. The decedent would have been entitled to bring an action for the injury if she had lived.
   d. The defendant's wrongful act caused the decedent's injury. Tex. Civ. Prac. & Rem. Code §71.021.

3. Damages recoverable in a Survival Action are:
   a. Actual Damages.
      i. When the defendant caused the death actual damages include the decedent's pain and suffering, medical and funeral expenses.
      ii. When the defendant did not cause the death actual damages are those that would be recoverable in the underlying tort. *Russell v, Ingersoll-Rand Co.*, 841 S.W.2d 343 (Tex. 1992).
   b. Exemplary Damages.
   c. Pre and Postjudgment Interest.
   d. Court Costs.

4. Suits for wrongful death are governed by the Texas Wrongful Death Act. Tex. Civ. Prac. & Rem. Code §§ 71.001-71.012.

5. The elements of a Wrongful Death Action are:
   a. The plaintiff is the statutory beneficiary of the decedent.
   b. The defendant is a person or corporation.
   c. The defendant's wrongful act caused the death of the decedent.
   d. The decedent would have been entitled to bring an action for the injury if she had lived.
   e. The plaintiff suffered actual injury.

6. Statutory Beneficiaries are Spouses, Children or Parents. Not siblings.

7. The executor or estate administrator may file suit if no other statutory beneficiary has within three months of the decedent's death unless asked not to by all the statutory beneficiaries.

8. Damages recoverable in a Wrongful Death Action are:
   a. Actual Damages.
      i. Pecuniary Losses.
         a. Loss of advice & counsel.
         b. Loss of services.
         c. Funeral Expenses.
         d. Expenses for psychological treatment.
      ii. Mental Anguish.
      iii. Loss of Companionship & Society.
      iv. Loss of Inheritance.
   b. Exemplary Damages.
   c. Pre and Postjudgment Interest.
   d. Court Costs.

G. Punitive Damages

1. Punitive (or exemplary) damages are designed to penalize and deter conduct that is outrageous, malicious, or morally culpable. Tex. Civ. Prac. & Rem. Code §41.001(5).

2. Punitive damages are recoverable under the following statutes:
   a. The Damages Act.
      i. With few exceptions, the Damages Act applies to any cause of action in which a plaintiff seeks to recover exemplary damages. Tex. Civ. Prac. & Rem. Code §41.002 (a)(b). This includes both common-law and statutory causes of action in which the plaintiff has proved the necessary level of culpability by clear and convincing evidence. *Id.*
      ii. Under the Damages Act there are three types of aggravated conduct that will support exemplary damages:
         - Gross Negligence
         - Malice
         - Fraud

   b. Statutory Fraud. Tex. Bus. & Com. Code §27.01(c).
   c. Wrongful Death. Tex. Civ. Prac. & Rem. Code §71.009. ; Tex. Const. art. 16, §26.

3. A jury is asked to consider the following factors when awarding damages as a penalty or by way of punishment:
   a. The nature of the wrong.
   b. The character of the conduct involved.
   c. The degree of culpability of the wrongdoer.
   d. The situation and sensibilities of the parties concerned.
   e. The extent to which such conduct offends a public sense of justice and propriety.
   f. The net worth of the defendant. (Texas P.J.C. 15.7C)

4. At the defendant's request, the court must bifurcate the issue of exemplary damages from the liability part of the suit. Tex. Civ. Prac. & Rem. Code §41.009

5. Punitive damages are not recoverable in actions for:
   a. Breach of Contract. *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617, 618 (Tex. 1986).
   b. Dram-shop actions. *Steak & Ale v. Borneman*, 62 S.W.3d 898, 910 (Tex.—App. Forth Worth 2001, no pet.).
   c. UCC Breach of Warranty. *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 669 (Tex. App. – Amarillo 1977, no writ.).
   d. Usury. *Hill v. Budget Fin. & Thrift Co.* 338 S.W.2d 79, 83 (Tex. App. – Dallas, 1964, no writ).
   e. Texas Insurance Code Violations. Tex. Civ. Prac. & Rem. Code §41.002(d).
   i. But the plaintiff may recover additional damages of up to three times the amount

of actual damages. Tex. Ins. Code §541.152(b).

d. DTPA.

i. But the plaintiff can recover additional damages of up to three times the amount of economic and mental-anguish damages for a Deceptive Trade Practices Act claim. Tex. Bus. & Com. Code §17.50(b)(1).

ii. Economic damages can be trebled if the defendant knowingly or intentionally violated the DTPA. Tex. Bus. & Com. Code §17.45(9).

iii. Mental anguish damages can be trebled if the defendant acted intentionally. Tex. Bus. & Com. Code §17.45(13).

iv. Punitive damages may also be recovered in a suit involving the sale of annuities.

6. Pre-judgment interest on punitive damages is not recoverable. Tex. Civ. Prac. & Rem. Code §41.007.

7. In most cases, the plaintiff must recover actual damages against the defendant to recover punitive damages. *Safeshred, Inc. v Martinez,* 365 S.W.3d 655, 660 (Tex. 2012). This is not the case in a suit brought under the Texas Labor Code §408.001 for the wrongful death of an employee.

H. Diminution in Value of Damaged Vehicle

1. The Texas Supreme Court has held that a standard automobile insurance policy does not obligate an insurer to compensate a policyholder for a vehicle's diminished value when the car has been adequately repaired. *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003).

2. In *Schaefer*, the plaintiff argued the diminished value was a "direct or accidental loss" and was covered under the policy. Defendant argued that the "Limit of Liability" section, which limits the insurer's liability to the lesser of the vehicle's actual cash value or the amount necessary to repair or replace it, does not encompass any concept of "value." The Court agreed and held that while a vehicle's diminished value may be a "direct loss" under the policy's insuring provision, AMM's obligation to compensate the insured for that loss is circumscribed by the policy's "Limit of Liability" section. That section states, in pertinent part, that AMM's liability for loss is limited to the damaged vehicle's "actual cash value" or the amount needed "to repair or replace" the vehicle, whichever is less.

3. Other jurisdictions have reached the opposite conclusion, but in Texas the law is that DV is not a covered loss if the vehicle can be repaired.

I. Loss of Use of Motor Vehicle

1. In assessing damages to chattels caused by negligent acts of tortfeasors, the courts of this state have always sought to provide "... fair, reasonable, and proper compensation for the injury inflicted as a proximate result of the wrongful act complained of*." Pasadena State Bank v. Isaac*, 228 S.W.2d 127 (Tex.Sup.1950). When the chattel is only partially damaged and can be repaired, the owner can recover not only the cost of repairs but also

the reasonable value of the loss of use of the chattel while it is being repaired. *Id.*

2. This will be governed by any applicable insuring agreement.

Evidentiary Issues

A. Preventability Determination

Oklahoma courts have allowed such evidence.

There are no Texas cases directly on point addressing admissibility of preventable determinations. However, if the standard by which a company made their preventability determination is different from the negligence standard in Texas an agreement could be made to exclude the evidence under Texas Rule of Evidence 403.

> This case a rises from a low-speed accident which allegedly occurred on October 8, 2002 in Claremore, Oklahoma between Plaintiff Jerry Ferguson and Defendant Martin Brower's driver, Charles Alexander. Plaintiff claims that he was injured when the tractor-trailer driven by Alexander rolled back at a stop-light and struck his Chevrolet Blazer. Defendants argue that certain information would be irrelevant to the resolution of these claims and seek to exclude same. Specifically, Defendants move this Court for an order in limine barring Plaintiff from introducing the following matters. Martin Brower's investigation into this accident and any conclusion relating to the "preventability" of this accident. Defendants admit that Martin Brower investigates any accidents involving its vehicles to determine if they were preventable. Such information is clearly relevant to the claims at issue here. To the extent that these investigations are conducted and recorded as part of Martin Brower's regular business practice, information contained therein is also admissible. Defendants argue that jurors would not understand the difference between "preventability" and "liability" and thus, that such information would be more prejudicial than probative. The Court disagrees and finds that any misapprehension or prejudice can be adequately addressed on cross-examination and/or in the jury instructions.

Ferguson v. Martin Brower, L.L.C., 2006 WL 964796 (N.D.Okla. Apr 12, 2006) at pg *2.

Illinois courts have excluded the evidence

> Defendants move to bar admission at trial of (1) the August 6, 1996 Report of Accident Review prepared subsequent to the accident, (2) the August 7, 1996 Letter of Investigation addressed to Riggs, and (3) the August 20, 1996 Letter of Discipline issued to Riggs by Consolidated Freightways. Defendants further request that Villalba be barred from mentioning or referring to these documents or their contents. The August 6, 1996 Report of Accident Review indicates that Riggs' supervisor found that the accident was preventable because Riggs made an improper lane change. The August 7, 1996 Letter of Investigation informed Riggs that the August 6, 1996 accident was under investigation and that he would be notified of the findings at the conclusion of the investigation. The

> August 20, 1996 Letter of Discipline issued to Riggs states that Riggs was involved in a preventable accident on August 4, 1996 when he made an improper lane change. The notice constituted a Final Warning and indicated that similar infractions would result in more severe disciplinary action up to and including discharge.
>
> Villalba clearly wants the jury to infer from the results of the accident review that Riggs was negligent. The problem with that inference is that the standard for determining preventability and the standard for determining negligence under Illinois law are not necessarily the same. Villalba maintains that the standard of preventability is the same as the standard of negligence law. *Compare* I.P.I. Civil No. 10.01 (negligence means "the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence) *with* National Safety Council, p. 2 ("A preventable accident is one in which the driver failed to do everything that reasonably could have been done to avoid the accident. In other words, when a driver commits errors and/or fails to react reasonably to the errors of others, the National Safety Council considers an accident to be preventable."). Although the standards appear similar, the National Safety Council makes clear that its preventability standard "is not solely based on or determined by legal liability." Defendants' Ex. E, p. 3. Thus, the two standards may confuse and mislead the jury and result in a mini-trial regarding the different standards and the significance of the preventability finding, diverting attention away from the real issue of negligence. Likewise, there exists a danger that the proposed evidence could suggest a decision to the jury on an improper basis. CF's finding of preventability could lead the jury to decide the issue of negligence by improper reference to the preventability standard and CF's finding of preventability.

Villalba v. Consol. Freightways Corp. of Delaware, 2000 WL 1154073 (N.D.Ill.2000)

New York courts have also excluded the evidence.

> Plaintiff's counsel also argues that the Federal Express Vehicle Accident Report establishes Defendants Smyth's and Federal Express's liability. According to Plaintiff's counsel the indication in this report that this accident was "preventable", supports Plaintiff's theory. (The contention that an accident is "preventable" in an accident report adds little or nothing to the liability analysis at hand.) Additionally, there are photographs in the report which, according to Plaintiff's counsel, show the "Stop Ahead" sign as "visible and unobstructed." However, Plaintiff's counsel fails to indicate to the court whether any witness identified these photographs as fairly and accurately depicting the accident scene and the signage conditions and, more importantly, whether the photos accurately depicted Defendant Smyth's line and field of vision when he was operating the FedEx van on Connors Road at an apparently lawful speed of 50 miles per hour.

Beaumont v. Smyth, 1 Misc.3d 912(A), 781 N.Y.S.2d 622, 2004 N.Y. Slip Op. 50040(U) (N.Y.Sup. Jan 09, 2004)

B. Traffic Citation from Accident

The Texas Supreme Court has long held that evidence that a party to an automobile collision was given a citation is not admissible for any purpose in a civil trial. *DeLeon v. Louder*, 743 S.W.2d 357 (Tex.App.—Amarillo, 1987). The reason for this is that the officer is trained in identifying violations of penal ordinances or statutes but not necessarily in establishing fault for purposes of civil litigation. *Condra Funeral Home v. Rolin,* 158 Tex. 478 (Tex. 1958).

Appellant stated without equivocation that he did not plead guilty in open court; rather, he paid the fine to a clerk. See Johnson v. Woods, 315 S.W.2d 75 (Tex.Civ.App.—Dallas 1958, writ ref'd n.r.e.). In cases involving moving traffic violations for which the maximum punishment is a fine, payment of the fine constitutes a finding of guilty, "as though a plea of nolo contendere had been entered by the defendant." TEX.CODE CRIM.PROC.ANN. art. 27.14 (Vernon Supp.1984). A plea of nolo contendere to a traffic violation cannot be admitted into evidence in a civil suit for damages arising out of the same incident. TEX.CODE CRIM.PROC.ANN. art. 27.02 (Vernon Supp.1984) and TEX.R.EVID. 410.

Certain guilty pleas may be admissible. However, unless a plea of guilty to a traffic offense was made in open court, according to law, evidence of such guilty plea is not admissible in a civil suit for damages arising out of negligence giving rise to the charge. Cox v. Bohman, 683 S.W.2d 757, 758 (Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.) (citing Barrios v. Davis, 415 S.W.2d 714, 716 (Tex.Civ.App.-Houston 1967, no writ)).

C. Failure to Wear a Seat Belt

Historically, evidence regarding the use of a seatbelt was not admissible. In 1985, the Texas Legislature enacted the mandatory seatbelt statute which made the nonuse of a seatbelt an offense. Act of June 15, 1985, 69th Leg. R.S., ch. 804, § 1, 1985 Tex. Gen. Laws 2846, 2846-2847, amended by Act of May 23, 1995, 74th Leg., R.S. ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1643, repealed by Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863. Subsequently codified into § 545.413(g) of the TEXAS TRANSPORTATION CODE and herein after referred to as "Section 545.413(g)." Section 107C(j) of the statute also precluded the possibility for a tort litigant to present evidence of the use or nonuse of a seatbelt. *Id.* On June 11, 2003, however, House Bill 4 was signed into law, and it deleted the language prohibiting evidence regarding the use or nonuse of a seatbelt. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863. Nevertheless, there is still some question as to whether evidence of the nonuse of a seatbelt will be admissible in this case. A look at the evolution of the seatbelt defense will better help us to understand the current state of the law.

A. The common law

The common law which predates the enactment of Section 545.413(g) provided that the failure to wear a seatbelt was not actionable negligence. *See Kerby v. Abilene Christian College,* 503 S.W.2d 526, 527 (Tex. 1973); *Carnation Co. v. Wong,* 516 S.W.2d 116, 116-117 (Tex. 1974). In *Kerby v. Abilene Christian College,* the Texas Supreme Court noted that driving without a seatbelt was not actionable negligence but instead was "negligence contributing to the damages sustained." *Kerby,* 503 S.W.2d at 526. This case involved a car collision between a van, driven by Kerby, and a school bus, driven by an employee of Abilene Christian College. *Id.*

The employee crashed into Kerby's van after running a red light. *Id* The door to Kerby's van was open, causing Kerby to be ejected and crushed by the van. *Id.* In reversing the trial court and the court of civil appeals, the Texas Supreme Court compared driving with a door open to driving without wearing a seatbelt. *Id.* at 527-528. Both driving with the door open and driving without a seatbelt were not actionable negligence by the court. *Id.*

Then in 1974, the Texas Supreme Court held in *Carnation Co v. Wong* that failure to wear a seatbelt does also not permit reduction or mitigation of damages. *Carnation,* 516 S.W.2d at 116-117. *Carnation* involved injuries sustained by plaintiffs Bobbie Joan Wong and Kling Son Wong after their automobile was negligently struck by a truck that was owned by Carnation Company. *Id.* The trial court admitted evidence of seatbelt use and found that the plaintiffs' failure to buckle their seatbelts constituted negligence and was a proximate cause of the injuries they sustained. *Id.* The appellate court reversed, holding that *Kerby* stated there exists no duty to wear a seatbelt in order to mitigate damages. *Id.* The Texas Supreme Court affirmed the appellate court by first rejecting all cases from those jurisdictions that allowed the seatbelt defense to completely bar the plaintiff's recovery through contributory negligence. *Id.* The court also dismissed the mitigation of damages approach, stating that "persons whose negligence did not contribute to an automobile accident should not have the damages awarded to them reduced or mitigated because of their failure to wear seatbelts." *Id.*

B. Section 545.413(g) codified the common law

In 1985, the Texas Legislature enacted the mandatory seatbelt statute which made the nonuse of a seatbelt an offense. Act of June 15, 1985, 69th Leg. R.S., ch. 804, §1, 1985 Tex. Gen. Laws 2846, 2846-2847, amended by Act of May 23, 1995, 74th Leg., R.S. ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1643, repealed by Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863. Section 545.413(g) of the statute also precluded the possibility for a tort litigant to present evidence of the use or nonuse of a seatbelt. *Id.* There was some question of whether the goal of the legislature, in enacting this statute, was to simply codify the common law or to completely prohibit this type of evidence in all cases.

In *Pool v. Ford Motor Co.,* the Texas Supreme Court addressed the inadmissibility of seatbelt evidence under the statute for the first time. *See Pool,* 715 S.W.2d 629, 630 (Tex. 1986). *Pool* involved a defendant automobile manufacturer and a plaintiff who had failed to use available seatbelts. *Id.* Plaintiff brought suit alleging that a defective U-bolt assembly in the vehicle was a producing cause of the automobile accident. Defendant urged plaintiff's contributory negligence in the form of driving while intoxicated, driving at an extensive speed, and failing to wear an available seatbelt. *Id.* at 630-631. Affirming the lower court's refusal to consider the seatbelt issue, the Texas Supreme Court's first opinion provided:

> As to the seatbelt allegation, that matter was disposed of in *Kerby v Abilene Christian College* . . . when we said "contributory negligence must have the causal connection with the accident that but for the conduct the accident would not have happened.' However, Ford Motor Company argues that *Duncan v. Cessna Aircraft Co.,* . . .restricted the scope of *Kerby.* We disagree. While *Duncan* specifically overrules certain prior decisions of this court, *Kerby* was not

> one of them. Moreover, the comparative causation scheme enunciated in *Duncan* was never intended, *except in crashworthiness cases,* to elevate non-causative factors such as failure to wear a seat belt to the level that they would be considered as a producing cause . . . . We reaffirm our holding in *Kerby v. Abilene Christian College.* Failure to wear a seatbelt cannot, as a matter of law, be any evidence of contributory negligence. *Pool,* 29 Tex. Sup. Ct. J. 204, 206 (Feb. 12, 1986), *withdrawn,* 715 S.W.2d 629 (emphasis added).

The Supreme Court addressed, at least in dicta, the scenario to which this point had eluded it: the seatbelt defense in a crashworthiness case. *Id.* Recognizing distinctions between typical design defect and a crashworthiness case, the Supreme Court acknowledged that in crashworthiness cases it is proper to consider the plaintiff's misconduction. *Id.* The amicus brief of American Honda Motor Company took notice of this carved out distinction and argued that the seatbelt defense should have a much broader application. Brief of Amicus Curiae of American Honda Motor Co., Inc. at 1-2, *Pool,* 715 S.W.2d 629 (Tex. 1986) (No. C-4097). In response, instead of acknowledging the justifications for limiting the seatbelt defense to crashworthiness cases, the Supreme Court chose to skirt the issue completely and proceed in a different direction. It simply abrogated the defense in all settings. The Supreme Court withdrew its first opinion and in the second opinion, replaced the former language with the following:

> [The seatbelt allegation] involves a question of law controlled by *Carnation Co. v. Wong* . . . when we held that plaintiffs "should not have damages awarded to them reduced or mitigated because of their failure to wear available seat belts." Moreover, we note that the legislature has ratified *Carnation's* policy for future cases: '[u]se or nonuse of safety belt is not admissible evidence in a civil trial.' . . . Therefore, we affirm that failure to wear a seatbelt is not evidence of contributory negligence. Although *Carnation* and the statute preclude reducing damages for injuries caused by not wearing a seatbelt, in all other regards, the *Ducan v. Cessna* formula remains . . . . *Pool,* 715 S.W.2d at 633.

The sentence in the Texas Supreme Court's first *Pool* opinion, appearing to clarify an issue which had never come before the court, was retracted without explanation. The Supreme Court ratified its holding in *Carnation Co. v. Wong. Id.*

C. The Crashworthiness Exception

In the same year that *Pool* was decided, the Fifth Circuit suggested in dicta that the holding of *Carnation* was limited to cases in which negligence was asserted and one that specifically involved allegations of failure to wear a seatbelt. *Kennon v. Slipstreamer,* 794 F.2d 1072, 1075-1076, n. 3 (5th Cir. 1986) ("…failure to wear a safety belt may present a special case because Tex.Rev.Civ.Stat.Ann. art. 6701d specifically provides that failure to use a safety belt is not contributory negligence") As such, the Fifth Circuit signaled an exception for cases involving causes of action outside of negligence.

In 1994, the Texas Supreme Court confirmed an exception to the seatbelt rule in *Bridgestone/Firestone, Inc. v. Glyn-Jones. See Bridgestone/Firestone, Inc.,* 878 S.W.2d 132, 134

(Tex. 1994). In *Bridgestone*, Glyn Jones who was injured in an automobile accident brought a products liability action against the manufacturer of a seat belt and shoulder harness restraint system. *Id* According to the intermediate appellate opinion, Glyn-Jones "contend[ed] that the prohibition against the use of seat belt evidence [did] not apply to products liability cases involving the *crashworthiness* of an automobile. Alternatively, she argue[d] that the statute violate[d] the open courts provision of the Texas Constitution." *Id* As had the trial court, the intermediate appellate court, held the statute proscribed admission of such evidence. *See Glyn-Jones v. Bridgestone/Firestone, Inc.,* 857 S.W.2d 640 (Tex. App.—Dallas 1993), *aff'd Bridgestone/Firestone, Inc. v. Glyn-Jones,* 878 S.W.2d 132. It did so by concluding the statute was unambiguous and "[did] not differentiate between negligence actions and products liability cases." *Id.*

The intermediate appellate court granted relief, however, under the open-courts provision of the Texas Constitution because the statute "[was] arbitrary and unreasonable insofar as it prohibit[ed] the introduction of seat belt evidence in a *crashworthiness* case." *Id.* at 643-44 (emphasis added). Earlier, the court noted: "Crashworthiness has been a recognized cause of action in Texas since it was adopted by the Texas Supreme Court in 1979." *Id.* at 643. Moreover, the statute "unreasonably denie[d] Glyn-Jones . . . redress for [her] injuries." *Id.* at 644. Therefore, the statute "violate[d] the open courts provision of the Texas Constitution." *Id.*

The Texas Supreme Court affirmed the intermediate appellate court, but did so on a statutory, *not* a *constitutional,* basis. *Bridgestone*, 878 S.W.2d at 133 (emphasis added). In beginning of its analysis the Supreme Court stated: "We must initially determine whether [the statute] actually precludes Glyn-Jones from offering evidence that she used her seat belt in this case. Because we conclude that the legislature did *not* intend to bar use of such evidence, *we need not reach* the posed constitutional question." *Id.* In construing the statute, the Court stated it could *not* apply the usual rules of construction just to that subsection but instead had to view it in the light of the entire statute. *Id.* It then stated: "While the context normally provides clarity . . . here it creates ambiguity about the legislature's purpose." *Id.* Therefore, it ruled it had to look beyond the language in the statute "to even determine the *true* purpose of the provision." *Id.* (emphasis in original).

The Supreme Court held that the statute prohibiting the evidence of use or nonuse of the seatbelt in a civil trial was not intended to and did not apply to protect a seatbelt manufacturer from liability for defective restraint systems. *Id.* at 134-135. The Court reasoned:

> Subsection (j) was included in Section 107C in order to make clear that the sole legal sanction for failure to wear a seatbelt is a criminal penalty provided by the statutes and that failure to could not be used against the injured person in a civil trial. By including subsection (j), the legislature intended not to forge new ground in tort law, but merely to preserve the status quo. *Id.* at 134.

According to the Court, the legislature added subsection (j) to ratify *Carnation's* holding and did not, by adding subsection (j) seek to preclude plaintiffs from bringing claims against seatbelt manufacturers for injuries caused by defective seatbelts. *Id.* The Texas Supreme Court noted that when viewed in the context of the entire statute, there is "ambiguity about the legislature's

purpose"; this is because the seatbelt-evidence prohibition for civil trials falls within the criminal penalties of the Texas Transportation Code, an unlikely place for a provision that has been read to have such an expansive scope. *See id.* at 133-34

The limited holding of *Bridgestone* raises the question whether evidence of failure to wear a seatbelt is admissible in any type of crashworthiness case or limited only to cases involving claims of defective seatbelts. According to the Dallas Court of Appeals in *Bridgestone*, "[c]rashworthiness cases involve a form of design defect. The design defect can be anything that compromises the safety of the vehicle as a whole." *See Glyn-Jones,* 857 S.W.2d at 640.

D. *Bridgestone* Exception Applies Only to Cases Concerning the Vehicle's Safety Features.

The Texas Supreme Court did not, however, issue another opinion after *Bridgestone* to give further insight as to how far reaching the *Bridgestone* exception should be understood to apply and whether any cases outside of negligence can admit evidence of the use or nonuse of seatbelts. However, the Fifth Circuit and the San Antonio Court of Appeals have provided some insight as to whether or not the *Bridgestone* exception applied to cases involving any design defect. *See Milbrand v. DaimlerChrysler Corporation,* 105 F.Supp.2d 601, 603 (5th 2000);

The Fifth Circuit in *Milbrand v. DaimlerChrysler Corporation* held that the Texas statute prohibiting evidence of seatbelt nonuse in civil trials should be applied to bar defense expert's opinions about whether injuries of the driver who was not wearing his seatbelt would have been different if he had not been ejected from his vehicle. *Milbrand,* 105 F.Supp.2d at 605-607. The court reasoned that such a holding on the basis that the plaintiff, the driver's wife, was not alleging that the vehicle failed to reduce or prevent the injuries suffered because of a defect in the vehicle's safety related feature, but was bringing the traditional product liability case in which the issue was whether the alleged defect in the vehicle's wheels or axle caused the accident. *Id.* The court reasoned that Texas courts have narrowly applied the Texas statute providing but a single exception in *Bridgestone* and noted that nothing in the *Bridgestone* opinion altered this long standing Texas rule or the holdings in *Carnation* and *Pool*. *Id.* at 606.

The Fifth Circuit distinguished *Bridgestone* from the facts in *Milbrand* by stating that while *Bridgestone* was a crashworthiness case, the case before it was not. The court explained:

> In a crashworthiness case, a plaintiff does not seek compensation for injuries received from the initial collision between the vehicle and another object. Instead, the plaintiff seeks compensation for injuries that occur when the plaintiff strikes the interior of the vehicle or is thrown from the vehicle. In a crashworthiness claim, plaintiff seeks compensation for injuries over and above the injury that would have occurred as a result of the impact of collision, absent the vehicle's alleged negligently defective design. In this case, Mrs. Milbrand is not alleging that the vehicle failed to reduce or prevent injuries suffered because of a defect in its safety related features. Instead, this is a traditional product liability case where the issue is whether or not the defect caused the accident. *Id.*

Thus, according to the Fifth Circuit, in cases where the safety of the vehicle was not alleged as a contributing factor of the injuries sustained, cases not involving secondary collisions, then evidence of seatbelt use was not admissible.

The Court of Appeals in *Vasquez v. Hyundai Motor Co.* followed a similar analysis to that used in *Milbrand*. *Vasquez,* 119 S.W.2d 848, 850, n. 2 (Tex.App.—San Antonio 2003) (en banc), *reversed on other grounds,* 119 S.W.3d 743. The court reiterated the holding in *Bridgestone* by noting that Section 545.413(g) was intended to preserve the status quo concerning failure to wear a seatbelt not being evidence of contributory negligence, but noted in dicta that the statute was never intended to exclude evidence of seatbelt use in "secondary collision" cases. *Id* In this case, the parents of a child killed by a deploying air bag in an automobile accident pursued a product-liability action against the manufacturer on a *crashworthiness* theory. *See id.* at 850. Although the Texas Court of Appeals, *en banc,* decided the case on other grounds, it noted in dicta that where the functionality of the passenger's passive restraint system, which included the seatbelt, is at issue, seatbelt evidence is relevant to proving causation and the ultimate effectiveness of the restraint system. *Id.* at 850, n.2. The Court reasoned that the manufacturer's interest in offering seatbelt evidence was not to mitigate the "product defendant's liability for damages, but [was] offered . . . to support [its] defense that the air bag, in conjunction with seatbelt use, was *not* defective as designed." *Id.* Thus, according to the San Antonio Court of Appeals, seatbelt evidence is available in cases not only where the seatbelt is alleged defective but also where the design of safety restraint system as a whole is implicated.

When considered altogether, the holdings in *Bridgestone, Milbrand* and *Vasquez* carve out an exception to Section 545.413(g) and preserve the status quo at the time of the statute's enactment by allowing for the admissibility of seatbelt evidence in crashworthiness cases, cases where secondary collisions and the overall safety of the vehicle is at issue. Seatbelt evidence is inadmissible and the statute governs, except in design defect cases which only involve whether the alleged defect caused the accident.

E. HB 4 repeals Section 545.413(g) of the Texas Transportation Code and the Common Law Regarding the Admissibility of Seatbelt Evidence

On June 11, 2003, House Bill 4 was signed into law, and it deleted the language from Section 545.413(g) prohibiting evidence regarding the use or nonuse of a seatbelt. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863. There is some question as to whether HB 4 repealed only Section 545.413(g) or whether it also repealed the common law regarding the inadmissibility of seatbelt evidence.

1. The legislative history suggest that the Legislature's intent was to repeal the common law in addition to the statutory provision prohibiting the admissibility of seatbelt evidence

While there are no set criteria for deciding whether a statute repeals the common law, case law shows that some indication of legislative intent is required. A statute may be interpreted as abrogating a common law principle only when its express terms or necessary

implications clearly indicate the legislature's intent to do so. *Gallagher Headquarters Ranch Development, Ltd. v. City of San Antonio,* 269 S.W.3d 628, 637 (Tex.App.—San Antonio 2008), no pet; *Bruce v. Jim Walters Homes, Inc.,* 943 S.W.2d 121, 122-123 (Tex. App.—San Antonio 1997), writ denied. The Texas Supreme Court has also acknowledged that its purpose in construing a statute, is to give effect to the Legislature's intent. *Union Bankers Ins. Co. v. Shelton,* 889 S.W.2d 278, 280 (Tex. 1994). In an effort to give effect to the Legislature's intent, numerous Texas courts have acknowledged that the courts are not bound by the literal meaning of words in the construction of statutes. *Bridgestone,* 878 S.W.2d at 134 (citing *Miers v. Brouse,* 271 S.W.2d 419 (Tex. 1954); *Prudential Health Care Plan, Inc. v. Commissioner of Ins.,* 626 S.W.2d 822, 826 (Tex. App.—Austin 1981, writ ref'd n.r.e); *Board of Ins. Comm'rs v. Sproles Motor Freight Lines, Inc.,* 84 S.W.2d 769, 775 (Tex. App.—Fort Worth 1936, writ ref'd); *see also* TEX. GOV'T CODE ANN. § 312.005.) In order to determine the Legislature's intent, the Texas Supreme Court will consider the statute's language, history, and purposes and consequences of alternate constructions. *Cash America Intern. Inc v.* Bennett, 25 S.W.3d 12, 16 (Tex. 2000) (citing *Union,* 889 S.W.2d at 280). Here, there are no words to construe in HB 4, other than "Section 545.413(d) and 545.413(g), Transportation Code, are repealed." Act of June 11, 2003, 78th Leg., R.S., ch. 204, §8.01, 2003 Tex. Gen. Laws 847, 863. As such, a Texas court would be most likely to turn to the legislative history behind HB 4 to determine whether or not it also repealed the common law in addition to Section 545.413(g).

The legislative history of HB 4 suggests that not only was it the legislature's intent to repeal the statutory provision prohibiting the admissibility of seatbelt evidence, but the Legislature also intended to also change the common law and make such evidence admissible. In the 63rd Legislature (1973), House Committee staff began producing bill analyses, documents that were to give a short statement of the purpose and a summary of each section of the bill. *Researching Legislative History and Intent,* http://www.lrl.state.tx.us/legis/intent/intentStep2.html (last updated 11/25/02). According to the House Research Organization bill analysis of HB 4, the bill "would repeal Transportation Code § 545.413(g), making the use or nonuse of seatbelts admissible in evidence in civil trials." House Comm. On Civil Practices, Bill Analyses, Tex. H.B. 4, 78th Leg., R.S. (2003). The analysis shows that supporters of the bill argued that HB 4 would "ensure fairness at trial by allowing the use or nonuse of seatbelts to be admissible in evidence." *Id.* The section outlining proponents' arguments states:

> Jurors must be able to hear appropriate evidence to assign fault appropriately. Excluding this evidence can result in assessing more responsibility and damages to defendants than they deserve. It is nonsensical to require people to wear seatbelts when in a moving vehicle and then to reward them at trial even if they have broken the law. [HB 4] would give people an additional reason to wear their seatbelts, because if they were injured, they would bear some responsibility for failing to obey the law. *Id.*

Even the opponents of the bill acknowledged that HB 4 would allow the use or nonuse of seatbelts to be admissible. Opponents argued that this could allow defendants to reduce their liability on the basis on something wholly unrelated to the cause of an accident. *Id.* Thus, no matter whether a proponent or an opponent of HB 4, all legislators understood that the effect of

the bill would be to allow for the admissibility of seatbelt evidence despite any prior common law holdings. In addition to looking at the legislative intent behind HB 4, we can also look to how the Fifth Circuit Court of Appeals has suggest that a Texas court might interpret the repeal of Section 545.413(g).

2. Fifth Circuit case law interpreting the repeal of Section 545.413(g) suggests Texas courts might interpret the repeal of the statute as also a repeal of the common law

Unfortunately, the Texas Supreme Court has not heard any cases, either negligence or crashworthiness cases, since Section 545.413(g) was repealed, so there is no definitive case law regarding whether evidence of a seatbelt would be admissible in a cases analogous to our client's. However, we can look to the Fifth Circuit for guidance of how the Texas Supreme Court might interpret law since the repeal of Section 545.413(g).

In *Hodges v. Mack Trucks, Inc.,* the Fifth Circuit held that the Texas state statute prohibiting the admission of evidence of seatbelt use or nonuse in civil trials did not bar a truck manufacturer's introduction of evidence that the truck driver was not wearing a seatbelt at the time of his injury in an ejection-type secondary collision, in order to negate causation in the driver's defective-design products liability action alleging failure of door latch. *Hodges,* 474 F.3d 188, 202 (5h Cir. 2006). This case involved a truck driver injured in a secondary collision in 2002, Section 545.413(g) applied because of the year in which the accident occurred and his wife brought a diversity products liability action against the truck's manufacturer, alleging that the defective door latch installed by the manufacturer had contributed to his injuries, and against the manufacturer of the seatbelt installed in the truck. *Id.* at 192. Following the driver's settlement with seatbelt manufacturer, the trial court entered a verdict against the truck manufacturer, Mack Trucks. *Id.* Mack appealed and sought judgment as a matter of law or in the alternative a new trial, claiming the trial court improperly excluded evidence concerning the use, or non use, of the seatbelt by the injured driver, James Hodges. *Id.*

The Fifth Circuit held:

> . . . [I]n secondary-collision product liability actions, such seatbelt evidence may be admissible to show, or, as in this action, rebut, the essential element of causation. Seatbelt evidence was necessary for Mack to rebut the essential element of causation-whether its door latch was the proximate cause of Hodges' injuries-and, ultimately, to defeat a crashworthiness claim. Such evidence is *not* prohibited by subsection (g). *Id.* at 202.

It then also noted that this reasoning is "arguably . . . also demonstrated by the repeal of subsection (g), even though that subsection applies here." *d.* The *Hodges* court continued to acknowledge the exception to Section 545.413(g) in crashworthiness cases where the seatbelt evidence could show or rebut the essential element of causation, cases in which the vehicle's safety related features were at issue, but more importantly, it suggested that the evidence of seatbelt use would be admissible without such an analysis in light of the repeal of Section 545.413.

3. Commentator's Interpretation of HB 4

One commentator also acknowledges that HB 4 appears to have authorized the admission of evidence regarding seat belt usage. Brian Bagly, *The Seat Belt Defense in Texas,* 35 STMLJ 707, 729 (2004). He suggests that because the old legislative language making seatbelt evidence in admissible has been deleted, this strongly implies that defendants in civil suits can now attempt to successfully raise the seatbelt defense. *Id.* Nonetheless, he notes that despite this implication, the defense has yet to be recognized in Texas and argues for a similar judicial recognition as has been done in Arizona. *Id.*

Other commentators believe the true impact of HB 4 remains to be seen, particularly in light of *Pool v. Ford Motor Co.'s* holding. *Part Two: Detailed Analysis of Judicial Reforms,* 36 TXTLR 51, 139 (2005); They explain that the *Pool* court held that, by statute, the failure was not admissible, but then states that "we reaffirm that failure to wear a [seatbelt] is not evidence of contributory negligence. *Id.* Such holding, they suggest, may preclude the full use of seatbelt evidence. Furthermore, they also acknowledge that it is unclear from the holding in *Pool* whether the court is merely stating that the failure to wear a seatbelt is not negligence that was the cause of the occurrence, as opposed to negligence that was the cause of enhanced injuries.

D. Failure of Motorcyclist to Wear a Helmet

§ 661.003. Offenses Relating to Not Wearing Protective Headgear

We have found no Texas case law directly interpreting the admissibility of evidence of failure to wear a motorcycle helmet.

Under Texas law, drivers 21 years of age or older are not required to wear a helmet in Texas, provide they have completed a motorcycle safety course, or is covered by health insurance. Tex. Transp. Code. Sec. 661.003 (Vernon 2012).

(a) A person commits an offense if the person:

(1) operates or rides as a passenger on a motorcycle on a public street or highway; and

(2) is not wearing protective headgear that meets safety standards adopted by the department.

(b) A person commits an offense if the person carries on a motorcycle on a public street or highway a passenger who is not wearing protective headgear that meets safety standards adopted by the department.

(c) It is an exception to the application of Subsection (a) or (b) that at the time the offense was committed, the person required to wear protective headgear was at least 21 years old and had successfully completed a motorcycle operator training and safety course under

Chapter 662 or was covered by a health insurance plan providing the person with medical benefits for injuries incurred as a result of an accident while operating or riding on a motorcycle. A peace officer may not arrest a person or issue a citation to a person for a violation of Subsection (a) or (b) if the person required to wear protective headgear is at least 21 years of age and presents evidence sufficient to show that the person required to wear protective headgear has successfully completed a motorcycle operator training and safety course or is covered by a health insurance plan as described by this subsection.

(c-1) A peace officer may not stop or detain a person who is the operator of or a passenger on a motorcycle for the sole purpose of determining whether the person has successfully completed the motorcycle operator training and safety course or is covered by a health insurance plan.

(c-2) The Texas Department of Insurance shall prescribe a standard proof of health insurance for issuance to persons who are at least 21 years of age and covered by a health insurance plan described by Subsection (c).

Evidence of Use or Disuse of Motorcycle Helmet

Whether evidence of use or disuse of a motorcycle helmet is admissible at trail is an open question in Texas. There is no statute in the Transportation Code, Rules of Civil Evidence, the Civil Practice & Remedies Code, or elsewhere either strictly prohibiting or expressly approving of the admission of said evidence at trial. Further, there is no express holding from the Supreme Court of Texas or from any of the Courts of Appeals on this issue.

There are Texas cases from that have touched on the issue of helmet use as evidence. In the *Thompson* case, the Kawasaki defendants designated an expert witness who testified about helmet safety and the effects of the deceased rider's failure to wear a helmet at the time of the accident. The plaintiffs' complaints about this witnesses testimony regarded whether this witness was properly designated and the foundation of his opinions. Plaintiffs' points of error on appeal were not couched in terms of the general admissibility of helmet use/disuse. The Dallas Court of Appeals described his testimony as material issues crucial to the jury determination that there was no liability on one of the Kawasaki defendants. The Court of Appeals found there to be error in admitting his testimony from a procedural standpoint when combined with the materiality of his testimony in light of the problems with his designation. The foundation of his opinion was met with approval by the Court of Appeals. *Thomson, et al., v. Kawasaki Motors, et al.*, 824 S.W.2d 212, 217-218 (Tex.App.-Dallas 1992, reversed on other grounds by 872 S.W.2d 221). The Supreme Court of Texas, in reversing the Court of Appeals, did not address the issue of helmet use. There is no case from the Supreme Court of Texas setting a bright line rule on the admissibility of helmet use evidence.

There have been other cases where the use or lack of use of motorcycle or batting helmets has been an issue – and the merits of this evidence was discussed in the traditional sense, i.e., regarding the admissibility or the effect of such evidence under the standard procedural and evidentiary rules, and not from the standpoint of this type of evidence being expressly admissible or inadmissible in all aspects. *See Hall v. Martin*, 851 S.W.2d 905 (Tex.App.-Beaumont 1993, writ denied, cert. denied); *Sanchez v. Brownsville Sports*, 51 S.W.3d 643 (Tex.App.-Corpus

Christi 2001, review granted, vacated pursuant to settlement); and *Downing v. Little League Baseball, Inc.*, 2000 WL 145450 (Tex.App.-Beaumont 2000, no pet. hist.).

The answer is then, whether you seek to have this evidence admitted or excluded, there is a chance that it could be deemed admissible or inadmissible at trial, dependent of course on the trial courts' case-by-case rulings from a procedural and/or evidentiary standpoint while serving in their role as gatekeepers. It would be expected that this could be an issue to be addressed during the *motion in limine* phase of the pretrial hearing.

E. Evidence of Alcohol or Drug Intoxication

Several Texas statutes address issues associated with drug and alcohol intoxication.

§ 724.011. Consent to Taking of Specimen

(a) If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place, or a watercraft, while intoxicated, or an offense under Section 106.041, Alcoholic Beverage Code, the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration or the presence in the person's body of a controlled substance, drug, dangerous drug, or other substance.

(b) A person arrested for an offense described by Subsection (a) may consent to submit to the taking of any other type of specimen to determine the person's alcohol concentration.
Tex. Trans. Code §724.011 (Vernon 2012).

§ 724.012. Taking of Specimen

(a) One or more specimens of a person's breath or blood may be taken if the person is arrested and at the request of a peace officer having reasonable grounds to believe the person:

(1) while intoxicated was operating a motor vehicle in a public place, or a watercraft; or

(2) was in violation of Section 106.041, Alcoholic Beverage Code.

(b) A peace officer shall require the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily:

(1) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident:

(A) any individual has died or will die;

(B) an individual other than the person has suffered serious bodily injury; or

(C) an individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment;

(2) the offense for which the officer arrests the person is an offense under Section 49.045, Penal Code; or

(3) at the time of the arrest, the officer possesses or receives reliable information from a credible source that the person:

(A) has been previously convicted of or placed on community supervision for an offense under Section 49.045, 49.07, or 49.08, Penal Code, or an offense under the laws of another state containing elements substantially similar to the elements of an offense under those sections; or

(B) on two or more occasions, has been previously convicted of or placed on community supervision for an offense under Section 49.04, 49.05, 49.06, or 49.065, Penal Code, or an offense under the laws of another state containing elements substantially similar to the elements of an offense under those sections.

(c) The peace officer shall designate the type of specimen to be taken.

(d) In this section, "bodily injury" and "serious bodily injury" have the meanings assigned by Section 1.07, Penal Code.

Tex. Trans. Code § 724.012 (Vernon 2012).

§ 724.013. Prohibition on Taking Specimen if Person Refuses; Exception

Except as provided by Section 724.012(b), a specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer.

Tex. Trans. Code § 724.013 (Vernon 2012).

§ 724.061. Admissibility of Refusal of Person to Submit to Taking of Specimen

A person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial.

Tex. Trans. Code § 724.061 (Vernon 2012).

§ 724.062. Admissibility of Refusal of Request for Additional Test

The fact that a person's request to have an additional analysis under Section 724.019 is refused by the officer or another person acting for or on behalf of the state, that the person was not provided a reasonable opportunity to contact a person specified by Section 724.019(a) to take the specimen, or that reasonable access was not allowed to the arrested person may be introduced into evidence at the person's trial.

Tex. Trans. Code § 724.062 (Vernon 2012).

§ 724.063. Admissibility of Alcohol Concentration or Presence of Substance

Evidence of alcohol concentration or the presence of a controlled substance, drug, dangerous drug, or other substance obtained by an analysis authorized by Section 724.014 is admissible in a civil or criminal action.

Tex. Trans. Code § 724.063 (Vernon 2012).

Further Analysis:

In an unpublished opinion, the Houston Court of Appeals for has considered this case. Ticknor v. Doolan, 2006 WL 2074721 (Tex.App.-Hous. (14 Dist.) Jul 27, 2006) (NO. 14-05-00520-CV), review denied (Nov 10, 2006)

A. Evidence of Alcohol Consumption and Intoxication is Relevant.

Evidence of alcohol consumption is relevant and admissible evidence bearing on the issues of causation and contributory negligence. *Trans-State Pavers, Inc. v. Haynes;* 808 S.W.2d 727, 733 (Tex.App.-Beaumont 1991, writ denied). Although evidence of intoxication, standing alone, does not establish negligence or proximate cause, it is an evidentiary fact to be considered by the jury in assessing contributory negligence. *Benoit v. Wilson,* 239 S.W.2d 792, 798 (Tex.1951); *see also Scott v. Gardner,* 137 Tex. 628, 637, 156 S.W.2d 513, 518 (1941) ("[drunkenness] is a fact admissible in evidence as tending to prove negligence."); *Gunter v. Morgan,* 473 S.W.2d 952, 954 (Tex.Civ.App.-Texarkana 1971, no writ) (evidence tending to prove that a person was impaired by the use of alcohol is admissible and may be considered by the jury when "vigilance, judgment or reactions and similar matters are at issue.")

Here, Doolan's "vigilance, judgment or reactions" are at issue. Contrary to Doolan's assertions, Ticknor does not base her allegations of contributory negligence solely on evidence of Doolan's intoxication, but offered testimony that Doolan suddenly veered in front of her. Moreover, Doolan's alcohol consumption prior to the accident bears on the weight afforded to his

recollection of events. In sum, because evidence of Doolan's alcohol consumption is relevant to the claims and defenses in the case, the evidence is rebuttably presumed to be admissible. *See* TEX.R. EVID. 402. *Id.*

B. Expert Testimony that Intoxication Caused the Accident Is Not a Prerequisite to Admissibility.

Doolan urged the trial court to exclude alcohol-related evidence because there is no "reliable evidence that causally connects alcohol consumption or intoxication to the cause of this collision...." As the record and the briefs make clear, this objection was based on the assumption that evidence of Doolan's alcohol consumption was properly excluded if Ticknor failed to offer expert opinion testimony that Doolan's alleged intoxication was a cause of the accident. This assumption is incorrect. No expert evidence of causation is required in this case, as causation can be proved by circumstantial evidence and inference. *See Havner v. E-Z Mart Stores, Inc.,* 825 S.W.2d 456, 459 (Tex.1992) ("Nor 'need [causation] be supported by direct evidence, as circumstantial evidence and inferences therefrom are a sufficient basis for a finding of causation.' ") (quoting *City of Gladewater v. Pike,* 727 S.W.2d 514, 518 (Tex.1987)); *see also El Chico Corp. v. Poole,* 732 S.W.2d 306, 311 (Tex.1987) ("we know by *common knowledge* that alcohol distorts perception, slows reaction, and impairs motor skills ....") (emphasis added).

Doolan asked the trial court to apply the requirements governing **admissibility** of **expert** opinion testimony to the **admissibility** of all evidence of his alcohol consumption. Although the trial court acts as a gatekeeper in assessing the reliability of scientific methods on which an **expert** opinion is based, *See Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 726 (Tex.1998) ("fundamental requirements of reliability and relevance are applicable to all expert testimony offered under [Tex.R. Evid. 702] ... All expert testimony should be shown to be reliable before it is admitted.") such assessments are not preconditions to the **admission** of factual evidence of alcohol consumption, business records showing blood-alcohol levels, or non-**expert** opinions regarding **intoxication**. Although the trial court granted several motions excluding expert testimony, those rulings were not appealed. Doolan did not move to exclude the expert testimony of Dr. Kushwaha.

See Missouri-Kansas-Texas R.R. Co. v. May, 600 S.W.2d 755, 756 (Tex.1980) ("The hospital lab report showing results of a blood-alcohol test is **admissible** as a business record of the hospital when the evidence shows that the record was made in the regular course of business and the other requirements of [TEX.R. EVID. 902] are met."); *Vaughn v. State,* 493 S.W.2d 524, 525 (Tex.Crim.App.1972) ("It is elementary in Texas that one need not be an **expert** in order to express an opinion upon whether a person he observes is **intoxicated**."); *also compare* Tex.R. Evid. 701 (governing opinion testimony by lay witnesses) *with* TEX.R. EVID. **702** (governing testimony by **experts**). Thus, Ticknor was not required to offer **expert** testimony that Doolan's alcohol use or **intoxication** caused the accident in order to present such evidence.

The test for admissibility of expert testimony is instead found in TEX. R. EVID. 702: If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining whether the proffered testimony satisfies Rule 702, a trial court may consider the following non-exclusive factors: (1) the extent to which the theory has been or can be tested; (2) the extent to which the

technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *E.I. du Pont de Nemours & Co., Inc. v. Robinson,* 923 S.W.2d 549, 557 (Tex.1995).

Ticknor v. Doolan, 2006 WL 2074721 (Tex.App.-Hous. (14 Dist.) Jul 27, 2006) (NO. 14-05-00520-CV), review denied (Nov 10, 2006)

With respect to admissibility of possession of narcotics absent evidence of intoxication, Texas Rule of Evidence 403 holds:

Exclusion of Relevant Evidence on Special Grounds

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Tex. R. Evid. 403

F. Testimony of Investigating Police Officer

Generally, accident reports are admissible under Texas Rules of Evidence 803(8) as an exception to the hearsay rule.] *See* TEX. R. EVID. 803(8); *See also Griffin v. Carson*, 2009 WL 1493467 (Tex.App.—Houston [1st Dist.] 2009. Rule 803(8) provides for the admissibility of reports of public offices or agencies set forth in "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report...." *Id*. However, in some instances, an accident report is properly excluded if it contains expert opinions. *See McRae v. Echols*, 8 S.W.3d 797, 800 (Tex.App.—Waco 2000, pet. denied).

In *Pilgrim's Pride Corp.*, the trial court held that the police officer's opinion on the cause of the accident contained in his public records police report was inadmissible under Rule 803(8) in a personal injury action because the officer was insufficiently qualified to give an expert opinion regarding whose negligence caused the accident. The court went on to state "a trial court has the discretion, and indeed the obligation, to exclude an entire report or portions thereof – whether narrow 'factual' statements or broader 'conclusions' – that the court determines untrustworthy." *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 892 n.2 (Tex. App.—Texarkana 2004, pet. denied) Furthermore, in many Texas courts, police officers are often found not qualified to render opinions as to the causation of car accidents based on their position and/or training as police officers alone. *See Clark v. Cotton*, 573 S.W.2d 886 (Tex.App.—Beaumont 1978)(the court found that even the investigating officer who had "been with the Department of Public Safety eight and one-half years, had received seventeen weeks of training, and had investigated 350 accidents" was qualified to opine as to the ultimate cause of the accident); *Lopez v. Southern Pacific Transp. Co.*, 847 S.W.2d 330 (Tex.App.—El Paso 1993)(officer not qualified to render causation opinion based on his position as a police officer alone); *St. Louis Southwestern R. Co. v. King*, 817 S.W.2d 760 (Tex.App.—Texarkana 1991)(an officer present immediately after the accident did not qualify to give an expert opinion as to causation based

solely on years of service and attendance at the policy academy and seminar on accident investigation).

Nevertheless, even if some of the more technical aspects of accident reconstruction are generally outside the competence of most law enforcement officers, our own Court has stated that an investigating officer, once shown to be qualified, may properly base an estimate of speed upon skid marks. *Rogers,* 654 S.W.2d at 514; *see also Adams v. Smith,* 479 S.W.2d 390, 395 (Tex.Civ.App.—Amarillo 1972, no writ). It has thus repeatedly been held to be within the trial court's discretion to allow a law enforcement officer to testify as an expert, based on police training schools and experience in prior accident investigations, regarding the speed of a vehicle based on the skid marks left at the scene of an accident. **Trailways, Inc. v. Clark** 794 S.W.2d 479 Tex.App.–Corpus Christi,1990, no writ) (citing *Rogers; Bates v. Barclay,* 484 S.W.2d 955 (Tex.Civ.App.—Beaumont 1972, writ ref'd n.r.e.)).

G. Expert Testimony

Texas Rules of Evidence 702 and 704 establish the basic parameters for expert testimony, as well as the standard in Texas for an expert to testify as to ultimate facts in Texas state courts. Two Texas Supreme Court cases, the *Robinson* and *Havner* opinions, are particularly instructive on the standards for admission of expert testimony.

702. Testimony by Experts

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Tex. R. Evid. 702

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Tex. R. Evid. 704

With respect to reliability and admissibility of expert opinion, The Texas Supreme Court, in reliance on seminal U.S. Supreme Court opinion in *Daubert v Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) has held:

The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *United States v. Downing,* 753 F.2d 1224, 1242 (3d Cir.1985); *see Daubert,* 509 U.S. at 589–93, 113 S.Ct. at 2795–96. Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. 3 WEINSTEIN & BERGER,

WEINSTEIN'S EVIDENCE, ¶ 702 [02] (1994). It is thus inadmissible under Rule 702 as well as under Rules 401 and 402.

In addition to being relevant, the underlying scientific technique or principle must be reliable. Scientific evidence which is not grounded "in the methods and procedures of science" is no more than "subjective belief or unsupported speculation." *Daubert,* 509 U.S. at 590, 113 S.Ct. at 2795. Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702. *Kelly,* 824 S.W.2d at 572 (quoting Kreiling, *Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence,* 32 ARIZ.L.REV. 915, 941–42 (1990)).

There are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702. These factors include, but are not limited to:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert, 3 WEINSTEIN & BERGER, *supra,* ¶ 702[03];

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

We emphasize that the factors mentioned above are non-exclusive. Trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence. The factors a trial court will find helpful in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each particular case.

If the trial judge determines that the proffered testimony is relevant and reliable, he or she must then determine whether to exclude the evidence because its probative value is outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX.R.CIV.EVID. 403; *see Daubert,* 509 U.S. at 595–96, 113 S.Ct. at 2798; *Kelly,* 824 S.W.2d at 572; *Dudley v. Humana Hosp. Corp.,* 817 S.W.2d 124, 127 (Tex.App.—Houston [14th Dist.] 1991, no writ).

E.I. du Pont de Nemours and Co. v. Robinson, 923 S.W.2d 549, 557 (Tex.1995).

Further, with respect to foundational aspect of the experts opinion, the Texas Supreme Court has held:

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.

Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706, 714 (Tex.1997),

However, opining on the *Robinson* opinion, the Texas Supreme Court has further held:

An expert witness may testify regarding 'scientific, technical, or other specialized' matters if the expert is qualified and if the expert's opinion is relevant and based on a reliable foundation." *Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 578 (Tex.2006) (citing TEX.R. EVID. 702). In determining whether expert testimony is reliable, a court should consider the factors we set out in *E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 557 (Tex.1995),[FN2] as well as the expert's experience, knowledge, and training. *See Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 726–27 (Tex.1998) (deeming expert testimony based on the latter considerations unreliable when "there is simply too great an analytical gap between the data and the opinion proffered") (citing *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)); *see also* TEX.R. EVID. 702 (providing for witnesses qualified as experts "by knowledge, skill, experience, training, or education").
…
[I]n very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson,* or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based on a qualified expert's experience. *Whirlpool Corp. v. Camacho,* 298 S.W.3d 631, 638 (Tex.2009); *see also Mack Trucks,* 206 S.W.3d at 579 ("[T]he criteria for assessing reliability must vary depending on the nature of the evidence.").

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***Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211**, 215-16 **(Tex.2010)**.

H. Collateral Source

The collateral source rule precludes any reduction in a tortfeasor's liability because of benefits received by the plaintiff from someone else. *Haygood v. De Escabedo,* 356 S.W.3d 390 (Tex.2011). In particular, if medical services are provided gratuitously to a plaintiff, he may still recover them from the tortfeasor. *See Tex. Power & Light Co. v. Jacobs,* 323 S.W.2d 483, 494–95 (Tex.Civ.App.-Waco 1959, writ ref'd n.r.e.); *see also Oil Country Haulers, Inc. v. Griffin,* 668 S.W.2d 903, 904 (Tex.App.-Houston [14th Dist.] 1984, no writ). The collateral source rule reflects "the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall to the tortfeasor." *Haygood,* 356 S.W.3d at 395. Thus, under the collateral source rule, a plaintiff can recover for services paid for from a charitable source.

The collateral source rule is a rule of both evidence and damages. *Taylor v. American Fabritech, Inc.,* 132 S.W.3d 613, 626 (Tex.App.-Houston [14th Dist.] 2004, pet. denied) (citing *Lee v. Lee,* 47 S.W.3d 767, 777 (Tex.App.-Houston [14th Dist.] 2001, pet. denied); *Exxon Corp. v. Shuttlesworth,* 800 S.W.2d 902, 907-08 (Tex.App.-Houston [14th Dist.] 1990, no writ); Restatement (Second) of Torts § 920A (1979)).

Additional application of the collateral source rule:

The long-recognized "collateral source rule," precludes a tortfeasor from obtaining the benefit of payment conferred upon the injured party from sources other than the tortfeasor. *See Castillo v. American Garment Finishers Corp.,* 965 S.W.2d 646, 650 n. 2 (Tex.App.—El Paso 1998, no writ). *See Lee v. Lee* 47 S.W.3d 767, 777 Tex.App.–Houston [14 Dist.],2001. no pet. In Texas, the collateral source rule has been held to apply in cases where the injured party **received insurance benefits**, *see Brown v. American Transfer & Storage Co.,* 601 S.W.2d 931, 934 (Tex.1980) (emphasis added), general fringe benefits, *see McLemore v. Broussard,* 670 S.W.2d 301, 303 (Tex.App.—Houston [1st Dist.] 1983, no writ), gratuitous services, *see Oil Country Haulers, Inc. v. Griffin,* 668 S.W.2d 903, 904 (Tex.App.—Houston [14th Dist.] 1984, no writ), and worker's compensation benefits. *See Lee–Wright, Inc. v. Hall,* 840 S.W.2d 572, 582 (Tex.App.—Houston [1st Dist.] 1992, no writ).

Special consideration under the new paid or incurred laws.

Section 41.0105 of the Texas Civil Practice and Remedies Code provides:

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

TEX. CIV. PRAC. & REM.CODE ANN. § 41.0105 (Vernon 2012). In *Haygood,* the Supreme Court discussed the collateral source rule and section 41.0105 in determining whether a plaintiff could recover full "list" prices for medical services in cases when a health care provider has agreed to accept payment of lower reduced rates by virtue of contracts with insurance carriers and Medicare and Medicaid regulations. In discussing that issue, the Supreme Court first made clear that Texas law allows a plaintiff to recover "reasonable medical expenses." However, the Court explained that determining what expenses were "reasonable" in a given case has become difficult in modern practice where medical providers accept payments far less than

amounts billed based on contracts with insurance carriers and Medicare regulations.

The court held that limiting a plaintiff to recovery of these reduced fees did not violate the **collateral source rule**. In reaching its decision, the Court noted that the purpose of the **collateral source rule** is to prevent a windfall to the defendant when the plaintiff's costs are paid by a third party for the benefit of the plaintiff. *See Haygood,* 356 S.W.3d at 395. The court first specifically noted that the reduced rates were either determined to be "reasonable" under Medicare or other programs or were reached by agreement by willing providers and willing insurers. *Id.* at 394–95. Thus, the defendant was still required to pay for reasonable expenses and received no windfall. On the other hand, the Court stated that allowing a plaintiff to recover for elevated expenses that a provider could not legally recover would create a windfall to the plaintiff. *See id.* at 395. The Court concluded "the common-law collateral source rule does not allow recovery as damages of medical expenses a health care provider is not entitled to charge." *Id.* at 395.

Payments not a collateral source.

Payments made pursuant to an employee benefit plan have been determined to be a collateral source if the benefit plan constitutes a fringe benefit for the employee, but if the primary purpose of the benefit plan is to protect the employer, then the plan is not a collateral source as against the employer. *Johnson v. Dallas County,* 195 S.W.3d 853, 855 (Tex.App.-Dallas 2006, no pet.); *Taylor v. Am. Fabritech, Inc.,* 132 S.W.3d 613, 626 (Tex.App.-Houston [14th Dist.] 2004, pet. denied); *Castillo v. Am. Garment Finishers Corp.,* 965 S.W.2d 646, 650 (Tex.App.-El Paso 1998, no pet.); *Tarrant County Waste Disposal, Inc. v. Doss,* 737 S.W.2d 607, 611 (Tex.App.-Fort Worth 1987, writ denied) (holding that payments made by an employer's insurance carrier under its accident policy covering on-the-job injuries do not constitute a collateral **163* source and that the nonsubscriber employer was entitled to an offset).

I. Recorded Statements

Witness statements are discoverable in Texas. Tex. R. Civ P. 194.2(i); see also Tex. R. Civ. P. 192.3 (h), which reads in pertinent part:

A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"--regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party. *Id.*

The issue of admissibility of statements generally concerns whether the statement is hearsay, or if hearsay, whether is meets several of the exceptions identified in the Texas Rules of Evidence.

The key Texas Rules of Evidence in this area are:

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

Tex. R. Evid. 106.

Rule 613. Prior Statements of Witnesses: Impeachment and Support

(a) Examining Witness Concerning Prior Inconsistent Statement. In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

(b) Examining Witness Concerning Bias or Interest. In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

(c) Prior Consistent Statements of Witnesses. A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).

Tex. R. Evid. 613.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written verbal expression or (2) nonverbal

conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Matter Asserted. "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.

(d) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(e) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;

(C) one of identification of a person made after perceiving the person; or

(D) taken and offered in a criminal case in accordance with Code of Criminal Procedure article 38.071.

(2) *Admission by party-opponent.* The statement is offered against a party and is:

(A) the party's own statement in either an individual or representative capacity;

(B) a statement of which the party has manifested an adoption or belief in its truth;

(C) a statement by a person authorized by the party to make a statement concerning the subject;

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Tex. R. Evid. 801.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by statute or these rules or by other rules prescribed pursuant to statutory authority. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.

Tex. R. Evid. 802.

Texas Rule of Evidence 803 specifics 24 types of statements that are hearsay exceptions. Those most frequently arising in the context of civil litigation for transportation and automobile accidents are as follows:

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a

regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency;

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or

(C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;

unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) Judgment of Previous Conviction. In civil cases, evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), judging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. In criminal

cases, evidence of a judgment, entered after a trial or upon a plea of guilty or *nolo contendere*, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused. In all cases, the pendency of an appeal renders such evidence inadmissible.

(24) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Tex. R. Evid. 803.

J. Prior Convictions

Generally, prior convictions are not admissible to show actions in conformity therewith. Tex. R Evid. 404. Evidence of convictions of felonies or crimes of moral turpitude may be admitted to attack character if not more than 10 years have elapsed since the date of conviction. Tex. R. Evid. 609. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice of admittance. Tex. R. Evid. 403.

Rule 403. Exclusion of Relevant Evidence on Special Grounds

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Tex. R. Evid. 403.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of victim.* In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the

same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

Tex. R. Evid. 404.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) Pendency of Appeal. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Tex. R. Evid. 609.

K. Driving History

Texas Rule of Evidence 404(b) provides that evidence of other wrongs is not admissible to prove the character of a person in order to show that he acted according to his character. *Nix v. H.R. Management Co.,* 733 S.W.2d 573, 576 (Tex.App.—San Antonio 1987, writ ref'd n.r.e.). Such evidence is admissible, however, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. TEX.R.CIV.EVID. 404(b); *Kanow v. Brownshadel,* 691 S.W.2d 804, 806 (Tex.App.—Houston [1st Dist.] 1985, no writ);

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

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(1) *Character of accused.* Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of victim.* In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

Tex. R. Evid. 404.

In *Castro v. Sebesta,* 808 S.W.2d 189 (Tex.App.—Houston [1st Dist.] 1991, no writ) the Plaintiff argued that the evidence was admissible to prove defendant's state of mind at the time of the accident, which would go to the issue of punitive damages. Plaintiff argues that the evidence was not offered to prove *whether* defendant committed a negligent act (defendant stipulated that); the evidence was offered to prove the *quality* of defendant's act. The Court agreed. The limitation on the evidence imposed by the court did not allow the plaintiff to show defendant's actual level of culpability. That defendant regularly smoked marihuana while driving a car was relevant to the determination of punitive damages. To determine if an award for punitive damages was appropriate, plaintiff should have been able to show the jury just how indifferent the defendant was to the danger of driving a car while smoking marihuana. The exclusion of the testimony was calculated to and probably did cause the rendition of an improper judgment. *Texaco, Inc.,* 729 S.W.2d at 837; TEX.R.APP.P. 81(b)(1). In *Kanow,* this Court held a person's criminal history was admissible to show the *context* of the alleged contract. 691 S.W.2d at 806. Here, we hold that defendant's history of driving while under the influence of illegal drugs was admissible to show the *context* of his actions on the night of the accident. Considering the entire case, if the court had permitted plaintiff to elicit evidence that defendant had regularly smoked marihuana while driving, it probably would have changed the outcome of the verdict, resulting in an improper judgment. Additionally, TEX.R.CIV.EVID. 406 states that evidence of the habit of a person, whether corroborated or not and regardless of the presence of eyewitness, is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit or routine practice. *Acker v. Texas Water Comm'n,* 790 S.W.2d 299, 302 (Tex.1990). Because defendant's routine safety practice, or lack of it, was relevant to the issue of punitive damages, the trial court erred in refusing to permit plaintiff to introduce the testimony of Fisk and Chambers relating to defendant's use of drugs.

L. Fatigue

In an unpublished opinion courts have convalesced this issue and allowed evidence of fatigue in.

Plaintiffs also point to evidence in the Qualcomm data, driver logs, and fuel reports that Nichols violated the hours-of-service regulations the week preceding the accident, including the day before. *See* Ps. Br. at 17 (citing Ps.App. 9). They also cite proof that Nichols was driving on the road instead of in the sleeper berth, as indicated by his log books. *See id.* (citing Ps.App. 10). Stopper also opines that Nichols drove for 755 miles the day before the accident and falsified his

logs. *See* Ps.App. 10. Some of Stopper's other opinions expressed in his affidavit are called into question by his deposition testimony. *See* Ds. Mot. Exclude App. 30–32. But his deposition testimony does not conflict with his conclusion that "based upon the gross inconsistencies between [the] recorded drivers' logs, the Qualcomm satellite vehicle positioning reports, and the fuel reports it was clear that [Nichols] was in violation of hours of service regulations during the week prior to the collision[.]" Ps.App. 9. To the extent that defendants assert that Stopper's testimony is not adequately supported, "[v]igorous cross-examination, presentation of contrary evidence ... are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Plaintiffs have presented evidence that would permit a reasonable trier of fact to find that MSC was grossly negligent. Proof of Nichols' driver log infractions is not, as defendants contend, irrelevant. "Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Rutherford v. Harris County,* 197 F.3d 173, 186 (5th Cir.1999) (Fitzwater, J.) (citing Fed.R.Evid. 401). Nichols' driver log violations were recorded by the "RapidLog system" that MSC used until May 2001, months before the December 2001 accident.[FN8] Stopper's testimony about these violations is relevant—despite the fact that they were recorded several months before the December 2001 accident—because a jury could reasonably infer that violations continued after MSC stopped using RapidLog, that MSC was aware of them, and that it failed to discipline Nichols, consciously indifferent to the effect on others. As the Texas Supreme Court wrote in *General Motors Corp. v. Sanchez,* 997 S.W.2d 584 (Tex.1999):

There is evidence in this case that Nichols committed numerous safety violations, including hours violations that tend to cause fatigue. Moreover, in both cases the company knew of the violations.[FN13] Nichols' RapidLog data indicated 322 log violations from April 2000 to May 2001, including 13 hours of service rule violations in one month. Ps.App. 10. When viewed favorably to plaintiffs, the Qualcomm data from the week before the accident indicates there were further violations of hours of service rules. *See* Ps.App. 10. From this evidence a jury could reasonably infer that in the interim between the end of the RapidLog data (May 2001) and the week before the accident (December 2001), Nichols continued to violate hours of service rules.

MSC contends there is no evidence that fatigue caused the accident and that any theory that fatigue may have caused the accident is mere speculation or surmise that does not constitute competent summary judgment evidence. It also points to evidence that the state trooper on the scene did not record fatigue as a factor and that no witness attributed fatigue as a cause of the accident. In *Dalworth Trucking* the officer who investigated the accident concluded that fatigue was not a factor and that the driver did not attribute the wreck to fatigue. *Dalworth Trucking,* 924 S.W.2d at 733. The court nevertheless concluded, based at least in part on testimony that cumulative fatigue could cause a reduction of alertness, that it was conceivable that the driver had become so fatigued by successive over-hours driving that he could have lost some degree of alertness and possibly failed to see a stop sign or to see it in time to stop. *Id.* at 734. It held that the jury could have reasonably found that the driver's cumulative safety violations caused a lack of alertness that contributed to his failure to see the stop sign in time to stop." *Id.* Plaintiffs have

offered similar evidence in this case. *See* Ps.App. 9–10.

Defendants move to exclude and/or limit the testimony of Stopper, plaintiffs' expert witness. Plaintiffs seek to introduce Stopper's expert opinion to evaluate, *inter alia,* the cause of the accident, opine concerning driver fatigue as a potential cause of the accident, and review driver log entries. Defendants object to the proposed testimony and move the court to limit and/or exclude it.

Defendants contend that Stopper failed to reconstruct the accident, failed to independently map the scene, and relied upon unreliable data. "As a general rule, questions relating to the bases and sources of an experts opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the [trier of fact's] consideration." *Viterbo v. Dow Chem. Co.,* 826 F.2d 420, 422 (5th Cir.1987). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596.

Defendants also argue that Stopper's opinion that fatigue may have contributed to the accident is not based on scientific analysis or independent testing, and that Stopper cannot recall any evidentiary support for Nichols' supposed fatigue beyond his own "professed amazement that Nichols did not notice the stop sign until the last minute." Ds. Br. 5. Defendants essentially argue that Stopper's opinion on this matter is not an expert opinion. Stopper's opinion is based on Nichols' record of hours-of-service violations and his failure to see the warning signs before entering the intersection. Based on the violations of the FMCSRs and analysis of the driver logs, and considering his familiarity with the effects of fatigue, Stopper can opine that fatigue may have been a factor. Stopper's knowledge of FMCSRs and the driver logs will assist the trier of fact.

The court concludes that his testimony is reliable under *Daubert* and consequently denies defendants' motion to exclude and/or limit the trial testimony at issue.

Perez Librado v. M.S. Carriers, Inc., 2004 WL 1490304 (N.D.Tex. Jun 30, 2004)

M. Spoliation

Allegations of spoliation do not give rise to an independent cause of action under Texas law, *Trevino v. Ortega,* 969 S.W.2d 950, 953 (Tex.1998); *Malone v. Foster,* 977 S.W.2d 562, 563 (Tex.1998). Rather, spoliation is an evidentiary concept that is best remedied by the trial court within the context of the core lawsuit in which such allegations arise. *See Trevino,* 969 S.W.2d at 953. In those cases, the non-spoliating party may attempt to remedy the situation by either moving for sanctions or requesting a presumption that the destroyed evidence would not have been favorable to the spoliator. *Id.* at 954 (Baker, J., concurring); *see Brewer v. Dowling,* 862 S.W.2d 156, 159 (Tex.App.-Fort Worth 1993, writ denied) (discussing the presumptions that arise from the non-production of evidence). While rule 166a(i) requires a motion to be specific in alleging a lack of evidence on an essential element of the plaintiff's cause of action, it does not require the defendant to also attack evidentiary components, such as spoliation, that may ultimately be used to prove the challenged element. *See In re Mohawk Rubber Co.,* 982 S.W.2d

494, 497–98 (Tex.App.-Texarkana 1998, no pet.).

Spoliation is the improper destruction of evidence relevant to a case. *Kang v. Hyundai Corp.,* 992 S.W.2d 499, 502 (Tex.App.-Dallas 1999, no pet.). Intentional spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator. *Ordonez v. M.W. McCurdy & Co., Inc.,* 984 S.W.2d 264, 273 (Tex.App.-Houston [1st Dist.] 1998, no pet.). Within the context of the original lawsuit, the factfinder deduces guilt from the destruction of presumably incriminating evidence. *Trevino,* 969 S.W.2d at 952. (internal citation omitted). This traditional response to the problem of evidence spoliation properly frames the alleged wrong as an evidentiary concept, not a separate cause of action. *Id.* Spoliation causes no injury independent from the cause of action in which it arises. *Id.* "If, in the ordinary course of affairs, an individual destroys his or her own papers or objects, there is no independent injury to third parties." *Id.* The destruction becomes relevant only when someone believes that those destroyed items are instrumental to his or her success in a lawsuit. *Id.*

"[W]hen spoliation occurs, there must be adequate measures to ensure that it does not improperly impair a litigant's rights...." *Id.* at 953. It is simple, practical, and logical to rectify any improper conduct within the context of the lawsuit in which it is relevant. *Id.* "Indeed, evolving remedies, sanctions and procedures for evidence spoliation are available under Texas jurisprudence." *Id.* Trial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions. *Id.* As with any discovery abuse or evidentiary issue, there is no one remedy that is appropriate for every incidence of spoliation; the trial court must respond appropriately based upon the particular facts of each individual case. *Id.*

The Supreme Court has explained that [e]vidence may be unavailable for discovery and trial for a variety of reasons. Evidence may be lost, altered or destroyed willfully and in bad faith or it may be lost for reasons completely innocent. Sometimes, lost evidence may be easily replicated, or it may be so marginal that it has little or no effect on the outcome of the case. On other occasions, the loss or destruction of evidence may seriously impair a party's ability to present its case. A trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available. These remedies must generally be fashioned on a case-by-case basis. *Wal-Mart Stores, Inc. v. Johnson,* 106 S.W.3d 718, 721 (Tex.2003) (internal citation omitted).

The loss or destruction of evidence may seriously impair a party's ability to present its case. *Tex. Electric Coop. v. Dillard,* 171 S.W.3d 201, 208 (Tex.App.-Tyler 2005, no pet.) (citing *Wal-Mart Stores, Inc. v. Johnson,* 106 S.W.3d 718, 721 (Tex.2003)). When a party believes that another party has improperly destroyed evidence, it may either request a spoliation presumption instruction or move for other sanctions. *Trevino v. Ortega,* 969 S.W.2d at 954. At that point, a trial court should determine whether a presumption instruction or another sanction. *Id.* The trial court enjoys discretion to fashion an appropriate remedy for negligent spoliation. *See Johnson,* 106 S.W.3d at 721.

Because parties have a duty to reasonably preserve evidence, it is only logical that they should be held accountable for either negligent or intentional spoliation. While allowing a court

to hold a party accountable for negligent as well as intentional spoliation may appear inconsistent with the punitive purpose of remedying spoliation, it is clearly consistent with the evidentiary rationale supporting it because the remedies ameliorate the prejudicial effects resulting from the unavailability of evidence. In essence, it places the burden of the prejudicial effects upon the culpable spoliating party rather than the innocent nonspoliating party. *See Trevino,* 969 S.W.2d at 957 (Baker, J., concurring) (internal citation omitted). "Furthermore, by punishing negligent conduct, courts will deter future spoliation. The theory of deterrence is not merely limited to deterring intentional conduct. It applies equally to negligent conduct." *See id.* at 957 n. 1.

Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the nonproducing party had a duty to preserve the evidence in question. *Dillard,* 171 S.W.3d at 209 (citing *Johnson,* 106 S.W.3d at 722). There must be a sufficient foundational showing that the party who destroyed the evidence had notice both of the potential claim and of the evidence's potential relevance thereto. *Dillard,* 171 S.W.3d at 209 (citing *Johnson,* 106 S.W.3d at 722). An objective test for anticipation of litigation is whether a reasonable person would conclude from the severity of the accident and other circumstances surrounding it that there was a substantial chance for litigation. *Dillard,* 171 S.W.3d at 209 (citing *Johnson,* 106 S.W.3d at 722). "A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed." *See Trevino,* 969 S.W.2d at 955 (Baker, J., concurring).

Settlement

A. Offer of Judgment

1. In Texas this procedure is called "Offer of Settlement". It is governed by Tex. R. Civ. Pro. 167.

2. The purpose of an offer of settlement is to encourage early settlements by shifting the litigation costs to the party that rejected a fair settlement offer.

3. This procedure is only available for claims seeking monetary damages filed after January 1, 2004.

4. The Offer of Settlement Procedure cannot be used in:
    a. Class actions.
    b. Shareholder derivative actions.
    c. Family Code actions.
    d. Worker's compensation actions.
    e. JP Court actions.
    f. At mediation, arbitration or other ADR proceeding.

5. Procedure:
    a. A defendant must invoke Rule 167 by filing a declaration with the court no later than 45 days before trial but not sooner than 60 days before it made an appearance in the case.
    b. Either party may then make a settlement offer that is:
        i. in writing,

ii. state that it is made pursuant to Rule 167,
iii. identify the parties,
iv. state the terms by which all monetary claims may be settled (including attorneys' fees, interests and costs),
v. state a deadline for acceptance, no sooner than 14 days after the offer is made, and
vi. Serve the offer on all parties to whom it is made.

6. If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.

7. "Significantly less favorable" is defined as:
   a. The offeree is a claimant and the judgment is less than 80% of the offer.
   b. The offeree is a defendant and the judgment would be more than 120% of the offer.

8. There are statutory limits on the litigation costs that may be recovered. For suits filed after September 2011 the plaintiff would not be required to pay costs greater than the judgment.

B. Liens

1. Hospital and Emergency Medical Services Provider Lien
   a. A hospital may perfect a lien on a cause of action or claim of a person who
      i. Receives hospital services for injuries caused by an accident that is attributed to the negligence of another person, and
      ii. Is admitted to the hospital within 72 hours of the accident. Tex. Prop. Code §55.002(a)
   b. An emergency medical service provider in a county of 800,000 or less has a similar lien. Tex. Prop. Code §55.002(c).
   c. To perfect the lien the hospital or provider must give notice to the injured individual and file a notice of lien with the county clerk of the county in which services were provided before money is paid to an entitled person because of the injury. Tex. Prop. Code §55.005(a)(d).
   d. When properly perfected the lien attaches to a Texas court judgment or the proceeds of a settlement in the cause of action by the injured person.
   e. A release of a cause of action to which a lien may attach is not valid unless
      i. The charges were paid in full before the execution and delivery of the release,
      ii. The charges were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured person by or on behalf of the other parties to the release; or
      iii. The hospital or provider is a party to the release.

2. Worker's Compensation
   a. An injured employee covered by worker's compensation law may proceed against a

third person claimed to have caused the injury and against the workers' compensation carrier. Lab. C. §417.001.

b. If the employee proceeds against a third party, some or all of the proceeds of the action must be applied to reimburse the carrier for past benefits and medical expenses paid. Lab. C. §417.001(b).
c. Any amount recovered by the injured employee in excess of the benefits already received by the employee is to be treated as an advance against future benefit payments. Lab. C. §417.002.
d. For this reason, an agreed settlement of a third-party claim of an injured worker should allocate the proceeds among the several categories of damages, including past and future medical expenses, loss of earnings and pain and suffering.
e. A workers' compensation carrier who has paid benefits to an employee injured in an automobile accident may not subrogate itself to the employee's claims for uninsured motorist's benefits. *Bogart v. Twin City Fire Insurance Co.,* 473 F.2d 619 (5th Cir. 1973).
f. A workers' compensation carrier is not entitled to receive any pre-judgment interest recovered via a third party action. *Moseley v. State Department of Highways and Public Transportation***,** 748 S.W.2d 226, 226-227 (Tex. 1988).

3. Medicare Liens

a. Whenever a Medicare recipient receives money in resolution of a personal injury claim, Federal law creates an obligation to reimburse Medicare for the care it paid for related to the claim.

b. The Medicare and Medicaid SCHIP Extension Act of 2007 requires all liability insurers, no-fault insurers, workers' compensation insurers, and group health insurers to report detailed information directly to Medicare each time a settlement, judgment, award or other payment is made to a claimant who is entitled to receive Medicare benefits.

c. Failure to comply with the reporting requirements carries a civil penalty of $1,000 per claim, per day.

d. A settlement agreement should explicitly describe the manner in which Medicare is to be paid.

e. An insurance company or other paying party may be subject to **double liability** if it does not ensure that a Medicare lien is paid because if Medicare is not reimbursed, it can collect not only from the injured claimant and his or her attorney, but may also collect from the third-party payor:

4. Medicaid Liens

a. Medicaid is medical assistance that is offered to all persons who receive financial assistance from the state of Texas.
b. The Texas statute regulating Medicaid subrogation, § 32.033, establishes that by filing for, or receiving, medical assistance through the State, the injured person assign his or her right to recovery from (1) their own personal insurance, (2) other

sources, or, (3) another person whose negligence or wrongdoing caused the applicant or recipient's injuries.

c. The State statute, then, like the Medicare lien, applies to PIP payments and uninsured/underinsured motorist benefits that, under other subrogation schemes, could not ordinarily be attached as satisfaction of the subrogated interest.

d. Insurers are required to identify each of their insureds whose names appear on a Medicaid data tape (a reference tape containing the certified names of all Medicaid recipients sent out to insurers no more than once a year) in an effort to determine whether or not the insurance company has paid, or should have paid, health benefits for a person for whom Medicaid has footed the bill. TEX. HUM. RES. CODE ANN. § 32.042 (Vernon's Supp. 1994).

e. Texas has written into its Insurance Code a provision that specifically requires accident and group insurance companies to pay the Texas Department of Human Services the actual costs of the medical expenses it has paid for the benefit of their insured, (the injured person), if the insured is entitled to payment for those medical expenses under his or her policy of insurance. TEX. INS. CODE ANN. § 21.49-10 (Vernon's 1981).

C. Minor Settlement

1. For a settlement agreement to be fully binding, it is generally necessary that the parties have the capacity and authority to contract with reference to the subject matter of the compromise. *In the Interest of J__T__H___*, 630 S.W.2d 473, 477 (Tex. App. – San Antonio 1982, no writ).

2. A minor person who is not mentally competent mat be represented by a legal guardian duly appointed by a court exercising probate jurisdiction. Prob. C. §601.

3. The guardian must obtain authority from the appointing court to settle or compromise the ward's estate. Prob. C. §774(a).

4. A minor or incompetent who has no legal guardian may be represented in a lawsuit by a "next friend" who is also authorized to settle litigation only on approval of the trial court. Tex. R. Civ. Pro. 44.

D. Negotiating Directly With Attorneys

1. While representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person the member knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. State Bar Rule 4.02.

E. Confidentiality Agreements

1. Settlement agreements may contain confidentiality provisions. These agreements, however, are subject to the restrictions of Tex. R. Civ. Pro. 76a(2)(b). This rule states the parties cannot by their settlement agreements, without hearing and notice, seal information that relates to matters that may adversely affect the general public health or

safety, the administration of public office, or the operation of government.

F. Releases

1. A release is a contractual surrender by one party of its cause of action against the other party. *Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. App. – San Antonio 1980, writ ref'd n.r.e.).

2. To be effective, the release must identify the parties to the release including the parties, the attorneys and the insurer.

3. The release should describe the dispute and the extent to which the release is intended to settle it.

4. The release should state the consideration for the release.

G. Voidable Releases

1. The case law in Texas indicates that as long as the release contains the necessary provisions it cannot be voided simply because a party is not represented by counsel. *Ostrow v. United Business Machines, Inc.*, 982 S.W.2d 101 (Tex. App. – Houston [1st Dist.] 1998, no pet.

Transportation Law

A. State DOT Regulatory Requirements

The Texas Transportation Code addresses the relation between Texas law and the FMCSR.

§ 644.002. Conflicts of Law

(a) A federal motor carrier safety regulation prevails over a conflicting provision of this title applicable to a commercial vehicle operated in interstate commerce. A rule adopted by the director under this chapter prevails over a conflicting provision of a federal motor carrier safety regulation applicable to a commercial vehicle operated in intrastate commerce.

(b) A safety rule adopted under this chapter prevails over a conflicting rule adopted by a local government, authority, or state agency or officer, other than a conflicting rule adopted by the Railroad Commission of Texas under Chapter 113, Natural Resources Code.

Tex. Transp. Code §644.002 (Vernon 2012).

§ 644.051. Authority to Adopt Rules

(a) The director shall, after notice and a public hearing, adopt rules regulating:

(1) the safe transportation of hazardous materials; and

(2) the safe operation of commercial motor vehicles.

(b) A rule adopted under this chapter must be consistent with federal regulations, including

federal safety regulations.

(c) The director may adopt all or part of the federal safety regulations by reference.

(d) Rules adopted under this chapter must ensure that:

(1) a commercial motor vehicle is safely maintained, equipped, loaded, and operated;

(2) the responsibilities imposed on a commercial motor vehicle's operator do not impair the operator's ability to operate the vehicle safely; and

(3) the physical condition of a commercial motor vehicle's operator enables the operator to operate the vehicle safely.

(e) A motor carrier safety rule adopted by a local government, authority, or state agency or officer must be consistent with corresponding federal regulations.

Tex. Transp. Code §644.051 (Vernon 2012).

644.052. Applicability of Rules

(a) Notwithstanding an exemption provided in the federal safety regulations, other than an exemption relating to intracity or commercial zone operations provided in 49 C.F.R. Part 395, a rule adopted by the director under this chapter applies uniformly throughout this state.

(b) A rule adopted under this chapter applies to a vehicle that requires a hazardous material placard.

(c) A rule adopted under this chapter may not apply to a vehicle that is operated intrastate and that is:

(1) a machine generally consisting of a mast, engine, draw works, and chassis permanently constructed or assembled to be used and used in oil or water well servicing or drilling;

(2) a mobile crane that is an unladen, self-propelled vehicle constructed as a machine to raise, shift, or lower weight; or

(3) a vehicle transporting seed cotton.

Tex. Transp. Code §644.052 (Vernon 2012).

§ 644.053. Limitations of Rules

(a) A rule adopted under this chapter may not:

(1) prevent an intrastate operator from operating a vehicle up to 12 hours following eight

consecutive hours off;

(2) require a person to meet the medical standards provided in the federal motor carrier safety regulations if the person:

(A) was regularly employed in this state as a commercial motor vehicle operator in intrastate commerce before August 28, 1989; and

(B) is not transporting property that requires a hazardous material placard;

(3) require a person who returns to the work-reporting location, is released from work within 12 consecutive hours, has at least eight consecutive hours off between each 12-hour period the person is on duty, and operates within a 150-air-mile radius of the normal work-reporting location to maintain a driver's record of duty status as described by 49 C.F.R. Section 395.8, provided that the person maintains time records in compliance with 49 C.F.R. Section 395.1(e)(5) and documents that verify the truth and accuracy of the time records such as:

(A) business records maintained by the owner that provide the date, time, and location of the delivery of a product or service; or

(B) documents required to be maintained by law, including delivery tickets or sales invoices, that provide the date of delivery and the quantity of merchandise delivered; or

(4) impose during a planting or harvesting season maximum driving and on-duty times on an operator of a vehicle transporting an agricultural commodity in intrastate commerce for agricultural purposes from the source of the commodity to the first place of processing or storage or the distribution point for the commodity, if the place is located within 150 air miles of the source.

(b) For purposes of Subsection (a)(3)(A), an owner's time records must at a minimum include:

(1) the time an operator reports for duty each day;

(2) the number of hours an operator is on duty each day;

(3) the time an operator is released from duty each day; and

(4) an operator's signed statement in compliance with 49 C.F.R. Section 395.8(j)(2).

(c) In this section, “agricultural commodity” means an agricultural, horticultural, viticultural, silvicultural, or vegetable product, bees or honey, planting seed, cottonseed, rice, livestock or a livestock product, or poultry or a poultry product that is produced in this state, either in its natural form or as processed by the producer, including woodchips.

(d) A rule adopted by the director under this chapter that relates to hours of service, an operator's record of duty status, or an operator's daily log, for operations outside a 150-mile radius of the

normal work-reporting location, also applies to and must be complied with by a motor carrier of household goods not using a commercial motor vehicle. In this subsection:

(1) "commercial motor vehicle" has the meaning assigned by Section 548.001; and

(2) "motor carrier" has the meaning assigned by Section 643.001.

Tex. Transp. Code §644.053 (Vernon 2012).

§ 644.054. Regulation of Contract Carriers of Certain Passengers

(a) This section applies only to a contract carrier that transports an operating employee of a railroad on a road or highway of this state in a vehicle designed to carry 15 or fewer passengers.

(b) The department shall adopt rules regulating the operation of a contract carrier to which this section applies. The rules must:

(1) prohibit a person from operating a vehicle for more than 12 hours in a day;

(2) require a person who operates a vehicle for the number of consecutive hours or days the department determines is excessive to rest for a period determined by the department;

(3) require a contract carrier to keep a record of all hours a vehicle subject to regulation under this section is operated;

(4) require a contract carrier to perform alcohol and drug testing of vehicle operators on employment, on suspicion of alcohol or drug abuse, and periodically as determined by the department;

(5) require a contract carrier, at a minimum, to maintain liability insurance in the amount of $1.5 million for each vehicle; and

(6) be determined by the department to be necessary to protect the safety of a passenger being transported or the general public.

(c) The department shall inform contract carriers and railroad companies that employ contract carriers of the requirements of state statutes applicable to contract carriers.

Tex. Transp. Code §644.054 (Vernon 2012).

B. State Speed Limits

§ 545.351. Maximum Speed Requirement

(a) An operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing.

(b) An operator:

(1) may not drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for actual and potential hazards then existing; and

(2) shall control the speed of the vehicle as necessary to avoid colliding with another person or vehicle that is on or entering the highway in compliance with law and the duty of each person to use due care.

(c) An operator shall, consistent with Subsections (a) and (b), drive at an appropriate reduced speed if:

(1) the operator is approaching and crossing an intersection or railroad grade crossing;

(2) the operator is approaching and going around a curve;

(3) the operator is approaching a hill crest;

(4) the operator is traveling on a narrow or winding roadway; and

(5) a special hazard exists with regard to traffic, including pedestrians, or weather or highway conditions.

Tex. Transp. Code §545.351 (Vernon 2012).

§ 545.352. Prima Facie Speed Limits

(a) A speed in excess of the limits established by Subsection (b) or under another provision of this subchapter is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful.

(b) Unless a special hazard exists that requires a slower speed for compliance with Section 545.351(b), the following speeds are lawful:

(1) 30 miles per hour in an urban district on a street other than an alley and 15 miles per hour in an alley;

(2) except as provided by Subdivision (4), 70 miles per hour on a highway numbered by this state or the United States outside an urban district, including a farm-to-market or ranch-to-market road;

(3) except as provided by Subdivision (4), 60 miles per hour on a highway that is outside an urban district and not a highway numbered by this state or the United States;

(4) outside an urban district:

(A) 60 miles per hour if the vehicle is a school bus that has passed a commercial motor vehicle inspection under Section 548.201 and is on a highway numbered by the United States or this state, including a farm-to-market road; or

(B) 50 miles per hour if the vehicle is a school bus that:

(i) has not passed a commercial motor vehicle inspection under Section 548.201; or

(ii) is traveling on a highway not numbered by the United States or this state;

(5) on a beach, 15 miles per hour; or

(6) on a county road adjacent to a public beach, 15 miles per hour, if declared by the commissioners court of the county.

(c) The speed limits for a bus or other vehicle engaged in the business of transporting passengers for compensation or hire, for a commercial vehicle used as a highway post office vehicle for highway post office service in the transportation of United States mail, for a light truck, and for a school activity bus are the same as required for a passenger car at the same time and location.

(d) In this section:

(1) "Interstate highway" means a segment of the national system of interstate and defense highways that is:

(A) located in this state;

(B) officially designated by the Texas Transportation Commission; and

(C) approved under Title 23, United States Code.

(2) "Light truck" means a truck with a manufacturer's rated carrying capacity of not more than 2,000 pounds, including a pick-up truck, panel delivery truck, and carry-all truck.

(3) "Urban district" means the territory adjacent to and including a highway, if the territory is improved with structures that are used for business, industry, or dwelling houses and are located at intervals of less than 100 feet for a distance of at least one-quarter mile on either side of the highway.

(e) An entity that establishes or alters a speed limit under this subchapter shall establish the same speed limit for daytime and nighttime.

Tex. Transp. Code §545.352 (Vernon 2012).

§ 545.363. Minimum Speed Regulations

(a) An operator may not drive so slowly as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law.

(b) When the Texas Transportation Commission, the Texas Turnpike Authority, the commissioners court of a county, or the governing body of a municipality, within the jurisdiction of each, as applicable, as specified in Sections 545.353 to 545.357, determines from the results of an engineering and traffic investigation that slow speeds on a part of a highway consistently impede the normal and reasonable movement of traffic, the commission, authority, county commissioners court, or governing body may determine and declare a minimum speed limit on the highway.

(c) If appropriate signs are erected giving notice of a minimum speed limit adopted under this section, an operator may not drive a vehicle more slowly than that limit except as necessary for safe operation or in compliance with law.

Tex. Transp. Code §545.353 (Vernon 2012).

C. Overview of State CDL Requirements

§ 522.003. Definitions

In this chapter:

(5) "Commercial motor vehicle" means a motor vehicle or combination of motor vehicles used to transport passengers or property that:

(A) has a gross combination weight or a gross combination weight rating of 26,001 or more pounds, including a towed unit with a gross vehicle weight or a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight or a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport 16 or more passengers, including the driver; or

(D) is transporting hazardous materials and is required to be placarded under 49 C.F.R. Part 172, Subpart F.

Tex. Transp. Code §522.003 (Vernon 2012).

§ 522.011. License or Permit Required; Offense

(a) A person may not drive a commercial motor vehicle unless:

(1) the person:

(A) has in the person's immediate possession a commercial driver's license issued by the

department appropriate for the class of vehicle being driven; and

(B) is not disqualified or subject to an out-of-service order;

(2) the person:

(A) has in the person's immediate possession a commercial driver learner's permit issued by the department; and

(B) is accompanied by the holder of a commercial driver's license issued by the department appropriate for the class of vehicle being driven, and the license holder:

(i) occupies a seat beside the permit holder for the purpose of giving instruction in driving the vehicle; and

(ii) is not disqualified or subject to an out-of-service order; or

(3) the person is authorized to drive the vehicle under Section 522.015.

(b) A person commits an offense if the person violates Subsection (a).

(c) An offense under this section is a Class C misdemeanor.

(d) It is a defense to prosecution under Subsection (a)(1)(A) if the person charged produces in court a commercial driver's license that:

(1) was issued to the person;

(2) is appropriate for the class of vehicle being driven; and

(3) was valid when the offense was committed.

Tex. Transp. Code §522.011 (Vernon 2012).

§ 522.022. License Requirements

The department may not issue a commercial driver's license other than a nonresident license to a person unless the person:

(1) has a domicile in this state;

(2) has passed knowledge and skills tests for driving a commercial motor vehicle that comply with minimal federal standards established by 49 C.F.R. Part 383, Subparts G and H; and

(3) has satisfied the requirements imposed by the federal act, federal regulation, or state law.

Tex. Transp. Code §522.022 (Vernon 2012).

§ 522.023. Tests

(a) The tests required by Section 522.022 must be prescribed by the department.

(b) The knowledge test must be conducted by the department. The department shall provide each applicant who has a reading impairment an opportunity to take the knowledge test orally or, at the applicant's option, the applicant may have the questions read to the applicant and may answer in writing.

(c) Except as provided by Subsection (d), the department must conduct the skills test.

(d) The department may authorize a person, including an agency of this or another state, an employer, a private driver training facility or other private institution, or a department, agency, or instrumentality of local government, to administer the skills test specified by this section if:

(1) the test is the same that would be administered by the department; and

(2) the person has entered into an agreement with the department that complies with 49 C.F.R. Section 383.75.

(e) The skills test must be taken in a commercial motor vehicle that is representative of the type of vehicle the person drives or expects to drive.

(f) The department may waive the skills test for an applicant who meets the requirements of 49 C.F.R. Section 383.77.

(g) The department shall test the applicant's ability to understand highway traffic signs and signals that are written in English.

(h) An applicant who pays the applicable fee required by Section 522.029 is entitled to three examinations of each element under Section 522.022. If the applicant has not qualified after the third examination, the applicant must submit a new application accompanied by the required fee.

(i) The department may not issue a commercial driver's license to a person who has not passed each examination required under this chapter.

Tex. Transp. Code §522.023 (Vernon 2012).

§ 521.081. Class A License

A Class A driver's license authorizes the holder of the license to operate:

(1) a vehicle with a gross vehicle weight rating of 26,001 pounds or more; or

(2) a combination of vehicles that has a gross combination weight rating of 26,001 pounds or more, if the gross vehicle weight rating of any vehicle or vehicles in tow is more than 10,000 pounds.

Tex. Transp. Code §522.081 (Vernon 2012).

§ 521.082. Class B License

(a) A Class B driver's license authorizes the holder of the license to operate:

(1) a vehicle with a gross vehicle weight rating that is more than 26,000 pounds;

(2) a vehicle with a gross vehicle weight rating of 26,000 pounds or more towing:

(A) a vehicle, other than a farm trailer, with a gross vehicle weight rating that is not more than 10,000 pounds; or

(B) a farm trailer with a gross vehicle weight rating that is not more than 20,000 pounds; and

(3) a bus with a seating capacity of 24 passengers or more.

(b) For the purposes of Subsection (a)(3), seating capacity is computed in accordance with Section 502.162, except that the operator's seat is included in the computation.

Tex. Transp. Code §522.082 (Vernon 2012).

§ 521.083. Class C License

A Class C driver's license authorizes the holder of the license to operate:

(1) a vehicle or combination of vehicles not described by Section 521.081 or 521.082; and

(2) a vehicle with a gross vehicle weight rating of less than 26,001 pounds towing a farm trailer with a gross vehicle weight rating that is not more than 20,000 pounds.

Tex. Transp. Code §522.083 (Vernon 2012).

§ 521.085. Type of Vehicle Authorized

(a) Unless prohibited by Chapter 522, and except as provided by Subsection (b), the license holder may operate any vehicle of the type for which that class of license is issued and any lesser type of vehicle other than a motorcycle or moped.

(b) Subsection (a) does not prohibit a license holder from operating a lesser type of vehicle that is a motorcycle described by Section 521.001(a)(6-a).

Tex. Transp. Code §522.085 (Vernon 2012).

Insurance Issues

A. State Minimum Limits of Financial Responsibility

§ 601.051. Requirement of Financial Responsibility

A person may not operate a motor vehicle in this state unless financial responsibility is established for that vehicle through:

(1) a motor vehicle liability insurance policy that complies with Subchapter D;

(2) a surety bond filed under Section 601.121;

(3) a deposit under Section 601.122;

(4) a deposit under Section 601.123; or

(5) self-insurance under Section 601.124.

§ 601.072. Minimum Coverage Amounts; Exclusions

(a) Expired.

(a-1) Effective January 1, 2011, the minimum amounts of motor vehicle liability insurance coverage required to establish financial responsibility under this chapter are:

(1) $30,000 for bodily injury to or death of one person in one accident;

(2) $60,000 for bodily injury to or death of two or more persons in one accident, subject to the amount provided by Subdivision (1) for bodily injury to or death of one of the persons; and

(3) $25,000 for damage to or destruction of property of others in one accident.

(b) The coverage required under this section may exclude, with respect to one accident:

(1) the first $250 of liability for bodily injury to or death of one person;

(2) the first $500 of liability for bodily injury to or death of two or more persons, subject to the amount provided by Subdivision (1) for bodily injury to or death of one of the persons; and

(3) the first $250 of liability for property damage to or destruction of property of others.

(c) The Texas Department of Insurance shall establish an outreach program to inform persons of the requirements of this chapter and the ability to comply with the financial responsibility requirements of this chapter through motor vehicle liability insurance coverage. The

commissioner, by rule, shall establish the requirements for the program. The program must be designed to encourage compliance with the financial responsibility requirements, and must be made available in English and Spanish.

(d) Expired.

§ 601.124. Self-Insurance

(a) A person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the department as provided by this section.

(b) The department may issue a certificate of self-insurance to a person if:

(1) the person applies for the certificate; and

(2) the department is satisfied that the person has and will continue to have the ability to pay judgments obtained against the person.

(c) The self-insurer must supplement the certificate with an agreement that, for accidents occurring while the certificate is in force, the self-insurer will pay the same judgments in the same amounts as an insurer would be obligated to pay under an owner's motor vehicle liability insurance policy issued to the self-insurer if such policy were issued.

(d) The department for cause may cancel a certificate of self-insurance after a hearing. The self-insurer must receive at least five days' notice of the hearing. Cause includes failure to pay a judgment before the 31st day after the date the judgment becomes final.

§ 601.151. Applicability of Subchapter

(a) This subchapter applies only to a motor vehicle accident in this state that results in bodily injury or death or in damage to the property of one person of at least $1,000.

(b) This subchapter does not apply to:

(1) an owner or operator who has in effect at the time of the accident a motor vehicle liability insurance policy that covers the motor vehicle involved in the accident;

(2) an operator who is not the owner of the motor vehicle, if a motor vehicle liability insurance policy or bond for the operation of a motor vehicle the person does not own is in effect at the time of the accident;

(3) an owner or operator whose liability for damages resulting from the accident, in the judgment of the department, is covered by another liability insurance policy or bond;

(4) an owner or operator, if there was not bodily injury to or damage of the property of a person other than the owner or operator;

(5) the owner or operator of a motor vehicle that at the time of the accident was legally parked or legally stopped at a traffic signal;

(6) the owner of a motor vehicle that at the time of the accident was being operated without the owner's express or implied permission or was parked by a person who had been operating the vehicle without that permission; or

(7) a person qualifying as a self-insurer under Section 601.124 or a person operating a motor vehicle for a self-insurer.

B. Uninsured Motorist Coverage

1. UM/UIM Defined:

"Uninsured Motorist" refers to the driver of a motor vehicle who does not carry liability insurance coverage, or to an unidentified driver in a hit-and-run accident, or to an insured driver whose insurance carrier has denied coverage or has become insolvent. *See United Services Automobile Assoc. v. Hestilow*, 754 S.W.2d 754 (Tex. App.—San Antonio 1988); *see* TEX. INS. CODE § 1952.102.

"Underinsured Motorist" refers to a driver of a motor vehicle with liability insurance, but not enough coverage to pay for the damages in the accident. An "underinsured motorist" is defined by statute to mean a motorist operating an insured vehicle "on which there is collectible liability insurance coverage with limits of liability for the owner or operator that were originally lower than, or have been reduced by payment of claims arising from the same accident to, an amount less than the limit of liability stated in the underinsurance coverage of the insured's policy." TEX. INS. CODE § 1952.103.

2. Insurance Company Obligation:

Texas law requires insurers to provide uninsured or underinsured motorist coverage ("UM/UIM coverage") in at least the minimum amounts prescribed by Texas Transportation Code § 601.072. TEX. INS. CODE § 1952.101. To reject UM/UIM coverage, a named insured must provide the insurer with a rejection in writing. *Id.*

3. Stacking:

"Stacking" means collecting from more than one policy on the same claim. Texas permits "inter-policy" stacking, but not "intra-policy" stacking. For example, if one is injured by an uninsured motorist while one is occupying a vehicle with UM coverage, one may collect on both the policy for the occupied vehicle and one's own personal UM motorist policy. *See, e.g., American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972). This is inter-policy stacking. However, one is not permitted to stack or recover from different

policy provisions within the same policy to effect coverage, or, intra-policy stacking. For example, a policy that insures two cars with $20,000 in coverage on each vehicle will not yield $40,000 of UM/UIM coverage. Also, one cannot exhaust the liability limits of a policy and then recover UM/UIM coverage under the same policy.

4. Offsets and Reimbursements:

An insurance carrier may take a credit or offset for Personal Injury Protection benefits it has paid under the same policy, if the policy contains a "non-duplication of benefits" clause.

C. No Fault Insurance

Texas is not a "no-fault" state, in that there is no statutory mandate that insurance policies must cover an insured's dames up to policy limits regardless of fault. Automobile insurance in Texas can be described as a hybrid of fault-based and no-fault insurance. "In 1973, the Legislature enacted Insurance Code *article 5.06-3* to require all automobile liability insurance policies to offer [personal injury protection or] PIP coverage. PIP gives a minimum of $2500 coverage to any covered person -- the insured, members of the insured's household, and occupants of the insured's vehicle -- for reasonable medical expenses and lost wages that result from an accident. PIP coverage, unlike UM/UIM coverage, is a form of no-fault insurance." *Mid-Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 265, 268 (Tex. 1999).

Moreover, Texas law does not prohibit no-fault insurance coverage beyond the $2500 mandated in article 5.06-3(b) and (c). Indeed, a consumer is free to purchase additional no-fault coverage if he or she were inclined to do so and could find a company willing to write such a policy. *See* Tex. Ins. Code art. 5.06-3(g)("nothing contained in this Act shall be construed to prevent an insurer from providing broader benefits than the minimum benefits enumerated in this Act subject to the rules and forms prescribed by the State Board of Insurance.").

Texas statutes and regulations governing insurance clearly recognize the validity of no-fault insurance. *See* Tex. Ins. Code § 1506.002(12).

D. Disclosure of Limits and Layers of Coverage

Texas Rules of Civil Procedure 194 requires the disclosure of any indemnity and insuring agreement s described in Rule 192.3(f). Rule 192.3(f) provides that a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered I nthe action or to indemnify or reimburse fro payments made to satisfy the judgme4nt. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial. Tex. R. Civ. P. 192.3(f).

Rule 192.3(f) does not foreclose discovery of insurance information beyond that identified in the rule; however, we also conclude that the plain language of Rule 192.3(f), by itself, does not provide a sufficient basis to order discovery beyond the production of the "existence and contents" of the policies. A party may discover information beyond an insurance

agreement's existence and contents only if the information is otherwise discoverable under our scope-of-discovery rule. *See* Tex. R. Civ. P. 192.3(a) ("In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.") This would include such information as policy limits.

E. Unfair Claims Practices

The Texas Insurance Code provides private causes of action for unfair settlement and claim practices, including (a) false, misleading or deceptive acts or practices (Chapter 541); and (b) prompt-payment claims (Chapter 542). Below are some examples of this prohibited conduct:

a) false, misleading or deceptive act or practice (Chapter 541):

- Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to the insurer's liability which has become reasonably clear;
- Misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
- Refusing to pay a claim without conducting a reasonable investigation with respect to a claim;
- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under the insurer's policies;
- Failing to provide a policyholder a reasonable explanation of the basis in the policy for the insurer's denial of a claim or offer of a compromise settlement of a claim.

b) prompt payment claims (Chapter 542):

- Failing to promptly provide notice of receipt of a claim;
- Failing to promptly notify the claimant of acceptance or rejection of his claim;
- Failing to promptly make payment on a claim;

A defendant that violates Chapter 541 may also be held liable under the Texas Deceptive Trade Practices Act. *See Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 120-21 (Tex. App.—San Antonio 2002, no pet.).

Chapter 542 requires an insurer to follow certain procedures and meet certain deadlines when it received, accepts, rejects or pays an insurance claim. The statute's purpose is to require insurers to promptly pay claims made by their insureds. *See* TEX. INS. CODE § 542.054. Chapter 542 includes detailed rules along these lines.

A plaintiff may recover actual damages for a violation of Chapter 541. *Tex. Mut. Ins. Co. v. Morris*, 287 S.W.3d 401, 431-32 (Tex. App.—Houston [14th Dist.] 2009). Additionally, plaintiff may recover additional damages with a fact finding that defendant acting knowingly. *See* TEX. INS. CODE § 541.152(b). However, for a Chapter 541 violation, a plaintiff cannot recover exemplary damages per Chapter 41 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 41.002(d).

A plaintiff may recover the amount of the claim for a violation of Chapter 542. *See* TEX. INS. CODE § 542.060(a). In addition, plaintiff can recover statutory damages of 18% interest per year on the amount of the claim. *See* TEX. INS. CODE § 542.060(a). The statutory damages start accuring on the date the insurer violates the statute. *State Farm Life Ins. Co. v. Martinez*, 174 S.W.3d 772, 790 (Tex. App.—Waco 2005).

F. Bad Faith Claims

Bad-faith liability in the insurance context, also known as the breach of the duty of good faith and fair dealing, arises from the contractual relationship between the insured and the insurer. *Aranda v. Insurance Co. of N. Am*., 748 S.W.2d 210, 212 (Tex. 1988). The duty of good faith and fair dealing is separate and distinct from the insurer's settlement duties that arise under the Texas Insurance Code. *See Lane v. State Farm Mut. Auto. Ins. Co*., 992 S.W.2d 545, 553-54 (Tex. App.—Texarkana 1999, pet. denied).

The insurer owes a duty of good faith and fair dealing to the insured. *Aranda*, 748 S.W.2d at 212. The insurer does not owe a duty of good faith and fair dealing to a third-party claimant. *Maryland Ins. Co. v. Head Indus. Coating & Servs*., 938 S.W.2d 27, 28-29 (Tex. 1996).

An insurance company does not breach its duty of good faith and fair dealing by erroneously denying a claim. *U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997). Rather, an insurer breaches its duty of good faith and fair dealing when the insurer fails to settle a claim if the insurer knew of should have known that it was reasonably clear that the claim was covered. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997). Whether an insurer has breached its duty of good faith and fair dealing is a fact issue. *Id.* To prove an action for bad faith, the plaintiff must also establish that defendant's breach of good faith and fair dealing proximately caused plaintiff's damages. *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 193 n. 13 (Tex. 1998).

Below are examples of an insurers breach of this duty:

- In *Simmons*, the Texas Supreme Court concluded that there was evidence that the insurer's investigation was biased and outcome-oriented because there was evidence that the carrier knowingly and repeatedly ignored evidence that the insureds did not burn their own home. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 45-47 (Tex. 1998)

- In *Nicolau*, the Texas Supreme Court held that there was sufficient evidence to support a bad faith claim with evidence that an insurer denied a claim that leaky plumbing caused foundation damage based upon an expert report prepared by an engineer that (a) worked almost exclusively for insurance companies; (b) was aware that plumbing leaks would cause the insurer to incur liability; and (c) nearly exclusively found no liability for the insurer. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997). There was also evidence that the insurer did not conduct an adequate investigation. *Id.*

In an action for bad faith, plaintiff can recover actual damages—so called "extra-contractual damages"—for economic or personal injuries. *See Pena v. State Farm Lloyds*, 980 S.W.2d 949, 958 (Tex. App.—Corpus Christi 1998, no pet.). Plaintiff may recover exemplary damages if (1) actual damages were awarded for an injury independent of the loss of policy benefits and (2) the insurer's conduct was fraudulent, malicious, intentional, or grossly negligent. *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997).

G. Coverage – Duty of Insured

In Texas, a liability insurer must show that it was prejudiced or deprived of a valid defense by the insured's lack of cooperation before it can rely upon that lack of cooperation to avoid coverage. *USAA Co. Mut. Ins. Co. v. Cook*, 241 S.W.3d 93, 102 (Tex.App.—Houston [1st Dist.] 2007, no pet.). *See Progressive Co. Mut. Ins. Co. v. Trevino,* 202 S.W.3d 811, 816 (Tex.App.—San Antonio 2006, pet denied) *and cases cited therein; Oil Ins. Assoc. v. Royal Indemnity Co*., 519 S.W.2d 148, 151-152 (Tex. Civ. App.—Houston [14th Dist] 1975, writ ref'd n.r.e.) *and cases cited therein*. The insurer must show actual prejudice, not theoretical or potential prejudice. *Griffin v. Fidelity & Cas. Co*., 273 F.2d 45, 48 (5th Cir. 1960). *See Coastal Refining & Marketing, Inc. v. U.S. Fidelity & Guar. Co*., 218 S.W.3d 279, 288 (Tex.App.—Houston [14th Dist.] 2007, no pet.) (Insurer in late notice case must demonstrate a material change in position to establish prejudice; actual prejudice required, not speculative or potential prejudice). The insured's lying to the insurer regarding who was driving the insured vehicle at the time of the accident did not sufficiently prejudice the insurer in *Griffin*, 273 F.2d at 47-48. The insured's lying in sworn deposition testimony did not prejudice the insurer in *U.S. Cas. Co. v. Schlein*, 338 F.2d 169, 174 (5th Cir. 1964). But, the insured's not permitting defense counsel hired by insurer to appear on insured's behalf and ultimately failing to appear for trial, resulting in entry of a default judgment against insured, was sufficient to prejudice the insurer in *Trevino*, 202 S.W.3d at 817-18.

H. Fellow Employee Exclusions

Standard Texas commercial automobile insurance policies can and do include fellow employee exclusions.

Texas Courts have upheld the fellow employee exclusion. The Fort Worth Court of Appeals has held that the fellow employee exclusion in a standard form motor vehicle insurance policy, which applied to bodily injury to fellow employees of the employer and which arose in course of fellow employee's employment, precluded coverage for the inured emplyee's suit. *See Truck Ins. Exchange v. Musick,* 902 S.W.2d 68, 70 (Tex.App.-Fort Worth 1995, writ denied). In Musick, the insured employee of construction company backed his pickup truck over another employee. It was stipulated that the two were fellow employees and that the injury suffered by injured employee arose out of and in course and scope of his employment. *See Id.*

Courts have further held that a commercial automobile liability insurer did not have a duty to defend the insured in an action brought by drivers for the insured carrier arising out of an accident in which one driver fell asleep at the wheel and drove the vehicle into a river killing the other driver. The policy exclusion for bodily injury to a fellow employee arising out of and the course of employment applied. Both men in the truck were working for the insured. The court explained that the employee exclusion in a standard Texas commercial auto policy excludes from

coverage injuries sustained by a truck driver while operating a covered vehicle, regardless whether the driver was an independent contractor or an employee. This exclusion relieved the insured of any duty to defend; and where there is no duty to defend, there is also no duty to indemnify. *Canal Indem. Ins. Co. v. Texcom Transp., L.L.C.*, No. 3:09-CV-1430-BD, 2010 WL 2301007 (N.D. Tex., June 4, 2010).

Under Texas law, the insurer has the burden to prove that an exclusion applies. *See Primrose Operating Co. v. National American Ins. Co.,* 382 F.3d 546, 553 (5th Cir.2004); *Sentry Ins. v. R.J. Weber Co.,* 2F.3d 554, 556 (5th Cir.1993). *See also* TEX. INS.CODE ANN. § 554.002 (Vernon 2009). The burden then shifts to the insured to establish an exception to the exclusion or show that coverage exists under some other policy provision.

In any coverage dispute, the court's primary concern in interpreting the insurance policy is to determine the intent of the parties. *See Pendergest–Holt v. Certain Underwriters at Lloyd's of London,* 600 F.3d 562, 569 (5th Cir.2010), *citing Don's Building Supply, Inc. v. One Beacon Ins. Co.,* 267 S.W.3d 20, 23 (Tex.2008). "The terms used in the policy are given their plain, ordinary meaning unless the policy itself shows that the parties intended the terms to have a different, technical meaning." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. McMurray,* 342 Fed.Appx. 956, 958, 2009 WL 2710076 at *2 (5th Cir. Aug.27, 2009), *quoting American Nat'l General Ins. Co. v. Ryan,* 274 F.3d 319, 323 (5th Cir.2001). When a term is defined in the policy, that definition controls. *Id.* (citing cases). However, the court cannot simply consider policy terms in the abstract. Rather, the court "must consider the policy as a whole and interpret it to fulfill [the] reasonable expectations of the parties in light of the customs and usages of the industry." *Consumers County Mut. Ins. Co. v. P .W. & Sons Tucking, Inc.,* 307 F.3d 362, 365 (5th Cir.2002), *quoting North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, Inc.,* 930 S.W.2d 829, 834 (Tex.App.-Houston [1st Dist.] 1996, no writ).

When a coverage dispute involves the duty to defend, that determination is made solely by reference to the allegations of the latest complaint in the underlying litigation and the terms of the policy. *See Allstate Ins. Co. v. Disability Services of the Southwest Inc.,* 400 F.3d 260, 263 (5th Cir.2005); *King v. Dallas Fire Ins. Co.,* 85 S.W.3d 185, 187 (Tex.2002). The allegations of the underlying complaint must be liberally construed and accepted as true. *Disability Services,* 400 F.3d at 263; *see also Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.,* 1 F.3d 365, 369 (5th Cir.1993). The duty to defend "is not affected by facts ascertained before suit, developed in the process of the litigation, or by the ultimate outcome of the suit." *Gemmy Indus. Corp. v. Alliance General Ins. Co.,* 190 F .Supp.2d 915, 918 (N.D.Tex.1998), *aff'd,* 200 F.3d 816 (5th Cir.1999) (Table), *quoting American Alliance Ins. Co. v. Frito–Lay, Inc.,* 788 S.W.2d 152, 154 (Tex.App.-Dallas 1990, writdism'd); *see also Colony Ins. Co. v. H.R.K., Inc.,* 728 S.W.2d 848, 850 (Tex.App.-Dallas 1987, no writ). The insurer must provide a defense if the complaint contains at least one claim that is facially within the policy's coverage. *Disability Services,* 400 F.3d at 263; *Primrose Operating,* 382 F.3d at 552.

Where there is no duty to defend there is no duty to indemnify, if "the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to

indemnify." *Mt. Hawley Ins. Co. v. Wright Materials, Inc.,* No. 3–03–CV–2729–BD, 2005 WL 2805565 at *5 (N.D.Tex. Oct.27, 2005), *quoting Farmers Texas County Mut. Ins. Co. v. Griffin,* 955 S.W.2d 81, 84 (Tex.1997).

Construction Defect

A. Statute of limitations and Statute of Repose

Statute of Limitations

The statute of limitation for a construction defect is dependent upon whether the claims for construction defect is based in contract, tort or warranty. The following statutes of limitations or pertinent :

1. Breach of contract: Two years from the accrual of the injury.
2. Breach of express common law warranty: Four (4) years from the time services are rendered. *Certain-Teed Prods. V. Bell*, 422 S.W.2d 719, 721 (Tex. 1968). Discovery rule does not apply. *Safeway Stores v. Certainteed Corp*., 710 S.W.2d 544 546 (Tex. 1986).
3. Breach of implied common law warranty: Four (4) years from accrual date. Certain-Teed Prods. V. Bell, 422 S.W.2d 719, 721 (Tex. 1968)
4. Negligence/Negligence per se/Negligent Misrepresentation: Two (2) years from the accrual date. An action for negligence accrues whean a wrongful at causes an injury, regardless of when the plaintiff learns of the injury or whether all resulting damages have occurred. *Childs v, Haussecker*, 974 S.W.2d 31, 36. (Tex. 1998)
5. Fraud: Four (4) year limitation period from that date defendant makes false representation. Tex. Civ. Prac. & Rem. Code. § 16.004(a)($).; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1998).

Statute of Repose

The following statutes of repose are pertinent to actions arising out of a defective or unsafe condition of the real property:

1. Claims against a person who constructs or repairs an improvement to real property: ten (10) years after the substantial completion of the improvement. Tex. Civ. Prac. & Rem. Code. § 16.009

Tolling: If the claimant presents a written claim for damages, contribution, or indemnity to the person performing the construction or repair work during the 10-year period, the period is extended for two years from the date the claim is presented. Tex. Civ. Prac. & Rem. Code. (c). If the damage occurs during the tenth year then the claimant must bring suit within two years from the accrual date. Tex. Civ. Prac. & Rem. Code(d).

2. Claims against a registered or licensed architect, engineer, interior designer or landscape architect: ten (10) years after substantial completion of the improvement or the beginning of operation. Tex. Civ. Prac. & Rem. Code. 16.008.

Tolling: If the claimant presents a written claim for damages, contribution, or indemnity to the person performing the construction or repair work during the 10-year period, the period is

extended for two years from the date the claim is presented. Tex. Civ. Prac. & Rem. Code. 16.008(c).

B. The Parties to Construction Defect Action

A construction defect action can be brought by the Owner and/or Tenant against the General Contractor, Subcontractor or Engineer/Architect. See *Thomson v. Espey Huston & Assocs., Inc.,* 899 S.W.2d 415 (Tex.App.-Austin 1995, no writ); *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617 (Tex.1986). The General Contractor may also bring claims against a Subcontractor for work performed under a subcontract. *Thomson,* 899 S.W.2d at 419

C. Particular Litigants

a. Homeowners/Homeowner Associations v. Subcontractors

A homeowners association has not right agsint a subcontractor for a breach of the subcontract unless the homeowner's association is found to be a third party beneficiary to thte subcontract. *Thomson v. Espey Huston & Assocs., Inc.,* 899 S.W.2d 415, 419 (Tex.App.-Austin 1995, no writ).

b. General Contractor/Developer v. Subcontractors

A general contractor can bring an action against a subcontractor for breach of the subcontract. *Thomson v. Espey Huston & Assocs., Inc.,* 899 S.W.2d 415, 419 (Tex.App.-Austin 1995, no writ).A general contractor does not have a claim against a subcontractor for damages are just from the subject of the subcontract itself, but does have a claim for damages outside of the subcontract. *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617, 618 (Tex.1986).

c. General Indemnity

Indemnity agreements are construed under normal rules of contract construction. *Gulf Ins. Co. v. Burns Motors, Inc.,* 22 S.W.3d 417, 423 (Tex.2000). Generally, when parties include an indemnity provision in a contract, the duty to indemnify includes the duty to pay for all costs and expenses associated with defending suits against the indemnitee. *Fisk Elec. Co. v. Constructor's & Assoc., Inc.,* 888 S.W.2d 813, 815 (Tex.1994)

A party who attempts to indemnify itself from its own negligence must satisfy two fair notice requirements: (1) the express negligence test and (2) a conspicuous requirement. *Krupar Const. Co., Inc., v. Rosenberg*, 95 S.W.3d 322, 334 (Tex.App.-Houston [1st Dist.] 2002) The express negligence test requires a party contracting for indemnity from the consequences of its own negligence to clearly express that intent within the four corners of the contract. *Fisk Elec. Co.,* 888 S.W.2d at 814. The doctrine is intended to remove the ambiguity from indemnity provisions and ultimately reduce the need for satellite litigation regarding interpretation of indemnity clauses. *Id.* (citing *Ethyl Corp. v. Daniel Constr. Co.,* 725 S.W.2d 705, 708 (Tex.1987)). Indemnity provisions that do not unequivocally state the intent of the parties within the four corners of the instrument are unenforceable as a matter of law. *Id.* The express negligence requirement is not an affirmative defense, but a rule of contract interpretation which is determinable*375 as a matter of law. *Id.* Such a determination should not depend on the outcome of the underlying suit, but should be established as a matter of law from the pleadings. *Id*.

D. Theories of Liability

a. Purchaser's Dwelling Act

N/A

b. Breach of express warranty for services

The elements of a cause of action for breach of an express warranty are:

1. The defendants sold services to plaintiff;
2. The defendant made a representation to the plaintiff about the quality or characteristic of the services in one fo the following ways:
   (1) By affirmation of fact;
   (2) By promise; or,
   (3) By description.
3. The representation became part of the basis of the bargain.
4. The defendants breached the warranty.
5. The plaintiff notified the defendant of the breach.
6. The plaintiff suffered injury.

Paragon Gen. Contractors, Inc. v. Larco Constr., Inc., 227 S.W.3d 876, 886 ((Tex.App.-Dallas 2007, no pet.)

c. Breach of Implied Warranty of Workmanship and Habitability

A builder of a residential house impliedly warrants that the house will be constructed in a good and workmanlike manner. *Codner v. Arellano*, 40 S.W.3d 666, 674 (Tex.App.-Austin 2001 no pet.) This warranty applies only to latent defects. *Gupta v. Ritter Homes, Inc.* 646 S.W.2d 168, 169 (Tex. 1983.) A plaintiff must further prove that they purchased the house. *Id.*

Further, an implied warranty to perform services to repair or modify existing tangible property in a good workmanlike manner may arise under common law. *Codner*, 40 S.W.3d at 674. The plaintiff must show that the defendant sold the services. *Parkway Co. v. Woodruff*, 901 S.W.3d 434, 438 (Tex. 1995)

Good and workmanlike manner means the quality of work performed by a person who has knowledge, training, or experience necessary for the successful practice of a trade or occupation, performed in a manner generally considered proficient by those capable of judging the work. *Melody Home Mfg. v. Barnes*, 741 S.W.3d 349, 354 (Tex. 1987). The focus of the claims is not on the result of the work done, but the manner in which it was done. *Id*.

A homeowner may not assert a claim for breach of good and workmanlike performance against a subcontractor. *J.M. Krupar Const. Co., Inc. v. Rosenberg*, 95 S.W.3d 322, 332 (Tex.App.-Houston[1st Dist.] 2002, no pet.)

d. Breach of Fiduciary Duty

The elements of a cause of action for breach of fiduciary duty are:

1. The plaintiff and defendant had a fiduciary relationship;
2. The defendant breached its fiduciary duty to the plaintiff;
3. The defendant's breach resulted in:
   (1) Injury to the Plaintiff; or,
   (2) Benefit to the defendant.

- *Plotkin v. Joekel*, 304 S.W.3d 455, 479 (Tex.App-Houston [1st Dist.] 2009, no pet.)

When one person is under a duty, created by law or contract, to act on or give advice for the benefit of another within the scope of the relationship, that person has a fiduciary

relationship with the other person. *Stephan v. Laird*, 846 S.W.2d 895, 901 (Tex.App.-Houston [1st Dist.] 1993, writ denied.) An informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence, generally called a confidential relationship. *Associated Indem. Corp. v. CAT Contracting, Inc*. 964 S.W.2d 276, 287 (Tex. 1998) The law recognizes the existence of confidential relationships in those cases 'in which influence has been acquired and abused, in which confidence has been reposed and betrayed. *Id.* To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit. *Id.* at 288. In a building context, a fiduciary relationship has been recognized between a condominium board and tenant. *See Sassen v. Tanglegrove Townhouse Condominium Ass/n*, 877 S.W.2d 489, 492 (Tex.App.-Texarkana 199)

A fiduciary owes the following duties:

(a) duty of loyalty and utmost good faith. *Kinzbach Tool Co. v. Corbett-Wallace Cor*p., 160 S.W.2d 509, 512 (Tex. 1942);
(b) duty of fair and honest dealing. *Id*.; and,
(c) duty of full disclosure. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938).

e. Negligence/Negligence per se

The elements of negligence are that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty of care, and (3) the breach of duty proximately caused the plaintiff's injury or damages. *Nabors Drilling, U.S.A., Inc. v. Escoto,* 288 S.W.3d 401, 404 (Tex. 2009).

In deciding whether there is a common law duty, courts apply the risk-utility test and consider whether there was a special relationship between the parties. The factors the courts use when applying the risk-utility test are the risk, forseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995). The most important factor is the forseeability of the risk. *City of Waco v. Kirwan*, 298 S.W.3d 618, 623-24 (Tex. 2009). Forseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable. Madison v. Williamson, 241 S.W.3d 145, 152 (Tex.App.-Houston [1st Dist.] 2007, pet. denied.)

An ordinary defendant breached its duty of care to plaintiff when the defendant fails to exercise the degree of care that a person of ordinary prudence would or would not have done under the same or similar circumstances. *Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984). When a duty requires the defendant to exercise a "high degree of care," the defendant's standard of care is defined as what a very cautious and prudent person would or would not have done under the same or similar circumstances. *Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210, 212 (Tex. 2003). A high degree of care applies to activities conducted by a common carrier. *Id*. A "common carrier" is those in the business of carrying passengers and goods who hold themselves out for hire by the public. *Id.*

The components of proximate cause are (1) cause-in-fact and (2) forseeability. *Western Invs. V. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). The test for cause-in-fact is whether the negligent act or omission was a substantial factor in bringing about injury and whether the injury would have occurred without the act or omission. *Del Lago Partners v. Smith*, 307 S.W.3d 762, 774 (Tex.2010).

Negligence per se-

A cause of action for negligence per se arises when a duty is owed to another under a statute. *Parrot v. Garcia*, 436 S.W.2d 897, 900 (Tex. 1969). In order to prove to bring a claim of negligence per se, the plaintiff must: (1) show they belong to the class the statute was designed to protect, (2) the statute is one for which tort liability may be imposed when violated; and (3) the defendant violated the statute. *Perry v. S.N.*, 973 S.W.2d 301, 305 (Tex. 1998). Texas Court have found that a claim of negligence per se may not be brought for a violation of an OSHA statute. *Abarca v. Scott Morgan Residential, Inc*., 305 S.W.3d 110, 128 (Tex.App.-Houston [1st Dist.] 2009, pet denied.)

Economic Loss Rule –

Under the economic loss rule, tort damages are generally not recoverable unless the plaintiff suffers an injury that is independent and separate from the economic losses recoverable under a breach of contract claim. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 45–47 (Tex.1998) "When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617, 618 (Tex.1986). Economic losses have been recognized to include the costs of repairs and replacement of defective product. *Thompson v. Epsey Huston & Assocs*., 899 S.W.2d 415, 419 (Tex.App.-Austin 1995, no writ).

f. Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are:
(1) The defendant made a representation to the plaintiff;
(2) The defendant supplied false information for the guidance of others;
(3) The defendant did not exercise reasonable care or competence in obtaining or communicating the information;
(4) The plaintiff justifiably relied on the misrepresentation; and,
(5) The defendant's negligent misrepresentation caused the plaintiff injury.
McCanish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999)

Negligent misrepresentation is not based on a duty owed to a client but instead an independent duty owed to a non-client. Id.

g. Common Law Fraud

The elements of a common law fraud are that the defendant made a representation that was: (1) material and false; (2) made with knowledge that it was false or with recklessness; (3)

made with the intent that it be relied upon; and, (4) it was relied upon to the plaintiff's detriment. *Italian Cowboys Partners v. Prudential Ins*., 341 S.W.3d 323, 337 (Tex. 2011).

h. Strict Product Liability

Texas strict products liability claims are governed by Section 402A of The Restatement (Second) of Torts. *American Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 426 (Tex.1997). Under Section 402A:

(1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts § 402A (1965).

The rule requires only that the defendant be engaged in the business of introducing the product into channels of commerce. *See Rourke v. Garza,* 530 S.W.2d 794 (Tex.1975). The product, however, must reach the user in essentially the same condition as when it left the seller's possession. Restatement (Second) of Torts § 402A(1)(b). The rule applies even where the seller has exercised care in the preparation and sale of the product and even though the user has not purchased the product or entered into any contractual arrangement with the seller. *Id*. at § 402A(2). A product may be unreasonably dangerous because of a defect in marketing, design or manufacturing. *American Tobacco*, 951 S.W.2d at 426.

E. Claims Against Design Professionals

Chapter 150 addresses suits brought against "licensed or registered professionals." *See generally* Tex. Civ. Prac. & Rem. Code §§ 150.001–.002 (West 2011). A licensed or registered professional means a licensed architect,, licensed professional engineer, registered professional land surveyor, registered landscape architect, or any firm in which licenses or registered professionals practice. Tex. Civ. Prac. & Rem .Code. 150.001(1).

Specifically, Section 150.002, requires, in relevant part:

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; and

(3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:

(A) knowledge;

(B) skill;

(C) experience;

(D) education;

(E) training; and

(F) practice.

(b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitations will expire within ten days of the date of filing.

(d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

The plaintiff's failure to file the affidavit is accordance with this section shall result in dismissal of the complaint.

Professional negligence in the context of engineering services means doing that which an engineer of ordinary prudence in the exercise of ordinary care would not have done under the same or similar circumstances or failing to do that which an engineer of ordinary prudence in the exercise of ordinary care would have done under the same or similar circumstances. *See Ryan v. Morgan Spear Assoc., Inc.,* 546 S.W.2d 678, 681 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.). This standard of care must be established by the testimony of a qualified expert. *Prellwitz v. Cromwell, Truemper, Levy, Parker and Woodsmale, Inc.,* 802 S.W.2d 316, 317 (Tex.App.—Dallas, 1990, no writ); To qualify as an expert able to set the standard of care for a given profession, the witness must be licensed in the same profession. Id.

- *Parkway Co. v. Woodruff*, 857 S.W.2d 903, 919 (Tex.App.-houston [1st Dist.] 1993) aff'd as modified, 901 S.W.2d 434

F. Calculation of Damages

A plaintiff is entitled to recover for breach of a construction contract the lesser of reasonable cost of remedying the defects or deviations from the contract, or the difference in value of the structure contracted for and the value of the structure in its defective condition. *Greene v. Bearden Enterprises, Inc*., 598 S.W.2d 649, 652 (Tex.Civ.App.-Fort Worth 1980, writ ref'd n.r.e.) Whether the remedial cost or difference in value is the proper measure of damages depends on the facts and circumstances of the particular case. In most circumstances the main factors to be considered are the physical and economic feasibility of correcting defects or bringing the structure into compliance with the contract. Where the correction of defects and deviations would impair the entire structure or require the expenditure of sums in excess of the value of the structure, the correct measure of damages is the difference in the value of the structure as constructed and its value had it been constructed without defects or deviations. *Hutson v. Chambless*, 157 Tex. 193, 300 S.W.2d 943 (1957). Where the correction of defects and deviations would not impair the structure as a whole, the remedial cost is an appropriate measure of damages. *Rogowicz v. Taylor and Gray, Inc.*, 498 S.W.2d 352 (Tex.Civ.App. Tyler 1973, writ ref'd n. r. e.).

Residential Construction Liability Act-

The Residential Construction Liability Act ("RCLA") applies to homeowners who seek damages for a construction defect against a builder. Tex. Prop. Code. § 27.004. The RCLA requires the homeowner to give the builder notice and the opportunity to cure prior to suit. *Id.* If a claimant rejects a reasonable offer, or does not permit a reasonable opportunity to inspect or repair the defect under an accepted offer of settlement, the claimant may not recover more than the fair market value of the contractor's last offer of settlement, or the amount of a reasonable monetary settlement or purchase offer. *Id.* Otherwise, the claimant may recover only the following economic damages proximately caused by a construction defect:

• the reasonable cost of repairs necessary to cure any construction defect

• the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence

• reasonable and necessary engineering and consulting fees

• the reasonable expenses of temporary housing reasonably necessary during the repair period

• the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure

• reasonable and necessary attorney's fees

- Tex. Prop Code 27.004(e) & (g).

G. Defenses

a. Standing

To have standing to bring a breach of contract claim, a plaintiff is required to show either

privity to a contract or third party beneficiary status. *OAIC Commercial Assets, L.L.C. v. Stonegate Village, L.P.*, 234 S.W.3d 726, 738 (Tex. App.—Dallas 2007, pet. denied). In the construction context, a property owner is not a third party beneficiary of a contract between the general contractor and a subcontractor. *Raymond v. Rahme*, 78 S.W.3d 552, 561 (Tex.App.-Austin 2002, no pet.); *P. McGregor Enterprises Inc. v. Hicks Construction Group*, --S.W.3d--, 2012 WL 28538 (Tex. App. – Amarillo 2012, no pet.). Mere knowledge that a property owner will benefit from the subcontract is insufficient to establish a third party beneficiary arrangement. *Raymond*, 78 S.W.3d at 561.

There is a presumption against conferring third-party beneficiary status on non-contracting parties. *South Texas Water Authority v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007). In Texas, it is well-settled that third-party beneficiary claims succeed or fail according to the provisions of the contract upon which suit is brought. *Union Pacific R.R. Co. v. Novus Intern, Inc.*, 113 S.W.3d 418, 421 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). A contract does not confer third-party beneficiary rights unless:

(1) the contract plainly expresses the third-party obligation of the bargain-giver;
(2) it is unmistakable that a benefit to the third party is within the contemplation of the primary contracting parties; and
(3) the primary parties contemplate that the third party would be vested with the right to sue for enforcement of the contract.

EPGT Tex. Pipeline, L.P. v. Harris County Flood Control Dist., 176 S.W.3d 330, 340 (Tex. App.–Houston [1st Dist.] 2004, pet. dism'd). The intention to confer a direct benefit on a third-party must be clearly and fully spelled out in the four corners of the contract. *MCI Telecomms. Corp. v. Tex. Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999).. Absent direct language in the contract indicating the party is a third-party beneficiary, this status is difficult to establish. *See Union Pacific R.R. Co*., 113 S.W.3d at 422-43. Any doubt concerning intent should be resolved against the third party. *Greenway Park Townhomes Condominium Ass'n, Inc. v. Brookfield MUD*, 575 S.W.2d 90, 91 (Tex. Civ. App.–Houston [14th Dist.] 1978, no writ).

b. Patent defects

Implied warranties of home construction, habitability and suitability apply only to latent defects. *Gupta v. Ritter Homes, Inc*., 646 S.W.2d 168, 169 (Tex. 1983)(implied warranty of construction & habitability); *7979 Airport Garage, LLC v. Dolar Rent A Car Sys*., 245 S.W.3d 488, 502 (Tex.App.-Houston[14th Dist] 2007, pet denied)(implied warranty of suitability). For a defect to be latent, it must not be discoverable by a reasonably prudent inspection of the building at the time of sale. Gupta, 646 S.W.2d at 169. If the defect is discoverable, then it is a patent defect and is not covered under these implied warranties. *Id.*.

c. Contributory Negligence, Comparative fault of parties and Non-Parties

The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers for each claimant, defendant, settling person and designated responsible third party with respect to each persons causing or contributing to cause in any way the harm for which recovery of damages is sought. Tex. Civ. Prac. & Rem. Code § 33.003. A claimant may not recover damages if his percentage of responsibility is greater than

50%. *Id*. at § 33.001. If the claimant is not barred from recovery, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility. Id. at § 33.012. A liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility. Id. at § 33.013.

d. Failure to mitigate

A mitigation of damages instruction is proper when the negligence complained of merely contributed to or added to the extent of the losses or injuries, but has no part in causing the incident in question. *Elbaor v. Smith,* 845 S.W.2d 240, 245 (Tex.1992). In this way, the law seeks to avoid economic waste by denying the wronged party a recovery for such losses as could have reasonably been avoided. *Alexander & Alexander v. Bacchus Indus.,* 754 S.W.2d 252, 253 (Tex.App.—El Paso 1988, writ denied).

The burden of proving a failure to mitigate is upon the party who caused the loss and the standard is that of ordinary care, i.e., what an ordinary prudent person would have done under the same or similar circumstances. *Moulton v. Alamo Ambulance Service,* 414 S.W.2d 444, 447 (Tex.1967); 28 TEX. JUR 3D *Damages* § 194 (1996). Mitigation of damages is ordinarily a question of fact for the jury. *Sorbus, Inc. v. UHW Corp.,* 855 S.W.2d 771, 775 (Tex.App.—El Paso 1993, writ denied); *Hardison v. Beard,* 430 S.W.2d 53, 57 (Tex.Civ.App.—Dallas 1968, writ ref'd n.r.e.). Evidence must be developed which clearly shows a plaintiff's failure to mitigate caused further damages, and the evidence must be sufficient to guide the jury in determining which damages were attributable to a plaintiff's failure to mitigate. Hygeia Dairy Co. v. Gonzalez, 994 S.W.2d 220, 225 (Tex.App.-San Antonio 1999, no pet.) An award to the plaintiff may be reduced by any damages attributed to the plaintiff's failure to mitigate. Id.

e. Diminution in Value

Where the correction of defects and deviations would impair the entire structure or require the expenditure of sums in excess of the value of the structure, the correct measure of damages is the difference in the value of the structure as constructed and its value had it been constructed without defects or deviations. *Hutson v. Chambless*, 157 Tex. 193, 300 S.W.2d 943 (1957). Under a dimunition of value the measure of the owner's damage is the difference between the value of the building as constructed and its value had it been constructed in accordance with the contract. *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.,* 642 S.W.2d 160, 164 (Tex.1982)

f. Economic Waste

In cases concerning defective construction issues, Texas courts generally allow damages based on the cost of repairs if repairs are feasible and do not involve economic waste. *Jim Walter Homes, Inc. v. Gonzalez*, 686 S.W.2d 715, 717 (Tex.App.-San Antonio 1985, writ dism'd). If the repair of the defects requires that the structure in whole or material part be changed or would impair the structure as a whole, then the cost of repair would constitute economic waste. *Id*. In that situation, the proper measure of damages would be the difference in the value of the structure as constructed and its value had it been constructed without defects not the cost of repair. Id.

g. Extrapolation

N/A

h. Waiver

A waiver takes place where one dispenses with the performance of something which he has a right to exact, and occurs where one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it. *Ford v. Culbertson*, 158 Tex. 124, 308 S.W.2d 855, 865 (Tex. 1958). To establish a waiver of rights under a contract, there must be proof of an intent to relinquish a known right. *Johnson v. Structured Asset Services*, LLC, 148 S.W.3d 711, 722 (Tex.App.-Dallas 2004, no pet.) A contractual waiver must be knowing to be valid. *Id*. Thus, a party can waive contract provisions that are in the contract for the party's benefit, if there is an intentional relinquishment of that right *Id.*

i. Product Liability Defense

A manufacturer shall indemnify and hold harmless a seller against loss arising out of a product's liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product. A seller is liable for harm caused to the claimant by that product if the claimant proves: (1) the seller participated in the design of the product;

(2) that the seller altered or modified the product and the claimant's harm resulted from that alteration or modification;

(3) that the seller installed the product, or had the product installed, on another product and the claimant's harm resulted from the product's installation onto the assembled product;

(4) that the seller exercised substantial control over the content of a warning accompanying the product;

(5) that the seller made an incorrect factual representation about the proudly that was relied on to the claimant's harm.

(6) That the seller actually knew of the defect in the product that caused the harm; or

() the manufacturer is insolvent or not subject other jurisdiction of the court.

-Tex. Civ. Prac. & Rem. Code. § 82.003

j. Fee Shifting

Is it not against public policy for a contract to include a provision which shifts attorney's fees to one party even if the party does not prevail at trial. There are also statutory fee shirting provision in the Texas Deceptive Trade Practices Act and Texas Rules of Civil Procedure,

Texas Rules of Civil Procedure 167. Offer of Settlement; Award of Litigation Costs:

Ligation costs may be awarded against a party who rejects a settlement offer to settle a claim for monetary damages. The settlement offer must be in writing, state that nit is made under Rule 167, identify the party making the offer and the party ot whom the offer is made; state the terms by which all monetary claims may be settled, state ad deadline to respond and be served on the offeree. Tex. R. Civ. P. 167.2. If the offer is rejected and the judgment awarded is significantly less favorable then was the offer, the offerer must be awarded litigation costs from the time the offer was rejected. Tex. R. Civ. P. 167.4

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