STATE OF TEXAS COMPENDIUM OF LAW

Prepared by
Greg C. Wilkins
Orgain Bell & Tucker, LLP
470 Orleans Street
Beaumont, TX 77701
(409) 838-6412
www.obt.com

Renée McElhaney
Cox Smith Matthews Incorporated
112 East Pecan, Suite 1800
San Antonio, TX 78205
(210) 554-5500
www.coxsmith.com

Joyce Ondich
Fee, Smith, Sharp & Vitullo, LLP
13155 Noel Road, Suite 1000
Dallas, TX 75240
(972) 934-9100
www.feesmith.com

Carlos Rincon
Rincon Law Group, P.C.
1014 North Mesa, Suite 200
El Paso, TX 79902
(915) 532-6800
www.rinconlawgroup.com

PRE-SUIT CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

Generally, a plaintiff is not required to provide notice of his claim prior to filing suit. There are several statutory exceptions.

A) **State entities.** A plaintiff must provide written notice to a state entity defendant within six months of the incident that is the subject of the claim. TEX. CIV. PRAC. & REM. CODE § 101.101(a) (2007). If the required notice is not provided, the lawsuit must be dismissed.

B) **Attorneys' fees.** A plaintiff is also required to provide oral or written notice of a contract claim to be entitled to recover statutory attorneys' fees. TEX. CIV. PRAC. & REM. CODE § 38.001 (2007).

C) **Suit-specific requirements.** A plaintiff must also provide 60 days written notice before filing suit against a health-care provider, TEX. CIV. PRAC. & REM. CODE § 74.051(a) (2007), filing suit under the Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE § 17.505(a) (2007), and filing suit for a deceptive act under the Insurance Code, TEX. INS. CODE § 541.154 (2007). The failure to provide this notice is remedied by abatement.

Description of the Organization of the State Court System.

A) **Judicial selection.** Judges are elected by popular vote. If a bench becomes open during a term, the governor appoints a replacement. The appointed judge is then required to run for election in the next electoral season. *See generally* Texas Courts Online, available at http://www.courts.state.tx.us/pubs/AR2007/jud_branch/5-judge-qualifications-chart-07.pdf (last visited December 9, 2008).

B) **Structure.** The Texas court system has three tiers: trial courts, intermediate appellate courts and appellate courts of last resort. Texas trial courts include district courts, county courts, justice courts, and small claims courts. The state's courts of appeal consist of three major courts: the Supreme Court, the Court of Criminal Appeals, and Courts of Appeals. There are fourteen intermediate courts of appeals, each having regional jurisdiction. These courts hear intermediate appeals from trial courts in their respective courts of appeals districts. The appellate courts of last resort are the Supreme Court, which has final appellate jurisdiction in civil and juvenile cases, and the Court of Criminal Appeals, which has final appellate jurisdiction in criminal cases. See generally Texas Courts Online, available at http://www.courts.state.tx.us/ (last visited December 9, 2008).

C) **Alternative dispute resolution.** Texas does not require ADR. However, it is common for trial courts to create their own local rules, which may mandate ADR prior to trial.

Service of Citation

A) **"Service of citation."** "Service of citation" is a term of art used to describe the process by which a plaintiff informs the defendant that it has been sued. *Tex. Nat. Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 813 (Tex. 2002). The citation includes information regarding the suit, including the cause number. The citation also identifies the name and location of the court in which the case is pending. The citation must include the name of the plaintiff and the plaintiff's attorney. The citation must also include the defendant's correct name, whether the defendant is being sued in a representative capacity, and the defendant's address for service. It also must state that the defendant is required to file a written answer the Monday after the expiration of twenty days from the date of service. The citation is signed by the clerk and is issued under the seal of the court.

B) **Requirements.** Service is accomplished when (1) the citation and a copy of the petition are delivered to the defendant, or (2) the defendant is given notice of suit through other authorized means. TEX. R. CIV. P. 99(a) (2007). The citation may be served by "(1) any sheriff or constable or other person authorized by law, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court." TEX. R. CIV. P. 103. If requested, service by registered or certified mail and citation by publication must be made by the clerk of the court. *Id.* No person who is a party or who is interested in the outcome of the suit may serve process. *Id.*

C) **Forms of citation.**

1) **Personal service.** Service may be accomplished by delivering a copy of both the citation and petition to the defendant personally or by registered or certified mail, return receipt requested. TEX. R. CIV. P. 106(a) (2007).

2) **Abode service.** Upon a motion supported by affidavit, service may be accomplished by leaving a copy of both the citation and petition with a person over sixteen years of age at the defendant's usual place of business or abode, or in any other manner the affidavit or other evidence demonstrates will be reasonably effective to notify the defendant of the suit. TEX. R. CIV. P. 106(b).

3) **Citation by publication.** Moreover, citation by publication is permitted when the defendant's residence is unknown. TEX. R. CIV. P. 109 (2007). In some instances, the Secretary of State may be designated as an agent for service of process. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (1997) (service on non-resident defendant); TEX. BUS. ORGS. CODE ANN. § 5.201(a)-(b) (Supp. 2008) (service on corporation).

D) **Service upon various entities.**

1) **Person.** When the defendant is an individual, service of citation should be made on the individual. TEX. R. CIV. P. 106(a) (2007). Constructive (substitute) service may be made on various persons by court order or on an agent or clerk at the defendant's office. TEX. R. CIV. P. 106(b). If the defendant's residence is unknown, service may be made by publication. TEX. R. CIV. P. 109. And if the individual is a non-resident defendant, constructive service may me made on the Secretary of State. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (2007).

2) **Public corporation.** When the defendant is a corporation or an authorized foreign corporation, whether public or private, actual service may be accomplished by delivering a copy of the citation and petition to the corporation's president, vice president, or registered agent. TEX. BUS. ORGS. CODE. §§ 5.201(a)-(b), 5.255(1) (2007). Constructive service may be made on the Secretary of State. *Id.* § 5.251; TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (2007).

3) **Private corporation.** Whether the corporation is public or private, actual service may be accomplished by delivering a copy of the citation and petition to the corporation's president, vice president, or registered agent. TEX. BUS. ORGS. CODE §§ 5.201(a)-(b), 5.255(1) (2007). Likewise, constructive service may be made on the Secretary of State. *Id.* at § 5.251; TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (2007).

E) **Waiver.** A legally competent defendant may appear in open court and waive service of process in person, by an attorney, or by a duly registered agent. TEX. R. CIV. P. 120 (2007). Likewise, a legally competent defendant may waive service of process in writing. TEX. R. CIV. P. 119. To be effective, the written waiver must (1) state that the defendant waives service, (2) acknowledge that the defendant received a copy of the petition, (3) be signed by the defendant, its attorney, or its duly authorized agent, (4) be dated after suit was brought, (5) be sworn before an officer other than an attorney in the case, and (6) be filed with the papers of the cause. *Id.*

Statutes of Limitations

A) **Construction.** The applicable statute of limitation in a construction case will depend upon the claim or claims asserted.

B) **Contracts.** Breach of contract actions are governed by (1) the general four-year statute of limitation found in the Texas Civil Practice & Remedies Code or (2) the special four-year statute of limitation governing contracts for the sale of goods and found in the Texas UCC. *See* TEX. CIV. PRAC. & REM. CODE § 16.004 (2007); TEX. BUS. & COM. CODE § 2.725 (2007).

1) **Accrual date contrasted with limitations period.** There is an important distinction between the two statutes of limitation—the accrual date of the

limitations period. *Compare* TEX. CIV. PRAC. & REM. CODE § 16.004(c) *with* TEX. BUS. & COM. CODE § 2.725(b). Under the general four-year statute found in the Civil Practice and Remedies Code, a cause of action accrues when the dealings between the parties cease. TEX. CIV. PRAC. & REM. CODE § 16.004(c). Under the special four-year statute found in the Business and Commerce Code, by contrast, a cause of action accrues when the breach occurs. TEX. BUS. & COM. CODE § 2.725(b). Because a cause of action may be timely under one statute but barred by the other, the court's determination of which statute applies is of utmost importance. *See Childs v. Taylor Cotton Oil Co.*, 612 S.W.2d 245, 249-50 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

C) **Contribution.** A cause of action for contribution or indemnity does not accrue until the plaintiff recovers damages or receives a sum in settlement. *See, e.g.*, *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 200 (Tex. App. 14th Dist. 2006). The statute of limitations for a contribution claim is four years from the date a co-debtor pays more than his pro rata share of the judgment or settlement. *Wyatt v. Lowrance*, 900 S.W.2d 360, 362 (Tex. App. 14th Dist. 1995). Accordingly, a suit for contribution may be timely even if the original plaintiff's claim against the party sued for contribution would be barred by limitations. *See, e.g.*, *Amoco Chems. Corp. v. Malone Serv. Co.*, 712 S.W.2d 611, 613 (Tex. App. 1st Dist. 1986).

D) **Employment discrimination under Title VII of the Civil Rights Act of 1964.**

1) **Exhaustion of administrative remedies.** Before filing suit under Title VII of the Civil Rights Act of 1964, a plaintiff must exhaust all its administrative remedies. 42 U.S.C. § 2000e-5 (2000). The exhaustion requirement is a jurisdictional prerequisite to filing suit under Title VII, and it is designed to give the Equal Employment Opportunity Commission (the "EEOC") an opportunity to investigate and resolve the dispute. *Barnes v. Levitt*, 118 F.3d 404, 408 (5th Cir. 1997).

2) **Charge of discrimination.** Generally, a plaintiff must file a charge of discrimination with the EEOC within 180 days after the allegedly unlawful practice. 42 U.S.C. § 2000e-5(e)(1). Because Texas is a "deferral" state, providing a state or local administrative mechanism for hearing employment discrimination complaints, the time to file a charge is extended to 300 days. *See id.*

3) **Plaintiff's right to sue.** After completing the administrative process, the EEOC will issue a notice of the plaintiff's right to sue. The plaintiff must file suit within 90 days after receiving the notice, or within 90 days after the EEOC's dismissal of the claim. 42 U.S.C. § 2000e-5(f)(1); *Torres v. Johnson*, 91 S.W.3d 905, 912 (Tex. App.—Fort Worth 2002, no pet.). The 90-day time period begins to run when the plaintiff *actually* receives the notice of the right to sue. *Bunch v. Bullard*, 795 F.2d 384, 387-88 (5th Cir. 1986).

E) **Employment discrimination under Section 1981 of the Civil Rights Act of 1866.** To file a claim of discrimination under section 1981, a plaintiff need not file a charge with the EEOC or exhaust administrative procedures required by Title VII. *Johnson v. Ry.*

Express Agency, 421 U.S. 454, 460 (1975). In Texas, section 1981 claims are subject to the two-year statue of limitations for personal injury cases. *See Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000).

F) **Employment discrimination under the Equal Pay Act.** The Equal Pay Act of 1963 prohibits wage discrimination based on gender. 29 U.S.C. § 206(d) (2000). A plaintiff must commence suit for violation of the Equal Pay Act within two years after the cause of action accrues. *Id.* § 255(a). If, however, a cause of action arises from a willful violation of the Equal Pay Act, the plaintiff has three years to commence suit. *Id.*

D) **Employment discrimination under the State Whistleblower Act.** The Whistleblower Act prohibits a state or local government entity from acting adversely against "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE § 554.002 (2007).

1) **Prerequisites.** Before filing suit under the Whistleblower Act, an employee must initiate action under the employer's grievance or appeal procedures. *Id.* § 554.006(a). The employee must invoke these procedures within 90 days after the alleged violation occurred or was discovered by the employee through reasonable diligence. *Id.* § 554.006(b). If a final decision is not rendered within 60 days after the employee initiates the procedures, the employee may (1) exhaust all applicable procedures or (2) terminate procedures and file suit. *Id.* § 554.006(d).

2) **Timeframe for filing suit.** Moreover, an employee must file suit within 90 days after the alleged violation occurred or was discovered by the employee through reasonable diligence, but the time used to pursue relief under the employer's grievance procedures is excluded. *Id.* § 554.005; 554.006(c). If after the employee initiates action under the employer's grievance procedures, the employer fails to render a decision within 60 days and the employee chooses to exhaust all applicable procedures, the employee must file suit within 30 days after those procedures are exhausted. *Id.* § 554.006(d)(1). If, however, the employee elects to terminate procedures, the employee must file suit within the time remaining under the 90-day period. *Id.* § 554.006(d)(2).

E) **Fraud.** The statute of limitations for fraud is four years from the date the cause of action accrued. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4) (2007).

F) **Governmental entities.** The applicable statute of limitation in a case brought against a governmental entity will depend upon the claim or claims asserted.

G) **Improvements to realty.** The applicable statute of limitation in a claim arising from improvements to realty will depend upon the claim or claims asserted.

H) **Indemnity.** Similar to a cause of action for contribution, a cause of action for indemnity does not accrue until the plaintiff recovers damages or receives a sum in settlement. *See, e.g.*, *J.M.K. 6, Inc.*, 192 S.W.3d at 200.

1) **Type of indemnity.** The limitations period for an indemnity claim depends on the type of indemnity involved. An indemnity against damages claim must be asserted within four years after the indemnitee incurs damages, whereas an indemnity against liabilities claim must be asserted within four years after the date when liability comes fixed and certain, whether or not the indemnitee has paid anything. *Ingersoll-Rand Co v. Valero Energy Corp.*, 997 S.W.2d 203, 207, 211 (Tex. 1999). *Id.* Meanwhile, a common-law indemnity claim must be asserted within two years after the underlying judgment is fixed by judgment or settlement. *Advent Trust Co. v. Hyder*, 12 S.W.3d 534, 543 (Tex. App. 14 th Dist. 1999).

I) **Personal injury.** The statute of limitations for personal injury resulting from a negligent act is two years. TEX. CIV. PRAC. & REM. CODE § 16.003(a) (2007).

J) **Professional liability.** The applicable statute of limitation in a professional liability case will depend upon the claim or claims asserted. A claim for professional malpractice is subject to a two-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.003(a) (2007). A claim for breach of contract, breach of fiduciary duty or fraud is subject to a four-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(5); *Williams v. Khalaf,* 802 S.W.2d 651, 656 (Tex. 1990).

K) **Property damage.** A person must bring suit within two years to recover for trespass for injury to the estate or to the property of another. TEX. CIV. PRAC. & REM. CODE § 16.003(a) (2007). This language, according to the Texas Supreme Court, encompasses the general body of tort law. *See First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 288-89 (Tex. 1986).

L) **Survival.** The limitations period for a survival action is the same as the limitations period for the decedent's underlying cause of action. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 16.003 (2007) (two year statute of limitations for personal injury). If the decedent's action would have been barred by limitations immediately before the decedent's death, a survival action based on the same alleged wrong is likewise barred. *Russell v. Ingersoll-Rand Co.*, 841 S.W. 2d 343, 345 (Tex. 1992).

M) **Tolling.** A limitations period can be tolled on any of the following grounds:

1) **Plaintiff's military service.** Under the Servicemembers Relief Act, the limitations period for an action by or against a person in the United States military service is tolled for the period of time the person is in active service or on active duty. 50 U.S.C. App. § 526 (2008).

2) **Plaintiff's disability.** If the plaintiff is under a legal disability when the cause of action accrues, the limitations period can be tolled. TEX. CIV. PRAC. & REM. CODE § 16.001(b) (2007). A disability that occurs after accrual does not toll the limitations period. TEX. CIV. PRAC. & REM. CODE § 16.001(d). A person is under legal disability if the person is (1) under the age of 18, or (2) of unsound mind. TEX. CIV. PRAC. & REM. CODE § 16.001(a).

3) **The plaintiff's misnaming of the defendant in its petition.** When the plaintiff lists the wrong name for a defendant on a complaint, Texas distinguishes between misnomer and misidentification.

a) **Misnomer.** A misnomer of parties can toll an action's limitations period. *Chilkewitz v. Hyson*, 22 S.W. 3d 825, 828 (Tex. 1999). Misnomer occurs when the original petition misnames either the plaintiff or the defendant but the correct parties are actually served.

b) **Misidentification.** Misidentification occurs when the party named in the petition is not the party with an interest in the suit. When the petition misidentifies a defendant, its filing generally does not toll limitations. *Enserch Corp. v. Parker*, 794 S.W. 2d 2, 4-5 (Tex. 1990). Limitations may be tolled if two separate but related entities use a similar trade name and an identification error cannot be corrected after limitations has run. *Id.*, at 5-6.

4) **The original court's lack of jurisdiction.** An actions limitations period may be tolled if (1) the court dismissed or otherwise disposed of the plaintiff's suit for lack of subject-matter jurisdiction, and (2) the plaintiff refiled the same action in a different court of proper jurisdiction with 60 days after the date of the dismissal or other disposition became final. TEX. CIV. PRAC. & REM. CODE § 16.064(a) (2007). Limitations are only tolled if plaintiff (1) effected service in the first suit and (2) did not file the first suit with an intentional disregard of proper jurisdiction. TEX. CIV. PRAC. & REM. CODE § 16.064(b).

5) **The defendant's absence from the state.** An action's limitations period may be tolled for the period of time that the defendant is absent from the state. TEX. CIV. PRAC. & REM. CODE § 16.063(a) (2007).

6) **A party's death.** An actions' limitations period may be tolled for 12 months following the death of a person against whom or in favor of whom may be a cause of action. TEX CIV. PRAC. & REM. CODE. § 16.062(a) (2007).

N) **Wrongful death.**

1) **For the underlying claim.** For most personal injuries, the statute of limitations for the underlying claim is two years from the date the injury claim accrued. TEX. CIV. PRAC. & REM. CODE. § 16.330(a) (2007).

2) **For the wrongful death claim.** The statute of limitations for a wrongful death claim is usually two years from the date the claim accrues, usually the date of the decedent's death. TEX. CIV. PRAC. & REM. CODE. § 16.003(b).

O) **Statute of repose.**

1) **Healthcare.** Healthcare liability claims must be brought no later than ten years after the date of the act or omission that gives rise to the claim. TEX. CIV. PRAC. & REM. CODE § 74.251(b) (2007).

2) **Actions involving a fraudulent conveyance.** Actions arising from the fraudulent conveyance of property by a debtor with the intent to hinder, delay, or defraud his creditors by placing his property beyond the creditor's reach must be brought no later than four years after the conveyance, or if more than four years have passed since the conveyance, one year after the creditor knew or reasonably should have known about the conveyance. TEX. BUS. & COM. CODE § 24.010(a)(1) (2007); *Duran v. Henderson*, 71 S.W.3d 833, 837 (Tex. App. 2002).

3) **Actions against surveyors.** An action arising from an injury or loss caused by an error in a survey conducted by a registered public surveyor or licensed state land surveyor must be brought no later than ten years after the date the survey was completed. TEX. CIV. PRAC. & REM. CODE § 16.011(a)(1) (2007).

4) **Actions against architects, engineers, & interior designers.** An action arising out of a defective or unsafe condition of real property or an improvement to or attached to real property against a registered or licensed architect, and interior designer, a landscape architect, or an engineer who designs, plans, or inspects the construction of an improvement to real property (or equipment attached to real property) must not be brought later than ten years after the substantial completion of the improvement or the beginning of operation of the equipment. TEX. CIV. PRAC. & REM. CODE § 16.008(a) (2007); *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 478 (Tex. 1995).

5) **Actions against agricultural operations.** A nuisance action against an agricultural operation that has been in lawful operation for more than a year must be brought no later than one year after the start of the conditions or circumstances that give rise to the nuisance action. TEX. AGRIC. CODE § 251.004(a) (2007); *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003).

6) **Products liability.** A products-liability action against a manufacturer or seller of products must be brought no later than fifteen years after the date of the sale of the product by the manufacturer or seller. TEX. CIV. PRAC. & REM. CODE. § 16.012(b) (2007). If the manufacturer or seller expressly warranted in writing that the product had a useful safe life of longer than 15 years, the number of years warranted after the date of the sale of the product by the seller. TEX. CIV. PRAC. & REM. CODE. § 16.012(c).

7) **Actions against persons furnishing construction.** An action arising out of a defective or unsafe condition of real property or a deficiency in the construction or repair of an improvement to real property against a person who constructed or repaired the improvement must be brought no later than ten years after the

substantial completion of the improvement. TEX. CIV. PRAC. & REM. CODE § 16.009(a) (2007). This does not bar an action based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair. TEX. CIV. PRAC. & REM. CODE § 16.009(e)(3).

Venue

A) Venue is determined by facts as they existed when the cause of action accrued. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) (2007). The venue scheme describes "proper venue" in hierarchical terms. TEX. CIV. PRAC. & REM. CODE § 15.001(b). All suits must be brought according to the following scheme.

B) **Mandatory venue provisions.** A suit must be filed in the county of mandatory venue, as required by the Texas Civil Practice and Remedies Code Chapter 15, Subchapter B, or other statutes prescribing mandatory venue. *See generally* TEX. CIV. PRAC. & REM. CODE §§ 15.011-.020 (2007). Mandatory venue is compulsory only if a defendant properly objects to the plaintiff's choice of venue. The majority of mandatory venue rules are listed in chapter 15 of the Texas Civil Practice and Remedies Code.

1) **Land dispute suits.** Suits regarding land disputes must be filed in the county where all or part of the land is located. TEX. CIV. PRAC. & REM. CODE § 15.011 (2007).

2) **Injunction against suits.** An action to stay a proceeding in a suit must be filed in the county where the suit is pending. TEX. CIV. PRAC. & REM. CODE § 15.012 (2007).

3) **Mandamus against State.** A petition for a writ of mandamus against the head of a department of the State of Texas must be filed in Travis County. TEX. CIV. PRAC. & REM. CODE § 15.014 (2007).

4) **Suit against political subdivisions.** A suit filed against a political subdivision that is located in a county with a population of 100,000 or less must be brought in the county where the political subdivision is located. TEX. CIV. PRAC. & REM. CODE § 15.0151(a) (2007).

5) **FELA & Jones Act Suits.** A suit brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, or the Jones Act, 46 U.S.C. § 688, must be brought in one of the following counties: (1) the county where all or a substantial part of the events or omissions giving rise to the claim occurred, (2) the county where the defendant's principal office in Texas is located, or (3) the county where the plaintiff resided when the cause of action accrued. TEX. CIV. PRAC. & REM. CODE §§ 15.018(b), 15.0181(c) (2007).

6) **Contractual agreement for venue.** Under TEX. CIV. PRAC. & REM. CODE § 15.020 (2007), parties may agree to venue in writing in a "major transaction."

7) **Landlord-tenant suit.** A suit between a landlord and a tenant arising under a lease must be brought in the country where all or part of the real property is located. TEX. CIV. PRAC. & REM. CODE § 15.0115(a) (2007).

8) **Injunction against execution of judgment.** An action to restrain the execution of a judgment based on the invalidity of the judgment or writ of execution must be filed in the county where the judgment was rendered. TEX. CIV. PRAC. & REM. CODE § 15.013 (2007).

9) **Action against county.** A suit against a county must be filed in that county. TEX. CIV. PRAC. & REM. CODE § 101.102(a) (2007).

10) **Suit involving defamation or invasion of privacy.** A suit for libel, slander, or invasion of privacy must be filed in one of the following: (1) the county where the plaintiff resided when the action accrued, (2) the county where the defendant resided when the suit was filed, (3) the county where any of the defendants reside, or (4) the domicile of any corporate defendant. TEX. CIV. PRAC. & REM. CODE § 15.017 (2007).

11) **Inmate litigation.** A suit brought by an inmate for an action that accrued while the inmate was in a Texas prison operated by the Texas Department of Criminal Justice must be filed in the county where the facility is located. TEX. CIV. PRAC. & REM. CODE § 15.019(a) (2007).

12) **TTCA Suit.** The Texas Tort Claims Act (TTCA) provides that a suit under the TTCA shall be brought in the county where "the cause of action or a part of the cause of action arises." TEX. CIV. PRAC. & REM. CODE § 101.012(a) (2007).

13) **Injunction against party.** Injunction suits against a resident must be tried in a district or county court in the county where the party is domiciled. TEX. CIV. PRAC. & REM. CODE § 65.023(a) (2007) (except subject to Subsection(b)).

14) **Suit on insurance contract.** In a suit against an insurance company regarding coverage, there are two mandatory venues: (1) the county where the policyholder or beneficiary who instituted the suit resided at the time of the accident or (2) the county where the accident involving the uninsured or underinsured motorist's vehicle occurred. TEX. INS. CODE § 1952.110 (2007).

15) **Trust matters.** For suits involving a trust, venue is in any county where during the four year period before the suit is filed, the trustee resided or the trust administered. TEX. PROP. CODE § 115.002(b), (c) (2007).

16) **Condemnation suit.** In a condemnation proceeding, if the owner resides in a county where part of the property is located, venue is in the county where the owner resides. TEX. PROP. CODE § 21.013(a) (2007).

17) **Attorney disciplinary action.** In a suit against an attorney for disciplinary action, venue is in the district court (1) in the county of the attorney's principal place of practice; (2) in the county of the attorney's residence; or (3) in the county where the misconduct occurred in whole or in part. TEX. R. DISC. P. 3.03. In all other instances, venue is in Travis County. *Id.*

C) **General venue rule.** If no mandatory venue provision applies, the plaintiff must consult the general venue provision to determine where to file suit. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a) (2007). Under the general venue rule, lawsuits must be brought (1) in the county where all or a substantial part of the events giving rise to the claim occurred; (2) in the county where the defendant resided when the cause of action accrued if the defendant is a natural person; (3) in the county of the defendant's principal office in Texas if the defendant is not a natural person; or (4) if none of the preceding provisions apply, in the county where the plaintiff resided when the cause of action accrued. *Id.* In limited instances, a court may transfer an action from a county of proper venue to another county of proper venue. *Id.* § 15.002(b) (permitting transfers for the convenience of the parties and witnesses and in the interest of justice). The court's decision to grant or deny a transfer is not grounds for appeal or mandamus. *Id.* § 15.002(c).

D) **Permissive venue provisions.** The permissive venue provisions provide alternatives to the general venue rule in certain instances. *See, e.g.*, *id.* § 15.031. Examples of permissive venue provisions are as follows:

1) **Suits against estates.** A suit against an executor, administrator, or guardian to establish a money demand against the estate may be brought in the county where the estate is administered, or if the suit arises out of a negligent act or omission by an executor, administrator, or guardian, suit may be brought where the negligent act or omission occurred. *Id.*

2) **Certain insurance companies.** A suit against a fire, marine, or inland insurance company may be brought in any county where the insured is situated. *Id.* § 15.032. A suit against a life, health, or accident insurance company may be brought in the county of the company's principal office in Texas, in the county where the loss occurred, or in the county where the plaintiff resided when the cause of action accrued. *Id.*

3) **Manufacturers.** A suit for breach of warranty by a manufacturer of consumer goods may be brought in any county where all or a substantial part of the events giving rise to the claim occurred, in the county of the manufacturer's principal office in Texas, or in the county where the plaintiff resided when the cause of action accrued. *Id.* § 15.033.

4) **Written contracts.** A suit on a written contract that states the contract will be performed in a certain county may be brought in that county or in the county where the defendant is domiciled. *Id.* § 15.035(a). A suit by a creditor involving a consumer transaction for goods may be brought in the county where the defendant

signed the contract or in the county where the defendant resided when suit was filed. *Id.* § 15.035(b).

5) **Deceptive Trade Practices Act.** A suit under the Deceptive Trade Practices Act must be brought in a county of proper venue under chapter 15 of the Civil Practice and Remedies Code or in a county where the defendant or its authorized agent solicited the transaction. TEX. BUS. & COM. CODE § 17.56 (2007).

6) **Whistleblower.** A whistleblower suit brought by a state employee may be filed in the county where the cause of action arose or in Travis County. TEX. GOV'T CODE § 554.007(a) (2007).

NEGLIGENCE

Comparative Fault / Contributory Negligence

A) **Proportionate liability.** In Texas, "proportionate responsibility" is the method for determining the percentage of damages that each party to a lawsuit must pay. If a plaintiff is partially responsible for its own damages, the plaintiff's recovery is reduced—or barred—by whatever percentage of those damages can be attributed to the plaintiff. Under the common law doctrine of contributory negligence, any negligence on the part of the plaintiff that contributed to the injury barred the plaintiff's recovery. This harsh doctrine was eliminated by the Texas Legislature in 1973. In its place, the Legislature adopted a more equitable system of proportionate responsibility, which operates on the principle that each party should be liable only for its own share of the fault. MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION, ch. 55 § 1, p. 1379 (2007).

B) **Assignment.** The rules governing the assignment of proportionate responsibility are found in Chapter 33 of the Texas Civil Practice and Remedies Code.

C) **Applicability.** Chapter 33 expressly applies to the following types of cases:

1) **All actions based in tort.** TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a)(1) (2007). Specifically, Chapter 33 applies to the following tort claims:

a) Negligence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a); *JWC Electronics, Inc. v. Garza*, No. 05-1042, 2008 WL 2554942, at *3 (Tex. June 27, 2008).

b) Products liability. *See Garza*, 2008 WL 2554942, at *3.

c) Fraud. *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 773 (Tex. App. 4th Dist. 2002), *overruled on other grounds*, *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 59 (Tex. 2008).

d) Breach of implied warranties under the Uniform Commercial Code. *Garza*, 2008 WL 2554942, at *4.

e) Dram shop claims. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 692 (Tex. 2007).

2) Claims under the Texas Deceptive Trade Practices Act. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a)(2) (2007).

D) **Inapplicability.** The proportionate responsibility scheme does not apply in all cases. For example, Chapter 33 does not apply in the following:

1) Breach of contract actions. *See Doncaster v. Hernaiz*, 161 S.W.3d 594, 604 (Tex. App. 4th Dist. 2005, no pet.).

2) Claims for conversion under the Uniform Commercial Code. *See S.W. Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104, 111 (Tex. 2004).

3) Claims for statutory fraud brought under section 27.01 of the Texas Business and Commerce Code. *Davis v. Estridge*, 85 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied).

4) Actions to collect workers' compensation benefits. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(c)(1) (2007).

5) Employees' lawsuits for work-related injuries against employers who were not subscribers to workers' compensation insurance. *See Kroger Co. v. Keng*, 23 S.W.3d 347, 352 (Tex. 2002).

6) Claims for exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(c)(2) (2007).

7) Causes of action arising from the sale of methamphetamine, as described by Chapter 99 of the Texas Civil Practice & Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(c)(3) (2007).

E) **Jury's determination.** In cases governed by Chapter 33, the jury is required to determine the percentage of responsibility for the following persons:

1) **Each claimant.**

a) **Definition.** A "claimant" is a "person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party claimant." CIV. PRAC. & REM. CODE ANN. § 33.011(1) (2007).

b) **Derivative actions.** In derivative actions (e.g. a lawsuit brought by a family member for wrongful death), then the definition of "claimant" includes not only the person seeking recovery of damages, but also (1) any person who has sought recovery of damages; (2) any person who could seek recovery of

damages; and (3) the person who died, was injured or harmed, or whose property was damaged. CIV. PRAC. & REM. CODE ANN. § 33.011(1).

2) **Each defendant.**

a) **Definition.** A "defendant" is a person from whom, at the time the case is submitted to the jury, a plaintiff seeks recovery of damages. CIV. PRAC. & REM. CODE ANN. § 33.011(2) (2007).

3) **Each settling person.**

a) **Definition.** A "settling person" is a "person who has, at any time, paid or promised to pay money or anything of monetary value to the plaintiff in consideration of potential liability" for the damages sought. CIV. PRAC. & REM. CODE ANN. § 33.011(5) (2007).

4) **Each responsible third party.**

a) **Definition.** A "responsible third party" is any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought. CIV. PRAC. & REM. CODE ANN. § 33.011(6) (2007).

b) **Designated person.** A defendant may file a motion for leave to designate a person as a responsible third party. CIV. PRAC. & REM. CODE ANN. § 33.004(a) (2007). The motion must be filed at least 60 days before trial. *Id*. The plaintiff may file an objection to the motion within 15 days. CIV. PRAC. & REM. CODE ANN. § 33.004(f). However, as long as the defendant has satisfied the pleading requirements of the Texas Rules of Civil Procedure, the court is required to grant the motion for leave to designate the person as a responsible third party. *See* CIV. PRAC. & REM. CODE ANN. § 33.004(g). Once the motion for leave is granted, the person is designated a responsible third party without further action by the defendant. CIV. PRAC. & REM. CODE ANN. § 33.004(h).

c) **Motion to strike.** After adequate time for discovery, a party may move to strike a responsible third party by alleging there is no evidence the designated person is responsible for any portion of the claimant's alleged injury or damages. At that point, the burden shifts to the defendant to present sufficient evidence to create a genuine issue of material fact regarding the designated person's responsibility. CIV. PRAC. & REM. CODE ANN. § 33.004(l) (2007).

d) **Effect.** It should be noted that the granting of a motion for leave to designate a responsible third party does not, by itself, impose liability upon that person. Moreover, it cannot be used in another proceeding to establish liability against that person by virtue of doctrines like *res judicata* or collateral estoppel. CIV. PRAC. & REM. CODE ANN. § 33.004(i) (2007).

e) Significantly, however, once a person is designated as a responsible third party, the claimant has sixty days to join that person as a defendant—even if such a claim would otherwise be barred by the applicable statute of limitations. CIV. PRAC. & REM. CODE ANN. § 33.004(e) (2007).

F) **Damages barred.** If the jury assigns more than 50% (i.e. 51% or more) of the responsibility to a claimant, the claimant is barred from recovering damages. CIV. PRAC. & REM. CODE ANN. § 33.001 (2007).

G) **Damages reduced.** If the jury assigns a percentage of responsibility of 50% or less to a claimant, the court is required to reduce the amount of damages by a percentage equal to the percentage of responsibility assigned to the claimant. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (2007). The amount of damages is then reduced by the amount of any settlements. CIV. PRAC. & REM. CODE ANN. § 33.012(b).

1) **Health care liability.** In health care liability claims (i.e. medical malpractice), where one or more persons have settled, a defendant is entitled to make an election between (1) a dollar-for-dollar credit for the amount of the settlements or (2) a reduction of the damages based upon each person's percentage of responsibility. CIV. PRAC. & REM. CODE ANN. § 33.012(c).

Exclusive Remedy – Workers' Compensation Protections

A) **Optional participation.** In Texas, participation in the workers' compensation system is optional for employers and employees. However, if the employer purchases workers' compensation insurance, the employer must adhere to the statutory and regulatory guidelines of the Workers' Compensation Act. In exchange for fulfilling the Act's requirements, the Act protects an employer from an employee's common law claims for injuries or death occurring during the course and scope of the employee's work responsibilities, except those claims involving the death of an employee caused by an employer's intentional or grossly negligent conduct. An employee who does not "opt out" of the workers' compensation system waives claims not provided by the Act. Thus, workers' compensation insurance provides the exclusive remedy for the injury or death of a participating employee in most cases. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 658 (Tex. 2008) (internal citations omitted).

B) **Effect of non-subscription.** On the other hand, if an employer does not subscribe to workers' compensation insurance, the employer will be exposed to suits based on negligence or gross negligence. *See* TEX. LABOR CODE § 406.033 (2006). In such cases, the non-subscribing employer will be precluded from raising the defenses of contributory negligence, assumption of the risk, negligence of a fellow employee, or pre-injury waiver. *Id*.

Joint and Several Liability

A) Generally, a defendant is liable to the claimant only for the percentage of damages equal to the percentage of responsibility assigned to that defendant by the jury. TEX. CIV. PRAC.

& REM. CODE ANN. § 33.013(a) (2007). However, a defendant may be also jointly and severally liable for the entire amount of damages if the jury has assigned that defendant a percentage of responsibility greater than 50%. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 § 33.013(b)(1). Moreover, a defendant may be jointly and severally liable if its conduct is found to be in violation of certain provisions of the Texas Penal Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b)(2).

B) **Contribution.** TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(a) (2007):

> If a defendant who is jointly and severally liable pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.

C) **Proportionality.** TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(b) (2007):

> As among themselves, each of the defendants who is jointly and severally liable . . . is liable for the damages recoverable by the claimant . . . in proportion to his respective percentage of responsibility. If a defendant who is jointly and severally liable pays a larger proportion of those damages than is required by his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other defendant with whom he is jointly and severally liable . . . to the extent that the other defendant has not paid the proportion of those damages required by that other defendant's percentage of responsibility.

D) **Failure to pay.** TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(c) (2007):

> If for any reason a liable defendant does not pay or contribute the portion of the damages required by his percentage of responsibility, the amount of the damages not paid or contributed by that defendant shall be paid or contributed by the remaining defendants who are jointly and severally liable for those damages. The additional amount to be paid or contributed by each of the defendants who is jointly and severally liable for those damages shall be in proportion to his respective percentage of responsibility.

E) **Settlements.** "No defendant has a right of contribution against any settling person." TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(d) (2007).

Indemnification

A) **Common-law negligence indemnity.** Although largely replaced by a statutory scheme for contribution described in the foregoing section, common-law indemnity is available in negligence cases (1) in which one party's liability is purely vicarious or (2) to protect innocent sellers in certain product liability cases. In general, common-law indemnity permits a party to recover its expenses paid in discharging liability when, through no action of its own, it is subjected to tort liability for wrongful conduct of another solely based on the parties' relationship. There is, however, no right of common-law indemnity against a defendant who is not liable to the plaintiff. *FG Holdings, Inc. v. London American Risk Specialists, Inc*., 2007 WL 4341408, at *6 (Tex. App. 2007) (not designated for publication).

B) **Contract.** An obligation to indemnify may also arise by operation of contract. However, because indemnity provisions seek to shift the risk of one party's future negligence to the other party, Texas imposes a fair notice requirement before enforcing such agreements. *Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508-09 (Tex. 1993). An agreement that does not satisfy either of the fair notice requirements is unenforceable as a matter of law. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004).

1) **Fair notice requirements.** The fair notice requirements are the express negligence doctrine and the conspicuousness requirement. *Reyes*, 134 S.W.3d at 192.

a) **Express negligence.** Under the express negligence doctrine, an intent to indemnify one of the parties from the consequences of its own negligence must be specifically stated in the four corners of the document. *Ethyl Corp. v. Daniel Constr. Co*., 725 S.W.2d 705, 707 (Tex. 1987).

b) **Conspicuousness.** The conspicuousness requirement mandates that something must "appear on the face of the contract to attract the attention of a reasonable person when he looks at it." *Dresser*, 853 S.W.2d at 508. Language is conspicuous if it appears in larger type, contrasting colors, or otherwise calls attention to itself. *Id.* at 511.

C) **Statutory indemnity.** Indemnity may also be required by statute in some circumstances. For example, a manufacturer is required to indemnify a seller in a products 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, for which the seller would be independently liable. TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(a) (2005).

Strict Liability

A) **Ultrahazardous or abnormally dangerous activities.** Texas does not recognize a cause of action for strict liability for "ultrahazardous" or "abnormally dangerous" activities. *Prather v. Brandt*, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Texas has not adopted RESTATEMENT (SECOND) OF TORTS § 19 regarding liability for abnormally dangerous activities. *Id*.

B) **Products liability.** Texas does, however, recognize a strict liability cause of action in the context of products liability. *See, e.g.*, *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996). In that regard, Texas has adopted RESTATEMENT (SECOND) OF TORTS § 402A, holding those who sell defective products strictly liable for physical harm they cause to consumers. *See New Tex. Auto Auction Servs., L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 402 (Tex. 2008). Specifically, section 402A states:

> (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.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

1) **Introducing product.** The rule applies to any person engaged in the business of selling products for use or consumption. To incur liability, a defendant does not have to actually sell the product; introducing the product into channels of commerce is enough. *See Barajas*, 927 S.W.2d at 613. Notably, strict liability has been applied to manufacturers, distributors, lessors, bailors, and dealers. *See Gomez De Hernandez*, 249 S.W.3d at 403.

2) **Mere engagement in selling.** On the other hand, Texas has limited the scope of those "engaged in the business of selling" to those who actually placed a product in the stream of commerce. Imposition of strict liability demands more than an incidental role in the overall marketing program of the product. For example, the Texas Supreme Court has noted that an advertising agency that provides copy, a newspaper that distributes circulars, an internet provider that lists store locations, and a trucking business that makes deliveries all might be "engaged" in product sales, but they do not themselves sell the products. Thus, strict liability only to businesses that are "in the same position as one who sells the product." The reason for this limitation arises from the justifications for strict liability itself, namely: (1) compensating injured consumers, (2) spreading potential losses, and (3) deterring future injuries. Businesses that play only an incidental role in a product's placement are rarely in a position to deter future injuries by changing a product's design or warnings. If required to spread risks, they must do so across far more products than the one that was defective. Moreover, while many businesses may be able to pay compensation, consumers normally expect a product's manufacturer to be the one who stands behind it. *See Gomez De Hernandez*, 249 S.W.3d at 403-04.

3) **Available theories.** A plaintiff may prove that a product is defective under any one of the following three theories (*see, e.g.*, *Benavides v. Cushman, Inc*., 189 S.W.3d 85, 881 (Tex. App. 1st Dist. 2006).

   a) **Manufacturing defects.** A manufacturing defect exists if a product does not conform to the design standards and blueprints of the manufacturer, and the flaw makes the product more dangerous and therefore unfit for its intended or reasonably foreseeable uses.

b) **Design defects.** A product with a design defect complies with all design specifications, but the design configuration is unreasonably dangerous because the risk of harm associated with its intended and reasonably foreseeable use outweighs its utility.

c) **Marketing defects (failure to warn)**. A marketing defect is found if the lack of adequate warnings or instructions renders an otherwise adequate product unreasonably dangerous. A marketing defect occurs if a defendant knows or should know of a potential risk of harm presented by a product but markets it without adequately warning of the danger or providing instructions for safe use.

According to *Chandler v. Gene Messer Ford, Inc*., 81 S.W.3d 493, 504 (Tex. App. 2002), in marketing defect cases, a plaintiff must prove that:

> (1) a risk of harm is inherent in the product or may arise from the intended or reasonably anticipated use of the product;
>
> (2) the product supplier actually knew or should have reasonably foreseen the risk of harm at the time the product was marketed;
>
> (3) the product must possess a marketing defect;
>
> (4) the absence of a warning or instructions renders the product unreasonably dangerous to the user or consumer of the product; and
>
> (5) the existence of a causal nexus between the failure to warn or instruct and the user's injury.

i) **Affirmative defenses.** There are two affirmative defenses to marketing defect claims: the "common knowledge" defense and the "learned intermediary" defense. Both defenses must be pled and proved by the manufacturer in the trial court. *Coleman v. Cintas Sales Corp*., 40 S.W.3d 544, 551 (Tex. App. 2001). Pursuant to the "common knowledge" defense, a manufacturer does not have a duty to warn if the danger is so well known to the community as to be beyond dispute. Pursuant to the "learned intermediary" defense, a manufacturer may fulfill its duty to warn by proving that an adequate warning was given to an intermediary who would then pass the warning along to the user. *Id.*

Willful and Wanton Conduct

A) Texas law does not recognize a cause of action for willful and wanton conduct. Nor is "willful and wanton conduct" the standard for imposing exemplary damages. Instead, the three types of aggravating conduct that will support a finding of exemplary damages are

gross negligence, malice and fraud. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (2008).

1) **Gross negligence.** In order to prove gross negligence, the plaintiff must prove either: (1) the act or omission, when viewed objectively from the defendant's standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; or (2) the defendant had actual, subjective awareness of the risk but proceeded anyway with a conscious indifference to the rights, safety or welfare of others. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11)(a)-(b) (2007).

2) Malice is defined as the specific intent to cause substantial injury or harm to the plaintiff. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(7).

3) **Exemplary damages.** In the context of exemplary damages, the plaintiff must prove actual fraud—*i.e.* fraud involving dishonesty of purpose or the intent to deceive. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(6) (2007); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964).

B) **Standard.** The plaintiff has the burden of proving the aggravated conduct by clear and convincing evidence, which is the measure or degree of proof that will produce in the mind of the fact-finder a firm belief or conviction about the truth of the allegations. The burden "may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith or deceptive trade practices." TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(b) (2007).

C) **Factors.** In determining whether to award exemplary damages, the jury should consider the following factors: the nature of the wrong; the character of the conduct; the degree of culpability; the situation and sensibilities of the parties; public sense of justice and propriety; and the defendant's net worth. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a) (2007).

D) **Excessiveness.** An award of exemplary damages cannot be unreasonably excessive. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The recovery of exemplary damages is also subject to a statutory cap, found in TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2007). Specifically, exemplary damages cannot exceed an amount equal to the greater of: (a) two times the amount of economic damages plus (b) the amount of non-economic damages not to exceed $750,000.00; or $200,000.00. *Id.*

DISCOVERY

Electronic Discovery Rules

A) Discovery of data or information that exists in electronic or magnetic form is governed by TEX. R. CIV. P. 196.4 (2007). Rule 196.4 provides that a party must specifically request production of electronic or magnetic data, and must specify the form in which it is to be produced. The responding party must provide data that is responsive and

reasonably available in the ordinary course of business. To the extent that the data cannot be reasonably retrieved or produced in the form requested, the responding party must state an objection complying with the Rules of Civil Procedure. If the court orders a party to comply with a request, the court must also order the requesting party to "pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

Expert Witnesses

A) **Qualification.** TEX. R. EVID. 702 (2007) allows a witness "qualified as an expert by knowledge, skill, experience, training or education" to testify in the form of opinion or otherwise where the expert's specialized knowledge will "assist the trier of fact to understand the evidence or determine a fact issue." Texas courts rely upon the principles set forth by Texas Supreme Court to analyze both the qualifications of proffered experts and the reliability of proffered expert testimony. Some of these well-established principles are articulated in *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713 (Tex. 1998) (acknowledging that different factors may be considered to assess the reliability of scientific evidence in different cases); *Merrell Dow Pharms. V. Havner*, 953 S.W.2d 706 (Tex. 1997) (discussing reliability of scientific testimony); *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996) (discussing necessary qualifications of an expert witness); and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (identifying a list of non-exclusive factors to be used to determine whether an expert's scientific testimony is of probative value).

B) **Forms of disclosure – reports required.** The scope of permissible discovery with regard to expert witnesses depends upon the expert's characterization as (1) a testifying expert or (2) a consulting expert.

1) **Testifying experts.** A party may discover information regarding testifying expert witnesses only through TEX. R. CIV. P. 194 and 195 (2007).

a) **Requests.** TEX. R. CIV. P. 194.2(f) (2007) permits a party to request disclosure of (1) the identity of any testifying expert, (2) the subject matter on which the expert will testify and (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them. Rule 194.2(f)(4) further permits a party to request any reports or data compilations prepared by the expert in anticipation of the expert's testimony. To the extent no report or data compilation has been prepared by an expert witness, the court may order the witness to reduce his observations and opinions to tangible form under TEX. R. CIV. P. 195.5.

b) **Timeframe.** TEX. R. CIV. P. 195.2 (2007) provides that, unless otherwise ordered by the court, a party seeking affirmative relief must designate its experts no later than 90 days before the end of the discovery period; all other experts must be designated no later than 60 days before the end of the discovery period. Rule 195 also permits a party to conduct discovery relating to testifying expert witnesses through the oral deposition of the witness.

c) **Exclusion.** TEX. R. CIV. P. 193.6 (2007) provides for mandatory and automatic exclusion of the testimony of any witness not timely and properly identified. TEX. R. CIV. P., Rule 193.6(a); *Matagorda County Hosp. Dist. v. Burwell*, 94 S.W.3d 75 (Tex. App. 2002).

d) **Consulting experts.** A consulting expert is defined by TEX. R. CIV. P. 192.7 (2007) as one who is hired for consultation only, and is not expected to testify. Pursuant to TEX. R. CIV. P. 192.3(e), the identity and mental impressions of a consulting expert are not discoverable. A consulting expert will be treated as a discoverable testifying expert, however, if the expert's mental impressions or opinions are reviewed by a testifying expert. TEX. R. CIV. P. 192.3(e). Further, a consulting expert will be treated as a discoverable fact witness to the extent that the expert acquires first-hand knowledge of discoverable facts or information. TEX. R. CIV. P., Rule 192.3(c). One example of this would be if the expert personally inspected equipment involved in an accident. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550 (Tex. 1990).

B) **Rebuttal witnesses.** Although there is no specific rule governing rebuttal witnesses, Texas courts have generally, in civil matters, applied the same standards for disclosure to rebuttal witnesses as are applied to any other expert witness. To the extent that one party can reasonably anticipate the need to rebut specific testimony or theories offered by another party at trial, the identity, mental impressions and opinions of the proffered rebuttal witness must be disclosed pursuant to the rules governing discovery. *See, e.g., Moore v. Memorial Hermann Hosp. System, Inc*. 140 S.W.3d 870, 875 (Tex. App. 14th Dist. 2004) (holding that once a hospital disclosed the opinions of its expert witness, Plaintiff could reasonably have anticipated the need to rebut the expert's testimony at trial). In criminal matters, the duty to disclose witnesses that the State intends to call does not generally encompass rebuttal witnesses. *See Hoagland v. State*, 494 S.W.2d 186 (Tex. Crim. App. 1973); *DePena v. State*, 148 S.W.3d 461 (Tex. App. 2004); *Doyle v. State*, 875 S.W.2d 21 (Tex. App. 1994).

C) **Discovery of expert work product.** TEX. R. CIV. P. 194.2(f)(4) (2007) permits a party to request disclosure of any documents, reports or data compilations that have been reviewed by or prepared by a party's retained testifying expert witness. Further, Rule 194.5 provides that there can be no assertion of work product privilege to a request for disclosure made under Rule 194.2.

Non-Party Discovery

A) **General rules.** General rules regarding discovery from nonparties is governed by TEX. R. CIV. P. 205 (2007).

B) **Subpoenas.** Subpoenas are generally governed by TEX. R. CIV. P. 176 (2007). A subpoena may be issued by the clerk of court, any attorney authorized to practice in the State of Texas, or an officer authorized by take depositions in the State of Texas. TEX. R. CIV. P. 176.4. A party may issue a discovery subpoena upon a non-party to compel an

oral deposition, a deposition upon written questions or production of documents and tangible things. TEX. R. CIV. P. 176.2, 205.1. The party seeking such discovery is required to serve upon the non-party and upon all parties, a copy of the notice applicable to the type of discovery being requested. TEX. R. CIV. P. 205.2. Subpoenas to be served upon non-parties must be filed with the court. TEX. R. CIV. P. 191.4. A non-party that is not retained by, employed by, or otherwise subject to the control of a party may not be compelled by subpoena to appear for testimony or to produce documents in a county that is more than 150 miles from where the person resides or is served. TEX. R. CIV. P. 176.3, 199.3. The witness must be paid $10.00 for each day of attendance at trial or discovery, and is entitled to receive payment for one day at the time that the subpoena is served. TEX. CIV. PRAC. & REM. CODE § 22.001 (2007).

B) **Time frames for responses.** A non-party upon whom a proper subpoena is served must comply with the command stated therein unless the non-party serves upon the requesting party a proper objection or obtains a protective order prior to the time for compliance. TEX. R. CIV. P. 176.6 (2007). Texas rules do not establish a specific time frame within which a non-party must respond to a discovery subpoena; the date for compliance or response is provided within the discovery notice and subpoena. The rules, however, do require that a party provide the non-party a "reasonable time" to respond. TEX. R. CIV. P. 205.3. A subpoena upon a non-party to appear for deposition must be served upon the witness "a reasonable time before the deposition is taken." TEX. R. CIV. P. 199.2.

Privileges

A) **Attorney-client privilege.** The attorney-client privilege is governed by TEX. R. EVID. 503 (2007). The general rule states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client: (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (B) between the lawyer and the lawyer's representative; (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; (D) between representatives of the client or between the client and a representative of the client; or (E) among lawyers and their representatives representing the same client.

B) **Confidentiality.** A communication is confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." TEX. R. EVID. 503(a)(5) (2007). Communications made in the presence of others who do not qualify as representatives of the client or the lawyer are not considered confidential. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App. 1997); *see In re Ford Motor Co*., 988 S.W.2d 714, 719 (Tex. 1998) (held no attorney–client relationship between the insured and the carrier at the time the statements were made because the carrier was not the insured's counsel or representative of their counsel). A lawyer's representative is a person employed by the lawyer to assist in the rendition of professional legal services. TEX. R. EVID. 503(a)(4); *see IMC Fertilizer, Inc.*

v. O'Neill, 846 S.W.2d 590, 592 (Tex. App. 14th Dist. 1993) (investigator hired by counsel is lawyer's representative).

C) **Work product privilege.** The work product privilege is broader than the attorney-client privilege because it includes all communications made in preparation for trial, including an attorney's interviews with parties and non-party witnesses. *In re Bexar County Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007). TEX. R. CIV. P. 192.5(a) (2007) states that the scope of the privilege covers:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). Documents, communications, or mental impressions are prepared in "anticipation of litigation" if: "(1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue" (objective standard); and (2) the party "resisting discovery believed in good faith that there was a substantial chance that litigation would ensue" and prepared the material, conducted the investigation, developed the mental impression, or communicated the information in anticipation of such litigation (subjective standard). *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204-207 (Tex.1993).

1) **Protected materials.** This privilege extends to mental impressions, opinions, conclusions, and legal theories, as well as the selection and ordering of documents. *In re Bexar County Dist. Attorney's Office*, 224 S.W.3d 182. Core work product is material that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. TEX. R. CIV. P. 192.5(b)(2) (2007). Core work product is absolutely privileged and not discoverable. *In re Bexar County Dist. Attorney's Office*, 224 S.W.3d 182; *see Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App. 1st Dist. 1997) (interview notes after anticipation of litigation receive absolute protection); *In re Bloomfield Mfg Co.*, 977 S.W.2d 389, 392 (Tex. App. 1998) (database created by attorney protected); *National Union Fire Ins. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993) (attorney litigation file protected); *Humphreys v. Caldwell*, 888 S.W.2d 469 (Tex. 1994) (documents in claim file prepared by attorney protected). All other work product is non-core work product, and is discoverable only upon a showing that the requesting party has a substantial need for the material and is unable without undue hardship to obtain the substantial equivalent of the material by other means. *In re Bexar County Dist. Attorney's Office*, 224 S.W.3d 182, 188 (Tex. 2007).

2) **Non-protected materials.** However, there are some items gathered or generated during an investigation that will not receive protection from disclosure due to a claim of work product privilege. *See* TEX. R. CIV. P. 192.5(c)(4) (2007) (photos); *Axelson, Inc. v. McIlhaney*, 755 S.W.2d 170, 173 (Tex. App. 1988) (holding photographs taken by attorney were not protected under work product privilege);

Terry v. Lawrence, 700 S.W.2d 912, 913 (Tex. 1985) (photographs taken during insurance investigation not privileged); *Lopez v. La Madeleine of Texas, Inc*., 200 S.W.3d 854 (Tex. App. 2006) (reversing case based on admission of undisclosed surveillance video and photographs); TEX. R. CIV. P. 192.3(h), 192.5(c)(1) (witness statements, regardless when they are made); TEX. R. CIV. P. 192.5(c)(1) (information concerning expert witnesses, including all materials provided to, reviewed by, or prepared by or for the expert); TEX. R. CIV. P. 192.5(c)(3) (identity of potential parties and persons with knowledge of relevant facts).

D) **Other privileges.** There are also additional specific privileges allowed in Texas. TEX. OCC. CODE § 901.457(a) (2007) (accountant-client privilege); TEX. R. EVID. 504 (2007) (husband-wife privilege); TEX. R. EVID. 509(c), TEX. OCC. CODE § 159.002(b) (physician-patient privilege); TEX. R. EVID. 510(b)(1) (2007) (mental-health information privilege); TEX. OCC. CODE § 160.007(e) (peer review & medical-committee privilege); TEX. R. EVID. 507 (trade-secret privilege); TEX. CONST. art. 1, § 10 (privilege against self-incrimination); TEX. R. EVID. 505(b) (clergy privilege); TEX. R. EVID. 506 (2007) (political vote); TEX. R. EVID. 502 (reports required by law); *Texas Employers' Ins. Ass'n v. Jackson*, 719 S.W.2d 245, 247 (Tex. App. 1986) (social security information); TEX. CIV. PRAC. & REM. CODE § 30.006 (2007), TEX. GOV'T CODE § 552.108 (2007) (law-enforcement privilege); TEX. R. EVID. 508(a) (identity of informant); *Tilton v. Moye*, 869 S.W.2d 955, 956 (Tex. 1994) (disclosure of member list); TEX. REV. CIV. STAT. art. 4447cc, § 5-6 (2007) (environmental-audit privilege); *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001) (legislative privilege); *Volkswagon, A.G. v. Valdez*, 909 S.W.2d 900, 902 (Tex. 1995) (privileges of foreign jurisdictions); TEX. OCC. CODE § 201.402 (chiropractor records); TEX. OCC. CODE § 202.402 (podiatrist records); TEX. OCC. CODE § 258.102 (dentist records); *Wadley Research Inst. V. Whittington*, 843 S.W.2d 77, 85-86 (Tex. App.-Dallas 1992, orig. proceeding) (results of AIDS test); TEX. HEALTH & SAFETY CODE § 162.003 (2007) (blood bank records); TEX. HEALTH & SAFETY CODE § 773.091 (EMS-patient privilege); TEX. HEALTH & SAFETY CODE § 241.152, 241.153 (hospital-patient privilege).

Requests to Admit

A) "A party may serve on another party . . . written requests that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact, or the genuineness of any documents served with the request." TEX.R. CIV. P. 198.1 (2007). "Unless the responding party states an objection or asserts a privilege, the responding party must specifically admit or deny the request or explain in detail the reasons that the responding party cannot admit or deny the request." TEX. R. CIV. P. 198.2(b). "The responding party may qualify an answer, or deny a request in part, only when good faith requires." TEX. R. CIV. P. 198.2(b). "Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny." TEX. R. CIV. P. 198.2(b).

B) **Deadlines**

1) **Service.** The responding party is required to serve a written response thirty days after service except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. TEX.R. CIV. P. 198.2(a) (2007). If a response to a request for admission is not timely served, the request is considered admitted without the necessity of a court order. TEX.R. CIV. P. 198.2(c).

2) **Judgment.** "[O]nce admissions are deemed admitted by operation of law and where said admissions fully support each element of a cause of action, including damages, they will fully support a judgment based thereon." *Sherman Acquisition II LP v. Garcia,* 229 S.W.3d 802 (Tex. App. 2007). However, a responding party may have the admissions withdrawn upon a showing of "good cause." *Boulet v. State,* 189 S.W.3d 833, 836 (Tex.App. 1st Dist. 2006). Good cause is established by a showing that the failure to respond to the request for admissions "was an accident or mistake, not intentional or the result of conscious indifference." *Id.* (internal quotations omitted). "Even a slight excuse will suffice, especially when delay or prejudice to the opposing party will not result." *Id* (internal quotations omitted). However, undue prejudice occurs when permitting the withdrawal and allowing a late response will delay the trial or significantly hamper the opposing party's ability to prepare for trial. *Wheeler v. Green,* 157 S.W.3d 439, 443 (Tex. 2005).

Unique State Issues

The uniqueness of this rule in Texas is the controversial inclusion of un-filed discovery documents in the definition of "court records." According to the rule, the court may not seal any un-filed discovery if the discovery document is "concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." TEX. R. CIV. P. 76a (2007). It doesn't appear that any other state has a statute that places un-filed discovery under open court records provisions. Robert C. Nissen, *Open Court Records in Products Liability Litigation*, 72 Texas L. Rev. 931, 938 (1994).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) An accident reconstruction is often done by expert witnesses who testify to the details of an incident, usually automobile or airplane accidents. An accident reconstruction may be presented to the jury if the reconstruction evidence is relevant, would assist the jury's understanding of the facts, and would not be cumulative evidence. *See* TEX. R. EVID. 401, 403 (2007). Also, there must be evidence of a substantial similarity between conditions existing at the time of the accident in question and those at the time of the accident reconstruction. *Fort Worth & Denver Ry. Co. v. Williams*, 375 S.W.2d 279, 281-282 (Tex. 1964).

B) **Substantial similarity.** In order to show substantial similarity, the advocate of the accident reconstruction should have prepared a witness familiar with the conditions of the

accident in question and those during the accident reconstruction. *See Kirk v. Bennett*, 456 S.W.2d 191, 194 (Tex. Civ. App. 1970) (party to automobile collision testified to the reenactment of an accident). For example, where the vehicle used in testing was substantially similar to the vehicle involved in the accident, a mechanic's tests were admissible to show the possibility of an unavoidable accident. *Keith v. Silver*, 476 S.W.2d 335, 338-339 (Tex. Civ. App. 14th Dist. 1971).

Appeal

A) **When permitted.** An appeal is considered to be a continuation of a legal proceeding. Generally, a party may only file an appeal once a final judgment has been entered. A final judgment exists when all parties and all issues have been concluded. There is a presumption of finality after a conventional trial on the merits. TEX. CIV. PRAC. & REM. CODE § 51.012 (2007). Final judgments become interlocutory when the trial court grants a new trial. Select interlocutory orders may be appealed including those listed in TEX. CIV. PRAC. & REM. CODE § 51.014. If a party seeks to appeal an order for which there is no final judgment or statutory allowance the party may seek writ of mandamus.

B) **Perfection.** Proper perfection of appeal is governed by TEX. R. APP. P. 25.1 (2007). If an appeal is properly perfected the court of appeals has obligatory jurisdiction, and must hear the case so long as at least $100 is the amount in controversy, if there is an amount in controversy. *Tune v. Texas Department of Public Safety*, 23 S.W.3d 358, 361-62 (Tex. 2000). In contrast, under TEX. R. APP. P. 56.1, the Supreme Court of Texas has discretionary review because it is not an error-correcting body. Rather, its job is to establish jurisprudence.

C) **Preservation.** Preservation of appellate complaints is governed by TEX. R. APP. P. 33.1, 33.2 (2007). To win on appeal the complaining party should be able to show that the trial court committed error, that the error was properly preserved, and that the error was material to the outcome of the case.

D) **Timing.** Time to perfect appeal in civil cases is governed by TEX. R. APP. P. 26.1 (2007). Generally, the notice of appeal must be filed within 30 days after the judgment is signed. TEX. R. APP. P. 26.1. If an extending motion is filed then the notice of appeal may be filed within 90 days. TEX. R. APP. P. 26.1(a). Extending motions include a motion for new trial, motion to modify, motion to reinstate, or a request for findings of fact if filed during the time the trial court has plenary power. *Id*. Accelerated appeals, including interlocutory orders and family cases, must be perfected within 20 days. TEX. R. APP. P. 26.1(b). An appeal asserting fundamental error, including lack of subject matter jurisdiction or matter of public interest which transcends the rights of the parties, has no time limit. If a party timely files a notice of appeal, any other party may file a notice of appeal within 14 days. *See* TEX. R. APP. P. 25.1(b).

1) **Record.** The time to file the clerk's record and the reporter's record is governed by TEX. R. APP. P. 35. Generally, the appellate record must be filed in the appellate court within 60 days after the judgment is signed. *See* TEX. R. APP. P.

35.1. There are exceptions however; including the allowance of 120 days after the judgment is signed for filing if an extending motion is filed, or 10 days after the notice of appeal is filed in the case of an accelerated appeal. *See* TEX. R. APP. P. 35.1(a), (b).

2) **Responsibility for record.** TEX. R. APP. P. 35.3(a) governs the responsibility for filing the clerk's record. The trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if proper notice, request and payment have been made.

3) **Reporter.** The official or deputy reporter is responsible for preparing, certifying, and timely filing the reporter's record if proper notice, request, and payment have been made according to TEX. R. APP. P. 35.3(b).

4) **Requesting filing of record.** Because of the foregoing rules on responsibility, a party to the case should be more concerned with the time to properly request the filing of the record. Request must be made at or before the time for perfecting appeal if seeking a limited record, or within 30 days if not. *See* TEX. R. APP. P. 34.6(b).

The time to file briefs on appeal is governed by TEX. R. APP. P. 38.6 (2007). Appellants generally must file their briefs 30 days after the complete record is filed. If there is an accelerated appeal, then the appellant may file within 20 days after the complete record is filed. Appellees generally must file their briefs within 30 days after the appellant's brief is filed. For an accelerated appeal, the appellee's brief is due 20 days after the appellant's brief is due. A reply brief, if any, must be filed within 20 days after the date the appellee's brief was filed. If either party is struggling with these due dates then the party may obtain an extension by filing a request on reasonable explanation. *See* TEX. R. APP. PROC. 38.6(d); 10.5(b).

Biomechanical Testimony

A) Because biomechanical testimony is based on specialized knowledge and skill, it must meet the qualifications of expert testimony. *See* TEX. R. EVID. 702 (2007). As such, to be admissible, biomechanical testimony must be both relevant and reliable. *E.I. du Ponte de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995). The trial court acts as gatekeeper and makes the initial determination of whether the adequate threshold of relevance and reliability has been met before the evidence is presented to the jury. *Id.* at 557. In order to determine the reliability of an expert's testimony the court is not to focus on the accuracy of the expert's conclusions, but rather on the reliability of the analysis the expert used in reaching them. *Gross v. Burt*, 149 S.W.3d 213, 237 (Tex. App. 2004); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 319 (Tex. App. 2002).

B) **Factors.** In order to assist a lower court's determination of reliability, the Texas Supreme Court has laid out six factors which should be considered:

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 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 nonjudicial uses that have been made of the theory or technique."

Robinson, 923 S.W.2d at 557. These factors are intended to ensure that admitted scientific evidence is firmly based on "the methods and procedures of science" such that the evidence is not "subjective belief or unsupported speculation." *Id.*.

C) **Appeal.** If biomechanical testimony is admitted over proper objection, the objecting party may later complain on appeal that the expert testimony is legally insufficient to support the judgment because it is unreliable. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998) (1998). If deemed unreliable on appeal then a legal sufficiency review will be conducted without the biomechanical testimony because unreliable expert testimony is not evidence. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

Collateral Source Rule

The collateral source rule serves two functions, as a limit to both evidence and damages. *Johnson v. Dallas County*, 195 S.W.3d 853, 855 (Tex. App. 2006); *Taylor v. American Fabritech, Inc.,* 132 S.W.3d 613, 626 (Tex. App. 14th Dist. 2004). Generally, it precludes a defendant in a tort claim from obtaining the benefit of, or disclosing to the jury, payments to the plaintiff from a source other than defendant. *Taylor*, 132 S.W.3d 613. In other words, the tortfeasor is precluded from asserting that its damages should be lessened because the plaintiff already received funds from a collateral source. *Id*. Such collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's loss. Courts frequently apply the collateral source rule where the defendant seeks a reduction of damages because the plaintiff has received insurance benefits that partly or wholly indemnify the plaintiff for the loss.

Convictions

A) **Criminal.** Criminal convictions are inadmissible character evidence except as what may be permitted by cross examination in Rule 609. *See* TEX. R. EVID. 608(b) (2007). TEX. R. EVID. 609(a) requires a two step process before evidence of prior criminal conviction may be admitted for impeachment purposes only. First, any crimes admitted under the rule must be either a felony or one of moral turpitude, regardless of punishment. Second, the court must apply a modified TEX. R. EVID. 403 analysis by determining "that the probative value of admitting this evidence outweighs its prejudicial effect to a party."

TEX. R. EVID. 609(a); *Lewis v. State*, 933 S.W.2d at 177. Although the wording of Rule 609 is similar, Rule 403, itself, requires that the probative value of evidence admitted outweigh "*unfair* prejudice" against the opponent. Also, contrary to the practice under Rule 403 which requires that the opponent prove prejudice, Rule 609 requires that the proponent carry the burden. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Cr. App. 1992). Thus, one may believe that Rule 609(a) carries a heightened standard for admission. In reality however, the analysis involved in admission of prior criminal history under Rule 609 may be less stringent.

1) **Relevance.** Rule 609 "provides for the admissibility of criminal convictions upon satisfaction of the specified conditions *without regard* to the concept of relevance found in Rule 401." *Id.* at 879 n.3 (emphasis in original). This is because "Congress believed that all felonies have some probative value on the issue of credibility." *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983) (discussing Fed. R. Evid. 403). Also, if the court's determination of probative value versus prejudicial effect is not expressly stated in the record, the reviewing court will presume one was made. *See Theus*, 845 S.W.2d at 880 n.6.

2) **Factors.** Factors which are often considered in weighing the probative value of a conviction against its prejudicial effect under Rule 609 include

> (1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the [case] and the witness' subsequent history, (3) the similarity between the past crime and the offense being prosecuted, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue.

Id. at 880 (citing *United State v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

a) **Impeachment value.** "The impeachment value of crimes that involve deception is higher than crimes that involve violence, and the latter have a higher potential for prejudice." *Theus*, 845 S.W.2d at 881 (citing *United States v. Jackson*, 627 F.2d 1198, 1210 (D.C. Cir.1980.)). Therefore, "when a party seeks to impeach a witness with evidence of a crime that relates more to deception than not, the first factor weighs in favor of admission. Also, the second factor will favor admission if the past crime is recent and if the witness has demonstrated a propensity for running afoul of the law." *Theus*, 845 S.W.2d at 881 (citing *United States v. Hayes,* 553 F.2d 824, 828 (2d Cir. 1977)). If, however, the past crime and the subject matter of the case are similar, the third factor will militate against admission. *Id.* "The rationale behind this is that the admission for impeachment purposes of a crime similar to the crime charged presents a situation where the jury would convict on the perception of a past pattern of conduct, instead of on the facts of the charged offense." *Theus*, 845 S.W.2d at 881 (citing *Jackson,* 627 F.2d at 1210).

b) **Testimony and credibility.** "Finally, the last two factors are related, because both depend on the nature of defendant's testimony and the means by which he can prove his story." *See Theus*, 845 S.W.2d at 881. If defendant's testimony is bolstered by that of other witnesses, his credibility is not likely to be a critical issue. *See id*. When there are not numerous witnesses or there is contradictory evidence as to some part of defendant's testimony, however, the importance of defendant's credibility and testimony escalates. *See id*. "As the importance of the witness's credibility escalates, so will the need to allow the opponent an opportunity to impeach the witness's credibility." *United States v. Fountain,* 642 F.2d 1083, 1092 (7th Cir.).

B) **Traffic.** It is settled in Texas that "traffic tickets are only given for violation of penal ordinances or statutes and not for the purpose of establishing fault in civil litigation." *Cody v. Mustang Oil Tool Co., Inc.*, 595 S.W.2d 214 (Tex. Civ. App. 1980); *Condra Funeral Home v. Rollin*, 158 Tex. 478, 314 S.W.2d 277 (1958). *See also Isaacs v. Plains Transport Company*, 367 S.W.2d 152 (Tex. 1963). Thus, "[i]n trial of a civil negligence action arising from an auto accident, it is improper to show that an investigating officer has or has not filed criminal charges or given a traffic ticket as a result of that accident." *Switzer v. Johnson*, 432 S.W.2d 164, 166-67 (Tex. Civ. App. 1st Dist. 1968). "To hold otherwise would be to permit the jury to consider extra-judicial conclusions which are based on penal provisions, which apply a different yardstick from that used in determining civil fault." *Id*. at 167. A traffic ticket may be admissible however, if a party received the ticket in relation to the subject matter of the suit and pled guilty. *See Estate of Cecil Ray Brown v. Masco Corp.*, 576 S.W.2d 105, 107 (Tex. Civ. App. 1978); *Fisher v. Leach*, 221 S.W.2d 384 (Tex. Civ. App. 1949); *Barrios v. Davis*, 415 S.W.2d 724 (Tex. Civ. App. 1967).

C) **Agencies.** TEX. R. EVID. 803(8) (2007) states that

> agency records, reports, statements, or data compilations in any form which set forth the agency's activities, matters observed by the agency pursuant to duty, or factual findings resulting from an investigation made pursuant to authority granted by law are admissible as an exception to the hearsay rule unless the material lacks trustworthiness.

See TEX. R. EVID. 803(8). The traffic conviction exception has been held not to apply to agency convictions. *See Valenzuela v. Heldenfels Brothers, Inc.*, 2006 WL 2294562 (Tex. App. 2006).

Day in the Life Videos

A "Day in the Life" video is a trial tool often utilized to exhibit a plaintiff or victim's typical daily activities. The videos are often produced in personal injury litigation to show how the daily life of the injured party has been affected by the injury suffered, and to potentially gain the sympathy of the jury. *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 772-73 (Tex. App. 1999). Alleged tortfeasor defendants sometimes offer surreptitiously taken "Day in the Life" tapes that show active and unimpaired activities of the plaintiff to defend against a plaintiff's claim. A "Day in the Life" video may also be used in a criminal trial as 'victim impact'

evidence. *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002). The video must be a fair representation of the subject's daily activities to be admissible. *Seymour v. Gillespie*, 608 S.W.2d 897, 898 (Tex. 1980). A "Day in the Life" videotape should be deemed inadmissible if its probative value is outweighed by unfair prejudice. TEX. R. EVID. 403. Mere arousal of the jury's sympathy does not by itself establish inadmissibility, if the video is otherwise probative and relevant. *Walters*, 1 S.W.3d at 772.

Dead Man's Statute

TEX. R. EVID. 601(b) (2007), commonly called the Dead Man's Statute, operates to exclude the testimony of a party in a suit by or against executors, administrators, or guardians which relates to a transaction with or statement by the decedent. *See Adams v. Barry*, 560 S.W.2d 935, 936-37 (Tex. 1978) (referring to Texas' previously-numbered "Dead Man's Statute"). Rule 610(b) is an exception to the general rule in Rule 610(a) that parties to a lawsuit are competent to testify. *Id*., *see also Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988) ("[T]he rules of evidence [do not] contemplate exclusion of otherwise relevant proof unless the evidence proffered is unfairly prejudicial, privileged, incompetent, or otherwise *legally* inadmissible."). As such, Rule 610(b) is strictly construed. *Id*. The rule is intended to insure fairness between the litigants by excluding testimony of a living party pertaining to a transaction with or statement by the deceased whose death precludes rebuttal. *Id*. However, "the rule does not prohibit a party from testifying to facts from personal knowledge arising otherwise than from a transaction with or statement by the decedent." *Id*. (citing *Wideman v. Coleman*, 17 S.W.2d 786 (Tex. Comm. App. 1929)).

Medical Bills

Where physical or mental injury damages are in issue a party may seek in a request for disclosure medical records and bills reasonably related to such injury, or in lieu thereof, an authorization permitting their discovery. *See* TEX. R. CIV. PROC. 194(j) (2007). The party who furnished an authorization may request copies of all medical bills and records obtained by such furnished authorization. *See* TEX. R. CIV. PROC. 194(k). Medical bills may be introduced at trial by a custodian, other qualified witness, or affidavit which complies with Rule 902(10) which must prove the "business record" requirements of Texas Rule of Evidence 803(6). *See* TEX. R. EVID. 902(10), 803(6)-(7) (2007) ("the bills must have been 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").

Offers of Judgment

The offer of judgment rule states that if defendant debtor tenders payment for a just amount owed unconditionally, and plaintiff refuses to accept and proceeds to trial, then defendant is not liable for plaintiff's attorney's fees. *Staff Industries, Inc. v. Hallmark Contracting, Inc.*, 846 S.W.2d 542, 548-49 (Tex. App. 1993); *Southwestern Bell Telephone Co. v. Vollmer*, 805 S.W.2d 825, 833 (Tex. App. 1991); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 1985). It is essential that the tender be an "unconditional offer by the debtor . . . to pay a sum not less than that due [to the creditor]." *Hallmark Contracting*, 846 S.W.2d at 548 (citing *Atlas Van*

Lines, Inc. v. Brookes, 692 S.W.2d 123, 126 (Tex. App. 1985)). If the attempted tender is accompanied by conditions that the debtor has no right to assert, such as settlement for a lesser amount or payment so long as creditor does not seek an appeal, then the offer has no legal effect. *Hallmark Contracting*, 846 S.W.2d at 549; *C.F. Bean Corp. v. Rodriguez,* 583 S.W.2d 900, 901 (Tex. Civ. App. 1979).

Offers of Proof

Offers of proof are governed by TEX. R. EVID. 103(a)(2), (b) (2007). If the court decides not to admit specific evidence in a ruling outside of the presence of the jury, and a party wants to preserve this erroneous ruling for appeal, the party must make an offer of proof at trial. *See In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App. 14th Dist. 2002) ("To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility."). The party seeking admission should request to approach the bench and ask to make an offer of proof outside of the presence of the jury. After the jury has been removed proponent counsel should say "Here begins my offer of proof." Counsel may make the offer himself by adequately summarizing the actual testimony and not just the reasons for the testimony, if not already apparent. *See In Re N.R.C.*, 94 S.W.3d at 806. However, at the request of a party the court shall "direct the making of an offer in question and answer form." TEX. R. EVID. 103(b). Once finished with the offer the proponent counsel should say "Here ends my offer of proof" and obtain a ruling on the record. If the judge grants the offer then the evidence may be introduced to the jury after its return. If the judge maintains after the offer of proof that the evidence shall not be admitted, the offering party has preserved error for appeal so long as the offer was properly recorded. *See Perez v. Lopez*, 74 S.W.3d 60, 66 (Tex. App. 2002) ("While the reviewing court may be able to discern from the record the nature of the evidence and the propriety of the trial court's ruling, without an offer of proof, we can never determine whether exclusion of the evidence was harmful").

Prior Accidents

Evidence of prior accidents is often offered in automobile injury cases to help the jury understand the cause of an accident. Such evidence cannot serve as proof of any relevant issue unless the prior accidents are shown to have occurred under "the same type of occurrence." *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 201 (Tex. App. 2000); *McEwen v. Wal-Mart Stores, Inc.*, 975 S.W.2d 25, 29 (Tex. App. 1998). The burden of proving such similarity is on the proponent of the evidence. *Id*. The proponent should be prepared to offer evidence as to location, similar conditions, a connection of the conditions in some meaningful way, or that the accidents occurred by means of the same instrumentality. *Huckaby*, 20 S.W.3d at 202 (citing *McEwen*, 975 S.W.2d at 29). Where a trooper testified that there had been ten or twenty similar accidents that occurred in different locations as the subject accident, but never explained how they were similar, the court found such testimony improper predicate. *Huckaby*, 20 S.W.3d at 201-02. The court cannot rely on conclusory statements to determine similarity. *Id*. Without a proper showing of similarity the evidence is "not relevant, not material, and is prejudicial." *Southwestern Bell Tel. Co. v. Vollmer*, 805 S.W.2d 825 (Tex. App. 1991). Further, if a trial court were to admit evidence of prior accidents not based on proper predicate, the court will have abused its discretion. *Huckaby*, 20 S.W.3d at 202.

Relationship to the Federal Rules of Evidence

Texas has its own Code of Civil Procedure and its own Code of Evidence. It has adopted portions of certain Federal Rules. The Texas Rules of Evidence are patterned after the Federal Rules of Evidence, and cases interpreting federal rules should be consulted for guidance as to their scope and applicability unless the Texas rule clearly departs from its federal counterpart. C. Miller, *Texas Rules of Evidence: Article V. Privileges,* 16 VOICE FOR THE DEFENSE 40 (October 1986); S.H. Clinton, *Texas Rules of Evidence: Genesis and General Provisions,* 16 VOICE FOR THE DEFENSE 26 (October 1986); *see also Campbell v. State,* 718 S.W.2d 712, 716 (Tex. Cr. App. 1986).

Seat Belt Use Admissibility

A) **Requirements.** It is a misdemeanor under the Texas Transportation Code for a person age 15 or older to ride in the front seat of a vehicle without their safety belt or to fail to ensure minors and small children are properly belted or using proper child passenger safety seat system. *See* TEX. TRANSP. CODE § 545.413(a),(b),(d) (2007).

Civil actions filed in Texas before July 1, 2003 are governed by the rule that use or nonuse of a safety belt or a child passenger safety seat system is not admissible evidence, except in certain suits under the Family Code. *See* former TEX. TRANSP. CODE § 545.413(g)--repealed effective for cases filed on or after July 1, 2003; Acts 2003, 78th Leg., R.S. ch. 204, §§ 8.01, 23.02(c). For actions filed on or after July 1, 2003, the admissibility of seat belt and helmet use is governed by the Texas Rules of Evidence and common law. *See* Acts 2003, 78th Leg., R.S. ch. 204, §§ 8.01, 23.02(c).

B) **Effect on damages.** Prior to the enactment of the repealed statutes, litigants sometimes attempted to argue that a motorist's failure to use an available seat belt either constituted negligence or contributed to the motorist's damages. With respect to liability and damages, some courts viewed the failure to use available seat belts as irrelevant such that failure is neither actionable negligence, nor an act of contributory negligence. *See Quinius v. Estrada*, 448 S.W.2d 552, 554 (Civ. App. 1969); *Sonnier v. Ramsey*, 424 S.W.2d 684, 689 (Civ. App. 1st Dist. 1968); *Red Top Taxi Co. v. Snow*, 452 S.W.2d 772, 779 (Civ. App. 1970). Similarly, The Supreme Court of Texas has held that damages will not be reduced or mitigated because of a plaintiff's failure to wear an available seat belt. *See Carnation Co. v. Wong*, 516 S.W.2d 116, 117 (Tex. 1974); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633 (Tex. 1986).

Spoliation

A) Spoliation is the withholding, hiding, or destruction of evidence relevant to a legal proceeding. Upon a spoliation complaint the judge must determine "(1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator either negligently or intentionally spoliated evidence; and (3) whether the spoliation prejudiced the nonspoliator's ability to present its case or defense." *Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998).

B) **Duty to preserve.** A party may have a statutory, regulatory, or ethical duty to preserve evidence. *Id*. at 955. For example, the Texas Health and Safety Code require hospitals to maintain patient's medical records for a certain period of time. *See* TEX. HEALTH & SAFETY CODE § 241.103 (2007). Also, physicians have an ethical obligation to keep medical records for "at least as long as the length of time to the statute of limitations for medical malpractice claims." *See* Council on Ethics & Judicial Affairs, AMERICAN MED. ASS'N, CODE OF MEDICAL ETHICS, § 7.05 (1994). In certain circumstances a court may heighten these obligations to a legal duty or presumption of spoliation such that the duties are not rendered meaningless. *See Trevino*, 969 S.W.2d at 955.

C) **Foreseeability.** In *Trevino*, The Supreme Court of Texas found that once a party can reasonably determine that litigation is foreseeable, the party has a duty not to destroy evidence relevant to the potential litigation or reasonably calculated to lead to the discovery of admissible evidence. *Id*. at 955-56. The nonspoliating party will bear the burden of proof that the spoliating party could have reasonably anticipated the litigation. *Id*. at 956. The issue is ultimately one of fact, viewed by a totality of the circumstances, to be decided by the court. *Id.* at 957. If the spoliating party negligently or intentionally destroyed evidence when it could have reasonably anticipated litigation, the court may sanction the spoliating party or instruct the jury as to a presumption of spoliation. *Id*., *see also* TEX. R. CIV. P. 215(3) (2007). A party is entitled to a remedy only when evidence spoliation hinders its ability to present its case or defense. *Trevino*, 969 S.W.2d at 958. This is because there is not currently a separate cause of action in civil trials for spoliation.

Subsequent Remedial Measures

TEX. R. EVID. 407(a) (2007) excludes from evidence remedial measures made after an injury in order to prove "negligence or culpable conduct." *See* TEX. R. EVID. 407(a). The Rule further provides that in product liability actions such evidence is "not admissible to provide a defect in a product, a defect in a product's design, or a need for a warning or instruction." *Id*. Such evidence is admissible however in order to prove "ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." *Id*. The Rule is one of public policy and "good sense" as it seeks to encourage, or at least not discourage, people from taking steps to further safety. *E.V.R. II Assocs. V. Brundigs*, 813 S.W.2d 552, 556 (Tex. App. 1991).

Use of Photographs

Photographs are demonstrative evidence. To introduce a photograph a party must have a sponsoring witness who must prove the following: (1) the witness saw the subject of the photograph at or near the time of the event in issue; (2) the witness recognizes the exhibit as a representation of the subject seen; and (3) the exhibit is a true and accurate representation of the subject as it appeared at the relevant time. *State v. City of Greenville*, 726 S.W.2d 162, 168 (Tex. App. 1986). Negatives and prints made from them are considered original photographs. TEX. R. EVID. 1001(c) (2007).

Photographs are governed by the general rule that evidence, even if relevant, must not be admitted if the probative value is outweighed by the danger of unfair prejudice. TEX. R. EVID.

403. This rule often comes into play where a photograph may be deemed to invoke such emotion in the jury that they could no longer fairly decide the case. *Castro v. Sebesta*, 808 S.W.2d 189, 193 (Tex. App. 1st Dist. 1991). However, even where photographs are gruesome, they may still be admissible if they are relevant, verbal descriptions of their content is admissible, and their admission would assist the jury's understanding of complicated testimony such as autopsy testimony. *State v. Long*, 823 S.W.2d 259 (Tex. Crim. App. 1991); *see also Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 671 (Tex. App. 1991) (if relevant, a photograph is admissible, even if gruesome).

DAMAGES

Caps on Damages

A) **Requirements.** Texas has a cap on the amount of exemplary damages a plaintiff can recover from the defendant or defendants. Exemplary damages are defined as damages awarded as penalty or punishment. TEX. CIV. PRAC. & REM. CODE § 41.001(5) (2007); *see Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998); *Transportation Inc. Co. v. Moriel* 879 S.W.2d 10, 16 (Tex. 1994). The courts have held in order to recover exemplary damages, the plaintiff must recover actual damages against the defendant; nominal damages are generally not enough to support an award of exemplary damage. *Safeway Managing Gen. Agency v. Cooper*, 952 S.W.2d 861, 869-70 (Tex. App. 1997); TEX. CIV. PRAC. & REM. CODE § 41.004(a) (2007); *Harkins v. Crews*, 907 S.W.2d 51, 61 (Tex. App. 1995).

B) **Limits.** The award of exemplary damages is limited to the greater of the following: (1) twice the amount of the economic damages, plus any noneconomic damages (up to $750,000.00) found by the jury or (2) $200,000.00. TEX. CIV. PRAC. & REM. CODE §§ 41.008(b), 41.010(b) (2007); *Fist Valley Bank v. Martin*, 55 S.W.3d 172, 194 (Tex. App. 2001), *rev'd on other grounds*, 144 S.W.3d 466 (Tex. 2004).

Calculation of Damages

The plaintiff is not required to stipulate the measure of damages, he only needs to allege sufficient facts to state a cause of action from which the court can determine the proper measure of damages. *See Bowen v. Robinson*, 227 S.W.3d 86 (Tex. App. 1st Dist. 2006); *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 834 (Tex. App. 1993).

Available Items of Personal Injury Damages

A) **Past medical bills.** In Texas, the Plaintiff is able to recover medical expenses, regardless of an award for pain and suffering. *Waltrip v. Bilbon Corp*., 38 S.W.3d 873, 879 (Tex. App. 2001).

1) **Standard.** To recover past medical expenses, the Plaintiff must prove (1) the expenses were necessary to treat the injury and were reasonable in amount, and (2) the expenses were incurred or paid by the plaintiff or on the plaintiff's behalf. TEX.

CIV. PRAC. & REM. CODE § 41.0105 (2007); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 382-83 (Tex. 1956).

2) **Controverting damages.** The plaintiff is able to prove his past medical expenses were "reasonable and necessary" with either expert testimony or by an affidavit attesting the charges for services. The defendant is entitled to controvert the plaintiff's affidavit by submitting a counter affidavit. However, the defendant's counter affidavit must be made by an expert who is qualified to testify at trial, and must give reasonable notice of the basis on which the defendant intends to controvert the claim. *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App. 2001). It is important to note that the defendant's burden is greater than that of the plaintiff, who only needs to produce an affidavit from any non-expert custodian of records. TEX. CIV. PRAC. & REM CODE §§ 18.001, 18.001(b), 18.001(c), 18.002 (2007).

B) **Future medical bills.** To recover future medical expenses, the plaintiff must show there is a reasonable possibility that expenses resulting from the injury will be necessary in the future. *Williams Distrib. Co. v. Franklin*, 884 S.W.2d 503, 510 (Tex. App.—Dallas 1994).

1) Once the plaintiff has provided evidence of the reasonable probability he will incur expenses and the probable amount of theses expenses, then it is up to the jury to decide the actual award. *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485 (Tex. App. 2006); *Rosenboom Mac. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 828 (Tex. App. 1st Dist. 1999); *Williams Distrib.*, 884 S.W.2d at 510. The jury can base the award on (1) the injuries suffered, (2) the medical care rendered before trial, (3) the progress toward recovery under the treatment received, and (4) the plaintiff's condition at the time of trial. *Rosenboom Mac. & Tool*, 995 S.W.2d at 828; *Hughett v. Dwyre*, 624 S.W.2d 401, 405 (Tex. App. 1981).

C) **Hedonic damages.** In Texas hedonic damages fall under the category of physical impairment and loss of normal life, as discussed below. *See Patlyek v. Brittain*, 149 S.W.3d 781, 785 (Tex. App. 2004); *Ramirez v. Fifth Club, Inc.,* 144 S.W.3d 574, 591 (Tex. App. 2004); *Dawson v. Briggs*, 107 S.W.3d 739, 752 (Tex. App. 2003); *Golden Eagle Archer, Inc. v. Jackson*, 116 S.W.3d 757, 764-65, 772 (Tex. 2003).

D) **Increased risk of harm.** Under Texas law, the plaintiff has but one cause of action for all the damages caused by the defendants' legal wrong; the diseases that have developed and will in probability develop are included within this cause of action, for they are but part of the sequence of harms resulting from the alleged breach of legal duty. *Texaco Country Club v. Wade,* 163 S.W.2d 219, 223 (Tex. Civ. App. 1942).

1) The plaintiff cannot split his cause of action and recover damages for one injury/disease, then later sue for damages caused by other such other diseases which might develop, then still later sue, for example, for cancer should cancer appear. His claim includes, without limitation, all damages for future pain and suffering, inability to work in the future, reduced life expectancy, future medical expenses, and future disabilities and diseases that will probably develop from

present injuries. *See*, *e.g., Houston & T.C. Ry. Co. v. Fox,* 106 Tex. 317, 320, 166 S.W. 693, 695 (1914).

E) **Disfigurement.** Disfigurement is recognized as a separate element of recovery from pain and suffering, mental anguish, and loss of earning capacity. *Goldston Corp. v. Hernanez*, 714 S.W.2d 350, 352-53 (Tex. App. 1986) (pain and suffering and mental anguish); *Texas Farm Prods. v. Leva*, 535 S.W.2d 953, 959 (Tex. App. 1976) (loss of earning capacity); *Houston Lighting & Power Co. v. Reed*, 365 S.W.2d 26, 30 (Tex. App. 1963) (loss of earning capacity). A plaintiff can claim he is disfigured when there is an impairment of the person or thing which renders it unsightly, misshapen, imperfect, or deformed in some manner. *Goldman v. Torres*, 341 S.W.2d 154, 160 (Tex. 1960) (construing the term under the Workers' Compensation Act); *Schindler Elevator Corp.*, 78 S.W.3d at 413; *Hopkins Vty. Hosp. Dist. v. Allen*, 760 S.W.2d at 341, 343 (Tex. App. 1988) (construing the term under the Workers' Compensation Act). The amount of damages is measured from the date of the injury until such time the disfigurement is expected to end. *See, e.g., Sunbridge Health Care Corp. v. Penny*, 160 S.W.3d 230, 253-53 (Tex. App. 2005) (disfigurement awarded for a 4-day period from date of injury until death).

1) Disfigurement can be large or small, and can include scars, burns, amputations, contorted limbs or other deformities. *Baptist Mem'l Hosp. Sys. v. Smith*, 822 S.W.2d 67, 80 (Tex. App. 1991); *Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 413 (Tex. App. 14th Dist. 2001) (amputation). The plaintiff can prove past disfigurement through photos and expert testimony. *Baptist Mem'l Hosp.*, 822 S.W.2d at 80. However, because damages for future disfigurement are necessarily speculative the jury is given considerable discretion in awarding said damages to the plaintiff. *Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486, 465 (Tex. App. 14th Dist. 1998).

F) **Loss of normal life.** The Texas standard for loss of normal life is actually "physical impairment." Physical impairment must be specifically pleaded and is defined as "loss of enjoyment of life." *See* TEX. R. CIV. P. 56 (2007); *Golden Eagle Archer, Inc. v. Jackson*, 116 S.W.3d 757, 766 (Tex. 2003); *Dawson v. Briggs*, 107 S.W.3d 739, 752 (Tex. App. 2003).

1) **Past and future.** A plaintiff may recover for both past and future physical impairment. To recover for past physical impairment, the plaintiff must prove he suffered additional loss beyond that of lost earning capacity and pain and suffering. *General Motors Corp. v. Burry*, 203 S.W.3d 514, (Tex. App. 2006); *Shindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 412 (Tex. App. 14th Dist. 2001). If the loss not obvious, then the plaintiff is required to produce evidence showing the tasks or activities he can no longer perform. *See Estrada v. Dillon*, 44 S.W.3d 558, 560-61(Tex. 2001) (evidence of physical impairment must focus on restriction of activities caused by injury).

G) **Disability.** A plaintiff's damages for his disability fall under the same category of loss of normal life/physical impairment, as described above. A plaintiff can recover for

permanent and temporary disability. Below are several brief descriptions of facts where the plaintiff's disability damages either proved or not proved.

1) **Disability proved.** In a negligence suit against an escalator manufacture, the plaintiffs testified that as a result of his injuries, their son had been confined to a wheelchair and had been unable to play like other children. *Shindler Elevator Corp.*, 78 S.W.3d at 412.

In a premises liability case against the owner of a business, the plaintiff testified that her injuries temporarily restricted her to a wheelchair. *Sharm, Inc. v. Martinez*, 900 S.W.2d 777, 784-85 (Tex. App. 1995).

In a negligence case against an ophthalmologist for treatment that resulted in the loss of the plaintiff's eye, the plaintiff established she would suffer from a lack of depth perception and hand-eye coordination and from other vision problems in the future. *Marvelli v. Alston*, 100 S.W.3d 460, 482-83 (Tex. App. 2003).

In a negligence case against a surplus store, the plaintiff showed the injury to his back impaired his ability to sleep and reduce his ability to run, bicycle, and play with his children. *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 39 (Tex. App. 2003).

In a personal injury suit against an employer, testimony established that the plaintiff's asbestosis had caused difficulty breathing and coughing for at least 15 years before the lawsuit. *Quigley Co. v. Calderon*, 2003 WL 77256 (Tex. App. 2003).

2) **Disability not proved.** In a negligence action based on a car accident, testimony established the only limitations the plaintiff might have would be to avoid heavy lifting and repetitive bending and stooping. *Peter v. Ogden Ground Servs.*, 915 S.W.2d 648, 650 (Tex. App. 1st Dist. 1996).

H) **Past pain and suffering.** In Texas, it is up to the jury to whether or not the pain and suffering occurred and the adequate compensation for the plaintiff's damages. *See Missouri Pac. R.R. v. Robinson*, 25 S.W.3d 251, 258 (Tex. App. 2000); *Southwest Tex. Coors, Inc. v. Morales*, 948 S.W.2d 948, 951-52 (Tex. App. 1997); *Austin v. Shampine*, 948 S.W.2d 900, 915 (Tex. App. 1997). To prove past physical pain, the plaintiff may introduce medical records or even testify, himself, as to the pain he has endured. *See Lee v. Andres*, 545 S.W.2d 238, 248 (Tex. App. 1976) (nurse's records); *see also City of Harlingen v. Vega*, 951 S.W.2d 25, 29 (Tex. App. 1997) (plaintiff's testimony in response to summary judgment on immunity defense). However, even without direct evidence, the jury can still infer the degree of pain from the nature of the injury. *Escoto v. Estate of Ambriz*, 200 S.W.3d 716, 730 (Tex. App. 2006); *Prescott v. Kroger Co.*, 877 S.W.2d 373, 376 (Tex. App. 1st Dist. 1994).

I) **Future pain and suffering.** To prove future physical pain, there must be evidence of a reasonable probability the injury will continue to affect the plaintiff; a mere possibility of

future pain is insufficient. *Hicks v. Ricardo*, 834 S.W.2d 587, 590 (Tex. App. 1st Dist. 1992); *See*, *e.g*, *Fisher v. Coastal Transp. Co.*, 230 S.W.2d 522, 524 (Tex.1950) (jury's charge erroneous because it requested damages for pain that plaintiff "may have to undergo in the future").

J) **Loss of society.** Plaintiffs in Texas can recover damages for "loss of consortium," both past and future. Texas PJC-General Negligence & Intentional Torts (2006), PJC 8.3 & cmt.; *Haskett v. Butts*, 83 S.W.3d 213, 216 (Tex. App. 2002) (awarding damages for both past and future loss of consortium). Loss of consortium is a derivative claim made by a spouse, child or parent of the plaintiff to compensate him or her for the loss of love, affection, protection, emotional support, companionship, and society due to the plaintiff's injuries. *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990) (loss of parental consortium); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978) (loss of spousal consortium); *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex.1983) (loss of child consortium). Damages for loss of consortium are not available to the plaintiff's siblings and step-parents. *Ford Motor Co. v. Miles,* 967 S.W.3d 377, 383 (Tex.1998). These damages are also unavailable to parents whose child suffered nonfatal injuries. *Roberts v. Williamson*, 111 S.W.3d 113, 119-120 (Tex. 2003).

1) **Pleading requirements.** Loss of consortium must be specifically pleaded by the Plaintiff. TEX. R. CIV. P. 56 (2007). Once at trial, the plaintiff is not allowed introduce expert testimony regarding the value of the loss. *See*, *e.g.*, *Seale v. Winn Expl*. Co. 732 S.W.2d 667, 669 (Tex. App. 1987) (expert could not help jury decide value of loss of love, affection, and companionship between mother and son); *see also Celotex Corp. v. Tate,* 797 S.W.2d 197, 202 (Tex. App. 1990) (experts can testify about damages based on hypothetical figures, but it was improper to allow testimony based on expert's specific figures on comparative value of guidance and counsel of teacher). However, the defendant is allowed to introduce evidence that would bar or reduce the recovery of the injured person's claim, such as the plaintiff's contributory negligence. *Reagan*, 804 S.W.2d at 466-67 (child's consortium claim for injury to parent); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 738-39 (wife's consortium claim for injury to husband); *Brewerton v. Dalrymple*, 997 S.W.2d 212, 217 (Tex.1999) (wife's consortium claim "is wholly derivative of her husband's intentional infliction claim and fails with it."). The defendant is also allowed to introduce evidence of marital discord to defeat a spouse's claim for past and future loss of consortium. *Pool v. Ford Motor Co*., 715 S.W.2d 629, 636 (Tex. 1986).

K) **Lost of income, wages, earnings.** In Texas, the proper measure of damages in a personal injury case is loss of earning capacity rather than loss of earnings in the past. *Southwestern Bell Tel Co. v. Sims*. 615 S.W.2d 858, 864. Loss of earnings is defined as the loss of actual income because of the inability to perform a certain job that the person held before the injury. *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App. 2002); *Beneficial Personnel Servs. v. Rey* 927 S.W.2d 157, 176 (Tex. App.—El Paso 1996).

1) **Loss of earning capacity.** The plaintiff can recover damages for loss of earning capacity, both past and future. *Bonney v. San Antonio Transit Co*., 325 S.W.2d

117, 120-21 (Tex. 1959); Texas PJC—General Negligence and Intentional Personal Torts (2006), PJC 8.2; *Strauss v. Continental Airlines*, 67 S.W.3d 428, 435 (Tex. App. 14th Dist. 2002); *City of Cleburne v. Trussell,* 10 S.W.3d 407, 410 (Tex. App. 2000); *Harris v. Belue*, 974 S.W.2d 386, 395 (Tex. App. 1998). For future loss of earning capacity, the plaintiff must introduce evidence sufficient to allow the jury to reasonably measure earning capacity in monetary terms. *Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117, 120-21(Tex. 1959); All loss of earning claims, past and future, must also evidence the plaintiff's net loss after any applicable tax liability. TEX. CIV. PRAC. & REM. CODE §§ 18.091(a), (b).

Lost Opportunity Doctrine

A cause of action for lost chance of survival, which a plaintiff may recover when a doctor's or hospital's actions have diminished the plaintiff's chance of survival, is not recognized in Texas. *Arguelles v. UT Family Medical Center*, 941 S.W.2d 255 (Tex. App. 1996); *Kramer v. Lewisville Memorial Hosp*., 858 S.W.2d 397 (Tex. 1993); *Crawford v. Deets*, 828 S.W.2d 795 (Tex. App. 1992). Recovery for lost chance of survival or cure in a medical malpractice action is not authorized in Texas by either the Wrongful Death Act or the Survivalship Statute, or under a separate common-law cause of action. *Kramer v. Lewisville Memorial Hosp*., 858 S.W.2d 397 (Tex. 1993).

Mitigation

A) The plaintiff has a duty to exercise reasonable care in minimizing his damages. *Great Am. Ins. Co. v. North Austin Mun. Util. Dist.*, 908 S.W.2d 415, 426 (Tex. 1995). However, the plaintiff can recover, as damages, the amount reasonably expended in his efforts to minimize his damages. *See Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 857 (Tex.1999). If the plaintiff fails to exercise reasonable care to minimize his damages, then he cannot recover those damages which could have been avoided. *Pinson v. Red Arrow Freight Lines*, 801 S.W.2d 14, 15 (Tex. App. 1990); *see Moulton v. Alamo Ambulence Serv*., 414 S.W.2d 444, 450 (Tex 1967); *City of Fort Worth v. Satterwhit*, 329 S.W.2d 899, 902 (Tex. App. 1959).

B) **Affirmative defense.** It is important to note that the duty to mitigate is affirmative defense, to which the burden of proof is on the defendant. *Toshiba Mach. Co., v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 781 (Tex. App. 2005). The defendant is only entitled to a mitigation instruction if: (1) the defense's evidence clearly shows that plaintiff's decision not to mitigate caused further damages and (2) the defense is able to sufficiently guide the jury in determining which damages were attributable to the plaintiff's decision not to mitigate. In spite of this, the defense is not required to prove an exact amount of damages attributable to the plaintiff's conduct. *Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 225 (Tex. App. 1999).

Punitive Damages

A) Punitive damages, also known as exemplary damages, are designed to penalize a defendant for his outrageous, malicious, or otherwise morally culpable conduct and to deter said conduct in the future. *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex.1994); *see* TEX. CIV. PRAC. & REM. CODE § 41.001(5) (2007).

1) **When may be brought.** In Texas, exemplary damages are authorized by statue and must be specifically pleaded. *Al Parker Buick Co. v. Touchy*, 788 S.W.2d 129, 130 (Tex. App. 1st Dist. 1990).

2) **Standard.** The standard for recovery of exemplary damages is whether or not, by clear and convincing evidence, the harm to plaintiff resulted from gross negligence. "Clear and convincing evidence" means the "measure or degree" of proof that produces a "firm belief or conviction as to the truth of the allegations sought to be established." *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 21 (Tex.1994).

3) **Gross negligence.** "Gross Negligence" means an actor or omission by the Defendant which was committed with such entire want of care as to establish that the act or omission in question was the result of actual conscious indifference to the rights, welfare, or safety of the persons affected by it. TEX. CIV. PRAC. & REM. CODE. ANN § 41.001(5) (Vernon Supp. 1994); *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 21 (Tex.1994).

B) **Insurability.** Texas courts have held public policy prohibits allowing a person from insuring against his intentional misconduct. *Decorative Ctr. v. Employers Cas. Co.,* 833 S.W.2d 257, 260 (Tex. App.-Corpus Christi 1992, writ denied). "The rationale behind the public policy is that the insured is more likely to engage in behavior which is harmful to society if he believes that he will not have to bear the financial costs of his intentional indiscretions." *Id.*

C) **Caps.** An award of exemplary damages cannot be unreasonably excessive. Thus, exemplary damages may be capped by either the Damages Act or the due-process cap. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW, Inc. v. Core,* 517 U.S. 559, 568 (1996); *Moriel*, 879 S.W.2d at 16-17; *Baribeau v. Gustafson*, 107 S.W.3d 52, 63-66 (Tex. App. 2003).

1) Under the Damages Act, the cap is calculated as the greater of the following: (1) twice the amount of economic damages (up to $750,000.00) found by the jury, or (2) $200,000.00. TEX. CIV. PRAC. & REM. CODE §§ 41.008(b), 41.010(b) (2007); *First Valley Bank v. Martin*, 55 S.W.3d 172, 194 (Tex. App. 2001), *rev'd on other grounds*, 144 S.W.3d 466 (Tex. 2004). In addition, the Damages Act exempts certain felonious conduct from the cap requirements of § 41.008(b). However, despite this statutory exemption, the award may be subject to the due process cap. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(c), (f).

2) An award for exemplary damages can also be capped under the Due Process Clause of the U.S. or Texas Constitution. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW, Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex1998); *Prudential Ins. Co. v. Jefferson Assocs.*, 839 S.W.2d 866, 877 (Tex. App.-Austin 1992), *rev'd on other grounds*, 896 S.W.2d 156 (Tex.1995). *See*, *e.g.*, *Baribeau v. Gustafson*, 107 S.W.3d 52, 63 (Tex. App. 2003) (exemplary damages award of $25,000.00, which was reduced to $200,000.00 under Damages Act cap, was not unconstitutionally excessive).

Recovery and Pre- and Post-Judgment Interest

A) **Prejudgment Interest.** Prejudgment interest is meant to compensate the plaintiff for the lost use of money owed as damages during the time between accrual of the plaintiff's claim and the date of judgment. *Johnson & Higins, Inc. v. Kenneco Energy, Inc*. 962 S.W.2d 507, 528-29 (Tex.1998); *Aquila Sw. Pipeine v. Harmony Expl*., Inc., 48 S.W.3d 225, 242 (Tex. App. 2001); *Lee v. Lee*, 47 S.W.3d 767, 799 (Tex. App. 14th Dist 2001). If the plaintiff is entitled to statutory prejudgment interest or prejudgment interest under a contract, then there is no required special pleading. *See*, *e.g.*, *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 638 (Tex. App. 1993) (wrongful death, personal injury or, property damage claims); *Pegasus Energy Group, Inc. v. Cheyenne Pet. Co*., 3 S.W.3d 112, 123-24 (Tex. App. 1999) (suit on breach of contract where contract provided for prejudgment interest). If, however, the plaintiff is seeking prejudgment interest for a common law tort case, he must specifically make such plea. The exceptions to the plea requirement can be found in TEX. FIN. CODE § 304.102 (2007).

1) **Equity.** If prejudgment interest is not authorized by statute, it may still be awarded under the general principles of equity. *Johnson & Higgins*, 962 S.W.2d 528; *see*, *e.g.*, *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930-31 (Tex. 1998) (equitable prejudgment interest recoverable in breach-of-contract case). However, prejudgment interest in not recoverable when it is in direct conflict with a statute or case law. *Concord Oil*, 966 S.W.2d 451 (Tex. 1998); *see*, *e.g.*, *Standard Fire Ins. Co. v. Morgan*, 745 S.W.2d 310, 313 (Tex.1987) (neither prejudgment interest nor recoverable on medical expenses under Worker's Compensation Act); TEX. FIN. CODE § 304.1045 (prejudment interest not recoverable on future damage); *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 325-26 (Tex. 1994) (prejudgment interest cannot be awarded on attorney fees).

2) **Simple interest.** Prejudgment interest is computed as simple interest. *Johnson & Higgins*, 962 S.W.2d at 532. Simple interest is computed by multiplying the amount of principal by the interest rate by the time of accrual (I= P x R x T). BLACK'S LAW DICTIONARY 830 (8th ed. 2004); *Pemberton*, *A Guide to Recent Changes & New Challenges in Texas Prejudgment Interest Law*, 30 TEX. TECH. L. REV. 71, 72 (1999).

3) **Accrual.** When calculating prejudgment interest, the principal is the amount of damages found by the trier of fact, minus any amounts on which prejudgment

interest is prohibited by statue or case law. *Johnson & Higgins*, 962 S.W.2d at 538; *See*, *e.g.*, *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930-31 (Tex. 1998) (equitable prejudgment interest recoverable in breach-of-contract case). The rate is the same as that for post-judgment interest and can be found in the TEX. FIN. CODE § 304.003. Prejudgment interest begins to accrue on the earlier of (1) the 180th day after the defendant receives written notice of the plaintiff's claim, or (2) the day the suit is filed.

B) **Post-judgment interest.** Post-judgment interest is compensation for the use or detention of money, computed from the date of the signing of the judgment until the date of its satisfaction. *Sisters of Charity of the Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 119 (Tex. App. 1992); *see also* TEX. FIN. CODE § 304.005(a) (2007). Post-judgment interest can be recovered on any state-court money judgment and it can be recovered even if the judgment does not mention it. However, all money judgments must specify the post-judgment interest rate applicable to the judgment. *See* TEX. FIN CODE § 304.001; *Jarrin v. Sam White Oldsmoblie Co*., 929 S.W.2d 21, 25 (Tex. App. 1st Dist. 1996) (construing TEX. REV. CIV. STAT. ART. 5069-1.05, the predecessor to TEX. FIN CODE § 304.001); *Staff Indus., Inc. v. Hallmark Contracting, Inc*., 846 S.W.2d 542, 551(Tex. App. 1993) (construing TEX. REV. CIV. STAT. ART. 5069-1.05, the predecessor to TEX. FIN CODE § 304.001).

1) **Accrual.** Post-judgment interest is compounded annually and is calculated on both the principal amount and the previously accumulated interest. TEX. FIN CODE § 304.006; BLACK'S LAW DICTIONARY 830 (8th ed. 2004). When calculating post-judgment interest, the principle is the amount of judgment, including prejudgment interest and court costs. See TEX. FIN. CODE § 304.003(a); *Sisters of Charity of the Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 119 (Tex. App. 1992). The rate is the same as that for post judgment interest and can be found in the TEX. FIN. CODE § 304.003.

Recovery of Attorneys Fees

A) Recovery of attorney fees from the adverse party is allowed only when the recovery is permitted by statue, by a contract between the litigants, or under equity. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 95 (Tex.1999) (statute or contract); *Knebel v. Capital Nat'l Bank,* 518 S.W.2d 795, 799 (Tex.1974) (equity).

B) **Requirements.** To recover attorney fees, the plaintiff must establish the following:

1) **Pleading.** The plaintiff specifically pleaded for attorney fees. *Swate v. Medina Cmty Hosp*., 966 S.W.2d 693, 701 (Tex. App. 1998); *R. Conrad Moore & Assocs. v. Lerma,* 946 S.W.2d 90, 96 (Tex. App. 1997); *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 868 S.W.2d 861, 870 (Tex. App. 1993).

2) **Authorized to recover.** The plaintiff was authorized to recover attorney fees on its claim, *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 95 (Tex.1999) (statute or contract); *Knebel v. Capital Nat'l Bank,* 518 S.W.2d 795, 799 (Tex. 1974) (equity):

a) By statue, *see* TEX. CIV. PRAC. & REM. CODE § 38.001 (2007);

b) By a contract between the plaintiff and the defendant, *see*, *e.g.*, *Norrell v. Arkansas County. Navigation Dist*., 1 S.W.3d 296, 303 (Tex. App. 1999) (lease agreement provided that prevailing party would be entitled to attorney fees in event of any litigation involving lease); *One Call Sys. v. Houston Lighting & Power Co*., 936 S.W.2d 673, 675-76 (Tex. App. 14th Dist. 1996) (contract provided that either party could recover attorney fees);

c) Under the principles of equity, *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex.1974) (recognizing that attorney fees can be awarded under equity));

3) **Attorney.** The plaintiff was represented by an attorney. *Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex. App. 1994) (attorney who appears pro se cannot collect attorney fees).

4) **Conditions precedent.** The plaintiff complied with the conditions precedent to recovery. TEX. R. CIV. P. 54 (2007);

5) **Entitled.** The plaintiff was entitled to attorney fees. *Holland v. Wal-Mart Stores,* 1 S.W.3d 91, 95 (Tex.1999) (statute or contract); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795,799(Tex.1974) (equity);

6) **Incurred fees.** The plaintiff incurred or may incur attorney fees. *See*, *e.g.*, *Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W.3d 401, 404 (Tex. App. 2005) (plaintiff incurred attorney fees under contingent-fee agreement); and

7) **Reasonable and necessary.** The attorney fees were reasonable and necessary. *Arthur Andersen & Co., v. Perry Equip. Corp.*, 945 S.W.2d 812, 828-29 (Tex.1997) (the plaintiff must prove the attorney fees were reasonable and necessary for the prosecution of the case).

Settlement Involving Minors

In Texas, suits involving minors are brought by a "Next Friend." Tex. R.Civ. P. 44 (2007). Once a settlement has been proposed, it is the Next Friend who has the duty to determine and advise the court whether the settlement is in the party's best interest. Tex. R.Civ. P. 44, 173.4(c). If the court believes there to be a conflict, or potential conflict, between the Next Friend and the minor, then it can appoint a guardian ad litem. *See Brownsville-Valley Reg'l Med. Ctr. v. Gamez*, 894 S.W.2d 753, 755 (Tex.1995). The guardian ad litem will assist in properly protecting the child's interests in the litigation and settlement thereof. *American Gen. Fire & Cas. Co. v. Vanewater*, 907 S.W.2d 491, 493 n.2 (Tex.1995);

Taxation of Costs

A) A taxable cost is a litigation-related expense that the successful party is entitled to as a part of the court's award. BLACK'S LAW DICTIONARY 372 (8th ed. 2004). A party must move for adjudication of these costs. *City of Ingleside v. Stewart*, 554 S.W.2d 939, 948 (Tex. App. 1997). The trial court should state in its judgment which party is to pay the costs. Then, once the suit is over, the successful party should send an itemized list of costs to the clerk, and a copy to the other party. *See Varner v. Howe*, 860 S.W.2d 458, 466 (Tex. App. 1993). After the judgment is signed and the clerk has an itemized list of the costs, the clerk will send a cost bill to the unsuccessful party. *Wood v. Wood,* 320 S.W.2d 458, 466 (Tex. App. 1993). The successful party will then collect the costs by a writ of execution in the same manner as other awards. *See* TEX. R. CIV. P. 131, 149 (2007).

B) **Challenge.** The award of court costs can be challenged by filing either a motion for new trial or a motion to retax costs. *Reaugh v. McCollum Expl. Co.,* 167 S.W.2d 727, 728 (Tex. 1943); *Operation Rescue-National v. Planned Parenthood, Inc*., 937 S.W.2d 60, 87 (Tex. App. 14th Dist. 1996).

C) **Taxable costs.** The following costs are taxable:

1) Clerk fees, including filling fees, TEX. CIV. PRAC. & REM. CODE § 31.007(b)(1) (2007); *Crescendo Inv. v. Brice*, 61 S.W.3d 465, 480 (Tex. App. 2001);

2) Service fees, regardless if service was made by public officer or private process server, TEX. CIV. PRAC. & REM. CODE § 31.007(b)(1) (2007); *Shenandoah Assocs. v. J & K Props., Inc.*, 741 S.W.2d 470, 487 (Tex. App. 1987); *Operation Rescue-National v. Planned Parenthood, Inc*. 937 S.W.2d 60, 87-88 (Tex. App. 14th Dist. 1996).

3) Court reporter fees for original stenographic transcript only, TEX. CIV. PRAC. & REM. CODE § 31.007(b)(2) (2007); *Crescendo Inv.,* 61 S.W.3d at 480 (Tex. App. 2001);

4) Master fees for court-appointed masters are taxable costs, TEX. CIV. PRAC. & REM. CODE § 31.007(b)(3) (2007); TEX. R. CIV. P. 171 (2007); *Crescendo Invs*., 61 S.W.3d at 480.

5) Interpreter fees, including the interpreter's compensation plus a $3.00 collection fee collected by the clerk, TEX. CIV. PRAC. & REM. CODE §§ 21.051, 31.007(b)(3) (2007); *Crescendo Invs.*, 61 S.W.3d at 480; TEX. R. CIV. P. 183;

6) Reasonable guardian ad litem fees that are imposed by the court, TEX. CIV. PRAC. & REM. CODE § 31.007(b)(3) (2007); TEX. R. CIV. P. 173.6(c) (2007); *Roberts*, 111 S.W.3d at 116 n.1.; *Rogers*, 686 S.W.2d at 601; *Cresendo Invs*., 61 S.W.3d at 480; *Minns v. Minns*, 615 S.W.2d 893, 897 (Tex. App. 1st Dist. 1981); *Simon v. York Crane & Rigging Co.,* 739 S.W.2d 793, 794 (Tex. 1987);

7) Auditor fees for court-appointed auditors, TEX. R. CIV. P. 172 (2007); *Taormina v. Culicchia*, 355 S.W.2d 569, 575-76 (Tex. App. 1962);

8) Receiver fees for court-appointed receivers, *Jones v. Strayhorn*, 321 S.W.2d 290, 292-93 (Tex. 1959); *Wiley v. Sclafani*, 943 S.W.2d 107, 111 (Tex. App. 1st Dist. 1997); *Hodges v. Peden*, 634 S.W.2d 8, 12 (Tex. App. 14th Dist. 1982);

9) ADR fees for impartial third party, TEX. CIV. PRAC. & REM. CODE § 154.054(b) (2007); *Decker v. Lindsay,* 824 S.W.2d 247, 259 (Tex. App. 1st Dist. 1982);

10) Witness fees, a maximum of $10.00 per day, TEX. CIV. PRAC. & REM. CODE § 22.001(a), (c) (2007); *Armes v. Campbell*, 603 S.W.2d 249, 254 (Tex. App. 1980).

11) Deposition costs, including the costs of the original transcript plus exhibits, certified copies, and trial transcripts, *Wallace v. Briggs*, 348 S.W.2d 523, 527 (Tex.1961); *Crescendo Invs*., 61 S.W.3d at 480-481; TEX. R. CIV. P. 203.2(f) (2007); *Allen v. Crabtree*, 936 S.W.2d 6, 8 (Tex. App. 1996);

12) Fees for required copies required by statue or rule are taxable costs, *see* TEX. R. CIV. P. 140 (2007);

13) Cost of statutory procedures, including tests or procedures mandated by statue, *see*, *e.g*., *Adams v. Stotts*, 667 S.W.2d 798, 800-01 (Tex. App. 1983) (blood test required by Texas Family Code in paternity suit was properly taxed as court cost);

14) Fees of court-appointed surveyor in a trespass-to try title suit, *see Whitley v. King*, 581 S.W.2d 541, 544 (Tex. App. 1979); *see also* TEX. R. CIV. P. 796 (2007) (judge may appoint surveyor at own discretion or on motion of either party);

15) Post-judgment interest on court costs, compounded annually, TEX. FIN. CODE §§ 302.003(a), 304.006 (2007); and

16) Other costs and fees permitted by law may be assessed, as permitted by rules and state statutes, TEX. CIV. PRAC. & REM. CODE § 31.007(b)(4) (2007); *see*, *e.g*., TEX. FAM. CODE § 6.708 (expenses for marital counseling in a divorce suit); TEX. HEALTH & SAFETY CODE § 571.017 (fees for court appointed personnel under the Texas Health and Safety Code); TEX. LOC. GOV'T CODE § 142.009(c) (witness fees for firefighters or police officers when a municipality or other political subdivision is a party).

D) **Nontaxable costs.** The following costs are not taxable:

1) Incidental litigation expenses, such as delivery services, long-distance calls, postage, photocopying, binding of briefs, secretarial overtime, and office air conditioning on weekends, *Shenandoah Assocs. v. J & K Props., Inc.,* 741 S.W.2d 470, 487 (Tex. App. 1987);

2) Expert witness fees for a party's expert witness, *Richards v. Mena*, 907 S.W.2d 566, 571 (Tex. App. 1995); *Adams*, 667 S.W.2d at 801; *Whitley*, 581 S.W.2d at 544;

3) Fees for copies not required by law, TEX. R. CIV. P. 140 (2007);

4) Bond premiums, *see*, *e.g.*, *Hammonds v. Hammonds*, 313 S.W.2d 603, 605 (Tex. 1958) (supersedeas bond); *Brandtjen & Klge, Inc. v. Manney* 238 S.W.2d 609, 612 (Tex. App. 1951) (replevy bond); and

5) Travel expenses associated with litigation, *Wallace v. Briggs*, 348 S.W.2d 523, 52 (Tex.1961); *Shenandoah Assocs*., 741 S.W.2d at 487.

Unique Damages Issues

A) **Constitutional violations.** There are no monetary damages for violation of the Texas Constitution. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995).

B) **Medical expenses in default hearings.** Even in a default judgment hearing, the plaintiff must still prove his past medical expenses were reasonable and necessary. *State v. Esquivel*, 92 S.W.3d 17, 21-22 (Tex. App. 2002).

C) **True amount paid.** Although not meant to overrule the collateral source rule, Texas does allow reduction of medical expenses to reflect the true amount paid or incurred by a managed care entity, government benefit program or private insurance. *Flegle & Farquhar*, *Changes to Exemplary damages by H. B. 4—2003 Texas Legislature, Tort Reform & Insurance Law: 2003 Legislative Update*, UNIV. OF HOU. CLE ch.17 p. 12 (2003).

D) **Future medical expenses.** The plaintiff is under no obligation to make the argument of future medical expenses by and through expert testimony. *Volkswagen*, 79 S.W.3d at 127; *Blankenship v. Mirck*, 984 S.W.2d 771, 779 (Tex. App. 1999); *Thate v. Texas Pac. Ry.*, 595 S.W.2d 591, 601 (Tex. App. 1980).

E) **Mental anguish.** Plaintiffs in Texas are able to recover for mental anguish damages or fear of future disease without a present physical injury. *Gideon v. Johns-Manville Sales Corp.,* 761 F.2d 1129 (5th Cir.1985).

F) **Physical impairment.** When proving physical impairment, the plaintiff is not required to show he is unable to perform an act that he was able to perform prior to his injury. *Dodge v. Watts*, 876 S.W.2d 542, 543-44 (Tex. App. 1994).

H) **Lost earning.** An unemployed person can recover for lost earning capacity. *Brazoria Cty. v. Davenport*, 780 S.W.2d 827, 832 (Tex. App. 1st Dist. 1989); *North Houston Pole Line Corp. v. McAllister*, 667 S.W.2d 829, 833 (Tex. App. 14th Dist. 1983).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and

is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.