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TORT LAW UPDATE:
RECENT DEVELOPMENTS IN TEXAS TORT LAW

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TORT LAW UPDATE:
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I. DUTY AND CAUSATION

WIFE HAS NO DUTY TO PREVENT HUSBAND'S UNFORESEEABLE CRIMINAL ACT

Madison v. Williamson, 241 S.W.3d 145 (Tex. App.—Houston [1st Dist.] 2007, pet. filed).

In 1999, Williamson engaged in several acts of inappropriate sexual conduct with a neighbor's (Madison's) daughter. Williams was eventually charged with indecency with a child and aggravated sexual assault, and pleaded no contest to misdemeanor assault. Williamson received deferred adjudication and was placed on community supervision for two years, which was later modified to prohibit him from traveling on the street where Madison's daughter lived. He was not prohibited from visiting his own children or being present on his wife's property, located on the same street as Madison's house, but he had to enter his wife's property from a back entrance. Madison's daughter claimed, however, that Williamson appeared in front of the Madison house and made "intimidating faces" to try and frighten her.

Madison sued Williamson and his wife civilly, and claimed that the wife was negligent in allowing Williamson to sexually assault the daughter and in allowing him to violate the terms of his supervision by driving on the street where Madison's house was located. The trial court granted summary judgment for the wife holding that there was no evidence that she had a duty to prevent Williamson from sexually assaulting Madison's daughter or ensure Williamson's compliance with the terms of his community supervision. Claims against Williamson went to trial, and a jury returned a verdict in favor of Madison. The trial court entered judgment against Williamson for $3 million in actual damages, and $1.75 million in punitive damages.

On appeal, the court examined the factors to determine if a duty is owed by a property owner for criminal act, as set forth in *Timberwalk Apartment, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998). Generally, there is no duty to control the conduct of others, but this does not apply when a special relationship exists between the actor and the third person, which imposes a duty upon the actor to control the third person's conduct, or a special relationship exists between the actor and the other person which gives the other person a right to protection (i.e., employer/employee, parent/child).

Affirming the trial court's judgment, the court determined that Madison failed to produce evidence that the wife should have foreseen that Williamson would engage in inappropriate sexual conduct with Madison's daughter on wife's property. There was no evidence that the wife knew about any prior inappropriate sexual conduct on the part of Williamson. Thus, there was no fact issue on a duty owed by the wife. The court also held that there was no fact issue with

[1] A portion of this paper was originally written by Christopher T. Colby. I appreciate his generosity in permitting me to use his paper.

regard to whether the wife was negligent in failing to prevent Williamson from driving on the street where Madison's house was located.

The court went further and held that there is nothing inherent in this husband-wife relationship that gives rise to a fact issue that either spouse had the right to control the other. In the case at bar, the wife did not have a duty to control Williamson's conduct, and the trial court properly granted summary judgment on Madison's claim that the wife was negligent in failing to prevent Williamson from driving near Madison's house.

EXPANSION OF DUTY TO EMPLOYEES OF INDEPENDENT CONTRACTORS

Central Ready Mix Concrete Co. v. Islas, 228 S.W.3d 649 (Tex. 2007).

Central delivers premixed concrete in trucks with rotating drums. Central hired an independent contractor to clean leftover concrete out of the drums. It gave the contractor written instructions to make sure the drum was not rotating while someone was inside. Islas, an employee of the independent contractor, was injured when someone started the drum rotating as Islas was trying to crawl out of the drum. Islas sued Central, among others. Although the jury found some negligence against Central, the trial court granted Central's take-nothing judgment notwithstanding the verdict.

The court of appeals reversed the trial court's decision holding that Central owed Islas a duty of care even though he was an independent contractor because Central had actual knowledge of the danger involved in the work, but failed to train Islas and failed to investigate Islas' training and experience. Central appealed to the Texas Supreme Court.

Reversing the court of appeals judgment, the Texas Supreme Court held that as it was undisputed that Islas's employer was an independent contractor of Central, Central owed Islas no legal duty. The Supreme Court rejected the court of appeals three reasons for disregarding this general rule. First, the Court held that Central's knowledge of the dangerousness of the work did not give rise to a duty as the duty to warn of dangers applies to concealed premises conditions, not to the independent contractor's own work. Second, the Court held that Central's failure to train or monitor the independent contractor did not give rise to a duty because there was no evidence that Central had a right to control the training the contractor gave its employees. Additionally, the Court reasoned that Central's provision of instructions could not have created a legal duty in light of the fact that the contractor failed to use them. Third, the Court rejected the lower court's reliance on Central's failure to investigate the independent contractor's knowledge and experience, because there was no evidence that an investigation would have revealed a history of negligent operation.

PREMISES LIABILITY: PEDESTRIAN RAMP DID NOT POSE AN UNREASONABLE RISK OF HARM

Brinson Ford, Inc. v. Alger, 228 S.W.3d 161 (Tex. 2007) (per curiam).

Alger fell from a pedestrian ramp leading from the front door of a Ford dealership to the parking lot. Handrails existed along most of the length of the ramp, but a small portion of the ramp extended beyond the handrails to the sidewalk. The highest point of this unrailed section was four inches above the sidewalk, "and it was marked by yellow paint along the ramp's edges and around the parking space next to the ramp." The ramp was the dealer's main entrance, and the dealer had no record of anyone falling in the nearly ten years that the ramp had been in existence. Alger sued, alleging the "unrailed" section of the ramp was "unreasonably dangerous" and caused her to fall and suffer injuries. The trial court granted summary judgment for Brinson, but the court of appeals reversed. The Supreme Court, however, reversed and rendered judgment for Brinson.

Evidence revealed that the ramp met Texas Accessibility Standards and standards set by the American Society for Testing and Materials. The evidence that the drop was only four inches and was marked with yellow paint and absence of complaints or other accidents further established as a matter of law that the condition of the ramp did not pose an unreasonable risk of harm.

CAUSATION: SUFFICIENCY OF THE EVIDENCE IN ASBESTOS CASES

Borg Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007).

Flores was a retired brake mechanic whose job included grinding brake pads which contained asbestos fibers. For approximately four years of Flores' 35-year career, he used Borg Warner brake pads, among others. His job involved grinding the pads, which generated clouds of dust he inhaled while working in a small room. He sued Borg Warner, and other defendants, alleging that he had asbestosis caused by Defendants' products. Flores proceeded to trial before a jury, who found in his favor, and judgment was entered. The court of appeals affirmed holding that that evidence of causation is legally sufficient as long as the defendant contributed to any of a plaintiff's asbestos exposure.

Rejecting this decision, the Texas Supreme Court reversed and rendered judgment for Borg Warner holding that the evidence of causation was legally insufficient. The Court explained that the test in Texas for causation requires a showing that the defendant's product was a substantial factor in bringing about the plaintiff's injuries. In asbestos cases, this requires proof about how much asbestos exposure the plaintiff suffered, and evidence that this amount is sufficient to cause asbestosis. Although Flores introduced evidence that brake pads contain asbestos and that some asbestos could be released upon grinding of the pads, Flores provided no evidence regarding the amount of exposure to Borg Warner asbestos, or that such an amount sufficiently contributed to his asbestosis to be considered a substantial factor.

II. PRODUCTS LIABILITY

CLARIFICATION OF DEFINITIONS OF "MANUFACTURING DEFECT" AND "PRODUCING CAUSE"

Ford Motor Company v. Ledesma, 242 S.W.3d 32 (Tex. 2007)

Two frequently submitted jury instructions—one giving the definition of a "manufacturing defect" and the other the definition for "producing cause" under Texas law—were rejected as incomplete by the Texas Supreme Court.

In March 1999, Ledesma bought a new Ford pickup for his construction business. In June 1999, Ledesma turned onto a two-lane street in Austin and began to accelerate. After shifting gears the truck suddenly began to lurch, and he lost control, hitting two parked cars on the side of the street. The truck then hit the street curb and stopped. At the time of the accident, the truck's odometer read about 4,100 miles.

Ford and Ledesma agreed that the truck's "rear leaf spring and axle assembly" came apart, which caused the drive shaft to dislodge from the transmission. However, the parties disputed when and why this failure occurred, and whether it caused Ledesma's collision or was a result of the collision. The court's charge stated: "Did a manufacturing defect trigger the right rear-axle displacement and cause Ledesma to lose control of the truck and strike the parked ears (as Ledesma claims), or did the right rear axle detach when Ledesma struck the parked ears and curb (as Ford claims)?" The jury rendered a verdict for Ledesma, finding that a manufacturing defect caused the accident and that Ledesma was not contributorily negligent. The Austin Court of Appeals affirmed.

Ford argued to the Texas Supreme Court, among other things, that the trial court improperly in instructed the jury on the definitions of "manufacturing defect" (which the trial court followed from Pattern Jury Charge 71.03) and "producing cause" (which the trial court followed from Pattern Jury Charge 70.1) alleging that they were "not accurate under the law." The Court agreed. The trial court may have submitted the PJC's definition on "manufacturing defect," but the model charge was erroneous. It did not include the requirement that "a manufacturing defect must deviate from its specifications or planned output in a manner that renders the product unreasonably dangerous." This requirement is separate from, and in addition to, the requirements that the product was defective when it left the manufacturer and that the defect was a producing cause of the plaintiff's injuries.

The requirement of including "deviation from manufacturer's specifications or planned output" allows for malting the essential distinction between a manufacturing defect and a design defect. The trial court's use of PJC 71.3 simply asked whether a "condition" of the product rendered it unreasonably dangerous. Such a "condition" could have been a design defect or a manufacturing defect. The distinction is material. It is risky to allow a jury to conclude that the defect "was or might have been" a *design defect* because "[a] design defect claim requires proof and a finding of a safer alternative design," which the court's charge did not ask.

Requiring a "deviation from specifications or planned output" also permits the jury to determine whether a specific defect caused the accident, instead of basing liability on a product failure alone. Generally, Texas law does not recognize a product failure/malfunction, standing alone, as sufficient proof of a defect. A "specific defect must be identified by competent evidence and other possible causes must be ruled out." The trial court's charge only required a

finding of an undifferentiated "condition" that renders the product unreasonably dangerous. While a products claim does not require proof of manufacturer negligence, the deviation from design that caused the injury must be identified. Otherwise, the jury is invited to find liability based on speculation as to the cause of the incident in issue. The court's charge was fundamentally flawed in omitting the requirement that the product deviate, in its construction or quality, from its specifications or planned output in a manner that renders it unreasonably dangerous.

Ford also complained about the instruction on "producing cause." Following PJC 70.1, the court provided that "'Producing cause' means an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question. There may be more than one producing cause." Ford claims a valid definition would state that producing cause "means that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause."

The Court stated that the second part of the definition—recognizing there may be more than one producing cause of an event—is correct. To say that a producing cause is "an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question" is incomplete. The Court believed juries would be left to ponder the meaning of "efficient" and "exciting," explaining that these "adjectives are foreign to modem English language as a means to describe a cause, and offer little practical help to a jury striving to make the often difficult causation determination in a products case." However, defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred. This is the definition of producing cause that should have been given in the jury charge.

III. TEXAS DRAM SHOP ACT

NO AUTOMATIC RESPONSIBILITY FOR ALL DAMAGES CAUSED BY AN INTOXICATED PATRON[2]

F.F.P. Operating Partners v. Duenez, 237 S.W.3d 680 (Tex. 2007).

After spending the day cutting firewood while consuming a case and a half of beer, Roberto Ruiz drove his truck to a Mr. Cut Rate convenience store owned by F.F.P. Operating Partners, L.P. and purchased a twelve-pack of beer. The store's assistant manager, Carol Solis, sold the beer to Ruiz. Ruiz then climbed into his truck, opened a can of beer, and put the open beer can between his legs. There was conflicting testimony about whether Ruiz actually drank any of the beer that he purchased at Mr. Cut Rate.

Ruiz then drove onto a nearby highway and swerved into oncoming traffic several times. Two cars dodged his truck to avoid a collision. As he crossed a bridge approximately a mile and

[2] Andy Payne, *Third-Party Dram Shop Liability*, 70 Tex. B.J. 44 (2007).

a half from the Mr. Cut Rate convenience store, Ruiz swerved across the center line, hitting the Duenezes' car head-on. All five members of the Duenez family suffered injuries.

Ruiz was arrested at the accident scene for drunk driving. He pled guilty to intoxication assault and was sentenced to prison. The Duenezes brought a civil suit against F.F.P., Ruiz, Solis, Nu-Way Beverage Company, and the owner of the land where Ruiz had spent the afternoon cutting firewood and drinking. F.F.P. filed a cross-action against Ruiz, naming him as a responsible third-party and a contribution defendant. The Duenezes thereafter nonsuited all defendants except F.F.P.

At the pretrial conference, the Duenezes obtained a partial summary judgment that chapter 33 of the Texas Civil Practice and Remedies Code, the proportionate responsibility statute, did not apply to this case. The trial court then severed F.F.P.'s cross-action against Ruiz, leaving F.F.P. as the only defendant for trial. F.F.P.'s severed action against Ruiz remains pending in the trial court.

The Duenezes' claim against F.F.P. proceeded to trial. At the charge conference, the trial court refused to submit questions for determination of Ruiz's negligence. The court also failed to submit questions on the proportionate responsibility of Ruiz and F.F.P.

The jury found that when the alcohol was sold to Ruiz, it was "apparent to the seller that he was obviously intoxicated to the extent that he presented a clear danger to himself and others," and that Ruiz's intoxication was a proximate cause of the collision. The jury returned a $35 million verdict against F.F.P., upon which the trial court rendered judgment.

The court of appeals affirmed the trial court's judgment, holding:

> [I]n third-party actions under the Dram Shop Act in which there are no allegations of negligence on the part of the plaintiffs, a provider is vicariously liable for the damages caused by an intoxicated person, and such a provider is not entitled to offset its liability by that of the intoxicated person.

69 S.W.3d 800, 805 (Tex. 2002).

On September 3, 2004, the Texas Supreme Court issued its first opinion in *Dueñez*. See *F.F.P. Operating Partners, L.P. v. Dueñez*, No. 02-0381, 2004 WL 1966008 (Tex. Sep. 3, 2004), at *1 (hereinafter "*Dueñez I*"). In that opinion, the court held that the Chapter 33 Proportionate Responsibility Statute applied to dram shop claims such that the jury should allocate fault as between the drunk and the dram shop. However, this first opinion allowed the plaintiff to recover from the dram shop both the percentage of fault assigned to the dram shop and the percentage of fault assigned to the drunk. The rationale for this holding was that the Dram Shop Act imposed liability on the dram shop not only for its own actions but also "for the actions of their customers ... who become intoxicated." This holding was also consistent with the Dram Shop Act's tying of proximate causation to intoxication rather than to the dram shop's conduct. Finally, the *Dueñez I* opinion points out that the legislative purpose of the Dram Shop Act would be

eliminated if it were read to not make the dram shop liable for the drunk's intoxicated actions.

The defendant in *Dueñez* filed a motion for rehearing. While the motion for rehearing was pending, the Legislature convened but took no action to disturb the *Dueñez I* opinion's interpretation of the Dram Shop Act. The only thing that did change was the makeup of the Texas Supreme Court. Between the time the first opinion was issued and the time rehearing was granted, three members of the five-member majority in the *Dueñez I* opinion left the court. The new Texas Supreme Court withdrew the first opinion, reached the opposite result.

On November 3, 2006, the Texas Supreme Court withdrew its prior *Dueñez* opinion and issued a new opinion reversing the judgment and creating new law regarding the interplay between the Dram Shop Act and the Proportionate Responsibility Statute. The Court held that imposing liability on the dram shop for the conduct of the drunk conflicts with the Proportionate Responsibility Statute. The court pointed out that a dram shop should only be held jointly and severally responsible if it is greater than 50 percent responsible just as any other defendant. Further, the court noted that a fundamental tenet of tort law rests on the premise that liability stems only from one's own conduct. Finally, the court reasoned that the Dram Shop Act's intent to deter providers from serving obviously intoxicated individuals is still being accomplished because, among other reasons, the provider is still subject to having its license to serve alcohol revoked.

IV. PROFESSIONAL MALPRACTICE

ACT OF GIVING LEGAL ADVICE ON TEXAS LAW DIRECTED TO A TEXAS RESIDENT INSUFFICIENT TO ESTABLISH SPECIFIC JURISDICTION

Markette v. X-Ray X-Press Corporation, 240 S.W.3d 464 (Tex.App.—Houston [14th Dist.] 2007, no pet.).

After appellee X-Ray X-Press Corporation ("X-Ray"), a Texas corporation, was sued in Indiana by C & G Technologies, Inc. ("C & G"), it hired appellant Gilliland & Caudill, L.L.P. ("Gilliland"), an Indiana law firm, to defend its interests. Appellant Robert P. Markette, Jr., an attorney with Gilliland who is licensed to practice law in Indiana, sent X-Ray a letter in Texas via facsimile stating that he "will be handling the litigation currently pending in Washington County, Indiana." Markette also enclosed a copy of Gilliland's standard legal services contract, which X-Ray signed in Texas and returned to Markette. Immediately before the line for X-Ray's signature, the contract states: "I have read and understand the foregoing and wish to retain [Gilliland] to represent [X-Ray] in litigation currently pending in Washington County[,] Indiana."

Markette filed a motion to dismiss the Indiana suit for lack of personal jurisdiction, which the Indiana court denied. Markette then wrote X-Ray a letter, which he emailed to X-Ray in Texas, providing legal advice as to three options for proceeding. This case centers around the first option:

> The first option is to take no further action. If [X-Ray] does not file an answer in this matter, [C & G] will move for default judgment. Assuming [X-Ray] ignores the motion, the Court will grant judgment in favor of [C & G] for the amount it demanded in its complaint. At that time, [C & G] will institute enforcement proceedings in order to collect the judgment. *[X-Ray] could, at that time, relitigate the issue of jurisdiction.* Because [C & G] would likely need to use the Texas court system to enforce the judgment, *[X-Ray] could attack the jurisdiction in a Texas court, which would be more likely to agree that Indiana did not have jurisdiction over a Texas company*. However, if the Texas court's [sic] agreed with the Indiana court, [X-Ray] would be saddled with a default judgment that it would have to satisfy.

(emphasis added). X-Ray followed this first option and allowed C & G to obtain a default judgment against it in the Indiana suit. Thereafter, C & G filed a suit in Texas to enforce the judgment, and X-Ray was ultimately required to satisfy that judgment.

X-Ray sued Markette and Gilliland for legal malpractice and many related claims, including fraud, negligent misrepresentation, breach of fiduciary duty, and breach of contract. Markette and Gilliland filed special appearances. The trial court initially granted their special appearances, but thereafter, the court granted X-Ray's motion for new trial and reversed its ruling. Markette and Gilliland then appealed.

In the trial court, X-Ray's primary jurisdictional allegation was that Markette provided incorrect legal advice about Texas law upon which it relied to its detriment. Thus, on appeal, X-Ray argued that Markette's act of giving legal advice on Texas law directed to a Texas client was sufficient to establish personal jurisdiction. Markette argued that the statement in the letter that X-Ray "*could* attack the jurisdiction in a Texas court, which would be *more likely to agree* that Indiana did not have jurisdiction over a Texas company" was not giving legal advice about Texas law because no Texas cases or statutes were cited and Markette was merely discussing possibilities.

Although the court disagreed with Markette and held that he did, in fact, provide legal advice about Texas law, the court reversed the trial court's judgment and rendered judgment in favor of Markette. In doing so, the Fourteenth Court of Appeals relied on the Texas Supreme Court's recent decision in *Moki Mac River Expeditions v. Drugg,* 221 S.W.3d 569, 574 (Tex., 2007). In *Moki Mac,* the supreme court analyzed the relatedness requirement of specific jurisdiction. The court noted that neither it nor the United States Supreme Court had given much guidance as to how closely related a cause of action must be to the defendant's forum activities to support personal jurisdiction. *See id.* at 579, 584. After discussing and rejecting three other approaches, the court determined that "for a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation." *See id.* at 579-584. Thus, the court held in *Moki Mac* that the Texas contacts of a Utah-based expedition company were not sufficiently related to the cause of action because the operative facts of the litigation principally concerned the negligence of guides in Arizona, even though the plaintiff parents may have relied on the company's safety

representations made in the promotional materials it sent to Texas in deciding to send their son on a fatal rafting trip in Arizona. *See id.* at 572, 584-585.

In applying the *Moki Mac* decision to the present case, the court held that Markette exercised his legal judgment and formed his legal opinions in Indiana, which he then communicated to X-Ray in Texas. Because the operative facts of the underlying litigation would have focused primarily on Markette's legal advice, not the communication of that advice to Texas, specific jurisdiction did not arise in this case.

V. DAMAGES

NEW RULES FOR RECOVERY OF ATTORNEYS' FEES IN MIXED CONTRACT AND TORT CASES[3]

Tony Gullo Motors I, L.P. and Brien Garcia v. Chapa, 212 S.W.3rd 299 (Tex. 2006).

Ms. Chapa paid Gullo $30,200 for a Toyota Highlander "Limited." When she arrived at the dealership, she was given a base-model Highlander instead. She later accepted delivery of another base-model based on Gullo's representations that the engine in the base model was the same as the "Limited" and that Gullo would install certain upgrades. Gullo failed to install the upgrades.

Chapa sued for breach of contract, fraud and DTPA violations. A jury found economic damages of $7,213, mental anguish damages of $21,693, exemplary damages of $250,000, and attorneys' fees of $20,000. The trial court granted judgment on the contract claim, but denied claims for attorneys' fees because they were not segregated. The court of appeals disagreed and awarded her all amounts found by the jury, but reduced exemplary damages to $125,000.

The Supreme Court found error by court of appeals under the one-satisfaction rule. The Court first concluded that because Gullo did not contest damage awards for breach of contract, Chapa was entitled to recover her economic damages under a breach of contract theory. But, the Court looked further to determine entitlement to more.

Gullo argued that the exemplary damages were unconstitutional under federal substantive law. The Court adhered to the analysis of the U.S. Supreme Court under three "guideposts": (1) the nature of the defendant's conduct, (2) the ratio between exemplary and compensatory damages, and (3) the size of civil penalties in comparable cases. The Court examined evidence supporting the first guidepost by considering five more factors: (1) whether the harm was physical or economic, (2) whether the actions threatened the health or safety of others, (3) whether the actions were a repeated or isolated instance, (4) whether Ms. Chapa would be financially ruined, and (5) whether the conduct was deceitful rather than accidental.

The Court found that the exemplary damages were more than 17 times Chapa's economic damages, observing "the court of appeals judgment pushes against, if not exceeds, the

[3] John S. Gray, *Intertwined Attorneys' Fees and Exemplary Damages*, 44 Apr. Hous. Law. 57 (2007).

constitutional limit." The Court drew on penalties permitted in *comparable* cases for violations of the Texas Occupations Code ($10,000) and those collectable under the DTPA ($20,000), finding the jury verdict of $250,000 constitutionally excessive, and remanding the case to the court of appeals.

The Court also laid down a new approach for recovery of attorneys' fees in contract cases that also involve claims on which attorneys' fees may not be based. The Court's new approach appears to be motivated by a policy concern that parties were invoking the "inextricably intertwined" exception and recovering attorneys' fees for services performed to pursue claims that do not permit recovery of attorneys' fees.

Chapa recovered 100 percent of her attorneys' fees (a significant fact in this opinion). The court of appeals approved this award on grounds that Chapa was not required to segregate fees because she "was required to prove essentially the same facts in pursuing each of her three causes of action," an approach seemingly required by *Stewart Title Guaranty Co. v. Sterling*, 941 S.W.2d 68 (Tex. 1997). The Court reviewed difficulties encountered by the previous approach, noting that the Chapa award impermissibly included fees for work done on the fraud claim because Chapa recovered 100 percent of her attorneys' fees whereas her attorney no doubt devoted time to the fraud claim (for which attorneys' fees are not recoverable).

The Court then set forth its new analysis, focusing on the function of legal services and the nature of claims advanced. All attorneys' fees that relate "solely" to a claim for which such fees are unrecoverable must be segregated and cannot be recovered. Whether facts support two "intertwined" claims will no longer be the test. Under *Gullo*, "it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated."

VI. ALTERNATIVE DISPUTE RESOLUTION

NON-SIGNATORIES TO AN ARBITRATION AGREEMENT MAY BE COMPELLED TO ARBITRATE

In Re Kaplan Education Corp., 235 S.W.3d 206 (Tex. 2007)

Students enrolled in an electrician's program at San Antonio College of Medical and Dental Assistants-McAllen Branch, a wholly-owned subsidiary of Kaplan Higher Education Corporation. Students alleged they were fraudulently induced to enroll by assurances that upon graduation they would be eligible for licenses as journeymen or master electricians. Each student signed an enrollment agreement detailing tuition, rules, and graduation requirements, and requiring them to arbitrate "[a]ny controversy or claim arising out of, or relating to, this Agreement."

Plaintiffs initially filed suit against Kaplan, the College, the College's president, and the College's admissions director. Defendants moved for arbitration, and the plaintiffs dropped their claims against the College and the president (signatories to the enrollment agreements), and claims of joint venture or enterprise. This left only their claims against Kaplan and the

admissions director (nonsignatories to the agreement). The students sought to avoid arbitration by pursuing their claims only against the two nonsignatories.

The students alleged negligence, negligence per se (based on alleged violations of the Texas Education and Texas Administrative Codes), violations of the DTPA, and negligent misrepresentation. The Court deemed the substance of the claims was fraudulent inducement, because they sought tuition refunds and other costs they would not have incurred had they not been induced to enroll. The Court determined that such claims fall within an agreement to arbitrate all disputes "involving" an underlying contract. According to the Court, the students' complaints clearly arose out of and relate to their enrollment agreements, but also stated that the students were not suing on those agreements.

Agents of a signatory may sometimes invoke an arbitration clause even if they themselves are nonsignatories and a claimant is not suing on the contract—a contracting party generally cannot avoid unfavorable clauses by suing the other party's agents. This also applies when a party to an arbitration agreement seeks to avoid it by pleading a contract dispute as a fraudulent inducement claim against an agent of the other. If arbitration clauses are enforceable only if every officer, employee, agent, or affiliate signs or is listed in the contract, such clauses would be more easily avoided than other contract clauses.

The students' agreements further required arbitration because the College would be liable for the judgment if their suit is successful. The enrollment agreements specifically provided for tuition refunds in the event enrollment was induced by misrepresentation. If the College's liability for such refunds (about $10,000 for each student) can be decided in court by suing its agents, then the arbitration contract has been effectively abrogated.

The Court emphasized that arbitration clauses do not automatically cover all corporate agents or affiliates. Arbitration agreements "are enforced according to their terms and according to the intentions of the parties." When an agreement between two parties clearly provides for the substance of a dispute to be arbitrated, one cannot avoid it by simply pleading that a nonsignatory agent or affiliate was pulling the strings. Court conditionally granted the writ of mandamus to order that the students' claims proceed to arbitration.

TEXAS RULE OF CIVIL PROCEDURE 167 OFFER OF SETTLEMENT PROCEDURE[4]

TEX. R. CIV. P. 167

An "offer of settlement" under Rule 167 is a procedure whereby one party makes a settlement offer to another. If the offer is rejected and the party that made the offer ultimately wins the case at trial, then the winner recovers its litigation costs, including reasonable attorney's fees. Rule 167 applies to all general tort, negligence, and commercial cases seeking monetary damages filed after January 1, 2004, with certain listed exceptions. It is a tool that, if utilized properly, minimizes risk to the offeror and increases risk to the offeree, thereby encouraging settlement. If used carelessly, the risk to a party rejecting a settlement offer increases well beyond the already-present risk of an adverse judgment.

[4] Cliff Harrison, *Texas Hold'em: Offer of Settlement Under Rule 167*, 70 Tex. B.J. 936 (2007).

Although either a plaintiff or a defendant can make an offer of settlement once Rule 167 has been invoked, only a defendant can invoke the rule by filing the appropriate declaration with the court. Once a defendant files the declaration, which must be filed no later than 45 days before the trial setting, either party can make an offer to settle claims against that defendant. If there is more than one defendant, the procedure is triggered only with respect to the defendant filing the notice. The offer must meet the requirements set forth in Rule 167.2(b). The offer must be written, state the specific terms and conditions of the offer, and state a deadline for acceptance, which can be no sooner than 14 days after the offer is served upon the opposing party. An offer may be made subject to reasonable conditions, such as execution of appropriate releases and indemnities. If no timely written objection is made, such conditions will be presumed to have been reasonable. If an offer is rejected because a condition is "unreasonable" and the court finds that the condition was unreasonable, then the rejection of the offer will not be the basis for an award of litigation costs. An offer of settlement cannot be made within 60 days of the defendant's answer or within 14 days of the trial setting.

An offer can be withdrawn at any time before it has been accepted, so long as it is withdrawn in writing. Although an offer may be withdrawn, there is no provision in Rule 167 for withdrawing or revoking a filed declaration triggering the Rule 167 procedure. Once the declaration has been filed, either party can make offers with respect to the claims against the defendant filing the declaration. The offer can be accepted, but the acceptance must be in writing. An offer that is not withdrawn or accepted is deemed to have been rejected. Successive offers may be made by either party after rejecting or withdrawing an offer, but the offering party may only recover litigation costs if the successive offer was better than any of the previous offers made by that party.

If an offer of settlement is rejected, the case proceeds to trial, and the amount of the judgment is significantly less favorable to the rejecting offeree than the rejected offer, then the court must award litigation costs to the offeror. A judgment is "significantly less favorable" to a rejecting plaintiff if the rejecting plaintiff is ultimately awarded less than 80 percent of the defendant's offer. A judgment is "significantly less favorable" to a rejecting defendant if the plaintiff is awarded more than 120 percent of a plaintiff's rejected demand. Litigation costs to be awarded to the prevailing party include court costs, reasonable fees for up to two testifying experts, and reasonable attorney's fees.

There are limits on litigation costs that can be recovered by the prevailing party. Recoverable costs are limited to those costs incurred after the offer of settlement was rejected. In addition, there is a cap on recoverable costs. The costs to be awarded must not exceed the sum of the non-economic damages, the exemplary or additional damages, and one-half of the economic damages, minus the amount of any statutory or contractual liens. No double recovery of costs is permitted in cases where a party is entitled to recover attorney's fees and costs under another law or theory of recovery, such as the Deceptive Trade Practices Act or breach of contract.

When should a defendant invoke Rule 167? The simple answer is when he or she intends to use it. If a defendant does not intend to actually make an offer of settlement, then there is no reason to file a declaration invoking the rule, because doing so will only provide the plaintiff an

opportunity to "raise the stakes" by making an offer which, if not accepted by the defense (and if the judgment is 121 percent greater than the plaintiff's offer), subjects the defendant to payment of the plaintiff's litigation costs. In other words, filing a declaration invoking the rule when the defense does not plan to make an offer constitutes a strategy of high risk but minimal reward.

So when should a defendant make an offer of settlement under Rule 167? Should an offer be made in a case of slim liability, thereby increasing the risk to the plaintiff? The counter-intuitive answer to this question is "probably not." The reason is that a plaintiff will never, under Rule 167, be required to reimburse the defendant's litigation costs out of pocket. If the defendant wins the case by holding the ultimate judgment to less than 80 percent of the settlement offer, any litigation costs awarded to the defendant are awarded only as a setoff to the plaintiff's judgment, if any. This means that if the defendant wins the case by obtaining a finding of "no liability," such that the plaintiff recovers nothing, then the defendant recovers no litigation costs from the plaintiff because there is no plaintiff recovery to offset against.

Because the defendant can only "recover" litigation costs by reducing the plaintiff's ultimate recovery, there seems to be little incentive for a defendant to make a Rule 167 settlement offer in a case of zero or slim liability. Any offer made by the defense in such a case is likely to be relatively low compared with the potential recoverable damages, because the defendant's chances of winning on liability are fairly high. Filing a declaration and making a low offer in such a case, however, will probably be rejected by the plaintiff and may serve only to invite the plaintiff to make a counteroffer that, because it is a case of slim liability, will undoubtedly be rejected by the defense. The risk to the defense has increased because, if the plaintiff wins such a long-shot case at trial, the plaintiff will recover not only a judgment that probably was not anticipated, but also will recover litigation costs. This result is inapposite, especially in light of the fact that defense lawyers typically are hired to minimize risk, not increase it. Accordingly, triggering Rule 167 in a case of no liability may be a strategy of high risk but minimal reward.

When should a plaintiff make an offer of settlement under Rule 167? As we have seen, this is not even an option for the plaintiff unless the defendant has triggered the procedure by filing the required designation. It is important to remember, however, that a defendant is defined as a party from which another party seeks monetary damages and therefore includes counter-defendants, cross-defendants, or third-party defendants. If a defendant, by way of a counterclaim, seeks damages from a plaintiff, then that plaintiff (counter-defendant) can trigger the Rule 167 procedure by filing the declaration. In that event, of course, the procedure is triggered only as to the counterclaim, and not with respect to the plaintiff's claims against the defendant.

With respect to the plaintiff's claims against the defendant, only a defendant can trigger the procedure for that claim. Once the defendant does so, however, a plaintiff can make an offer of settlement. A plaintiff should consider making such an offer in a case of slim liability where the defendant has unwisely filed the declaration triggering the procedure. The plaintiff's offer probably should be for slightly less then the full amount of the reasonably anticipated damages. The defendant is probably going to reject the offer because liability is slim, but the offer should be reasonable enough that there is a realistic chance that the plaintiff will be successful in obtaining a judgment in excess of 120 percent of the rejected offer.

The plaintiff should also make an offer in a case of clear liability where the defendant has triggered the procedure, but has either failed to make an offer or has made a "lowball" offer that has been rejected. The plaintiff now has an opportunity to increase the risk to the defendant in a case that is already risky for the defense because of the clear liability. The defendant is going to have to pay *something*. The plaintiff should consider making an offer low enough to tempt the defense and low enough to create additional risk by creating a scenario where the plaintiff has a reasonably good chance of obtaining a judgment in excess of 120 percent of the rejected offer. The lower the offer, the greater the chance of exceeding it at trial. The lower the plaintiff's offer, then, the greater the risk may be to the defendant.

VII. TEXAS STATUTES

STATE UNIVERSITY HAD PROTECTION UNDER RECREATIONAL-USE STATUTE

Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007).

Flynn was injured while riding her bicycle on a community trail through SFA. She was knocked off her bike by force of water from an oscillating sprinkler. She sued SFA under the Tort Claims Act, and SFA filed a plea to the jurisdiction and motion to dismiss based on sovereign immunity and the recreational-use statute. The trial court denied SFA's plea to the jurisdiction, and the court of appeals affirmed.

The Supreme Court addressed whether the Tort Claims Act waived SFA's sovereign immunity. The Court discussed the distinction between policy-level decisions (for which SFA was immune), and operational-level decisions (for which immunity was waived). The Court agreed with the court of appeals that deciding when and where to run the sprinklers was an operations-level decision rather than a policy-level decision, so immunity was waived. But the Court disagreed with the court of appeals' interpretation of the Recreational-Use statute or TEX. CIV. PRAC. & REM. CODE §§ 75.001-.004. Under that statute, a landowner who opens its land to the public for recreational use cannot be held liable for premises liability absent gross negligence or intent to injure. The court of appeals held that SFA was not entitled to invoke the Recreational-Use statute because the trail was on an easement SFA had given to the City of Nacogdoches.

The Supreme Court disagreed, holding that landowner who dedicates a public easement for recreational purposes is entitled to invoke the Recreational-Use statute. The Court also concluded that SFA was entitled to dismissal under the Recreational-Use statute. Flynn's .allegations did not show a viable claim for gross negligence. And SFA's evidence established that Flynn saw the sprinkler before she was knocked to the ground. The Recreational-Use statute does not impose a duty to warn about known conditions, thus, the Court dismissed Flynn's suit.
Justice Hecht filed a concurring opinion, joined by Justices Wainwright and Willett. Justice Hecht explained that, in deciding that SFA was immune from Flynn's suit because it was not grossly negligent in irrigating its campus, which is a prerequisite for liability under the Recreational-Use Statute, the Court did not need to consider whether SFA was also immune from suit because its conduct fell within the discretionary function exception to the Texas Tort Claims Act's waiver of immunity:

> [S]uppose the University, for some reason, had made when and where water was to spray a policy matter, and grounds workers had faithfully carried out that policy. The Court's analysis would then except the University's actions from the Act's waiver of immunity because it had exercised its discretion, as a policy matter, to water the way it did. If the government is immune from liability for all policy decisions, it could minimize its liability by making everything policy. The government would be encouraged to make policy on every silly subject imaginable, and the Act's discretionary function exception would swallow most of the waiver. As difficult as it has been "to meaningfully construe and consistently apply" the Act, I would not make matters worse.

INTERPRETATION OF TEXAS CIVIL PRACTICE AND REMEDIES CODE SECTION 41.0105[5]

Mills v. Fletcher, 229 S.W.3d 765 (Tex. App.—San Antonio, no pet.).

This case involved a personal injury claim by Kevin Fletcher against Alisa Mills, where the jury awarded Fletcher $1,551.00 in past medical expenses. On appeal, Mills argued that the figure should have been reduced by the trial court, because Fletcher's medical providers had accepted lesser amounts for their services from Fletcher's health insurer, thereby "writing off" the remaining balance due. As part of her bill of exceptions, Mills introduced two of Fletcher's medical bills that reflected an amount paid by the insurer, an amount "written off" by the provider, and a resulting balance due of zero ($0.00).

The San Antonio Court of Appeals held that the amount of past medical expenses should have been reduced to the figure actually paid by Fletcher's insurer, pursuant to the new requirements of TEX. CIV. PRAC. & REM. CODE §41.0105. The section, titled "Evidence Relating to Amount of Economic Damages," was passed as part of the sweeping tort reform provisions enacted by the legislature as House Bill 4. It states that "*recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant*."

The issue on appeal and resolved by the opinion, involved the definition of the word "incurred" (which appears twice in the statute). Specifically, the issue presented was whether medical expenses which are written off by a provider are ever "actually incurred" for purposes of the statute. Mills relied on common dictionary definitions of the word--which defined it as when a person makes himself liable to pay a debt. The language of the statute limits recovery of "incurred" expenses to those "actually incurred." It was necessarily intended to limit recoverable expenses to some amount less than that which was charged. Mills, therefore, argued that because Fletcher was no longer liable for the amount "written off," this lesser figure should be what is "actually incurred," for purposes of limiting his recovery and not the $1,551.00 charged. The Court accepted this definition and this argument, and ordered the trial court to reduce the award

[5] Chris C. Miller, *Reduction of Medical Expense Damage Award*, 45 Aug. Hous. Law. 50 (2007).

accordingly.

In a footnote, the Court acknowledged that its ruling was in direct violation of the collateral source rule, since it necessarily required evidence of insurance and other forms of recovery that reduced a plaintiff's expenses to the benefit of a defendant's amount of liability. The Court explained only that the legislature had the power to abrogate this longstanding legal doctrine, and, by the plain language of the statute, had done just that. The Court dismissed outright the legislative history relating to House Bill 4, and the legislature's deletion or revision of previous versions of Sec. 41.0501, because the legislature found them to violate the collateral source rule. Fletcher had argued this history was evidence of the legislature's intent that the statute not violate the rule and should prevent the Court from holding otherwise. But the Court was adamant that the language in the section was clear and unambiguous; therefore, it was not required to even consider legislative history and intent.

Justice Stone, in a dissenting opinion, noted that the majority's opinion flew in the face of longstanding precedent that medical expenses are "incurred" at the time services are rendered. Further, she noted that the opinion creates significant timing issues which are not addressed by the language of the statute. "At what point does the court decide the bills have been incurred?" What if the bills are not written off until after a verdict? What if they are never written off in a patient's account as a zero balance, but the provider testifies that he does not anticipate pursuing payment? What if a dispute arises between the insurer and provider over coverage and bills that would normally be written off are not? What if services are provided and charged to an uninsured patient, so that they are never written off, but the provider is not considering the patient liable for those amounts? Are such expenses "actually incurred" under the majority's view?

Such questions were dismissed by the majority in its discussion of the constitutionality of §41.0501. After previously acknowledging that its interpretation of the provision violated the collateral source rule, a rule grounded on the notion that a defendant should not be allowed to benefit from a reasonable plaintiff's contracting for insurance coverage, the Court instead concluded that its interpretation of the statute furthered the legislature's purpose "to develop a statutory scheme that would allow neither the injured plaintiff nor the responsible defendant to benefit from the medical provider's write-off." In sum, with regard to statutory interpretation, the Court acknowledged the statute did grant a benefit to a defendant from a plaintiff's insurance coverage (in violation of the collateral source rule), but, with regard to constitutionality of that same statute, it did not.

TEX. CIV. PRAC. & REM. CODE §33.004(E) HELD APPLICABLE TO STATUES OF REPOSE

Pochucha v. Galbraith Engineering Cons., Inc., 243 S.W.2d 148 (Tex.App.—San Antonio 2007, pet. filed).

On April 10, 2003, Sam and Jean Pochucha purchased a home built by Bill Cox Constructors, Inc. ("Bill Cox") in September of 1995. After purchasing the home, the Pochuchas noticed water would leak into the lower rooms after it rained. The Pochuchas had the home

inspected by engineers who informed them the french drain system under the foundation of the house was improperly designed and installed.

On April 1, 2005, the Pochuchas filed suit against Bill Cox for the damage to their home. On November 3, 2005, Bill Cox filed a motion for leave to designate Galbraith as a responsible third party. On December 1, 2005, the trial court granted Bill Cox leave to designate Galbraith as a responsible third party. On January 27, 2006, the Pochuchas joined Galbraith as a defendant pursuant to TEX. CIV. PRAC. & REM. CODE § 33.004(e) which provides as follows:

> If a person is designated under this section as a responsible third party, a *claimant is not barred by limitations* from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.

On June 28, 2006, Galbraith moved for summary judgment, seeking dismissal of the Pochuchas' claims on the ground that the ten-year statute of repose set forth in TEXAS CIVIL PRACTICE AND REMEDIES CODE section 16.008(a) which requires that a suit be filed "not later than 10 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment." Galbraith argued that because section 16.008 is a statute of repose and § 33.004(e) refers to "limitations," § 33.004(e) does not apply to extend the ten-year period contained in § 16.008. On November 8, 2006, the trial court signed an order granting Galbraith's motion for summary judgment and dismissing the Pochuchas' claims against Galbraith with prejudice. The Pochuchas appealed.

In reversing the trial court's judgment, the San Antonio Court of Appeals held that while § 16.008 may be a statute of repose, the Texas Legislature did not distinguish between statutes of limitations or statutes of repose when it enacted § 33.004(e). Thus, other than the claims specifically excluded in section 33.002(c), the court concluded that the Legislature used the word "limitations" in § 33.004(e) for the purpose of referring to each of the "limitations" periods listed in TEXAS CIVIL PRACTICE AND REMEDIES CODE Chapter 16, without regard to whether those "limitations" periods were determined to be statutes of repose. The court further explained that its holding is not contrary to the purpose of a statute of repose, which is "to give absolute protection to certain parties from the burden of indefinite potential liability" because § 33.004(e) provides for only a sixty-day extension after a party is designated as a responsible third party, which does not expose members of the construction industry to "indefinite" liability.

On December 21, 2007, Galbraith filed a petition for review with the Texas Supreme Court. On June 5, 2008, the Texas Supreme Court requesting briefing. Galbraith has filed its brief and has argued that § 33.004(e) has effectively repealed all statutes of repose and the substantive right to be free from liability after a legislatively determined period of time. There have been three amicus briefs filed by the Texas Society of Architects, the Texas Association of Defense Counsel, and Alliance of Automobile Manufacturers, Inc., all of which support

Galbraith's position. The Texas Supreme Court's ruling in this case could drastically change Texas law regarding the liability of third parties.