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Thursday

7.5 hours including 1.5 ethics

8:00 **Registration**
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8:40 **Welcoming Remarks**
Course Directors
Jim M. Perdue, Jr., *Houston*
Perdue & Kidd

George 'Tex' Quesada, Jr., *Dallas*
Sommerman, McCaffity & Quesada

8:45 **Texas Supreme Court Update** *.5 hr*
Jay Jackson, *Houston*
Abraham Watkins Nichols Sorrels Agosto & Aziz

9:15 **SCAC Update: What is the Supreme Court Advisory Board Up To?** *.5 hr*
Jim M. Perdue, Jr., *Houston*
Perdue & Kidd

9:45 **How to Prove Up Attorneys' Fees in State and Federal Court**
.5 hr (.25 ethics)
Polly Fohn, *Houston*
Haynes and Boone

10:15 **Break**

10:30 **Legislative Update** *.5 hr*
C. Chantel Crews, *El Paso*
Ainsa Hutson Hester & Crews

11:00 **Ethical Conduct in the Courtroom**
1 hr ethics
Houston
Hon. Roy B. Ferguson, *Alpine*
Judge, 394th District Court

San Antonio
Hon. David Canales, *San Antonio*
Judge, 73rd District Court

12:00 **Break – Lunch Provided**

12:15 **Luncheon Presentation: Demonstrative Evidence** *.5 hr*
Stephen Malouf, *Dallas*
Malouf & Nockels

12:45 **Break**

1:00 **Discovery Update** *.5 hr*
Mitzi S. Mayfield, *Amarillo*
Riney & Mayfield

1:30 **Depositions for Trial** *.5 hr*
Jennifer A. Haltom Doan, *Texarkana*
Haltom & Doan

2:00 **Social Media Discovery and Admissibility** *.5 hr (.25 ethics)*
Shawn L. Thompson, *Dallas*
Law Office of Tiffany A. Liber

2:30 **Discovery and Admissibility of Other Similar Incidents** *.5 hr*
Michael M. Guerra, *McAllen*
Law Offices of Michael M. Guerra

3:00 **Networking Break**

3:15 **Evidence Update** *.5 hr*
George 'Tex' Quesada, Jr., *Dallas*
Sommerman, McCaffity & Quesada

3:45 **Evidence of Medical Expenses** *.5 hr*
Sonia M. Rodriguez, *San Antonio*
Cowen | Rodriguez | Peacock

4:15 **Let the Great Ax Fall: Exemplary Damages in 2019** *.5 hr*
Cade W. Browning, *Abilene*
Browning Law Firm

4:45 **Discovery of Damages in TCPA Cases** *.5 hr*
Collin J. Cox, *Houston*
Yetter Coleman

5:00 **Adjourn to welcoming reception**
(San Antonio site only)

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- Take time away from the office to focus on CLE without distractions!

Friday

5.75 hours including 1.25 ethics

8:15 **Coffee and Pastries Provided**

8:40 **Announcements**

8:45 ***Daubert*: Dos and Don'ts** *.5 hr*
John B. Gsanger, *Corpus Christi*
The Ammons Law Firm

9:15 **Expedited Discovery** *.5 hr*
Elizabeth C. Brandon, *Dallas*
Barnes and Thornburg

9:45 **Third Party Discovery** *.5 hr*
Christopher S. Hamilton, *Dallas*
Hamilton Wingo

Ray T. Khirallah, Jr., *Dallas*
Hamilton Wingo

10:15 **Break**

10:30 **The Federal and State Court Judges Best Practices** *1 hr*
Houston
Hon. Micaela Alvarez, *McAllen*
Judge, United States District Court
Southern District of Texas

Hon. George C. Hanks, Jr., *Galveston*
Judge, United States District Court
Southern District of Texas

Hon. Daryl L. Moore, *Houston*
Judge, 333rd District Court

San Antonio
Hon. Xavier Rodriguez, *San Antonio*
Judge, United States District Court
Western District of Texas

Hon. Renee Yanta, *San Antonio*
Judge, 150th District Court

Additional Speaker to be Announced

11:30 **Seatbelts, Immigration Status, and Criminal Records** *.5 hr*
Alison Kennamer, *Brownsville*
Colvin, Saenz, Rodriguez & Kennamer

12:00 **Break - Lunch Provided**

12:15 **Luncheon Presentation: Evidence in the Courtroom**
.75 hr (.25 ethics)
Hon. Mike C. Engelhart, *Houston*
Judge, 151st Civil District Court

Daniel Guerra, *Houston*
Kane Russell Coleman & Logan

Marcy L. Rothman, *Houston*
Kane Russell Coleman & Logan

1:00 **Break**

1:15 **Working Alone or As a Team: The Ethical Issues Involved**
1 hr ethics
Michael Hendryx, *Houston*
Strong Pipkin Bissell & Ledyard

Judson Paul Manning, *Lubbock*
Field, Manning, Stone, Hawthorne & Aycock

Patricia Long-Weaver, *Midland*
Long-Weaver & Manning

2:15 **Drafting Discovery Requests, Interrogatories, Objections, and Admissions** *.5 hr*
Brandy R. Manning, *Midland*
Long-Weaver & Manning

2:45 **Using Evidence in Opening and Closing** *.5 hr*
Michael P. Doyle, *Houston*
Doyle Law Firm

3:15 **Adjourn**

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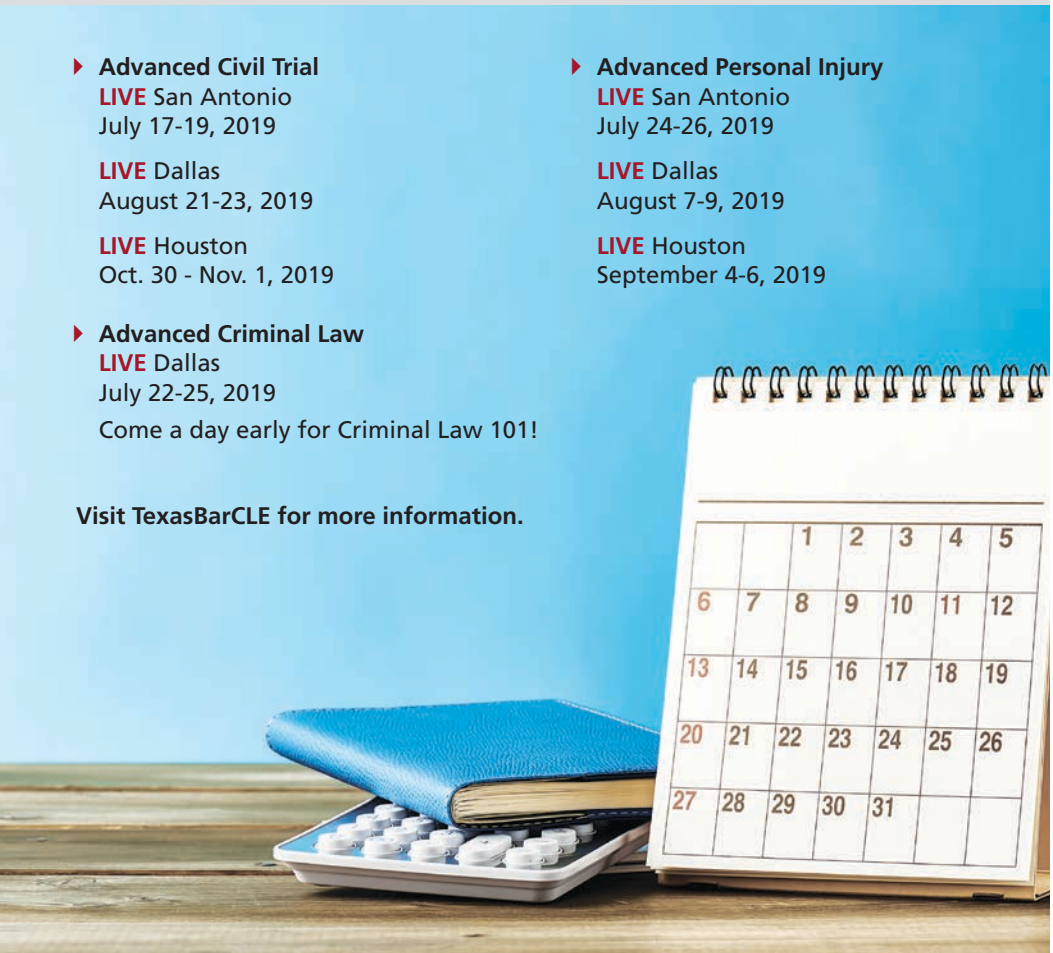

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LET THE GREAT AX FALL[1]
EXEMPLARY DAMAGES IN 2019

CADE BROWNING, *Abilene*
Browning Law Firm, PLLC

State Bar of Texas
32ND ANNUAL
ADVANCED EVIDENCE AND DISCOVERY
Houston – April 11-12, 2019
San Antonio – May 23-24, 2019

CHAPTER 13

[1] "And where the offense is, let the great ax fall" Shakespeare, *Hamlet*, Act IV, Scene 5, Page 10.

BIOGRAPHY

Cade Browning's practice is devoted to litigation. He is board certified by the Texas Board of Legal Specialization in personal injury trial law and is licensed in both Texas and Oklahoma.

Cade was born in Lucas, Texas where he grew up raising, training, selling, and showing cutting horses. He continues that tradition today at his ranch in Coronado's Camp where he lives with his wife, Katie, and their two boys, Barrett and Bede. Cade graduated from Texas A&M University and Baylor University School of Law, where he was twice elected President of the Student Bar Association. Professionally, Cade has served as president of the Abilene Bar Association, president of the Abilene Young Lawyers Association, was named Abilene's Outstanding Young Lawyer, and was voted Runner-Up Best Attorney in Abilene by the readers of the Abilene Reporter-News.

Cade currently serves as President of the West Texas Chapter of ABOTA and on the Executive Committee for the Litigation Council of the Litigation Section of the State Bar of Texas where he has served for the last ten years. He was also elected to serve on the Texas Young Lawyers Association's Board of Directors for four years representing his thirty-four-county area in West Texas. Cade has served on multiple State Bar Committees, including the Grievance Committee where he was Panel Chair, and the Local Bar Services Committee. In 2009, The Texas Bar Foundation selected Cade as a Fellow, a distinction awarded to only 10 percent of the attorneys in Texas. He now enjoys membership as a Sustaining Life Fellow of the Foundation.

Locally, Cade has been very involved in Abilene and West Texas. Cade currently serves on the board of trustees and executive committees for the Grace Museum, Taylor County Expo Center, and Western Heritage Classic. Cade was previously on the board of directors for the Abilene Preservation League, Abilene Community Foundation- Future Fund, St. John's Episcopal School, Big Country Health Education Center, Texas Frontier Heritage and Cultural Center Advisory Board, and Abilene A&M Club. Cade was honored to serve as the president of the board for the Abilene Preservation League, the chairperson of the board for the Abilene Community Foundation – Future Fund, and the Chair for the Board of Trustees for the Grace Museum.

In 2014, Cade was honored to be asked to run for Justice on the Eleventh Court of Appeals in Eastland, a twenty-eighty county district, stretching from Stephenville to New Mexico. Although he won Taylor, Jones, Fisher, Shackelford, Stonewall, and Ector Counties, the bid was unsuccessful, allowing him to happily return to private practice.

Cade was admitted in 2007 as a life member to the Million Dollars Advocate's Forum, which is limited to trial lawyers who have recovered a verdict, award, or settlement for a single case of a million dollars or more and has been selected as a Texas Super Lawyer- Rising Star six times.

TABLE OF CONTENTS

LET THE GREAT AX FALL EXEMPLARY DAMAGES IN 2019

I. INTRODUCTION

"Punishment is Justice for the Unjust."
Augustine of Hippo

No element of recovery is so hardly fought for, so feared, so leveraged, and so easily lost as exemplary damages. This paper will outline the status of punitive damages in Texas in 2019 and, we hope, will provide the practitioner a simple and easy reference to delve into the convoluted world of punishment damages as it applies to the everyday trial practice in Texas.

In civil litigation, the dominant purpose is to compensate the aggrieved. To place the victim back to their pre-tort condition; *restitutio in integrum.* However, punitive damages arose in common law as a supplementary sanction in exceptional cases where compensatory damages do not provide sufficient levels of deterrence and retribution. Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 Clev. St. L. Rev. 251 (2016).

Known by various names, including exemplary, penal, retributory, or vindictive damages, punitive damages are damages "over and above those necessary to compensate the plaintiff." *Id*. "Punitive damages are awarded for three main reasons: (1) to punish the defendant and provide retribution, (2) to act as a deterrent to the defendant and others minded to behave in a similar way, and (3) to demonstrate the court's disapproval of such conduct." *Id*.

From the earliest Texas cases in which exemplary damages were recognized, extraordinarily reprehensible conduct has been required. Demarest, *The History of Punitive Damages in Texas*, 28 S. Tex. L. Rev. 535 (1987). Possibly the first such case in Texas was *Graham v. Roder*, 5 Tex. 141 (1849), in which the Texas Supreme Court held:

> "Where either of the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. This rule seems settled in England and the general jurisprudence of this country."

Id. at 149.

Two years later, the Supreme Court again approved the recovery of exemplary damages if the injury was "tainted with fraud, malice, or willful wrong." *Cole v. Tucker*, 6 Tex. 266, 268 (1851). Except for some fluctuations in the definition of "gross negligence," culminating in the Supreme Court's decision in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981), the prerequisites are essentially the same today.

Ingleside v. Kneuper, 768 S.W.2d 451, 454-55 (Tex. App.—Austin 1989, writ denied).

II. STANDARDS FOR RECOVERY

"Men are not punished for their sins but by them."

Kin Hubbard

Texas codified the recovery of punitive damages in Chapter 41 of the Texas Civil Practice and Remedies Code. Section 41.003(a) allows for the recovery of exemplary damages only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from a unanimous finding of:

(1) fraud;
(2) malice; or
(3) gross negligence.

TEX. CIV. PRAC. & REM. C. §41.003.

Fraud is defined as "fraud other than constructive fraud." TEX. CIV. PRAC. & REM. C. §41.001(6). Malice is defined as "a specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. & REM. C. §41.001(7). Gross Negligence is defined, "as an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others."

TEX. CIV. PRAC. & REM. C. §41.001(11).

III. PLEADING EXEMPLARY DAMAGES

> **"No, Not So Much Perdition, as a Hair."**
> **Shakespeare, *The Tempest,* Scene 2**

The plaintiff's pleading must "give fair notice of the claim involved." TEX. R. CIV. P. 47. In addition to the general "fair notice" pleadings standard provided by Rules 45 and 47, Rule 56 clearly states that "[w]hen items of special damage are claimed, they shall be specifically stated." TEX. R. CIV. P. 56. Thus, the recovery of exemplary damages must be "supported by express allegations." *Marin v. IESI TX Corp*., 317 S.W.3d 314, 332 (Tex. App.–Houston [1st Dist.] 2010, pet. denied).

Not only must a plaintiff specifically plead for the recovery of exemplary damages, but if seeking to 'bust the caps' based on proving the defendant intentionally or knowingly engaged in felonious conduct under criminal statutes listed in Texas Civil Practice and Remedies Code 41.008 (c), the plaintiff must likewise plead the alleged exception to the cap. *Marin v. IESI TX. Corp*., 317 S.W.3d 314 (Tex. App.—Houston [1st Dist.] 2010 pet. denied).

On the contrary, it is now clear that a defendant need not plead the statutory cap on the amount of exemplary damages as an affirmative defense. The Texas Supreme Court has recently clarified some discrepancy among the Courts of Appeals and held that the statutory cap is automatic and, therefore, does not require a pleading. *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 163 (Tex. 2015). The cap imposes no burden on the defendant to prove any facts, so it is not an affirmative defense that must be pleaded. *Id*. As the Court stated, "[b]ecause the statutory cap on exemplary damages automatically applies and its scope is delineated by statute, there is little concern that plaintiffs will be genuinely surprised by its application in any given case. …Section 41.008, in and of itself, provides sufficient notice of the types of claims that are excluded from the cap, allowing plaintiffs to structure their cases to avoid the cap when desired and possible." *Id*. at 157.

If the defense intends to attack the constitutionality of punitive damages at a later stage in the proceeding, the question of if the attack should be preserved specifically through the use of affirmative defenses is unclear, but it seems to be wise to err on the side of safety and plead it.

A plaintiff or defendant who desires to rely on either an affirmative defense listed in the rules of civil procedure or upon any other matter that constitutes an avoidance of an opposing party's claim must plead that defense. TEX. R. CIV. P. 94; *Simmons v. Compania Financiera Libano, S.A.*, 830 S.W.2d 789, 792 (Tex. App.--Houston [1st Dist.] 1992, writ denied). An affirmative defense not pled or tried by consent is waived. *Tacon Mech. Contractors v. Grant Sheet Metal, Inc*., 889 S.W.2d 666, 671 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Ordinarily, the unconstitutionality of a statute is an affirmative defense that must be pled. Knoll v. Neblett, 966 S.W.2d 622, 639 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

IV. FACTORS IN CONSIDERING AMOUNT OF EXEMPLARY DAMAGES

> **"If a man steals an ox or a sheep, and kills it or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. He shall make restitution; if he has nothing, then he shall be sold for his theft. If the stolen beast is found alive in his possession, whether it is an ox or an ass or a sheep, he shall pay double."**
> ***Exodus* 22:1**

Biblical references to exemplary damages indicate that such damages should bear a multiple, but reasonable, relationship to the compensatory award. In this spirit, TEXAS CIVIL PRACTICE AND REMEDIES CODE Section 41.011(a) provides that, "in determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:

(1) the nature of the wrong;
(2) the character of the conduct involved;
(3) the degree of culpability of the wrongdoer;
(4) the situation and sensibilities of the parties concerned;
(5) the extent to which such conduct offends a public sense of justice and propriety; and
(6) the net worth of the defendant."

TEX. CIV. PRAC. & REM. C. §41.011(a).

Although the factors the jury can consider in determining its award is specifically laid out, other non-listed factors have been discussed by the Courts and sometimes adopted and sometimes rejected.

The Texas Supreme Court has held that it was improper for a plaintiff to testify about the intended use of the jury's award of exemplary damages, as such testimony was self-serving and had no relevance to the factors listed in chapter 41. *Service Corp. International v. Guerra*, 348 S.W.3d 221 (Tex. 2011).

However, in *Techcraft, Inc. v. Van Houten*, 709 S.W.2d 688 (Tex. App.—San Antonio 1986, no writ), the San Antonio Court of Appeals court held that it was proper to consider legal fees in assessing exemplary damages when the defendant's conduct necessitated the plaintiff's resort to judicial relief.

The Texas Supreme Court has also allowed defendants to introduce evidence about the profitability

of a defendant's misconduct and about any settlement amounts for punitive damages or prior punitive damages awards that the defendant has actually paid for the same course of conduct, in mitigation of punitive damages. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40-41 (Tex. 1998). "Such evidence is relevant because it better informs the fact finder about the parties' situation and the amount of punitive damages necessary to fairly punish a party and to deter the conduct in question. …Allowing such evidence also provides an important safeguard to minimize the risk of unjust punishment." *Id.*

But, "[e]vidence that is not relevant, or is unduly prejudicial, and thus, not admissible to mitigate punitive damages, includes actual damage amounts paid by settlements or by judgments; the number of pending claims filed against a defendant for the same conduct; the number of anticipated claims for the same conduct; insurance coverage; unpaid punitive damages awards for the same course of conduct; and evidence of punitive damages that may be levied in the future." *Id.*

V. DISCOVERY OF NET WORTH

"Let the punishment fit the crime."
William Schwenck Gilbert, *The Mikado*

"Net worth means the total assets of a person minus the total liabilities of the person on a date determined appropriate by the trial court." TEX CIV. PRAC. & REM. C. 41.001(7-a).

A defendant's net worth is relevant, and therefore subject to discovery, in an action in which the plaintiff seeks to recover exemplary damages. TEX. CIV. PRAC. & REM. C. § 41.011(a)(6); *Lunsford v. Morris*, 746 S.W.2d 471, 471–473 (Tex. 1998). A defendant's ability to pay bears directly on the question of adequate punishment and deterrence. *Id.* at 473.

However, in 2015, the Texas Legislature adopted Section 41.0115 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE which limits the ability of the plaintiff to discover evidence of the net worth of a defendant.

Section 41.0115(a) provides:

> On the motion of a party and after notice and a hearing, a trial court may authorize discovery of evidence of a defendant's net worth if the court finds in a written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages.

TEX CIV. PRAC. & REM. C. § 41.0115(a).

Under this new procedure, a plaintiff must first file a motion to obtain net worth discovery and demonstrate and obtain a finding from the trial court that there is a substantial likelihood of success on the merits of a claim for exemplary damages. *Id.*

Evidence submitted by to the court in support of or in opposition to a motion seeking discovery of net worth may be in the form of an affidavit or a response to discovery. *Id.*

Although, to recover exemplary damages, a plaintiff must carry a 'clear and convincing burden,' to prevail on a motion for discovery of net worth discovery, the plaintiff need only prove there is a 'substantial likelihood of success.' Though there are not yet any reported cases, a 'substantial likelihood of success' burden is significantly less than 'clear and convincing' and probably less than a 'preponderance of the evidence.'

The legislative history of Section 41.0115 provides an exchange between Reps. Clardy and King, wherein it is clear that the phrase "substantial likelihood is not intended to be the same as the clear and convincing standard," but that the Plaintiff need only present a "prima facie case."

> REPRESENTATIVE CLARDY: There were a couple of amendments offered a while ago with some concern about substantial likelihood and what that standard means under Texas law. There were a number of authorities, I think, that you and I discussed. One is that substantial likelihood is not intended to be the same as the clear and convincing standard, is that right?
>
> REPRESENTATIVE K. KING: That's correct.
>
> CLARDY: And likewise, in the clear and convincing standard that's what's required for the plaintiff's burden on the ultimate issue for gross negligence and exemplary damages. So for discovery standard, you are not expecting that to be as high as the ultimate burden of clear and convincing, correct?
>
> K. KING: That's my understanding.
>
> CLARDY: And likewise, the substantial likelihood is less than a likelihood standard, which means that it will be more likely than not---or a preponderant standard. Is that also your intent?
>
> K. KING: Correct.
>
> CLARDY: And it's your intention, Mr. King, that for the burden that the plaintiff to be entitled to net worth discovery, it's only necessary that the claimant present a prima

> facie case, but not to demonstrate that he is certain to win. Is that right?
>
> K. KING: That's correct.
>
> CLARDY: So in other words, Mr. King, it's enough if the claimant has raised questions on the merits to make them fair ground for more deliberative investigation. That is the intention and the standard you seek in this bill?
>
> K. KING: Yes.

http://www.journals.house.state.tx.us/HJRNL/84R/HTML/84RDAY75FINAL.HTM

Nonetheless, if a plaintiff files its net worth discovery motion, the Court shall presume that adequate time for discovery has elapsed. TEX CIV. PRAC. & REM. C. § 41.0115(d).

The statute defines "adequate time" as enough discovery that the defendant has sufficient information to prepare facts for a no-evidence motion for summary judgment on the plaintiff's exemplary damage claim. *Id*.

In other words, a prudent plaintiff's lawyer better be ready for a No-Evidence Motion for Summary Judgment if she files her Motion for Net Worth Discovery, as the argument that there has not been an adequate time for discovery under Texas Rule of Civil Procedure 166a(i) will most likely fall on deaf ears.

Conversely, as a matter of judicial anti- hypocrisy, if a trial judge were to allow Net Worth discovery, that Judge, by definition, has found there was a "substantial likelihood of success on the merits of a claim for exemplary damages." TEX. CIV. PRAC. & REM. C. § 41.0115(a).

Whatever "substantial likelihood of success" means, it certainly should be "more than a scintilla of evidence" necessary to defeat a no-evidence motion for summary judgment and is arguably more than a "genuine issue of material fact" to defeat a traditional motion for summary judgment.

If the trial court does authorize discovery, the court's order may only authorize use of the least burdensome method available to obtain the net worth evidence. TEX. CIV. PRAC. & REM. C. § 41.0115(b). This could include tax returns, financial statements, or Securities and Exchange

Commission filings. But see *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558, 559 (Tex. 1992) (trial court abused discretion in ordering production of five years' worth of Sears's tax returns based on Sears's production of annual reports reflecting its net worth).

A public company's worth is arguably a matter of public records, in the company's 10-K and 10-Q filings. Thus, a party should be prepared for the argument that if the information is equally available to both parties, good cause does not exist for production.

Finally, it also must be anticipated that a trial court's order may be subject to mandamus review and, when reviewing an order authorizing or denying discovery of net worth evidence, the reviewing court may consider only the evidence submitted by the parties to the trial court in support of or in opposition to the motion seeking discovery TEX CIV. PRAC. & REM. C. § 41.0115(c).

VI. BURDEN OF PROOF

> **"Every guilty person is his own hangman"**
> ***Seneca the Younger***

Once a party has pled and conducted discovery on exemplary damages, the plaintiff now needs to prove it. Texas requires proof of liability for exemplary damages and the amount of exemplary damages by clear and convincing evidence. TEX. CIV. PRAC. & REM. C. §41.003(a). Clear and convincing evidence "means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."

To prove a claim of gross negligence, a plaintiff must prove, by clear and convincing evidence, an act or omission:

- which when viewed objectively from the standpoint of the defendant at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
- of which the defendant has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX CIV. PRAC. & REM. C. § 41.001(7)(B).

A good way of thinking about this definition is to break it into two parts: (1) an objective prong and (2) a subjective prong. Evidence of ordinary negligence is not sufficient to satisfy either the subjective or objective prong of this definition. TEX CIV. PRAC. & REM. C. § 41.003(b); *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999).

The objective, "extreme risk" component means that the actor has done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993).

'Extreme risk' is not a remote possibility or even a high probability of minor harm, but rather the likelihood

of the plaintiff's serious injury." *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). But, statistical evidence of the probability of serious injury is not necessary to establish the objective component of gross negligence. *Goodyear Tire & Rubber Co. v. Rogers*, 538 S.W.3d 637, 645 (Tex. App.—Dallas 2017, pet. filed).

In other words, to establish this first element, a plaintiff must prove that the wrongdoer's actions or inactions involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others. *Columbia Med. Ctr. of Las Colinas v. Hogue*, 271 S.W.3d 238, 248-53 (Tex. 2008) (hospital's failure to provide an echocardiogram on a stat basis created an extreme risk to others); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998) (Mobil's conduct in "not monitoring contract workers for benzene exposure, not warning them of the danger of such exposure, and not providing them with protective gear" -- "involved an extreme degree of risk."); *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001) (contractor's failure to provide lifeline to window installers on tall building "posed obvious risks of falls").

For example, when a truck driver admits that driving in excess of the maximum hours established by federal regulations results in fatigue, which could lead to accidents in which people are catastrophically injured, the objective prong has been met, and the fatigued driving posed an extreme risk or likelihood of serious injury to other drivers, including the plaintiff. *Rayner v. Dillon*, 501 S.W.3d 143, 153 (Tex. App.—Texarkana 2016, pet. granted, but dismissed).

The second prong, the subjective element, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts. Actual awareness means the defendant knew about the peril, but its acts or omission demonstrated that it did not care. *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311 (Tex. 2014).

"[A]wareness of an extreme risk does not require proof that the defendant anticipated the precise manner in which the injury would occur to identify to whom the injury would befall." U-Haul, 380 S.W.3d at 139. But, conscious indifference should not be the result of momentary thoughtlessness, inadvertence, or error of judgment. *Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 326 (Tex. 1993)*. There must be something in the nature of a continued or persistent course of action. *Rogers v. Blake*, 240 S.W.2d 1001, 1004 (Tex. 1951).

Determining whether an act or omission involves peril requires "an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." *Rayner*, 501 S.W.3d at 148.

In examining proof of this second, subjective element "courts focus on the defendant's state of mind, examining whether the defendant knew about the peril caused by his conduct but acted in a way that demonstrates he did not care about the consequences to others." *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 796 (Tex. 2013). That is, "a party cannot be liable for gross negligence when it actually and subjectively believes that circumstances pose no risk to the injured party, even if [it is] wrong." *Perez v. Arredondo*, 452 S.W.3d 847, 854 (Tex. App.—San Antonio 2014, no pet.).

In simpler terms, the subjective elements mean that the defendant knew about the risk, but went ahead anyway. *Lee Lewis*, 70 S.W.3d at 784 (holding that the subjective element of gross negligence was satisfied where a job superintendent saw employees working on the ninth floor of a building that was under construction with an "ineffective fall-protection system" and "did nothing to remedy it").

VII. CAPS

> **"He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes."**
>
> ***Book of Proverbs, 13:24***

Decisions about whether exemplary damages should be awarded and the amount of exemplary damages awarded are reserved to the discretion of the trier of fact. TEX. CIV. PRAC. & REM. C. § 41.010(b). But an exemplary damage award may not exceed the cap set forth in section 41.008. *Id*. § 41.008(b).

Section 41.008 limits an award of exemplary damages to the greater of: (1) (A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000. *Id*. § 41.008(b).

But what constitutes 'economic damages' for the calculation?

The jury must determine the amounts of economic and noneconomic damages separately from one another. *Id*. § 41.008(a).

Economic damages are "compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages." *Id*. § 41.001(4). Pecuniary losses are "direct economic losses." *Moore v. Lillebo*, 722 S.W.2d 683, 687 (Tex. 1986); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 531 (Tex. 2002) ("The ordinary meaning of 'pecuniary' is 'of or pertaining to money.'")

The Supreme Court has explained that "damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or

the creation of liabilities." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 153 (Tex. 2014).

In contrast, noneconomic damages mean "damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages." TEX. CIV. PRAC. & REM. C. § 41.001(12).

"Non-pecuniary damages do not require certainty of actual monetized loss" but "are measured by an amount that 'a reasonable person could possibly estimate as fair compensation.'" Id.

So what elements of damages constitutes "actual economic or pecuniary loss" to be used in the cap calculation? Certainly, medical expenses and lost wages, but what about loss of care, maintenance, support, advice, counsel and reasonable monetary contributions (gifts)?"

The Dallas Court of Appeals, in recently examining this issue, held that the phrase "actual economic or pecuniary loss[es]" means those types of losses that are supported by evidence of an existing in fact, real monetary loss like lost wages, lost profits, or the increased expenditures associated with obtaining replacement or new services. "Stated differently, by using the phrase "actual economic or pecuniary loss" to describe the nature and extent of the available losses useable in the cap calculation's economic damages prong, the legislature emphasized that amounts must be based on evidence of existing in fact, real lost economic value." *Goodyear Tire & Rubber Co. v. Rogers*, 538 S.W.3d 637, 652 (Tex. App.—Dallas 2017, pet. pending).

Thus, proof of the actual monetary amount lost must be used to categorize these losses as economic losses. "For example, assuming [the plaintiff] had been an accountant who did their tax returns for free, how much would they have to pay to replace that free service? Or, as was shown here, how much will the wife have to pay for household services that [the plaintiff] previously provided for free? Those are examples of actual economic or pecuniary losses that would be includable under the cap's economic damages prong if there was evidence supporting them. On the other hand, although [the plaintiff]'s practical advice to his family had some unquantified, inherent value to them, losing such advice in the future would not be an actual economic or pecuniary loss to appellees if there is no evidence of an associated monetary impact on them to replace that advice and counsel. These examples illustrate the difference between (i) the undifferentiated, non-monetized "pecuniary losses" the jury found in response to question three and (ii) the types of actual economic and pecuniary losses that the legislature made includable when determining the economic damages prong in § 41.008(b)(1)(A). The latter are included in that prong, whereas, the former are not. *Id*. at 653.

Thus, economic damages in the exemplary damages cap formula are those "losses shown to be actual (that is, existing and real) monetary losses that can be measured in fact-based monetary amounts." *Id.* at 654.

VIII. CAP BUSTING

> **"But if you know me, you know that I'm liable to bust a cap 'cause it's all about survival of the fittest."**
>
> **Ice Cube, *AmeriKKKa's Most Wanted***

Alas, rest assured, there is a hammer to break through the cap's glass ceiling. Cap busting. TEXAS CIVIL PRACTICE AND REMEDIES CODE Section 41.008(c) provides that the caps on exemplary damages do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in various sections of the Penal Code, and the conduct was committed knowingly or intentionally. TEX. CIV. PRAC. & REM. C. § 41.008(c).

The legislature specifically identified 17 separate Penal Code sections that will bust the caps on exemplary damages:

(1) Section 19.02 (murder);
(2) Section 19.03 (capital murder);
(3) Section 20.04 (aggravated kidnapping);
(4) Section 22.02 (aggravated assault);
(5) Section 22.011 (sexual assault);
(6) Section 22.021 (aggravated sexual assault);
(7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care);
(8) Section 32.21 (forgery);
(9) Section 32.43 (commercial bribery);
(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
(11) Section 32.46 (securing execution of document by deception);
(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
(14) Section 49.07 (intoxication assault);
(15) Section 49.08 (intoxication manslaughter);

(16) Section 21.02 (continuous sexual abuse of young child or children); or
(17) Chapter 20A (trafficking of persons).

TEX. CIV. PRAC. & REM. C.41.008(c).

To bust the caps, though, a plaintiff must obtain a jury finding that the defendant violated one of the criminal code provisions listed in the statute, **and** that the violation was committed knowingly or intentionally. *Signal Peak Enters. of Tex., Inc. Bettina Invs., Inc.*, 138 S.W.3d 915, 927 (Tex. App.—Dallas 2004, pet. stricken).

"Intentionally" and "knowingly" have the same meanings assigned those terms in sections 6.03(a) and (b) of the Penal Code.

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

TEX. PEN. C. § 6.03.

In examining Section 6.03 of the Penal Code, though, criminal punishment also includes reckless as well as intentional and knowing conduct, but recklessness is not sufficient to bust the cap under chapter 41.

Thus, in order to apply the exception to the caps, the plaintiff will need a finding of fraud, malice, or gross negligence **and** a separate jury question that the defendant knowingly or intentionally violated one of the criminal provisions listed in section 41.008(c). *Madison v. Williamson*, 241 S.W.3d 145, 161 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Nevertheless, there is no culpable mental state requirement for two listed offenses, namely, sections 49.07 (Intoxication Assault) and 49.08, (Intoxication Manslaughter), as section 49.11 of the Penal Code does not require a culpable mental state for those offenses. Thus, under chapter 41, violation of those two intoxication offenses will bust the cap, regardless of whether the defendant engaged in the conduct intentionally or knowingly. TEX. CIV. PRAC. & REM. C. §41.008(c).

IX. IMPUTING ACTIONS TO CORPORATION

"Had you not created great sins, god would not have sent a punishment like me upon you."

Genghis Khan, Rules for (Warriors) Writers

Unlike vicarious liability under *respondeat superior*, a corporation is not automatically liable for intentional acts by its employee that might give rise to exemplary damages. Rather, there must be a direct act of negligence against the corporation, such as negligent hiring, training, or, supervision.

Corporations can "only act through individuals." *Tri v. J.T.T.*, 162 S.W.3d 552, 562 (Tex. 2005). In order for a corporation to be liable for the exemplary damages based on an act of its employee, the plaintiff must prove that:

1) the principal authorized the doing and the manner of the act;
2) the agent was unfit and the principal was reckless in employing him;
3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
4) the employer or a manager of the employer ratified or approved the act.

Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967); *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997).

The vice-principal doctrine allows a party to hold a corporation directly liable for the acts of certain corporate agents commonly referred to as "vice-principals." *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 253 (Tex. 2009).

The acts of a vice-principal are deemed to be acts of the corporation for purposes of exemplary damages because the vice-principal "represents the corporation in its corporate capacity." *Bennett v. Reynolds*, 315 S.W.3d 867, 884 (Tex. 2010) (quoting *Hammerly Oaks*, at 391-92). Under this theory, the negligence, gross negligence, or malicious conduct of certain agents is treated as the conduct of the principal. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406-07 (Tex. 1934), overruled on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987).

The vice-principal doctrine differs from *respondeat superior* in that the negligent acts of the vice-principal are treated as the very acts of the principal. *Waring v. Harris*, 221 S.W.2d 345, 346 (Tex. Civ. App.—Austin 1949, writ ref'd n.r.e.). In other words, there is direct liability to the principal. *Id.*

There are four classes of employees who may be vice-principals under Texas law: (1) corporate officers;

(2) those who have the authority to employ, direct, and discharge servants of the master; (3) those engaged in the performance of nondelegable or absolute duties of the master; and (4) those to whom the master has delegated the management of all or part of its business. Tex. PJC 10.14C; *Bennett*, at 883.

But who is a 'corporate officer' of limited liability companies and limited partnerships, since they are not technically corporations? The answer lies in the Texas Business Organizations Code which defines an "officer" as an individual elected, appointed, or designated as an officer of an entity by the entity's governing authority or under the entity's governing documents. TEX. BUS ORG. C. § 1.002(61). The governing authority of a limited liability company consists of the managers of the company, if the company's certificate of formation states that the company will have one or more managers. *Id.* § 101.251(1). Further, with regard to Limited Liability Companies, the terms "corporation" or "corporate" includes a "limited liability company" and reference to "directors" includes "managers" of a manager-managed limited liability company. *Id.* § 101.002. Thus, a manager of limited liability company is equivalent to a "corporate officer" of a corporation. *Id*.

Nonetheless, in the context of a vice-principal, the Court in *Hammerly Oaks, Inc*. elaborated on the meaning of "corporate officer," saying that the term was not intended to restrict vice principals only to corporate officers, per se, but that the term "vice principal" includes one who represents a corporation in its corporate capacity. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 407 (Tex. 1997) (citing *Chronister Lumber Co. v. Williams*, 116 Tex. 207, 288 S.W. 402 (Tex. 1926)). Neither the title of the employee nor the degree of responsibility is determinative, unless the responsibility falls within the parameters of the definition of vice principal *Id*.

Finally, a corporation also remains independently liable for the performance of its "absolute or nondelegable duties," which include:

1) the duty to provide rules and regulations for the safety of employees and to warn them as to the hazards of their positions or employment;
2) the duty to furnish reasonably safe machinery or instrumentalities with which its employees are to labor;
3) the duty to furnish its employees with a reasonably safe place to work; and
4) the duty to exercise ordinary care to select careful and competent co-employees.

Fort Worth Elevators, 70 S.W.2d at 401; see also *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 186 n.45 (Tex. 2004).

X. BIFURCATING THE TRIAL

There is one, and only one, thing in modern society more hideous than crime - namely, repressive justice.

Simone Weil, *Human Personality*

Defendants have long been fearful that when a jury hears the evidence of net-worth, it could impact their determination of liability. Thus, TEXAS CIVIL PRACTICE AND REMEDIES CODE Section 41.009 codified the Texas Supreme Court holding in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), that when presented with a timely motion, a trial court should bifurcate the determination of the amount of punitive damages from the liability phase of the trial.

Section 41.009 provides that on motion by a defendant, the court shall provide for a bifurcated trial. The motion must be made prior to the voir dire or as directed by the court in a pretrial order. If there is more than one defendant, the court must bifurcate upon the motion of any defendant. TEX. CIV. PRAC. & REM. C. § 41.009(b).

In the first phase of a bifurcated trial, the trier of fact shall determine liability for compensatory and exemplary damages and the amount of compensatory damages. If liability for exemplary damages is established during the first phase, the second phase determines the amount of exemplary damages to be awarded. *Id*. § 41.009(b).

It is generally thought that a bifurcation would be preferable to the defendant. However, in practice, that is not always so. *See generally* J. Stephen Barrick, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS L. REV. 1059, 1083-86 (1995) (discussing potential effects of bifurcation).

In order to get to the second phase of the exemplary damage trial, the jury must decide first if the defendant's actions rise to gross negligence or malice. It is common sense that, if they find such culpability, they are more likely to award high damages and possibly drive up the noneconomic damages awarded. The defendant then has to come back and allow the jury to again award damages in the second phase. "The same jury that hears the liability phase of a case must also hear the punitive damages phase." *In re Bradle*, 83 S.W.3d 923, 926 (Tex. App.— Austin 2002, orig. proceeding [leave denied]).

As one juror said, "None of us had an idea that there would be a punitive side. We thought what we were doing [in the first verdict] was sending a message to the industry." *Schindler Elevator Corp. v. Anderson*,

78 S.W.3d 392, 417 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated w.r.m.).

In *Schindler*, the jury returned a verdict of $16.97 million in damages in the first phase of the bifurcated trial, consisting largely of noneconomic damages (*e.g.*, mental anguish, physical impairment, loss of consortium) for a child's injury in an escalator accident. *Id.* at 398, 410-14. The jury then awarded an additional $100,000 in punitive damages during the bifurcated punitive damages phase of the trial. *Id.* at 400. In dissenting from the court's denial of rehearing en banc, Chief Justice Brister observed that "[w]hat happened in this case is quite clear – the jury included punitive damages in the guise of compensatory damages." *Id.* at 417 (Brister, J., dissenting).

If the trial is bifurcated, though, "[e]xemplary damages may be awarded only if the jury [is] *unanimous* in regard to finding liability for *and* the amount of exemplary damages." TEX. CIV. PRAC. & REM. C. § 41.003(d). Further, the jury must be instructed that "in order for you find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous." *Id.* § 41.003(e).

XI. COVERAGE FOR EXEMPLARY DAMAGES

Men are not hanged for stealing horses, but that horses may not be stolen.

George Savile Halifax, *Of Punishment*

So now assume you have recovered exemplary damages or your client has been tagged with an exemplary damage award. How does it get paid? The biggest question of all: Is it covered?

The Texas Supreme Court has opined on this issue in *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 654 (Tex. 2008). In *Stephens Martin*, the Court was given a certified question from the United States Court of Appeals for the Fifth Circuit: "Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?" The answer, in short, is generally no, but the actual language of the policy may still exclude coverage.

In *Stephens Martin*, the Texas Supreme Court laid out a two-step analysis for determining whether exemplary damages for gross negligence are insured by the policy. *Id*. at 655.

First, the court must decide whether the plain language of the policy covers the exemplary damages sought in the underlying suit against the insured. *Id*.

Second, if the court finds that the policy provides coverage, the court must determine "whether the public policy of Texas allows or prohibits coverage in the circumstances of the underlying suit" by first looking "to express statutory provisions regarding the insurability of exemplary damages to determine whether the Legislature has made a policy decision." *Id*. Absent an explicit policy decision by the Legislature, the court should consider the general public policies of Texas. *Id*.

The *Stephens Martin* Court determined that the Legislature has prohibited insuring against punitive damages in only two contexts, health care providers and guaranty funds/excess liability pools. *Id*. at 656–57.

It then turned to Texas public policy considerations. *Id*. at 666. On the one hand, public policy values freedom of contract; on the other, the exemplary damages statute makes it clear that "the punishment imposed through exemplary damages is to be directed at the wrongdoer." *Id*. at 666–67.

Applying these considerations, the Court reached a holding limited to the facts of the case: "the public policy of Texas does not prohibit insurance coverage of exemplary damages for gross negligence in the workers' compensation context." *Id*. at 670.

However, since *Stephens Martin*, some recent cases have trended towards not allowing coverage for exemplary damages in commonly litigated situations.

The San Antonio Court of Appeals recently held that exemplary damages were not covered under an automobile policy. *Farmers Texas County Mut. Ins. Co. v. Zuniga*, 548 S.W.3d 646 (Tex. App—San Antonio 2017, no pet. h.)

In *Zuniga*, the San Antonio Court of Appeals held that the Farmers personal auto policy that covered "damages for bodily injury" did not, on its face, cover exemplary damages. The court drew a distinction between an insuring agreement covering "all sums which the insured shall become legally obligated to pay as damages because of… bodily injury," to the narrower Farmers policy, which only covered "damages for bodily injury."

The court concluded that while the "all sums" insuring agreement may be broad enough on its face to include punitive damages, the phrase "damages for bodily injury," standing alone, does not include punitive damages, and nothing else in the Farmers policy created coverage for punitive damages.

Even more recently, U.S. District Judge Xavier Rodriguez in the Western District of Texas held the plain language of a commercial insurance policy did not cover a punitive damages award. *Frederking v. Cincinnati Ins. Co.*, No. SA–17–CV–651–XR, 2018 WL 1514095, 2018 U.S. Dist. LEXIS 49917 (W.D. Tex. Mar. 27, 2018), reconsideration denied sub nom. *Frederking v. Cincinnati Ins. Co., Inc.*, No. SA–17–CV–651–XR, 2018 WL 2471455 (W.D. Tex. May 31, 2018).

Frederking alleged he was injured when his vehicle was struck by a drunk driver, who was operating a motor vehicle owned by his employer at the time of the collision. *Id*. at *1–2. A state court jury found Sanchez

grossly negligent and awarded Frederking $207,550.00 in punitive damages. *Id*. Frederking filed suit against the employer's insurer, Cincinnati Insurance Company, for failing to pay the punitive damages award. *Id*.

The Court held under the plain language of the policy, Cincinnati was only required to indemnify an insured for an "accident" or "occurrence." *Id*. at *5–6. Since the jury found Sanchez had actual, subjective awareness of the risk involved, the Court determined the collision was not an accident and the punitive damages were not covered. *Id*. at *8.

Neither case addressed the public policy portion of *Stephens Martin*, instead the cases were decided on the language in the policy.

Nonetheless, these lines of cases create quite a conundrum for both the plaintiff and defendant. A plaintiff cannot assume that the claims will be covered and will need to be aware that an exemplary damage finding could adversely affect coverage for an "accident."

Defense lawyers hired by the insurance company are now possibly put in a real bind under the tripartite relationship. Further, insurance companies, as well, will have to tread lightly. How does this affect a *Stower's* demand to an insured? Does the insurance company have a duty to protect its insured from a non-covered exemplary damage judgment? What issues arise when an insurance company uses captive counsel to represent an insured, but does not cover the exemplary damage claims?

At the time of this article, neither case has yet been cited. In *Zuniga*, after remand, the trial court granted Farmers' summary judgment on October 18, 2018. *Zuniga v. Farmers Texas County Mut. Ins. Co.*, No. 2014-CI11445 (73rd Dist. Ct. Bexar County, Tex. Oct 18, 2018). Counsel for Zuniga has filed a Notice of Appeal on December 4, 2018. Zuniga's brief is due March 4 2019.

http://www.search.txcourts.gov/Case.aspx?cn=04-18-00899-CV&coa=coa04

An appeal is also pending in the Fifth Circuit in *Frederking* at this time. The reply brief was filed on November 21, 2018 and will be argued on April 2, 2019. *Frederking v. Cincinnati Ins. Co*., No. 18-50536 (5th Cir. 2018).

In sum, until we get further instruction, unless the policy expressly includes or excludes punitive damages or there is legislation addressing the issue, whether a policy covers exemplary damages or not will be a fact-specific inquiry that involves careful construction of the policy language by the practitioner.

XII. PRE-INJURY RELEASE OF EXEMPLARY DAMAGE LIABILITY

"Learn the rules like a pro, so you can break them like an artist"

Pablo Picasso

Can someone draft a pre-injury waiver of exemplary damage liability? It apparently depends where you are located.

A supermajority of courts in Texas have found that a preinjury release cannot relieve a defendant from liability for damages caused by its own gross negligence because such a release is void against public policy.

- Waco - *Akin v. Bally Total Fitness Corp.*, No. 10-05-00289-CV, 2007 WL 475406 2007 Tex. App. LEXIS 1218 (Tex. App.— Waco Feb 14, 2007, pet. denied)
- Eastland - *Tex. Moto-Plex, Inc. v. Phelps*, No. 11-03-0036-CV, 2006 Tex. App. LEXIS 892, 2006 WL 246520 (Tex. App.—Eastland Feb 2, 2006, no pet.)
- Beaumont - *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.— Beaumont 1986, no writ)
- Houston [14th Dist.] – *Sydlik v. REEIII, Inc*, 195 S.W.3d 329 (Tex. App.—Houston 2006, no pet.)
- San Antonio - *McCloskey v. The Clubs of Cordillera Ranch, LP, et al*, 2017 WL 6502444 (Tex. App. – San Antonio, 2017, no pet.)

However, the San Antonio Court of Appeals upheld a granting of summary judgment on behalf of defendants—even where the plaintiffs' plead gross negligence. *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713 (Tex. App.—San Antonio 1994, writ denied).

Newman was a wrongful death and survival action brought against a diving school and diving instructors after Jean Newman died during a scuba certification course. *Id.* The defendants filed a motion for summary judgment based on a preinjury release signed by Ms. Newman. *Id.* The court held that negligence and gross negligence are not separable claims and that therefore a release of liability for negligence also releases a party from liability for gross negligence.

Further, the Dallas Court of Appeal recently distinguished its previous holding in *Van Voris v. Team Chop Shop*, 402 S.W.3d 915, 924 (Tex. App.—Dallas 2013, no pet.), finding that public policy dictates a pre-injury waiver of gross negligence must be express. *Quiroz v. Jumpstreet8, Inc*., 2018 Tex. App. LEXIS

5107, *12-13, 2018 WL 3342695 (Tex. App.—Dallas 2018, pet. filed).

The Court held, "*Van Voris* is distinguishable from the case here in that Quiroz's Release specifically stated that both negligence and gross negligence claims were waived. The assumption of risk paragraph that lists the specific types of claims/causes of actions that were included in the Release was encased in a box, had all capital lettering, and appeared above the signature line. As noted above, Quiroz received fair notice regarding the claims being waived." *Id.*

Quiroz was decided on July 8, 2018 and petition for review was filed, but denied on January 30, 2019.

Recently, a unanimous Texas Supreme Court reiterated its strong affinity behind the public policy of freedom to contract in upholding a contractual waiver of punitive damages, even when accompanied by fraud. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, NO. 17-0578, 2019 WL 406075, 2019 LEXIS 101, (Tex. Feb. 1, 2019).

In *Bombardier*, the plaintiff purchased a new airplane that apparently fraudulently contained used engines. The plaintiff won at the trial court level on a fraud claim and received an award of punitive damages. However, there were contractual waivers of the ability to recover punitive damages in the underlying purchase agreement. *Id.* at * 30.

In upholding the validity of the waiver of punitive damages the Texas Supreme Court explained:

> "As the plaintiffs point out, we have held that 'fraud vitiates whatever it touches.' . . . We have never held, however, that fraud vitiates a limitation-of-liability clause. We must respect and enforce terms of a contract that parties have freely and voluntarily entered…And the plaintiffs 'cannot both have [the] contract and defeat it too.' . . . Rather than seeking rescission of the agreements based on Bombardier's fraudulent conduct, the plaintiffs have tried to enforce the agreements, seeking an award of actual damages, while at the same time seeking to strike the limitation-of-liability clauses to receive an exemplary damages award."

Id. at * 39.

The Court stated, "[i]In balancing the competing interests between protecting parties from 'unintentionally waiving a claim for fraud' and 'the ability of parties to fully and finally resolve disputes between them,' we believe parties can bargain to limit exemplary damages. We note that the purchasing parties did not waive a claim for fraud; they only waived the ability to recover punitive damages for any fraud. As such, the valid limitation-of-liability clauses must stand." *Id.* at * 40.

The Court specifically withheld judgment on whether a breach of fiduciary claim would have the same result. The Court wrote: "Because there is no breach of fiduciary duty claim and the plaintiffs did not seek exemplary damages on that basis, we decline to decide whether a breach of fiduciary duty for fraudulent conduct would affect the validity of a limitation-of-liability clause." *Id.* at * 39.

Further, despite denying the petition in *Quiroz* just a few before releasing the opinion, the Court addressed personal injury cases specifically, stating, "[w]e have also suggested, however, that pre-injury releases for gross negligence may be void as a violation of public policy in the personal injury contact". *Id*. at 25 (citing *Fairfield Ins. v. Stephens Martin Paving, LP*, 246 S.W.3d 653,687 (Tex. 2008) (Hecht, J., concurring) (indicating that "[o]utside the insurance context, it is worth noting that this Court has suggested that a person's pre-injury waiver of another's liability for gross negligence is against public policy"). *Id.* at * 34.