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Thursday

6.75 hours including .25 ethics

8:15 **Registration**
Coffee & Pastries Provided

8:55 **Welcoming Remarks**
Course Director
Geoff Gannaway, *Houston*
Beck Redden

9:00 **Legislative Update** *.75 hr*
Moderator
Carlos E. Cárdenas, *El Paso*
Attorney & Counselor at Law

Panelists
Jerry D. Bullard, *Grapevine*
Adams Lynch & Loftin

Representative Joseph E. Moody, *El Paso*
Moody & Sahualla

9:45 **Supreme Court Update: Attorney's Fees** *.75 hr*
Robert Ford, *Houston*
Fogler Brar Ford O'Neil & Gray

10:30 **Break**

10:45 **Developments in Proving Up Medical Expenses** *1 hr (.25 ethics)*
Moderator
Pending
Moderator

Panelists
Jennifer Lee, *Dallas*
Fee Smith Sharp & Vitullo

Spencer P. Browne, *Dallas*
Reyes Browne Reilley

11:45 **Break - Lunch Provided**

12:00 **Luncheon Presentation: The Litigation Experience – Damages Issues from All Points of View** *1 hr*
Moderator
Geoff Gannaway, *Houston*
Beck Redden

Panelists
Chip Brooker, *Dallas*
Brooker Law

Juan Guevara, *Upland, CA*
M&G Jewelers

Victoria Webster, *Newnan, GA*
Yamaha Motor Corporation

1:00 **Break**

1:15 **Wrongful Death & Survival Damages** *.75 hr*
Quentin Brogdon, *Dallas*
Crain Lewis Brogdon

2:00 **Ch. 33: How to Make the Best Use of and Avoid Pitfalls Under Texas' Proportionate Responsibility Scheme** *.5 hr*
Jody Sanders, *Fort Worth*
Kelly Hart & Hallman

2:45 **Living Vicariously** *.75 hr*
Cade W. Browning, *Abilene*
Browning Law Firm

3:30 **Litigating Contractual Limitation of Remedies** *.5 hr*
Amy Falcon, *Houston*
Porter Hedges

Harris Stamey, *Houston*
Porter Hedges

4:00 **Avoiding Early Dismissal** *.75 hr*
Allison Standish Miller, *Houston*
Beck Redden

4:45 **Adjourn**

Friday

6 hours including .75 ethics

8:30 **Coffee & Pastries Provided**

8:55 **Announcements**

9:00 **An Overview of Restitution** *.5 hr*
H. Douglas Laycock, *Charlottesville, VA*
Professor, University of Virginia Law School

9:30 **Equitable Remedies** *.5 hr*
Lara Hudgins Hollingsworth, *Houston*
Rusty Hardin & Associates

10:00 **Compensatory Damages** *.5 hr*
Pending
Speaker

10:30 **Break**

10:45 **Damages in Oil and Gas Litigation** *.75 hr*
Jaime S. Rangel, *San Antonio*
Uhl Fitzsimons Jewett Burton Wolff & Rangel

11:30 **Employment Law Damages** *.5 hr*
George P. Andritsos, *El Paso*
Attorney at Law

12:00 **Break - Lunch Provided**

12:15 **Luncheon Presentation: The State of the Judiciary** *1 hr (.5 ethics)*
Moderator
Amy M. Stewart, *Dallas*
Stewart Law Group

Panelists
Hon. Brett Busby, *Austin*
Justice, Supreme Court of Texas

Hon. Linda Y. Chew, *El Paso*
Judge, 327th District Court

Hon. Rebeca Carrillo Martinez, *San Antonio*
Justice, Fourth Court of Appeals

1:15 **Break**

1:30 **Damage Experts: Pursuing and Defending Pre-Trial and Appellate Challenges to the Sufficiency of Damages Expert Testimony** *.5 hr*
Hon. Tonya Parker, *Dallas*
Judge, 116th Civil District Court

2:00 **Collectability of Damages: Post-Judgment Concerns That Should Be Pre-Suit Considerations** *.75 hr (.25 ethics)*
Donna Brown, *Austin*
Donna Brown, PC

Richard A. Simmons, *Houston*
Waldron & Schneider

2:45 **Break**

3:00 **Presenting Damages at Trial and Arbitration** *1 hr*
Moderator
Mark Shank, *Dallas*
Diamond McCarthy

Panelists
Pending Additional Speaker

Pending Additional Speaker

4:00 **Adjourn**

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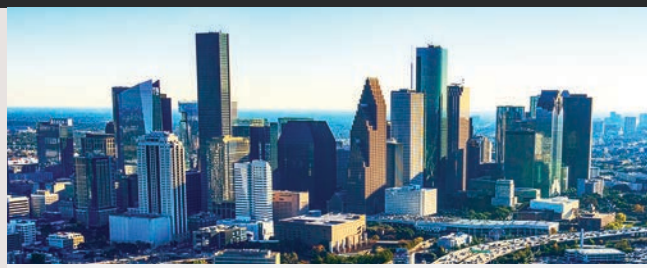

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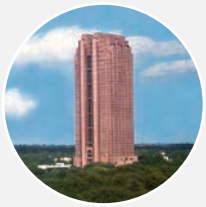

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LIVING VICARIOUSLY
VICARIOUS LIABILITY IN TEXAS

CADE BROWNING, *Abilene*
Browning Law Firm, PLLC

State Bar of Texas
12TH ANNUAL
DAMAGES IN CIVIL LITIGATION
February 6-7, 2020
Houston

CHAPTER 7

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 (near Buffalo Gap) 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 and received the 'High A' in Baylor's esteemed Practice Court course from Professor Muldrow.

Professionally, Cade has served as president of the Abilene Bar Association, president of the Abilene Young Lawyers Association, and was named Abilene's Outstanding Young Lawyer.

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. He has been named a Texas Super Lawyer seven times and is a Sustaining Life Fellow of the Texas Bar Foundation and the ABOTA 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.

TABLE OF CONTENTS

LIVING VICARIOUSLY VICARIOUS LIABILITY IN TEXAS

I. INTRODUCTION

> vicarious liability
>
> n. The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent.

Black's Law Dictionary. HENRY CAMPBELL BLACK, M.A., 1990.

> This is a course in Damages.
>
> Question: What is more important than obtaining damages?
>
> Answer: Obtaining damages that can be paid.

Plaintiffs often need to establish the liability of a principal for an agent in order to drive damages and collect those damages. This paper will focus on recent developments in vicarious and derivative lability.

II. RESPONDEAT SUPERIOR AND CONTROL

One of the first Latin phrases many Texas lawyers ever learned was *Respondeat Superior*:

> Let the Master Answer for His Servant.

However, much ink has been inked and trees killed on summary judgments determining exactly when an employee is in the course and scope of his employment and when he is not.

Respondeat Superior, is "a deliberate allocation of risk" in line with "the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002) (quoting Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 499-501 (5th ed. 1984)).

Respondeat Superior thus constitutes an exception to the general rule that a person has no duty to control another's conduct. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007) (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)).

Historically, to prove an employer's vicarious liability for a worker's negligence, the plaintiff had to establish that, at the time of the negligent conduct, the worker (1) was an employee and (2) was acting in the course and scope of his employment. *Id.*; *see also Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002).

However, throughout the years various court of appeals applied these elements differently. Many courts applied a right to control test on the actions of the agent. *London v. Texas Power & Light Co*., 620 S.W.2d 718, 720 (Tex. Civ. App.—Dallas 1981, no writ). "It is settled that the test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect." *Parmlee v. Tex. & New Orleans R.R. Co*., 381 S.W.2d 90, 93-96 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e). "[A] master is liable for acts of his agent under the doctrine of respondeat superior only where the relationship of master and servant exists at the time and in respect to the very thing causing the injury and from which it arises." *Id*. "[O]nce the control ends – as when the employee leaves the workplace – the master's potential for vicarious liability also ends in all but the most extraordinary situations." *Painter v. Amerimex Drilling I, Ltd*., 511 S.W.3d 700, 706 (Tex. App.—El Paso 2015, rev'd).

Some courts were insisting that the employer must be in control of the very task for which the employee was engaged in at the time of the tort. As the Corpus Christi Court noted in *Stapp Drilling Co. v. Roberts*, 471 S.W.2d 131, 135 (Tex.Civ.App.—Corpus Christi 1971, writ ref'd n.r.e.):

> It is settled that the test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent ***in the performance of the causal act or omission at the very instant of the act or neglect***. Putting the matter in a different way, it may be said that a master is liable for acts of his agent under the doctrine of respondeat superior only where the relationship of master and servant exists at the time ***and in respect to the very thing causing the injury and from which it arises***.

Id. at 134-35 (emphasis added).

However, in 2018, the Texas Supreme Court attempted to provide some clarity and harmonize various conflicting court of appeals decisions in *Painter v. Amerimex Drilling I, Ltd*., 561 S.W.3d 125 (Tex. 2018).

In *Painter*, Sandridge Energy Inc. ("Sandridge") hired Amerimex Drilling I, Ltd. ("Amerimex") to drill oil wells on the Longfellow Ranch in Pecos County, near Fort Stockton. Normally, Amerimex would provide bunkhouses for its crews. But Longfellow Ranch did not allow the bunkhouses to be located on the ranch. Thus, the bunkhouses were set up near Fort Stockton, some 30 miles from the ranch.

The contract between Sandridge and Amerimex provided that Amerimex would invoice Sandridge for and pay each driller $50/day to drive a crew out to the well location. Amerimex did not require its crew to stay in the bunkhouse or ride with the driller. Amerimex placed no restrictions on what route they took between the bunkhouse and the drilling site or where they stopped along the way.

One such driller was J.C. Burchett. Burchett was paid the daily bonus to drive his crew between the bunkhouse and the ranch in his own truck. On February 28, 2007, Burchett and his crew members— Steven Painter, Earl Wright, and Albert Carrillo, were returning to Fort Stockton after their shift ended when Burkett fell asleep and rolled his truck, killing Wright and Carrillo and injuring Painter. Painter filed suit against Burchett and Amerimex, alleging negligence and that Sandridge and Amerimex were vicariously liable for Burchett's negligence.

The Texas Supreme Court addressed the conflicting court of appeals decisions and held that there is now a two-step process for proving an employer's vicarious liability for a worker's negligence:

At the time of the negligent conduct, was the worker:

(1) an employee; and
(2) acting in the course and scope of his employment?

The Court made it clear that the right-to-control issue is only needed to satisfy the first element: that the wrongdoer was an employee at the time of the negligent conduct.

The employment-status inquiry involved in step one depends on whether the employer has the *overall* right to control the progress, details, and methods of operations of the work, whether or not it chooses to exercise that right as to any particular task. If the employee relationship is undisputed, "the employer essentially concedes the existence of the right to control that is necessary to give rise to the relationship." *Id*. at 131.

Once established, "this right to control extends to all the employee's acts within the course and scope of his employment, i.e., actions "within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired." *Id*.

In other words, the Court overruled a task-by-task analysis of control for an employee, holding the task-by-task analysis "conceivably could result in an individual shifting between employee and independent contractor status countless times in a given work day." *Id* at 132. The right-to-control is established by the nature of the employment relationship, if it was exercised during the actual tortious activity or not. *Id* at 135.

Once it is proven that the agent was an employee of the employer, the courts should move onto the second element: Was the employee acting in the course and scope of his employment?

This step involves an objective analysis, hinging on whether the employee was performing the tasks generally assigned to him in furtherance of the employer's business. That is, the employee must be acting with the employer's authority and for the employer's benefit. *Id* at 138. Vicarious liability arises only if (a) the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and (b) for the accomplishment of the object for which the employee was hired. *Id.*

The Supreme Court reversed the trial court's summary judgment for Amerimex finding there was a fact issue as to whether Burchett was acting in the course and scope of his employment when the accident occurred. The Court focused on the fact that Burchett was paid to drive the crew to the worksite. The Court dispelled the notion that the contract only provided that Burchett was to drive the crew to the worksite, and that because the accident occurred driving the crew away from the worksite, there should be no liability. The Court held that common sense says that the crew shouldn't be stranded at the end of the work day and that Burchett had a duty as a "driller—and one for which he was paid additional money over his regular salary—to provide the crew transportation to and from the drilling site. This benefited Amerimex by ensuring that the full crew showed up for each shift and was not left stranded on site at the end of the workday, and that the drillers were not hired away by other companies." *Id*. at 135.

A. Coming-And-Going Rule Exception

In *Painter,* though, the Supreme Court also confirmed that the "coming-and-going" exception, under which an employee is generally not acting within the scope of his employment when travelling to and from work, is still alive. *Id*. at 138. "This rule is based on the premise that an injury occurring while traveling to and from work is caused by risks and hazards incident to driving on public streets, which has nothing to do with the risks and hazards emanating from a person's employment." *Molina v. City of Pasadena*, No. 14-17-00524-CV, 2018 Tex. App. LEXIS 6579, at *8, 2018 WL 3977945 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.).

The *Painter* Court did, however, recognize the 'special mission' exception for when such travel involves the performance of regular or specifically assigned duties for the benefit of the employer. The Court held Burchett's driving of workers to a workplace is such a duty, even in his personal truck. *Id*.

In a different context, if an employee is driving a company vehicle when an accident occurs, a presumption arises that the employee was acting within the scope of his employment. *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971) ("It is recognized in Texas that when it is proved that the truck was owned by the defendant and that the driver was in the employment of defendant, a presumption arises that the driver was acting within the scope of his employment when the accident occurred.").

If there is evidence that the driver was on a personal errand, simply commuting, or otherwise not in the furtherance of his employer's business, the presumption can be rebutted. *Id.*; *Williams v. Great Western Distrib. Co*., No. 12-16-00095-CV, 2016 Tex. App. LEXIS 13410, 2016 WL 7322802, at *3 (Tex. App.—Tyler Dec. 16, 2016, no pet.) (mem. op.).

In *Meija-Rosa*, the Houston Court of Appeals recently affirmed the granting of a summary judgment when the employee hit a pedestrian as he entered the parking lot of his apartment complex at the end of his work day. Although the employee was driving a company van, his employer rebutted the company-owned car presumption with testimony that the employee was not furthering the affairs of the employer at the time of wreck. *Mejia-Rosa v. John Moore Servs*., No. 01-17-00955-CV, 2019 Tex. App. LEXIS 6405, at *16 (Tex. App.—Houston [1st Dist.] July 25, 2019).

The *Mejia-Rosa* Court rejected the plaintiff's arguments that he had used a company phone while driving home and was "on-call." The Court stated "the phone records do not show that [the employee] was on a phone call at the time of the accident. Instead, they indicate that the last call placed or received on his company cell phone ended a half-hour before the accident and that there were two brief calls beginning about a half-hour after the accident…[and]… there is no evidence in the record revealing the substance of these calls, i.e., whether they were work-related." "Even if the record contained evidence that the phone calls were work-related, such evidence would be insufficient to present a fact issue here because the purpose of [the employee's] drive was simply to go home, not to further any business of [the employer]." *Id* at *19.

The Court also held that being subject to call, without more, is insufficient to place an employee within the course and scope of his employment for vicarious liability purposes. *Id* at *21 (citing *Atlantic Indus., Inc. v. Blair, 457 S.W.3d 511, 516 (Tex. App.—El Paso 2014), reversed on other grounds, 482 S.W.3d 57 (Tex. 2016)* (evidence that employee was on call and driving truck with company logo insufficient to support determination that he was within course and scope of his employment at time of accident); *Mayes*, 236 S.W.3d at 757 (summary-judgment evidence that employee on personal errand was driving company truck loaded with company products for delivery, was available via pager 24 hours a day, and was not restricted from using truck for personal business, insufficient to raise genuine issue of fact regarding course and scope); *J & C Drilling Co. v. Salaiz, 866 S.W.2d 632, 637-38 (Tex. App.—San Antonio 1993, no writ)* (fact that employee involved in accident while driving company car was required to be on 24-hour call "not sufficient to raise an issue of course and scope").

B. Personal Deviation Exception

The Supreme Court in *Painter* also left room for the personal deviation exception in the vicarious liability context. The Court said that if Burchett had stopped for a meal, run a personal errand, or traveled somewhere not furthering the affairs of his employer. the course and scope analysis would be affected. "[A]n employer is not responsible for what occurs when an employee deviates from the performance of his duties for his own purposes." *Id.* (citing *Mayes*, 236 S.W.3d at 757). This is the case even if the deviation occurs with the employer's express or implied permission. *Mayes*, 236 S.W.3d at 757 (holding that an employee was not within the scope of employment while using his employer's vehicle to run a personal errand, even though he was not restricted from using the truck for personal business).

In another recent decision from a Houston Court of Appeals, a City of Pasadena employee was driving a city-owned vehicle. *Molina v. City of Pasadena*, No. 14-17-00524-CV, 2018 Tex. App. LEXIS 6579, at *1, 2018 WL 3977945 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.) (mem. op.). The employee, an inspector for the City, would pick up his city-owned vehicle at the City dispatch in the morning and would drive to up to seven construction sites per day. He was allowed to drive the vehicle to lunch and back, but would leave it at the dispatch at the end of the day. *Id.*

On the day of the accident, after eating lunch at a fast-food restaurant, as he was proceeding to the next construction site, he failed to yield the right-of-way to a pedestrian and knocked the pedestrian down. The Court affirmed the granting of a plea to the jurisdiction holding that *Painter* did not change older case law that "an employee returning to work from a personal errand is not acting within the course and scope of his employment. An accident that occurs while an employee is 'returning to the zone of his employment' does not fix liability against the employer." *Id.*

III. BORROWED EMPLOYEES

An employer may also be liable for actions of a borrowed employee. A tortfeasor is a "borrowed employee" of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about. Tex. PJC 10.2. Thus, an employer who borrows an employee will have the same liability for the negligent acts of the borrowed employee as for its regular employees. *Producer's Chem. Co. v. McKay*, 366 S.W.2d 220, 225 (Tex. 1963).

> If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequences of their negligence.

Id.

Thus, for the *Painter* analysis, in order to prove borrowed employee, the party must prove the right-to-control first. Thus, the employment-status inquiry involved in step one depends on whether the employer has the overall right to control the progress, details, and methods of operations of the work, whether or not it chooses to exercise that right as to any particular task. *FFP Operating Partners, LP v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007).

IV. INDEPENDENT CONTRACTOR

As a general rule, an employer is insulated from liability for the tortious acts of its independent contractors. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 796 (Tex. 2006). But Texas has adopted the rule enunciated in the Restatement (Second) of Torts:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985) (expressly adopting Restatement (Second) of Torts § 414 (1977)). So, a general contractor does not have a duty to ensure that the independent contractor performs its work in a safe manner, unless the general contractor retains some control over the manner in which the work is done. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001); *Redinger*, 689 S.W.2d at 418.

Thus, to determine responsibility for the tortfeasor, under *Painter*, we must first look to the first step, Was he an employee? The employer's overall right to control the details of the work is what principally distinguishes an employee from an independent contractor. *Painter*, 561 S.W.3d at 131.

The right to control a worker's conduct can be established one of two ways—it is created by a written contract (Master Service Agreement, Contracts, Agreements, Work Orders). *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002) (recognizing that when a written contract creates a right to control, the plaintiff need not prove actual exercise of control). Or, in the absence of a contractual right of control, it can be implied from the exercise of actual control over the manner in which work was performed. *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 226 (Tex. 1963) ("In such cases [in which there is no contractual provision for right of control,] right of control is necessarily determined as an inference from such facts and circumstances as the nature of the general project, the nature of the work to be performed by the machinery and employees furnished, length of the special employment, the type of machinery furnished, acts representing an exercise of actual control, the right to substitute another operator of the machine, etc.").The Supreme Court has outlined five factors pertinent to the control analysis: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except about final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002).

Arguably, if one establishes that the employer does retain the degree of overall control that would subject him to liability as a master, then that tortfeasor is to be treated as an employee. Under *Painter*, then, control would be assumed for all tasks done in furtherance of the employment.

However, *Painter* seems to provide a second independent contractor analysis when there is not overall control, which allows a task-by-task analysis in determining if the principal controlled the tort-causing action. "By contrast, supervisory liability for damages caused by an independent contractor is premised on a right to control the specific task giving rise to the injury." *Id.* at 27. "Control over an independent contractor's conduct for supervisory-liability purposes is necessarily task-specific, but that is simply not the case when the conduct at issue is that of an admitted employee. *Id*. at 134.

V. NON-EMPLOYEE MISSION

The Texas Supreme Court in *Arvizu v. Estate of Puckett*, 364 S.W.3d 273 (Tex. 2012) affirmed the imposition of liability based upon a principal-agent relationship between a non-employer who had control over the details of the job. The non-employer had the right to control details of the transportation; because the trip was "for the benefit" of the non-employer, the Supreme Court affirmed a judgment rendered against the non-employer. *Arvizu*, 364 S.W.3d at 275. The jury found . . . [Contractor] was subject to Puckett's control as to the details of the mission . . . [the Court rendered] . . . judgment against the [contractor] . . . and Puckett, jointly and severally." *Arvizu*, 364 S.W.3d at 275.

VI. CIVIL CONSPIRACY

Can I hold someone liable for the actions of another if they are involved in a civil conspiracy? The Texas Supreme Court has said yes. The elements of a conspiracy have vacillated over the years, but the Court has recently reiterated that an action for civil conspiracy has five elements:

(1) a combination of two or more persons;
(2) the persons seek to accomplish an object or course of action;
(3) the persons reach a meeting of the minds on the object or course of action;
(4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and
(5) damages occur as a proximate result.

First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 222 (Tex. 2017).

Like other forms of vicarious liability, civil conspiracy is not an independent tort, but is a derivative tort. *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 623 F.Supp.2d 798, 810 (S. D. 2009) citing to *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). It is a means of extending liability beyond the tortfeasor to those who participated or assisted the tortfeasor's act. *Carroll v. Timmers Chevrolet, Inc*., 592 S.W.2d 922, 925-26 (Tex.). If a civil conspiracy is established, each co-conspirator is responsible for the actions of each of the other co-conspirators in furtherance of the conspiracy. Each element of the underlying tort is imputed to each participant. *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983).

But, civil conspiracy requires a specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means. *Id.* This inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement. *Id.* There cannot be a civil conspiracy to be negligent, since it requires specific intent. *Chon Tri v. J.T.T.*, 162 S.W.3d 552, 557 (Tex. 2005). "[M]erely proving a joint 'intent to engage in the conduct that resulted in the injury' is not sufficient to establish a cause of action for civil conspiracy. If proving intent to engage in the conduct that resulted in injury were enough, intent to leave an excavation in a roadway uncovered, with no warning signs, would give rise to liability for a civil conspiracy even though the conduct amounted to negligence and perhaps gross negligence, depending on the circumstances, but did not amount to an intentional." *Id*. Likewise, participation in a breach of contract will not support a cause of action for conspiracy. *Deaton v. United Mobile Networks*, L.P., 926 S.W.2d 756, 760–761 (Tex. App.—Texarkana 1996), aff'd in part, rev'd in part on other grounds, 939 S.W.2d 146 (Tex. 1997).

Employees acting in the course and scope of their employment cannot conspire with their employer, as their actions are the actions of the employer. *Crouch v. Trinque*, 262 S.W.3d 417, 427 (Tex. App. –Eastland 2008, not pet.) Similarly, an agent cannot conspire with its principal as long as the agent is acting within the scope of his agency relationship. The acts of an agent and his principal are the acts of a single entity and cannot constitute a conspiracy. *Lyons v. Lindsey Morden Claims Mgmt., Inc*., 985

S.W.2d 86, 91 (Tex. App.—El Paso 1998, no pet.).

So, how do you prove a civil conspiracy? It would be an evil empire indeed which would put to paper two entities' desire to commit an unlawful act. Good luck finding that smoking gun. Thus, most cases trying to prove a civil conspiracy must rely on circumstantial evidence. Inferences of concerted action can be drawn from joint participation in the transaction and enjoyment of the fruits of the transactions. *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963). The general rule is that conspiracy liability is sufficiently established by proof showing concert of action or other facts and circumstances from which the natural inference arises that the unlawful, overt acts were committed in furtherance of common design, intention, or purpose of the alleged conspirators. *Id.* "[B]ut vital facts may not be proved by unreasonable inferences from other facts and circumstances…or, as has often been said by this court, a vital fact may not be established by piling inference upon inference..." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp*., 435 S.W.2d 854, 858 (Tex. 1968). Proof of any vital fact by evidence must be something more than a mere scintilla. *Id.*

The jury charge for civil conspiracy as recommended by the Pattern Jury Charge, predicates the submission of a question on a "finding of a statutory violation or a tort (other than negligence) that proximately caused damages." Tex. PJC 109.1. Once that predicate is established, the jury is asked:

Was Connie Conspirator part of a conspiracy that damaged Paul Payne?

> To be part of a conspiracy, Connie Conspirator and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Paul Payne. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.
>
> Answer "Yes" or "No."

TEX. PJC 109.1.

So, if the answer is yes, what does this mean as to damages? The damages recoverable in an action for civil conspiracy are those damages resulting from the commission of the wrong, not the conspiratorial agreement. *Carroll v. Timmers Chevrolet, Inc*., 592 S.W.2d 922, 925 (Tex. 1979). The plaintiff in a conspiracy claim can recover the types of actual damages that are available for the underlying tort. *Tilton*, 925 S.W.2d at 681.

Likewise, if the underlying tort allows recovery of exemplary damages, the plaintiff who proves a civil conspiracy is able to recover them. *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983).

But, be cautious! Some older cases held that a finding of civil conspiracy does not automatically result in the imposition of joint and several liability on the conspiring parties, especially if there are various torts attached to each defendant. In order to recover a judgment for civil conspiracy there must be a finding of damages resulting from that conspiracy. *Belz v. Belz*, 667 S.W.2d 240, 243 (Tex. App. – Dallas 1984, writ ref'd n.r.e.). The jury should be provided with a question to determine what damages were attributable to the conspiracy. *Bunton v. Bentley*, 176 S.W.3d 1(Tex. App. –Tyler 1999, aff'd in part and rev'd and remanded in part, 914 S.W.3d 561 (Tex. 2002). Learned authors have noted that, "[i]n a conspiracy case, when there are multiple causes of action and a divergence between the damages attributable to each cause of action and each defendant, there will need to be a submission to the jury of a question inquiring about dollar amount of damages caused by the conspiracy." Link Beck, *Joint and Several Liability*, 2015 10th Annual Fiduciary Litigation Course.

However, a recent Texas Supreme Court has clarified that damages in a civil conspiracy claim are related to the "damage from the underlying wrong, not the conspiracy itself" and that, therefore, a damage issue, separate and apart from a damage issue relative to the underlying tort, is not required in a civil conspiracy claim. *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136 (Tex. April 5, 2019). Each coconspirator 'is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination." *Carroll*, 592 S.W.2d at 926. "Coconspirator liability is joint and several…We are of the opinion that joint and several liability attaches to a civil conspiracy finding and is not affected by the proportionate responsibility statutes. *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687, 719 (Tex. App.—Eastland 2019, pet. filed).

In *Agar*, the Court was tasked with deciding what statute of limitations applies to a claim of civil conspiracy. The Court held that because civil conspiracy is a derivative tort that "depends on participation in some underlying tort," the applicable statute of limitations and its accrual must coincide with that of the underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable. *Agar*, 580 S.W.3d at 138. In reaching this holding the Court took the time to clarify that civil conspiracy is a vicarious liability theory, requiring some underlying wrong, not just the conspiracy itself. *Id.* at 141. While reaching this holding the Court stated the majority view that, "[i]n most jurisdictions, civil conspiracy is a vicarious liability theory that imparts joint-and-several liability to a co-conspirator who may not be liable for the underlying tort." *Id*. at 140.

Does this answer the question if Texas Civil Practice and Remedies Code Chapter 33's proportionate responsibility provisions apply to common-law joint-and-several liability theories like conspiracy?

The Eastland Court of Appeals has tackled this question even more recently. *Stephens*, 580 S.W.3d at 719. In applying *Agar*, and reversing itself, Eastland held a co-conspirator was jointly and severally liable irregardless of Chapter 33 comparative findings. *Id*. In *Stephens* a Fisher County jury returned a verdict totaling $98,103,682.77 against various defendants finding they committed fraud, breached their fiduciary duties, and engaged in a conspiracy related to the acquisitions and sale of leasehold interests in the Cline Shale. On appeal the Eastland Court eventually, after *Agar*, upheld the jury's finding on civil conspiracy and found the co-conspirators jointly and severally liable for the actual and exemplary damages found to be caused by their co-conspirator's breach of fiduciary duty. At the time of this article, Petitions for Review have been filed with the Supreme Court.

For further discussion of this question, See Lyndon Bittle, Conspiracy: *Has Joint and Several Liability Been Supplanted by Proportionate Responsibility?*, 69 Baylor L. Rev. 378 (2017).

As a side note, regarding jurisdiction, one corporation's actions cannot be imputed to another corporation under a conspiracy or a joint enterprise theory for the purposes of asserting jurisdiction over the other corporation. *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995).

VII. CONCERT OF ACTION / AIDING AND ABETTING

Under this theory, two or more persons are jointly and severally liable when they jointly participate in concerted action to commit a common tort and accomplish their purpose. *McMillen Feeds, Inc. of Texas v. Harlow*, 405 S.W.2d 123, 139 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

Aiding-abetting and conspiracy have been regarded as closely allied forms of liability. However, a conspiracy generally requires an agreement as well as an overt act causing damage, while aiding and abetting does not require any agreement, but rather assistance given to the principal wrongdoer.

The supreme court has noted "whether such a theory of liability is recognized in Texas is an open question." *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). In *Juhl*, the Court set out two descriptions of the theory, one by Prosser and Keeton and the other in the Restatement (Second of Torts). *Juhl*, 936 S.W.2d at 643.

All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

Keeton et al., *Prosser and Keeton on the Law of Torts* § 46, at 323.

The Restatement imposes liability on a person for the conduct of another which causes harm if the defendant:

(a) does a tortious act in concert with the other or pursuant to a common design with him, or
(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts § 876 (1977).

Civil conspiracy differs from concert of action as defined in Section 876 in that civil conspiracy requires that the defendants have an intent to accomplish an unlawful objective for the purpose of harming another, while concert of action merely requires that the defendants commit a tort while acting in concert.

But, the *Juhl* court stated, "if we were to adopt § 876(a) we would require allegations of specific intent, or perhaps at least gross negligence, to state a cause of action." *Juhl*, 936 S.W.2d at 644. Specific intent requires an agreement to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means; neither proof of negligence nor proof of intent to engage in the conduct that resulted in the injury is enough. *III Forks Real Estate, L.P. v. Cohe*n, 228 S.W.3d 810, 815 (Tex. App.—Dallas 2007).

The Court further noted subsection (b) of section 876 requires "substantial assistance" and knowledge that the tortfeasor's conduct constitutes a breach of duty. *Juhl*, 936 S.W.2d at 644. Therefore, under subsection (b), unlawful intent is required, "i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions." *Id* at 644.

The *Juhl* court also noted that the comments to the Restatement listed five factors to consider in determining whether "substantial assistance" had been provided: (1) the nature of the wrongful act; (2) the kind and amount of the assistance; (3) the relation of the defendant and the actor; (4) the presence or absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind. *Juhl*, 936 S.W.2d at 644 (citing Restatement (Second) of Torts § 876 cmt. d).

Although the *Juhl* Court found the plaintiff had not met the elements, it fell short of adopting Concert of Action as a theory of recovery. At least the Houston 14th Court of Appeals and the Eastland Court of Appeals have since declined to recognize the cause of action. *Solis v. S.V.Z.*, 566 S.W.3d 82, 103 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.); *AmWins Specialty Auto, Inc. v. Cabral*, 582 S.W.3d 602, 611 (Tex. App.—Eastland 2019, no pet. h)("we decline to adopt aiding and abetting as an independent cause of action").

However, recently in *Agar*, the Court stated that a "concerted action is a separate theory of vicarious liability distinct from civil conspiracy." *Agar* 580 S.W.3d 136, 140 n.2 (citing *Juhl*, 936 S.W.2d 643-644). In other words, concert of action / aiding and abetting is not an independent cause of action, but is a derivative tort, like conspiracy, which is dependent on an underlying tort.

VIII. INDIVISIBLE INJURY

Texas common law has long recognized that tortfeasors, even if not acting in concert, are jointly and severally liable for an indivisible injury. *Austin Road Co. v. Pope*, 147 Tex. 430, 216 S.W.2d 563, 565–566 (1949). Such liability arises from an indivisible injury if the injury, by its nature, cannot be attributed with reasonable certainty to individual wrongdoers. *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952) (pollution of lake by two different sources of salt water constituted indivisible injury).

However, what about proportionate responsibility? Wouldn't the defendant only be liable for their proportionate responsibility of the injuries as found by the jury?

While Chapter 33 lists several instances in which joint and several liability is still permitted (e.g. upon a finding that a defendant is more than 50% responsible,

and upon a finding of certain criminal acts), it does not provide that an indivisible injury would give rise to joint and several liability. TEX. CIV. PRAC. & REM. C. § 33.013; see also *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103 (Tex. App.—Beaumont 2001, pet. denied) (citing § 33.013 and holding that absent a finding of 50% liability or a finding of civil conspiracy or undisputed vicarious liability, there was no basis to hold multiple defendants jointly and severally liable, and each defendant was only liable for the percentage of liability assigned to them by the jury).

However, even after the enactment of Chapter 33, Texas cases continue to state that indivisible injury is a basis for joint and several liability. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996) (citing *Landers* with approval for proposition that if injuries cannot be apportioned with reasonable certainty, the plaintiff's injuries are indivisible and defendants are jointly and severally liable); *In re Liu*, 290 S.W.3d 515, 524 (Tex. App.—Texarkana 2009, orig. proceeding) (same); *Bradford v. Vento*, 997 S.W.2d 713 (Tex. App.—Corpus Christi 1999).

In *Lakes of Rosehill*, recently appointed Texas Supreme Court Justice Busby wrote for the Houston Court examining this very topic, finding that joint and several liability for tortfeasors of an indivisible injury survived the enactment of Chapter 33. *Lakes of Rosehill Homeowners Ass'n v. Jones*, 552 S.W.3d 414, 418–422 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Justice Busby examined the statute and common law and found that when responsibility for plaintiff's injury cannot be apportioned with reasonable certainty among defendants, then proportionate responsibility statutes do not apply and availability of joint and several liability is alive and well. *Id*. at 422.

IX. PARTNERSHIP

A partnership is liable for loss or injury to a person caused by or incurred as a result of the wrongful act or omission or other actionable conduct of a partner acting (1) in the ordinary course of the business of the partnership or (2) with the authority of the partnership. TEX. BUS. ORGS. C. § 152.303. This statute is applicable to a limited partnership. TEX. BUS. ORGS. C. § 153.003(a); *Doctor's Hosp. at Renaissance Ltd. v. Andrade*, 493 S.W. 3d 545, 547-48 (Tex. 2016). Each partner is an agent of the partnership for the purpose of its business. TEX. BUS. ORGS. C. § 152.301.

This first question, then, is:

Is there a partnership?

Under the common law, Texas used to be rigid and hostile towards the recognition of partnerships unless the would-be partners clearly announced their intention to create one. I*ngram v. Deere*, 288 S.W.3d 886, 893-894 (Tex. 2009).

However, Texas has now passed Chapter 152 of the TEXAS BUSINESS ORGANIZATIONS CODE. A partnership agreement may be either express or implied from the parties' conduct. *Ingram*, 288 S.W.3d at 893-94. When an express agreement does not exist, the question of whether the parties intended to enter into a partnership must be "determined by an examination of the totality of the circumstances." *Id*, 2 at 903-904. The statutory test in Chapter 152 "contemplates a less formalistic and more practical approach to recognizing the formation of a partnership." *Ingram*, 288 S.W.3d at 895. Under the statutory test, the dispositive question is simply whether there is "an association of two or more persons to carry on a business for profit as owners." TEX. BUS. ORGS. C.§ 152.051(b). As long as two or more persons carry on a business "as owners," the business is regarded as a general partnership by default unless the parties expressly invoke a different form of business organization, such as a corporation or an LLC. *Id.* §152.051(c).

The Code sets forth five factors that a court should review in determining whether a partnership exists:

(1) receipt or right to receive a share of profits of the business;
(2) expression of an intent to be partners in the business;
(3) participation or right to participate in control of the business;
(4) agreement to share or sharing:

    (A) losses of the business; or
    (B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

TEX. BUS. ORGS. C. § 152.052(a); see also *Ingram*, 288 S.W.3d at 894-95.

In *Ingram*, the Court adopted a totality of the circumstances test to these factors, holding that under the Code, a party seeking to establish the existence of a partnership is not required to provide evidence of all five factors; in particular, the Code expressly provides that an agreement to share losses is not necessary to create a partnership. TEX. BUS. ORGS. C. § 152.052(c). Evidence of only one factor standing alone is not sufficient to establish a partnership in a business. TEX. BUS. ORGS. C. § 152.052. However, as the Court in *Ingram* explained, evidence of all five factors establishes a partnership as a matter of law, and therefore, the five-factor test is considered on a "continuum" between these two points. *Ingram*, 288 S.W.3d at 893-94. But,

conclusive evidence of only one factor is normally insufficient to establish a partnership. *Id*.

Of the five factors, the first and third factors (the receipt or right to receive a share in the profits and the participation or right to participate in the control of the business) are the most important. *Id*. at 904 at 896; *Shafipour v. Rischon Dev. Corp*., No. 11-13-00212-CV, 2015 Tex. App. LEXIS 5493, 2015 WL 3454219, at *6 (Tex. App.—Eastland May 29, 2015, pet. denied) (mem. op.).

The Eastland Court in *Stephens* in applying the factors, found the defendants did not form a partnership. *Stephens*, 580 S.W.3d at 710. The Court held that, to prove that a partnership exists, there must be evidence that the parties were to participate in the profits and share them as principals of the business, as opposed to sharing in the interest as compensation under an agreement to share profits. In accordance with the agreement that the parties made in *Stephens*, distributions were not made to a partnership, but to the individual parties, and the overriding royalty interests were also made directly to individuals—not to a partnership as partnership property. "Although the evidence to which we have referred shows that the parties were investors in the project, it does not show that the parties participated in the profits as owners or principals of a business." *Id*. Even though the agreement in *Stephens* used the term "partners" the Eastland Court held that when a person refers to another as "partner," that fact alone does not signal the expression of an intent to form a partnership. *Id*.

Despite the jury's finding that a partnership existed, the Eastland Court applied the factors and held, "[a]lthough there may be some evidence of one or more of the factors that we are to consider, that evidence in and of itself, when we consider the totality of the circumstances, is no more than a scintilla to support a finding that a partnership exists. … we determine that there is no evidence of a partnership." Id. at 713-714. The plaintiffs have petitioned the Supreme Court to determine what standard of review should be applied to "partnership" findings, legal or factual sufficiency. It is unknown at the time of the article, if the Supreme Court will grant the review.

X. VICE PRINCIPAL / ALTER EGO

A corporation can "only act through individuals." *Tri v. J.T.T*., 162 S.W.3d 552, 562 (Tex. 2005). 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).

There are four classes of employees who may be vice-principals under Texas law: (1) corporate officers; (2) those who have the authority to employee, 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. Texas PJC 10.14C; *Bennett v. Reynolds*, 315 S.W.3d 867, 883 (Tex. 2010). An "officer" is 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 & COM. C § 1.002 (61). 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. TEX. BUS. ORG. § 101.002. Thus, a manager of limited liability company is equivalent to a "corporate officer" of a corporation. *Id*.

The negligence or gross negligence of a vice-principal are deemed to be acts of the corporation 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, Inc. v. Edwards*, 958 S.W.2d 387, 391-92 (Tex. 1997)). Under this theory, the negligence, gross negligence, or malicious conduct of certain agents is treated as the conduct of the principal itself. *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). In other words, there is direct liability to the principal. *Id.*

The liability of a corporation for the acts of its vice-principal however, "is not absolute" but is limited to those acts which are referable to the company's business to which the vice-principal is expressly, impliedly or apparently authorized to transact. *Rhodes, Inc. v Duncan*, 623 S.W. 2d 741, 744 (Tex. App—Houston [1st Dist.] 1981, no writ. In other words, in order to impute the vice-principal's actions to the principal, the tortious conduct must further the principal's business. *J. C. Penney Co. v. Oberpriller*, 170 S.W.2d 607, 610 (Tex. 1943).

In applying this analysis to a post-*Painter* case, the Fort Worth Court of Appeals recently affirmed a summary judgment for Elite Metal Fabricators, Inc. ("Elite") when its majority shareholder and president of the closely held corporation, was involved in a horrible car accident outside Sturgis, South Dakota while attending the Sturgis Motorcycle Rally. *Grogan v. Elite Metal Fabricators, Inc*., No. 02-18-00048-CV, 2018 Tex. App. LEXIS 10089, 2018 WL 6424216 (Tex. App.—Fort Worth Dec. 6, 2018, no. pet.).

Elite moved for summary judgment claiming he had been on a personal vacation and had not been in the course and scope of any business venture when the collision occurred. The plaintiff that argued that because the president owned Elite, all of Elite's manifestations of consent existed at his pleasure, particularly when Elite delegated to him the responsibility of overseeing any ongoing projects or pursuing new projects, whether he

was onsite or not, and delegated how he accomplished such tasks. The plaintiff produced evidence that, at the time of the collision, the president had been heading west, to Sturgis, so that he could connect to the road that would take him south to Tilford, to the campground, to collect his luggage. If the collision had not occurred, he would then have driven north to get back to Sturgis so that he could head west to the hotel in Spearfish, where he was planning to meet up with "some guys from Dallas," one of whom owned a metal fabrication shop. Further, many of the expense were paid for by Elite's credit card. *Id.* at *13-14.

In analyzing the case and affirming the summary judgment, the Court applied the second prong of *Painter's* analysis, holding that the vacation was not within the scope of general authority for Elite and it was not furthering the business of Elite for the president to attend the rally. Finally, the Court held that Elite's objective was to sell steel and welding services to the building construction industry in the DFW area through bidding jobs. Notwithstanding Elite's financial records, nothing in the record supported a conclusion that Darter's trip was undertaken to accomplish that objective. *Id.* at *25.

XI. JOINT ENTERPRISE / JOINT VENTURE

"Joint enterprise" liability makes each party to the enterprise the agent of the other and thereby holds each responsible for the negligent act of the other. *Texas Department of Transportation v. Able*, 35 S.W.3d 608, 613 (Tex. 2000); *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 14 (Tex. 1974).

"A "joint enterprise" exists if the persons concerned have (1) an agreement, either express or implied, with respect to the enterprise or endeavor; and (2) a common purpose; and (3) a community of pecuniary interest in [the common purpose of the enterprise], among the members [of the group]; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." Tex. PJC 10.11; see *Shoemaker*, 513 S.W.2d at 14 (adopting Rest. of Torts, Section. 491, cmt. c)).

For the first element, a written contract evidencing the parties' agreement to jointly operate their business endeavor satisfies this element. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002) (recognizing that the "the Program Contract [was] ample evidence of an agreement between St. Joseph [Hospital] and the Foundation"). The "agreement" element will also be deemed satisfied if a court can examine the evidence and find that the parties' relationship was based on some agreement or understanding.

In establishing a "community of pecuniary interest," common interest in a profitable outcome is not sufficient. *Motloch v. Albuquerque Tortilla Co.*, 454 S.W.3d 30, 35-37 (Tex. App.—Eastland 2014, no pet.). The analysis should consider the endeavor as a whole. *St. Joseph Hosp.*, 94 S.W.3d at 527. For instance, whether there is a pooling of efforts and monetary resources between the parties to achieve common purposes, namely the reduction in costs and contemplation of economic gain by approaching the project as a joint undertaking. *Blackburn v. Columbia Med. Ctr. of Arlington Subsidiary, L.P.*, 58 S.W.3d 263, 271 (Tex. App.—Fort Worth 2001, pet. denied).

Similarly related, joint enterprise differs from the relationship contemplated under "joint venture" law, but unlike joint enterprise, the joint ventures must have an agreement to share losses and profits. *Coastal Plains Development Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). A joint venture must be based on an agreement that has all the following elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an express agreement to share losses, and (4). a mutual right of control or management of the venture. *Ayco Development Corp. v. G.E.T. Service Co.*, 616 S.W.2d 184, 186 (Tex. 1981).

XII. NON-DELEGABLE DUTIES

A nondelegable duty is imposed by law on the basis of concerns for public safety, and the party bearing such a duty cannot escape it by delegating it to another. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2005). A nondelegable duty includes: (1) inherently dangerous activities; and (2) duties imposed by statute. *Mbank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992) (duty is nondelegable when it is imposed by law on basis of concerns for public safety).

Texas courts have recognized a number of nondelegable duties owed to one's own employees including: (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 coemployees. *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397, 401 (Tex. 1934); H*ammerly . Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391-92 (Tex. 1997) (noting nondelegable duty to hire competent coemployees); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996) (noting nondelegable duty to provide safe workplace); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 923-24 (Tex. 1981) (noting nondelegable duty to provide safety regulations for employees).

However, Texas courts have recognized very few such duties with respect to third-party nonemployees. *Central Ready-Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 652 (Tex. 2007). But a principal does have a nondelegable duty to avoid harm to third parties due to negligence of an independent contractor who performs work that is "inherently dangerous." *Fifth Club*, 196

S.W.3d at 795. Work is inherently dangerous if it involves a risk of danger to others that is derived from the nature of the activity itself, not the manner in which it is performed. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 794 n.36 (Tex. 2001). In other words, work that will probably result in injury to a third person or the public. *Agricultural Warehouse, Inc. v. Uvalle*, 759 S.W.2d 691, 694-95 (Tex. App.—Dallas 1988), writ denied, 779 S.W.2d 68 (Tex. 1989).

Likewise, some statutes impose certain nondelegable duties on businesses, making the business liable for acts violating the duty, even if the duty is being performed by an independent contractor. *MBank*, 836 S.W.2d at 153 (discussing section 9-503 of the Uniform Commercial Code).