

**EVIDENCE AND CASE LAW UPDATE**  
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## Evidence and Case Law Update

### I. SCOPE OF PAPER

This paper attempts to summarize recent cases which have some significance in the area of evidence law. I have tried to group the cases according to the relevant Rules of Evidence and by subject matter of the substantive law points.

The Supreme Court of Texas changed the standards for a no-evidence review. *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), stated the new standard:

When expert testimony is required, lay evidence supporting liability is legally insufficient. In such cases, a no-evidence review cannot disregard contrary evidence showing the witness was unqualified to give an opinion. And if an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded.

After we adopted gate-keeping standards for expert testimony, evidence that failed to meet reliability standards was rendered not only inadmissible but incompetent as well. Thus, an appellate court conducting a no-evidence review cannot consider only an expert's bare opinion, but must also consider contrary evidence showing it has no scientific basis. Similarly review of an expert's damage estimates cannot disregard the expert's admission on cross-examination that none can be verified.

Thus, evidence that might be "Some evidence" when considered in isolation is nevertheless rendered "no evidence" when contrary evidence shows it to be incompetent.

The Supreme Court's new standard requires that when conducting a no-evidence review, the reviewing court must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 807. The effect of the Court's new "no evidence" standard did more than merely overrule *In re King's Estate*, 244 S.W.2d 660 (Tex. 1952), the effect is to extend its reach into areas previously prohibited by the Texas Constitution's limitation against Supreme Court fact finding.

The Supreme Court of Texas' reach into evidentiary

matters hardly needed the assistance of a new standard.

As a recent law review article noted:

"In...2004-2005, the court found no evidence in eighteen (82%) of the twenty-two cases in which a no-evidence claim was presented. All of the decisions holding no evidence favored defendants...In seventeen of the decisions, the evidence had seemed probative to the jury, the trial judge, and the court of appeals, but the supreme court reversed."

Anderson, D., "Judicial Tort Reform in Texas" 26 *Review of Litigation*, 1, 18 (2007). Examples such as *Kroger Tex. L.P. v. Suberu*, 216 S.W.3d 788 (Tex. 2006) are becoming the norm, rather than the exception, as the same article noted "the extent of the current court's use of no evidence determinations appears to be unprecedented." Anderson, "Judicial Tort Reform," 26 *Review of Litigation*, at 23.

It is probably no small wonder that "there has been a decline of more than fifty percent in the number of civil jury verdicts in Texas from 1985 to 2002." Toben, Underwood, Underwood and Wren, "Straight from the Horse's Mouth: Judicial Observation of Jury Behavior and the Need for Tort Reform," 59 *Baylor University Law Review*, 419, 433 (2007).

### II. TEXAS RULES OF EVIDENCE

#### A. Texas Rule of Evidence 103: Rulings on Evidence.

*PPC Transp. v. Metcalf*, 254 S.W.3d 636 (Tex. App.—Tyler 2008, no pet.), held party preserved error pursuant to Rule 103 by presenting the excluded evidence outside the presence of the jury through multiple offers of proof.

*Richmond Condos. v. Skipworth Commercial Plumbing, Inc.*, 245 S.W.3d 646 (Tex. App.—Fort Worth 2008, pet. denied), holds that motions in limine do not preserve error. "A trial court's ruling on a motion in limine preserves nothing for review; a party must object at trial when the testimony is offered in order to preserve error. . . ." *Richmond Condos.*, 245 S.W.3d at 665. Further, the Court of Appeals made clear that a complaining party must secure a ruling on any objection.

*In re Estate of Miller*, 243 S.W.3d 831 (Tex. App.—Dallas 2008, no pet.), involved an offer of proof tendered as part of a will contest. The trial court excluded evidence offered to demonstrate instructions given to an attorney. The Court of Appeals affirmed the trial court's exclusion and stressed the need to file either an informal or a formal bill of exception. An offer of proof as part of a

motion for new trial does not preserve error in this context.

*Greenberg, Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004, no pet.), discusses pretrial rulings under TEX. R. EVID. 103 and instances in which those objections do not need to be re-urged at trial. It is consistent with the 5th Circuit's teaching in *Microchemical, Inc. v. Lextron, Inc.*, 387 F.3d 1387 (5th Cir. 2003), interpreting Fed. R. 103 in light of the recent changes to that rule.

*Pojar v. Cifre*, 199 S.W.3d 317 (Tex. App.—Corpus Christi 2006, pet. denied) is an interesting case concerning “taking the sting out” of negative evidence and attempts to preserve error. Efforts to preempt an opponent's evidence may result in a waiver of error concerning the admission of that evidence.

In *Austin v. Weems*, 337 S.W.3d 415 (Tex.App. Houston [1st Dist.] 2011, no pet.), the court held that a widow waived her objection to a deputy's oral testimony. The pre-trial objection was directed to the proffered testimony of the officer, but did not mention his investigative report. The trial court overruled the objections to the officer's testimony and allowed the witness to express his opinions. The Court of Appeals held that the pre-trial objections were not specific enough and did not complain of opinions contained within the police report itself. The Court of Appeals held that the pre-trial objections to the officer's testimony did not extend to opinions contained within the officer's written report.

*SCI International v. Guerra*, \_\_\_S.W.3d\_\_\_ (Tex. 2011), held that the failure to object to an attorney's statements during voir dire of the jury panel does not waive a later objection to evidence offered during trial. Statements by lawyers during the jury selection process are not evidence.

SCI properly preserved error by timely objecting to the same voir dire material when it was introduced in trial.

#### **B. Texas Rule of Evidence 201: Judicial Notice**

Judicial Notice was the topic in *Phillips v. United Heritage Corp.*, 319 S.W.3d 156 (Tex.App.—Waco, 2010, no pet.) where a party moved for summary judgment based in part on the laws of a foreign country, the response included expert testimony about the laws of the foreign country, and the party created a trial brief on the foreign laws, the notice and proffering requirements of Rule 203 were met.

In *Trujillo v. Carrasco*, 318 S.W.3d 455 (Tex.App.—El Paso 2010), the court found that where plaintiff did not ask the court to take judicial notice of a Labrador's characteristics, the court could not find that the Labrador in question was prone to hunting and killing fowl and the plaintiff could not show foreseeability, and thus

proximate cause, of the dog killing plaintiff's roosters and hens.

In *Muela v. Gomez*, No. 08-09-00140CV, 2011 WL 648940 (Feb. 23, 2011, no pet. h.), the court rendered a take nothing judgment as to one defendant against victim of a pit bull attack where the defendant was the son of the trailer home owners. The court found there was no evidence showing that the son lived in the trailer or knew of or owned the dog.

#### **C. Texas Rule of Evidence 401: Relevant Evidence**

*Republic Waste Servs., Ltd. v. Martinez*, 335 S.W.3d 401 (Tex. App. — Houston [1<sup>st</sup> Dist.] 2011, n.p.h.). Affirmed a trial court's decision to exclude evidence concerning the decedent's immigration status under Rules 401 and 403. The defense asserted that decedent was an undocumented worker should be presented to the jury in order to make a proper determination of his future lost income. They claimed that because the decedent was subject to immediate deportation, the jury should have been allowed to determine whether or not he would have spent some of his working lifetime in the United States or in his native country. The Court of Appeals agreed with the trial court's determination that the prejudicial effect of the evidence far outweighed its probative value under Rule 403.

*Matbon, Inc. v. Gries*, 288 S.W.3d 471 (Tex. App.—Eastland 2009, no pet.), involved a multi-vehicle wreck which began when a tractor-trailer crossed the center line into on-coming traffic, causing one driver to swerve out of the way and hit the plaintiffs's vehicle. Defendants sought to exclude evidence that the swerving driver died in the crash as irrelevant and unfairly prejudicial. The trial court allowed the evidence and the court of appeals affirmed. It held the evidence was relevant because the actions of the swerving driver were a focal point at trial and evidence of the driver's death was relevant to explain why she was not there to testify at trial.

#### **D. Texas Rule of Evidence 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

In *All Metals Fabricating, Inc. v. Ramer Concrete, Inc.*, No. 08-07-00233CV, 2009 WL 638259 (Tex. App. — El Paso 2009, no pet.), a commercial metal company brought suit against the general contractor and subcontractor that built its metal fabrication facility. On summary judgment, the defendant claimed the metal company did not have a valid cause of action because it did

not own the property at issue or enter into any contract related to the property. The metal company responded by attaching evidence it was the assignee of the actual owner of the property. Defendant objected to the evidence based on Rule 402, claiming it was irrelevant because the metal company had not alleged assignment in its pleadings. The court of appeals reversed summary judgment, holding

**E. Texas Rule of Evidence 403: Exclusion of Relevant Evidence on Special Grounds**

In *PPC Transp. v. Metcalf*, 254 S.W.3d 636 (Tex. App.—Tyler 2008, no pet.), the defendant in a truck wreck case appealed the trial court's exclusion of evidence the plaintiffs were intoxicated. The trial court found the evidence relevant but excluded it after a hearing based on Rule 403, concluding the probative value substantially outweighed by the danger of unfair prejudice. The court of appeals re-evaluated the evidence and concluded that under an abuse of discretion standard, evidence should have been admitted.

In *Matbon, Inc. v. Gries*, 288 S.W.3d 471 (Tex. App.—Eastland 2009, no pet.), the court of appeals held post-wreck conduct by a tortfeasor was relevant when the plaintiffs sought to recover exemplary damages.

**F. Texas Rule of Evidence 407: Subsequent Remedial Measures; Notification of Defect**

In *Christus Health Southeast v. Wilson*, 305 S.W. 3d 392 (Tex. App. — Eastland 2010, no pet.), it was harmless error where a picture of the parking garage curb that a visitor had tripped over was admitted when the picture was taken after the curb had been repainted. While the paint was considered to be evidence of a subsequent remedial measure, the curb in question was supposed to have been painted and painting the curb did not constitute an admission of an otherwise contested issue.

**G. Texas Rule of Evidence 408: Compromise & Offers to Compromise**

*Vinson Minerals, Ltd. v. XTO Energy, Inc.*, 335 S.W.3d 344 (Tex.App.— Fort Worth 2010, no pet.), a demand letter was found to be inadmissible under 408 as an offer to compromise. The court found that while the letter did contain the phrase "demand . . . for all undisputed payments due," permitting a party to re-characterize what was "clearly a settlement demand" would prevent parties from negotiating in good faith.

In *John A. Broderick, Inc. v. Kaye Bassman Int'l Corp.*, 333 S.W.3d 895 (Tex.App.—Dallas 2011, no pet.), the court found that an email demonstrating an agreement to a "bookend range" of \$15,000 to \$30,000 but did not state to

defendant's motion claiming the plaintiff was not a property owner rendered evidence of the assignment relevant and admissible.

what the range applied, was not an enforceable written high-low Rule 11 settlement agreement.

In *Rodriguez v. Villarreal*, 314 S.W.3d 636 (Tex. App. — Houston [14<sup>th</sup> Dist.] 2010, no pet.), the court found that where the jury awarded \$550,000 in exemplary damages and \$112,109 in compensatory damages and the parties had a high-low agreement of \$100,000/\$750,000, the "high" end-low agreement was not reached because the court should have applied the statutory exemplary-damages cap, reducing the award to \$220,218.

**H. Texas Rule of Evidence 606: Competency of Juror as a Witness**

In *Lincoln v. Clark Freight Lines, Inc.*, 285 S.W.3d 79 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2009, no pet.), the plaintiff argued the trial court gave the jurors inadequate instruction based on several questions the jury sent to the judge during deliberations. The questions involved the jury's need to sign the last page of a non-unanimous verdict. The first time the jury came back with a verdict, it was signed only by the presiding juror even though it was not unanimous. The court sent the jurors back to deliberate, overruled a motion for mistrial, and received two more questions from the jury about how to fill out the verdict. The jury ultimately returned a second time with a defense verdict. The plaintiff moved for new trial and attached the affidavit of a paralegal who polled the jurors to evidence the jury's confusion. The court concluded the affidavit was inadmissible under Rule 606(b) and was not proper evidence for the motion for new trial.

**I. Texas Rule of Evidence 609: Impeachment by Evidence of Conviction of Crime**

*TXI Transp. Co. v. Hughes*, 224 S.W.3d 870 (Tex. App.—Fort Worth 2007, pet. granted), involved admission of evidence concerning a truck driver's immigration status at the time of the wreck. The trucking company argued that under 608(b) evidence that the driver was an undocumented worker should have been excluded as an improper attempt to use a specific instance of conduct to impeach a witness' credibility. The Court of Appeals affirmed the trial court's decision to admit the evidence, holding that this was not impeachment via a specific

instance of misconduct, but instead, impeachment through prior verbal statements (including those contained in the application).

**J. Texas Rule of Evidence 513: Claim of Privilege Against Self-Incrimination in Civil Cases**

*Webb v. Maldonado*, 331 S.W.3d 879 (Tex.App.—Dallas 2011, no pet.), held that while the trial court in *Cunningham v. Hughes & Luce, L.L.P.*, 312 S.W.3d 62 (Tex. App.—El Paso 2010, no pet.), is a legal malpractice suit where the appellate court reviewed expert testimony about the untimely designation of an expert. In the suit where the plaintiff was represented by the defendants, the trial court excluded the testimony because the discovery responses failed to disclose the expert's opinions, the sources he relied upon, and the amount of fees sought. The trial court's ruling was upheld on appeal before this malpractice suit was litigated. At trial on this suit, the defense expert testified, without objection from the plaintiff, that the previous attorneys were not negligent. The plaintiff's attorney, in violation of the order *in limine*, took things a step further and asked whether the previous judges' rulings were correct. The defense attorney was then permitted to ask similar questions of their witness because of the plaintiff's waiver.

**1. Supplementation**

In *TXI Transp. Co. v. Hughes*, 224 S.W.3d 870 (Tex. App.—Fort Worth 2007, pet. granted), the Court of Appeals affirmed the trial court's decision to exclude testimony from a "expert" on cell phone company practices. The witness was proffered to support a claim that one of the drivers involved in a collision was on a cell phone at the time. The cellular telephone company was not listed as an expert witness nor as a fact witness, but instead, as "records custodians and employees of Southwestern Bell Mobile Systems." The trial court and the Court of Appeals found this was an improper attempt to designate an expert (and lay) witness.

*Mandell v. Mandell*, 214 S.W.3d 682 (Tex. App.—Houston [14th Dist.] 2007, no pet.), involved a will contest which boiled down to a dispute about attorney's fees.

The trial court allowed testimony from an expert even though the designation/supplementation was arguably very late. The Court of Appeals affirmed the trial court's exclusion, holding that the failure to timely challenge the late-designation waived any objection.

**2. Daubert/Robinson (General)**

*Arkoma Basin Exploration Co., Inc., v. F. M. F.*

court was free to draw negative inferences from Defendant driver's assertion of his Fifth Amendment privilege, any negative inference that might be drawn did not rise beyond mere suspicion, and thus was insufficient to prevail against Defendant's no-evidence motion for summary judgment.

**K. Texas Rule of Evidence 702: Testimony by Experts.**

*Assoc., 1990-A, Ltd.*, 249 S.W.3d 380 (Tex. 2008), affirmed the trial court's decision to allow testimony from an oilfield engineer. A "no evidence" challenge was raised based upon the expert's lack of calculation in his testimony. The Supreme Court affirmed the admission of the testimony, holding that the testimony was adequately explained and not merely conclusory.

"Producing Cause" is no longer the standard in products liability claims. Rejecting the PJC definition, the Supreme Court of Texas in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), decided that the new standard of proof requires evidence that the defect was a "substantial cause" of the injuries and damages.

The Supreme Court's new formulation requires that the jury be charged that (1) the cause must be a substantial cause of the even in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.

The expert opinions were admissible even though he could not explain *why* the nuts were not tightened sufficiently. However, the Supreme Court cautioned that to prove a manufacturing defect, Ledesma need not prove that the manufacturing process is flawed, only that it produced a flawed product." Thus, there was not an analytical gap sufficient to show error on the part of the trial court.

The Supreme Court also found admissible the testimony of an accident reconstruction expert testifying mostly on the basis of photographs of the scene who stated the pavement marks and damage supported Ledesma's claims. Ford argued this testimony "contain[ed] too many assumptions and logical leaps to be reliable." But the court stated that Ford's criticisms of Hall's testimony went to the credibility, not the reliability of Hall's theories, and these were subject to vigorous cross-examination regarding the accuracy of his opinions.

*Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211 (Tex. 2010) held that treating physicians' expert opinion is not exempt from scrutiny under the expert testimony rule and must be evaluated as carefully as any other expert testimony. The court admitted the treating physician's opinion where an employee who was taking immunosuppression drugs because of a kidney transplant

developed injections and died as a result of a knee injury.

*Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306 (Tex. 2009) involved a no evidence summary judgment because the plaintiff did not prove that a trailer was unreasonably dangerous in light of its intended use and purpose. There were warnings about the trailer that, if followed, would have prevented the harm in this case. Also, the supreme court found that the risk-utility test factors confirmed that the trailer was not defective as a matter of law because there was a very low risk of injury and a very high utility for each of the designs involved.

In *Thomas v. Uzoka*, 290 S.W.3d 437 (Tex. App.—San Antonio 2001, no pet.), held expert's testimony was unreliable and irrelevant to the issue of whether a plumbing leak caused foundation damage six to eight feet away. The Court of Appeals found that the consulting engineer's opinion regarding leaks causing remote damage was "not amenable to a strict application of the *Robinson* factors." *Id.* at 499. However, applying *Gammill's* analytical gap analysis, the Court found the expert unreliable and irrelevant because he failed to show any proof of his experiences with similar situations and could not rule out other related causes. *Id.* at 500.

By comparison, *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313 (Tex. App.—San Antonio 2002, pet. denied), held an expert's testimony that a plumbing leak caused foundation damage was reliable. The Court of Appeals commented that State Farm did not object to the expert's qualifications, data, or methodology. *Id.* at 319. Instead State Farm argued that the expert was inherently unreliable because he referenced one of his opinions as a "wild ass guess," and could not attribute 100% of the damage to the potential causes. *Id.* The Court noted that while the expert's "wild ass guess" comment did not help the Rodriguez's case, it did not make his opinion unreliable. *Id.* at 320. The Court evaluated the entire substance of the testimony rather than one phrase, and found there were not any analytical gaps. *Id.*

In *Merck & Co. v. Garza*, 277 S.W.3d 430 (Tex. App.—San Antonio 2008, pet.denied), relatives of patient, who died of heart attack, brought action against drug manufacturer on design defect and marketing defect strict liability claims based upon allegations that manufacturer's prescription drug caused patient's death. Evidence was legally insufficient to support finding that patient's relatives negated, with reasonable certainty, preexisting heart condition of patient, who died of heart attack, as plausible cause of his death, and therefore, evidence did not establish specific causation, as required for relatives' design defect and

App.—Houston [14th Dist.] 2009, no pet.), the court found that the accident reconstruction expert's opinion was reliable. The court explained that such experts must use estimated vehicle weights for calculations since exact pre-crash rates are almost always unavailable post-crash, that the vehicle-speed calculations were based on well-known physics and mathematical calculations which were readily verifiable by other experts, and that the software and methodology used by the expert was reliable, peer reviewed, and generally accepted by the accident reconstruction community.

marketing defect claims against manufacturer of drug, which allegedly caused patient's death; doctor's causation opinion was based on premise that, despite recent scan that was only mildly abnormal, two clots formed simultaneously in two different arteries sometime after patient began taking drug and such an occurrence was rare, but no scientific evidence was offered to support doctor's opinion that the clots were rare for someone with patient's risk factors.

In *Lincoln v. Clark Freight Lines, Inc.*, 285 S.W.3d 79 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2009, no pet.), the court of appeals affirmed a trial court order allowing an accident reconstructionist's conclusions as reliable under *Daubert/Robinson*. The expert testified he needed to determine the "coefficient of friction" to determine who caused the fatal truck wreck at issue, and the trial court allowed the testimony over the plaintiff's challenge. Despite testimony that the expert just "eyeballed it" to check the similarity of the tires and numerous dissimilarities between the test car and actual car, including 38% greater horsepower and 600 pound weight difference.

*Champion v. Great Dane Ltd. P'ship*, 286 S.W.3d 533 (Tex. App.—Houston [14th Dist.] 2009, no pet.), involved the trial court's exclusion of the plaintiff's expert in a negligence and products liability action brought by an injured truck driver. The trucker was injured by a defective gutter on a refrigerated truck trailer while using a pallet jack. The court granted directed verdict on the plaintiff's design defect claims after it excluded the testimony of his expert witness on the issue of defective design. The appellate court affirmed, finding the twenty-four year head of Texas A&M's Safety Engineering Program who contained advanced degrees in industrial engineering and an undergraduate degree in mechanical engineering (the same degree held by the defendant's engineers) was unqualified because he had never worked with uncovered gutters on refrigerated trailers before.

Occia  
downstream prices, it was not possible to reach any true conclusions about the market value, and because the expert

never resolved her findings to a market value "stated in dollars and cents," she was excluded.

In *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581 (5th Cir. 2003), the trial court excluded two expert reports that addressed both the effect of marijuana use and the cause of the accident. The trial judge opined the reports did not pass the Daubert test, did not prove causal connection between marijuana and the incident, and did not prove the driver was impaired because quantity and quality of marijuana was unknown. The Fifth Circuit reversed, holding that the trial court erred in excluding the report because the driver admitted he had ingested marijuana within a twelve hour period prior to the accident, the expert showed published and accepted studies that have demonstrated that marijuana use impairs cognitive functions for at least twelve hours, and due to the expert's knowledge and training in toxicology, his testimony would have been helpful to a fact finder. Concerning the quality or quantity of marijuana the driver used, the Court found that, while there are certain variables that will always be present (such as exact dosage), individuals smoke marijuana to get high, and a person who takes "five or six hits," as the driver did here, will be impaired. *Id.* at 589. The only question goes to the degree of impairment, which goes to the weight given to the testimony, not its admissibility. Thus, the Court of Appeals found the trial court's exclusion to be an abuse of discretion.

#### **4. Standard of Review; No Evidence**

In 2009, the Supreme Court of Texas continued the trend it started in *City of Keller v. Wilson* with several new no-evidence decisions.

For example, in *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009), homeowners alleged their child suffered in utero exposure to benzene from closed landfill which caused leukemia and reduced their property value. Plaintiffs hired a qualified expert who identified benzene as the culprit. The expert relied on studies showing a correlation between benzene exposure and chromosomal abnormalities similar to those of the Pollock's daughter. After hearing the evidence, a jury awarded the Pollocks over \$20 million dollars. The Texas Supreme Court overturned the jury verdict, and decided Plaintiffs' expert was not good enough because he did not do testing of benzene levels at the property prior to the child's birth. (Of course, the Pollocks didn't suspect benzene was a problem until after their child's birth, so no testing was done on the property or child during pregnancy).

Similarly, in *Dallas County v. Posey*, 290 S.W.3d 869 (Tex. 2009), Posey's parents sued the county claiming it negligently failed to assess Posey's suicide risk and placed

#### **3. Subjective Tests**

him in a cell that had a telephone with a cord on it. The parents presented evidence to the trial court that the county had ordered the replacement of all corded telephones with cordless telephones, indicating the county's awareness that telephone cords posed a significant suicide risk. On appeal, the court dismissed the case rather than let the jury decide if the cord constituted a dangerous condition.

In *Nabors Drilling USA v. Escoto*, 288 S.W.3d 401 (Tex. 2009), a jury found sufficient evidence to render a judgment against Nabors because it caused employees significant fatigue and sent them home in their cars. On appeal, the court decided it was no evidence of negligence, and reversed the verdict. It reasoned: "We note that fatigue is distinguishable from intoxication in significant respects. Unlike intoxication, there is no quantitative physical measure of fatigue that could be used to determine whether an employee is impaired."

Finally, in *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631 (Tex. 2009), the plaintiffs alleged that a dryer had a design defect that caused a fire. The supreme court stated that there was no evidence of a design defect because the plaintiff's expert did not base his opinions on reliable evidence and his testimony was the only evidence that even alleged a design defect. As such, there was legally insufficient evidence on the design defect cause of action.

In *Ford Motor Co. v. Wiles*, \_\_\_S.W.3d\_\_\_ (Tex.App.-Dallas, 2011, n.p.h.), the court held that the Wiles' expert failed to present legally sufficient evidence of a safer alternative design. Although the expert presented studies and video recordings to show that an alternative design was available and would have prevented the Wiles' accident, he had not actually performed the tests on Ford Explorers with the safer alternative design.

#### **5. More Than Laymen, Less Than Expert**

In *Valance Operating Co. v. Andarko Petroleum Corp.*, 303 S.W.3d 435 (Tex. App.—Texarkana 2010, no pet.), the appellate court determined that a landman expert could testify about the common understanding of the phrase "commence work on a proposed operation" in the oil and gas industry. The testimony on this issue neither involved science nor any scientific causation, but rather was about actual practice and general understanding of a term within the oil and gas industry. As such, a drilling expert was not necessary to explain the meaning of the term because such knowledge was within the scope of the landman's expertise.

*Reid Road Mun. Util. Dist. v. Speedy Stop Food*

*Store, Ltd.*, 337 S.W.3d 846 (Tex. 2011), held that under the "Property Owner Rule," an agent of an entity who is familiar with the market value of the entity's property may testify regarding that property value, even if not qualified or designated as an expert witness; a mere employee, however, is not sufficient. A note of caution: the court also excluded an affidavit made by someone who could have arguably been considered an agent, because in his affidavit he stated that his

In *Schronk v. City of Burleson*, 2009 NL 2215081 (Tex. App. — Waco 2009, pet. filed), the plaintiffs filed suit against the city after emergency technicians failed to resuscitate Mrs. Schronk because the battery on the defibrillator they brought was too weak to administer a shock.

The appellate court considered whether an affidavit from plaintiffs' expert was inadmissible evidence because it relied on what defendants called a "random collection of documents" which were also attached to the affidavit. The court rejected the city's argument, explaining Rule 703 allowed the affidavit and attached documents regardless of the attachments' admissibility because they were a type reasonably relied upon by experts in the field at issue when reaching their opinions. Considering this evidence, as well as the other evidence provided by plaintiffs, the court reversed and remanded the trial court's decision on the plea to the jurisdiction and motion for summary judgment.

#### **M. Texas Rule of Evidence 704: Opinion on Ultimate Issue**

In *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 242 S.W.3d 67 (Tex. App.—San Antonio 2007, pet. denied), court of appeals reviewed the factual sufficiency of a damages award which was in part based on an expert's opinion about the amount of damages sustained. The expert's testimony identified the information he reviewed and relied upon, summarized his general method of analysis, and rendered an opinion on the amount of damages. The court of appeals recognized Rules 704 and 705 permit an expert to testify to the ultimate issue and give opinions without disclosing the underlying facts or data. Even given this recognition, the court of appeals reversed holding the evidence was insufficient because the expert's testimony was speculative and conclusory.

#### **N. Texas Rule of Evidence 801: Hearsay; Definitions**

*Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231 (Tex. 2007), involved action for injuries sustained by child during labor and delivery. The defendant hospital sought to enter evidence of superseded pleadings where Plaintiffs dropped their claims against the treating doctors. Trial court excluded the superseded pleadings

opinion was "based upon my knowledge, background, education and experience." Thus court found that his opinion was based on his expertise and not his personal familiarity, making him an expert. Because he was not disclosed as an expert, the affidavit was excluded.

#### **L. Texas Rule of Evidence 703: Bases of Opinion Testimony by Experts**

because the statements were not inconsistent with the position taken by the opposed party. The Supreme Court reversed the trial court, holding Rule 801(e)(2) does not require inconsistency to admit superseded pleadings.

In *Reid Road Municipal Utility District v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846 (Tex. 2011), the court found that where the District introduced an appraisal before the special commissioners' hearing, the District adopted the appraisal and it was admissible. The court explained that the District used the appraisal in such a way as to amount to an approval of its content, and thus the appraisal could be admitted against it as an admission by adoption.

#### **O. Texas Rule of Evidence 1004: Admissibility of Other Evidence of Contents**

In *Jurek v. Couch-Jurek*, 296 S.W.3d 864 (Tex. App.—El Paso, 2009 no pet.), the trial court admitted a 1991 premarital agreement from a different marriage that was essentially identical to a 1990 premarital agreement that was not produced at trial. At trial the Defendant specifically objected to the admission under TEX. R. EVID. 1004(e), stating that the writing was not closely related to a controlling issue in the case and therefore the 1991 agreement should not be used as parol evidence of the 1990 agreement. On appeal, the Defendant argued that the writing should have been excluded under TEX. R. EVID. 1004(a). The appellate court rejected the argument because the argument raised on appeal differed from the one in the sub-section raised at trial and therefore the issue was waived.

### **III. SUBSTANTIVE EVIDENCE CASES**

#### **A. Gross Negligence/Malice**

In *Bennett v. Reynolds*, 315 S.W.3d 867 (Tex. 2010), the court held that an award of \$1.25 million to a cattle owner in exemplary damages was excessive in a conversion action against another ranch and its president, even though the harm resulted from the president's intentional malice. The court explained that the economic damages were only \$5,327.11, and that there was no physical harm or repeated actions.

*Thomas v Uzoka*, 290 S.W.3d 437 (Tex. App.—Houston [14th Dist.] 2009, no pet.), discusses the appropriateness of a negligence per se instruction regarding the failure to wear a seat belt in compliance with TEX. TRANS. CODE § 545.413. The appellate court rejected the argument that failure to submit an instruction created a *Casteel* situation because there was a finding of negligence on the part of the party not wearing a sea belt and because the requested instruction would not have impacted the jury’s apportionment of responsibility.

In *Smith v. O’Donnell*, 288 S.W.3d 417 (Tex. 2009), the supreme court found that there was no evidence of malice where attorneys had provided legal advice to a client about the administration of his wife’s estate in his role as executor before he died. The evidence presented did not raise a fact

*Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913 (Tex. 2010) held that where auditor discovered a “junk bond” issuer had opened a U.S. Trust cash management account instead of an escrow account (which was required) and the account balance fell short of the required minimum, but still issued a report stating that the issuer was complying with the escrow requirement, there was no evidence of actionable fraud by auditor. The court explained that investors had no relationship with the auditor and there was “no special reason to expect the investors’ reliance on the audit.”

### C. Medical Testimony, Costs, Causation

In *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007), the Texas Supreme Court reversed the court of appeals holding lay person testimony was insufficient to prove th causal nexus between the underlying car wreck and the plaintiff’s injuries. The Court recognized non-expert evidence alone would be sufficient to support a finding of causation where “both the occurrence and conditions complained of are such that the general experience and common sense of laypersons[sic] are sufficient to evaluation the conditions and whether they were probably caused by the occurrence.” *Id.* at 668. Note, the Court remanded the cause for remittitur instead of rendering judgment because the lay person evidence supported some of the damages awarded in the original \$1.1 million dollar verdict.

In *Bullard v. Lynde*, 292 S.W.3d 142 (Tex. App.—Dallas 2009, no pet.), the trial court entered judgment notwithstanding the verdict to award a motor vehicle wreck plaintiff all of her past medical expenses (\$11,660.50) after the jury returned a verdict for \$3,344.50 in past medical expenses. At trial, the defendant did not contest the reasonableness and necessity of the medical expenses or present medical testimony to support the argument the

issue that the attorneys intended to cause injury or acted with actual awareness of an extreme risk of injury. Because there was a punitive damages issue, the court was charged with evaluating “all of the evidence” pursuant to *Keller*. Moreover, in considering summary judgment on a claim requiring malice, the court should consider “all of the surrounding facts, circumstances, and conditions.” The attorneys here informed the client that the classification of property was important and that it was “presumably community” property, but that more information and a declaratory judgment should “probably” be sought on the issue.

### B. Auditors

plaintiff’s injuries were not related to the wreck. The court of appeals, citing evidence the plaintiff played sports after the wreck but before a surgery “could have” aggravated the original injury, found that more than a scintilla of evidence existed to support the original jury verdict on medical expenses.

Note, the recent *Bullard* decision seems to conflict with the ruling in *Columbia Med. Ctr. of Las Colinas v. Hogue*, 271 S.W.3d 238 (Tex. 2008), where the supreme court explained the defendant must present some evidence that the plaintiff contributed to cause his own injury. The court stated: “[P]roof of causation to support its contributory negligence submission must rise above mere conjecture or possibility.” It went on to hold physician testimony that the plaintiff “possibly” contributed to his own injuries was not enough to sustain the defendant’s burden.

In *Haygood v. de Escobedo*, \_\_S.W.3d\_\_(2011), the court held that Section 41.005 of the Texas Civil Practice and Remedies Code limits recovery of reasonable medical expenses in a wrongful personal injury suit to those expenses that have actually been paid or are pending. The court held that the adjustment of billed medical charges afforded to an insurance company is not covered by the collateral source rule. The claimant may not recover medical expenses that the health care provider is not entitled to recover because of its agreement with the insurance company.

*Young v. Mem’l Hermann Hosp. Sy.*, 573 F.3d 233 (5th Cir. 2009), involved a medical malpractice suit where the trial court found that there was insufficient evidence to raise a fact question regarding whether the plaintiff would have suffered less impairment if a drug had been administered. The standard in such cases is whether, in

reasonable medical probability, the injuries were caused by the defendant's negligence. In other words, the standard is one of whether something is "more likely than not." However, the court stated that the burden required the plaintiffs to provide epidemiological studies showing at least a doubling of the risk without the drug being administered. The plaintiffs failed to meet that burden because administration of the drug at issue only increased the chances of a favorable outcome from 42% to about 59%.

#### D. Parol Evidence

*DeClaire v. G&B McIntosh Family Ltd. P'Ship*, 260 S.W.3d 34 (Tex. App. — Houston [1<sup>st</sup> Dist.] 2008, no pet.), held that the parol evidence rule does not bar extrinsic proof of mutual mistake made by parties to a contract. The court found that where DeClaire made an oral agreement with the Partnership to repay \$159,000 that was then followed by a

In *Fiber Sys. Intern., Inc. v. Roehrs*, 470 F.3d 1150 (5<sup>th</sup> Cir. 2006), FSI sued former officers who left the corporation after a dispute over ownership resolved alleging fraud and the officers counterclaimed under defamation. During trial, video of Roehrs deposition was admitted. While FSI conceded that the video was admissible under both Fed. R. Civ. P. 32(a)(1) and Fed. R. Evid. 801(d)(1)(A), it contended that the video was only used to impeach Roehrs during cross-examination and not as substantive evidence, arguing that this prevented the jury from being able to consider the deposition as evidence of defamation. *Id.* at 1160. The court found that because FSI failed to object to the jury instructions or request a limiting instruction for the consideration of the testimony to impeachment purposes, FSI would have to show plain error—which it could not do because the deposition testimony was admissible for substantive use under 801(d)(1)(A). *Id.* at 1161.

#### F. Statutory Employer

In *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009), a subcontractor employee brought a personal injury claim against premises owner. Exclusivity under the Workers comp act at issue. Originally, the Texas Supreme Court held the Workers' Compensation Act did not preclude the owner from being a general contractor and, thus, being able to access workers' compensation exclusivity. The court abrogated a previous decision — *Williams v. Brown & Root, Inc.* — which had said owner must undertake services and then subcontract them to be a general contractor. Instead, it relied on the Workers' Compensation statute that said an owner can be a general contractor.

The court reconsidered its 2007 decision and allowed the parties to re-argue the case. Its *Entergy Gulf States, Inc.*

written contract with the same terms - but with the addition of a provision providing that shares in a closely held company would serve as the sole source of repayment to the Partnership - that there was no mutual mistake and because the oral agreement conflicted with the written contract it was inadmissible under the parol evidence rule.

*Dyer v. Cotton*, 333 S.W.3d 703 (Tex.App. —Houston [1st Dist.] 2010, no pet.), concerned an adverse possessor attempted to rely on deed purporting to convey an entire parcel of property, but court admitted testimony from seller that he said he only owned a 1/7th interest. The court explained that the parol evidence was admissible because it "tend[ed] to prove mutual mistake, and therefore, the parol evidence rule does not bar its admission."

#### E. Use of Videotaped Depositions at Trial

*v. Summers*, 282 S.W.3d 433 (Tex. 2009) opinion ultimately held the workers compensation exclusivity defense is available to premises owners who meet the definition of "general contractor" and who provide workers' compensation insurance to lower-tiered subcontractor's employees. The court reached to a 1917 statute and disregarded the traditional tripartite relationship between owners, general contractors, and subcontractors to rationalize its conclusion that a premises owner could become a statutory employer.

#### G. Right to Control/Chapter 95

*Gorman v. Meng*, 335 S.W.3d. 797 (Tex. App. — Dallas, 2011) (no pet. h.). Affirmed a take-nothing judgment in favor of a property owner under Chapt. 95 of the Civil Practices & Remedies Code. The owner of a convenient store hired an air conditioning contractor to repair a walk-in cooler. The Court of Appeals affirmed the trial court's finding that a condensing unit was "an improvement to real property," and that the contractor had been hired to diagnose and repair the condenser.

*GSF Energy, LLC v. Padron*, 2011 WL 481020 (Tex. App. — Houston [1<sup>st</sup> Dist.], no pet. h.). Affirmed a jury verdict against the operator of a processing-plant tank.

The worker's family sued the plant operator asserting that it retained both the right to control the details of the work and that it actually controlled the details of the work that led to the fatal incident. The court of appeals affirmed the jury's verdict, as there was evidence that the plant operator's employees had expanded the scope of the project, controlled the permits to enter the tanks, gave directions on how to carry out the work, and that the

subcontractor's employees felt that they could, "Not say 'no' to the plant operator.

#### H. Texas Torts Claim Act

In a premise defect case, *City of Corsicana v. Stewart*, Plaintiff was required to show that the City had actual knowledge of a dangerous condition in order to establish a waiver of immunity under the Texas Tort Claims Act. *City of Corsicana v. Stewart*, 249 S.W.3d 412 (Tex. 2008). Despite having an engineering study, city official testimony, and a closing of the road upstream, the Court found "no evidence" that the City knew the crossing was flooded. The Court explained that the evidence indicated there was inclement weather in the vicinity of Corsicana on the night of the accident, but the evidence pointed toward TxDOT, and not the City, having knowledge of the road closure that could give rise to knowledge of a dangerous condition.

#### I. Batson Challenges

*In re Jacobs*, 300 S.W.3d 35 (Tex. App.—Houston [14th Dist.] Oct. 20, 2009, orig. proceeding), arose out of an obstetrical medical malpractice case. The plaintiffs made gross negligence allegations in their petition and requested discovery of net worth information. On the plaintiff's motion to compel, the trial court ordered plaintiffs to plead more specific gross negligence allegations and defendants to produce actual financial statements provided to a lender in the last two years to identify assets and liabilities. Defendants, in the alternative were ordered, to produce an affidavit saying no such financial statements existed and produce an sworn document containing information in the format that would be provided to a lender to prove net worth.

The court of appeals held: (1) the plaintiffs petition made a sufficient claim for gross negligence; (2) no prima facie case for gross negligence was required to obtain net worth discovery; (3) discovery of two years net worth was overbroad because only current net worth was relevant; (4) narrowed the deposition questions plaintiffs could ask defendants about net worth to current net worth and its calculation; and (5) required defendants to produce existing documents showing net worth rather than creating affidavits.

#### K. Orders for New Trial

*In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204 (Tex. 2009), involved the mandamus review of a trial court order granting new trial "in the interests of justice and fairness" after a medical malpractice defense verdict. The plaintiffs' motion for new trial argued: the jury's negligence answer was against the great weight and preponderance of the evidence; evidence conclusively established negligence;

*Moeller v. Blanc*, 276 S.W.3d 656 (Tex. App.—Dallas 2008, pet. denied), involved a medical malpractice case where the plaintiff objected to the racially motivated use of peremptory challenges at trial. The trial court overruled the objection and the court of appeals reversed. It held that the Caucasian plaintiff had standing to object to the racially motivated exclusion of an African American juror. The court of appeals further held that the defendant failed to sustain his burden to show a facially neutral reason for striking the juror when defense counsel argued his reason for striking the juror was that he could not "get a read" on her from voir dire and was not "comfortable" with having her on the jury. The court specifically noted that the defendant did not rely on any facts about the juror nor rely on any objective observations like mannerisms or inattention.

#### J. Evidence of Net Worth

and the interests of justice and fairness warranted new trial.

The judge presiding over the trial agreed and that judge's successor in office affirmed the order for new trial without stating his reasons. On petition for mandamus, the supreme court granted mandamus relief despite precedent of affirming civil trial court orders granting new trials based solely on the "interests of justice and fairness" and decided the judge abused his discretion by not stating specific reasons even though its previous decisions did not indicate the order was insufficient. As the dissenting justices explained: "We have long held, unequivocally, that a trial court may grant a new trial 'in the interests of justice and fairness,' and trial and appellate courts have taken us at our word. The Court simply changes the rule and jettisons the law upon which the trial court relied." *Id.* at 215.

*In re Baylor Med. Ctr. at Garland*, 289 S.W.3d 859 (Tex. 2009), involved a medical malpractice case where the trial court entered judgment on a jury verdict, later granted a new trial, and then resigned. The Dallas Court of Appeals denied the defendant's request for mandamus relief, and mandamus to the supreme court was abated while the newly appointed trial judge reconsidered the motion. During abatement, a second district judge was elected and ultimately affirmed the grant of new trial without giving a reason. On review, the supreme court concluded the reasons given by the original trial just (who presided over the trial) could not be considered when evaluating the successor judge's grant of new trial. Instead it held, based on *In re Columbia Med. Ctr. of Los*

*Colinas*, the successor trial judge abused his discretion by not stating his reasons for affirming the new trial order.

*In re United Scaffolding, Inc.*, 301 S.W.3d 661 (Tex. 2010), involved a plaintiff who fell from a scaffolding unit. The trial court disregarded a jury verdict and granted a new trial. The supreme court held that the trial court abused its discretion in granting the new trial, based on *In re Columbia Med. Ctr. of Los Colinas*, because the only reason given for granting the new trial was that it was “in the interest of justice and fairness.” The court would not presume that a new trial was granted based on the grounds in the motion for new trial and stated that trial courts must specify the grounds on which they grant a new trial.

#### **L. Allegedly Improperly Obtained Evidence**

In *Neely v. Comm’n for Lawyer Discipline*, 302 S.W.3d 331 (Tex. App.—Houston [14th Dist.] 2009, no pet.), a lawyer brought up on disciplinary charges for misuse of his IOLTA trust account and client funds appealed the trial court’s grant of partial summary judgment. He claimed summary judgment evidence in the form of copies of cancelled payroll checks written on the account to one of his

Crenshaw claimed to be the wife of a decedent killed at work. As there was no formal marriage, she claimed an informal marriage existed. In Texas, the elements of an informal marriage include an (1) agreement to be married, (2) living together in Texas as husband and wife, and (3) representing to others they are married. TEX. FAM. CODE ANN. § 2.401(a)(2). At trial, the jury found that there was no marriage, and Crenshaw appealed, complaining that the jury charge failed to track the statute “as closely as possible” and that it commented on the weight of the evidence. The court of appeals reversed, holding that the charge was an improper comment on the weight of the evidence. The instruction “nudged” the jury and was more than an incidental comment on the weight of the evidence because the judge instructed the jury that “mere isolated references” to each other as husband and wife “does not amount to adequate evidence” of holding out.

former staff were inadmissible because the checks were allegedly stolen from his office. The appellate court rejected the argument because the Commission used checks obtained through a subpoena to the lawyer’s bank rather than the copies provided to it by the ex-staff member. The lawyer also objected to other records obtained through the subpoena, claiming lack of notice of the subpoena, violation of privacy, and attorney-client privilege. The appellate court further rejected the objections, and held the records were admissible for summary judgment.

#### **M. Joint Ventures/Joint Enterprises**

In *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009), the supreme court went through a detailed analysis of a psychiatrist’s claims, including joint venture-based claims, against a psychologist for work done at a clinic. The court found that there was legally insufficient evidence of a partnership or joint venture under the five factors of the Texas Revised Partnership Act.

#### **N. Proof of Informal Marriage**