EVIDENCE AND CASE LAW UPDATE
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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.
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> 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.
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> 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 of the twenty-two (82%) 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).

According to the Texas Administrative Office of Courts, there were 1,195 civil jury trials in the year ending August 31, 2011. Of these, there were 638 jury trials involving injury or damages. In the same time period, there were 4,891 civil cases decided by summary judgment. Office of Court Administration Annual Report for the Texas Judiciary, March 2012 (pp. 46-47). It appears that there was a twenty percent (20%) decline in the last year. Marc Curriden, "Day in Court Vanishing". Dallas Morning News, April 3, 2012 (p. D-1).

II. TEXAS RULES OF EVIDENCE

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

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 *Micro Chem., Inc. v. Lextron, Inc.*, 387 F.3d 1119 (5th Cir. 2003), interpreting FED. R. EVID. 103 in light of the recent changes to that rule.

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.

When the court hears objections outside the presence of the jury, the objections apply to such evidence without the necessity of repeating them. Tex. R. Evid. 103. *Service Corp. International v. Guerra*, 348 S.W.3d 221 (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.

Kia Motors v. Ruiz, 432 S.W.3d 865 (Tex. 2014) describes the extensive measures taken to preserve claims of error concerning admission of records of other similar (or dis-similar) incidents.

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.). The court found that when 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, no pet.), the court found that where the 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; therefore, the plaintiff could not show the dog killing plaintiff's roosters and hens was foreseeable, and thus Plaintiff failed to prove proximate cause.

Ennis, Inc. v. Dunbrooke Apparel Corp. 427 S.W.3d 527 (Tex. App.—Dallas 2014, no pet.) described the proper sequence of taking judicial notice concerning choice-of-law. The rules prescribe the sequence and steps related to proof of foreign law, and attempts to re-argue the matter through summary judgment pleadings may not be effective.

U-Haul International, Inc. v. Waldrip, 380 S.W.3d 118 (Tex. 2012) reversed a trial court's admission of evidence concerning the U-Haul's safety practices in Canada. The President of the Ontario Safety League, testified at trial that he had personally observed the inspections of a number of U-Haul vehicles and concluded that there was a "systematic disregard for public safety in the maintenance of vehicles" in

C. Texas Rule of Evidence 401: Relevant Evidence

In *Republic Waste Servs., Ltd. v. Martinez*, 335 S.W.3d 401 (Tex. App.—Houston [1st Dist.] 2011, no pet.), the court affirmed a trial court's decision to exclude evidence concerning the decedent's immigration status under Rules 401 and 403. The defense asserted that evidence showing the 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.

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

TXI Transportation v. Hughes, 306 S.W3d 230 (Tex. 2010), reversed a trial court's decision to admit evidence that a tractor-trailer driver was an undocumented worker. The survivors of a truck wreck filed suit against the commercial vehicle operator contending that its driver caused the collision. The plaintiffs produced evidence that the truck driver was not a legal U.S. resident (and referred to this fact on numerous occasions). The Supreme Court of Texas concluded that the probative value of the evidence was far outweighed by its prejudicial effect.

Grocer's Supply, Inc. v. Cabello, 390 S.W.3d 707 (Tex. App.—Dallas 2012, no pet.) considered the effect of the Immigration Reform and Control Act (IRCA) on an undocumented worker's ability to seek damages for future wage loss/earning capacity. In defending against a claim arising from an incident in which Mr. Cabello was injured while changing a tire on the side of the rode, Grocer's Supply claimed that federal law prohibited undocumented workers from receiving wages in this country and thus, pre-empted state law tort claims seeking that element of damages. The Court of Appeals declined to find that federal labor law pre-empted state court tort law in this area.

E. Texas Rule of Evidence 404: Character Evidence Not Admissible to Prove Conduct

Ontario, Canada. The evidence was proffered to show U-Haul's continuing and systematic safety deficiencies related to an apparently unsafe truck located in Texas. The Supreme Court reversed the trial court's decision, holding that it was the improper admission of other wrongful acts in an attempt to show a party's system or plan. Lay testimony concerning this evidence was inadmissible as it did not support the conclusion that safety problems in Canada were related to an extreme risk of serious injury in Texas, nor did it show that the incident was attributable to a defective safety program. The Court indicated that the evidence may be admissible on retrial if additional predicates were met.

Service Corp. International v. Guerra, 348 S.W.3d 241 (Tex. 2011) held that evidence of other suits involving burial of a body in the wrong space was inadmissible because there was insufficient connection between the events in the other lawsuits and the case in question. The Court found there was insufficient connection between the defendants and the events which occurred nearly 20 years before the events giving arise to this case.

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

In *Christus Health SE v. Wilson*, 305 S.W.3d 392 (Tex. App. — Eastland 2010, no pet.), admitting a photograph was was harmless error, even though the picture was taken after the curb had been repainted. While the paint was considered to be evidence of a subsequent remedial measure, the fact that the curb should have been painted was not a disputed fact. The plaintiff tripped over the unpainted curb and introduced evidence.

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 Rule 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 not stating to what the range applied or which party was to pay or receive the payments was not an enforceable written high-low Tex. R. Civ. P. 11, "Rule 11", settlement agreement.

In *Rodriguez v. Villarreal*, 314 S.W.3d 636 (Tex. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306 (Tex. App. — Houston [14th 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 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 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.

I. Texas Rule of Evidence 702: Testimony by Experts.

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 underlying suit, the trial court excluded the testimony because the discovery responses failed to disclose the expert's opinions, the sources relied upon, and the amount of fees sought. The trial court's ruling was upheld on appeal before the malpractice suit was litigated. At trial on the malpractice suit, the defense expert testified, without objection from the plaintiff, that the previous attorneys were not negligent. Further, 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 in response.

1. Daubert/ Robinson (General)

Transcontinental Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010) held that treating physician's 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 immunosuppressant drugs because of a kidney transplant developed serious health complications and died as a result of a knee injury at work.

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.—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.

In *Merck & Co. v. Garza*, 347 S.W.3d 256 (Tex. 2011), relatives of a patient who died from a heart attack brought an action against the drug manufacturer on design defect and marketing defect strict liability claims based upon allegations that the manufacturer's prescription drug caused the patient's death. The Supreme Court found the evidence was legally insufficient to support a finding against the manufacturer. Based upon *Havner's* required doubling of risk, the Court found that there was "no evidence" of causation.

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 plaintiffs 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.

2. Evidence not considered

Occidental Permian Ltd. v. The Helen Jones Foundation, 333 S.W.3d 392 (Tex. App.—Amarillo 2011, no pet.) held that an expert did not meet *Daubert/Robertson* standards where the expert's evaluation of royalties was based on the market value of percentage of proceeds. The court held that without evidence of the 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.

3. More Than Laymen, Less Than Expert

In *Valance Operating Co. v. Anadarko 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.

4. Adoptive Admissions; Eminent Domain

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 opinion was "based upon my knowledge, background, education and experience." Thus the 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.

In *State v. State Street Bank &Trust Co.*, 359 S.W.3d 375 (Tex. App.—Dallas 2012, no pet.) an expert real estate broker's opinion that the rental rate of the remainder of commercial property would be reduced following the State's condemnation of a portion of the property was supported by evidence and thus was not conclusory or speculative. The broker testified that he had been working in the industry for over 32 years, that he was familiar with the buildings in the area of the condemned property, that the property had always been considered of high quality, and that the State's condemnation of a portion of the property would result in a 20% reduction in rental rates.

When at least part of an acceptable method of calculating partial-taking damages requires determining the market value of the

entire tract before the taking, Texas Courts have held that an expert's testimony as to the pre-taking value of the property was relevant. *State v. Petropoulos*, 346 S.W.3d 525 (Tex. 2011). The expert used a generally accepted method for determining pre-taking value of property in partial-taking condemnation proceeding. *Id.*

5. Complicated Causation

Control Solutions, Inc. v. Gharda USA, Inc., 394 S.W.3d 550 (Tex. App. – Houston [1st Dist.] 2012, no pet.) involves "complicated scientific evidence" relating to the cause of a fire. There is an extensive discussion of whether the experts properly followed NFPA 21 given their investigation and whether the presence of multiple experts with expertise in different areas was sufficient. As with *Scott's Marina at Lake Grapevine, Ltd. v. Brown*, 365 S.W.3d 146 (Tex. App.—Amarillo 2012, pet. denied), the Court deferred to the trial court's discretion and essentially deferred to the jury's decision regarding very complicated issues.

J. Texas Rule of Evidence 801: Hearsay; Definitions & Exceptions

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.

Ortega v. Cach, LLC, 396 S.W.3d 622 (Tex App– Houston [14th Dist] 2013 no pet.) reversed a judgment based upon various business records. In this suit to collect on a bet, there were numerous discrepancies in the documents related to the various transactions. The Court of Appeals summary records were generated several years before it was filed, but the affidavits indicated that the records were not compiled "at or near the time" of the transactions involved. Other documents purported to be maintained in the "ordinary course of business" but were actually prepared shortly before trial.

Williams Farms Produce Sales, Inc. v. R.&G. Produce Co., 443 S.W.3d 250 (Tex. App.—Corpus Christi 2014, no pet.) and *Lawyers Title Co. v. Cooper Development, Inc.*, 424 S.W.3d 713 (Tex. App.—Dallas 2014, pet. denied) both dealt with the admissibility of government records. In *Williams Farms*, the court concluded that printouts from the Pacer.gov website were self-authenticating, while *Cooper Development* considered whether a photocopy of an indictment met a hearsay exception.

In *Zhu v. Lam*, 426 S.W.3d 333 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.), the court considered whether documents printed from the Harris County Appraisal District's website offered by the buyer of a home fell under the Rule 803(8) public records exception to the rule against hearsay. The court conclude that because the two print-outs of information about the same property contradicted one another, and the offering party did not establish any reason for the discrepancy, the documents did not fall under the hearsay exception.

In *Barnhart v. Morales*, No. 14-12-00167-CV, 2105 WL 1020869 (Tex. App.—Houston [14th Dist.] March 5, 2015, no pet. h.), the court found that damages awarded for future physical impairment were factually sufficient even when there was conflicting evidence on the issue because the jury is empowered to resolve inconsistent evidence and witness testimony. The jury was entitled to make this factual determination. The award of future mental anguish damages could not be challenged separately from the award of future physical pain because the jury instruction asked for a lump-sum award for both damage elements, and the appellant did not object at trial to submitting both damage elements as a single question to the jury.

III. STANDARD OF REVIEW; NO EVIDENCE

In 2009, the Supreme Court of Texas continued the trend it started in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005) with several new no-evidence decisions.

A. Mental Anguish Damages

A jury award of $2.2 million for mental anguish and $4 million in exemplary damages was overturned by the Texas Supreme Court in *Service Corp. International (SCI) v. Guerra*, 348 S.W.3d 221 (Tex. 2011). The Court found the evidence was legally insufficient to support findings that the decedent's daughters suffered compensable mental anguish due to the unauthorized movement of Decedent's body by the cemetery. Although the daughters experienced very strong emotional reactions that would be expected from the unauthorized moving of a loved one's body, there was no evidence that they experienced a specific high degree of mental pain and distress or that there was a substantial disruption of any particular family member's daily routine.

B. Punitive Damages/Gross Negligence

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 a closed landfill which caused the child's 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 child. After hearing the evidence, a jury awarded the Pollocks over $20 million in damages. The Texas Supreme Court overturned the jury's verdict because Plaintiffs' expert did not test 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 the pregnancy).

Bennett v. Reynolds, 315 S.W.3d 867 (Tex. 2010) arose from a case of missing cattle. The Supreme Court ruled 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. *Id.* The court explained that the economic damages were only $5,327.11, and that there was no physical harm or repeated actions. *Id.*

Grant Thornton, L.L.P. v. Prospect High Income Fund, 314 S.W.3d 913 (Tex. 2010) held that where an 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."

In *Merck & Co. v. Garza*, 347 S.W.3d 256 (Tex. 2011), the Court reaffirmed the requirements set out in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) for determining whether epidemiological evidence is scientifically reliable to prove causation. In *Merk & Co.*, the Court held the Plaintiffs did not present evidence of general causation in accordance with *Havner*. *Merk & Co.* at 267. The expert's testimony was determined to be unreliable, and legally, no evidence because the expert drew conclusions from data based on flawed methodology. *Id.* at 263.

Safeshred, Inc. v. Martinez, 365 SW3d 635 (Tex. 2012) was a *Sabine Pilot* case in which a former at-will employee brought a wrongful termination action against his employer arising from the employee's refusal to perform an illegal act. The Supreme Court of Texas overturned an award of exemplary damages to the employee, holding that actual malice required a showing of substantial injury independent of the harm of termination itself. The Court intimated that actual malice could not be demonstrated by evidence of "hypothetical harm" that the employee might have suffered from the illegal acts he was asked to perform. *Id.* at *6.

An appellant attacking the legal sufficiency of the evidence supporting an adverse finding by the jury on an issue for which it did not have the burden of proof must show that no evidence supports the jury's adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 195 (Tex. 2011). Where there was no evidence that Exxon did not drill and complete the requisite number of wells as called for by the lease, the Court rejected the claim that Exxon could have "developed further" and entered judgment in favor of Exxon on the royalty owners' breach of lease claim.

Evidence that the components of a child-resistant lighter deviated from manufacturing specifications, an accident occurred, and the deficient parts were involved in the accident was held to be insufficient evidence to support a causation finding in a manufacturing defect claim where a child accidentally set his sister on fire with child-resistant lighter. *BIC Pen Corp. v. Carter*, 346 S.W.3d 533 (Tex. 2011). The lack of relevant expert testimony on the causation element to show small deviations from the minimum force specifications in two of the lighter's child-resistant features led to the Court's reversal of the appellate court's judgment in favor of the claimants.

Boerjan v. Rodriguez, 436 S.W.3d 307 (Tex. 2014) considered the duty a landowner or occupier owes to a trespasser. A ranch operator followed a trespasser's vehicle down a ranch road, which later crashed and killed several occupants. Following the trespasser's vehicle did not create the likelihood of a serious injury or extreme risk of harm required for a claim of gross negligence brought by a trespasser against a land owner. The court refused to apply the unlawful acts doctrine as a basis for summary judgment.

C. Stigma Damages

Houston Unlimited, Inc. v. Mel Acres Ranch, 443

S.W.3d 820 (Tex. 2014) held that expert testimony that formed the basis of a damages award for loss in market value due to stigma attached to the land from environmental contamination was not legally sufficient to support a damage award. The percentage-reduction approach used by the expert was held to be insufficient because it failed to account for differences between the comparison properties at issue, differences in the level of contamination and remediation on the comparison properties, the contamination not attributable to the defendant, and assumed that the reduction in market values of the properties was wholly attributable to stigma from contamination. The court did not, however, expressly forbid recovery of stigma damages, or say that the percentage-reduction method could never be used to establish a leally sufficient opinion on dimunition damages.

D. Proximate Cause

In *HMC Hotel Properties II Limited Partnership v. Keystone-Texas Property Holding Corp.*, 439 S.W.3d 910 (Tex. 2014), the court considered whether a letter from a tenant to the property owner stating it would not waive its right of first refusal found in the lease agreement after it had indicated its intent to sign the waiver proximately caused a deal to sell the property to a third party to fail. The court acknowledged that the letter had a significant impact on the sale, but held that the letter was not the proximate cause of the failure because the tenant was not obligated to provide the waiver, and no evidence suggested that the outcome would have been any different had the tenant not sent the letter. The court found that the deal failed because the seller could not convince the tenant to voluntarily relinquish its rights, which was a necessary condition to obtain title insurance, and that the testimony about what the title insurance company might have done differently had the tenant not sent the letter was simply speculation and conclusory.

Ponte v. Bustamante, No. 05-12-01394-CV, 2014 WL 7476512 (Tex. App.—Dallas December 31, 2014, no pet.) is a medical malpractice case where the court held that expert testimony that only provided evidence that a different plan of treatment could have resulted in a different outcome for the patient, and that each instance of alleged negligence by the doctors contributed "in an incremental fashion" to the patient's poor outcome, was not legally sufficient to show but-for causation. In addition, unquantified evidence that a different course of action would have created a lower risk of harm is not legally sufficient to show but-for causation.

IV. SUBSTANTIVE EVIDENCE CASES

A. Medical Testimony, Costs, Causation

In *Haygood v. de Escobedo*, 356 S.W.3d 390 (Tex. 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.

Bullard v. Lynde, 292 S.W.3d 142 (Tex. App.—Dallas 2009, no pet.), concerned a 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 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.

Bullard 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 *Scott's Marina at Lake Grapevine, Ltd. v. Brown*, 365 S.W.3d 146 (Tex. App.—Amarillo 2012, pet. denied) the appellate court found sufficient evidence to uphold a trial court's entry of judgment on a jury verdict in favor of employee, awarding him $89,000 for past lost earning capacity, $102,300 for future lost earning capacity and $100,000 for future medical expenses in his negligence suit against his employer. The employee contracted enteroviral meningitis and Lemierres syndrome, allegedly due to his exposure to human feces while cleaning up backflowed sewage in the store. The court held there was sufficient medical testimony to establish a causal chain between exposure to human feces and plaintiff's illnesses. *Id.* at *6.

Saeco Electric & Utility, Ltd. v. Gonzalez, 392 S.W.3d 803 (Tex. App. – San Antonio 2012, no pet.) considered the quantum of evidence necessary to uphold an award of future medical costs. Testimony from the injured party's treating physician that "I don't know what he's going to need in the future" was sufficient to support an award of future medical expenses as the doctor went on to explain that there were a number of conditions which might arise in the future. This evidence, coupled with testimony from a life care planner, was factually sufficient to support the jury's award for this element of damages.

West Star Transportation, Inc. v. Robison, ___ S.W.3d ___ (Tex. App–Amarillo 2015, n.p.h. (Jan 23, 2015) affirmed a jury's award of future medical expenses. The jury's award was within the range of future medical costs supported by the plaintiff's expert witnesses.

The Texas Supreme Court is proposing a new affidavit relating to cases involving $100,000.00 or less

PNP Petroleum v. Taylor, 438 S.W.3d 723 (Tex. App.—San Antonio 2014, pet. filed), reversed a trial court's decision to exclude evidence of deletions made to an oil and gas lease agreement draft because the parol evidence rule does not bar courts from considering contract negotiations as surrounding circumstances when construing a lease. The deletions and revisions in the lease drafts should not have been excluded as hearsay because they were offered to show what was said, rather than the truth of what was said. After consideration of the lease negotiations, the court held that the parties did not intend to incorporate into the lease the industry's generally accepted meaning of the

of "monetary damages." The court's affidavit is prima facie proof of medical expenses. TEX. R. CIV. P. 47 (Proposed for Comment, Nov. 13, 2012).

United Nat. Ins. Co. v. AMJ Investments, LLC, 447 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2014, pet. filed). The court held that evidence of an agreement between the insured and insurer where the insurer would pay for costs of repair according to a specific estimate was legally and factually sufficient to support the finding that the insurer's liability was reasonably clear, and that the insurer's attempt to pay repair costs according to a different estimate was not a good faith attempt to effectuate a prompt, fair, and equitable settlement.

In *Henkel v. Norman*, 441 S.W.3d 249 (Tex. 2014), the court held that a homeowner's statement to a mail carrier, "don't slip," was legally sufficient to warn him of any icy sidewalk on her property. The court evaluated the statement in the totality of the surrounding circumstances, and held that the statement was sufficient to warn a reasonable person in the mail carrier's position that there were slippery conditions caused by freezing temperatures.

B. Parol Evidence

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."
term "shut-in royalty."

In *Americo Life, Inc. v. Myer*, 440 S.W.3d 18 (Tex. 2014), the court vacated an arbitration award because the arbitration panel was formed contrary to the express terms of the arbitration agreement when two independent potential panel members were disqualified for being partial to one party, but the arbitration agreement only required the arbitrators to be a "knowledgeable, independent businessperson or professional." The court held that an independent arbitrator is not required to be impartial, and if the parties wanted to require that the arbitrators be impartial, they should have said so in the express terms

of the agreement.

H2O Solutions v. PM Reality Group, 438 S.W.3d 606 (Tex. App.—Houston [1st Dist.] 2014, pet. filed) held that repeated allegations in appellant's original petition, affidavits, and settlement agreement that appellant performed work at a property under a written contract with a party constituted a judicial admission, which prohibited the appellant from later asserting that a different contract with a different party governed the work performed. The court also held that when introducing business records under Rule 902(10)(b), an affiant does not have to identify the particular person who originally created the document to satisfy the authentication requirement of Rule 901(a).

C. Right to Control/Chapter 95

Cohen v. Landry's Inc., 442 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2014, pet. filed) discussed the admissibility of post-incident repairs to show that one party or another had control over the premises in question. The case arose out of a trip and fall that happened on a sidewalk while the plaintiff was walking to a restaurant. The court relied on an invoice from a construction company to the defendants for repairs to the sidewalk that was sent about two years following the incident to hold that there was a scintilla of evidence that the defendant exercised control over the sidewalk. The plaintiff produced an expert witness who opined that the defendant knew or reasonably should have known of the hazardous condition, that the sidewalk posed an unreasonable risk of harm to pedestrians, that the defendant did not use reasonable care to reduce or eliminate the hazard, and that defendant's failure to use reasonable care was the proximate cause of plaintiff's injuries. Based on this evidence, the court reversed the judgment of the trial court, which granted defendant's no evidence and traditional motions for summary judgment on the premises liability claim.

Gorman v. Meng, 335 S.W.3d. 797 (Tex. App.—Dallas 2011, no pet.) affirmed a take-nothing judgment in favor of a property owner under Chapter 95 of the Civil Practices & Remedies Code. The owner of a convenience 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, 355 S.W.3d 700 (Tex. App.—Houston [1st Dist.], 2011, pet. denied), 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."

D. Lost Profits

University General Hospital, LP, vs. Prexus Health Consultants, LLC, 403 S.W. 3rd 547 (Tex App.–Houston [14th Dist.] 2013, no pet.). The Court of Appeals discussed proof necessary in order to support a finding of lost profits. The CEO of the company was allowed to testify about various components of lost profits (revenue, income and expenses), but was unable to provide a single complete calculation of lost profits reflecting revenue from lost business activity less expenses which would have been attributed to that activity. In this case, the Court of Appeals held that there was legally insufficient evidence of the components comprising the profit calculation.

E. Foreseeability of Criminal Conduct

In *Mindi M. v. Flagship Hotel, Ltd.*, 439 S.W.3d 551 (Tex. App.—Houston [14th Dist.] 2014, pet. filed), the court held that a hotel could have reasonably foreseen that a hotel employee might commit physical or sexual misconduct based on his criminal record, which revealed recent convictions for assault, citations for sexual assault while incarcerated, and two allegations of indecency with a child. The court left the question of whether the hotel acted reasonably in hiring the employee without a background check to the jury. Because Texas law does not categorically impose a duty on employers to conduct a background check on all potential employees, a jury is free to find that in the particular circumstances, a background check would have been required to establish the hotel acted

reasonably in hiring the employee, or that the hotel had received reasonable assurances that the employee did not pose a risk to others.

F. Proof of Informal Marriage

Nguyen v. Nguyen, 355 S.W.3d 82 (Tex. App.—Houston [14th Dist] 2011, pet. denied), and *Small v. McMaster*, 352 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2011, no pet.) involved proof of Informal Marriage. In both cases, the putative spouse's income tax returns listed them as "single," and the Court of Appeals put a great deal of weight on this particular piece of proof.

G. Same Sex Marriage

In re: Estate of Araguz, 443 S.W.3d 233 (Tex. App.—Corpus Christi 2014, pet. filed), the court held that there was a fact issue as to whether the person a male decedent married was a woman or a man, and that the marriage was not per se void as a same sex marriage under the Texas Constitution. The court relied on expert medical testimony about gender dysphoria that stated the person was "medically and psychologically" a female even though she had male sex organs at the time of the marriage and did not have genital reassignment surgery until after the marriage.

H. Spoliation

Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9 (Tex. 2014) clarified the situations in which a spoliation instruction can be properly given to a jury. A store employee saved an 8 minute video from the store's surveillance footage database that recorded the Plaintiff's slip and fall incident. The rest of the video footage from that day was destroyed as part of the store's routine procedure, which was to automatically record over surveillance footage every 30 days. The court held that the trial court's use of a jury instruction as a remedy for spoliation was an abuse of discretion. The court concluded that a party must intentionally spoliate evidence in order for a spoliation instruction to be an appropriate remedy. If the evidence was negligently lost or destroyed, a spoliation instruction is an appropriate remedy only if the prejudice to the nonspoliating party is so extreme that it is "irreparably deprived of having any meaningful ability to present a claim or defense." Indirect evidence used to attempt to prove the contents of missing evidence that is otherwise relevant to a claim or defense is admissible at trial, but the jury cannot hear evidence that is "unrelated to the merits of the case" and that "serves only to highlight the spoliating party's breach and culpability."

In *Petroleum Solutions, Inc. v. Head*, No. 11-0425, 2014 WL 7204399, (Tex. July 11, 2014), the court held that spoliation sanctions imposed by the trial court, which included a spoliation jury instruction, were improper because the destruction of a physical piece of evidence was not intentional when the defendant had provided the evidence to its council, who sent it for testing and storage at a laboratory, and the evidence was later destroyed when the lab's storage warehouse was torn down. No evidence suggested that the defendant was informed that the warehouse was being torn down or even knew that it was being stored there. Because the court did not find any evidence that the spoliation irreparably deprived the nonspoliating party of any meaningful ability to present their claims, a jury instruction on spoliation was not an appropriate sanction under the negligence exception found in *Brookshire Brother's*.

Wackenhut Corp. v. Gutierrez, ___ S.W.3d ____ (Tex. 2015) dealt with this issue in the context of preservation of error.

I. Whistleblower Act

Texas Dept. of Human Services v. Okoli, 440 S.W.3d 611, (Tex. 2014) the court held that an employee of a state agency was not entitled to the protections under the Texas Whistleblower Act because he failed to report the alleged violation to an appropriate law enforcement officer. An employee who reports alleged wrongdoing to a superior knowing that the report will have to be forwarded elsewhere for regulation, enforcement, investigation, or prosecution is not reporting to an appropriate law enforcement agency. Because the employee knew from a memorandum that his supervisors would have to refer his report of misconduct elsewhere, he could not have a good faith belief that he was reporting to an appropriate law enforcement agency.

In *University of Houston v. Barth*, 403 S.W. 851, (Tex. 2013), a university professor filed suit under the Texas Whistleblower Act after he reported alleged misconduct by the college's dean to the university's CFO and general council. The court held the professor was not entitled to protection under the statute because reporting violations of the university's internal administrative policies cannot form the basis of a violation of law because the administrative policies

were not adopted under a statute, which is required by the Whistleblower Act. In addition, by reporting the alleged violations to internal university officials who did not have the ability to investigate or prosecute violations of criminal law, there was no evidence that the professor met the objective good faith test for reporting a violation of law to an appropriate law enforcement authority, especially considering the professor's legal training and experience as an attorney.

J. Texas Citizens' Participation Act

Cheniere Energy, Inc. v. Lofti, 449 S.W.3d 210, (Tex. App.—Houston [1st Dist.] 2014, no pet.) the court held that the CEO and general counsel of a corporation had not met the evidentiary burden required to dismiss a tortious interference claim brought against them by a former employee under the Texas Citizens' Participation Act's (TCPA) early dismissal provision. No affidavits of support were included with the motion to dismiss, and neither reliance on the plaintiff's pleadings or the bare assertion of a lawyer-client relationship between the CEO and general counsel were sufficient to establish that they had a communication, they acted in furtherance of a common interest, and that the claim against them is related to their exercise of the right of association. The court stated that the purpose of the statute may require some nexus between the communication and the generally recognized First Amendment protections to prevent the early dismissal procedure from being used in suits involving solely private interests.