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**CAPS, CAUSATION AND COLLECTABILITY**

**An Update on Recent Developments  
in the Law of Damages**

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With special thanks to Shannon M. O'Malley, Esq. and Todd M. Tippet, Esq. for their assistance.

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## 1. ATTORNEYS' FEES

***Primrose Operating Co., et al. v. National American Insurance Co.***, 382 F.3d 546 (5th Cir. 2004).

*The trial court is considered an expert as to the reasonableness of attorneys' fees.*

Plaintiffs sued their liability insurer, NAICO, for breach of the duty to defend. A jury found for plaintiffs and awarded damages, including attorneys' fees. NAICO appealed.

The underlying liability lawsuit involved a claim against plaintiffs for pollution. The claims triggered multiple policies, some of which provided a defense to plaintiffs. In addition to the attorneys provided by the liability carriers, however, plaintiffs hired attorneys from the Cotton Bledsoe firm. On appeal, NAICO contended that plaintiffs were not entitled to attorneys' fees for Cotton Bledsoe since plaintiffs were represented by attorneys retained by the carriers. Plaintiffs argued that they retained Cotton Bledsoe to manage their uninsured exposure, including exposure during NAICO's policy period. The court determined that plaintiffs' were entitled to the additional attorneys' fees.

NAICO next attacked the testimony of plaintiff's expert regarding attorneys' fees because: (1) he lacked the necessary factual foundation for his opinions; and (2) plaintiffs failed to provide a written report.

The court noted that plaintiffs' expert was provided with complete copies of bills from both the Cotton Bledsoe firm and the carrier-selected counsel. The court then recognized that the *trial court* is considered an expert as to the reasonableness of attorneys' fees. Furthermore, the court found that the "fair and reasonable compensation for the professional services of a lawyer can certainly be ascertained by the opinion of members of the bar who have become familiar through experience and practice with the character of such services." Thus, the court determined that the expert was qualified to give an opinion regarding the reasonableness of the attorneys' fees.

Concerning the lack of an expert report, the court noted that it was within the trial court's discretion to admit or exclude expert testimony. Because plaintiffs identified the expert within the applicable deadlines and provided copies of the attorneys' bills, the court held that NAICO was not prejudiced by the lack of a report.

***ExxonMobil Corp. v. Valence Operating Co.***, No. 01-02-00994-CV, 2005 WL 1415320 (Tex. App.—Houston [1st Dist.] June 16, 2005, pet. granted).

*Award of attorneys' fees was proper even in the absence of proof of presentment, where a plaintiff pleaded all conditions precedent and defendant did not specifically plead any failure to satisfy conditions precedent.*

Valence sued ExxonMobil for violation of a maintenance of interest provision in the parties' joint operating agreement. The court entered judgment awarding \$834,299

in damages and \$166,250 in attorneys' fees after a bench trial. Defendant appealed the attorneys' fees award on the basis that plaintiff did not plead or prove presentment.

The court found that plaintiff had pleaded all conditions precedent to recovery. Because the defendant did not deny that all conditions precedent had been performed, the award of attorneys' fees without proof of presentment was not error.

**Valley Ranch L.P. v. City of Irving**, No. 05-03-014716-CV, 2004 WL 1418470 (Tex. App.—Dallas June 25, 2004, pet. denied).

*Attorneys' fees are not a "remedy" governed by a contract's exclusive remedy provision.*

The City of Irving sought to exercise an option to purchase a 193-acre tract of land owned by Valley Ranch under a previously executed agreement. Valley Ranch refused to convey the land and filed suit seeking a declaration that it had no obligation to do so. The City filed a counterclaim for specific performance and for its attorneys' fees. The trial court granted summary judgment in favor of the City, awarding it specific performance and attorneys' fees.

Valley Ranch appealed, contending that the City's exclusive remedy under the contract was specific performance and that it was, therefore, not entitled to the award of attorneys' fees. The City argued, and the court agreed, that attorneys' fees are an ancillary amount viewed more appropriately as costs because they did not arise directly from the alleged breach. Attorneys' fees are not typically viewed as a "remedy" that a plaintiff elects to make him whole from a breach of contract, and such an award is not precluded under a contract's "exclusive remedy" provision.

## 2. **CAUSATION**

**Citizens National Bank v. Allen Rae Investments, Inc.**, 142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet.).

*To prove damages for loss of credit reputation, a plaintiff must demonstrate that he is subject to additional interest, penalties, or collateral requirements as a result of the alleged injury.*

ARI sought to develop and invest in a hotel franchise in Decatur, Texas. Initially, ARI intended to develop a Motel 6. But when it sought financing from CNB, CNB persuaded ARI to invest and develop in a Bed & Bath franchise, which required a smaller investment. When CNB recommended Bed & Bath to ARI, however, it had not conducted a due diligence review of the company. Moreover, CNB's officers privately believed that Bed & Bath was a risky venture. Despite its internal reservations, CNB encouraged ARI to take out a loan and invest with Bed & Bath. The project eventually fell through and ARI sued CNB for DTPA violations, fraud, negligence, and negligent misrepresentation. The jury awarded actual and punitive damages.

On appeal, the defendant contended that the evidence was legally and factually insufficient to prove that its actions proximately caused all of ARI's damages, including

the franchise fee of \$28,500. The court recognized that the defendant failed to disclose pertinent and relevant information regarding Bed & Bath, including its misgivings regarding the strength of Bed & Bath as a company, before ARI paid the franchise fee. Because ARI testified that if it had known that “CNB and Lawson had lost enthusiasm for the project and were not going to recommend any other clients to Bed & Bath, ARI would have pulled out of the deal before closing,” the court determined that the evidence was sufficient to support a finding that the fraudulent nondisclosures proximately caused all of ARI’s actual damages, including the lost franchise fee.

The jury also awarded \$650,000 to ARI for loss of credit reputation. The appellate court reversed, concluding that ARI failed to present sufficient evidence to support this claim. Specifically, the court held, “to show damage to its credit reputation, a plaintiff must show that its inability to obtain a loan ‘resulted in injury and proof of the amount of that injury.’” The court noted that courts have found actual damages for injury to credit reputation where a party’s loan is actually denied, where a higher interest rate is charged, and/or where a party who could obtain a loan from a bank without collateral prior to a disagreement with a creditor may obtain a loan afterwards only if additional collateral or other conditions are imposed. Since ARI only presented evidence of a single failed attempt to obtain a loan to salvage the project, and failed to present evidence as to the reason for the denial of the loan, the court determined there was less than a scintilla of evidence to support the award for loss of credit reputation.

### 3. **CONTRACTUAL LIMITATIONS**

***Nasrallah v. Ordonez***, No. 2-04-137-CV, 2005 WL 1791985 (Tex. App.—Ft. Worth July 28, 2005, no pet.).

*Clause limiting contractual liability does not affect a plaintiff’s right to a bring breach of implied warranty claim or unconscionability action under the Texas Deceptive Trade Practices Act.*

Chris Nasrallah sold Baldemar Ordonez a vehicle transmission with a 90-day guarantee. The purchase price was \$514.18, and the invoice read, “The limits of liability of all items listed on this invoice shall be limited to & in no event shall exceed the purchase price shown on this invoice.” Ordonez subsequently contracted with a third party to install the new transmission. The third party told Ordonez that the transmission was defective. Ordonez returned the defective transmission and Nasrallah allegedly repaired it. However, Ordonez continued to have problems with the repaired transmission. Ordonez again returned the transmission to Nasrallah.

The parties entered into an agreement for Nasrallah to install the new transmission for a sum of \$250. Nasrallah, however, not only failed to properly install the new transmission, but also requested that Ordonez pay him additional money to complete the work. When Ordonez declined to pay, Nasrallah refused to give Ordonez his vehicle unless the additional sum was paid. Ordonez filed suit alleging various claims under the Defective Trade Practices Act including: 1) breach of express warranty; 2) breach of implied warranty that services be provided in a good and

workmanlike manner; and 3) unconscionably taking advantage of an uneducated consumer. Ordonez prevailed and was awarded a sum exceeding \$4,000. Nasrallah appealed, contending that the trial court erred by awarding damages greater than the contractual limitation.

The court affirmed the trial court's judgment, holding that while a limitation of liability clause is effective for a breach of express warranty claim, it is not effective for other DTPA claims, including breach of implied warranty and unconscionability.

**Valley Ranch L.P. v. City of Irving**, No. 05-03-014716-CV, 2004 WL 1418470 (Tex. App.—Dallas June 25, 2004, pet. denied).

*Attorneys' fees are not a "remedy" governed by a contract's exclusive remedy provision.*

This case is also discussed under Attorneys' Fees above.

The City of Irving sought to exercise an option to purchase a 193-acre tract of land owned by Valley Ranch under a previously executed agreement. Valley Ranch refused to convey the land and filed suit seeking a declaration that it had no obligation to do so. The City filed a counterclaim for specific performance and for its attorneys' fees. The trial court granted summary judgment in favor of the City, awarding it specific performance and attorneys' fees.

Valley Ranch appealed, contending that the City's exclusive remedy under the contract was specific performance and that it was therefore, not entitled to the award of attorneys' fees. The City argued, and the court agreed, that the attorneys' fees are an ancillary amount viewed more appropriately as costs because they did not arise directly from the alleged breach. Attorneys' fees are not typically viewed as a "remedy" that a plaintiff elects to make him whole from a breach of contract, and such an award is not precluded under a contract's "exclusive remedy" provision.

#### **4. DEFAULT JUDGMENTS**

**Argyle Mechanical, Inc. v. Unigus Steel, Inc.**, 156 S.W.3d 685 (Tex. App.—Dallas 2005, no pet.).

*To support a default judgment where damages are unliquidated, the judge entering the default judgment must hear evidence on the damages.*

A subcontractor brought claims against a general contractor and the general contractor's corporate officers. Plaintiff contended that the defendants misapplied certain construction payments held as trust funds. The defendants failed to answer and a default judgment was entered. On appeal, defendants contended that the trial judge erred in failing to conduct a hearing on the unliquidated damages and that there was no evidence to support the award of unliquidated damages.

The court of appeals noted: 1) that plaintiff failed to plead or prove the amount of the trust funds received by the defendants; 2) which trust funds came under the

defendants' control or direction; and 3) the plaintiff did not specifically plead the amount of damages sought.

Citing TEX. R. CIV. P. 243, the court of appeals concluded that because the damages were unliquidated, the trial court was required to hear evidence to support those damages. Accordingly, the court reversed and remanded the issue of damages and attorneys' fees for new trial.

***Fidelity & Guaranty Insurance Co. v. Drewery Construction Co.***, No. 12-04-00084-CV, 2005 WL 468323 (Tex. App.—Tyler Feb. 8, 2005, pet. filed).

*Evidence presented in default judgment hearing was sufficient to support award of damages.*

A subcontractor sued the general contractor and bond insurer for payment on change orders. The defendants failed to answer and a default judgment was entered. Defendants appealed on the basis that the default judgment failed to meet the *Craddock* requirements and on the basis that the evidence was legally and factually insufficient to support the damages awarded.

In the default judgment hearings, the plaintiff submitted damage evidence in writing and through testimony. The evidence consisted of contract documents submitted with the petition, live testimony from plaintiff's accountant and an itemized statement reflecting the balance owed. Further evidence consisted of testimony by plaintiff's president confirming that the amount sought reflected a true and correct balance owed by the bond holder; and counsel for plaintiff testified concerning his reasonable and necessary attorneys' fees.

Defendants contended that the damage claim was unliquidated. The court of appeals stated, "[a] claim is liquidated if the amount of damages may be accurately calculated by the trial court from the factual as opposed to the conclusory, allegations in plaintiff's petition and the instrument in writing." After reviewing the evidence, the court of appeals determined that the damage claim was liquidated and that the evidence submitted was sufficient to sustain the award of damages. The appellate court affirmed the trial court's judgment.

***Hubicki v. Festina***, 156 S.W.3d 897 (Tex. App.—Dallas 2005, pet. filed).

*A default judgment may award exemplary damages.*

Lender sued borrower for breach of contract and fraud relating to borrower's promise to repay a loan upon his death. Festina alleged that it loaned Hubicki a sum exceeding \$2 million, which Hubicki allegedly promised would be repaid from the sale of his home in Acapulco, Mexico and other assets of his estate upon his death. After the loan was made (but before Hubicki's death), Hubicki refused to execute any of the documents necessary to carry out his promises. Festina brought suit, alleging "intentional, willful, and malicious" fraud and sought actual and exemplary damages.

Hubicki failed to answer the suit, and after a hearing in which Festina presented the testimony of a fact witness and its attorney, the trial court entered judgment for \$2,302,000 representing the principal amount of the loan and \$4 million in punitive damages. Hubicki subsequently filed a restricted appeal contending the evidence was legally and factually insufficient to support the award.

The court reviewed the evidence presented below, including the testimony of plaintiff's representative concerning his long experience with defendant, his knowledge of defendant's business practices, and statements made by defendant. The court concluded that the evidence was sufficient to support the trial court's award of actual and punitive damages and affirmed the judgment of the trial court.

## 5. **EXEMPLARY DAMAGES**

***Smith v. Lowe's Home Centers, Inc.***, No. SA-03-CA-118-XR, 2005 WL 1071680 (W.D. Tex. Apr. 13, 2005).

*In a case of first impression, the court concludes (making an **Erie** guess) that only the actual damages on claims for which the jury awards exemplary damages should be considered in calculating Texas' exemplary damage cap.*

Smith claimed retaliation for filing a workers' compensation claim and slander. The jury found for Smith on both claims.

On the workers' compensation claim, the jury awarded \$187,084 in economic damages and \$125,000 in non-economic damages, but no exemplary damages. On the slander claim, the jury awarded \$100,000 in economic damages, \$200,000 in non-economic damages and exemplary damages in the amount of \$4 million.

Smith contended that the economic and non-economic damages for both the retaliation claim and the slander claim should be aggregated for purposes of computing the exemplary damage cap under Section 41.008 of the Texas Civil Practice & Remedies Code. Lowe's asserted that only the economic and non-economic damages awarded for the slander claim, which was the basis for the punitive damage award, should be considered in calculating the cap.

The court reviewed Texas law, concluding that the issue was one of first impression. The court defined the issue as:

Whether a single plaintiff who brings two claims upon which punitive damages can be recovered may include compensatory damages on a claim on which the jury did not award punitive damages in calculating the amount of economic and non-economic damages for the purposes of determining the amount of recoverable punitive damages.<sup>1</sup>

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<sup>1</sup> *Id.* at \*3.

Following the reasoning of the court of appeals in *Quest Communications Int'l. v. AT&T Corp.*<sup>2</sup>, and considering the legislative purpose of establishing a reasonable relationship between the punitive damages award and the harm caused, the court concluded that only the actual damages on claims for which the jury awards punitive damages should be considered in applying Texas' exemplary damage cap. Accordingly, a remittitur of the exemplary damage award to \$400,000 was proper.

The court further concluded that the state pre- and post-judgment interest rate of 5.5% (April 2005) applied, rather than the lower federal post-judgment interest rate.

***SAS & Associates, Inc. v. Home Marketing Servicing, Inc.***, No. 05-04-01297-CV, 2005 WL 1594402 (Tex. App.—Dallas July 6, 2005, no pet.).

*A remittitur of exemplary damages to three times the amount of damages from sixteen times was constitutionally permissible.*

SAS was Home Marketing's landlord under a commercial office lease. A dispute arose based upon alleged common-area maintenance overcharges. Home Marketing also alleged that SAS fraudulently induced SAS into signing the lease because SAS had no intention of performing its obligations under the lease at the time the parties entered the contract. At trial, a jury awarded Home Marketing damages of \$4,653 for breach of contract and \$7,574 for fraud. The jury also awarded punitive damages of \$200,000 because SAS represented that the leased premises was "a great space" when it had many known maintenance problems. The trial judge suggested a remittitur to \$22,722, an award equal to three times the amount of damages awarded for fraud. Two of the many issues on appeal were whether a punitive award of more than sixteen-times the compensatory award violated SAS's substantive due process rights, and whether the remittitur was appropriate.

Citing the United States Supreme Court decision of *State Farm Mut. Auto. Ins. Co. v. Campbell*,<sup>3</sup> the appellate court noted that awards exceeding a single-digit ratio between punitive and compensatory damages will generally not satisfy the due process clause of the United States Constitution. Sanctions of double, triple, or even quadruple the value of compensatory damages should be enough to deter and punish. The award of sixteen-times the compensatory damages was manifestly unjust. Therefore, the court held that the trial court did not err in ordering a remittitur.

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<sup>2</sup> 114 S.W.3d 15 (Tex. App. – Austin 2003, pet. filed).

<sup>3</sup> 538 U.S. 408 (2003).

**Bunton v. Bentley**, No. 12-97-00376-CV, 2005 WL 673938 (Tex. App.—Tyler Mar. 23, 2005, pet. filed).

*Exemplary damage award of \$1 million in defamation suit by judge against television talk show host was reasonable.*

A county district judge brought a defamation action against a television talk show host and co-host for comments made over a ten-year period. The host accused the judge of being “corrupt” and a “criminal” who “oughta be in jail.” A jury awarded \$150,000 for injury to the character and reputation of the judge, \$7 million for past mental anguish, and \$1 million in exemplary damages. On remittitur, the trial judge reduced the past mental anguish to \$150,000. The host appealed the award of exemplary damages as excessive.

The court noted that the United States Supreme Court in *Campbell* requires courts reviewing exemplary damage awards to consider three factors: 1) the degree of reprehensibility of the misconduct; 2) the disparity between the actual harm and the damages awarded; and 3) the difference between the award by the jury and the civil penalties imposed in similar circumstances.<sup>4</sup> The court evaluated the punitive award under these factors. It found: 1) the host’s acts of defamation were sufficiently reprehensible to warrant punitive damages; 2) the ratio of 3.33 to 1 between punitive and compensatory damages was acceptable; and 3) the \$1 million punitive damages award was in line with other defamation cases. Thus, the award of exemplary damages was reasonable.

**Community Initiatives, Inc. v. Chase Bank of Texas**, 153 S.W.3d 270 (Tex. App.—El Paso 2004, no pet.).

*Summary judgment as to exemplary damages is appropriate when a court also renders summary judgment on all associated tort claims.*

A public interest group striving to promote voter participation sought community help through a chamber of commerce fund-raising effort. Initially, area banks agreed to help with the effort. Soon after discovering the interest group’s affiliation with a controversial organization researching public policy issues, however, the banks declined to lend assistance and advised the chamber of commerce to do the same. The public interest group sued the banks for tortious interference with prospective business relations, business disparagement, and civil conspiracy. The group also sought exemplary damages.

The trial court granted the banks’ no-evidence summary judgment motion on all claims. The group appealed the trial court’s findings, including its finding that the group was not entitled exemplary damages. Concerning the exemplary damages, the court noted that the recovery of exemplary damages requires a finding of an independent tort resulting in actual damages. After finding that the trial court properly rendered summary

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<sup>4</sup> *Id.* at 418 (2003).

judgment on all associated tort claims, the court upheld summary judgment on the exemplary damage claim.

**City of San Antonio v. Pollock**, 155 S.W.3d 322 (Tex. App.—San Antonio 2004, pet. filed).

*A property owner is not entitled to recover exemplary damages in an inverse condemnation case when property is taken or damaged for public use.*

A young couple purchased and moved into a home abutting a landfill owned and operated by the City of San Antonio. One year later, the couple discovered they were expecting a child. Four years after the birth of their daughter, the daughter was diagnosed with acute lymphocytic leukemia. The couple contended that the City proximately caused the leukemia, alleging that it was caused by benzene leaking from the landfill into their home and backyard. They sued the City for negligence, nuisance, and trespass. The couple also sought exemplary damages. The jury awarded the family \$7 million for personal injury to the child, over \$6 million for past and future medical care, \$10,000 for loss of use and enjoyment of property, \$19,000 for loss of market value, and \$10 million in exemplary damages on the nuisance claims. The City appealed.

The appellate court held that the couple was not entitled to exemplary damages. The court noted that, as a matter of law, a property owner is not entitled to recover punitive damages in a case brought under Article 1, section 17 of the Texas Constitution for the taking or damaging of property for public use. The court noted that while some courts have upheld exemplary damage awards against a municipality for gross negligence; one may not recover such damages for inverse condemnation.

**Shear Cuts, Inc. v. Littlejohn**, 141 S.W.3d 264 (Tex. App.—Ft. Worth 2004, no pet.).

*To measure whether punitive damages are constitutionally excessive, courts look to factors set forth by the U.S. Supreme Court in **BMW of North America v. Gore**.*

Kay Littlejohn interviewed for a job as a cosmetologist at Shear Cuts. Littlejohn believed she had been hired at her initial interview, while Shear Cuts claimed that Littlejohn was still under consideration for the position. The day after the interview, Littlejohn arrived at Shear Cuts and began setting up her work station. Shear Cuts' regional manager, however, informed Littlejohn that she had not been hired, and asked Littlejohn to leave Shear Cut's premises. Littlejohn filed a complaint with the EEOC and brought a discrimination suit against Shear Cuts. The jury found in Littlejohn's favor and awarded \$40,911 in actual damages plus an additional \$50,000 in punitive damages.

Shear Cuts appealed the verdict and contested the legal sufficiency of the punitive damages award. The appellate court applied the three guideposts that the U.S. Supreme Court established in *BMW of North America, Inc. v. Gore*,<sup>5</sup> to determine

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<sup>5</sup> 538 U.S. 408 (2003)

whether punitive damages were proper: “1) the degree of reprehensibility of the misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases.”

The court recognized that the most important factor regarding whether punitive damages are reasonable is the degree of reprehensibility of the conduct. To measure reprehensibility, the court considered the following five factors: “1) whether the harm caused was physical as opposed to economic; 2) whether conduct indicates an indifference to or a reckless disregard for the health or safety of others; 3) whether the target of the conduct had financial vulnerability; 4) whether the conduct involved repeated actions or was an isolated incident; and 5) whether the harm was the result of intentional malice, trickery, deceit, or mere accident.”

Based on these factors, the court concluded that there was insufficient evidence to support the punitive damage award. Littlejohn was not physically injured, there was no evidence that Shear Cuts’ misconduct constituted a reckless disregard for the safety of others, and there was no evidence that Littlejohn was financially vulnerable. The court further found no evidence that the incident was anything other than an isolated event. Thus, because Littlejohn failed to prove the relevant factors by clear and convincing evidence, the court reversed the award of punitive damages.

## 6. EXPERT WITNESSES

***El Aguila Food Products, Inc. v. Gruma Corp.***, 131 Fed. Appx. 450 (5th Cir. 2005).

*To support a claim for lost profits based on a particular trade association’s growth, an expert must demonstrate reasonable similarity between the plaintiff’s business and the trade association.*

Plaintiffs filed an antitrust suit against Gruma Corp., alleging that Gruma used marketing agreements with retailers providing price reductions and incentives to obtain and manage shelf space at retail establishments. At trial, the court sustained Gruma’s *Daubert* objection to the plaintiffs’ damages and causation experts.

On appeal, the court reviewed the plaintiffs’ damages expert’s methodology. The expert compared plaintiffs’ sales history with sales data and growth projections from trade association studies, but made no effort to demonstrate the reasonable similarity of the plaintiffs’ firms with the trade association business used as the benchmark. The court determined that the expert generally characterized all variances between the trade association earnings data and the plaintiffs’ earnings as lost profits due to anti-competitive practices, without making allowances for losses caused by any other factors. Accordingly, the appellate court upheld the trial court’s exclusion of the expert.

**City of Keller v. Wilson**, 168 S.W.3d 802 (Tex. 2005).

*Expert evidence may be rendered “no evidence” when contrary evidence shows it to be incompetent.*

This case involved an action by landowners against a City to recover damages for inverse condemnation and for violations of the Texas Water Code. In the course of the opinion, the Texas Supreme Court explains in great detail the appropriate scope of a “no evidence” review.

The opinion itself does not conduct a specific “no evidence” review of the damages evidence presented in this case. The significance of the case for purposes of this paper, however, is its discussion of “competency evidence.”

In *Keller*, the court reinforces its holdings in *Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.*<sup>6</sup> and *Kerr-McGee Corp. v. Helton*<sup>7</sup> that when contrary evidence shows certain evidence to be “incompetent,” then that “incompetent” evidence is legally insufficient. Thus, an expert’s testimony may be rendered “no evidence” if the opposing party introduces contrary evidence showing that a witness is unqualified to give an opinion, that an opinion is based upon unfounded factual assumptions, or that an expert’s opinions are based solely on the *ipse dixit* of the expert. In *Kerr-McGee*, in particular, the court concluded that there was “too great an analytical gap” between the expert’s opinion and the existing data to support the damage expert’s testimony.<sup>8</sup> Accordingly, both competence and reliability must be considered in evaluating expert testimony.

**SAS & Assoc, Inc. v. Home Marketing Servicing, Inc.**, No. 05-04-01297-CV, 2005 WL 1594402 (Tex. App.—Dallas July 6, 2005, no pet.).

*Mere errors in accounting treatment or calculations did not create an impermissible “analytical gap” between the expert’s data and conclusions.*

This case is also discussed under Exemplary Damages, above.

An additional point addressed by the court was appellant’s contention that the testimony of plaintiff’s damage expert was not reliable and not supported by any evidence. SAS contended that the expert’s testimony was not supported by generally accepted accounting principles. SAS also criticized the specific calculations of plaintiff’s expert and gave his own opinions as to whether the opposing expert’s analysis was correct or incorrect.

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<sup>6</sup> 136 S.W.3d 277 (Tex. 2004).

<sup>7</sup> 133 S.W.3d 245 (Tex. 2004).

<sup>8</sup> *Kerr-McGee*, 133 S.W.3d at 257-258.

The court of appeals first noted that defendant did not point to any particular accounting principle which plaintiffs' expert had ignored. The court further concluded that the fact that one expert contended that another expert had made errors in accounting treatment or his calculations did not create and impermissible "analytical gap" between the data and the expert's conclusions. The court of appeals concluded that these alleged errors were, instead, a proper subject for cross-examination.

***Sunbridge Healthcare Corp. v. Penny***, 160 S.W.3d 230 (Tex. App.—Texarkana 2005, no pet.).

*Expert testimony is not a prerequisite to the award of damages for disfigurement*

Plaintiff's estate brought an action against a nursing home and a nursing operator following the resident's death as a result of an accident that occurred when the resident was left unattended in her wheelchair.

Between November 2000 and February 12, 2001, the decedent fell 14 times at the nursing home. On March 27, 2001, she and another resident were taken to a physician by a staff member and were placed in wheelchairs. The plaintiff's unattended wheelchair began rolling down the sidewalk. It subsequently veered off the sidewalk and she was thrown onto the concrete parking lot suffering serious injuries. Four days later, she died from the injuries.

The jury returned a verdict in favor of the plaintiff's estate, including an award for disfigurement damages. On appeal, defendants challenged the jury's award, in part, on the basis that there was no evidence of disfigurement prior to the March 27, 2001 fall.

The court of appeals noted that, while no evidence was presented of disfigurement resulting from pre-accident falls, the record did contain sufficient evidence of post-accident disfigurement. The court of appeals rejected the contention that expert testimony was a prerequisite to the award of damages for disfigurement. Based upon the four-day duration of the disfigurement, however, the court suggested a remittitur of the disfigurement damages in the amount of \$396,934.

***Pilgrim's Pride Corp. v. Smoak***, 134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied).

*An expert can present evidence of lost earning capacity based on what the plaintiff **could** have earned rather than what the plaintiff **actually** earned before an injury.*

William Smoak was injured in an automobile accident when he was struck by a truck owned by Pilgrim's Pride. At trial, Smoak presented expert testimony to support his loss of earning capacity. The jury awarded total damages of \$632,761.49. Pilgrim's Pride appealed, contending the expert's testimony should have been excluded.

Smoak's economic expert testified to Smoak's lost earning capacity by comparing what Smoak would be able to earn given the injuries sustained, with what he could have earned had he not been injured. Pilgrim's Pride argued that the expert's

testimony amounted to “no evidence,” requiring the appellate court to evaluate the expert’s methodology.

Noting that “proof of loss of earning capacity is always uncertain and must be left largely to the discretion of the jury,” the court found that the expert’s testimony and methodology were reliable. Though the expert relied on Smoak’s ability to earn money as a welder, despite the fact that Smoak never worked a continuous job welding in the year preceding the injury, the court noted that “loss of earning capacity is not measured by what a person actually earns before injury, but what the worker’s *capacity* to earn a livelihood actually was, even if he or she had never worked in that capacity in the past.”

## 7. JURY CHARGE

***Sunbridge Healthcare Corp. v. Penny***, 160 S.W.3d 230 (Tex. App.—Texarkana 2005, no pet.).

*Broad form damage question requesting an award for both physical pain and mental anguish is proper.*

This case is also discussed under Expert Witnesses, above.

Mrs. Penny was a resident at Sunbridge nursing home. Between November 2000 and February 2001, she fell 14 times at the home. On March 27, 2001, Mrs. Penny was severely injured when she was taken to visit a physician. Specifically, Mrs. Penny was left unattended in a wheelchair that rolled uncontrollably down a slope sidewalk and overturned. Mrs. Penny died four days later from the serious injuries she received due to the accident.

Her family sued Sunbridge and sought actual and exemplary damages, including damages for pain and suffering and mental anguish. The court submitted a broad form jury question which asked the jury to “award an amount for physical pain and mental anguish.” The jury awarded \$1,000,000.

On appeal, Sunbridge argued that the evidence was legally and factually insufficient evidence to support the jury’s award. The court noted that damages for physical pain and mental injuries are separate and distinct; but the jury charge requested damages for both in a single broad-form question. “When a damage issue is submitted in broad form, ascertaining the amount the jury awarded for each element of damages is difficult, if not impossible.” The court concluded that to successfully challenge a jury award based on a broad form jury question, Sunbridge must “address each element and show the evidence is insufficient to address the entire award.”

The facts in the case revealed that Mrs. Penny actually experienced conscious pain. The evidence included Mrs. Penny’s moans, and other verbal and physical expressions of pain. Therefore, the court found there was sufficient evidence to meet the burden to prove physical pain. The court also found evidence to support the mental anguish claim. Mrs. Penny’s “constant moaning and agitation during her final days indicate she suffered mental anguish.” Mrs. Penny was also conscious of her

impending death, another factor that may be considered in evaluating mental suffering. Thus, the court found sufficient evidence to support both the pain and suffering and the mental anguish claims and upheld the jury's award for \$1,000,000 based on the broad-form jury question.

## 8. LIQUIDATED DAMAGES

***Butterfly Kisses Four, Inc. v. Scheffey***, No. 01-02-01211-CV, 2005 WL 568063 (Tex. App.—Houston [1st Dist.] Mar. 10, 2005, no pet.).

*Court can award a residential home seller damages beyond the liquidated damages if the buyer neglects to raise contractual limitations at trial.*

A buyer and a seller entered into a residential property sales contract. The buyer provided an earnest money payment of \$25,000 toward the \$2.65 million purchase price. The sales contract allowed the seller to retain all earnest monies as liquidated damages in the event the buyer defaulted on the contract. At the date of closing, the buyer was unable to close the transaction, and asked for an extension. The buyer also tendered an additional \$425,000 in earnest money and agreed to lease the home until the sale closed. Due to numerous disputes regarding the condition of the home and the buyer's inability to make the scheduled lease payments, the parties did not close on the sale of the home. The buyer, however, had already recorded a warranty deed on the home. The seller terminated the lease and a lawsuit ensued over the title to the home and rights to the earnest money.

The trial court awarded title to the seller, nullified the buyer's warranty deed, and awarded the seller damages totaling more than \$827,000, in addition to the \$450,000 in earnest money that the seller retained. The buyer raised the liquidated damages limitation in the sales contract for the first time on appeal. The appeals court held that the seller was entitled to the entire award because the buyer had waived its right to rely on liquidated provision of the contract. The buyer failed to raise the issue at trial, and also failed to seek a jury instruction on whether retention of the \$450,000 precluded other damages.

***Southern Union Co. v. CSG Systems, Inc.***, No. 03-04-00172-CV, 2005 WL 171349 (Tex. App.—Austin Jan. 27, 2005, no pet.).

*As a matter of law, it is not unconscionable per se to award liquidated damages in an amount that is twice the amount of the actual damages.*

Southern Union entertained bids to outsource the printing and mailing of its billing operations. It selected CSG's bid from several candidates and entered into a 5-year contract for services. The contract contained a "discontinuance fee" provision, obligating Southern Union to pay a specified amount of damages in the event that it terminated the agreement before the 5-year expiration of the contract. Both parties stipulated that the provision was a liquidated damages provision.

Within four months of signing the contract, Southern Union caused work to cease on the project, and filed suit for breach of contract. CSG counterclaimed. A jury found both Southern Union and CSG in breach of contract, but found that CSG's breach was excused. The jury awarded CSG \$2.1 million under the discontinuance fee provision, despite the fact that the jury found lost profits of less than half the liquidated amount. Southern Union appealed, arguing that the award was unreasonable and disproportionate to the actual damages. The court upheld the liquidated damages award, finding no cases holding that a two-to-one ratio of liquidated-to-actual damages is unreasonable *per se*. To the contrary, the court recognized cases upholding 3-to-1. Accordingly, the court held that it is not *per se* unreasonable to award liquidated damages in an amount that is twice the amount of the actual damages.

## 9. **MEASURE OF DAMAGES – LOST PROFITS**

***El Aguila Food Products, Inc. v. Gruma Corp.***, 131 Fed. Appx. 450 (5th Cir. 2005).

*To support a claim for lost profits based on a particular trade association's growth, an expert must demonstrate reasonable similarity between the plaintiff's business and the trade association.*

This case is also discussed under Expert Witnesses above.

Plaintiffs filed an antitrust suit against Gruma Corp., alleging that Gruma used marketing agreements with retailers through price reductions and incentives to obtain and manage shelf space at retail establishments. At trial, the court sustained Gruma's *Daubert* objection to the plaintiffs' damages and causation experts.

On appeal, the court reviewed the plaintiffs' damages expert's methodology. The expert compared plaintiffs' sales history with sales data and growth projections from trade association studies, but made no effort to demonstrate the reasonable similarity of the plaintiffs' firms with the trade association business used as the benchmark. The court determined that the expert generally characterized all variances between the trade association earnings data and the plaintiffs' earnings as lost profits due to anticompetitive practices, without making allowances for losses caused by any other factors. Accordingly, the appellate court upheld the trial court's exclusion of the expert.

***Springs Window Fashions Division, Inc. v. The Blind Maker, Inc.***, No. 03-03-00376-CV, 2005 WL 1787440 (Tex. App.—Austin July 29, 2005, no pet.).

*The proper measure of damages for lost profits is lost net profits.*

Plaintiff The Blind Maker sued Defendant Springs Window Fashions for fraud and sought lost profits as consequential damages. Blind Maker, a blind fabricator that used Spring Window's blind products, claimed that Springs committed fraudulent acts to further its plan to take over its distribution fabricators, including Blind Maker, and move the fabrication process to Mexico. To fulfill this plan, Springs instigated a number of incentive programs for the fabricators, encouraging fabricators to overextend their

inventory debt and share customer information. The jury awarded Blind Maker \$5,157,240 in lost profits and \$2,090,000 in exemplary damages.

Springs challenged the legal and factual sufficiency of the jury's actual damage award. The court noted that Blind Maker sought *consequential lost profits* as opposed to direct damages. "Consequential damages result naturally but not necessarily from a defendant's wrongful acts; they must be a foreseeable result of the wrong and must be directly traceable to it." Thus, Blind Maker sought damages for lost business opportunities because of Springs Window's fraud.

In its analysis, the court noted that "lost profits are damages for the loss of *net* income to a business, and, broadly speaking, reflects income from lost business activity less expenses that would have been attributable to that activity." The court further noted that "lost profit calculations are no evidence of lost profits when [the court's] examination reveals them to be predicated on unfounded, speculative assumptions."

To support its claim, Blind Maker provided evidence of its financial performance "before and after" the fraudulent activity. The court found that this general approach to measuring damages is supported under Texas law. However, the company only showed a net annual profit of \$37,000 from 1991 to 1999 (the date of the fraud). Blind Maker also noted that it was closely held corporation, which paid its salaries as much as possible to reduce company income for purposes of income tax. The court recognized that a reduction in compensation is also a valid measure of lost profits and upheld Blind Maker's expert's calculation of \$516,446 in lost profits attributable to lost executive salaries and an additional \$100,064 in lost overall profits.

After analyzing further itemized damage evidence submitted by Blind Maker's employees, the court determined that Blind Maker could only support lost net profits of \$1,270,952, and suggested a remittitur of \$3,279,778.

***KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. KG v. Davis***, No. 01-02-00344-CV, 2005 WL 568056 (Tex. App.—Houston [1st Dist.] Mar. 10, 2005, no pet.).

*Though corporate valuation is speculative, courts will permit an expert to forecast a company's expected profits to support a damage claim.*

KMGI hired plaintiff Robert Davis to manage its newly formed company, Inliner Advantage. The employment contract granted Davis a membership interest in the new company and as incentive compensation. When Inliner Advantage lost money during its first year, KMGI entered negotiations to transfer its contracts to another company and attempted to amend Davis' employment contract to exclude the incentives. Davis left the company and never received his membership interest or incentive compensation. He subsequently sued KMGI for breach of contract and negligent misrepresentation. The jury found in favor of Davis.

On appeal, KMGI challenged the admissibility of the testimony of Davis' economist-expert, who testified as to the present and future value of Davis' employment contract. The expert used a top-down approach to corporate valuation. The court

recognized that “corporate valuation necessarily entails a fundamental degree of speculation,” but noted that this “does not mean that the underlying foundation of the methodology is unreliable.” Although the expert was forced to make assumptions about Inline Advantage, he also relied on the actual business history and its successor company’s business history. The court ultimately concluded that the expert’s analysis, though partially based on speculation, was admissible and upheld the jury award.

#### **10. MEASURE OF DAMAGES – PERMANENT INJURY TO LAND**

***Mieth v. Ranchquest, Inc.***, No. 01-02-00461-CV, 2005 WL 615594 (Tex. App.—Houston [1st Dist.] Mar. 17, 2005, no pet.).

*Unaccepted offer to purchase property at issue was no evidence of market value of property.*

Property owners brought a negligence action against oil and gas lessee and others alleging damages caused by well operations. The jury found that the property’s value was not diminished. The plaintiffs appealed.

On appeal, appellees contended that an unaccepted offer to purchase the property supported the jury’s finding of no diminution in the fair market value of the land. The court concluded, however, that unaccepted offers to purchase property are no evidence of market value.

Absent any evidence to support the jury’s finding of “no diminution,” the court examined whether the appellant had established the amount of diminution as a matter of law. The court reviewed conflicting expert testimony offered by appellants and appellees, and noted that appellants failed to object to the appellees’ expert testimony at trial. The court concluded that the evidence regarding the amount of diminution in value was conflicting and that the appellants had not established the diminution in the fair market value of their land as a matter of law. The court of appeals affirmed the judgment of the trial court.

#### **11. MEASURE OF DAMAGES – CARMACK AMENDMENT**

***National Hispanic Circus, Inc. v. Rex Trucking, Inc.***, 414 F.3d 546 (5th Cir. 2005).

*This case presents a circumstance in which awarding market value diminution or rental price of substitute equipment would not fairly compensate the plaintiff for its actual loss.*

National Hispanic Circus hired Rex Trucking to transport its circus equipment between Texas and Chicago. One of the trucks, carrying half of the Circus’ bleachers, was lost en route. The Circus was forced to rent bleachers, which provided 600-700 fewer seats, and eventually ordered replacement custom bleachers from Italy to fit its tents. Several months later, Rex found the missing bleachers in Arkansas.

The Circus sought \$148,500 for the cost to purchase and ship replacement bleachers, the cost to rent temporary bleachers, and lost ticket sales. The district court

dismissed the claim for the rental value of the bleachers and lost ticket sales, but awarded damages for the replacement bleachers.

On appeal, Rex claimed the court erred in awarding the replacement cost of bleachers since the missing bleachers were eventually recovered. The Fifth Circuit court noted that ordinarily, the measure of damages under the Carmack Amendment is the difference between the market value of the goods at the time of delivery and at the time when they should have been delivered. The court noted, however, that replacement cost can also be a valid measure of Carmack Amendment damages. Specifically, where awarding “market value” diminution or rental price of substitute equipment would not fairly compensate the plaintiff for its actual loss, the plaintiff is entitled to replacement cost. Accordingly, the judgment was affirmed.

## 12. **PRE- AND POST-JUDGMENT INTEREST**

***Battaglia v. Alexander***, No. 02-0701, 2005 WL 1252326 (Tex. May 27, 2005).

*Under section 16.02 of former article 4590i, pre-judgment interest accrues only on the portion of the judgment applicable to past damages and settlement credits must first be applied to past damages.*

Mark Alexander’s widow and parents brought a wrongful death and negligence action against two professional associations, a hospital, doctors, and a nurse after Alexander died during an outpatient arthroscopic shoulder surgery. The hospital and nurse settled before trial for \$1,875,000. The jury found the associations negligent and awarded \$3,657,223.05 in damages (including \$1,497,113.05 in past damages). The trial court applied a dollar-for-dollar settlement credit of \$1,875,000 and reduced the damage award to \$1,782,113.50, plus pre-judgment interest of \$367,498.05. The appellate court affirmed.

The Texas Supreme Court reversed the portion of the judgment pertaining to pre-judgment interest.

The court recognized that accrual of pre-judgment interest in health care liability suits and the relation to settlement credits is not specifically addressed by statute. The court then analyzed the purpose of pre-judgment interest as: “compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.” The court specifically noted that pre-judgment interest is *not* a penalty or fine for the defendant, nor is it intended to be a windfall to the plaintiff.

The court reasoned that “in order for interest to actually compensate for the lost time value of money...the timing of settlement payments must be taken into account.” The court determined that the settlement payment “should be credited first to accrued pre-judgment interest as of the date the settlement payment was made, then to the ‘principal,’ thereby reducing or perhaps eliminating pre-judgment interest from that point in time forward.”

The court then determined that the entire settlement credit should be applied to past damages before calculating pre-judgment interest. Because past damages were incurred first, settlement credits should be applied to past damages first, then to future damages. Consequently, “there is no need for an allocation of settlement credits because settlements are paid before judgment. The claimant receives all its compensation from a settlement agreement before it incurs any future damages.”

Under this analysis, the court determined that all past damages (\$1,497,113.05) were compensated by the settlement credit of \$1,875,000. Therefore, the plaintiffs were not entitled to pre-judgment interest.

***Bic Pen Corp. v. Carter***, No. 13-03-560-CV, 2005 WL 1982460 (Tex. App.—Corpus Christi Aug. 18, 2005, pet. filed).

*The Corpus Christi court of appeals determined that House Bill 2415 did **not** take effect until September 1, 2003, 90 days after the Regular Legislative Session ended.*

Carter brought a products liability action against Bic Pen Corp., the manufacturer of a child-resistant disposable lighter. Carter’s daughter suffered severe burns when Carter’s five-year old son accidentally set fire to her daughter’s dress. The jury found for Carter and awarded \$3,000,000 in actual damages and \$2,000,000 in exemplary damages.

Bic argued that the trial court awarded excessive interest because the provisions of House Bills 4 and 2415 govern and reduce the applicable interest rate. The court recognized that House Bill 4 did not apply because it did not take effect until September 1, 2003, and the judgment was signed on August 8, 2005.

The court then analyzed the effective date of House Bill 2415. It recognized that House Bill 2415 was signed by the governor on June 20, 2003, but that it was modified by Senate Concurrent Resolution 66. Resolution 66 was not passed by 2/3 majority of both houses, which is necessary to enable laws to take immediate effect.

The court reviewed Article III, Section 39 of the Texas Constitution which provides that a law passed by the Legislature is not effective until 90 days after the session adjourns unless a 2/3 majority from each house votes otherwise. Because the requirements of Article III, Section 39 were not met, the court determined that House Bill 2415 was not effective until September 1, 2003. Thus, Carter was entitled to 10% pre- and post-judgment interest.

**Hayhoe v. Henegar**, No. 11-03-00316-CV, 2005 WL 1473979 (Tex. App.—Eastland June 23, 2005, no pet.).

*Contrary to the **Bic Pen** court, the Eastland court of appeals determined that because House Bill 2415 took effect on June 20, 2003, pre- and post-judgment interest is calculated at 5% for cases in which final judgment was rendered after June 20, 2003.*

On May 31, 1999, Hayhoe collided her car with Henegar, causing Henegar back injuries. At trial, Henegar was awarded \$86,491.91 in damages. The court also awarded 10% pre- and post-judgment interest. The trial court entered judgment in favor of Henegar on July 24, 2003.

On appeal, Hayhoe claimed the judgment should be reformed to reflect a 5% pre- and post-judgment interest rate. The court of appeals agreed. Noting that “during the regular 2003 legislative session, the legislature passed House Bills 4 and 2415, both of which contained nearly identical amendments to the Finance Code,” the court recognized that the amendment reduced the post-judgment interest rate from 10% to 5%. The court noted that the bills applied to cases in which the final judgment was “signed or subject to appeal on or after” the Acts’ effective dates.

House Bill 4’s effective date was September 1, 2003. Therefore, its amendment did not apply to the Henegar judgment. But House Bill 2415’s effective date was June 20, 2003. Therefore, the Henegar judgment was subject to the lower, 5% post-judgment percentage rate.

### 13. PROPORTIONATE RESPONSIBILITY

**F.F.P. Operating Partners, L.P. v. Dueñez**, No. 02-0381, 2004 WL 1966008 (Tex. Sept. 3, 2004).

*The Proportionate Responsibility Act applies to all claims under the Dram Shop Act.*

An intoxicated driver drove his truck to a convenience store and purchased a twelve-pack of beer. He immediately began consuming the beer while driving. While driving and drinking the newly purchased beer, he collided with a family of five, less than a mile from the convenience store. The family brought suit against the intoxicated driver, his employer, the convenience store clerk, and the convenience store. The family sued the convenience store under the Dram Shop Act, and later non-suited the other defendants. A jury found that the beer was sold to an obviously intoxicated individual presenting a clear danger to himself and others, and returned a \$35 million verdict. The convenience store’s requested jury question regarding the comparative negligence of third parties was refused.

The convenience store appealed the trial court’s refusal to allow apportionment of the damages between the convenience store and the other responsible third parties, most notably the intoxicated driver. The court of appeals affirmed, holding that the convenience store was vicariously liable for the damages caused by the intoxicated driver. The court of appeals further held that proportionate responsibility only applied to

first-party Dram Shop suits, and not to third-party suits brought under the Dram Shop Act. The Texas Supreme Court reversed.

The court held that if the jury determines that a provider of alcohol has violated the Dram Shop Act, and its patron's intoxication caused harm to a third party, responsibility must be apportioned between the provider and the intoxicated patron. Damages may also be apportioned to the injured third party to the extent there is evidence of contributory negligence. The provider is liable, however, for the full amount of the judgment against the provider and the patron. The provider may then recover from the patron based on the percentages of responsibility that the jury assessed between them.

***Southwest Bank v. Information Support Concepts, Inc.***, 149 S.W.3d 104 (Tex. 2004).

*The proportionate responsibility statute does not apply to a conversion claim under the Texas Business and Commerce Code.*

An Information Support Concepts (ISC) employee stole more than 180 checks totaling \$300,000 during an eighteen-month period. The checks did not have an ISC endorsement, but the employee's bank accepted the deposits and secured payment on the checks. ISC subsequently brought a conversion claim against the employee's bank under the Texas Business and Commerce Code (UCC). The bank sought to join the employee, her husband, and ISC's CFO as responsible third parties under the Texas Civil Practices and Remedies Code (CPRC). The trial court denied the request to join the parties, and granted ISC summary judgment against the bank.

The bank appealed, contending that the trial court erred in refusing to submit the joinder of the employee as a responsible third party. The court of appeals affirmed, noting that under the UCC, it was the bank's sole responsibility to verify that the checks had been properly endorsed and therefore it could not apportion blame. Thus, the UCC and the CPRC provisions were in conflict. When two statutes are in conflict, the courts must give effect to the specific statute over general. The court of appeals held that the UCC was the specific statute, while the CPRC was the general. Therefore, the proportionate responsibility statute could not apply to a UCC conversion claim.

The Texas Supreme Court affirmed, noting that the proportionate responsibility statute applies to any cause of action based **in tort**. ISC's claim against the bank was based on conversion under the UCC, not in tort. Moreover, application of the CPRC statute would ignore the UCC provision entirely, as there is no possible reconciliation between the two statutes. The court held that when the legislature enacted the proportionate responsibility statute, it did not intend to upset the UCC's "carefully balanced liability provisions."

**Memphis, Inc. v. Coggsell**, No. 05-02-01876, 2005 WL 1774973 (Tex. App.—Dallas July 28, 2005, no pet.).

*It is reversible error if the trial court fails to include all parties in the proportionate responsibility jury question.*

Coggsell was a patron at a bar owned by Memphis. Another patron, appearing visibly drunk, initiated a fight with Coggsell. As a result of the altercation, Coggsell suffered multiple injuries. He sued the drunken patron and Memphis for assault and battery, negligence, intentional infliction of emotional distress, and premises liability. At trial, Memphis requested a comparative negligence question regarding the proportionate responsibility of Coggsell, the drunken patron, and Memphis. The court submitted a negligence question that included all parties, but failed to include the drunken patron in the proportionate responsibility question. The jury found Memphis 100% responsible for Coggsell's injuries, despite finding that the drunken patron also proximately caused Coggsell's injuries.

Memphis appealed, arguing that the trial court erred in not including the drunken patron in the percentage responsibility question submitted to the jury. The court of appeals reversed, holding that it was reversible error to fail to include all three parties in the proportionate responsibility question.

**Bedford v. Moore**, 166 S.W.3d 454 (Tex. App.—Ft. Worth 2005, no pet.).

*In a case involving negligent entrustment and/or hiring, it is proper to include both the employee and the employer in the initial liability question and in the proportionate responsibility question.*

Bedford was killed following an accident involving Moore, who was driving a truck leased by Western and owned by Aldrich. After the accident Moore tested positive for drug use. Moore had previously been involved in two accidents and had received multiple traffic citations. Western took no steps to check Moore's driving record at the time she was hired. Bedford's estate filed suit against Moore, Western, and Aldrich alleging negligent hiring, negligent entrustment, and vicarious liability. At trial, the court submitted a jury question listing only Bedford and Moore. The jury found Bedford 60% responsible for the injuries and rendered a take-nothing verdict.

Bedford's estate appealed, contending that the trial court erred by failing to submit a negligence question that included all parties, *i.e.* Bedford, Moore, Western, and Aldrich. Bedford argued that Texas law requires the court to place all named parties in the negligence and proportionate responsibility questions. Western and Aldrich argued, however, that it was not necessary to submit their liability to the jury, because their liability would be derivative of Moore's.

The court holds that there are three distinct types of cases under which this analysis is relevant. First is the purely vicarious liability situation, where the employer's negligence is not submitted because the employer and the employee are one in the same. Second is the situation of concurrent tortfeasors, where distinct acts by both

parties proximately cause damage to the plaintiff. Under this situation, both tortfeasors would be submitted to the jury for the determination of liability and percentage responsibility. Third is the combination of those two situations. The employer may be vicariously liable for the employee's acts, but may also be concurrently liable for negligent hiring. The court concluded that in such situations it is proper to submit both the employer and the employee in the initial liability question and in the proportionate responsibility question. But it is harmless error for the trial court to omit the employer from such questions.

#### 14. **SPECIAL DAMAGES**

***Pleasant Glade Assembly of God v. Schubert***, No. 2-02-264-CV, 2005 WL 2248098 (Tex. App.—Ft. Worth Sept. 15, 2005, no pet. h.).

*Lost earnings are not foreseeable damages for assault and battery and false imprisonment when former church member is physically restrained after she collapses at a church function.*

Schubert, a seventeen-year old member of the Pleasant Glade Assembly of God Church, was participating at a church function when she collapsed. After the collapse, she began clenching her fists, gritting her teeth, foaming at the mouth, crying, yelling, kicking, and hallucinating. Several church members found it necessary to physically restrain Schubert. Four days later a similar event occurred at another church function. The parties disagreed over the amount of force used to restrain Schubert and whether the restraint caused or was the result of her symptoms after she collapsed. Following the episodes, Schubert had visible injuries, became depressed, experienced nightmares, and attempted suicide.

Schubert filed suit against the Church for assault and battery and false imprisonment. A jury found the Church liable on both claims. The jury awarded Schubert damages for past physical pain, mental anguish, past and future loss of income, and past and future medical care. The Church appealed, contending that the awards for mental anguish and loss of earning capacity were not foreseeable and were awarded in error. The appellate court held that the mental anguish damages were the direct result of the church's intentional acts, and were proper even if such damages were not contemplated, foreseen, or expected. But the court noted the loss of earning capacity constituted special damages. Such damages must have been foreseen by the wrongdoer, and foreseeability may not be established by mere conjecture, guess, or speculation. Because there was no evidence presented that the Church contemplated that its conduct would lead to a loss of earnings, the court held that the trial court erred in awarding special damages for loss of earning capacity.

**Clayton v. Wisener**, No. 12-03-00251-CV, 2005 WL 1404992 (Tex. App.—Tyler June 15, 2005, no pet.).

*A jury may not grant loss of earnings damages based on conjecture alone.*

An employee of a medical billing company filed suit for intentional infliction of emotional distress and loss of privacy against one of the company's customers, a doctor. The complaint alleged that the doctor asked inappropriate questions regarding the employee's sex life. The suit also alleged that the doctor intentionally misread, as normal, test results when the employee consulted the doctor on a gallbladder issue.

At trial, a jury found in favor of the employee, awarding \$20,000 for past mental anguish, \$72,488 in past lost earnings, and \$500,000 in exemplary damages. The doctor appealed the verdict, challenging the legal and factual sufficiency of the evidence supporting the award for lost earning capacity. While the appellate court recognized that calculating the extent of lost earning capacity may be an exercise in uncertainty, it would not allow such a calculation to be "simply a journey into the realm of conjecture." In this case, the employee offered no evidence from which a jury could deduce the lost earnings award, including no evidence the employee's earnings at the medical billing company or the value of the employee's services. Thus, the court held that the award could only have been based on conjecture, and must be reversed.

## 15. **STATUTORY DAMAGE CAPS**

**Welch v. McLean**, No. 2-02-237-CV, 2005 WL 1293068 (Tex. App.—Ft. Worth June 2, 2005, no pet.).

*Case decided under former Article 4590i:*

- *\$500,000 cap is not swallowed by the "Stowers doctrine" exception.*
- *Pre-judgment interest is subject to the statutory cap on non-economic damages.*
- *Settlement credit with physician's co-defendant did not apply solely to capped damages against physician, but rather to the entire cause of action.*

Plaintiffs sued two physicians for failure to diagnose a pulmonary emboli more than two months before the patient died from a pulmonary embolism. One defendant settled. At trial, the court awarded past and future non-economic damages of \$5,154,000.

The trial court calculated the statutory cap at \$1,446,895.40 after applying the consumer price index adjustment. The trial court refused to apply the cap, however, entering judgment for the full amount of the jury award plus court costs, post-judgment interest, and *ad litem* fees.

The court refused to apply the cap on the basis of language in the prior Article 4590i, which stated that the cap “shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the ‘*Stowers doctrine*.’” The defendant contended that the *Stowers* exception did not lift the damages cap as to him, but merely provided that his insurer’s liability was not limited by the cap. Plaintiff contended, however, that the exception was intended to provide a large enough “stick” or “carrot” to induce insurance companies to enter settlement negotiations in good faith.

After reviewing the legislative history and the plain language of the statute (and after noting that an insurer would still potentially be liable for the full amount of any capped award above the \$500,000 policy limit), the appellate court concluded that the cap applied.

Next, the defendant contended that the pre-judgment interest award was subject to the damages cap. Noting that the Texas Supreme Court has held that pre-judgment interest on non-economic damages is a form of compensatory damages, the court of appeals agreed. Thus, the court concluded that the pre-judgment interest awarded in the judgment was subject to the cap.

Finally, defendant contended that the settlement credit from his co-defendant’s settlement should be applied to his capped damages. The court disagreed, finding that the statute clearly provides that the settlement credit is to be applied to the amount of damages to be recovered by the plaintiff in the entire cause of action, not merely to the damages recoverable against a single co-defendant. Because a deduction of the settlement credit from the total amount of the award would not have affected the capped damages as to the defendant, the trial court did not err by failing to deduct the settlement credit from defendant’s portion of the capped damages.

***Signal Peak Enterprises of Texas, Inc. v. Bettina Investments, Inc.***, 138 S.W.3d 915 (Tex. App.—Dallas 2004, pet. stricken).

*Breach of contract damages cannot be included in calculating Texas’ exemplary damage cap.*

Gaming-hall landlords sued their tenant for fraud and breach of various lease agreements. Under the agreements, the landlord was to receive half of tenant’s net proceeds. The Tenant allegedly refused to permit the landlord to conduct an audit of tenant’s income and expenses.

The jury awarded damages of \$425,000 for breach of contract against Signal Peak, \$100,000 for fraud against defendant Signal Peak, \$250,000 for fraud against defendant Stevens, and assessed \$1 million in exemplary damages against Stevens. The court also found that Signal Peak was the “alter ego” of defendant Stevens.

On appeal, Stevens contended that the \$1 million exemplary damage award exceeded Texas’ statutory cap under Section 41.008(b) of the Texas Civil Practice & Remedies Code. Plaintiff contended that the breach of contract damages should be

aggregated with the fraud damages so that the total exemplary damage cap would exceed the \$1 million award. The court rejected plaintiff's argument, holding that only the fraud damages should be considered in calculating the exemplary damage cap. Accordingly, the court reformed the judgment to reflect an award of exemplary damages of two times the fraud damages, or \$700,000.

Plaintiff also attempted to "bust" the cap by asserting, for the first time on appeal, that defendants' conduct fell within certain of the felony conduct exceptions to the cap. Plaintiffs argued that the jury's finding of "fraud" or "malice" by clear and convincing evidence was sufficient to satisfy the "knowing" and "intentional" requirements of the exceptions. The court rejected this argument, first noting that plaintiffs did not raise the exceptions in the trial court or obtain findings concerning the elements of the offenses. The court further disagreed with *Myers v. Walker*<sup>9</sup> that the fraud or malice findings were sufficient to satisfy the intent requirements of the statutory exceptions. Accordingly, the court rejected plaintiffs' argument that the statutory exceptions applied.

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<sup>9</sup> 61 S.W.3d 722 (Tex. App.—Eastland 2001, pet. denied).