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MASTER NON-SUBSCRIBER CASE LIST

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NON-SUBSCRIBER CASE LAW MASTER LIST

A. Alternative Dispute Resolution: Mediation, Arbitration and Settlement

1. *Sosa v. PARCO Oilfield Serv., Ltd.,* No.2:05-CV-153, 2006 WL 2821882 (E.D. Tex. Sept. 27, 2006).

   Facts: An employee sued his employer for wrongful denial of benefits under an ERISA Occupational Injury Benefit Plan, violation of wage and hour laws under the Fair Labor Standards Act, and state law negligence and gross negligence causes of action. The employee was allegedly injured when a co-employee operating a trench machine snagged electrical cables that became entangled in the digging apparatus of the trencher and wrapped around the employees legs. The employer was a non-subscriber and had an arbitration provision in their ERISA Occupational Injury Benefit plan that stated: "In the event that there is any dispute arising out of any accident or occurrence, or any claim for or regarding insurance or other benefits under this plan…you and the company agree to submit all disputes exclusively to final and binding arbitration." The parties disputed whether the alleged arbitration agreement was valid under various federal regulations, state laws and basic contract principals. Specifically, the employee alleged that the Texas Labor Code prohibited pre-injury waiver of rights by employees, that the benefit plan and arbitration agreement failed to satisfy the "fair notice requirements," that consideration for the injury benefit plan was illusory, that the plan was unconscionable, and that the arbitration agreement was unreasonable *per se* under 29 C.F.R. § 2560.503-1(c)(4).

Holding: The Court held that the employee's state law negligence and gross negligence claims were subject to the arbitration provision, but that the claim for wrongful denial of benefits was not subject to the arbitration provision because the arbitration provision conflicted with the relevant ERISA regulation. The Court stated that the non-waiver provision of the Texas Labor Code was preempted by the Supremacy Clause and the FAA. Further, the Court reasoned that even if the fair notice requirement was not met, any defect in the Plan as a whole did not invalidate the arbitration agreement. The Court stated that only if the arbitration clause was attacked on an independent basis could the Court decide the dispute; otherwise, general attacks on the agreement were for the arbitrator. With regard to the claim that there was illusory consideration, the Court stated that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory. Here, the Court held that the parties' agreement regarding compensation for occupational injures served as sufficient consideration because the arbitration clause was party of the underlying contract. The Court held that the Plan was not unconscionable and did not lack mutuality because there was no evidence that the employee didn't understand the agreement. Further, the employee accepted benefits under the Plan and simultaneously sued the plan for wrongfully terminating those benefits. As such, he must accept the terms, including the arbitration provision. With regards to 29 C.F.R. § 2560.503-1(c)(4), the Court held that it was the interplay between the FAA's presumption and the language of the Department of Labor's regulations that caused the Court to the order arbitration of the negligence claim while denying arbitration of the claim for benefits.

2. *In Re Brookshire Brothers, Ltd.*, 198 S.W.3d 381, (Tex. App.—Texarkana 2006, pet. filed).

Facts: An employee was injured on the job and sued their non-subscriber employer in state court for negligence. More than a year after the injury, the employer enacted a policy requiring arbitration of disputes or claims by employees. The employer moved to stay the litigation and compel arbitration, as per their arbitration policy. The Trial Court denied the employer's motion. The employer argued that the language of the arbitration policy suggested it applied to prior claims. The employer filed a Writ of Mandamus.

Holding: The Court of Appeals denied the writ of mandamus holding that the arbitration policy did not specifically include prior claims and construed the language against the employer/drafter. Further, the Court stated that the arbitration policy language seemed to apply prospectively. The Court held that because the employee's injury occurred before the arbitration policy was enacted and effective the employee was entitled to litigate the claim in state court. The Court then went on to attack the arbitration policy as procedurally unconscionable.

3. *Tovar v. Vratis*, No. 03-CV-1518 (122nd Dist. Ct., Galveston County, Tex. April 10, 2006).

Facts: An employee was "play-boxing" with a co-worker on the second story deck of his restaurant employer. The employee stepped back on the deck railing, fell and sustained closed head injuries. The employee argued that the railing was worn from exposure to the element and that the railing needed repair. The employer argued that the employee had no idea that the railing was dangerous, that there were no previous accidents on the deck and that the employee should not have been horseplaying. The employee recovered and returned to work and had claimed an unspecified amount of past and future loss of earning capacity. The parties settled for a total of $425,000 with the restaurant's insurance paying $225,000 and the property owner's insurance paying $200,000.

4. *In re Autotainment Partners*, 183 S.W.3d 532, (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).

Facts: Upon accepting employment, the employee signed an acknowledgement stating he had received information and training on the employer's policies requiring arbitration of any dispute. The employee sustained a work-related injury and was placed on paid leave, after which he sustained another injury "off the job" and was subsequently terminated. The employee then filed suit against his non-subscriber employer, and the employer moved to compel arbitration per the terms of the dispute resolution policy. The employee argued that the signed acknowledgement was not a valid agreement to arbitrate and also that the McCarran-Ferguson Act preempted application of the Federal Arbitration Act ("FAA"). The Court determined that this case was not subject to arbitration and denied the motion to compel arbitration. After the Court also denied a motion to reconsider, the relators sought a Writ of Mandamus ordering the Trial Court judge to withdraw the ruling and compel arbitration.

Holding: The Court of Appeals concluded that a valid arbitration agreement did in fact exist based on the employee's awareness of the existence of such agreement since he received benefits and signed the acknowledgement. The Court also held that the McCarran-Ferguson Act did not apply to preempt the FAA because the arbitration agreement was not specifically related to the business of insurance. Accordingly, the Court conditionally granted the petition for Writ of Mandamus.

5. *In re RRGT, Inc.*, No. 04-06-00012-CV, 2006, 2006 WL 622736 (Tex. App.—San Antonio Mar. 15, 2006, no pet.) (mem. op.).

Facts: As a condition of continued employment, an employer provided training to all employees regarding the company's Occupational Injury Benefits Plan. The training provided information about the Plan's mandatory alternative dispute resolution procedures. Though the employee refused to sign an acknowledgement of the Plan, he continued working for his employer. The employee was later injured on the job during an incident with another employee and received approximately $20,000.00 in wage replacement and medical benefits. The employee then sued his employer and the co-employee who was involved in the accident for negligence. The employer moved to compel arbitration per the Plan, but the Trial Court denied the employer's motion.

Holding: On a petition for Writ of Mandamus, the Court of Appeals held that the employee's failure to sign the acknowledgment was irrelevant. The Court stated that sufficient evidence suggested that the employee received notice of the arbitration agreement and accepted the terms of the Plan as a matter of law. The Court of Appeals further found that the Trial Court did not abuse its discretion in refusing to compel arbitration of the employee's claims against his co-employee as an individual because the employer failed to prove that these claims were subject to the arbitration agreement. Accordingly, the Trial Court was ordered to divide the case, sending the employee's claims against the employer to arbitration, but keeping the claims against the co-employee.

6. *In re Dillard Dep't Stores, Inc*., 198 S.W.3d 778 (Tex. 2006).

Facts: An employee worked as a sales associate at Dillard's Sunland Park store in El Paso. The employee was fired six months after requesting workers' compensation benefits for work-related injuries. The employee filed the underlying suit for retaliatory discharge, and the employer moved to compel arbitration. In response, the employee alleged that she never agreed to the arbitration policy, and even if she had, the agreement would be unenforceable because the employer retained the right to modify the policy at any time, rendering its promise to arbitrate illusory. The employer distributed an acknowledgement form which briefly stated the employer's arbitration policy. It stated that the effective date of the policy was August 1, 2000, and conspicuously warned that employees were deemed to accept the policy by continuing their employment.

Holding: The Texas Supreme Court held that the Trial Court abused its discretion in not compelling the arbitration. The Supreme Court reasoned that the employee's argument that the arbitration agreement, like her at-will relationship, was terminable at any time was without merit. The Supreme Court held that an arbitration agreement is not illusory, despite being formed in an at-will employment relationship, if the promises to arbitrate do not depend on continued employment. The employer's

arbitration materials here did not supply any basis for construing the agreement to be contingent on continued employment.

7. *In re Big 8 Food Stores, Ltd.*, 166 S.W.3d 869 (Tex. App.—El Paso 2005, orig. proceeding).

Facts: An employee was injured in the course and scope of her employment on her non-subscriber employer's premises. After her injury, she received and accepted benefits in the form of payments for medical bills and disability per a written agreement signed prior the accident. She subsequently sued her employer for negligence, denying that she had knowingly agreed to arbitration and that she was fraudulently induced. The employer moved to compel arbitration based on the agreement, but the Trial Court denied the motion. The employer then filed a motion to reconsider, which was also denied, followed by a Writ of Mandamus.

Holding: The Court of Appeals granted the writ and stated that the agreement to arbitrate was binding, rejecting the employee's claims of fraudulent inducement and unconscionability. The Court stated that a party must be held to understand the meaning of the words used in the execution of a valid contract and may not receive protection from an agreement merely because it was improvident. Accordingly, the Court conditionally granted the petition for Writ of Mandamus, instructing the Trial Court to enter an order consistent with its opinion.

8. *In re Beyond the Arches, Inc*., 2004 Tex. App. LEXIS 6930, No. 09-04-126 CV (Tex. App.—Beaumont 2004, no pet.).

Facts: An employee alleged that employer's negligence caused an injury she suffered at work. The employer, which had paid her medical expenses, filed a motion to compel arbitration, which was denied. The employer then filed a petition for mandamus to the Court of Appeals. The employer argued that the employee had signed a "release of medical records" form, which was contained in the employer's benefit plan. Based on that signature, the employer asserted that the employee knew or had reason to know of the arbitration agreement contained in the plan. The employee acknowledged signing the form, but argued that the form did not refer to arbitration or an injury plan. She asserted that no one ever mentioned or gave her a plan booklet or an arbitration agreement prior to injury and suit.

Holding: The Court of Appeals denied the petition for Writ of Mandamus. The Court found that the denial of the motion to arbitrate was not arbitrary and unreasonable, because the employer did not meet its burden of establishing a "meeting of the minds" consent to terms, and acceptance of the terms in strict compliance with the offer's terms. The trial judge was free to believe the employee's

testimony that she did not sign any document relating to or referencing an arbitration agreement and that she had no intent to be bound by an arbitration clause of which she had no knowledge. The Court was unpersuaded by the argument that the employee ratified the arbitration agreement by allowing the employer to pay work-related medical bills.

9. *In Re Luna*, 175 S.W.3d 315 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Facts: Former employee sought mandamus relief from an Order of the 344th District Court, Chambers County Texas, granting an employer's motion to compel arbitration of employee's wrongful discharge and retaliation action. The employee argued that the arbitration agreement's provisions were substantively unconscionable, and therefore should not be enforceable. The employee cited the agreement's cost-allocation provisions, which although they merely specified the parties would share the cost of arbitration equally, in practice they would require him to pay close to ten thousand dollars ($10,000.00) to arbitrate his claim in Harris County. The employee further argued that the existence of the arbitration agreement prevented him from obtaining legal counsel, as no attorney would take his case on a contingency basis knowing the claim had to be arbitrated.

Holding: The Court of Appeals held that the while the provisions of the arbitration agreement were not unconscionable in and of themselves individually, taken as a whole and in practice, they imposed such a financial hardship on the employee as to effectively prevent the employee from being able to obtain counsel and arbitrate his claim, and were therefore unconscionable and thus unenforceable. The Court of Appeals conditionally granted the employee's petition for writ of mandamus, pending issuance only if the Trial Court did not withdraw its order compelling arbitration.

B. Anti-Retaliation Under the Texas Workers' Compensation Act

1. *Luna v. Gunter Honey, Inc*., No. 09-05-207-CV, 2005 Tex. App. LEXIS 10582 (Tex. App.—Beaumont Dec. 22, 2005, pet. denied) (mem. op.).

Facts: An employee worked in North Dakota for Gunter Honey, Inc. as a beekeeper during the honey production season. For the remainder of the year, the employee worked for Gunter Honey Farms, a Texas partnership engaged in the business of manufacturing and refurbishing bee hives. The employee sustained an injury when he lifted a box while working for Gunter Honey Farms. He subsequently filed a claim for workers' compensation benefits; however, Gunter Honey, Inc. terminated his employment for failure to perform his duties. The employee then filed suit against Gunter Honey Inc. pursuant to Texas Labor Code §451.001 which states that an employee may not be discharged or discriminated against due to the filing of a

workers' compensation claim in good faith. His other employer, Gunter Honey Farms was not sued. Defendant, Gunter Honey Inc., was a non-subscriber under the Act; however, Gunter Honey Farms was a subscriber. The employee argued that the two companies were a single business enterprise and therefore should both be assigned a subscriber status. Defendant responded that the employee had not specifically plead his "integrated enterprise" theory.

Holding: The Court of Appeals upheld the Trial Court's grant of summary judgment asserting Defendant's non-subscriber status. In doing so, the Court declined to use the single integrated enterprise test to impose liability on a non-subscriber under Texas Labor Code §451.001.

See case also under topic: G. Exclusive Remedy Provision: Subscriber Status as an Affirmative Defense.

C. Discovery Disputes in Non-Subscriber Cases

1. *In Re: Exxon Corp*., No. 09-06-298-CV, 2006 WL 2883101 (Tex. App.—Beaumont October 12, 2006, no pet. h.).

Facts: Exxon was sued when contract employees alleged that they developed cancer as a result of benzene exposure on Exxon's premises. During a three-year time period, the employees served a series of requests for production of documents, which included many that were unlimited in time and duration. The employer objected to the scope, burdensomeness and lack of relevance of the request. However, the employer provided over 25,000 pages of documents and made is file room of over 100,000 documents available to the employee. The employee then filed a motion to compel the employer to comply fully with the request. The employee also noticed two people regarding the documents requested in the employee's numerous requests for production, including a custodian of records and an industrial hygienist. The Trial Court denied the employer's motion to quash the deposition and stated that the "deposition will be for a records custodian only. There will be no interrogation other than it relates to the records." The deposition; however, was not limited to a discussion of documents or document production. The employee further filed a motion to compel compliance with the Trial Court's orders regarding discovery and requested sanctions be imposed on the employee for having produced witnesses that had no knowledge of the method of the employer's search for documents responsive to the requests for production. The Trial Court granted the employee's motion to compel compliance. The employer appealed and argued that the employee's overbroad discovery requests constituted an improper fishing expedition. Further, the employer argued that because it complied with the order, its compliance could not further be compelled by the Trial Court later. The employer explained that the witnesses produced were prepared to discuss the proper subjects.

Holding: The Court of Appeals held that the employees obtained the Trial Court's permission to depose witnesses purely for the purposes of exploring the employer's efforts in responding to the discovery requests, without first establishing the necessity for the inquiry. Further, the Court held that the Trial Court abused its discretion and that there was no adequate remedy at law to cure the error.

2. *Lopez v. La Madeleine*, 200 S.W.3d 854 (Tex. App.—Dallas 2006, no pet. h.).

Facts: Employee sued his employer after the employee alleged that his foot slipped on a damaged drain cover and fell. The employee sued his employer for negligence. During the discovery period, the employee requested that the employer produce "any tape recordings, pictures or videos of Plaintiff or any witness in this case." The employer failed to produce these items as it stated that it was not currently in possession of any documents that met the request. A pretrial order stated that evidence not produced would not be admitted. Despite this order, the Trial Court admitted a surveillance videotape and photos at trial that showed the employee had testified falsely about the extent of his injuries. The issue before the Court of Appeals was whether the discovery rules allowed a party to impeach a witness and refute possible perjured testimony by introducing evidence that was withheld from disclosure.

Holding: The Court of Appeals held that there was no evidence to support the Trial Court's implied finding that the employer met its burden to establish lack of unfair surprise or unfair prejudice to Lopez regarding the introduction of the undisclosed videotape and photographs and that error in admitting this evidence probably caused the rendition of an improper judgment. Further, the Court of Appeals held that the Trial Court's error of admitting videotape and photos constituted reversible error, but requiring employer to pay amount of employer's last settlement offer was not an appropriate sanction.

3. *In Re Crest Care Nursing & Rehab. Center*, No. 12-05-00167-CV, 2006 WL 408226 (Tex. App.—Tyler Feb. 22, 2006, pet. denied).

Facts: Plaintiff was allegedly injured while a patient at Crest Care Nursing and Rehabilitation Center. During litigation, Plaintiff requested Crest Care to produce personnel files and job performance evaluations for employees working in Plaintiff's wing during the time of her injury. She also requested the personnel file of employees familiar with her lawsuit and of all administrators at Crest Care. Crest Care filed a Motion to Compel and the Trial Court ordered the production of the personnel files. Crest Care argued that the Trial Court had a duty to review the personnel files *in camera* before it made the Order. The Court stated that it would

review the files, but not "en masse." Crest Care filed a writ of mandamus with the Court of Appeals.

Holding: The Court of Appeals held that the Trial Court did not abuse its discretion by refusing to conduct an *in camera* review of all the personnel files. The Court reasoned that when a privacy right is asserted, a Trial Court does not always need to conduct an *in camera* inspection. The Court further held that the burden falls on the party resisting discovery to set forth factual allegations which show that the information sought violates privacy rights of an individual. According to the Court of Appeals, a hospital administrator's affidavit which stated that the personnel files are created with each employee's right to privacy in mind, that the records were supposed to be disclosed only to the employee and that the files are to remain privileged and confidential, does not constitute a prima facie showing that the personnel files fell within the constitutionally protected zone of privacy.

4. *In re Starflite Mgmt. Group, Inc.*, 162 S.W.3d 409 (Tex. App.—Beaumont 2005, orig. proceeding).

Facts: The underlying lawsuit arose when an employee was killed in an aircraft crash. The decedent was a charter pilot and employee of the non-subscriber employer StarFlite Management Group. The employee's widow brought suit against StarFlite for negligence and gross negligence. Plaintiff sought to compel Defendant to produce numerous financial documents during discovery, including copies of bank statements, cancelled checks, tax returns and credit card invoices. The Trial Court ordered the production of the documents, and Defendant subsequently filed a writ of mandamus which was initially granted.

Holding: The Court noted that since it had not been provided with a copy of Plaintiff's re-plead cause of action, it was hindered in its attempt to determine which discovery requests were proper. Nevertheless, the Court stated that discovery requests must be reasonably tailored to include only relevant matters. Based on the lack of more specific information and a properly plead cause of action, the Court conditionally granted mandamus relief to the employer and directed the Trial Court to modify its order to limit production to relevant items.

D. Dismissal of a Case Against a Non-Subscriber for Want of Prosecution

1. *Clark v. Frantz*, No. 05-05-01517-CV, 2006 WL 3028964 (Tex. App.—Dallas Oct. 26, 2006, no pet. h.)(mem. op.).

Facts: An employee filed suit against her non-subscriber employer when she was injured at work. After multiple joint motions for continuance, the employer's

attorney filed a suggestion of death, when the owner and named party of the company passed away. The Court sent the employee a notice of its intention to dismiss the suit unless the employee filed a motion to reinstate within fifteen days. The employee filed a motion to reinstate within fifteen days and requested a ninety-day continuance to await the appointment of an executor. An executor was appointed within the ninety days; however no further action was taken on behalf of the employee. A month after the executor was appointed and after no action was taken, the trial court dismissed the case for want of prosecution. The employee filed a motion to reinstate, which the trial court held a hearing on. The trial court denied the motion to reinstate noting that the executor was appointed a month before the case was dismissed.

Holding: The Court of Appeals affirmed the dismissal of the suit. The Court reasoned that although failure to provide adequate notice of a trial court's intention to dismiss for want of prosecution required reversal, that when a trial court holds a hearing on a motion to reinstate, in which the dismissed party received the same hearing with the same burden of proof it would have had before the order of dismissal was signed, no error was shown. Thus, the post-dismissal hearing cleared any due process concerns. Here, the employee participated in a hearing on her motion to reinstate which rendered any error in failing to provide the employee with further notice, harmless. Further, the Appellate Court noted that the trial court's recitation of the history of the case at the hearing for the motion showed a lack of diligent prosecution by the employee.

E. Duty to Defend or Indemnify by a Non-Subscriber Insurance Carrier

1. *Nat'l Ins. Co. v. Hagendorf Constr. Co.,* 337 F. Supp. 2d 902 (W.D. Tex. 2004)

Facts: In the underlying lawsuit, an employee sued his non-subscriber employer, Hagendorf Construction, as the result of a single vehicle accident where Plaintiff claimed the employer negligently failed to maintain the vehicle in question. The employer turned the claim over to its business automobile carrier seeking a defense and indemnity. The insurance carrier, Illinois National, subsequently filed a declaratory judgment action seeking a declaration that it owed no duty to defend or indemnify based upon the workers' compensation exclusion.

Holding: The Court reasoned that when an employee brings a suit against a non-subscriber employer, that claim arises under the Texas Workers' Compensation Act. Further, since the workers' compensation exclusion was embodied within the policy, it applied and defeated coverage. Therefore, Illinois National had no duty to defend or indemnify the employer in the underlying lawsuit and the court granted summary judgment in favor of Illinois National.

F. Employer's Duties to Employees and Third Parties

1. *Jack in the Box, Inc. v. Skiles*, --- S.W.3d ---, 2007 WL 431045 (Tex. 2007)

Facts: Mr. Skiles was employed as a tractor-trailer driver for twenty-four years by Jack in the Box. The employee used an automatic lift gate to unload food products at the stores. The drivers were instructed that they if encountered problems with the lift gate, they should call the company's independent service center and report the malfunction. A maintenance person would be sent out to make the repairs. During a delivery during lunch rush, the lift gate malfunctioned on the employee's truck. The employee used a ladder to climb over the non-functioning lift gate so that he could get to the food supplies needed by the restaurant. The employee stated that when he landed on the floor of the trailer, both of his knees "popped" and were injured. The employee argued that the employer had a duty to warn him of the dangers of using a ladder to climb over a lift gate. The trial court granted a no-evidence motion for summary judgment in favor of Jack in the Box; however, this was reversed by the Court of Appeals.

Holding: The Texas Supreme Court held that an employer's duty to warn an employee of a danger arises when: (1) the employment is dangerous or complex; and (2) the employer is aware of the danger and has reason to know the employee is not. The Court held that the dangers associated with the use of a ladder to climb over a lift gate were common and obvious to anyone. Further, the Court stated that unloading food product was a regular part of the employee's job and he was trained on how to handle situations when the lift gate would not operate. The Court also pointed to the fact that the employee acknowledged he voluntarily made the decision to find a ladder, jump into the trailer and unload the hamburger meat. The Court reasoned that these facts were entirely different from *Kroger v. Keng*, 976 S.W.2d 882 (Tex. App.—Tyler 1998), *aff'd*, 23 S.W.3d 347 (Tex. 2000), where an employee was ordered by her supervisor to engage in dangerous activity that was outside of her normal job duties.

2. *Sanchez v. Marine Sports, Inc*., 14-03-00962-CV, 2005 WL 3369506 (Tex. App.—Houston [14th Dist.] December 13, 2005, no pet.)(mem. op.)

Facts: Mr. Sanchez, a boat detailer, was injured when he fell off of a boat while detailing it. He sued his non-subscriber employer alleging that the employer never instructed him, never provided him boots or a Spanish language operations manual, never maintained a safety supervisor, never provided safety manuals or conducted safety meetings.

Holding: The Court of Appeals affirmed the Trial Court which had granted a directed verdict in favor of the employer and dismissed the case during trial. The Court of Appeals concluded, "Sanchez has not conclusively established that the failure to properly instruct him, provide boots or Spanish language operations manual, maintain a safety supervisor, a safety manual or conduct safety meetings was the cause in fact of his injuries. He introduced no evidence, testimony or otherwise, that wearing boots while washing the boat would have prevented his injury. He failed to show that specialized training was required to wash a boat. In fact, Sanchez had been a boat detailer for six or seven months at the time of the accident. Sanchez presented no evidence demonstrating how safety meetings, a safety supervisor or a safety manual would have prevented the accident. Finally, although Marine Sports had an English language operations manual, which Sanchez, fluent in Spanish only, could not read, there was no evidence of what information was included in that manual. At most, Sanchez showed that the failure to provide these things did no more than provide a condition that made the injury possible, not that it was a substantial factor in bringing about the injury which would not have occurred otherwise."

See case also under topic: K. Insufficient Evidence to Establish a Claim Against a Non-Subscriber on the Issue of Proximate Cause

3. *Allen v. Connolly*, 158 S.W.3d 61 (Tex. App.—Houston 14 Dist.] 2005, no pet.).

Facts: An employee was robbed and sexually assaulted while working at an insurance agency located on a leased premise. She sued her employer for negligence, alleging that her employer had failed to properly train her to use the alarm system, and that had she known the location of panic buttons and the fact that only a silent alarm would be activated, she would have utilized the alarm. The employer filed a No-Evidence Motion for Summary Judgment asserting that there was no evidence that the employer owed a duty to the employee because there was no evidence that other crimes of similar nature had occurred at the location of the assault or in its immediate vicinity. The Trial Court granted this motion. The employee appealed this summary judgment.

Holding: The summary judgment was affirmed by the Court of Appeals. The Court reasoned that an employer's duty to use reasonable care to provide a reasonably safe workplace is, with respect to the risk of violent crime, based upon the same considerations that determine whether a premises occupier must protect invitees against the same risk. The employer argued successfully in the Trial Court that no foreseeable risk of harm existed, and thus, the employer owed no duty to the employee.

See case also under topic: K. Insufficient Evidence to Establish a Claim Against a Non-Subscriber on the Issue of Proximate Cause

G. Exclusive Remedy Provision: Subscriber Status as an Affirmative Defense

1. W. *Steel Co. v. Altenburg*, No. 05-0630, 2006 WL 3040599 (Tex. Oct. 27, 2006).

Facts: Hank Altenburg was a temporary worker hired by Unique Employment Services and sent to work for Western Steel Company. While working, the worker was injured when a heated beam fell on his foot. He was thereafter paid benefits under Unique's workers' compensation policy. The worker subsequently sued Western for his injuries and Western answered, asserting its own workers' compensation policy as a bar to the worker's actions. Western also filed a motion for summary judgment, asserting it was not liable under the exclusive remedy provision of the worker's compensation statute because the worker was a borrowed employee. At trial, the worker offered into evidence Unique's and Western's workers' compensation policies. However, one exhibit was mistakenly Western's commercial general liability policy. The Trial Court rendered judgment against Western. Western appealed, challenging the legal and factual sufficiency of the jury's failure to find that the worker was Western's borrowed employee. Nonetheless, the Appellate Court focused on the incorrect exhibit and testimony and concluded that Western was not entitled to assert the workers' compensation bar as a defense because there was no evidence it had workers' compensation. The employer appealed.

Holding: The Texas Supreme Court reasoned that although the employer had the burden of proving it had workers' compensation insurance as a defense, it was not disputed by the worker that the employer had workers' compensation insurance. Further, the worker even attempted to put that policy in evidence as one of their exhibits. The Court stated that the Court of Appeals had put this matter at issue without reaching the merits of the issues actually raised on appeal. The Supreme Court held that the Court of Appeals erred in not accepting the undisputed fact that Western, the employer, had workers' compensation insurance at the time of the worker's injury. The judgment of the Court of Appeals was reversed and remanded.

2. *Luna v. Gunter Honey, Inc*., No. 09-05-207-CV, 2005 Tex. App. LEXIS 10582 (Tex. App.—Beaumont Dec. 22, 2005, pet. denied) (mem. op.).

Facts: An employee worked in North Dakota for Gunter Honey, Inc. as a beekeeper during the honey production season. For the remainder of the year, the employee worked for Gunter Honey Farms, a Texas partnership engaged in the business of manufacturing and refurbishing bee hives. The employee sustained an injury when he lifted a box while working for Gunter Honey Farms. He subsequently filed a claim for workers' compensation benefits; however, Gunter Honey, Inc. terminated his employment for failure to perform his duties. The employee then filed suit against Gunter Honey Inc. pursuant to Texas Labor Code §451.001 which states that

an employee may not be discharged or discriminated against due to the filing of a workers' compensation claim in good faith. Gunter Honey Farms was not sued. Defendant, Gunter Honey Inc., was a non-subscriber under the Act; however, Gunter Honey Farms was a subscriber. The employee argued that the two companies were a single business enterprise and therefore should both be assigned a subscriber status. Defendant responded that the employee had not specifically plead his "integrated enterprise" theory.

Holding: The Court of Appeals upheld the Trial Court's grant of summary judgment asserting Defendant's non-subscriber status. In doing so, the Court declined to use the single integrated enterprise test to impose liability on a non-subscriber under Texas Labor Code §451.001.

See case also under topic: B. Anti-Retaliation Under Workers' Compensation Act

H. Expert Witnesses Used In or Disallowed In Non-Subscriber Cases

1. *Moore v. Memorial Hermann Hosp. Sys., Inc*., 140 S.W.3d 870 (Tex. App.-Houston [14th Dist.] 2004, no pet.)

Facts: This case arose from a dispute regarding a back injury suffered by an employee during the course of her employment at the hospital. The employee appealed a jury's finding that the employer was not negligent.

Holding: The Court of Appeals affirmed the Trial Court's judgment. The Appellate Court generally held that, because the employee failed to make, amend, or supplement her discovery response to include all required relevant information concerning her treating physician, the Trial Court did not abuse its discretion in excluding his opinion testimony under Tex. R. Civ. P. 193.6(a). Also, based on the evidence before it, the Trial Court did not abuse its discretion in concluding that a workplace safety expert did not have a reasonable basis for any of his opinions with respect to the legal duties owed by the hospital and how those duties were breached. Further, the Trial Court did not abuse its discretion in excluding his testimony or in refusing the employee's requested jury instruction concerning the duties employers owed to their employees. Finally, the Trial Court did not abuse its discretion in either charging the jury to continue its deliberations or giving the jury a "dynamite charge" constituting situational coercion.

See case also under topic: L. Jury Charge

I. Improper Summary Judgment: Fact Issues Raised as to Employer Liability

1. *Browne v. Kroger Co.*, No.14-04-00604-CV, 2005 WL 1430473 (Tex. App.—Houston [14th Dist.] June 21, 2005, no pet.) (mem. op.).

Facts: The employee, a customer service representative for her non-subscriber employer, sustained a neck injury while cleaning and preparing the store for its grand re-opening. The employee could not identify any safety problems or issues that caused her injuries in the initial accident report. She subsequently filed suit against her employer based on negligence and premises liability theories. The employer moved for summary judgment, arguing that the employee could not establish any negligent act of the employer or any unreasonably dangerous condition of which the employer should have had notice. In response to a Motion for Summary Judgment, the employee filed an affidavit which was contradictory to her original accident report. The Trial Court granted the employer's Motion for Summary Judgment. On appeal, the employee argued that her affidavit presented genuine fact issues and that the employer failed to negate the elements of her negligence claim. The employer objected that the employee's affidavit was a "sham" affidavit and that there was no actionable negligence as a matter of law.

Holding: The Court of Appeals found that the complaint that the affidavit was a sham had been waived because the employer did not timely raise that objection at the Trial Court level. Therefore, considering the affidavit, the Court held that an issue of material fact was raised on the matter of negligence but none was raised on the matter of premises liability. Accordingly, the Court affirmed summary judgment as to the premises liability claim and reversed as to the negligence claim.

2. *Hall v. Sonic Drive-In of Angleton, Inc*., 177 S.W.3d 636 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

Facts: An employee sustained an injury to her right hand when she picked up a metal freezer cover that was lying on the floor in the middle of a walkway at her non-subscriber employer's restaurant. The cover had come to be in the middle of the walkway when the manager placed it on a table while the freezer was being repaired and then another employee removed it and placed it on the floor. After returning to work, the employee claimed that she was assaulted and subjected to intentional infliction of emotional distress by her manager when she was unable to use her right hand. The employee subsequently sued her employer and the manager, claiming premises liability, assault and intentional infliction of emotional distress. The employer moved for a Motion for Summary Judgment which the Trial Court granted.

Holding: The Court of Appeals stated that because the employer only moved for summary judgment based upon the absence of intent to injure, the employee's assault claim was not conclusively negated. Furthermore, the Court noted that since the

Motion for Summary Judgment did not address intentional infliction of emotional distress, the Trial Court was incorrect to grant summary judgment on that issue as well. The offered evidence also raised a fact issue as to whether the employer's actions were negligent in causing the employee's injury. Accordingly, the Court of Appeals reversed the judgment on the basis that fact issues were raised on all of the necessary elements for a premises liability claim.

3. *Pierce v. Holiday*, 155 S.W.3d 676 (Tex. App.—Texarkana 2005, no pet.).

Facts: An employee brought a negligence action and a failure to train action against his non-subscriber employer, a farm owner. The employee allegedly sustained injures while cutting hay on the employer's farm. The employer moved for summary judgment in the Trial Court and it was granted. The employee appealed.

Holding: The Court of Appeals held that the employer's traditional motion for summary judgment did not attack the employee's claim for receiving inadequate training or the employee's claim that he was provided inadequate equipment. As such, it was improper for the Trial Court to have granted a full and final summary judgment in the employer's favor. The Court of Appeals then addressed the employer's no-evidence motion for summary judgment. Again, the Court stated that the employer's motion only contended that there was no evidence of the employee's negligence claim. The employer failed to attack the employee's causes of action for inadequate training and equipment. Thus, the Court held that the Trial Court should not have granted a no-evidence summary judgment on all of the employer's claims. The Trial Court's ruling granting of the no-evidence summary judgment on the premises liability theory was affirmed.

J. Insufficient Evidence for a Plaintiff's Cause of Action That Lacked a Necessary Element of a Non-Subscriber Negligence Claim

1. *Charles v. Randalls Food & Drugs, L.P.*, No. 2003-26746 (133rd Dist. Ct., Harris County, Tex. Jan. 26, 2007).

Facts: An employee working as a janitor for a warehouse/distribution center alleged she was injured when heavy pallets would slide off rails and strike her, causing her to have to physically push them back. The employee stated that her was employer was negligent because full pallets of merchandise were left on sled guides and were not removed, as she claimed they should have been. Further, the employee said her injury was not properly reported and that she was told to go back to work without medical treatment. The employer argued that the manner in which the employee claimed to have been injured was not correct and that the supervisor did not file a report because he did not view what the employee stated as an accident or injury.

The supervisor stated that the employee only overexerted herself mopping and that it was not negligence to require a person in a warehouse to mop.

Holding: Despite the employee claiming she had substantial injuries to her entire body as a result of the accident, a jury found that her employer was not negligent. The employer had contended that the employee's symptoms were grossly out of proportion to any injury she could have sustained as a result of the incident and that the most she could have suffered was soreness or a strained muscle.

2. *De Los Santos v. Healthmark Park Manor, L.P.*, No. 06-05-00014-CV, 2005 WL 2708497 (Tex. App.—Texarkana Sept. 23, 2005, no pet.) (mem. op.).

Facts: An employee slipped and fell, sustaining a broken kneecap, when a co-employee unknowingly dropped a bottle of hand sanitizer which spilled onto the floor. The employee subsequently filed suit against her non-subscriber employer, arguing that the employer was liable for her injuries under a theory of premises liability. The employer filed a No Evidence Motion for Summary Judgment, stating that the employee could not establish the *Keetch v. Kroger* premises liability elements because no evidence existed that the employer had actual or constructive knowledge of an unreasonable risk of harm. The Trial Court granted the motion and dismissed the case.

Holding: The Court of Appeals affirmed, holding that even though the co-employee was responsible for dropping the bottle of hand sanitizer onto the floor, this alone was insufficient to show that the employer had actual or constructive knowledge of the dangerous condition.

3. *Sanders v. Home Depot U.S.A., Inc*., No. 2-04-196-CV, 2005 Tex. App. LEXIS 3651 (Tex. App.—Fort Worth May 12, 2005, pet. denied) (mem. op.).

Facts: An employee allegedly sustained a back injury as a result of lifting a lumber post by himself in the course of his employment. The injury required him to undergo two major back surgeries and extended medical treatment. The employee filed suit against his non-subscriber employer for negligence. The employer filed a No Evidence Motion for Summary Judgment on the basis that there was no evidence of a breach, a legal duty or causation. The employee responded by filing an affidavit of an expert witness in an effort to establish the necessary elements of his negligence claim. The employer made an objection to the affidavit based upon the lack of the expert's qualifications and reliability of his opinions. The Trial Court granted summary judgment.

Holding: On appeal, the Court held that the employee had waived any complaint as to the expert's qualification and thus did not address the reliability of the expert's

opinions. The Court then addressed the issue of causation and found that the employee's testimony suggested familiarity with the construction business which should have provided him with knowledge of the dangers associated with heavy lifting. The Court also found that there was no medical opinion based on reasonable medical probability linking the employer's alleged failures to provide a safe workplace to the employee's injuries. Therefore, the Court of Appeals affirmed the judgment of the Trial Court.

4. *Barker v. Kroger Tex. L.P.,* No. 2-03-382-CV, 2004 WL 2793268 (Tex. App.—Fort Worth Dec. 2, 2004, no pet.) (mem. op.).

Facts: This case was the result of the brutal murder of a mentally disabled individual who was abducted while riding her bike to work at Kroger. Her murderers were her acquaintances and former Kroger employees. However, at the time of the abduction and murder, the murderers were no longer employed by Kroger, and the crime did not occur on Kroger's premises. Plaintiff, administratrix of the deceased's estate, filed suit alleging that Kroger was negligent for employing one of the murderers who was a convicted felon at the time he was hired. Plaintiff also alleged that the employer should not have allowed a convicted felon to be a co-worker to a mentally disabled individual or to have access to personal information such as work schedules. The employer moved for a Traditional and No Evidence Motion for Summary Judgment on the issue of negligence and also moved for summary judgment on the basis that it had established the affirmative defense of superseding cause. The Trial Court granted the motion on the ordinary negligence claim by reason of superseding cause. Plaintiff challenged this ruling, arguing that since the employer was a non-subscriber, it was not entitled to raise any defenses.

Holding: The Court of Appeals rejected this contention and affirmed the Trial Court's ruling. In doing so, the Court noted that in order for a non-subscriber to be barred from common law defenses, the injury must have occurred in the course and scope of employment.

5. *Jea v. Cho*, 183 S.W.3d 466 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

Facts: While working, an employee was shot during a robbery. The employee subsequently sued his non-subscriber employer for negligence in failing to provide a safe workplace. A jury rendered a favorable verdict for the employee; however, the employer filed a Motion for Judgment Not Withstanding the Verdict, which the Trial Court granted. The Trial Court based its decision partially on the fact that there was no evidence of proximate cause.

Holding: The Court of Appeals affirmed the Trial Court's judgment because the Court could not find any evidence of omissions on the part of the employer, individually or in combination, that would have prevented either the robbery or shooting that caused the employee's injuries.

See case also under topic: K. Insufficient Evidence to Establish a Claim Against a Non-Subscriber on the Issue of Proximate Cause

6. *Lopez v. Homebuilding Co.,* No. 01-04-00095-CV, 2005 WL 1606544 (Tex. App.—Houston [1st Dist.] July 7, 2005, no pet.) (mem. op.).

Facts: An employee was injured when he fell from the second story of a house while performing stone masonry work. The employee brought suit against the general contractor company and the company's President for negligence. The employers moved for summary judgment, arguing that the employee was an employee of an independent contractor to whom they did not owe any legal duty. The Trial Court granted the motion and dismissed the case.

Holding: The Court of Appeals upheld the Trial Court's decision on the basis that the employee was familiar with the conditions of the balcony and thus it was not a concealed hazard. Further, the Court found that the employers did not exercise control over the details of the employee's work to the extent necessary to impose liability. Finally, the employee's argument that the "deemed employer" doctrine should apply to employees of non-subscriber entities was rejected because it was not properly preserved for appeal.

7. *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006) (per curiam).

Facts: Plaintiff, a clerk at a Kroger grocery store, was injured when a customer shut her vehicle door on his hand. As he was unloading the customer's groceries from the shopping cart into the vehicle, the employee placed his hand in the vehicle's door jam while keeping the cart secured with his foot to prevent it from rolling on the sloped parking lot. The employee filed suit against his non-subscriber employer for negligence, and a jury found Kroger liable for the employee's injuries, but also determined that the employee was negligent and reduced his judgment. The Court of Appeals affirmed the verdict and reformed the judgment to award the employee one hundred percent of the damages because non-subscribers are not entitled to a contributory negligence instruction. The employer petitioned for review, asserting that there was no evidence to support the verdict.

Holding: The Supreme Court of Texas held that although an employer has a duty to provide a safe workplace, there was no evidence that loading groceries on a sloped parking lot was an unusually dangerous situation that required them to warn or train

Plaintiff to avoid the actions he took. The Court further held that employee presented no evidence proving that his job required special training or that the sloped lot posed a foreseeable risk of injury. Therefore, the Court reversed the verdict and rendered judgment for the employer.

8. *Gibbs v. ShuttleKing, Inc*., 162 S.W.3d 603 (Tex. App.—El Paso 2005, pet. denied).

Facts: This case arose from a bus hijacking incident in which the bus driver sustained serious injuries. The bus driver brought suit against his non-subscriber employer, alleging that the employer failed to provide a reasonably safe workplace. The employee initially sought recovery on theories of negligence and promissory estoppel. The employer filed both No Evidence and Traditional Motions for Summary Judgment, which the Trial Court partially granted to dismiss the negligence claims. A jury awarded the employee $150,000.00 on his promissory estoppel claim. The Court of Appeals remanded the case to the Trial Court, stating that the judgment was interlocutory because it did not address all claims and parties. The Trial Court subsequently issued an amended final judgment which incorporated both the partial summary judgment on the negligence issues and the judgment on the jury verdict. The employee appealed the summary judgment as to negligence and sought to affirm the judgment as to promissory estoppel. The employee asserted that he submitted sufficient evidence to raise a fact issue as to the foreseeability of the risk of harm to drivers and passengers. The employee contended that the employer, as owner of the bus, was responsible for controlling the third parties who injured Plaintiff.

Holding: The Court held that the employee's claim was more akin to a premises liability claim than a negligent activity claim, and thus applied the foreseeability factors articulated in *Timberwalk*. The Court found that the relatively small number of crimes committed on the employer's buses over an extended period of time negated any element of foreseeability. Furthermore, the Court stated that the employee failed to establish that other incidents were similar to the crime which resulted in his injury. Accordingly, the summary judgment granted by the Trial Court was affirmed.

9. *Mora v. Hemco Indus., Inc*., 2005 WL 568067 (Tex. App.—Houston [1st Dist.] Mar. 10, 2005, pet. denied) (mem. op.).

Facts: An employee sustained an on-the-job injury to his back while attempting to manually lift a jig at his non-subscriber employer's facility. The employee notified his supervisor that he believed he had been injured, but continued working since he did not think it was serious. The employee's pain worsened and he saw a doctor for the first time nine days after the injury occurred. The doctor later diagnosed the employee with a herniated disc, and the employer paid for most of the associated medical expenses pursuant to its company policy. The employee eventually had surgery and

subsequently sued his employer for negligence. The employer moved for a directed verdict at a bench trial on the matter, arguing that the employee failed to prove medical causation. The Trial Court granted the employer's motion, but the employee filed a motion to re-open for additional evidence before the judgment was entered. When the Trial Court denied the motion, the employee subsequently filed a motion for a new trial, which was overruled. On appeal, the employee argued that he did present sufficient medical evidence of causation and that his employer judicially admitted that his back injury occurred while lifting the jig. The employee contended that no expert medical testimony was needed because causation could be shown from the medical records alone.

Holding: The Court of Appeals rejected this argument, stating that expert testimony was necessary to provide the causal link between the accident and the herniation. Further, the Court of Appeals found that the employer had not judicially admitted that the accident caused the injury. Accordingly, the judgment of the Trial Court was affirmed.

10. *Patino v. Complete Tire, Inc*., 158 S.W.3d 655 (Tex. App—Dallas 2005, pet. denied)

Facts: An employee was injured while removing a flat tire when a piece of pipe struck him in the head. The employee filed suit against his non-subscriber employer, alleging that his employer was negligent in failing to provide training and supervision on the proper method to safely remove and repair flat tires. During the initial phases of the proceedings, the employee was sanctioned for various discovery abuses. The employer filed a No Evidence Motion for Summary Judgment which the Trial Court first denied; the employer then filed a reasserted No Evidence Motion for Summary Judgment which was granted.

Holding: The Court of Appeals affirmed the summary judgment in the employer's favor, stating that the employee failed to provide any evidence as to the necessary elements of standard of care, breach of duty and causation. The Court found that this evidence did not address what a reasonable and prudent employer would do under same or similar circumstances and no evidence was established that showed even how the employee was injured. Further, the Court held that the sanctions for the employee's abuse of discovery were appropriately rendered.

K. Insufficient Evidence to Establish a Claim Against a Non-Subscriber on the Issue of Proximate Cause

1. *Barrientos v. Maxwell Lumber Co., Inc.*, No. 12-06-00148-CV, 2007 WL 259545 (Tex. App.—Tyler, Jan. 31, 2007, no pet. h.)(mem. op.)

Facts: While gathering lumber cut by a Cornell saw, an employee injured two fingers on his right hand. The employee argued that his non-subscriber employer had failed to create, implement and enforce safety policies, allowed another employee to operate the saw when that employee could not operate that equipment safely and failed to properly maintain the Cornell saw. Further, the employee argued that the employer failed to keep maintenance records on the saw and failed to properly train him. Although the jury awarded damages to the employee, the trial court granted a motion for judgment non obstante veredicto and stated there was no evidence of negligence or causation.

Holding: The Court of Appeals stated that although the employee presented evidence that employees did not wear certain safety equipment while working on the saw, there was no evidence that this equipment would have prevented the employee's injuries and affirmed the judgment of the trial court against the employee. The employee also failed to show that any failure of the employer to provide, implement and enforce safety rules and regulations caused his injuries. The employee had presented evidence that another employee operating the saw had hearing problems. However, the Court held that there was no evidence presented that this employee was unable to operate the saw properly. Further, the Court held that the employer performed daily maintenance on the saw and the lack of such records was no evidence of negligence and was not evidence that the employee's injuries could have been prevented. Last, although the employee argued that he did not receive proper training, the employee himself stated that he was told to watch other employees, that he read warning signs on the saw and followed them and that he had been trained to jump away from the machine if it made popping sounds. As such, the Court held that the employee had presented no evidence that any lack of training had caused his injures. The Court stated that the employee simply relied upon, "conjecture, guess, and speculation" to connect the employer's conduct to his injuries.

2. *McCown v. U.S. Pers., Inc.,* No. 305-CV-1582-M, 2006 WL 262398 (N. D. Tex. Sept. 11, 2006).

Facts: An employee sued her non-subscriber employer when she slipped and fell in an emergency and employee-only used stairwell. The employee did not recall any dangerous condition on the stairwell that caused her to fall. Almost a year after her accident, the employee failed to comply with instructions given to her by her supervisors, and was terminated. The employee claimed she suffered a panic attack and other symptoms immediately after the termination. The employee sued the employer for gross negligence, negligence, intentional infliction of emotional distress and denial of FMLA leave. The employee claimed that her superiors had harassed and humiliated her and assigned her demeaning work, including filing documents, stacking paper by the copy machine and performing tasks for coworkers that they

should have done themselves. The employer filed a motion for summary judgment on all the employee's claims.

Holding: The Court granted the employer's Motion for Summary Judgment on all issues, holding that the employee failed to demonstrate that a genuine issue of material fact existed to any of her claims against the employer. On the negligence claims, the employer argued that it could only owe the employee a duty under either a negligent activity theory or a premises liability theory and that it did not owe the employee a duty under either. Both parties had agreed that the employee was alone at the time of her fall. The Court stated it assumed for this Order that the stairwell was a "workplace" of the employer and that the employer did have a duty to provide a reasonably safe place to work. Further, the Court recognized that both parties had experts that disagreed whether the stairwell was OSHA compliant. Given this fact issue, the Court reasoned that whether the stairwell was OSHA compliant or not, that the employee had "not shown that a fact issue exists regarding causation." The Court also held that the employee had failed to prove the existence of a material fact with regards to a negligence per se claim. Further, the Court reasoned that ordinary workplace disputes were not sufficiently severe to support relief under the intentional infliction of emotional distress theory. The Court held that the employer's actions did not rise to a level of "extreme and outrageous conduct" that could be recoverable. With regards to her FMLA claim, the Court held that the employee had failed to present evidence that the employee's termination of her employment was in retaliation for her request for FMLA leave.

3. *LMB, Ltd. v. Moreno*, No. 05-0764, 2006 WL 2506030 (Tex. August 31, 2006)

Facts: A woman was struck by a car when she walked out from between two vehicles in a parking lot owned by the Defendant, LMB, Ltd. The deceased's family alleged that LMB was negligent in failing to inspect for and correct premises defects which caused the accident and death of the woman. The Defendant moved for summary judgment on the ground that there was no evidence that it proximately caused the injuries or the death. The family asserted that there were issues of material fact regarding whether the premises were kept in reasonably safe condition, whether LMB adequately and reasonably inspected the premises to discover latent defects and whether, after discovering the defects, LMB made the premises safe and gave warnings. The deceased's family produced an affidavit from a treating physician that stated that the medical probability of her death was the weakened condition caused by the accident. The Court of Appeals held that this was enough to raise a question of fact as to causation.

Holding: The Texas Supreme Court reversed the Court of Appeals and ordered that the deceased's family take nothing. The Court held that the doctor's assertion in his

affidavit did not comprise evidence that some premises condition or an act or omission by the Defendant causally related to the accident and death of the deceased. Further, the Court held that the affidavit was a mere bare conclusion that some unknown conduct of the Defendant was the cause.

4. *Gonzales v. B.J. Tidwell Indus., Inc*., No. 2005-CI-06885 (288th Dist. Ct., Bexar County, Tex. July 19, 2006).

Facts: An employee factory worker was injured while operating a machine setting hinges in cabinet doors. The employee's finger was amputated while the employee was using the drill press. The employee claimed that the employer was negligent in not repairing the drill press and that the drill press had activated on its own. Further, the employee stated that she had informed the employer of the malfunctioning drill press. The employer argued that the employee pushed the button while her left hand was under the drill and that the machine was working properly Further, a co-worker testified that the employee attended a machine safety meeting immediately before the accident, in which the employee appeared to be falling asleep.

Holding: A jury found that the employer was not liable for the employee's injury.

5. *Cano v. B.J. Tidwell Indus. Inc*., No. 2003-CI-10058 (166th Dist. Ct., Bexar County, Tex. July 14, 2006).

Facts: An employee table saw operator was injured when he turned off the table saw so he could remove a piece of wood from under the saw blade's guard. The employee had two fingers amputated and seriously injured a third finger when he tried to remove the wood before the saw's blade had stopped spinning. The employee contended that the employer had negligently trained him and that he was never properly taught how to use the saw. The employer argued that the employee should have known to wait for the blade to stop spinning before the power was cut. Further, the employer argued that the employee received training on his first day at work, received more specialized training in Spanish and had successfully operated a saw nine months before the accident.

Holding: A jury found that the employer was not negligent and properly trained the employee on how to use the saw.

6. *Jea v. Cho*, 183 S.W.3d 466 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

Facts: While working, an employee was shot during a robbery. The employee subsequently sued his non-subscriber employer for negligence in failing to provide a safe workplace. A jury rendered a favorable verdict for the employee; however, the

employer filed a Motion for Judgment Not Withstanding the Verdict, which the Trial Court granted. The Trial Court based its decision partially on the fact that there was no evidence of proximate cause.

Holding: The Court of Appeals affirmed the Trial Court's judgment because the Court could not find any evidence of omissions on the part of the employer, individually or in combination, that would have prevented either the robbery or shooting that caused the employee's injuries.

See case also under: J. Insufficient Evidence for a Plaintiff's Cause of Action That Lacked a Necessary Element of a Non-subscriber Negligence Claim

7. *Sanchez v. Marine Sports, Inc*., 14-03-00962-CV, 2005 WL 3369506 (Tex. App.—Houston [14th Dist.] December 13, 2005, no pet.)(mem. op.)

Facts: Mr. Sanchez, a boat detailer, was injured when he fell off of a boat while detailing it. He sued his non-subscriber employer alleging that the employer never instructed him, never provided him boots or a Spanish language operations manual, never maintained a safety supervisor, never provided safety manuals or conducted safety meetings.

Holding: The Court of Appeals affirmed the Trial Court which had granted a directed verdict in favor of the employer and dismissed the case during trial. The Court of Appeals concluded, "Sanchez has not conclusively established that the failure to properly instruct him, provide boots or Spanish language operations manual, maintain a safety supervisor, a safety manual or conduct safety meetings was the cause in fact of his injuries. He introduced no evidence, testimony or otherwise, that wearing boots while washing the boat would have prevented his injury. He failed to show that specialized training was required to wash a boat. In fact, Sanchez had been a boat detailer for six or seven months at the time of the accident. Sanchez presented no evidence demonstrating how safety meetings, a safety supervisor or a safety manual would have prevented the accident. Finally, although Marine Sports had an English language operations manual, which Sanchez, fluent in Spanish only, could not read, there was no evidence of what information was included in that manual. At most, Sanchez showed that the failure to provide these things did no more than provide a condition that made the injury possible, not that it was a substantial factor in brining about the injury which would not have occurred otherwise."

See case also under topic F: Employer's Duties to Employees and Third Parties

8. *Allen v. Connolly*, 158 S.W.3d 61 (Tex. App.—Houston 14 Dist.] 2005, no pet.).

Facts: An employee was robbed and sexually assaulted while working at an insurance agency located on a leased premise. She sued her employer for negligence,

alleging that her employer had failed to properly train her to use the alarm system, and that had she known the location of panic buttons and the fact that only a silent alarm would be activated, she would have utilized the alarm. The employer filed a No-Evidence Motion for Summary Judgment asserting that there was no evidence that the employee owed a duty to the employee because there was no evidence that other crimes of similar nature had occurred at the location of the assault or in its immediate vicinity. The Trial Court granted this motion. The employee appealed this summary judgment.

Holding: The summary judgment was affirmed by the Court of Appeals. The Court reasoned that an employer's duty to use reasonable care to provide a reasonably safe workplace is, with respect to the risk of violent crime, based upon the same considerations that determine whether a premises occupier must protect invitees against the same risk. The employer argued successfully in the Trial Court that no foreseeable risk of harm existed, and thus, the employer owed no duty to the employee.

See case also under topic F: Employer's Duties to Employees and Third Parties

L. Jury Charge

1. *Villarreal v. Norco Crude Gathering, Inc*., No. 04-02-00671-CV, 2004 WL 1491343 (Tex. App.-San Antonio 2004, no pet.).

Facts: An employee filed suit against his employer for injuries he sustained while working as a truck driver, delivering the company's oil. Following a trial, the jury rendered a take nothing verdict against the employee and in favor of the employer. The employee appealed - complaining that the Trial Court erred in submitting a question in its charge to the jury. The question asked whether the driver was acting as an employee and under the control of the company at the time of his injury. Specifically, the employee contended that the Trial Court should have confined the question to whether the company controlled the manner, means, and details of how he was to load his trailer to carry a full load and whether that alleged control made him an employee of the company.

Holding: The Court of Appeals found that the alleged error was harmless and affirmed the judgment of the Trial Court. The Court of Appeals reasoned that the jury found, in the question that was asked, that the company had not been negligent. Even if the jury had found the driver to have been an employee of the company or found it to have controlled the driver's work, it would not have altered the verdict, because the jury also found that the driver's negligence was the sole proximate cause of the accident. Therefore, the question was immaterial and viewing the charge as a whole, it did not mislead or confuse the jury.

2. *Moore v. Memorial Hermann Hosp. Sys., Inc*., 140 S.W.3d 870 (Tex. App.-Houston [14th Dist.] 2004, no pet.)

Facts: This case arose from a dispute about a back injury suffered by an employee during the course of her employment at the hospital. The employee appealed a jury's finding that the employer was not negligent.

Holding: The Court of Appeals affirmed the Trial Court's judgment. The Court generally held that, because the employee failed to make, amend, or supplement her discovery response to include all required relevant information concerning her treating physician, the Trial Court did not abuse its discretion in excluding his opinion testimony under Tex. R. Civ. P. 193.6(a). Also, based on the evidence before it, the Trial Court did not abuse its discretion in concluding that a workplace safety expert did not have a reasonable basis for any of his opinions with respect to the legal duties owed by the hospital and how those duties were breached. Further, the Trial Court did not abuse its discretion in excluding his testimony or in refusing the employee's requested jury instruction concerning the duties employers owed to their employees. Finally, the Trial Court did not abuse its discretion in either charging the jury to continue its deliberations or giving the jury a "dynamite charge" constituting situational coercion.

See case also under topic H. Expert Witnesses Used In or Disallowed In Non-Subscriber Cases

M. Lack of Appropriate Evidence to Uphold Punitive Damages Against a Non Subscriber Employer

1. *Agrium v. Clark*, 179 S.W.3d 765 (Tex. App.—Amarillo 2005, pet. denied).

Facts: An employee attempted to replace a discharge valve located in a highly pressurized line. However, the line had not been completely depressurized. The pressure in the line blew a plate from its seat and against the employee. The employee subsequently died from these injuries. The employee's surviving family brought suit against the employer under the theory of gross negligence for causing the death of the employee. The employee's family attempted to prove gross negligence to obtain exemplary damages by showing instances where the employer: 1) was not in compliance with OSHA regulations 2) failed to install additional or inspect existing redundant safety systems 3) lacked pertinent policies assuring that pressure valves were opened and locked-out to prevent their closure while repairs were undertaken 4) had *de minimus* training on how to repair the discharge value or remove the cover plate and 5) failed to affix warning labels on the compressor as recommended by its manufacturer. At trial, the jury found the employer negligent and awarded the

surviving spouse $2,000,000 in exemplary damages and none to the surviving children. The Trial Co
urt entered an award of $1,576,000 for the surviving spouse. The employer appealed this decision arguing that the company had general policies regarding the way its employees were to repair defective mechanisms within pressurized lines and that this policy was historically effective.

Holding: The Court of Appeals reversed the judgment of the Trial Court and denied the spouse any recovery against the employer. The Court reasoned that the employer had mandated a procedure to avoid the risk of injury while working on pressurized lines and that the procedure was effective over the years. Further, there was evidence that had the employee been following the procedures, he would have not been injured. Thus, the Court held that the record before them fell short of allowing a reasonable jury to form a firm conviction that the employer did not care about the risk of injury posed to the employee and that a finding of gross negligence and exemplary damages lacked the support of legally sufficient evidence.

N. Pre-Accident Waivers and Release Agreements

1. *Garcia v. J.J.S. Enters*., No. 08-04-00179-CV, 2005 Tex. App. LEXIS 7015 (Tex. App.—El Paso Aug. 25, 2005, no pet.).

Facts: This case arose when a convenience store manager was killed during the course of a robbery. Approximately three months before her death, the manager received training on the company's "no heroes" policy to be followed during store robberies. On the night of the incident, several teenagers came to the store in order to steal some beer. The decedent followed the teenagers out to their car and attempted to pull the car door open to stop them, but the driver accelerated, throwing the decedent under the car and killing her. The decedent's family filed a wrongful death suit against the employer for its alleged negligence. The employer filed for a Traditional and No Evidence Motion for Summary Judgment on grounds that the event was unforeseeable or, in the alternative, that there was no evidence that the employer's negligence, if any, proximately caused the employee's death. The employer also asserted that the Plaintiffs were barred from pursuing the lawsuit because the employee had signed a pre-injury waiver in exchange for acceptance of benefits provided by the employee welfare benefit plan. The Trial Court granted the employer's motion without stating the grounds for its ruling.

Holding: On appeal, the Court stated that the waiver was valid and did not violate public policy because it was entered into before the passage of Texas Labor Code §406.033(e), on June 17, 2001, which renders such waivers void. The Court also upheld the waiver on the grounds that it met the express negligence fair notice

requirement test. Since the Court upheld the validity of decedent's waiver, it affirmed the Trial Court's grant of summary judgment without addressing the other issues.

2. *Garcia v. LumaCorp, Inc*., 429 F.3d 549 (5th Cir. 2005).

Facts: An Employee maintenance worker suffered severe burns when chemicals he was mixing for application into a pool exploded. Prior to the accident, the employee signed a waiver or release of all claims in exchange for receiving occupational benefits from the employer. This action was taken prior to the enactment of Texas Labor Code §406.033(e), on June 17, 2001, which prohibited such waivers. As a result of his accident, the employee received in excess of $100,000.00 in plan benefits for medical costs and wage replacement. Prior to filing suit, the employee was approached by his employer and presented with a check for $10,000.00 and an agreement to pay an additional $14,441.96 in medical bills above and beyond the policy limits in exchange for a settlement and release. The employee was unrepresented by counsel at that time, and he signed the agreement and accepted the payments. Later he filed suit against his employer for negligence and fraud, among other claims. He also argued that the waivers had been procured through the use of coercion. The Trial Court granted the employer's Motion for Summary Judgment based upon the waiver and settlement agreement.

Holding: The Court of Appeals found that employee had accepted the benefit of the bargain and had lost his right on all causes of action for work related injuries. Ultimately, the Court of Appeals affirmed the Trial Court's ruling that the waiver was valid and refused to consider the employee's other claims.

3. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004).

Facts: Plaintiff, an employee at Storage & Processors, Inc., signed a pre-accident waiver and release in exchange for benefits pursuant to an Occupational Benefit Plan from the non-subscriber employer. The employee was injured on the job and accepted almost all available benefits under the plan. The employee subsequently filed a negligence lawsuit against his employer. The employer moved for Summary Judgment on the basis of the signed waiver and the theory of the employee's ratification by accepting the benefits. The Trial Court sustained the Motion for Summary Judgment, and the Court of Appeals reversed and remanded on the basis that the waiver and release violated public policy. While this case was pending, the Texas Supreme Court held in *Lawrence v. CDB Services* that waivers which were signed before June 17, 2001 were not prohibited by law. Thereafter, the employer filed a second Motion for Summary Judgment which was granted by the Trial Court. On appeal, the employee raised allegations of fraud, misrepresentation and mistake

relating to the signing of the release, but these claims were rejected because the employee did not raise them in the Trial Court. The employee also argued that the release did not satisfy the two fair notice requirements of the express negligence doctrine and conspicuousness. On that basis, the Court of Appeals reversed and remanded the Trial Court's judgment.

Holding: The Texas Supreme Court granted a petition for review and affirmed the reversal. Although the Texas Legislature prohibited pre-injury waivers with the enactment of Texas Labor Code §406.033(e), the Court stated that *Lawrence* still governs claims brought prior to this amendment. Therefore, the Court held that a non-subscriber employer offering less than subscriber-level benefits must meet the fair notice requirements in any waiver or release agreement signed by its employees. The Court ultimately affirmed the judgment of the Court of Appeals and remanded the case due to a fact issue on whether the employee had actual knowledge of the terms of the plan.

4. *Watts v. Pilgrim's Pride Corp*., No. 12-04-00082-CV, 2005 Tex. App. LEXIS 8155 (Tex. App.—Tyler Sept. 30, 2005, no pet.) (mem. op.).

Facts: An employee signed a pre-injury waiver prior to June 17, 2001. She subsequently sustained an on-the-job injury and accepted payments for medical expenses and lost wages per the employee benefits program. She then filed suit against her non-subscriber employer to recover personal injury damages. The employer filed, and the Trial Court granted, a Motion for Summary Judgment based on the affirmative defenses of waiver, ratification, election of remedies, and quasi-estoppel. In support of the summary judgment motion, the employer had attached an affidavit from an individual who was not present at the signing of the waiver. The employee appeared and argued that the affiant lacked personal knowledge and asserted that the waiver was obtained through fraud and misrepresentation.

Holding: The Court of Appeals reversed the Trial Court's granting of summary judgment, stating that there was insufficient evidence to support the affirmative defense of an informed choice to uphold the waiver. The Court further stated that receipt of benefits per the terms of the plan alone does not constitute an election of remedies barring an employee's action for common law damages.

5. *Silsbee Hosp., Inc. v. George*, 163 S.W.3d 284 (Tex. App.—Beaumont 2005, pet. denied).

Facts: An employee sustained multiple fractures to his foot when he fell from a ladder that was leaned against the roof of his non-subscriber employer's premises. Prior to his injury, and before June 17, 2001, the employee elected to participate in an

employee benefit plan which provided specified benefits in lieu of a common law remedy for personal injuries. The employee filed a negligence suit against his employer, and a Hardin County jury awarded him $1,000,000.00. The employer appealed the verdict, claiming that the employee's right to bring a negligence suit was precluded by the signed pre-accident waiver.

Holding: On appeal, the Court rejected the employer's waiver argument on the grounds of procedural issues and failure to meet the express negligence rule. Furthermore, the Court stated that the employer failed to demonstrate abuse of discretion by the Trial Court for denying the employer's requested trial amendment to assert ratification because the terms agreed to in writing were, in fact, enforced at trial. However, the Court found that the Trial Court erred in the jury selection process by failing to sustain the employer's objection to two biased potential jurors that opined they would favor the employee with an award even if he failed to prove his case. Accordingly, the Court of Appeals found that this was harmful error requiring the judgment to be reversed and remanded for a new trial.

O. Preemption and Removal: ERISA

1. *Stiles v. Memorial Hermann Healthcare System*, --- S.W.3d ---, 2007 WL 79436 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, no pet. h.).

Facts: After an employee was injured on the job, the employee asserted that her employer agreed to pay her health care expenses related to the incident in consideration of the employee releasing the employer from liability or negligence. The release referenced the employer's Occupational Health Plan and stated that notwithstanding the release of the employee's claims, the employee retained her rights under the Plan. The employee alleged that the employer refused to pay her medical bills pursuant to the release. The employer removed the case to federal court stating that ERISA preempted the claim. The employee argued that the employer's breach and fraud related to the release agreement and was distinct from the rights she had under the employer's Plan. The federal court remanded the case to state court stating that there was, "substantial doubt" as to whether the employee's claim falls within the preemptive scope of ERISA. Finally, the trial court dismissed the lawsuit concluding that the employee's state law claims for breach of contract and fraud were "addressed by" and "related to" the Plan and that ERISA preempted the claims. Thus, the trial court said it had no jurisdiction over the claims.

Holding: The Appellate Court held that the employee's claims based on breach of the release were not related to the ERISA-qualifying Plan so as to preempt state court jurisdiction and that the case should not have been dismissed. The Court reasoned that despite ERISA's expansive scope, "if a state law claim does not seek to recover

or replace benefits under an employee welfare benefit plan and is based on a violation of a legal duty independent of ERISA, it is not preempted by ERISA. Specifically, the Court pointed to the employee's petition which did not seek benefits under the Plan or claims that the employer improperly processed her claim for benefits. The employee's claims for breach of contract and fraud sought damages for the employer's alleged failure to honor the terms of the release agreement where the employer promised to pay the medical bills of the employee as they related to the work-related incident.

2. *Woods v. Texas Aggregates, L.L.C.*, 459 F.3d 600 (5th Cir. 2006).

Facts: An employee sued his employer as a result of a work-place injury. The employer removed the case to federal court alleging that the Occupational Injury Benefit Plan by the employer preempted the employee's non-subscriber negligence claim.

Holding: The 5th Circuit remanded this case back to state court and held that a workplace negligence claim only implicates the employer-employee relationship and not the administrator-beneficiary relationship necessary for ERISA preemption.

3. *Leake v. Kroger Texas, L.P.*, No. 3:04-CV-2707-D, 2006 WL 2842024 (N.D. Tex. September 28, 2006).

Facts: An employee sued her employer, Kroger Texas L.P. to recover Plan benefits that she claimed were wrongfully denied of her. The employer, a non-subscriber, had a Occupational Injury or Disease Benefit Plan and the employee suffered an on-the-job injury to her hands. The employer denied the employee's claim for Plan benefits stated that: (1) the employee failed to report the injury to her supervisor as soon as she was aware of it; (2) the employee used the services of an unapproved health care provider and (3) the employee's injury did not qualify as an occupational injury under the Plan. The employer moved for summary judgment on the claims. The employee contended that the employer violated ERISA and related regulations in handling her claim and that the Plan Administrator had abused their discretion in denying benefits.

Holding: The Court held that the employee failed to establish continuous ERISA procedural violations and that the Plan administrator did not abuse their discretion. The Court granted the summary judgment motion and dismissed the suit.

4. *Johnson v. Minyard Food Stores, Inc.*, 2005 WL 435109 (Tex. App.—Dallas Feb. 25, 2005, no pet.) (mem. op.).

Facts: The Plaintiff, a store clerk, alleged that she was injured while breaking down boxes and gathering shopping carts from her non-subscriber employer's parking lot. After the employee received money for medical costs and lost wages per her employer's plan, she was informed that she was not eligible to receive further benefits and was subsequently terminated. The employee brought suit against her employer, seeking damages based upon her claim that the employer failed to advise her that she was not covered by workers' compensation insurance. The employer moved for Summary Judgment based on ERISA preemption and the expiration of the statute of limitations. The employee later amended her pleading, alleging common law negligence. The trial judge granted the employer's motion and dismissed the employee's claims with prejudice.

Holding: The Court of Appeals affirmed, stating that the employee's negligence claim was precluded by the two-year statute of limitations and that the employee's other claims were preempted by ERISA.

5. *Portillo v. Convalescent Enters*., No. EP-05-CA-276-PRM, 2005 WL 1796146 (W.D. Tex. July 28, 2005).

Facts: An employee sued her non-subscriber employer in state court, alleging that her on-the-job injuries resulted from the employer's negligence. The employer removed the case to federal court based upon ERISA preemption, arguing that the employee's claim was covered by the self-administered Occupational Benefit Program governed by ERISA.

Holding: The case was remanded back to state court on the basis that a non-subscriber negligence claim for failing to maintain a safe worksite is not preempted by ERISA because those types of claims only implicate the employer/employee relationship and not the administrator/beneficiary relationship necessary for preemption.

6. *Holloway v. Avalon*, 107 Fed. Appx. 398, 2004 WL 1759249 (5th Cir. 2004).

Facts: Employee sued non-subscriber employer in state court, alleging that she was injured while attempting to move a patient and for wrongful termination. Employer removed the case to federal court based on ERISA preemption. The United States District Court for the Northern District of Texas granted the employee's motion to amend the employee's original complaint. Employee's amended complaint only contained a claim of workplace negligence, and the district court then found that ERISA preemption no longer applied and remanded the case back to state court. Employer appealed the district court's decision to remand the case, arguing that the

employee's state law negligence claim was fraudulently made to avoid ERISA preemption and was actually an attempt to receive damages from its insurance plan.

Holding: The Court of Appeals affirmed the decision of the District Court, holding that the employee's negligence claim was wholly independent from the existence of the employer's insurance plan. Since the employee claim did not arise under the employer's insurance plan, the district court properly found that the employee's claim was not preempted by ERISA and the employee did not have to arbitrate her claim.

P. Preemption and Removal: LMRA

1. *Hayward v. Friedrich Air Condition* Co., No. SA-04-CA-1040-XR, 2005 WL 2016978 (W.D. Tex. Aug. 23, 2005).

Facts: Plaintiff, a union member, was part of a Collective Bargaining Agreement ("CBA") requiring all workplace accidents to be settled through mediation. After the employee sustained an occupational injury he filed suit against his non-subscriber employer for negligence, failing to initiate the mediation procedures per the terms of the CBA. The employer removed the case to federal court based upon the contention that the Labor Management Relations Act ("LMRA") preempted the employee's state law negligence claims.

Holding: The Court subsequently granted the employer's Motion for Summary Judgment, holding that the employee's negligence claim was in fact preempted by the LMRA. The Court also found since the employee had received some benefits from the Occupational Benefit Plan, his negligence claim was "inextricably intertwined" with consideration of the terms of the CBA. Therefore, the employee was precluded from filing suit since he did not first exhaust the grievance-arbitration procedures mandated by the CBA.

2. *Coronel v. U.S. Natural Res., Inc.,* No. SA-04-CA-0804-RF, 2005 WL 831843 (W.D. Tex. Apr. 4, 2005).

Facts: An employee suffered an injury resulting in the amputation of several fingers while operating a punch press. She subsequently filed suit in state court against her non-subscriber employer for negligence relating to her injury. Her employer asserted that removal was proper because the Labor and Management Relations Act ("LMRA") preempted the state law negligence claim. The employer further argued that the negligence claims were governed by the collective bargaining agreement ("CBA"). The employee brought a Motion to Remand, stating that removal was improper because there was no evidence that the CBA could properly invoke the preemption provisions of the LMRA.

Holding: The Court held that since the CBA covered the claim in question, its grievance and arbitration procedures provided the sole vehicle for resolving the claim. The Court further held that even though the employee did not sign the Occupational Benefit Plan mentioned in the CBA, her receipt of benefits constituted acceptance of the terms of both the Plan and the CBA. Accordingly, the Court denied the employee's Motion to Remand, stating that the Plan governed the claims in this matter.

Q. Statutes of Limitations

1. *Espinosa v. Universal City Animal Hospital*, No. 04-05-00561-CV, 2006 WL 1080253, (Tex. App.—San Antonio April 26, 2006, no pet. h.).

Facts: An employee filed suit against her employer for an alleged accident that occurred on the employer's premises and for repetitious trauma events after the alleged accident when the employee returned to work and was required to lift in excess of her limitations. The employer filed a hybrid motion for summary judgment and argued that the employee's claim was barred by the two-year statute of limitations for personal injury actions and that there was no evidence to support the claim of "repetitious trauma" after March 1, 2000. The employee responded with an affidavit that asserted that she suffered an injury in July of 2000 that was a result of the continuous and repetitious performance of her employment duties and that a doctor told her in October of the same year to discontinue her employment. The trial court granted the employer's motions for summary judgment and specified that the claim was barred by the two year statute of limitations and that the employee had failed to produce any evidence to support a potential negligence claim within the permitted time period.

Holding: The Appellate Court upheld the Trial Court's decision to grant the motion for summary judgment in favor of the employer. The Court reasoned that the discovery rule was not applicable because this doctrine was not pled by the employee as she was aware of her injury on the very day it occurred, March 1, 2000. The Court also dismissed the employee's affidavit stating that in July of 200 she re-injured her back since it did not provide enough evidence of the factual details regarding the trauma and was conclusory.

2. *Brooks v. Tex-Pack Express, L.P.*, No. 02-05006-C, 2004, 2004 WL 2211714, (Tex. App.—Dallas 2004, no pet.)

Facts: An employee sued his non-subscriber employer for work injuries that he sustained on the job one day before the expiration of the two year statute of

limitations. The employer was not served with the lawsuit until five months later. The employer moved for summary judgment on the filing and service of the lawsuit after the expiration of the statute of limitations. The Trial Court agreed that the employee did not prove due diligence in suing and serving the employer with the petition within the two year statute of limitations and dismisses the case.

Holding: The Court of Appeals affirmed the Trial Court and held that the only appropriate evidence before them does not show any due diligence by the employee as an excuse for the delay in serving the employer.

R. Substantive Entitlement to Benefits: Procedural Defects

1. *Duncan v. Assisted Living Concepts, Inc*., No. 3:03-CV-1931-N, 2005 WL 331116 (N.D. Tex. Feb. 10, 2005).

Facts: An employee received an on-the-job injury and was treated by emergency room doctors selected by her non-subscriber employer's Occupational Injury Benefit Plan. The doctors suggested that the employee exhibited signs of symptom magnification and malingering and stated that she had been verbally abusive and noncompliant during her treatment. Shortly thereafter, the employee's benefits were terminated under the Plan. Several days later, employee's counsel sent a letter to the Plan Administrator requesting information, which the administrator considered as an appeal of its decision. Upon further review, the Plan Administrator once again upheld its decision to terminate benefits. The employee subsequently filed a claim alleging abuse of discretion, failure to provide information and violation of procedures for considering appeals of benefit denials. The employee then filed a Motion for Summary Judgment seeking judgment as a matter of law on the matters raised in her complaint.

Holding: The Court granted and denied the employee's motion in part. In doing so, the Court found that the employer had in fact committed procedural violations regarding the appeals process and not providing information. However, the Court stated that this alone did not entitle the employee to benefits as a matter of law. Accordingly, the Court remanded to the Plan Administrator to provide the requested information and to consider the employee's appeal. The Court held its ruling on attorney's fees because neither party had "prevailed" at this point in time.

S. Sufficient Evidence to Uphold a Negligence Claim Against a Non-Subscriber Employer

1. *Brookshire Grocery Co. v. Goss*, No. 06-05-00036-CV, --- S.W.3d ---, 2006 WL 3346147 (Tex. App.—Texarkana 2006, no pet. h.).

Facts: An employee of a non-subscriber employer went into a company cooler to obtain some food items. When the employee turned around, she hit her shin on a lowboy cart that was sitting in the cooler and used to move inventory. As the employee hit her shin, she reached and turned around to grab a shelf to keep from falling and pulled her back and injured her knee. The employee went through multiple medical procedures to attempt to alleviate her pain. The employee brought suit against her employer, alleging both ordinary negligence and premises liability. A jury verdict was returned in favor of the employee in the amount of $726,078.50. On appeal, the employer argued that the employee failed to show that the employer owed the employee a duty relating to a safe workplace, that the employee failed to present legally or factually sufficient evidence on the element of proximate cause, that the employee failed to present sufficient evidence to sustain the jury's damage award and that the Trial Court committed reversible error in refusing to give the appropriate premises liability instructed requested by the employer.

Holding: The Appellate Court affirmed the judgment of the trial court against the employer. In regards to the duty owed by the employer, the Appellate Court reasoned that employees are to be treated as invitees and that a safe workplace duty inevitably leads to notions of premises liability. Thus, the employer had a duty to provide a safe workplace. The Court explained that the employer failed to preserve error with regards to arguing a lack of factually sufficient evidence. The Court found that there was legally sufficient evidence to show that the lowboy cart in the cooler posed a threat of injury to the employee. The Court reasoned that the employer had recognized the carts as "tripping hazards" and declined the explanation of the employer that the employee should have known not to bump into the card, as the Texas Supreme Court has flatly rejected the open and obvious risk defense. Because the employer had acknowledged the cart as a risk in its own safety inspection checklist, the Court found that there was legally sufficient evidence of proximate cause, as the employee was only required to prove knowledge of the general danger. The Court also rejected the employer's argument regarding the jury charge. Although the employee pled both ordinary negligence and premises liability, the fact that the employee only elected to submit only the general negligence form of the cause of action did not require reversal. The Court found legally sufficient evidence on all of the theories of damages awarded and noted that the large damage award for future earning capacity was within the range provided by expert testimony.

2. *Theresa v. Dunn v. Denar Rest. LLC*, No. 04-9025-A (14th Dist. Ct., Dallas County, Tex. Sept. 28, 2006).

Facts: An employee waitress sued her non-subscriber employer after tripping and falling on a telephone cord lying in the floor near the check out counter. The

employee alleged that the telephone cord created a dangerous condition in an area that she worked, as the cord was lying loose in the walkway next to the cash register. Further, the employee claimed that her employer was negligent for failing to correct a condition that they should have known about and was negligent for not warning of this danger. The employer denied all negligence; further, the employer contended that if the condition was unreasonably dangerous, that the employer had no duty to warn the employee, as the condition would be open and obvious. After being admitted into the emergency room, the employee suffered a heart attack and underwent an emergency triple bypass surgery. The employee sought past, future and punitive damages. The employer claimed that the employee did not mitigate her damages by going to recommended therapy and appropriate rehabilitation.

Holding: A jury awarded a total of $437,500 for medical costs, physical impairment and pain and suffering. The Judge did not allow damages for the employee's heart-related costs, as there was no finding of causation by an expert.

3. *Milcherska v. Dal-tech Serv. Group, Inc*., No. 00-11289-B (Dallas County Court at Law No. 2, 2006).

Facts: An employee and head mechanic was injured while he stood on a milk crate to unlatch the trunk of a car while he was on a hydraulic lift. The employee fell backwards when the crate slipped out from under him on an oily floor. The employee sued the non-subscriber employer alleging that the area was an unsafe workplace. The employee stated that before opening the trunk, he should have been able to lower the car from the lift, but that the manager pressured him to work faster by not lowering the cars until all work was completed. The employer argued that the employee was the sole proximate cause of the accident as the employee had brought the crate from home and that it was the employee's idea to use the crate.

Holding: A jury found for the employee and awarded him $10,000 for pain and suffering and $2,000 for past disfigurement.

4. *Singleton v. Popeye's Fried Chicken & Biscuits*, No. 2005-27307 (270th Dist. Ct. Harris County, Tex. Aug. 31, 2006).

Facts: An employee sued her non-subscriber employer when she slipped and fell while working. The employee alleged that the employer was negligent in that the employer had an unsafe workplace conditions and operating procedures. The employee had allegedly slipped on loose floor tiles or a grease and water spill. The City of Houston health inspectors had found defective tiles on the floor before the accident. The employer argued that, as a manager, the employee was 100% responsible for the condition of the store. Further, the employer disputed whether or

not the employee fell in the area of the loose tiles and whether the tiles had been repaired before her accident.

Holding: A jury awarded the employee $368,000, which was reduced by $22,000 for an ERISA payment.

5. *Elliot v. Bay Area Waste Sys. Inc.,* No. 2005-10363 (334th Dist. Ct., Harris County, Tex. Aug. 25, 2006).

Facts: An employee sanitation worker was injured when a broken piece of glass cut his wrist while he was loading trash into a bin. The employee contended that the employer had a duty to provide a safe work environment, safety training and proper safety equipment and uniforms (such as gloves and goggles). The employer claimed that the employee's injuries were caused by his own horseplaying, as the employee was breaking bottles against the wall of the bin in the back of the truck. The employee was subsequently terminated after he allegedly forged a doctor's excuse. The employee underwent surgery to repair tendons and ligaments in his forearm.

Holding: The District Judge awarded the employee a total of $57,576 for medical costs, lost wages, disfigurement, pain and suffering and interest.

6. *Jones v. Jacobs Eng'g. Inc*., (164th Dist. Ct., Harris County, Tex. Aug. 9, 2006).

Facts: An employee electrician sued his employer after he tripped over boards that were being used to stack metal grates. The employee sued for workplace negligence and contended that the boards created a workplace hazard and that the employer did nothing to rectify the situation. Further, the employee stated that he told the employer about the condition, which the employer took no action on. The employer argued that the boards were covered with mud the day of the accident and that the employee did not see them. As such, the employer argued that since the employee knew of the boards, the employee was negligent in not avoiding them.

Holding: A jury awarded the employee $475,000, as the employee had to have a total knee replacement.

7. *Pustka v. Printpack, Inc*., No. 05-40043, 2006 WL 449055 (5th Cir. Feb. 22, 2006) (per curiam).

Facts: An employee was injured while unloading a pallet overloaded with rolls of paper. Although the pallet was stable upon arrival at the employer's premises, it became unstable when the employee cut the band holding the rolls together and then tried to correct the problem himself, resulting in his injury. The employee sued his

non-subscriber employer. The employer argued that the employee's sole negligence caused the accident because the pallet was stable when it arrived at the facility and became unstable due to the employee's own actions. During the trial, the employee and his co-workers testified that although safety rules prohibited employees from moving heavy loads without assistance, those rules were commonly ignored even with supervisors present. The employee obtained a favorable jury verdict. In addition, testimony showed that no disciplinary action was taken against employees who violated these rules.

Holding: The Court of Appeals affirmed the judgment, stating that sufficient evidence existed to allow a rational jury to conclude that the employee's injury was proximately caused either by negligence of the employer in loading the pallet or negligent enforcement of the safety rules.

8. *Dodge v. Durdin*, 187 S.W.3d 523 (Tex. App.—Houston [1st Dist.] 2005, no pet.)

Facts: An employee claims that she sustained an injury when an untamed horse kicked her in the abdomen as she was administering oral deworming medication to the horse pursuant to direction from her employer and supervisor. The employee asserted that her employers never warned her that the horse was not trained, dangerous and had to be handled with care. The trial court granted the employer's motion for summary judgment.

Holding: The Appellate Court reversed the decision of the Trial Court and held that the employee produced more than a scintilla of evidence on every element of her negligence claim. On the element of duty, the Court stated that the employee produced evidence that she was employed by the named defendants from tax forms and the fact that the employers did not distinguish their individual relationships to the employee in their motion for summary judgment. On the element of breach, the Court found that the employee's affidavit which emphasized that her employers did not warn her of the horse's dangerousness and her statement that her employers did not provide her with safety instructions or provide her other workers to assist her in handling the animals as enough evidence to raise a genuine issue of material fact. Further, the Court said that the employee produced enough evidence on the issue of proximate cause as the employee's affidavit stated that the employee learned that her injury could have been prevented if the employers had taken any of the precautions previously mentioned. Although the employers objected to this affidavit as a whole as not being based on personal knowledge, they did not specifically object to this statement and the objection was waived as being too general. Last, the employee produced enough evidence of the element of damages as the summary judgment record showed the employee incurred over $4,000 in medical bills as a result of her injury.