**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.** **SUPERIOR COURT**

**BEFORE THE COURT-APPOINTED REFEREE**
**IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY**
**DISPUTED CLAIMS DOCKET**

**In Re Liquidator Number:** **2008-HICIL-41**
**Proof of Claim Number:** **CLMN712396-01**
**Claimant Name:** **Harry L. Bowles**

# COMPENDIUM OF NON-NEW HAMPSHIRE AUTHORITIES CITED IN LIQUIDATOR'S SECTION 15 SUBMISSION

**Case** **Tab**

**Statute or Rule**

**ROBERT AND TONI AMSTADT ET AL., PETITIONERS v. UNITED STATES BRASS CORPORATION, RESPONDENT UNITED STATES BRASS CORPORATION ET AL., PETITIONERS v. EMERY H. AND SUSAN KOCHIE ET AL., RESPONDENTS UNITED STATES BRASS CORPORATION, SHELL OIL COMPANY D/B/A SHELL CHEMICAL COMPANY, AND HOECHST CELANESE CORPORATION, PETITIONERS v. NABEEL ANDRAUS ET AL., RESPONDENTS**

**No. 94-0008, consolidated with, No. 94-0023, consolidated with, No. 94-0123**

**SUPREME COURT OF TEXAS**

**919 S.W.2d 644; 1996 Tex. LEXIS 28; 39 Tex. Sup. J. 351**

**February 21, 1995, Argued**
**March 7, 1996, Delivered**

**PRIOR HISTORY:** [**1] ON APPLICATIONS FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff homeowners sought a writ of error to the Court of Appeals for the First District of Texas, for defendant manufacturers and sellers for violations under the Deceptive Trade Practices-Consumer Protection Act (DTPA), Tex. Bus. & Com. Code §§ 17.41-17.63. The common issue was whether upstream suppliers of raw materials and component parts were liable under the DTPA when none of their misrepresentations reached the consumers.

**OVERVIEW:** Defendant manufacturers and sellers sold to appellant homeowners plumbing systems constructed from flexible plastic pipes connected by plastic fittings. After a few years, the systems failed as cracks developed in the fittings, causing leaks. Plaintiff homeowners brought actions for negligence, fraud and violations under the DTPA. The trial court found that the manufacturers had made misrepresentations under the DTPA and were negligent. The court of appeals affirmed DTPA liability. The court affirmed the negligence claims, however, held that defendant's acts must be in connection with the plaintiff's consumer transaction to support liability under the DTPA and because the court concluded that the manufacturers had no conduct sufficient with the consumer transactions involving the purchases of plaintiffs' homes, the lower court rulings were reversed. The court found that privity existed between one group of homeowners and their successors and reversed the court of appeals holding that plaintiffs' claims were res judicata barred.

**OUTCOME:** The court affirmed in part and reversed in part the judgements of the court of appeals. The judgment in favor of plaintiff homeowners on their Deceptive Trade Practices Act claims was reversed because the court found no connection between defendant manufacturers' and sellers' conduct and the purchase of plaintiffs' homes. The court reversed the judgment with respect to res judicata finding that plaintiffs were in privity with the prior owners.

**CORE TERMS:** plumbing system, consumer, homeowner, household, fitting, homebuilder, misrepresentation, pipe, manufacturer, privity, res judicata, unconscionable, building code, producing cause, polybutylene, deceptive, builders, cause of action, subject matter, manufactured, installation, marketing, raw, negligence claims, manufacture, connected, installed, plumbing, resin, deceptive acts

**LexisNexis(R) Headnotes**

***Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation***
***Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage***
***Contracts Law > Types of Contracts > Lease Agreements > Personalty Leases > General Overview***
[HN1]The Deceptive Trade Practices Act (DTPA) grants consumers a cause of action for false, misleading, or deceptive acts or practices. Tex. Bus. & Com. Code § 17.50(a)(1). The DTPA defines a consumer as an individual who seeks or acquires by purchase or lease, any goods or services. Tex. Bus. & Com. Code § 17.45(4). Privity of contract with a defendant is not required for the plaintiff to be a consumer. A consumer must, in order to prevail on a DTPA claim, also establish that each de-

fendant violated a specific provision of the Act, and that the violation was a producing cause of the claimant's injury. Tex. Bus. & Com. Code § 17.50(a).

***Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview***
***Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage***
***Torts > Products Liability > Misrepresentation***
[HN2]The purpose of the Deceptive Trade Practices Act (DTPA) is to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection. Tex. Bus. & Com. Code § 17.44.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN3]Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims as were raised or could have been raised in the first action.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN4]Generally people are not bound by a judgment in a suit to which they were not parties. Tex. Civ. Prac. & Rem. Code § 37.006(a). The doctrine of res judicata creates an exception to this rule by forbidding a second suit arising out of the same subject matter of an earlier suit by those in privity with the parties to the original suit. The purposes of the exception are to ensure that a defendant is not twice vexed for the same acts, and to achieve judicial economy by precluding those who have had a fair trial from relitigating claims.

***Contracts Law > Breach > Causes of Action > General Overview***
[HN5]People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it, (2) their interests can be represented by a party to the action, or (3) they can be successors in interest, deriving their claims through a party to the prior action.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN6]Privity exists if the parties share an identity of interests in the basic legal right that is the subject of litigation. To determine whether a prior and later lawsuit involve the same basic subject matter, we focus on the factual basis of the complaint. If the second plaintiffs seek to relitigate the matter which was the subject of the earlier litigation, res judicata bars the suit even if the second plaintiffs do not allege causes of action identical to those asserted by the first. Res judicata also precludes a second action on claims that arise out of the same subject matter and which might have been litigated in the first suit.

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FOR RESPONDENTS (94-0008): Nelson, Mr. Kurt T., Rea, Ms. Loretta H., Zeidman, Mr. Mark R., Nelson & Zeidman, Houston, TX. Powers, Jr., Mr. William, Austin, TX.

FOR RESPONDENTS (94-0023): O'Brien, Mr. Michael, Mike O'Brien, Houston, TX. Moriarty, Mr. James R., Moriarty & Associates, Houston, TX. Fleming, Mr. George M., Hovenkamp, Mr. Mark A., Fleming Hovenkamp & Grayson, Houston, TX.

FOR RESPONDENTS (94-0123): Hovenkamp, Mr. Mark A., Fleming, Mr. George M., Fleming Hovenkamp & Grayson, Houston, TX. O'Brien, Mr. Michael, Mike O'Brien, Houston, TX.

**JUDGES:** JUSTICE CORNYN delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE ENOCH, JUSTICE BAKER and JUSTICE ABBOTT join. JUSTICE GONZALEZ, joined by JUSTICE SPECTOR, concurring in part and dissenting in part. JUSTICE OWEN not sitting. JUSTICE GONZALEZ, joined by JUSTICE SPECTOR, concurring in part and dissenting in part.

**OPINION BY:** JOHN CORNYN

**OPINION**

[*646] In these three cases, homeowners [**3] have sued the manufacturers of a polybutylene plumbing system for negligence and violations of the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE [*647] §§ 17.41-17.63 (DTPA). The common issue is whether the Legislature intended that upstream suppliers of raw materials and component parts be liable under the DTPA when none of their misrepresentations reached the consumers. This precise issue, which to our knowledge has never before been raised in the twenty-three-year history of the DTPA, animates the appeals in *Barrett v. United States Brass Corp.*, *United States Brass Corp. v. Knowlton/Kochie*, and *United States Brass Corp. v. Andraus*. In *Knowlton/Kochie* we also consider a res judicata issue; in *Barrett*, a comparative liability issue.

We hold that, although the homeowners who obtained a jury finding of negligence may recover on that theory, no homeowner may recover from Celanese, Shell, or U.S. Brass under the DTPA because these manufacturers' alleged DTPA violations did not occur in connection with the homeowners' purchase of their homes. We accordingly reverse the judgments of the courts of appeals with regard to DTPA liability [**4] in all three causes. We remand *Andraus* and *Kochie* to the trial courts for rendition of judgment in favor of those homeowners who received favorable jury findings on their negligence claims. We reverse the court of appeals' judgment in *Knowlton* on res judicata grounds and render judgment that the *Knowlton* households take nothing, and reverse and remand *Barrett* to the trial court to resolve the comparative liability issue in accordance with this opinion.

## I. FACTS

### *U.S. Brass, Shell, and Celanese v. Andraus*

In *Andraus*, the owners of approximately 95 homes in the Fairmont Park West subdivision in La Porte, Texas, sued General Homes Corporation (the developer and homebuilder), U.S. Brass, Shell Oil Company, and Hoechst Celanese Corporation after experiencing problems with their plumbing. U.S. Brass designed and manufactured the plumbing system.

The plumbing system used flexible plastic pipes made of polybutylene resin connected by fittings made of a plastic compound called Celcon. The pipes and fittings were joined together by a copper or aluminum crimp ring placed around the outside of the pipe at the point where the pipe and fitting [**5] were connected. The ring, fitting, and pipe were then compressed using a large wrench-like tool designed by U.S. Brass. The pressure from the crimp ring deformed the pipe and fitting, creating a water-tight seal.

Celanese manufactured Celcon and supplied Celcon pellets to U.S. Brass to be molded into fittings. Celanese promoted the use of Celcon in plumbing applications to U.S. Brass and other manufacturers, and knew that U.S. Brass used Celcon to make the fittings. Shell produced the polybutylene resin and provided it in raw form to U.S. Brass. U.S. Brass formed the resin into the pipe used in the plumbing system.

In the early 1980s, U.S. Brass and Shell promoted the plumbing system to municipal officials in La Porte in order to obtain building code approval of the system for residential use. U.S. Brass and Shell also marketed the system to homebuilders, including General Homes. General Homes installed U.S. Brass' plumbing system in homes it built in 1980, 1981, and 1982. In 1982, some of these systems began to fail. Cracks developed in the Celcon fittings that eventually caused leaks. At trial, the parties vigorously disputed what caused the fittings to fail. Some of the experts [**6] testified that degradation of the Celcon from exposure to the households' chlorinated water caused the cracks in the fittings. Others testified that inadequate design, defective manufacture, and improper installation, or a combination of these problems along with chemical degradation created excessive stress, which caused the fittings to crack.

The homeowners [1] sued General Homes, U.S. Brass, Shell, Celanese, and Vanguard [*648] Plastics, Inc. (a competitor of U.S. Brass, later dismissed from the suit). General Homes is not a party to this appeal. The homeowners alleged that the plumbing system's failure caused property damage and mental anguish. They sought damages based on negligence, fraud, and violations of the DTPA.

1 Most of the homes were owned by married couples, but some were owned by individuals.

> During discovery and trial, the members of each household were treated as one plaintiff. For example, one set of jury questions was asked for each couple. In this opinion, the words "homeowner," "household," and "plaintiff" are used interchangeably, and may refer to more than one person.

[**7] A jury found that U.S. Brass, Shell, and Celanese had made misrepresentations under the DTPA and were negligent. The jury also found that U.S. Brass had acted unconscionably and was grossly negligent. The trial court ruled that the statute of limitations barred the negligence claims of fifty-six households, and rendered a take-nothing judgment against five households for unspecified reasons. Three households elected to recover on the negligence findings, and the trial court rendered judgment accordingly. The trial court also rendered judgment for the eighty-six households that elected recovery under the DTPA.

Celanese, Shell, and U.S. Brass appealed. The court of appeals reversed the trial court's judgment in part and affirmed it in part. S.W.2d . Specifically, the court of appeals affirmed DTPA liability because it concluded that "there was a link between the representations made and the use of the plumbing system in the plaintiffs' homes, which ultimately caused damage." *Id.* at .

***Knowlton v. U.S. Brass, Shell, and Celanese;***

***Kochie v. U.S. Brass.***

In *Knowlton/Kochie*, homeowners sued General Homes, Buckner Boulevard Plumbing [**8] Company (a plumbing contractor), Celanese, Shell, U.S. Brass, and Vanguard. They asserted claims for negligence, strict liability, and misrepresentation and unconscionability under the DTPA based on the defendants' representations about the characteristics of the plumbing systems to homebuilders. They claimed that absent such representations, General Homes would not have installed the defective systems.

Celanese, Shell, U.S. Brass, and General Homes moved for summary judgment based on res judicata and the statute of limitations. The trial court granted the motion with respect to five households, led by the Knowltons, without specifying the grounds. The Knowlton households had bought their homes from people who had previously sued and recovered damages caused by the plumbing systems.

The remaining households, led by the Kochies, dismissed their claims against General Homes, Buckner, Celanese, and Shell, and proceeded to trial against U.S. Brass and Vanguard. After closing argument but before the jury returned a verdict, they also settled with Vanguard. The jury returned a verdict in favor of sixty-nine households. Forty-eight households elected recovery under the DTPA and twenty-one [**9] elected recovery for negligence. The trial court rendered judgment accordingly against U.S. Brass.

U.S. Brass appealed, complaining that the Kochie homeowners were not consumers under the DTPA. The court of appeals rejected that complaint. 864 S.W.2d 585, 592-93. The Knowlton homeowners also appealed. The court of appeals reversed the summary judgment rendered against them, holding that neither res judicata nor the statute of limitations barred their actions. 864 S.W.2d at 605-06.

***Barrett v. U.S. Brass***

In *Barrett*, several hundred homeowners sued nine companies, including U.S. Brass, alleging negligence, strict liability, and violations of the DTPA. The trial court put thirty-six homeowners to trial as a test group. The group settled with all defendants except U.S. Brass.

The trial proceeded against U.S. Brass. The trial court directed a verdict against nine households because U.S. Brass' products were not used in their homes. These nine did not appeal. The jury found in favor of twenty-three households for negligence and DTPA violations, but found against four [*649] households. The trial court rendered judgment against the four latter households, [**10] who were also unsuccessful at the court of appeals. The twenty-three households that obtained favorable jury findings elected to recover under the DTPA. The trial court, however, granted U.S. Brass' motion to disregard the jury's answers under the DTPA and rendered judgment based solely on negligence.

The court of appeals reversed the judgment in part, holding that all the homeowners were consumers under the DTPA, but that only seven of the twenty-three homeowners had produced sufficient evidence that U.S. Brass' misrepresentations were a producing cause of their injuries. 864 S.W.2d 606. The court also held that there was no evidence of producing cause with regard to the sixteen other households. *Id.*

**II. DTPA**

A.

[HN1]The DTPA grants consumers a cause of action for false, misleading, or deceptive acts or practices. TEX. BUS. & COM. CODE § 17.50(a)(1); *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980). The DTPA defines a "consumer" as "an individual . . . who seeks or acquires by purchase or lease, any goods or services." TEX. BUS. & COM. CODE § 17.45(4). Privity of contract with a defendant is not required for the plaintiff to be a consumer. *E.g.*, [**11] *Home Sav. Ass'n v.*

*Guerra*, 733 S.W.2d 134, 136 (Tex. 1987); *Kennedy v. Sale*, 689 S.W.2d 890, 892-93 (Tex. 1985); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540-41 (Tex. 1981). A consumer must, in order to prevail on a DTPA claim, also establish that each defendant violated a specific provision of the Act, and that the violation was a producing cause of the claimant's injury. TEX. BUS. & COM. CODE § 17.50(a); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995).

The manufacturers argue that DTPA liability, while not limited to those in contractual privity with the consumer, cannot extend to all entities in the chain of production or distribution when none of those entities' alleged misrepresentations ever reached the consumer. The homeowners, on the other hand, argue that a misrepresentation by any entity in the chain of distribution that is the cause-in-fact of actual damages entitles them to recover under the DTPA. We do not agree with the homeowners' contention. To accept the homeowners' argument would extend DTPA liability to upstream manufacturers [**12] or suppliers to an extent not intended by the Legislature when it enacted the DTPA.

[HN2]The purpose of the DTPA is to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." TEX. BUS. & COM. CODE § 17.44. As we have explained, that purpose is, in part, to encourage consumers to litigate claims that would not otherwise be economically feasible and to deter the conduct the DTPA forbids. *See Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980); *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980); *Woods v. Littleton*, 554 S.W.2d 662, 670 (Tex. 1977); *see also* Montford et. al., *1989 Texas DTPA Reform: Closing the DTPA Loophole in the 1987 Tort Reform Laws and the Ongoing Quest for Fairer DTPA Laws*, 21 ST. MARY'S L.J. 525, 576 (1990).

Although the DTPA was designed to supplement common-law causes of action, we are not persuaded that the Legislature intended the DTPA to reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. Despite its broad, overlapping prohibitions, [**13] we must keep in mind why the Legislature created this simple, nontechnical cause of action: to protect consumers in consumer transactions. Consistent with that intent, we hold that the defendant's deceptive conduct must occur in connection with a consumer transaction, as we explain below.

In *Cameron v. Terrell & Garrett, Inc.*, we said: "The Act is designed to protect consumers from any deceptive trade practices *made in connection with* the purchase or lease of any goods or services." 618 S.W.2d 535, 541 (Tex. 1981) (emphasis added). The [*650] in-connection-with requirement imposes a limitation on liability that is consistent with the underlying purposes of the DTPA. Without this limitation, we would merely substitute the defendant's introduction of a particular product into the stream of commerce for the conduct that was found to have violated the DTPA. We find no authority for shifting the focus of a DTPA claim from whether the defendant committed a deceptive act to whether a product that was sold caused an injury. Requiring a connection between the plaintiffs, their transactions, and the defendants' conduct enunciates a limitation we have alluded to, but not fully [**14] articulated, in prior cases. *See, e.g., Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 305 (Tex. 1988) (noting that deceptive conduct may be actionable under the DTPA if it is "inextricably intertwined" with a consumer transaction) (quoting *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382 (Tex. 1982); *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987) (stating that a plaintiff establishes standing to sue under the DTPA in terms of her relationship to a transaction); *Guerra*, 733 S.W.2d at 136 (stating that a defendant creditor "must be shown to have *some connection* either with the actual sales transaction or with a deceptive act related to" it) (emphasis added); *Flenniken*, 661 S.W.2d at 707 (holding that a bank may be subject to DTPA liability because its actions occurred "in *the context of*" the consumer's purchase of a home) (emphasis added); *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 388-89 (Tex. 1982) (concluding that a consumer had a DTPA claim for the defendant's deceptive acts "*connected with*" a sale); *Cameron*, 618 S.W.2d at 541 (ruling that the [**15] DTPA protects "consumers from any deceptive trade practice made *in connection with* the purchase or lease of any goods or services") (emphasis added); *see also Southwestern Bell Tel. Co. v. Boyce Iron Works, Inc.*, 726 S.W.2d 182, 187 (Tex. App.--Austin 1987) (holding that "neither the telephone company's representations asserted in the agency hearing nor its course of conduct were the producing cause of Boyce's actual damages" given the absence of "proof that any representation or any course of conduct by the telephone company influenced Boyce's purchase of the alarm company's protective services"), *rev'd on other grounds*, 747 S.W.2d 785 (Tex. 1988); *Taylor v. Burk*, 722 S.W.2d 226, 229 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.) (affirming the trial court's judgment notwithstanding the verdict in favor of Burk on a DTPA claim because Taylor presented no evidence that Burk "was *connected with* the real estate

transaction between Taylor and the Millers"). While our words have varied, the concept has been consistent: the defendant's deceptive trade act or practice is not actionable under the DTPA unless it was committed *in connection with* the plaintiff's transaction [**16] in goods or services.

In the three cases before us today, the homeowners purchased homes equipped with polybutylene plumbing systems. These systems are goods, and they form the basis of the homeowners' complaints. The homeowners are therefore consumers under the DTPA. TEX. BUS. & COM. CODE § 17.45(4). To determine whether the defendants may be liable under the DTPA, we must examine whether their conduct occurred in connection with the plaintiffs' purchase of their homes.

B. Celanese

Celanese manufactured the polybutylene compound, Celcon, and supplied Celcon pellets to U.S. Brass for its use in molding the plumbing system fittings. Celanese promoted the use of Celcon in plumbing applications to U.S. Brass and other manufacturers, and knew that U.S. Brass used Celcon to make fittings for its plumbing systems. Celanese did not control U.S. Brass' selection of raw materials, did not design the parts or tools, and did not instruct or train the homebuilders' plumbers. Celanese told U.S. Brass that it should mold prototype components from Celcon and subject them to the most severe anticipated end-use conditions. Celanese also informed U.S. Brass of Celcon's potential limitations [**17] in high-chlorine conditions. Celanese's marketing efforts were limited to promoting its material to the manufacturers of the plumbing systems. It did not market the systems to homebuilders or building code officials, or market the finished [*651] homes to the consumers. The manufacturers of the plumbing systems and the building code officials, and to a lesser degree the homebuilders, were intermediaries capable of assessing the suitability of Celcon for use in the systems.

None of these facts supports the conclusion that Celanese's misrepresentations were made in connection with the plaintiffs' purchase of their homes. Celanese exercised little or no control over the manufacture and installation of the finished plumbing systems, much less the manufacture and sale of the homes. Celanese had no influence over the terms of the sales to the homeowners. At most, Celanese enjoyed the benefit of selling a raw material to a downstream manufacturer.

We hold that, under these circumstances, Celanese's conduct did not occur in connection with the plaintiffs' purchase of their homes; consequently, that conduct cannot support DTPA liability. Therefore, we reverse the court of appeals' judgment [**18] in *Andraus* permitting recovery under the DTPA against Celanese. (Celanese had no judgment rendered against it in either *Knowlton/Kochie* or *Barrett*.)

**C. Shell**

Shell produced the polybutylene resin from which U.S. Brass manufactured the pipes used in the plumbing system. As with Celanese, Shell did not control U.S. Brass' selection of raw materials, did not design the parts or tools, and did not instruct or train the homebuilders' plumbers. However, Shell played a substantial role in marketing U.S. Brass' entire system for new homes in the early 1980s. It undertook a marketing campaign and directly contacted homebuilders to promote the system and increase the market for polybutylene resin. Several homebuilders testified that they learned about U.S. Brass' plumbing system from Shell at trade shows and from Shell salespeople who visited them. The record contains some evidence that La Porte building officials would not have approved the plumbing system for residential use absent Shell's representations about its quality, reliability, and longevity. Finally, there is some evidence that the homebuilders installed the systems in reliance on the same representations.

[**19] As was the case with Celanese, these facts do not support the conclusion that Shell's misrepresentations were made in connection with the relevant consumer transactions, the purchase of the homes. Shell had no control over the manufacture or installation of the plumbing systems, or of the homes ultimately purchased by the consumers. Shell had no influence over the terms of the consumers' purchases. Although Shell actively promoted use of the plumbing systems in residential homes, there is no evidence that the information provided to homebuilders or building code officials was intended to be or actually was passed on to consumers. Importantly, Shell's marketing efforts were not incorporated into the efforts to market homes to the plaintiffs in this case. Also, any information provided by Shell was subject to independent evaluation by building code officials and by homebuilders.

We therefore conclude that Shell's conduct was not sufficiently connected with the plaintiffs' purchase of their homes to support DTPA liability. We therefore render judgment in *Andraus* that plaintiffs take nothing from Shell on their DTPA claims. (No judgment was rendered against Shell in *Knowlton/Kochie* [**20] or *Barrett*.)

**D. U.S. Brass**

U.S. Brass designed and manufactured the plumbing system at issue. It selected the raw materials, designed and manufactured the parts and tools, and trained the homebuilders' plumbers. In the late 1970s and early 1980s, U.S. Brass sought approval of the system for resi-

dential use from building code officials. Together with Shell it conducted a sales campaign aimed at the new home market and targeted individual builders. U.S. Brass represented to builders that the polybutylene plumbing system was durable and would last twenty-five years, was easy to install, required fewer joints, and was a quality product with characteristics superior to copper, galvanized steel, and PVC plumbing systems. U.S. Brass' and Shell's representatives met with homebuilders many times. U.S. Brass also provided homebuilders [*652] with a catalog on the plumbing system representing that the pipes and fittings would not corrode and that the pipes would not freeze or experience mineral build-up.

Although the conduct of U.S. Brass comes closer to being in connection with the plaintiffs' purchase of their homes than the conduct of Shell or Celanese, it also falls [**21] short of meeting the nexus required for DTPA liability. U.S. Brass exercised significant control over the design and installation of the plumbing systems, but as with Shell and Celanese, U.S. Brass had no role in the sale of the homes to the plaintiffs. As with Shell, U.S. Brass' marketing efforts were not intended to, nor were they, incorporated into the marketing of the homes to the plaintiffs. Finally, U.S. Brass' products were subject to independent evaluation by building code officials, homebuilders, and the plumbing contractors who installed the materials. Viewed in this context, we conclude that U.S. Brass' actions were not connected with the plaintiffs' transactions, that is, the sale of the homes, in a way that justifies liability under the DTPA.

Our analysis of U.S. Brass' connection with the consumer transactions applies with equal force to allegations based on misrepresentations and unconscionable acts. The subject matter of the misrepresentations and the conduct found to be unconscionable is virtually identical. Because we conclude that the totality of U.S. Brass' involvement in the consumer transaction is insufficient to support DTPA liability, we reverse the judgments [**22] against U.S. Brass under both theories of DTPA liability.

Although we have concluded that the homeowners have no DTPA cause of action against Celanese, Shell, and U.S. Brass, no one disputes that they have a DTPA cause of action against General Homes, their seller. Given this recourse under the DTPA against the seller, and the contribution and indemnity provision of the DTPA, *see* TEX. BUS. & COM. CODE § 17.555, we think that rather than permit limitless upstream DTPA liability under these circumstances, the Legislature more likely intended for consumers to seek DTPA recourse against those with whom they have engaged in a consumer transaction. Then, to the extent that the seller's DTPA liability is caused or contributed to by the otherwise actionable misconduct of upstream manufacturers or suppliers, the seller may seek contribution or indemnity against them. Additionally, homeowners may obtain direct relief for foreseeable injuries due to the negligence of these parties.

### III. *KNOWLTON* -- RES JUDICATA

Under our holding today, the Knowlton homeowners are not entitled to maintain DTPA causes of action against the manufacturers because the manufacturers' conduct did [**23] not occur in connection with their consumer transactions. Therefore, the court of appeals erred in reversing the take-nothing judgment in favor of Celanese, Shell, and U.S. Brass as to the DTPA claims. We turn to the question of whether res judicata bars the Knowlton homeowners' negligence and strict liability claims.

A.

[HN3]Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *See Texas Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979). The question presented in this case is whether the Knowlton homeowners are in privity with prior owners of their homes who sued for damages allegedly caused by the defective plumbing systems in *Michael Diehl v. General Homes Corp.*, No. 87-21479 [**24] (141st Dist. Ct., Harris County, Tex., Mar. 3, 1989).

[HN4]Generally people are not bound by a judgment in a suit to which they were not parties. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(a). The doctrine of res judicata creates an exception to this rule by forbidding a second suit arising out of the same [*653] subject matter of an earlier suit by those in privity with the parties to the original suit. *See Crow Iron Works*, 582 S.W.2d at 771-72. The purposes of the exception are to ensure that a defendant is not twice vexed for the same acts, and to achieve judicial economy by precluding those who have had a fair trial from relitigating claims. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971).

[HN5]People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action.

*Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 800 (Tex. 1992); *Benson*, 468 S.W.2d at 363.

To determine whether subsequent plaintiffs are in privity with prior plaintiffs, [**25] we examine the interests the parties shared. *See* *Texas Real Estate Comm'n v. Nagle*, 767 S.W.2d 691, 694 (Tex. 1989). [HN6]Privity exists if the parties share an identity of interests in the basic legal right that is the subject of litigation. *Id.* To determine whether a prior and later lawsuit involve the same basic subject matter, we focus on the factual basis of the complaint. *Barr*, 837 S.W.2d at 630. If the second plaintiffs seek to relitigate the matter which was the subject of the earlier litigation, res judicata bars the suit even if the second plaintiffs do not allege causes of action identical to those asserted by the first. *See* 837 S.W.2d at 630; *Crow Iron Works*, 582 S.W.2d at 771-72. Res judicata also precludes a second action on claims that arise out of the same subject matter and which might have been litigated in the first suit. *Crow Iron Works*, 582 S.W.2d at 772; *Cain v. Balcom*, 130 Tex. 497, 109 S.W.2d 1044, 1045-46 (Tex. 1937). Under the foregoing standards, we consider whether the *Knowlton* plaintiffs were in privity with the *Diehl* plaintiffs, so that res judicata bars the Knowltons' suit.

B.

U.S. Brass and Celanese argue that the [**26] *Knowlton* plaintiffs were in privity with the *Diehl* plaintiffs because the *Knowlton* plaintiffs were successors in interest who derived their rights in property from the *Diehl* plaintiffs. We agree. "'All persons are privy to a judgment whose succession to the rights of property therein adjudicated are derived through or under one or the other of the parties to the action, and which accrued subsequent to the commencement of the action.'" *Kirby Lumber Corp. v. Southern Lumber Co.*, 145 Tex. 151, 196 S.W.2d 387, 388 (Tex. 1946) (quoting *Cain*, 109 S.W.2d at 1046). As a matter of law, the *Knowlton* plaintiffs were in privity with the *Diehl* plaintiffs because they succeeded to the rights of property in the homes. *See id.* ("'Privity, in this connection, means the mutual or successive relationship to the same rights of property.'"). Although the rule that res judicata bars the claims of successors in title arose in the context of land and property rights disputes, *see, e.g.*, *Freeman v. McAninch*, 87 Tex. 132, 27 S.W. 97, 98-100 (Tex. 1894), it applies here as well. As we stated in a water rights dispute, "one acquiring an interest in the property involved [**27] in a lawsuit takes the interest subject to the parties' rights as finally determined by the court." *Crow Iron Works*, 582 S.W.2d at 771.

For both the *Diehl* and *Knowlton* plaintiffs, the right at issue was the right to be compensated for injuries caused by the defective plumbing systems. The two lawsuits involved the same subject matter, the same houses, and the same plumbing systems. The negligence, gross negligence, products liability, and DTPA claims were virtually identical. Because the *Knowlton* plaintiffs are the *Diehl* plaintiffs' successors in interest and because they brought virtually identical claims concerning the same subject matter, we hold that res judicata bars the *Knowlton* plaintiffs' suit.

IV. *BARRETT* -- COMPARATIVE LIABILITY

Finally, we turn to the issue of comparative liability when the negligence of several defendants causes an indivisible injury. The court of appeals held that for certain plaintiffs in *Barrett*, "there is no evidence from which the jury could have allocated the liability as it did between U.S. Brass and [*654] Vanguard," and that accordingly, "there was no evidence of causation of damage to the homes and [**28] personal property" of those plaintiffs. 864 S.W.2d at 633.

If, however, there was evidence that U.S. Brass' negligence was a proximate cause of the plaintiffs' damages, U.S. Brass' responsibility for that damage did not evaporate if the jury erred in apportioning liability between U.S. Brass and Vanguard. If the injuries arising from the plumbing system could not be apportioned with reasonable certainty, then the plaintiffs' injuries were indivisible, and the defendants are jointly and severally liable for the whole. *See* *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731, 734 (Tex. 1952). Because the plaintiffs established the elements of their negligence claims, they are entitled to recover from U.S. Brass for its negligence. We accordingly reverse the court of appeals' take-nothing judgment as to the plaintiffs' negligence claims, and remand those claims to the trial court. At retrial, U.S. Brass will have the burden of apportioning its liability for the plaintiffs' injuries. If U.S. Brass cannot establish its percentage of liability, and thus remains liable for the whole, the trial court should credit U.S. Brass for the amounts the plaintiffs received [**29] in settlement from the other joint tortfeasors. *See* *Riley v. Industrial Fin. Serv. Co.*, 157 Tex. 306, 302 S.W.2d 652, 656 (Tex. 1957). [2]

2 We note that David and Tammie Love have also brought a point of error complaining of the court of appeals' holding that the statute of limitations barred their negligence claim. Because they did not reurge that complaint in their motion for rehearing before the court of appeals, we cannot consider it. *Smith v. Baldwin*, 611 S.W.2d 611, 618 (Tex. 1981); *see* TEX. R. APP. P. 131(e).

V. CONCLUSION

A defendant's acts must be in connection with the plaintiff's consumer transaction to support liability under the DTPA. As explained above, the homeowners presented no evidence that the conduct of Celanese, Shell, or U.S. Brass was in connection with the purchase of their homes.

We therefore affirm in part and reverse in part the judgments of the courts of appeals. We reverse the courts of appeals' judgments in favor of the plaintiffs on their DTPA claims, and render [**30] judgment that these plaintiffs take nothing against Celanese, Shell, or U.S. Brass under the DTPA. We remand *Andraus* and *Kochie* to the trial courts for rendition of judgment for those homeowners who received favorable jury findings on their negligence claims. We reverse the judgment of the court of appeals with respect to res judicata in *Knowlton*, and render judgment in favor of the defendants. We reverse the judgment of the court of appeals with respect to the apportionment of negligence damages in *Barrett*, and remand to the trial court for reapportionment in accordance with the standards described in this opinion.

Except to the extent reversed or modified by this opinion, we affirm the judgments of the courts of appeals.

John Cornyn

Justice

OPINION DELIVERED: March 7, 1996

**CONCUR BY:** RAUL A. GONZALEZ (In Part)

**DISSENT BY:** RAUL A. GONZALEZ (In Part)

**DISSENT**

I concur in the Court's judgment with respect to the plaintiffs' misrepresentation claims under the Deceptive Trade Practices--Consumer Protection Act (DTPA). However, I cannot join the Court's opinion because legally sufficient evidence supports the juries' findings that U.S. Brass [**31] engaged in unconscionable conduct. Thus, I would affirm in part and reverse in part the judgments of the court of appeals.

The Legislature has expressed a policy that the DTPA be liberally construed to protect consumers in their dealings with merchants and tradesmen. *See* TEX. BUS. & COM. CODE § 17.44. Consumers are authorized to bring suit not merely for false, misleading, or deceptive acts or practices, *see id.* § 17.50(a)(1), but also for "any unconscionable . . . course of action by any person." *Id.* § 17.50(a)(3). An unconscionable course of action includes "taking advantage of the [*655] lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree." *Id.* § 17.45(5)(A). To be actionable, the resulting unfairness must be "glaringly noticeable, flagrant, complete and unmitigated." *Kennemore v. Bennett*, 755 S.W.2d 89, 92 (Tex. 1988). Whether the defendant commits a misrepresentation or engages in unconscionable conduct, its actions must be taken "in connection with" the transaction forming the basis of the plaintiff's claim. *See, e.g.*, *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987); *Knight v. International* [**32] *Harvester Credit Corp.*, 627 S.W.2d 382, 388-89 (Tex. 1982); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 541 (Tex. 1981).

The "in connection with" requirement properly focuses our view of the evidence on producing cause. A plaintiff must prove the defendant's acts were the producing cause of his damages, but need not establish the existence of privity between the parties. *See* *Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 305 (Tex. 1988); *Guerra*, 733 S.W.2d at 136. The first component of producing-cause analysis is a purely fact-based examination, considering whether, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *See* *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). Under the DTPA, a defendant's acts cannot be the producing cause of a plaintiff's injuries unless the injuries flowed from the defendant's misconduct in connection with a consumer transaction. In this instance, there can be no dispute that the plaintiffs' damages flow from the deceptive or unconscionable conduct, satisfying the "but for" component of producing cause.

Producing-cause analysis further [**33] includes an inquiry into whether the defendants' conduct was the "legal cause" of the plaintiffs' injuries; that is, whether it was such a substantial factor in causing the plaintiffs' injuries that liability should be imposed. *See* *Prudential*, 896 S.W.2d at 161. *See generally* *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 779-84 (Tex. 1995) (Cornyn, J., concurring) (describing development and current status of producing-cause analysis). Policy-based considerations and "common-sense notions of responsibility" should guide the determination of whether the causal connection between the defendant's acts and the plaintiffs' injuries merits the imposition of DTPA liability. *See* WILLIAM POWERS, JR., TEXAS PRODUCTS LIABILITY LAW § 6.022, at 6-4, 6-20 (2d ed. 1992).

The analysis of legal cause also must be confined to the facts of the particular case, but courts should consider factors deemed significant in other DTPA cases. A nonexclusive list can be distilled from this Court's prior decisions. Such a list would include the following:

> (1) the extent to which the defendant benefitted from the overall transaction, *see* *Flenniken v. Longview Bank & Trust*

*Co.*, 661 [**34] S.W.2d 705, 707 (Tex. 1983); *Knight*, 627 S.W.2d at 389;

(2) the defendant's control over a product's manufacture, repair, or installation, *see Guerra*, 733 S.W.2d at 136-37; *International Armament Corp. v. King*, 686 S.W.2d 595, 599 (Tex. 1985); *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 251-52 (Tex. 1983);

(3) the defendant's knowledge of and ability to influence the terms of a sale of a product or service to consumers, *see Knight*, 627 S.W.2d at 389; *Cameron*, 618 S.W.2d at 537-39; *Ozuna v. Delaney Realty, Inc.*, 600 S.W.2d 780, 781-82 (Tex. 1980);

(4) the defendant's control over the marketing of goods or services, including its intent that its representations be passed on to consumers, and whether they were passed on to them, *see Kennemore*, 755 S.W.2d at 92; *Brown v. Galleria Area Ford, Inc.*, 752 S.W.2d 114, 115-16 (Tex. 1988); *Kennedy v. Sale*, 689 S.W.2d 890, 891-93 (Tex. 1985); and

(5) the extent to which intermediaries or the consumer can reasonably make an independent assessment of the characteristics of goods or services, and the extent to which they did, *see Doe v.* [**35] *Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 481-82 (Tex. 1995); *Prudential*, 896 S.W.2d at 161; *Dubow v.* [*656] *Dragon*, 746 S.W.2d 857, 860-61 (Tex. App.--Dallas 1988, no writ).

With these factors in mind, I consider the evidence under the appropriate standard of review, examining it in the light most favorable to the jury verdicts and disregarding all contrary evidence. *See Davis v. City of San Antonio*, 752 S.W.2d 518, 522 (Tex. 1988); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1133 (1993). My review of the record reveals significant distinctions between U.S. Brass's conduct and that of Celanese and Shell, which merely supplied some of the materials U.S. Brass used to manufacture the plumbing system. The record shows that U.S. Brass did the following:

(1) designed and exclusively manufactured the plumbing system at issue;

(2) selected the raw materials used in fabricating the system, including polybutylene resin for the pipe and Celcon compound for the fittings;

(3) ignored Celanese's recommendations that it test fittings made from Celcon in the severest [**36] anticipated end-use conditions;

(4) designed and produced the crimping tool used to install the system and the accompanying crimp rings;

(5) made representations to building code officials about the system's suitability despite its failure to test the system's fitness and durability for use under ordinary conditions present in LaPorte homes;

(6) conducted an aggressive sales campaign aimed at the new home market and targeted individual builders for sales of the system;

(7) represented to builders that the polybutylene plumbing system was durable and would last twenty-five years;

(8) depicted the system as easy to install, requiring fewer joints, and as a quality product with characteristics superior to copper, galvanized steel, and PVC plumbing systems;

(9) met with home builders numerous times, touting its system;

(10) provided a catalog on the plumbing system to home builders, which represented that the pipe would not corrode, freeze, or allow mineral build-up and that the fittings would not corrode;

(11) prepared the installation instructions for the system and trained the builders' [**37] plumbers and subcontractors on how to install it;

(12) suppressed a report from one of its product development specialists indicating that "enormous problems still needed to be overcome" regarding the system;

(13) ignored the specialist's recommendation that "a serious research and development program" was needed to fix continuing problems with leaks and excessive failure rates in the pipes and fittings, *see* 864 S.W.2d 606, 624; and

(14) rather than acting on these suggestions to mitigate the system's failure rate, told the specialist to destroy the most damming portions of his report, *id*.

Furthermore, but for U.S. Brass's aggressive promotion of its plumbing system, building officials would not have approved its use in subdivision homes and new home builders would not have installed it.

Under the factors I have listed, particularly whether the plaintiffs could reasonably evaluate the product, U.S. Brass's conduct clearly meets the "substantial factor" element of producing cause. The plaintiffs believed the plumbing system installed in their homes was a quality product that at least met building code standards for performance [**38] and longevity. They could not have known of, nor did they have the ability, experience, or capacity to detect, the micro-fine cracks in the pipes that would eventually split and burst or the cumulative degradation of the insert fittings that ultimately gave way because of chlorine exposure and stress. *See* *Kennemore*, 755 S.W.2d at 92 (ruling that defendant acted unconscionably in flagrantly taking advantage of consumers' "lack of knowledge" and inability to correct specific problems). U.S. Brass's conduct caused the [*657] installation of systems that failed miserably, resulting in property damage, diminution in the value of homes, and personal distress to the plaintiff-homeowners. I conclude that more than a scintilla of evidence supports the juries' findings that U.S. Brass took advantage of the new homeowners' lack of knowledge and capacity to evaluate the reliability of their plumbing systems and did so to a grossly unfair degree. *See* *Brown*, 752 S.W.2d at 116 (holding that defendant "took advantage" of plaintiffs "to a grossly unfair degree" by exploiting their lack of knowledge). In light of the policies animating the DTPA and common-sense notions of responsibility, [**39] the jury verdicts imposing liability upon U.S. Brass for unconscionable conduct toward new home buyers should stand.

On the other hand, some purchasers acquired their homes from prior owners by private sale or through foreclosure. U.S. Brass represented the plumbing system's characteristics to the home builders and to building code inspectors, anticipating that it would expand the new-home market for its plumbing system by doing so. However, U.S. Brass's role in connection with the acquisition of homes by subsequent purchasers was far less pronounced. Assuming that U.S. Brass's unconscionable conduct factually caused the presence of the defective plumbing systems in used homes, this connection is too attenuated to merit the imposition of DTPA liability. *See* *Boys Clubs*, 907 S.W.2d at 481-82.

In summary, more than a scintilla of evidence supports the juries' findings that U.S. Brass acted unconscionably and that its acts were a producing cause of the damages to new homeowners. Therefore, under the facts of these three cases, I would affirm the judgments of the court of appeals to the extent they approved the imposition of DTPA liability upon U.S. Brass for its unconscionable [**40] conduct toward new home buyers. *See* TEX. BUS. & COM. CODE §§ 17.45(5)(A), 17.50(a)(3). However, I would reverse the lower court's judgments, as specified by the Court, and render judgment that the plaintiffs take nothing against Celanese, Shell, and U.S. Brass for any alleged DTPA misrepresentations.

Raul A. Gonzalez

Justice

OPINION DELIVERED: March 7, 1996

**ANGUS CHEMICAL COMPANY, PETITIONER v. IMC FERTILIZER, INC. AND IMC FERTILIZER GROUP, INC., RESPONDENTS**

**No. 96-0743**

**SUPREME COURT OF TEXAS**

**939 S.W.2d 138; 1997 Tex. LEXIS 3; 40 Tex. Sup. J. 236**

**January 10, 1997, Delivered**

**PRIOR HISTORY:** [**1] ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS.

**DISPOSITION:** The Court granted Angus' application for writ of error and without hearing argument reversed the judgment of the court of appeals and remanded the case to the district court for rendition of judgment for Angus consistent with this opinion.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner chemical company sought review from a judgment of the Court of Appeals for the First District of Texas, which granted summary judgment in favor of respondents, management group and fertilizer company, in a third-party indemnity and contribution claims case initiated by victims of an explosion at petitioner's plant.

**OVERVIEW:** Petitioner chemical company challenged the grant of summary judgment in favor of respondents, management group and fertilizer company, when they sought reimbursement for property damages and claims in a case initiated by victims of an explosion at petitioner's plant. Petitioner had released respondents from all claims arising out of the explosion except, among others, indemnity and contribution for third party claims against them in Louisiana and elsewhere. Petitioner did not release respondent's insurers. The court held that in a jurisdiction where a determination of the insured's liability was not a prerequisite to an action against the insurer, and release of the insured was not an impediment to such action, Texas law did not preclude petitioner from suing respondent's insurers. The court would not rule on whether petitioner could maintain suit against respondent's insurers in Louisiana or what law should govern that action. Accordingly, the court granted petitioner's application for writ of error and reversed the judgment and remanded the case to the district court.

**OUTCOME:** The court granted petitioner chemical company's application for writ of error and reversed the judgment of petitioner who sought contribution for damages from respondents, management group and fertilizer company, in a case initiated by victims of an explosion at petitioner's plant. The court held that although respondent had been released from liability in a jurisdiction, Texas law did not preclude petitioner from suing respondent's insurers.

**CORE TERMS:** insurer, tortfeasor, plant, general rule, tortfeasor's insurer, writ denied, insured's liability, settlement, insured, prerequisite

**LexisNexis(R) Headnotes**

***Civil Procedure > Settlements > Releases From Liability > General Overview***
***Insurance Law > General Liability Insurance > Coverage***

[HN1]The general rule is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment. If the general rule applies, a release of the tortfeasor that precludes a final determination of liability by agreement or judgment therefore precludes the releasing party from suing the tortfeasor's insurer.

**COUNSEL:** For PETITIONER: Cheavens, Mr. Joseph D., Baker & Botts, Houston, TX. Bland (Nenninger), Ms. Jane A., Baker & Botts, Houston, TX. Novack, Mr. Stephen, Novack & Macy, Chicago, IL.

For RESPONDENTS: Lowes, Mr. Mark E., Bracewell & Patterson, Houston, TX. Brewer, III, Mr. William A., Bickel & Brewer, Dallas, TX. Collins, Mr. Michael J., Bickel & Brewer, Dallas, TX.

**OPINION**

[*138] **PER CURIAM**

In Texas, [HN1]the general rule (with exceptions not relevant here) is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment. *Great American Ins. Co. v. Murray*, 437 S.W.2d 264, 265 (Tex. 1969). If the general rule applies, a release of the tortfeasor that precludes a final determination of liability by agreement or judgment therefore precludes the [**2] releasing party from suing the tortfeasor's insurer. *See Pool v. Durish*, 848 S.W.2d 722, 723 (Tex. App.--Austin 1992, writ denied). But is the insurer actually released from liability or only shielded from suit in Texas and other jurisdictions that follow the same rule? Does a release of [*139] claims against the insured have the effect, under Texas law, of precluding the insurer from being sued on the same claims in a jurisdiction like Louisiana that allows direct actions against insurers without a prior determination of the insured's liability? The district court answered this last question yes. The court of appeals disagreed. 925 S.W.2d 355. We agree with the district court.

A nitroparaffin plant owned by Angus Chemical Company and managed by IMC Fertilizer Group, Inc. exploded, killing eight people, injuring many others, and destroying the plant. Although the plant was located in Louisiana, many of the injured people sued Angus, IMC, and others in Houston. Angus cross-claimed against IMC to recover property damages and reimbursement of claims paid to third parties. After the plaintiffs settled, Angus and IMC settled, agreeing to a $ 220 million judgment for Angus against [**3] IMC, which IMC could satisfy by paying Angus $ 180 million over three years. In turn, Angus released IMC from all claims arising out of the explosion except, among others, indemnity and contribution for third party claims against Angus in Louisiana and elsewhere. The release did not name IMC's insurers as parties being released.

Three weeks after the release was signed and the day before the agreed judgment was rendered, Angus sued IMC's insurers in Louisiana for damages not reimbursed by IMC in the settlement. IMC then filed this action against Angus for a declaration that Angus' release of IMC also released IMC's insurers. Angus counterclaimed for recovery of damages relating to the third-party claims that had been carved out of the settlement. Angus and IMC each moved for summary judgment on the effect of the release. The district court granted Angus' motion, denied IMC's motion, and severed its ruling from the remainder of the case, thereby making them final. The court of appeals reversed. IMC Fertilizer v. Angus Chem. Co., 925 S.W.2d 355 (1996).

In this State, "unless a party is named in a release, he is not released." *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 [**4] (Tex. 1971). Although *McMillen* involved joint tortfeasors, the rule is not limited to that context. Thus, in *Illinois National Insurance Company v. Perez*, 794 S.W.2d 373 (Tex. App.--Corpus Christi 1990, writ denied), the court held that the release of an employer for liability for the wrongful death of an employee did not release the employer's workers' compensation carrier not named in the release. In the case before us, IMC's insurers were not named in the release. Under *McMillen*, IMC's insurers were not released.

Angus cannot sue IMC's insurers in Texas for liability for which IMC has been released, but only because the release precludes the prerequisite determination of IMC's liability, not because IMC's insurers have themselves been released. In a jurisdiction where a determination of the insured's liability is not a prerequisite to an action against the insurer, and release of the insured is not an impediment to such action, Texas law does not preclude Angus from suing IMC's insurers. Like the district court, we intimate no view on whether Angus can maintain suit against IMC's insurers in Louisiana, where suit has been filed, or what law should govern that action, [**5] or whether it should succeed.

Accordingly, the Court grants Angus' application for writ of error and without hearing argument reverses the judgment of the court of appeals and remands the case to the district court for rendition of judgment for Angus consistent with this opinion. TEX. R. APP. P. 170.

Opinion delivered: January 10, 1997

**BAPTIST MEMORIAL HOSPITAL SYSTEM, PETITIONER v. RHEA SAMPSON, RESPONDENT**

**No. 97-0268**

**SUPREME COURT OF TEXAS**

**969 S.W.2d 945; 1998 Tex. LEXIS 83; 41 Tex. Sup. J. 833**

**December 2, 1997, Argued**
**May 21, 1998, Delivered**

**PRIOR HISTORY:** [**1] ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS.

**DISPOSITION:** Judgment of court of appeals reversed and judgment rendered that Sampson take nothing.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner hospital system applied for a writ of error to the Court of Appeals for the Fourth District (Texas), which reversed an order of the trial court that granted summary judgment for petitioner in respondent bite victim's negligence action arising from the malpractice of emergency room physicians.

**OVERVIEW:** Respondent bite victim sued petitioner hospital system on a vicarious liability theory when physicians in petitioner's emergency room failed to properly treat respondent's spider bite. The trial court granted summary judgment on petitioner's assertion that the physicians were independent contractors. The appellate court reversed, imposing a nondelegable duty on petitioner for the negligence of its emergency room physicians. The supreme court reversed the appellate court, rejecting the imposition of a nondelegable duty. The supreme court determined that the appropriate standard for liability required respondent to establish an ostensible agency. The supreme court held that respondent had to show that the conduct of petitioner led respondent to reasonably believe that emergency room physicians were petitioner's employees and that she justifiably relied on that appearance. The supreme court determined that based on the record, respondent failed to produce sufficient summary judgment evidence to raise a genuine issue of material fact on each element of ostensible agency.

**OUTCOME:** The court reversed the judgment of the appellate court and affirmed the order of the trial court that granted petitioner hospital system summary judgment in respondent bite victim's negligence action arising from the malpractice of emergency room physicians. The court held that respondent failed to produce sufficient summary judgment evidence to raise a genuine issue of material fact on each element of an asserted ostensible agency.

**CORE TERMS:** emergency room physician's, ostensible agency, patient, independent contractor, estoppel, summary judgment, ref'd, vicariously liable, issue of material fact, malpractice, genuine, writ denied, medical malpractice, apparent authority, justifiably relied, nondelegable duty, ostensible, vicarious, treating, brown recluse spider, consent forms, credentialing, administered, doctor, pain, matter of law, hospital employee, render judgment, party asserting, affirmative defense

**LexisNexis(R) Headnotes**

***Business & Corporate Law > Agency Relationships > Authority to Act > General Overview***
***Business & Corporate Law > Agency Relationships > Duties & Liabilities > Authorized Acts of Agents > Liability of Principal***
***Business & Corporate Law > Agency Relationships > Types > Employee & Employer***
[HN1]Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment, although the principal or employer has not personally committed a wrong. Nevertheless, an individual or entity may act in a manner that makes it liable for the conduct of one who is not its agent at all or who, although an agent, has acted outside the scope of his or her authority. Liability may be imposed in this manner under the doctrine of ostensible agency in circumstances when the principal's conduct should equitably prevent it from denying the existence of an agency. Ostensible agency is based on the notion of estoppel, that is, a representation by the principal causing justifiable reliance and resulting harm.

***Business & Corporate Law > Agency Relationships > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors***
***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview***
***Business & Corporate Law > Agency Relationships > Establishment > Estoppel, Ostensible Agency & Necessity > Ostensible Agency***
[HN2]A hospital is ordinarily not liable for the negligence of a physician who is an independent contractor. On the other hand, a hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency.

***Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > General Overview***
***Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview***
***Healthcare Law > Actions Against Facilities > Emergency Care Negligence > General Overview***
[HN3]A party asserting ostensible agency must demonstrate that (1) the principal, by its conduct, (2) caused him or her to reasonably believe that the putative agent was an employee or agent of the principal, and (3) that he or she justifiably relied on the appearance of agency.

***Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > Conduct of Parties***
***Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > Reliance***
***Business & Corporate Law > Agency Relationships > Causes of Action & Remedies > Burdens of Proof***
[HN4]Apparent authority is based on estoppel. It may arise either from a principal knowingly permitting an agent to hold herself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority she purports to exercise. A prerequisite to a proper finding of apparent authority is evidence of conduct by the principal relied upon by the party asserting the estoppel defense which would lead a reasonably prudent person to believe an agent had authority to so act.

***Business & Corporate Law > Agency Relationships > Establishment > Estoppel, Ostensible Agency & Necessity > Ostensible Agency***
***Healthcare Law > Actions Against Facilities > Independent Contractor Liability***
***Torts > Malpractice & Professional Liability > Healthcare Providers***
[HN5]To establish a hospital's liability for an independent contractor's medical malpractice based on ostensible agency, a plaintiff must show that (1) he or she had a reasonable belief that the physician was the agent or employee of the hospital, (2) such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold herself out as the hospital's agent or employee, and (3) he or she justifiably relied on the representation of authority.

***Evidence > Procedural Considerations > Rule Application & Interpretation***
***Governments > Legislation > Effect & Operation > General Overview***
[HN6]No one should be denied the right to set up the truth unless it is in plain contradiction of his former allegations or acts.

**JUDGES:** CHIEF JUSTICE PHILLIPS delivered the opinion of the Court.

**OPINION BY:** THOMAS R. PHILLIPS

**OPINION**

[*946] In this case, we decide whether the plaintiff raised a genuine issue of material fact that defendant Hospital was vicariously liable under the theory of ostensible agency for an emergency room physician's negligence. We granted Baptist Memorial Hospital System's application for writ of error to resolve a conflict in the holdings of our courts of appeals regarding the elements required to establish liability against a hospital for the acts of an independent contractor emergency room physician. We hold that the plaintiff has not met her burden to raise a fact issue on each element of this theory. Accordingly, we reverse the judgment of the court of appeals, 940 S.W.2d 128, and render judgment that the plaintiff take nothing.

I

On March 23, 1990, Rhea Sampson was bitten on the arm by an unidentified creature that was later identified as a brown recluse spider. By that evening, her arm was swollen and painful, [**2] and a friend took her to the Southeast Baptist Hospital emergency room. Dr. Susan Howle, an emergency room physician, examined Sampson, diagnosed an allergic reaction, administered Benadryl and a shot of painkiller, prescribed medication for pain and swelling, and sent her home. Her condition

grew worse, and she returned to the Hospital's emergency room by ambulance a little over a day later. This time Dr. Mark Zakula, another emergency room physician, treated her. He administered additional pain medication and released her with instructions to continue the treatment Dr. Howle prescribed. About fourteen hours later, with her condition rapidly deteriorating, Sampson went to another hospital and was admitted to the intensive care ward in septic shock. There, her bite was diagnosed as that of a brown recluse spider, and the proper treatment was administered to save her life. Sampson allegedly continues to have recurrent pain and sensitivity where she was [*947] bitten, respiratory difficulties, and extensive scarring.

Sampson sued Drs. Howle and Zakula for medical malpractice. She also sued Baptist Memorial Hospital System ("BMHS"), of which Southeast Baptist Hospital is a member, for negligence [**3] in failing to properly diagnose and treat her, failing to properly instruct medical personnel in the diagnosis and treatment of brown recluse spider bites, failing to maintain policies regarding review of diagnoses, and in credentialing Dr. Zakula. Sampson also alleged that the Hospital was vicariously liable for Dr. Zakula's alleged negligence under an ostensible agency theory. Sampson nonsuited Dr. Howle early in the discovery process. The trial court granted BMHS summary judgment on Sampson's claims of vicarious liability and negligent treatment. The trial court severed those claims from her negligent credentialing claim against BMHS and her malpractice claim against Dr. Zakula. [1] Sampson appealed only on the vicarious liability theory.

1 Sampson subsequently nonsuited her negligent credentialing claim against BMHS.

Both parties agree that BMHS established as a matter of law that Dr. Zakula was not its agent or employee. Thus the burden shifted to Sampson to raise a fact issue on each element of her ostensible [**4] agency theory, which Texas courts have held to be in the nature of an affirmative defense. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984); *Smith v. Baptist Mem'l Hosp. Sys.*, 720 S.W.2d 618, 622 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.), *disapproved on other grounds by* St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 509 n.1 (Tex. 1997). Sampson contended that she raised a material fact issue on whether Dr. Zakula was BMHS's ostensible agent. The court of appeals, with one justice dissenting, agreed and reversed the summary judgment. 940 S.W.2d 128. In our review, we must first determine the proper elements of ostensible agency, then decide whether Sampson raised a genuine issue of material fact on each of these elements.

II

[HN1]Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment, although the principal or employer has not personally committed a wrong. *See* DeWitt v. Harris County, 904 S.W.2d 650, 654 (Tex. 1995); RESTATEMENT (SECOND) OF AGENCY § 219 (1958). The most frequently proffered justification for imposing such liability [**5] is that the principal or employer has the right to control the means and methods of the agent or employee's work. *See* Newspapers, Inc. v. Love, 380 S.W.2d 582, 585-86 (Tex. 1964); RESTATEMENT (SECOND) OF AGENCY § 220, cmt. d. Because an independent contractor has sole control over the means and methods of the work to be accomplished, however, the individual or entity that hires the independent contractor is generally not vicariously liable for the tort or negligence of that person. *See* Enserch Corp. v. Parker, 794 S.W.2d 2, 6 (Tex. 1990); Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985). Nevertheless, an individual or entity may act in a manner that makes it liable for the conduct of one who is not its agent at all or who, although an agent, has acted outside the scope of his or her authority. Liability may be imposed in this manner under the doctrine of ostensible agency in circumstances when the principal's conduct should equitably prevent it from denying the existence of an agency. [2] [*948] *See, e.g.*, Marble Falls Hous. Auth. v. McKinley, 474 S.W.2d 292, 294 (Tex. Civ. App.--Austin 1971, writ ref'd n.r.e.). Ostensible agency in Texas is based on the notion of [**6] estoppel, that is, a representation by the principal causing justifiable reliance and resulting harm. *See* Ames v. Great S. Bank, 672 S.W.2d 447, 450 (Tex. 1984); RESTATEMENT (SECOND) OF AGENCY § 267; KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 733-34 (5th ed. 1984).

2 Many courts use the terms ostensible agency, apparent agency, apparent authority, and agency by estoppel interchangeably. As a practical matter, there is no distinction among them. *See, e.g.*, Birmingham-Jefferson County Transit Auth. v. Arvan , 669 So. 2d 825, 830-31 (Ala. 1995), (Cook, J., dissenting from overruling of application for rehearing); State of Fla. Dep't of Transp. v. Heckman, 644 So. 2d 527, 529 (Fla. Dist. Ct. App. 1994); Kissun v. Humana, Inc., 267 Ga. 419, 479 S.E.2d 751, 752 (Ga. 1997); O'Banner v. McDonald's Corp., 173 Ill. 2d 208, 670 N.E.2d 632, 634, 218 Ill. Dec. 910 (Ill. 1996); Deal v. North Carolina State Univ., 114 N.C. App. 643, 442 S.E.2d 360, 362 (N.C. Ct. App. 1994); Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 490 N.E.2d 823, 827, 499 N.Y.S.2d 904 (N.Y. 1986); Evans v. Ohio State Univ., 112 Ohio App. 3d 724, 680

N.E.2d 161, 174 (Ohio Ct. App. 1996); *Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 209 (Utah 1993); *Hamilton v. Natrona County Educ. Ass'n*, 901 P.2d 381, 386 (Wyo. 1995). *But see Guillot v. Blue Cross of La.*, 690 So. 2d 91, 99 (La. Ct. App. 1997) (Saunders, J., concurring and dissenting) (stating apparent authority is based on contract law, whereas agency by estoppel is grounded in tort principles); *Houghland v. Grant*, 119 N.M. 422, 891 P.2d 563, 568 (N.M. Ct. App. 1995)(recognizing that although ostensible agency and agency by estoppel are based on slightly different rationales, the theories have been used interchangeably). *See also* McWilliams & Russell, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. REV. 431, 445-452 (1996). Regardless of the term used, the purpose of the doctrine is to prevent injustice and protect those who have been misled. *See Roberts v. Haltom City*, 543 S.W.2d 75, 80 (Tex. 1976).

[**7] Texas courts have applied these basic agency concepts to many kinds of principals, including hospitals. *See Sparger v. Worley Hosp., Inc.*, 547 S.W.2d 582, 585 (Tex. 1977) (explaining that "hospitals are subject to the principles of agency law which apply to others"). [HN2]A hospital is ordinarily not liable for the negligence of a physician who is an independent contractor. *See, e.g., Berel v. HCA Health Servs.*, 881 S.W.2d 21, 23 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Jeffcoat v. Phillips*, 534 S.W.2d 168, 172 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ ref'd n.r.e.). On the other hand, a hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency. *See, e.g., Lopez v. Central Plains Reg'l Hosp.*, 859 S.W.2d 600, 605 (Tex. App.--Amarillo 1993, no writ), *disapproved on other grounds by Agbor*, 952 S.W.2d at 509 n.1; *Nicholson v. Mem'l Hosp. Sys.*, 722 S.W.2d 746, 750 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

III

In this case, the court of appeals held that two distinct theories of vicarious liability with different elements [**8] are available in Texas to impose liability on a hospital for emergency room physician negligence: agency by estoppel (referred to in this opinion as ostensible agency), based on the Restatement (Second) of Agency section 267, and apparent agency, based on the Restatement (Second) of Torts section 429. *See* 940 S.W.2d at 131. Under section 267, [HN3]the party asserting ostensible agency must demonstrate that (1) the principal, by its conduct, (2) caused him or her to reasonably believe that the putative agent was an employee or agent of the principal, and (3) that he or she justifiably relied on the appearance of agency. RESTATEMENT (SECOND) OF AGENCY § 267 (1958). Although neither party mentioned section 429 in the trial court or in their briefs to the court of appeals, the court of appeals then proceeded to adopt section 429 and hold that under that section, plaintiff had only to raise a fact issue on two elements: (1) the patient looked to the hospital, rather than the individual physician, for treatment; and (2) the hospital held out the physician as its employee. *See* 940 S.W.2d at 132. Holding that the plaintiff had established a genuine issue of material fact on each element [**9] of this latter affirmative defense, the court reversed and remanded to the trial court for trial on the merits. The court of appeals further suggested that a hospital could do nothing to avoid holding out a physician in its emergency room as its employee because notification to prospective patients in any form would be ineffectual:

> We take an additional step in our analysis to consider whether notice provided in consent forms and posted in emergency rooms can ever be sufficient to negate a hospital's "holding out" . . . .
>
> . . . .
>
> . . . Because we do not believe hospitals should be allowed to avoid such responsibility, we encourage the full leap--imposing a nondelegable duty on hospitals for the negligence of emergency room physicians.

940 S.W.2d at 135-136. Thus, the court of appeals would create a nondelegable duty on [*949] a hospital solely because it opens its doors for business.

We first reject the court of appeals' conclusion that there are two methods, one "more difficult to prove" than the other, to establish the liability of a hospital for the malpractice of an emergency room physician. 940 S.W.2d at 132. Our courts have uniformly required proof of all three elements [**10] of section 267 to invoke the fiction that one should be responsible for the acts of another who is not in fact an agent acting within his or her scope of authority. As we have explained:

> [HN4]Apparent authority in Texas is based on estoppel. It may arise either from a principal knowingly permitting an agent to hold herself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority she purports to exercise . . . .
>
> A prerequisite to a proper finding of apparent authority is evidence of conduct by the principal relied upon by the party asserting the estoppel defense which would lead a reasonably prudent person to believe an agent had authority to so act.

*Ames v. Great S. Bank*, 672 S.W.2d at 450; *see also, e.g.*, *Douglass v. Panama, Inc.*, 504 S.W.2d 776, 778-79 (Tex. 1974); *Chastain v. Cooper & Reed*, 152 Tex. 322, 257 S.W.2d 422, 427 (Tex. 1953). Thus, [HN5]to establish a hospital's liability for an independent contractor's medical malpractice based on ostensible agency, a plaintiff must show that (1) he or she had a [**11] reasonable belief that the physician was the agent or employee of the hospital, (2) such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold herself out as the hospital's agent or employee, and (3) he or she justifiably relied on the representation of authority. *See, e.g.*, *Drennan v. Community Health Inv. Corp.*, 905 S.W.2d 811, 820 (Tex. App.--Amarillo 1995, writ denied); *Lopez*, 859 S.W.2d at 605; *Nicholson*, 722 S.W.2d at 750. While a few courts of appeals have referred to section 429, it has never before been adopted in this state by any appellate court. *See Smith*, 822 S.W.2d 67, 72-73 (mentioning Restatement (Second) of Torts section 429 as additional support, but recognizing that the applicable rule is provided by Restatement (Second) of Agency section 267); *Byrd v. Skyline Equip. Co.*, 792 S.W.2d 195, 197 (Tex. App.--Austin 1990), *writ denied per curiam*, 808 S.W.2d 463 (Tex. 1991) (citing section 429 as an additional reason summary judgment in the case was improper); *Brownsville Med. Ctr. v. Gracia*, 704 S.W.2d 68, 74 (Tex. App.--Corpus Christi 1985, writ [**12] ref'd n.r.e.) (after stating that section 267 provides the applicable rule, mentions section 429 as additional authority). To the extent that the Restatement (Second) of Torts section 429 proposes a conflicting standard for establishing liability, we expressly decline to adopt it in Texas.

Next, we reject the suggestion of the court of appeals quoted above that we disregard the traditional rules and take "the full leap" of imposing a nondelegable duty on Texas hospitals for the malpractice of emergency room physicians. 940 S.W.2d at 136. Imposing such a duty is not necessary to safeguard patients in hospital emergency rooms. A patient injured by a physician's malpractice is not without a remedy. The injured patient ordinarily has a cause of action against the negligent physician, and may retain a direct cause of action against the hospital if the hospital was negligent in the performance of a duty owed directly to the patient. *See, e.g.*, *Diaz v. Westphal*, 941 S.W.2d 96, 98 (Tex. 1997); *Medical & Surgical Mem'l Hosp. v. Cauthorn*, 229 S.W.2d 932, 934 (Tex. Civ. App.--El Paso 1949, writ ref'd n.r.e.).

IV

We now examine the record below in light of the appropriate standard. [**13] The Hospital may be held liable for the negligence of Dr. Zakula if Sampson can demonstrate that (1) she held a reasonable belief that Dr. Zakula was an employee or agent of the Hospital, (2) her belief was generated by some conduct on the part of the Hospital, and (3) she justifiably relied on the appearance that Dr. Zakula was an agent or employee [*950] of the Hospital. *See, e.g.*, *Drennan*, 905 S.W.2d at 820.

As summary judgment evidence, BMHS offered the affidavit of Dr. Potyka, an emergency room physician, which established that the emergency room doctors are not the actual agents, servants, or employees of the Hospital, and are not subject to the supervision, management, direction, or control of the Hospital when treating patients. Dr. Potyka further stated that when Dr. Zakula treated Sampson, signs were posted in the emergency room notifying patients that the emergency room physicians were independent contractors. Dr. Potyka's affidavit also established that the Hospital did not collect any fees for emergency room physician services and that the physicians billed the patients directly. BMHS presented copies of signed consent forms as additional summary judgment evidence. During [**14] both of Sampson's visits to the Hospital emergency room, before being examined or treated, Sampson signed a "Consent for Diagnosis, Treatment and Hospital Care" form explaining that all physicians at the Hospital are independent contractors who exercise their own professional judgment without control by the Hospital. The consent forms read in part:

I acknowledge and agree that . . ., Southeast Baptist Hospital, . . . and any Hospital operated as a part of Baptist Memorial Hospital System, is not responsible for the judgment or conduct of any physician who treats or provides a professional service to me, but rather each physician is an independent contractor who is self-employed and is not the agent, servant or employee of the hospital.

To establish her claim of ostensible agency, Sampson offered her own affidavits. In her original affidavit, she stated that although the Hospital directed her to sign several pieces of paper before she was examined, she did not read them and no one explained their contents to her. Her supplemental affidavit stated that she did not recall signing the documents and that she did not, at any time during her visit to the emergency room, see any signs stating [**15] that the doctors who work in the emergency room are not employees of the Hospital. Both affidavits state that she did not choose which doctor would treat her and that, at all times, she believed that a physician employed by the hospital was treating her. Based on this record we must determine if Sampson produced sufficient summary judgment evidence to raise a genuine issue of material fact on each element of ostensible agency, thereby defeating BMHS's summary judgment motion.

Even if Sampson's belief that Dr. Zakula was a hospital employee were reasonable, that belief, as we have seen, must be based on or generated by some conduct on the part of the Hospital. [HN6]"No one should be denied the right to set up the truth unless it is in plain contradiction of his former allegations or acts." *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 932 (Tex. 1952). The summary judgment proof establishes that the Hospital took no affirmative act to make actual or prospective patients think the emergency room physicians were its agents or employees, and did not fail to take reasonable efforts to disabuse them of such a notion. As a matter of law, on this record, no conduct by the Hospital would [**16] lead a reasonable patient to believe that the treating emergency room physicians were hospital employees.

Sampson has failed to raise a fact issue on at least one essential element of her claim. Accordingly, we reverse the judgment of the court of appeals and render judgment that Sampson take nothing.

Thomas R. Phillips

Chief Justice

Opinion delivered: May 21, 1998

**GEORGE J. BARR, PETITIONER v. RESOLUTION TRUST CORP., EX REL. SUNBELT FEDERAL SAVINGS, RESPONDENT**

**NO. D-2082**

**SUPREME COURT OF TEXAS**

**837 S.W.2d 627; 1992 Tex. LEXIS 125; 35 Tex. Sup. J. 1193**

**September 23, 1992, Delivered**

**PRIOR HISTORY:** [**1] ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS.

**DISPOSITION:** We reaffirm the "transactional" approach to res judicata. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit. For these reasons, the judgment of the court of appeals is reversed and that of the trial court is affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant guarantor appealed from a decision of the Court of Appeals for the Third District of Texas, which held in favor of plaintiff creditor in a claim involving guaranty for a partnership debt. The guarantor claimed that the action was barred by res judicata because the creditor had unsuccessfully sued him in his capacity as guarantor and was now suing the guarantor in his capacity as a partner.

**OVERVIEW:** The guarantor personally guaranteed a note taken by a business venture in which he was a partner. In another action, the creditor sued the guarantor under the guaranty to collect the note. The guarantor received summary judgment on the grounds that the terms of the guaranty agreement were too uncertain to be enforceable. In the present action, which was against the partnership, the creditor amended pleadings to add the guarantor as a defendant. The trial court granted summary judgment to the guarantor, accepting the argument that the judgment from the first action barred litigation against him in the second action. The lower appeals court reversed, holding that res judicata was inapplicable. On further review, the court reversed the judgment of the lower appeals court, finding that the second lawsuit resulted from the same transaction as the first and the only difference was that the second lawsuit alleged liability under a different theory, the guarantor's partner status. The court concluded that subsequent suits would be barred if they arose out of the same subject matter of a previous suit and could have been litigated in the prior suit.

**OUTCOME:** The court reversed the decision of the lower appellate court on the grounds that the second lawsuit was barred under the doctrine of res judicata as the second lawsuit resulted from the same transaction.

**CORE TERMS:** cause of action, res judicata, res judicata, lawsuit, claim preclusion, prior suit, partnership, subsequent suits, litigated, subject matter, promissory note, summary judgment, theories of recovery, collateral estoppel, actually litigated, diligence, partner, issue preclusion, transactional, take-nothing, relitigation, general rule, form of action, final judgments, quantum meruit, stare decisis, counterclaim, conclusive, preclusion, guaranteed

**LexisNexis(R) Headnotes**

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN1]Res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments. Within this general doctrine, there are two principal categories: (1) claim preclusion (also known as res judicata); and (2) issue preclusion (also known as collateral estoppel).

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN2]Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN3]Issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN4]If the party asserting a claim prevails, the cause of action is merged into the judgment, and the cause of action as such ceases to exist. If the party defending a claim prevails in the prior suit, the judgment acts as a bar to matters which could have been litigated in the original suit.

***Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN5]If an identity of issues is strictly required, then there is no basis for precluding issues that should have been raised in the prior suit but were not, and there is no distinction between claim preclusion and issue preclusion.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN6]Claim preclusion prevents splitting a cause of action.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN7]As a general rule, a judgment on the merits in a suit on one cause of action is not conclusive of a subsequent suit on a different cause of action except as to issues of fact actually litigated and determined in the first suit.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN8]The scope of res judicata is not limited to matters actually litigated; the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN9]Any cause of action which arises out of the same facts should, if practicable, be litigated in the same lawsuit.

***Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN10]A party defending a claim must bring as a counterclaim any claim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

***Civil Procedure > Pleading & Practice > Pleadings > Cross-Claims > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN11]Res judicata provides that a final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose.

**COUNSEL:** For Other: Mr. Robert L. Kelsoe, Kelsoe, Anderson & Khoury, 5830 Alpha Road, Suite 101, Dallas, TX 75240.

For Petitioners: Mr. Albert B. Greco, Jr., Law Offices of Albert B. Greco, Jr., Two Galleria Tower, Suite 1420, 13455 Noel Road, Lock Box 15, Dallas, TX 75240, Ms. Barbara L. Wohlrabe, Law Offices of Albert B. Greco, Jr., Two Galleria Tower, Suite 1420, 13455 Noel Road, Lock Box 15, Dallas, TX 75240.

For Respondent: Mr. Jack N. Ross, II, Haynes and Boone, 3100 NationsBank Plaza, 901 Main Street, Dallas, TX 75202-3714.

**JUDGES:** Raul A. Gonzalez, Justice.

**OPINION BY:** RAUL A. GONZALEZ

**OPINION**

[*627] **OPINION**

The issue in this case is whether a claim by Sunbelt Federal Savings against George Barr based on a partner-

ship promissory [**2] note and guarantee agreement is barred by the doctrine of res judicata. The trial court granted Barr's motion for summary judgment based on res judicata. The court of appeals, with one Justice dissenting, reversed the trial court's judgment, holding that the doctrine did not apply. 824 S.W.2d 600. We reverse the judgment of the court [*628] of appeals and affirm the trial court's judgment.

In 1985, Barr and Ron Knott were partners in the Bar III Venture. On March 14, 1985 Bar III executed a promissory note for $ 369,750 in favor of Sunbelt's predecessor in interest. The same day, Barr and Knott executed a personal guarantee of the note. In March 1987, Bar III defaulted on the note.

On May 24, 1988, Sunbelt filed two separate lawsuits on the note. In one suit, Sunbelt alleged liability against the partnership as maker of the note and against Knott as guarantor of the note. In the other, Sunbelt alleged that Barr was personally liable because of his unconditional guarantee of the note.

Barr moved for summary judgment in the latter lawsuit on the grounds that the terms of the guaranty agreement were too uncertain to be enforceable. Barr argued that the agreement, a standard form [**3] containing a number of options to choose and blanks to complete, was not sufficiently completed to ascertain his liability. The trial court granted the motion, and rendered a final take-nothing judgment. Sunbelt did not appeal the judgment.

Thereafter, Sunbelt amended its pleadings in the suit against the partnership and Knott by adding Barr as a defendant, alleging that his status as a partner created liability for the note. Barr's answer asserted res judicata, among other defenses.

Barr moved for summary judgment on the grounds that the take-nothing judgment in the first lawsuit barred litigation of the claims against him in the second lawsuit. Sunbelt also moved for summary judgment, requesting a judgment on the note. The trial court granted Barr's motion and denied Sunbelt's. This interlocutory judgment became final when the court rendered judgment for Sunbelt on its claims against the partnership and Knott for the full amount of the note.

Sunbelt appealed, arguing that the trial court should have granted its summary judgment instead of Barr's. The court of appeals, with one justice dissenting, determined that the first suit did not bar the second. However, the court concluded [**4] that questions of fact prevented rendition in Sunbelt's favor, and thus remanded the case to the trial court. Both Barr and Sunbelt sought review in our court.

Much of the difficulty associated with the doctrine of res judicata is due to the confusion of several related theories. Broadly speaking, [HN1]res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments. *Puga v. Donna Fruit Co.*, 634 S.W.2d 677, 679 (Tex. 1982). Within this general doctrine, there are two principal categories: (1) claim preclusion (also known as res judicata); and (2) issue preclusion (also known as collateral estoppel). [1] [HN2]Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. *Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). [HN3]Issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit. [2] *Bonniwell*, 663 S.W.2d at [**5] 818. [*629] Barr's argument, that Sunbelt should have brought all theories of liability in one suit, is the defense of claim preclusion.

1 Res judicata may be further categorized into merger and bar, because the doctrine has different applications depending on which party is successful in the prior suit. [HN4]If the party asserting a claim prevails, the cause of action is merged into the judgment, and the cause of action as such ceases to exist. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985). If the party defending a claim prevails in the prior suit, the judgment acts as a bar to matters which could have been litigated in the original suit. *Id*.

2 An example of the confusion concerning collateral estoppel is the court of appeals' holding that "res judicata does not preclude relitigation of issues that the first court did not actually try and determine, unless a determination of those issues was essential to the judgment in the first suit." 824 S.W.2d at 602. The court relied on RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), which is entitled "Issue Preclusion--General Rule", i.e., collateral estoppel. *See Id.* § 17 (3), and comment (c). We disapprove similar language in the case cited by the court, *Faour v. Faour*, 762 S.W.2d 361 (Tex. App. -- Houston [1st Dist.] 1988, writ denied).

Our own recent holdings have contributed to the confusion by holding without elaboration that res judicata requires an "identity of issues" between the prior and subsequent suits. *See, e.g.*, *Coalition of Cities for Affordable Utility Rates v. Public Utilities Commission*, 798 S.W.2d 560, 563 (Tex. 1990); *Byrom v. Pendley*, 717 S.W.2d 602, 606 (Tex. 1986); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984).

[HN5]If an identity of issues is strictly required, then there is no basis for precluding issues that should have been raised in the prior suit but were not, and there is no distinction between claim preclusion and issue preclusion. *See* *Flores v. Edinburg Consolidated Indep. School Dist.*, 741 F.2d 773, 776 (5th Cir. 1984).

[**6] [HN6]

Claim preclusion prevents splitting a cause of action. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985). The policies behind the doctrine reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. Zollie Steakley & Weldon U. Howell, Jr., *Ruminations on Res Judicata*, 28 Sw. L. J. 355, 358-59 (1974).

The question that has given courts the most difficulty is determining what claims should have been litigated in the prior suit. Early on, this Court held that res judicata "is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided." *Foster v. Wells*, 4 Tex. 101, 104 (1849). We have never repudiated this definition of claim preclusion, and it appears in some form in most definitions of res judicata. *See, e.g.*, *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985)(res judicata bars not only what was actually litigated but also claims that could have been litigated in the original cause of action). If taken literally, this definition of the [**7] rule would require that all disputes existing between parties be joined, regardless of whether the disputes have anything in common. This court has resorted to a wide variety of theories and tests to give res judicata a more restrictive application. [3] *See generally* 5 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 131.06[4][b][ii] (1991); *Steakley*, 28 Sw. L. J. 355.

3 See, e.g., *Philipowski v. Spencer*, 63 Tex. 604, 607 (1885)("cause of action", being the grievance and wrong complained of, must be identical in both the earlier and subsequent suit, regardless of form of action); *Hanrick v. Gurley*, 93 Tex. 479, 56 S.W. 330, 330 (Tex. 1900), (all matters that could support the "claim or demand in controversy" in the prior suit would be precluded in a succeeding suit); *Freeman v. McAninch*, 87 Tex. 132, 27 S.W. 97, 100 (Tex. 1894) (pleader must use diligence in pleading all claims concerning the same "subject matter" of the suit); *Moore v. Snowball*, 98 Tex. 16, 81 S.W. 5, 8-10 (Tex. 1904)(proof of legal title is sufficiently different from proof of equitable title so as to be different "cause of action" for res judicata purposes); *Ogletree v. Crates*, 363 S.W.2d 431, 436 (Tex. 1963)(while suit to modify a divorce decree and suit to set it aside for fraud are technically different causes of action, they are the same "broad cause of action," and public policy requires all complaints concerning custody could and should have been brought in the same suit).

[**8] Even if only cases from more recent times are considered, our holdings with respect to res judicata are difficult to reconcile. In *Griffin v. Holiday Inns of America*, 496 S.W.2d 535 (Tex. 1973) the court determined that a take-nothing judgment in a suit to recover in contract for services and materials did not preclude a subsequent suit to be compensated in quantum meruit. The court rejected the view that a judgment as to one claim is res judicata of all claims or causes of action arising out of the same transaction, and stated that, [HN7]"as a general rule a judgment on the merits in a suit on one cause of action is not conclusive of a subsequent suit on a different cause of action except as to issues of fact actually litigated and determined in the first suit." *Id.* at 538. The court acknowledged, however, that alternative theories of recovery for the same "claim" may not be brought in different lawsuits. [4]

4 The court did not attempt to apply any test for res judicata to the facts in *Griffin*. Ultimately, the Court based its decision on stare decisis, because other courts had held that quantum meruit is not barred by a judgment on the contract. *Griffin*, 496 S.W.2d at 538. The court did so without discussion of the reasoning in the cases upon which it relied.

[**9] [*630] Thus, in *Griffin*, the court determined that a "cause of action" for res judicata purposes is something more than the set of facts necessary to establish a single theory of recovery but not necessarily the entire transaction between the parties. *Id.* at 537-38. The court gave no guidance on the question of how to make this fine distinction between a mere alternative theory of recovery and a different cause of action. Every theory of recovery has its unique elements of proof. As the *Griffin* case illustrates, only slight variations of the facts to support different theories of the same incident can result in a court finding different causes of action, thus thwarting the purposes of res judicata. *See Steakley*, 28 Sw. L.J. at 361-62.

The court took an entirely different approach in *Westinghouse Credit Corp. v. Kownslar*, 496 S.W.2d 531 (Tex. 1973). In that case Kownslar had guaranteed all promissory notes by the maker. The issue was whether res judicata required that Westinghouse bring in one suit its claims for all notes guaranteed by Kownslar that were then in default. Rather than decide whether there was

more than one cause of action involved, the court [**10] decided the case solely on whether it appeared that the policies of res judicata required such a result. [5]

> 5 The court announced a two-step analysis. First the court looked to see if stare decisis decided the case, and determined that there was no controlling case. Second, the court looked to see "whether the factual situation presented is such that the purposes of the doctrine of merger shall be frustrated absent enforcement of the bar." 496 S.W.2d at 532.

This pure policy approach as exemplified by *Westinghouse* makes it virtually impossible to determine in advance what policy will win out in any given case. Without any objective standards, each case is decided ad hoc, and therefore the doctrine is "inherently unpredictable" and "affords little basis for consistency and formulation of precedent." *Steakley*, 28 Sw. L.J. at 362-63. *Westinghouse* is the only case we have decided solely on policy grounds.

Then, in *Texas Water Rights Comm. v. Crow Iron Works*, 582 S.W.2d 768 (Tex. 1979), the court [**11] shifted the focus from the cause of action to the subject matter of the litigation. The question was whether a major lawsuit instigated to sort out water rights to the lower Rio Grande river precluded a subsequent suit based on the claim that during the pendency of that suit the plaintiff had purchased additional rights. The court concluded that the subsequent claim was barred, noting that:

> [HN8]The scope of res judicata is not limited to matters actually litigated; the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litigated, but also on *causes of action* or defenses which arise out of the same *subject matter* and which might have been litigated in the first suit.

*Id.* at 771-72 (emphasis added). *Accord*, *Gracia*, 667 S.W.2d at 519. Thus this definition is not consistent with earlier formulations of the rule, such as in *Griffin*, that only issues related to a single cause of action are barred in a subsequent suit. While we did not expressly overrule the *Griffin* test in either *Crow Iron Works* or *Gracia* we do so now.

A determination of what constitutes the subject matter of [**12] a suit necessarily requires an examination of the factual basis of the claim or claims in the prior litigation. It requires an analysis of the factual matters that make up the gist of the complaint, without regard to the form of action. [HN9]Any cause of action which arises out of those same facts should, if practicable, be litigated in the same lawsuit. *Gracia*, 667 S.W.2d at 519; *Crow Iron Works*, 582 S.W.2d at 772.

The definition of res judicata in *Gracia* and *Crow Iron Works* is substantially similar to the rule of compulsory counterclaims embodied in the rules of civil procedure. [HN10]A party defending a claim must bring as a counterclaim any claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." Tex. R. Civ. P. 97.

[*631] The Restatement of Judgments also takes the transactional approach to claims preclusion. [HN11]It provides that a final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose. Restatement of Judgments § 24(1). A "transaction" under the Restatement is not equivalent to a sequence of events, however; [**13] the determination is to be made pragmatically, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage." [6] *Id.* § 24 (2).

> 6 In *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985), we cited section 24(2) of the Restatement as authority for the definition of claims preclusion. We did not clearly adopt the Restatement in that case, however.

We conclude that the transactional approach to claims preclusion of the Restatement effectuates the policy of res judicata with no more hardship than encountered under rule 97(a) of the rules of civil procedure. Modern rules of procedure obviate the need to give parties two bites at the apple, as was done in *Griffin*, to ensure that a claim receives full adjudication. Discovery should put a claimant on notice of any need for alternative pleading. Moreover, [**14] if success on one theory becomes doubtful because of developments during trial, a party is free to seek a trial amendment.

In the case now before us, there is no valid reason to subject Barr to two different lawsuits. In the suit brought previously against Barr, the bank alleged that he executed the guarantee on the same day and as part of the "same transaction" as the promissory note. In both suits Sunbelt seeks to hold Barr primarily liable for payment of the note and seeks the same amount of damages. Both suits require proof establishing the notes of the partnership, that the notes are due, and that the partnership has defaulted. The only factual allegation that Sunbelt

pleaded in the second suit that was not in the first is that Barr is a general partner of Bar III Venture.

It is clear that in this case the execution of the partnership note and Barr's guarantee of it were related in time and space and motivation, and the parties considered it as a single transaction. The issues of both claims form a convenient trial unit, whereas separate lawsuits would require significant duplication of effort of the court and the parties involved. With due diligence, the claim that Barr was [**15] liable because he is a partner could have been joined in the suit on his guarantee of the partnership note.

We reaffirm the "transactional" approach to res judicata. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit. For these reasons, the judgment of the court of appeals is reversed and that of the trial court is affirmed.

Raul A. Gonzalez

Justice

OPINION DELIVERED: September 23, 1992

**CLS ASSOCIATES, LTD., APPELLANT, v. A B, APPELLEES**

**No. 05-87-01186-CV**

**COURT OF APPEALS OF TEXAS, Fifth District, Dallas**

**762 S.W.2d 221; 1988 Tex. App. LEXIS 3312**

**November 14, 1988**

**PRIOR HISTORY:** [**1] FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant client sought relief from a decision from a District Court of Dallas County (Texas), which granted summary judgment to appellee law firm in a legal malpractice action on the ground that the cause of action was barred by res judicata.

**OVERVIEW:** Appellee law firm performed legal services for appellant client. Appellant failed to pay, and appellee assigned its cause of action to a collection agency, which collected the fees. Appellant subsequently brought a legal malpractice action against appellee in connection with the services that gave rise to the fee dispute. A summary judgment was issued in favor of appellee on the ground of res judicata. On appeal, the court held that the fact that the fee dispute was on appeal was not a defense to the plea of res judicata because the appeal taken was not by trial de novo. Appellee's assertion of res judicata without additional facts was sufficient to support a summary judgment. Res judicata barred issues of malpractice connected with the fee dispute because such claim was a compulsory counterclaim to a claim for attorneys' fees and was, therefore, litigated as part of the fee dispute. A motion in limine did not result in a severance of the issue of malpractice. The fee dispute involved privies of the same parties as evidenced by an assignment document. The court held that appellant prosecuted the appeal for delay and without sufficient cause and was subject to sanctions.

**OUTCOME:** Summary judgment in favor of appellee law firm was affirmed because res judicata applied to appellant client's cause of action for legal malpractice. Such issues were litigated and essential to the judgment in the previous cause of action between appellant and appellee's successor-in-interest, a collection agency, involving a dispute over attorneys' fees in connection with the same services.

**CORE TERMS:** attorneys' fees, res judicata, malpractice, law firm, cause of action, summary judgment, prevailing, ref'd, legal services, insufficient to support, privity, malpractice suit, legal conclusion, trial de novo', affirmative defense, sufficient facts, sufficient cause, actually litigated, special exception, compulsory counterclaim, separate trials, alter ego, frivolous appeal, counterclaim, litigated, defensive, overrule, limine, times, gave rise

**LexisNexis(R) Headnotes**

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule***
***Civil Procedure > Appeals > Standards of Review > De Novo Review***
[HN1]A judgment is final for the purposes of issue and claim preclusion despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Res Judicata***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN2]All affirmative defenses such as res judicata must be specifically pleaded to give notice of the issue to be raised. The pleading of specific facts is not necessary. Tex. R. Civ. P. 94. If the opponent desires more particular information, a special exception is necessary. Tex. R. Civ. P. 90.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN3]A judgment on the merits in a suit on one cause of action is not conclusive of a subsequent suit on a differ-

ent cause of action except as to issues of fact actually litigated and determined in the first suit.

***Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims***
***Civil Procedure > Pleading & Practice > Pleadings > Cross-Claims > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN4]Res judicata bars litigation of all issues connected with a cause of action which, with the use of all diligence, might have been tried, as well as those which were actually tried. This rule, however, applies only to the cause of action which was actually filed by the plaintiff and not to cross-actions which might have been filed by a defendant unless a compulsory counterclaim rule is applicable.

***Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims***
***Legal Ethics > Client Relations > Attorney Fees > General Overview***
***Torts > Malpractice & Professional Liability > Attorneys***
[HN5]A claim of attorney malpractice is a compulsory counterclaim to a claim for attorneys' fees under Tex. R. Civ. P. 97(a).

***Civil Procedure > Pretrial Matters > Separate Trials***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
***Evidence > Procedural Considerations > Preliminary Questions > General Overview***
[HN6]A motion in limine does not result in a severance yielding separate trials. Instead, such a motion merely precludes reference to the subject of the motion without first obtaining a ruling on admissibility outside the presence of the jury.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Res Judicata***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
***Contracts Law > Performance > Assignment > General Overview***
[HN7]To be in privity does not require a party relying on the defense of res judicata to be the alter ego of the party in the initial suit. It is sufficient that the party in the second suit be a successor-in-interest to the party in the first suit.

***Civil Procedure > Remedies > Damages > Monetary Damages***
***Civil Procedure > Appeals > Frivolous Appeals***
[HN8]In civil cases where the court shall determine that an appeal or writ of error has been taken for delay and without sufficient cause, then the appellate court may, as part of its judgment, award each prevailing appellee or respondent an amount not to exceed 10 percent of the amount of damages awarded to such appellee or respondent as damages against such appellant petitioner. If there is no amount awarded to the prevailing appellee or respondent as money damages, then the appellate court may award, as part of its judgment, each prevailing appellee or respondent an amount not to exceed 10 times the total taxable costs as damages against such appellant or petitioner. Tex. R. App. P. 84.

***Civil Procedure > Appeals > Frivolous Appeals***
[HN9]The appellate court may decide sua sponte to assess damages for the taking of a frivolous appeal.

**COUNSEL:** Douglas J. Brooks.

Paul M. Koning.

**JUDGES:** Opinion by Justice Stephens..

**OPINION BY:** STEPHENS

**OPINION**

[*222] CLS Associates, Ltd. appeals an adverse summary judgment in its action against the law firm of A B alleging that the law firm committed malpractice and negligence while providing legal services to CLS. The trial court found that the malpractice claim was barred by res judicata arising from a prior suit to collect attorneys' fees due for the same services at issue in the instant suit. In three points of error, CLS asserts that the trial court erred in granting the summary judgment on the grounds of res judicata. We disagree and, accordingly, affirm the judgment of the trial court.

A B (Law Firm) performed legal services for CLS Associates, Ltd., [*223] pursuant to a contract. The Law Firm assigned its cause of action to D & L Collections (Collection Agency) when CLS failed to pay for the services rendered. The Collection Agency successfully collected the attorneys' fees. Subsequently, CLS brought a suit against the Law Firm for malpractice and negligence in connection [**2] with the same services which gave rise to the attorneys' fees suit. The Law Firm

asserted the affirmative defense of res judicata and a summary judgment was granted in its favor.

In its first point of error, CLS asserts that the Law Firm's First Amended Original Answer was insufficient to support the trial court's finding that the cause of action was barred by res judicata. Specifically, CLS contends that res judicata cannot apply because the action which gave rise to the res judicata was on appeal; that the assertion of res judicata was an improper legal conclusion not supported by sufficient facts; that the causes of action in the attorneys' fees suit and the malpractice suit are not identical; and that the issues regarding malpractice were not in fact decided in the first suit. We hold that the Law Firm's First Amended Answer was sufficient support a determination of res judicata for the reasons discussed herein.

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986), the Texas Supreme Court held that "[HN1]a judgment is final for the purposes of issue and claim preclusion 'despite the taking of an appeal unless what is called an appeal actually consists of a trial de [**3] novo'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)). The Court expressly overruled *Texas Truck Railroad Co. v. Jackson*, 85 Tex. 605, 22 S.W. 1030 (1893) (a judgment on appeal insufficient to support plea of res judicata). Thus, the fact that the attorneys' fees case was on appeal is not a defense to the plea of res judicata since the appeal taken was not by trial de novo.

CLS further alleges that the assertion of res judicata in the Law Firm's First Amended Original Answer constituted a legal conclusion and was not supported by sufficient facts to support a summary judgment. Rule 94 requires only that [HN2]all affirmative defenses such as res judicata be specifically pleaded to give notice of the issue to be raised. The pleading of specific facts is not necessary. TEX. R. CIV. P. 94. If the opponent desires more particular information, a special exception is necessary. *See* TEX. R. CIV. P. 90; *Agnew v. Coleman Electricity Cooperative*, 153 Tex. 587, 272 S.W.2d 877, 879 (Tex. 1954). Therefore, the Law Firm's assertion of res judicata without additional facts was sufficient to support the summary judgment in the absence of a special exception.

CLS also urges that [**4] the answer was insufficient to support a summary judgment because the cause of action presented in the attorneys' fees suit was not identical with the issue presented in this malpractice suit. As a general rule, [HN3]a judgment on the merits in a suit on one cause of action is not conclusive of a subsequent suit on a different cause of action except as to issues of fact actually litigated and determined in the first suit. *See Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973). Here, the issue of the quality of the legal services was not actually litigated and determined in the attorneys' fees suit. Instead, the only matter litigated was whether the attorneys' fees were due. In our previous decision, we held in the attorneys' fees suit that the fees were indeed due and owing for services performed. (*CLS Associates, Ltd. v. A B Collections*, No. 05-86-00760-CV (Tex. App. -- Dallas July 7, 1987) (unpublished)).

There is, of course, at least one exception to the general rule stated above. *See Griffin*, 496 S.W.2d at 538. That exception provides that [HN4]res judicata bars litigation of all issues connected with a cause of action which, with the [**5] use of all diligence, might have been tried, as well as those which were actually tried. *Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex. 1963). As we stated in *Swiss Avenue Bank v. Slivka*, 724 S.W.2d 394, 396 (Tex. App. -- Dallas 1986, no writ), "the *Ogletree* rule, however, applies only to the cause of action which was actually filed by the plaintiff [*224] and not to cross-actions which might have been filed by a defendant unless the compulsory counterclaim rule is applicable." *See Chandler v. Cashway Building Materials, Inc.*, 584 S.W.2d 950, 954 (Tex. Civ. App. -- El Paso 1979, no writ); TEX. R. CIV. P. 97. [HN5]A claim of attorney malpractice has been held a compulsory counterclaim to a claim for attorneys' fees under Rule 97(a). *Bailey v. Travis*, 622 S.W.2d 143 (Tex. App. -- Eastland 1981, writ ref'd n.r.e.); *Corpus Christi Bank & Trust v. Cross*, 586 S.W.2d 664 (Tex. Civ. App. -- Corpus Christi 1979, writ ref'd n.r.e.). Thus, because CLS was required to assert the malpractice claim for negligently performed services in the attorneys' fees suit, the *Ogletree* rule is applicable. For these reasons, we overrule CLS' first point of error.

In its second [**6] point of error, CLS asserts that "malpractice and negligence" were not litigated or essential to the judgment in the attorneys' fees suit. This point is without merit because, as discussed in this opinion with regard to point of error one, the defensive issue of malpractice was a compulsory counterclaim. It arose from the same transactions as the attorneys' fees and would have prevented the recovery. Thus, it cannot be "barely collateral" to the attorneys' fees suit. *See* TEX. R. CIV. P. 97.

The record reflects that on the date of trial in the attorneys' fees suit, CLS moved for a continuance to develop defensive theories. This motion was denied. Subsequently, the trial court granted the Collection Agency's Motion in Limine which resulted in the exclusion of evidence as to malpractice. CLS argues that this severed the issue of malpractice. Thus, CLS contends that res judicata cannot apply. The Texas Supreme Court in *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697

S.W.2d 381, 384 (Tex. 1985), held that when separate trials are granted by the trial court in an attorneys' fees suit with a malpractice counterclaim, the prevailing party in the attorneys' fees suit cannot [**7] properly assert res judicata in the subsequent malpractice trial. The instant case, however, is distinguishable. [HN6]A motion in limine does not result in a severance yielding separate trials. Instead, such a motion merely precludes reference to the subject of the motion without first obtaining a ruling on admissibility outside the presence of the jury. *See Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963). Thus, in the absence of an attempt to tender the evidence and an adverse ruling, CLS has nothing to complain about on appeal. *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 662 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.). Accordingly, CLS' second point of error is overruled.

CLS, in its third point of error, contends that res judicata cannot apply in this instance because the earlier suit did not involve the same parties or their privies. In support, CLS points out that in the attorneys' fees suit the jury expressly found that A B Collections was not the alter ego of A B . However, [HN7]to be in privity does not require a party relying on the defense of res judicata to be the alter ego of the [**8] party in the initial suit. *See Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). It is sufficient that the party in the second suit be a successor-in-interest to the party in the first suit. *Compare Gilbert v. Fireside Enterprises, Inc.*, 611 S.W.2d 869, 871 (Tex. Civ. App. -- Dallas 1980, no writ), *with Tarter v. Metropolitan Savings & Loan Association*, 744 S.W.2d 926 (Tex. 1988) (causes of action by different parties *not* in privity are not barred even though the outcomes of the two suits seem inconsistent). The privity between the Collection Agency and the Law Firm in the attorneys' fees suit is evidenced by the assignment document attached to the Plaintiffs' Original Petition which was executed on behalf of the Law Firm. There is no merit to CLS's argument; accordingly, we overrule its third point of error.

After reviewing the entire case carefully, we conclude that CLS has prosecuted this appeal for delay and without sufficient cause. We cannot find that there was even a likelihood of a favorable result for CLS. Texas Rule of Appellate Procedure 84 provides:

> [HN8]In civil cases where the court shall determine that an appeal or writ of error [**9] has been taken for delay and without sufficient [*225] cause, then the appellate court may, as part of its judgment, award each prevailing appellee or respondent an amount not to exceed ten percent of the amount of damages awarded to such appellee or respondent as damages against such appellant petitioner. If there is no amount awarded to the prevailing appellee or respondent as money damages, then the appellate court may award, as part of its judgment, each prevailing appellee or respondent an amount not to exceed ten times the total taxable costs as damages against such appellant or petitioner.

The purpose of this rule is to shift an appellee's expense of defending itself in a frivolous appeal to the appellant. [HN9]This Court may decide sua sponte to assess damages for the taking of a frivolous appeal by CLS. *Dallas County Appraisal District v. The Leaves, Inc.*, 742 S.W.2d 424 (Tex. App. -- Dallas 1987, writ denied); *Bullock v. Sage Energy Co.*, 728 S.W.2d 465, 468 (Tex. App. Austin 1987, writ ref'd n.r.e.).

Spurious litigation unnecessarily burdens the parties and the courts alike. Thus, it should not go unsanctioned. In this case, we conclude that damages must [**10] be assessed against CLS in an amount equal to ten times the total taxable costs on appeal, to be awarded A B .

The judgment of the trial court is affirmed.

**DEBORAH ELLIS, Plaintiff-Appellant, versus AMEX LIFE INS. CO., ET AL, Defendants, LIFE INSURANCE COMPANY OF NORTH AMERICA, Defendant-Appellee.**

**No. 99-11010**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**211 F.3d 935; 2000 U.S. App. LEXIS 10998**

**May 18, 2000, Decided**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the Northern District of Texas. 3:98-CV-495-P. Jorge A Solis, US District Judge.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff appealed entry of summary judgment, for defendant insurance company, by the United States District Court for the Northern District of Texas. Judgment was based on res judicata effect of prior dismissal, as barred by statute of limitations, of plaintiff's action against defendant in another federal district.

**OVERVIEW:** Plaintiff beneficiary sued defendant insurer, alleging improper denial of accidental death benefits. While first-filed federal action was stayed, plaintiff filed a suit in state court, which was removed to federal court and dismissed as time-barred. The court held that resumption of original suit was barred by res judicata. All elements required for res judicata were present: same parties, court of competent jurisdiction, judgment on merits (in Fifth Circuit, decision based on limitations period was on merits), and same nucleus of facts constituting single claim. Since neither Texas nor the Fifth Circuit had authority on whether a judgment in a later-filed case had preclusive effect on an earlier-filed case, the court followed the majority rule that when two actions were based on the same claim or issue, the final judgment first rendered in one of the actions became conclusive in the other action, regardless of order in which they were brought.

**OUTCOME:** The court affirmed judgment for defendant, because dismissal as time-barred was decision on the merits and because first judgment rendered had preclusive effect on any other lawsuits, even though it was filed later.

**CORE TERMS:** res judicata, res judicata, preclusive effect, summary judgment, final judgment, cause of action, lawsuit, insurance policy, pending action, time-barred, correctly, judicata, predict, nucleus, res

**LexisNexis(R) Headnotes**

***Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN1]The preclusive effect of a prior federal court judgment is controlled by federal res judicata rules.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN2]Res judicata is appropriate if: (1) the parties to both actions are identical (or at least in privity); (2) the judgment in the first action is rendered by a court of competent jurisdiction; (3) the first action concluded with a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
***Governments > Legislation > Statutes of Limitations > General Overview***
[HN3]In res judicata context, dismissals for want of jurisdiction are not decisions on the merits, while dismissals on limitations are.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN4]A judgment, otherwise entitled to res judicata effect in a pending action, may not be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action. Thus, when two actions are pending based on the same claim, or involving the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action, regardless of which action was first brought.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN5]Courts apply a transactional test in determining whether two suits involve the same claim for res judicata purposes; the critical issue is whether the plaintiff bases the two actions on the same nucleus of operative facts.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN6]Res judicata bars all claims that were brought or could have been brought based on the operative factual nucleus.

**COUNSEL:** For DEBORAH ELLIS, Plaintiff - Appellant: Andrew Ross Korn, Dallas, TX.

For LIFE INSURANCE COMPANY OF NORTH AMERICA, Defendant- Appellee: James Leroy Johnson, The Johnson Law Firm, Dallas, TX.

**JUDGES:** Before EMILIO M. GARZA, DeMOSS, and STEWART, Circuit Judges.

**OPINION BY:** EMILIO M. GARZA

**OPINION**

[*936] EMILIO M. GARZA, Circuit Judge:

Deborah Ellis ("Ellis") appeals from the summary judgment granted to Life Insurance Company of North America ("Life"). The district court found that Ellis' action was barred by res judicata, based on the prior dismissal as time-barred of another suit filed by Ellis against Life. We affirm.

Ellis claimed that she was improperly denied accidental death benefits due under her mother's insurance policy with Life. Ellis filed the instant suit against Life in Henderson County, Texas state court in 1992. The case was removed to the Eastern District of Texas. In December 1992, the case was stayed. In May 1997, Ellis filed a separate suit with similar allegations in Dallas County, Texas state court. This case was removed to the Northern District of Texas. In July 1997, Life moved for summary judgment in the Northern District lawsuit, alleging that it was barred by the applicable statute of limitations. In February 1998, Life's motion was granted and the suit dismissed [**2] with prejudice.

Meanwhile, in September 1997 Ellis moved to lift the stay on the Eastern [*937] District suit. After the dismissal of the Northern District suit, the Eastern District suit was transferred to the Northern District. Subsequently, Life moved for summary judgment in the Eastern District suit. The district court granted summary judgment on the ground that the Eastern District suit was barred by res judicata, in light of the dismissal of the Northern District suit. Ellis appeals.

[HN1]The preclusive effect of a prior federal court judgment is controlled by federal res judicata rules. *See* *Agrilectric Power Partners, Ltd. v. General Electric, Co.*, 20 F.3d 663, 664 (5th Cir. 1994); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045 (5th Cir. 1989). [HN2]Res judicata is appropriate if: 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits. *See* *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994). [**3]

The first and second elements of res judicata are not disputed. Ellis first argues that the dismissal of the Northern District suit as time-barred was not a decision on the merits for res judicata purposes. We have rejected this claim. *See* *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 561 (5th Cir. 1983) (en banc) ([HN3]holding, in res judicata context, that "dismissals for want of jurisdiction are not decisions on the merits, while those on limitations are"); *Thompson*, 870 F.2d at 1045-46 (stating that *Nilsen* "enunciated an unequivocal standard with respect to the res judicata effect which shall be given to a judgment dismissing a cause of action under limitations grounds," and therefore holding that under federal res judicata rules, a Louisiana federal district court's dismissal on prescriptive grounds was a final judgment on the merits), *reh'g denied*, 880 F.2d 818, 819 (5th Cir. 1989) ("Our holding today merely stands for the proposition that a dismissal on statute of limitations grounds in federal court (Louisiana) is a final adjudication on the merits."). The dismissal of the Northern District suit was, under Fifth Circuit [**4] law, a decision on the merits.

Second, Ellis claims that res judicata is inapplicable because the Eastern District suit was brought prior to the Northern District suit. We have not been presented with this argument in applying federal res judicata law. However, we have twice been presented with it in cases dealing with the res judicata effect of a prior Texas state

court judgment on a pending federal case. *See Hogue v. Royse City, Texas*, 939 F.2d 1249, 1252 (5th Cir. 1991); *In re Hansler*, 988 F.2d 35, 38 (5th Cir. 1993). In *Hogue*, plaintiff filed state and federal lawsuits in Texas simultaneously. *See Hogue*, 939 F.2d at 1252. Summary judgment was awarded in the state court suit. *See id.* In determining the res judicata effect of the state court judgment, we were required to give that judgment the preclusive effect it would be given under Texas law. *See id.* We rejected Hogue's argument that filing suits simultaneously warranted different treatment from filing them successively. *See id.* at 1255. Noting that Texas courts had not addressed the issue, we stated that Texas courts likely would follow the Restatement [**5] (Second) of Judgments § 14, which stated: "'Nor is [HN4]a judgment, otherwise entitled to res judicata effect in a pending action, to be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action. . . . Thus when two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action ... regardless of which action was first brought.'" *Id.* at 1255 (quoting from Restatement (Second) of Judgments § 14, comment a (1982)). Because "a later-filed claim can be preclusive of an earlier-filed claim," Hogue's [*938] federal claim was barred by res judicata. *Id.*

We relied on *Hogue* in *Hansler*, which also dealt with the preclusive effect of a Texas state court judgment. *See Hansler*, 988 F.2d at 37. Hansler argued that, because his federal action was filed first, the Texas judgment against him could not have res judicata effect. *See id.* at 38. We noted that "we find no support for Hansler's position and substantial authority to the contrary" and held that "the [**6] first judgment, regardless of when the suits are filed, is given preclusive effect." *Id.* (citing *Hogue* and the Restatement (Second) of Judgments § 14, comment a).

While *Hogue* and *Hansler* required us to predict Texas res judicata law, there is no reason to believe that the Restatement rule would not also apply to a federal court judgment. Notably, in an earlier case, we were required to predict Texas law with regard to whether a judgment could have res judicata effect as to a prior-filed suit. *See Joleewu, Ltd. v. City of Austin*, 916 F.2d 250, 252 n.1 (5th Cir. 1990), *vacated in part on other grounds*, 934 F.2d 621 (5th Cir. 1991). Noting that there were no cases declining to apply res judicata in this situation, "we assumed that Texas courts would follow the general rule" set forth in Restatement (Second) of Judgments § 14. *Id.* Cases from other circuits confirm that the Restatement rule is the majority rule. *See, e.g.*, *United States v. Northrop*, 147 F.3d 905, 909 (9th Cir. 1998) ("The date of rendition of the judgment is controlling for purposes of res judicata, not the dates of commencement of the action creating [**7] the bar or the action to be affected by the bar.") (citing Restatement (Second) of Judgments § 14 (1980)); *Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 705 (7th Cir. 1982) ("As between two actions pending at the same time, the first of two judgments has preclusive effect on the second.") (citing, as to res judicata, Restatement (Second) of Judgments § 14). Ellis has presented no case law to support her contrary argument. Therefore, we conclude that res judicata is applicable to the Eastern District lawsuit even though it was commenced prior to the Northern District suit.

Finally, Ellis does not appear to renew on appeal her argument that the fourth element of res judicata--identity of causes of action--is absent here. Even if this argument is preserved, it is without merit. The district court correctly noted that [HN5]we apply a "transactional" test in determining whether two suits involve the same claim, where the "critical issue" is "whether the plaintiff bases the two actions on the same nucleus of operative facts." *See Agilectric*, 20 F.3d at 665 (internal citation omitted). [1] As the district court found, both suits by Adams arose out of the [**8] same transaction: Life's denial of benefits under Adams' mother's insurance policy after her death. Therefore, the district court correctly found that the fourth res judicata requirement was met.

1 As the district court [HN6]noted, res judicata bars all claims that were brought *or* could have been brought based on the operative factual nucleus. *See Nilsen*, 701 F.2d at 560; *Agilectric*, 20 F.3d at 665.

We therefore hold that the district court did not err in finding that the dismissal of the Northern District suit should have res judicata effect as to the Eastern District suit. The grant of summary judgment to Life is AFFIRMED.

**MARY MARGARET GOGGIN, Appellant v. ELLEN ELKINS GRIMES, Appellee**

**NO. 14-97-00507-CV**

**COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON**

**969 S.W.2d 135; 1998 Tex. App. LEXIS 2663**

**May 7, 1998, Rendered**
**May 7, 1998, Opinion Filed**

**PRIOR HISTORY:** [**1] On Appeal from the 269th District Court. Harris County, Texas. Trial Court Cause No. 96-22814-A.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant client sought review of a judgment from the 269th District Court, Harris County (Texas) dismissing her claim for legal malpractice against appellee attorney and granting appellee's motion for summary judgment pursuant to Tex. R. Civ. P. 97(a).

**OVERVIEW:** Appellant client sought review of a judgment from the trial court granting summary judgment in favor of appellee attorney in an action brought by appellant for legal malpractice. The court affirmed, holding that appellant's claim was barred by res judicata. Appellee withdrew as counsel prior to a final judgment and then intervened and sued appellant for attorney fees in the same pending divorce action for which she was retained. The court held that appellant's claim of attorney malpractice was a compulsory counterclaim to appellee's claim for attorney's fees pursuant to Tex. R. Civ. P. 97(a). The issue of malpractice and the other claims pleaded by appellant all arose from the same transaction as the attorney's fees. In addition, the court held that appellee's summary judgment affidavit was not defective. Appellee's affidavit was based on appellee's personal knowledge and stated facts in a form that would be admissible in evidence at a trial. Appellee further stated how she became personally familiar with the facts and showed that she was competent to testify to matters stated in the affidavit pursuant to Tex. R. Civ. P. 166a(f).

**OUTCOME:** The court affirmed the judgment of dismissal, holding that appellant client's claim was barred by res judicata because she failed to file a compulsory counterclaim to appellee attorney's claim for attorney's fees. The court also held that appellee's summary judgment motion was supported by a proper affidavit because the affidavit was based on personal knowledge and stated facts that would be admissible at trial.

**CORE TERMS:** summary judgment, attorney fees, malpractice, res judicata, personal knowledge, divorce, legal malpractice, divorce action, causes of action, invasion, affiant, decree, accrue, sworn, compulsory counterclaim, writ denied, protected interest, counterclaim, personally, nonmovant, withdrew, movant, divorce case, discovery rule, judgment proof, legally cognizable, affirmatively, categorized, intervened, admissible

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview***
***Civil Procedure > Summary Judgment > Standards > Genuine Disputes***
[HN1]In order to prevail on summary judgment, the movant must disprove at least one of the essential elements of each of the plaintiff's causes of action. This burden requires the movant to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the nonmovant is taken as true, and all reasonable inferences are indulged in favor of the nonmovant. Any doubt is resolved in favor of the nonmovant.

***Civil Procedure > Summary Judgment > Appellate Review > General Overview***
***Civil Procedure > Summary Judgment > Standards > General Overview***
***Civil Procedure > Appeals > Standards of Review > De Novo Review***
[HN2]When a summary judgment does not specify the grounds upon which the trial court granted it, the review-

ing court will affirm the judgment if any one of the theories advanced in the motion is meritorious.

***Torts > Procedure > Attorney-Client Relationship***
***Torts > Procedure > Commencement & Prosecution > General Overview***
***Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule***
[HN3]Under the legal injury rule, the attorney's conduct must raise a risk of harm to the client's legally protected interest; the harm does not have to be finally established or an inevitable consequence of the conduct. Under the legal injury rule, a cause of action sounding in tort generally accrues when the tort is completed, that is, the act committed and damage suffered. The date of the legal injury is not the time it is discovered or the date when actual damage is fully ascertained.

***Torts > Malpractice & Professional Liability > Attorneys***
***Torts > Procedure > Commencement & Prosecution > General Overview***
[HN4]The legal injury rule provides: If the defendant's conduct results in an invasion of the plaintiff's legally protected interest, so that he may obtain an immediate remedy in court, his right of action accrues with the invasion, provided some legally cognizable injury, however slight, has resulted from the invasion or would necessarily do so. The defendant's conduct is in such case, categorized as unlawful. Conversely, if no right of redress exists by reason of the defendant's conduct, because no legally protected interest of the plaintiff has been invaded at the time of the conduct complained of, the defendant's conduct is categorized as lawful and any cause of action based thereon does not accrue until some invasion of the legally protected interest does occur.

***Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims***
***Torts > Malpractice & Professional Liability > Attorneys***
[HN5]A claim of attorney malpractice has been held a compulsory counterclaim to a claim for attorneys' fees under Tex. R. Civ. P. 97(a).

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN6]Res judicata bars litigation of all issues connected with a cause of action which, with the use of all diligence, might have been tried, as well as those which were actually tried.

***Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview***
***Civil Procedure > Summary Judgment > Supporting Materials > Affidavits***
[HN7]To be competent as summary judgment proof, an affidavit must affirmatively show that it is based on the personal knowledge of the affiant and state facts in a form that would be admissible in evidence at a trial. An affidavit is a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office.

***Civil Procedure > Summary Judgment > Supporting Materials > General Overview***
[HN8]Where the affidavit does not specifically recite that the facts set forth are true, but does set out that it was made on affiant's personal knowledge, it satisfies the requirements of Tex. R. Civ. P. 166a.

**COUNSEL:** John H. Ward, of Houston, TX, for Appellant.

John B. Wallace, Houston, TX. Gregg S. Weinberg, Houston, TX, for Appellees.

**JUDGES:** Panel consists of Justices Lee, Amidei, and Fowler.

**OPINION BY:** Maurice Amidei

**OPINION**

[*136] OPINION

Mary Margaret Goggin (Goggin) appeals from a summary judgment in favor of Ellen Elkins Grimes (Grimes) in Goggin's legal malpractice suit against Grimes. In two points of error, Goggin contends (1) summary judgment was improper because res judicata did not bar her legal malpractice claim, and (2) Grimes' motion for summary judgment was not supported by proper summary judgment proof. We affirm.

Goggin hired Grimes, an attorney, to represent her in a divorce. Grimes withdrew and filed a petition in intervention for her attorney fees in Goggin's divorce case. Goggin filed an answer contesting Grimes' right [*137] to recover attorney fees, and also made a claim for attorney fees for her newly retained attorney in the divorce case. The divorce decree awarded Grimes attorney fees and was not appealed by Goggin. About one year later, Goggin sued Grimes for legal malpractice in the handling of her divorce case. Grimes moved for summary

judgment on the grounds that Goggin's malpractice claim [**2] was a compulsory counterclaim and, because she did not file a counterclaim in the underlying suit, her malpractice claim was barred by res judicata and collateral estoppel. The trial court granted Grimes' motion for summary judgment without specifying the grounds.

[HN1]In order to prevail on summary judgment, the movant must disprove at least one of the essential elements of each of the plaintiff's causes of action. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). This burden requires the movant to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the nonmovant is taken as true, and all reasonable inferences are indulged in favor of the nonmovant. *Id.; see also Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). Any doubt is resolved in favor of the nonmovant. *Nixon*, 690 S.W.2d at 548-49; *see also Doe*, 907 S.W.2d at 477.

[HN2]When a summary judgment does not specify the grounds upon which the trial court [**3] granted it, the reviewing court will affirm the judgment if any one of the theories advanced in the motion is meritorious. *State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

In point of error one, appellant contends res judicata does not bar her claim for legal malpractice because the malpractice claim did not accrue or mature until after the final divorce decree was entered. Appellant argues the "discovery rule" in limitation cases should also apply to this res judicata claim. We disagree.

In the underlying divorce action, Grimes withdrew from representation of Goggin before judgment was entered. The attorney-client relationship ended upon Grimes' withdrawal and no legal injury could occur after that because the attorney had no duty to the client (Goggin) at that point. *See Hall v. Stephenson*, 919 S.W.2d 454, 465 (Tex. App. -- Fort Worth 1996, writ denied). [HN3]Under the legal injury rule, the attorney's conduct must raise a risk of harm to the client's legally protected interest; the harm does not have to be finally established or an inevitable consequence of the conduct. *Id.* Under the legal injury [**4] rule, a cause of action sounding in tort generally accrues when the tort is completed, that is, the act committed and damage suffered. *McClung v. Johnson*, 620 S.W.2d 644, 646 (Tex. Civ. App. -- Dallas 1981, writ ref'd n.r.e.). The date of the legal injury is not the time it is discovered or the date when actual damage is fully ascertained. *Id.* [HN4]The legal injury rule was set out in *Zidell v. Bird*, 692 S.W.2d 550, 555 (Tex. App. -- Austin 1985, no writ), as follows:

> If the defendant's conduct results in an invasion of the plaintiff's legally protected interest, so that he may obtain an immediate remedy in court, his right of action "accrues" with the invasion, provided some legally cognizable injury, however slight, has resulted from the invasion or would necessarily do so. The defendant's conduct is in such case, categorized as "unlawful." Conversely, if no right of redress exists by reason of the defendant's conduct, because no legally protected interest of the plaintiff has been invaded at the time of the conduct complained of, the defendant's conduct is categorized as "lawful" and any cause of action based thereon does not accrue until some invasion of the legally protected [**5] interest does occur [citations omitted].

*Id.* at 555.

When Grimes intervened and sued Goggin for her attorney fees in the same pending divorce action, Goggin suffered a "legally cognizable injury" because Grimes intended to collect $ 6,738.83 from her for Grimes' alleged "unlawful" malpractice. The [*138] "discovery rule" does not apply to this situation because Grimes pleaded res judicata barred Goggin's malpractice action, not the statute of limitations. Because Goggin did not make a compulsory counterclaim pursuant to rule 97(a), Texas Rules of Civil Procedure, in the underlying divorce action, Grimes contended her subsequent malpractice action was barred by res judicata. Goggin filed an answer to Grimes' intervention plea denying she owed Grimes anything, and also claimed she should be awarded her attorney fees for the services of her replacement lawyer. However, Goggin failed to counterclaim damages for legal malpractice at that point.

[HN5]A claim of attorney malpractice has been held a compulsory counterclaim to a claim for attorneys' fees under Rule 97(a). *CLS Associates, Ltd. v. A__ B__*, 762 S.W.2d 221, 224 (Tex. App. -- Dallas 1988, no writ). In this case, the [**6] issue of malpractice, and other actions pleaded by Goggin, all arose from the same transaction as the attorney's fees. Because Goggin chose not to counterclaim for these actions, all claims are barred by res judicata. *Id. See Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex. 1963) ([HN6]res judicata bars litigation of all issues connected with a cause of action which, with the use of all diligence, might have been tried, as well as those which were actually tried). Appellant's point of error one is overruled.

In point two, appellant contends summary judgment was improper because Grimes' summary judgment affidavit was defective. Goggin argues that Grimes did not state the facts in the body of the affidavit were true. In

support of her motion for summary judgment, Grimes attached copies of various documents in the underlying divorce action. All the documents were attached to her affidavit, listed and identified in her affidavit, and sworn to be true and correct copies of all the original documents on file in that cause. Grimes stated she made her affidavit on her own personal knowledge.

[HN7]To be competent as summary judgment proof, an affidavit must affirmatively show that it is based on the [**7] personal knowledge of the affiant and state facts in a form that would be admissible in evidence at a trial. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Huckin v. Connor*, 928 S.W.2d 180, 183 (Tex. App. -- Houston [14th Dist.] 1996, writ denied). An affidavit is a "statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." *Perkins v. Crittenden*, 462 S.W.2d 565, 567-68 (Tex. 1970); *Huckin*, 928 S.W.2d at 183.

Ms. Grimes stated she was "fully competent and qualified to make this affidavit on my own personal knowledge." She then set out how she became personally familiar with the facts so as to be able to testify as a witness. She stated she was the attorney for Goggin in the underlying divorce, until she withdrew. She stated she then intervened for her fees. She stated that Exhibits A through D (notice of substitution of counsel, plea in intervention, Goggin's original answer, and the final decree of divorce) were true and correct copies of the "originals and are what they purport to be." She signed the affidavit which [**8] was sworn to and subscribed before a notary public.

"[HN8]Where the affidavit does not specifically recite that the facts set forth are true, but does set out that it was made on affiant's personal knowledge, it satisfies the requirements of *Brownlee* and rule 166a of the Texas Rules of Civil Procedure." *Huckin*, 928 S.W.2d at 183. Ms. Grimes further stated how she was personally familiar with the documents; she was an attorney in the proceedings, an intervening party, and was awarded attorney fees in the final decree. An affidavit must affirmatively show how the affiant became personally familiar with the facts so as to testify as a witness, and a self-serving recitation of such does not satisfy the requirement. *Villacana v. Campbell*, 929 S.W.2d 69, 74 (Tex. App. -- Corpus Christi 1996, writ denied). The supreme court has held that copies of documents which are attached to a properly prepared affidavit are sworn copies within the meaning of rule 166a(f), Texas Rules of Civil Procedure. *See Republic Nat. Leasing Corp. v. Schindler*, [*139] 717 S.W.2d 606, 607 (Tex. 1986). We find the affidavit complied with rule 166a, Texas Rules of Civil Procedure, and was "made on personal knowledge," [**9] did "set forth such facts as would be admissible in evidence," and did "show that the affiant is competent to testify to matters stated therein." TEX. R. CIV. P. 166a(f). We overrule appellant's point of error two and affirm the judgment of the trial court.

/s/ Maurice Amidei

Justice

Judgment rendered and Opinion filed May 7, 1998.

Panel consists of Justices Lee, Amidei, and Fowler.

**Tristina Guidry, Appellant v. National Freight, Inc., Appellee**

**NO. 03-96-00451-CV**

**COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN**

**944 S.W.2d 807; 1997 Tex. App. LEXIS 2494**

**May 1, 1997, Filed**

**PRIOR HISTORY:** [**1] FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT. NO. 95-02062-A, HONORABLE F. SCOTT McCOWN, JUDGE PRESIDING.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant injured party sought review of a summary judgment entered by the 353rd Judicial Court of Travis County (Texas), in favor of appellee trucking company in appellant's suit to recover damages for personal injuries inflicted by appellee's employee.

**OVERVIEW:** Appellee trucking company hired a long-haul trucker who claimed to have no criminal record, but who did have a history of sexual misconduct. Appellee did not do background checks. The employee raped appellant injured party, who sought damages from appellee for negligent hiring, supervision, and retention. The record indicated that the rapist wore no clothing representative of being appellee's employee; he was not in the course of hauling or delivering anything from appellee to appellant; and appellee's truck was not used in the attack. The trial court granted summary judgment to appellee. On appeal, the court held that the sexual assault was not foreseeable by appellee when the trucker was hired. Appellee had a duty to hire competent drivers to promote highway safety and prevent accidents, but appellee's obligation with respect to hiring, supervising, and retaining its drivers did not flow to appellant so as to impose upon appellee a duty to protect one in her position from sexual assault by one of its drivers. Because there was no legal duty owed by appellee to appellant, the trial court's summary judgment was affirmed.

**OUTCOME:** The court affirmed the summary judgment entered by the trial court in favor of appellee trucking company. As the rape of appellant injured party by appellee's driver was not foreseeable, appellee had no legal duty to protect appellant.

**CORE TERMS:** summary judgment, driver, hiring, truck, trucking, long-haul, driving, owed, background checks, criminal record, truck driver, sexual assault, foreseeable, entity, writ denied, motor vehicle, foreseeability, misconduct, vulnerable, severing, assault, foresee, sexual, commit, drive, hire, parking lot, matter of law, facts surrounding, criminal offense

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Appellate Review > General Overview***
***Civil Procedure > Summary Judgment > Standards > General Overview***
***Civil Procedure > Trials > Jury Trials > Right to Jury Trial***
[HN1]The standards for reviewing a summary judgment are well established: the movant for summary judgment has the burden of showing there is no genuine issue of fact and that it is entitled to summary judgment as a matter of law, in deciding whether there is a disputed fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and every inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

***Torts > Negligence > General Overview***
[HN2]The common law doctrine of negligence consists of three elements: a legal duty owed by one person to another, a breach of that duty, and damages proximately resulting from the breach. The threshold issue in a negligence case is whether a duty exists. Whether a duty exists is a question of law for the court to decide from the facts surrounding the occurrence in question.

***Torts > Negligence > Duty > General Overview***
[HN3]In determining whether the defendant is under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury

weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. The foremost consideration among these factors is the foreseeability of the risk.

***Torts > Business Torts > Negligent Hiring & Supervision***

[HN4]An employer can be held directly liable for hiring or retaining an incompetent employee, especially where the occupation at issue could cause hazard to others or requires skilled or experienced persons.

***Torts > Negligence > General Overview***

[HN5]Before liability will be imposed, there must be sufficient evidence indicating that the defendant knew or should have known that a foreseeable harm would eventually befall a victim.

***Torts > Procedure > Multiple Defendants > Joint & Several Liability***

[HN6]The Texas Rules of Civil Procedure expressly provide, however, that any claim against a party may be severed and proceeded with separately. Tex. R. Civ. P. 41. Furthermore, although the trial court need not sever an interlocutory summary judgment, it has broad discretion in determining whether severance should be granted.

***Civil Procedure > Summary Judgment > Standards > Appropriateness***

***Torts > Procedure > Multiple Defendants > Joint & Several Liability***

[HN7]Where summary judgment in favor of a single defendant is proper in a case with multiple defendants, severance of that claim is also proper so that it may be appealed.

**COUNSEL:** For APPELLANT: Mr. Jack W. London, Law Offices of Jack W. London & Associates, P.C., Austin, TX.

For APPELLEE: Mr. Michael Klein, Fulbright & Jaworski LLP, Austin, TX.

**JUDGES:** Before Chief Justice Carroll, Justices Aboussie and B. A. Smith

**OPINION BY:** Marilyn Aboussie

**OPINION**

[*808] Appellant Tristina Guidry appeals the trial court's summary judgment in favor of appellee National Freight, Inc. ("National"). In two points of error, Guidry asserts the trial court erred by granting National's motion for summary judgment and severing National from the original group of defendants in her negligence claim. We will affirm the judgment of the trial court.

**BACKGROUND**

The background facts surrounding this case are known through the confession and subsequent criminal prosecution of Alberto Jaramillo, a long-haul truck driver employed by National, whose actions form the basis of Guidry's negligence claim against National. Jaramillo stated in his 1992 employment application for National that he had no criminal record, [**2] but National never confirmed Jaramillo's [*809] statement. In fact, Jaramillo had a history of sexual misconduct contained within his military records, criminal records, and previous employment records. National checked the driving record of Jaramillo as required by law but never conducted an independent investigation into his non-vehicular criminal past. National did not obtain verbal or written information on Jaramillo from his last employer. [1]

1 The employer's records reflect that Jaramillo had called to report that he was arrested in Dallas on September 11, 1991 for public lewdness, assault, and resisting arrest. His truck was parked in Dallas. The employer retrieved the truck and suspended Jaramillo, who called a few days later to say he was not returning to work.

While driving through Austin, around 2:00 a.m. on February 23, 1993, Jaramillo stopped and parked his National truck at the Internal Revenue Service building in Austin to urinate and stretch his legs. Leaving his truck in the parking lot, [**3] he wandered through an adjacent neighborhood and eventually into the parking lot of the Timber Ridge III condominiums. Meanwhile, Guidry was returning home from a University of Texas library. Jaramillo approached Guidry in the parking lot and proceeded to drag her to an adjoining apartment complex, assault her, and rape her. Jaramillo wore no clothing representative of a National employee; he was not in the course of hauling or delivering anything to her or the apartment complex where she lived or was assaulted, and National's truck was not used in the attack.

Guidry sued numerous defendants, including National, for personal injury damages resulting from the sexual assault. She alleged that National was liable for the negligent hiring, supervision, and retention of Jaramillo. National filed a motion for summary judgment on the grounds that it owed no duty to Guidry and, in the

alternative, that National's actions were not the proximate cause of Guidry's injuries. The trial court granted National's motion for summary judgment, severed Guidry's claim against National from the remaining defendants, and rendered final judgment in favor of National. Guidry appeals.

**DISCUSSION**

[**4] [HN1]The standards for reviewing a summary judgment are well established: (1) the movant for summary judgment has the burden of showing there is no genuine issue of fact and that it is entitled to summary judgment as a matter of law; (2) in deciding whether there is a disputed fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (3) every inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The function of summary judgment is not to deprive litigants of the right to trial by jury but to eliminate nonmeritorious claims and defenses. *See Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 931 (Tex. 1952). Because the district court granted summary judgment in a general order, we must affirm the judgment if it is supported by either of the legal grounds presented in National's motion. *See State Farm Fire & Cas. Co. v. S. S.*, 858 S.W.2d 374, 380 (Tex.1993); *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex.1989). We review de novo the district court's determination that National was entitled to judgment as [**5] a matter of law. *See Sharp v. Caterpillar, Inc.*, 932 S.W.2d 230, 234 (Tex. App.--Austin 1996, writ requested); *Capitan Enters., Inc. v. Jackson*, 903 S.W.2d 772, 775 (Tex. App.--El Paso 1994, writ denied).

[HN2]The common law doctrine of negligence consists of three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). The threshold issue in a negligence case is whether a duty exists. *El Chico Corp.*, 732 S.W.2d at 311. Whether a duty exists is a question of law for the court to decide from the facts surrounding the occurrence in question. *Greater Houston Transp. Co.*, 801 S.W.2d at 525.

[HN3]In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury [*810] weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. [**6] *Greater Houston Transp. Co.*, 801 S.W.2d at 525. The foremost consideration among these factors is the foreseeability of the risk. *El Chico Corp.*, 732 S.W.2d at 311.

Guidry's theory of liability requires a finding of negligence in National's hiring, supervision, or retention of Jaramillo. [HN4]An employer can be held directly liable for hiring or retaining an incompetent employee, especially where the occupation at issue could cause hazard to others or requires skilled or experienced persons. *See* Restatement (Second) of Torts § 378 (1965). For example, National has a duty to take steps to prevent injury to the driving public by determining the competency of a job applicant to drive one of its trucks. [2] *See* 49 C.F.R. § 391.21 (1996). The purpose of this regulatory duty imposed upon long-haul commercial carriers, however, is to promote highway safety and prevent motor vehicle accidents, not to prevent general criminal activity. *See* 49 C.F.R. § 383.1(a) (1996). Jaramillo's competency to drive a truck is not at issue here. Guidry seeks to impose a duty requiring National not only to hire competent drivers, but also to determine whether any prospective or current employees [**7] have a criminal record and presumably refuse to hire or retain anyone who has committed a criminal offense unrelated to the duties of a long-haul driver or the use of a motor vehicle. Requiring National to conduct criminal background checks upon all new job applicants, as well as periodic checks upon current employees, would be an extension of the duty now imposed by federal regulation.

2 Guidry complains that National violated federal regulations by failing to obtain required information on Jaramillo's last three years' employment, including the reason for leaving each employer, *see* 49 C.F.R. § 391.21(10), and failing to contact and make a written record with respect to his prior employers and retain the information in his driver's qualification file. *See* 49 C.F.R. § 391.23(2)(c) (1996). She further points out that a person is disqualified from driving a truck who has committed various criminal offenses including a felony involving the use of a motor vehicle. *See* 49 C.F.R. § 391.15(a), (c)(2) (1996).

[**8] In arguing to extend National's duty, Guidry relies upon a line of cases imposing a tort duty upon entities for placing potentially harmful employees in a position to commit torts. *See Golden Spread Council of Boy Scouts v. Akins*, 926 S.W.2d 287 (Tex. 1996) (organization held negligent for recommending scoutmaster amidst rumors of his past sexual deviancy); *Porter v. Nemir*, 900 S.W.2d 376 (Tex. App.--Austin 1995, no writ) (drug-counseling agency held liable for continued employment of counselor known to be engaging in sexual relations with clients); *Deerings W. Nursing Ctr. v. Scott*, 787 S.W.2d 494 (Tex. App.--El Paso 1990, writ

denied) (negligence to hire nursing assistant with fifty-six theft convictions who subsequently attacked eighty-year-old resident). The heightened obligation in these cases, however, is predicated upon the entity's placing the tortfeasor into a special relationship of trust with a vulnerable group: a scoutmaster with young boys, a drug counselor with the family of a recovering addict, a nursing assistant with the elderly and infirm. *See* *Golden Spread Council*, 926 S.W.2d at 291-92; *Porter*, 900 S.W.2d at 386; *Deerings*, 787 S.W.2d [**9] at 498-99. Liability is imposed when the entity brings into contact or association with the vulnerable person an individual whom the entity knows or should know is particularly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct. *See* *Golden Spread Council*, 926 S.W.2d at 291; Restatement (Second) of Torts § 302B, cmt. e (1965).

In an opinion released this day, this Court addressed the duty of employers to perform background checks on prospective employees, holding a vacuum manufacturer liable for not warning or requiring its distributors to check the background of prospective employees when such employees were required by contract to sell their products within customers' homes. *Scott Fetzer Co. v. Read*, 945 S.W.2d 854, 1997 Tex. App. LEXIS 2493, No. 3-95-544-CV, slip op. at 23 (Tex. App.--Austin May 1, 1997, no writ h.). Our holding in *Scott Fetzer* is consistent with the creation of a heightened obligation for employers who, incident to the [*811] nature of employment, create a situation where a peculiar risk of harm is foreseeable.

The facts of the instant case are distinguishable, [**10] however, from *Scott Fetzer* and other cases requiring employers to check the backgrounds of potential employees. [HN5]Before liability will be imposed, there must be sufficient evidence indicating that the defendant knew or should have known that a foreseeable harm would eventually befall a victim. *Greater Houston Transp. Co.*, 801 S.W.2d at 526. Guidry argues that a proper investigation into Jaramillo's last employment would have revealed his earlier offense from which National should have perceived the risk of hiring him and the foreseeability of his injuring her. Jaramillo's employment duties brought him to the city of Austin on the occasion in question, and National could foresee that he might stop to stretch on his long-haul drive. However, as a truck driver, Jaramillo should never have come into contact with Guidry in the exercise of his duties as an employee of National. Consequently, the sexual assault was not foreseeable by National when Jaramillo was hired. *See* *id.* at 526. Furthermore, Guidry is not a member of a vulnerable or specially protected group with whom Jaramillo could be expected to come into contact during his work; any duty to her must flow from a duty [**11] owed to the general public.

Although there are no Texas cases directly on point, the Colorado Supreme Court recently decided a case arising out of similar facts. See *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316 (Colo. 1992). In *Connes*, a long-haul truck driver with a criminal history stopped his truck at a hotel during his route and raped a young woman at knife point. *Id.* at 1319. The trucking company had a policy forbidding its drivers from stopping at hotels. *Id.* at 1318. The victim sued the trucking company for the negligent hiring of its driver. *Id.* at 1319. The Colorado court upheld a summary judgment in favor of the trucking company due to the absence of a duty, stating, "The scope of the employer's duty in exercising reasonable care in a hiring decision will depend largely on the anticipated degree of contact which the employee will have with other persons in performing his or her employment duties." *Id.* at 1321. Although the trucking company clearly had a duty to the driving public to employ competent drivers, this duty did not require an independent investigation into employees' non-vehicular criminal backgrounds. See *id.* at 1323. [**12] The trucking company had no reason to foresee that its hiring of the truck driver would create a risk that he would sexually assault a member of the general public. *Id.* at 1323. Because the harm was not foreseeable, the Colorado court held the trucking company had no duty to conduct independent criminal background checks. *Id.* at 1323.

National could not be expected to foresee the risk that Jaramillo would commit a sexual assault at some point in time while on a trip for his employer. Furthermore, other factors involved in the determination of whether National owed a duty to Guidry weigh against imposing such a duty. National operates a lawful business that performs a needed service and, therefore, has social utility. Additionally, imposing a duty to perform a nationwide criminal background check on all of National's current and prospective drivers would create a significant administrative burden. Guidry's theory of liability would impose upon National a continuing duty to check criminal records in all states, military records, and all other sources of such data to ensure no criminal activity escaped its notice. Under the facts of this case, to impose an investigative duty [**13] on National would be to require an employer to insure the safety of those who come into contact with an employee by reasons other than his employment. That is a requirement we are not prepared to impose. *Doe v. Boys Clubs*, 868 S.W.2d 942, 951 (Tex. App.--Amarillo 1994), *aff'd*, 907 S.W.2d 472 (Tex. 1995).

Despite National's apparent failure to follow federal regulations and its own hiring guidelines, we decline to extend National's duty under these facts beyond that of

hiring competent drivers. National's obligation with respect to hiring, supervising, and retaining its drivers did not flow to Guidry so as to impose upon National a duty to protect one in her position from sexual assault by [*812] one of its drivers. Because National owed no legal duty to Guidry, the trial court did not err in granting summary judgment in favor of National. We overrule Guidry's first point of error.

In her second point of error, Guidry asserts the trial court erred by severing her claim against National from her claims against the remaining defendants. [HN6]The Texas Rules of Civil Procedure expressly provide, however, that "any claim against a party may be severed and proceeded with separately." [**14] Tex. R. Civ. P. 41. Furthermore, although the trial court need not sever an interlocutory summary judgment, it has broad discretion in determining whether severance should be granted. *See Johnson v. J. Hiram Moore, Ltd.*, 763 S.W.2d 496, 502 (Tex. App.--Austin 1988, writ denied). [HN7]Where summary judgment in favor of a single defendant is proper in a case with multiple defendants, severance of that claim is also proper so that it may be appealed. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 526 (Tex. 1982). Having upheld the trial court's summary judgment, we correspondingly hold the trial court did not abuse its discretion by severing Guidry's claims against National from the remaining defendants. We overrule Guidry's second point of error.

**CONCLUSION**

Having overruled Guidry's two points of error, we affirm the judgment of the trial court.

Marilyn Aboussie, Justice

Before Chief Justice Carroll, Justices Aboussie and B. A. Smith

Affirmed

Filed: May 1, 1997

**PILGRIM ENTERPRISES, INC.; PILGRIM CONVENIENCE, INC.; R&G NO. 1, INC.; R&G NO. 2, INC.; R&G NO. 3, INC.; PILGRIM LAUNDRY COMPANY, INC.; PILGRIM EQUIPMENT CO., INC.; R.F.S., INC. NO. 8; R.F.S., INC. NO. 11; R.F.S., INC. NO. 17; S&R NO. 2, LTD.; and PLC NO. 11 JOINT VENTURE, Appellants v. MARYLAND CASUALTY COMPANY, Appellee MARYLAND CASUALTY COMPANY, Appellant v. PILGRIM ENTERPRISES, INC.; PILGRIM CONVENIENCE, INC.; R&G NO. 1, INC.; R&G NO. 2, INC.; R&G NO. 3, INC.; PILGRIM LAUNDRY COMPANY, INC.; PILGRIM EQUIPMENT CO., INC.; R.F.S., INC. NO. 8; R.F.S., INC. NO. 11; R.F.S., INC. NO. 17; S&R NO. 2, LTD.; and PLC NO. 11 JOINT VENTURE, Appellees**

**NO. 01-97-01421-CV**

**COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON**

**24 S.W.3d 488; 2000 Tex. App. LEXIS 4160**

**June 22, 2000, Opinion Issued**

**PRIOR HISTORY:** [**1] On Appeal from the 113th District Court. Trial Court Cause No. 95-51488A. Harris County, Texas.

**DISPOSITION:** Affirmed in part, reversed in part and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant insured and appellee insurer both appealed a judgment from the 113th District Court, Texas, which granted partial summary judgment in favor of appellee in appellant's coverage lawsuits and which severed the judgment to allow appellant to commence an immediate appeal.

**OVERVIEW:** The court reversed a grant of partial summary judgment in favor of appellee in appellant's coverage lawsuits but affirmed severance of the judgment to allow appellant to commence an immediate appeal. Appellee claimed it had no duty to defend its insured, appellant, when plaintiffs filed suit against appellant for personal injuries and property damage allegedly caused by long term exposure to a chemical known as perchloroethylene (PCE) and other hazardous substances released from appellant's dry cleaning facilities. At issue was whether personal injury and property damage from underground contamination "occurred" under Texas law only when the harm was "discovered" for purposes of coverage under the parties' occurrence-based comprehensive general liability (CGL) insurance policy. The court answered the question in the negative, holding that for CGL policies covering continuous or repeated exposure to conditions, injury could occur as the exposure took place. This exposure rule applied to both physical injury and property damage. Thus, because the pleadings potentially alleged exposure during the policy periods and damages for this exposure, appellee owed appellant a duty of defense.

**OUTCOME:** The court reversed a grant of partial summary judgment in favor of appellee in appellant's coverage lawsuits because when the exposure rule was applied to plaintiffs' personal injury and property damage claims, appellee had a duty to defend, but affirmed severance of the judgment to allow appellant to commence an immediate appeal.

**CORE TERMS:** policy period, exposure, coverage, duty to defend, property damage, occurrence, severance, summary judgment, insured's, contamination, insurer's, severed, bodily injury, trigger, continuous, lawsuit, dry cleaning, manifestation, chemical, repeated, manifest, insurance policy, remaining claims, writ denied, partial, manifestation rule, occurring, pure, cause of action, occurrence-based

**LexisNexis(R) Headnotes**

***Civil Procedure*** **>** ***Summary Judgment*** **>** ***Opposition*** **>** ***General Overview***
***Civil Procedure*** **>** ***Summary Judgment*** **>** ***Partial Summary Judgments***
***Civil Procedure*** **>** ***Appeals*** **>** ***Standards of Review*** **>** ***Abuse of Discretion***
[HN1]A partial summary judgment becomes final and appealable when the trial court signs an order severing

into a separate case the parties and claims addressed. Tex. R. Civ. P. 41 provides that any claim against a party may be severed and proceeded with separately. A trial court has broad discretion in the matter of severance and consolidation of causes. The standard of review for determining whether a trial court erred in ordering a severance is abuse of discretion. The reasons undergirding a proper grant of severance are to do justice, avoid prejudice and further convenience. Severance is proper if (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.

***Insurance Law > General Liability Insurance > Coverage > Triggers > General Overview***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN2]Unlike the duty to defend, the duty to indemnify is based on facts proven, not on pleadings.

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule***
***Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders***
[HN3]A severance is a proper means of rendering an otherwise interlocutory appeal final when some parties and issues still remain.

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule***
[HN4]The mere fact that some issues or claims remain against a defendant does not render a severance invalid per se.

***Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule***
[HN5]An improper severance does not rob the court of jurisdiction to consider a case.

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN6]Texas courts apply the "eight corners" rule to determine whether an insurer has the duty to defend an insured, comparing the plaintiff's pleading allegations to the insurance contract provisions without regard to the facts that develop during discovery and trial. Unlike the duty to indemnify, the duty to defend arises when the plaintiff alleges facts that potentially support claims for which there is coverage. The duty to defend is determined from the face of the pleading, without regard to the ultimate truth or falsity of the allegations. In determining the duty to defend, courts construe the plaintiff's allegations against the insured liberally, resolving any doubt in favor of the insured, though without reading facts into the pleadings for that purpose.

***Insurance Law > General Liability Insurance > Coverage > Property***
***Insurance Law > General Liability Insurance > Coverage > Triggers > General Overview***
***Insurance Law > General Liability Insurance > Occurrences***
[HN7]For comprehensive general liability policies covering continuous or repeated exposure to conditions, injury can occur as the exposure takes place. Ultimate complications from sustained exposure, on the other hand, would tend to define the scope of damages.

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***
***Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN8]In case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in the insured's favor. Thus, an insurer's duty to defend arises if the factual allegations against the insured, when fairly and reasonably construed, state a cause of action potentially covered by the policy.

***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN9]The duty to defend is not affected by facts ascertained before suit, developed in the process of the litigation, or by the ultimate outcome of the suit.

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FOR APPELLEE: D. Mitchell McFarland, Houston, TX. James E. Essig, Houston, TX. Dale Hausman, Washington, D.C. Robert Barron Boemer, Houston, TX.

**JUDGES:** Lee Duggan, Jr., [8] Justice. Panel consists of Justices Cohen, Nuchia, and Duggan.

8 The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

**OPINION BY:** Lee Duggan, Jr.

**OPINION**

[*490] The principal question in this appeal from a summary judgment is as follows: for purposes of coverage under an occurrence-based comprehensive general liability ("CGL") insurance policy, do personal injury and property damage from underground contamination "occur" under Texas law only when the harm is "discovered"? We answer in the negative.

Eleven plaintiffs filed seven suits [1] in 1996 against Pilgrim Enterprises, Inc. and related entities [2] (collectively, "Pilgrim") for personal injuries and property damage allegedly caused by long term exposure to a chemical known as perchloroethylene ("PCE") and other hazardous substances released from Pilgrim's facilities. Each suit was filed by a former Pilgrim landlord or adjacent property owner. Pilgrim filed three coverage lawsuits, later [**2] consolidated by agreement into one case, against Maryland Casualty Co. ("Maryland") and other insurers, seeking a defense and indemnification. Maryland filed a motion for partial summary judgment, asserting that it had no duty to defend Pilgrim in five of the seven pending suits. The trial court granted the partial summary judgment in favor of Maryland and, over Maryland's objection, severed the judgment to allow Pilgrim to commence an immediate appeal.

1 The seven lawsuits are as follows: in 127th District Court, Harris County, Texas--*Turk v. Pilgrim Enterprises, Inc.*, Cause No. 06-38291; *Turk (II) v. Pilgrim Enterprises, Inc.*, Cause No. 96-38290; *Turk (III) v. Pilgrim Enterprises, Inc.*, Cause No. 96-38289. In the Southern District of Texas--*Sunblossom v. Pilgrim Enterprises, Inc.*, C.A. No. H-96-0405; *Briargrove Shopping Center J.V. v. Pilgrim Enterprises, Inc.*, C.A. No. H-96-724. In the 113th District Court, Harris, County, Texas--*Murad v. Pilgrim Enterprises, Inc.*, Cause No. 96-021802. In the 190th District Court, Harris County, Texas--*Agim v. Pilgrim Enterprises, Inc.*, Cause No. 96-53714.

[**3]

2 The other entities are Pilgrim Convenience, Inc.; R&G No. 1, Inc.; R&G No. 2, Inc.; R&G No. 3, Inc.; Pilgrim Laundry Company, Inc.; Pilgrim Equipment Co., Inc.; R.F.S., Inc. No. 8; R.F.S., Inc. No. 11; R.F.S., Inc. No. 17; S&R No. 2, L.T.D.; and PLC No. 11 Joint Venture.

Maryland appeals the trial court's action in granting the severance; Pilgrim appeals the summary judgment holding that Maryland has no duty to defend the five suits.

We affirm that portion of the trial court's judgment severing the cause; we reverse the remaining portion of the judgment, which rendered summary judgment on the ground that Maryland had no duty to defend, and remand the cause.

**I.**

**Factual Background**

Pilgrim has operated dry cleaning facilities in Harris and Bexar counties since the 1960s. In the course of its operations, Pilgrim purchased CGL insurance policies from various insurers, including four consecutive policies from Maryland between December 1981 and December 1985.

Over the years, Pilgrim used PCE as the primary solvent in its dry cleaning operations. In 1994, Pilgrim conducted [**4] soil sampling at 17 of its dry cleaning sites and discovered PCE contamination in the soil and, in some cases, the groundwater. The contamination allegedly arose from [*491] repeated spills, overfills, and leakage when Pilgrim's suppliers delivered PCE and during Pilgrim's maintenance and operation of its PCE storage units and dry cleaning equipment. Pilgrim notified the Texas Natural Resources Conservation Commission ("TNRCC") of the contamination and agreed with the TNRCC to clean up the contaminated sites in 1995.

In 1996, the seven suits against Pilgrim were filed. Pilgrim notified Maryland and requested a defense and indemnity under the 1981-85 policies. Maryland initially agreed to defend each suit, subject to a reservation of its right to withdraw from the defense and assert its coverage defenses. When Pilgrim made similar demands on its other insurers, and none agreed to defend or participate in funding Pilgrim's defense, Maryland withdrew its offer of complete defense. Pilgrim rejected Maryland's offer to pay only a "pro-rata" share of the defense costs.

After Pilgrim's coverage lawsuits against Maryland and its other insurers were consolidated, Maryland filed a motion for partial [**5] summary judgment on the ground that it had no duty to defend Pilgrim in five of the seven pending PCE lawsuits--*Sunblossom*, *Briargrove*, *Murad*, *Turk III*, and *Agim*. Maryland conceded its duty to defend in two suits, *Turk I* and *Turk II*, but asserted in its motion that the plaintiffs' claimed injuries in the five suits were not alleged to have occurred within the coverage period of Pilgrim's Maryland policies.

Maryland argued that the language of each policy triggered its duty to defend Pilgrim only if the alleged property damage or bodily injury became "manifest" during a policy period and that the tort plaintiffs' claims did not allege that. The trial court agreed, granted Maryland's motion for summary judgment on the five claims, and severed them from Pilgrim's remaining actions, specifically reciting that "the Court's Partial Judgment is hereby made final so that Plaintiffs may commerce an immediate appeal."

**II.**

**Maryland's appeal of the severance**

Maryland argues in its point of error that the trial court abused its discretion in severing the five claims because they are inextricably interwoven (1) with the remaining claims Maryland must [**6] defend and (2) with the defenses of the twelve remaining defendant insurers. Further, Maryland argues, because the severance was improper, the partial summary judgment is not an appealable final judgment. Because Maryland's point of error would be dispositive of the entire appeal, if sustained, we address it first.

**A. Whether the severance order separated claims that are inextricably interwoven with remaining claims**

[HN1]A partial summary judgment becomes final and appealable when the trial court signs an order severing into a separate case the parties and claims addressed. *Mafrige v. Ross*, 866 S.W.2d 590, 592 (Tex. 1993). Texas Rule of Civil Procedure 41 provides that "any claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. A trial court has broad discretion in the matter of severance and consolidation of causes. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990). The standard of review for determining whether a trial court erred in ordering a severance is abuse of discretion. *Id.*

The reasons undergirding a proper grant of severance "are to do justice, avoid prejudice [**7] and further convenience." *Id.* Severance is proper if

1. the controversy involves more than one cause of action;

2. the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and

3. the severed claim is not so interwoven with the remaining action that [*492] they involve the same facts and issues.

*Id.*

Here, Maryland claims the third element of this test is not met because (1) Pilgrim's claim against Maryland for a defense in the two remaining lawsuits involves the same facts and issues as in the severed actions; (2) Maryland's other defenses to coverage (such as a pollution exclusion clause) apply equally to its duty to defend here; and (3) other defendant insurers in the consolidated case have the same policy language defining when an injury occurs.

Maryland's duty to defend each severed and each remaining claim is a contractual undertaking defined by each policy. *See Whatley v. City of Dallas*, 758 S.W.2d 301, 304 (Tex. App.--Dallas 1988, writ denied). The specific language of each policy and the factual allegations of each underlying plaintiffs' pleadings against Pilgrim will determine Maryland's duty to defend [**8] each claim. *Nationwide Property & Cas. Ins. Co. v. McFarland*, 887 S.W.2d 487, 492 (Tex. App.--Dallas 1994, writ denied).

Similarly, Maryland's indemnity obligations on the severed claims are not inextricably interwoven with the remaining claims because the duties to defend and to indemnify in both the severed and remaining claims are separate duties. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821-22 (Tex. 1997). [HN2]Unlike the duty to defend, the duty to indemnify is based on facts proven, not on pleadings. *American Alliance Ins. Co. v. Frito-Lay, Inc.*, 788 S.W.2d 152, 154 (Tex. App.--Dallas 1990, writ dism'd).

We hold that the five severed claims are not inextricably interwoven with Pilgrim's remaining claims.

**B. Whether a severance order is proper if it severs some, but not all, claims against a particular defendant**

Maryland argues that a severance of some but not all claims against a party cannot form a final judgment for purposes of appeal, citing *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994), *Guidry v. National Freight, Inc.*, 944 S.W.2d 807, 812 [**9] (Tex. App.--Austin 1997, no writ), and *Rutherford v. Whataburger, Inc.*, 601 S.W.2d 441, 443 (Tex. App.--Dallas 1980, writ ref'd, n.r.e.). None of these cases, however, holds that severance is *never* proper unless all claims against a particular defendant are released.

Maryland argues that the controlling reasons for a severance, "to do justice, avoid prejudice and further convenience," [3] apply only when all of the claims against a party are severed. However, it cites no case expressly so holding. In fact, the Texas Supreme Court has noted that severance is proper to set out a final judgment for appeal precisely when all issues against a defendant have

not been disposed of. In *City of Beaumont v. Guillory*, the Court noted as follows:

A summary judgment . . . is presumed to dispose of only those issues expressly presented, not all issues in the case. *A summary judgment that fails to dispose expressly of all parties and issues in the pending suit is interlocutory and not appealable unless a severance of that phase of the case is ordered by the trial court . . . .*

751 S.W.2d 491, 492 (Tex. 1988) (emphasis added). As this highlighted [**10] language emphasizes, [HN3]a severance is a proper means of rendering an otherwise interlocutory appeal final when some parties *and issues* still remain. Otherwise, the language above would simply refer to "all parties in the pending suit," not "all parties and issues."

3 *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658.

[HN4]The mere fact that some issues or claims remain against a defendant does not render a severance *invalid per se*.

[*493] **C. Whether this court possesses jurisdiction to consider the appeal**

Maryland argues that, even if the trial court's severance order was not an abuse of discretion, Pilgrim's appeal is interlocutory and this court is, therefore, without jurisdiction to consider the appeal. We disagree. "[HN5]An improper severance does not rob [the] court of jurisdiction to consider a case; otherwise [the court] could not consider whether the severance itself was in fact improper." *Nicor Exploration Co. v. Florida Gas Transmission Co.*, 911 S.W.2d 479, 482 (Tex. [**11] App.--Corpus Christi 1995, writ denied).

We hold that the trial court did not abuse its discretion in severing the five defense coverage claims from Pilgrim's remaining claims. We overrule Maryland's point of error and proceed to the merits of Pilgrim's appeal.

**III.**

**Pilgrim's appeal of the summary judgment**

The policies provide coverage for alleged injury or damage "which occurs" during the policy period. Maryland urged in its motion for summary judgment, and the trial court agreed, that the term "which occurs during the policy period" means that coverage is triggered only when the injury or damage is *discovered*, or *manifest*, within the policy period. Pilgrim responded that coverage is triggered when harm is sustained from exposure to continuous pollution, even if it remains undiscovered until after the policy period. Because the policies define a covered occurrence as "an accident, including continuous or repeated exposure to conditions," Pilgrim reasons that a harm "occurs" *if it happens within the policy period.*

Pilgrim asserts that when and how coverage is triggered for an occurrence, as defined, depends on the plain language of the policy; that these [**12] policies do not make coverage contingent upon the time the alleged injury or damage is discovered; that the court's only role is to enforce the trigger as demanded by the policy's terms; and that by grafting the "discovery" requirement onto the unambiguous policy, the trial court judicially rewrote the policy and diminished Pilgrim's coverage. Pilgrim argues that the plaintiffs' factual allegations, fairly and reasonably construed, state causes of action potentially within Maryland's coverage periods, thus invoking Maryland's duty to defend, even if Maryland is ultimately not required to indemnify.

**A. Applying the "eight corners" rule**

[HN6]Texas courts apply the "eight corners" rule to determine whether an insurer has the duty to defend an insured, comparing the plaintiff's pleading allegations to the insurance contract provisions without regard to the facts that develop during discovery and trial. *See National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

Unlike the duty to indemnify, the duty to defend arises when the plaintiff alleges facts that *potentially* support claims for which there is coverage. *Id.* [**13] The duty to defend is determined from the face of the pleading, without regard to the ultimate truth or falsity of the allegations. *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). In determining the duty to defend, we construe the plaintiff's allegations against the insured liberally, "resolving any doubt in favor of the insured," though without reading facts into the pleadings for that purpose. *Cowan*, 945 S.W.2d at 825.

**1. The tort plaintiffs' pleadings**

To apply the eight corners rule, we examine the plaintiffs' pleadings in the five severed causes of action for those portions pertaining to the chronology of the alleged occurrences. The *Sunblossom* suit, filed by the owner of an apartment complex where a Pilgrim facility was located, alleges [*494] that (1) Pilgrim operated a dry cleaning business at the complex since 1978; (2) Pilgrim discovered in 1995 that its business had contaminated the subsurface of the property; and (3) the plaintiff suffered property damages and costs from this contamination.

The *Briargrove* suit, filed by the owner of a shopping center at which Pilgrim operated a business, alleges that [**14] (1) Pilgrim operated a dry cleaning service

business at the shopping center "from 1960 until 1979 or 1980"; (2) Pilgrim "permitted or caused hazardous substances to seep or leak," damaging the plaintiff's property; and (3) the plaintiff discovered the contaminants and, in 1994, asked Pilgrim to pay for the costs associated with the contamination.

The *Murad* suit, filed by Dolares Murad, the owner of a home adjacent to a Pilgrim dry cleaning facility, alleges in the second amended original petition that (1) Pilgrim operated the business continuously since it was opened in "early 1985"; (2) Pilgrim allowed chemicals used in the dry cleaning operation to escape from the property and migrate beneath Ms. Murad's property; and (3) in addition to property damage, Ms. Murad was diagnosed with cancer as a result of the contamination.

The *Turk* lawsuits, filed by the owner of three shopping centers at which Pilgrim operated leased facilities, alleged that (1) Pilgrim operated a dry cleaning facility at the three locations from December 9, 1965 until at least 1990 for the first location and from November 24, 1964 and June 20, 1966, through the present, for the other two locations [**15] and (2) Pilgrim allowed PCE or other hazardous substances to enter the surface or subsurface of the premises, damaging the properties.

The *Agim* plaintiffs, who live near a Pilgrim dry cleaning facility, alleged that (1) Pilgrim owned and operated its dry cleaning facility "from December 1979 to the present"; (2) Pilgrim allowed PCE and other hazardous substances to migrate onto the plaintiffs' property; and (3) the contamination physically injured the plaintiffs through chronic exposure and caused damage to the property.

**2. The Maryland policies' coverage language**

Under each of its four policies, Maryland agreed to pay all sums that Pilgrim "shall become legally obligated to pay . . . because of . . . bodily injury or . . . property damage . . . to which this insurance applies, caused by an *occurrence*." (Emphasis added).

Each policy defines an "occurrence" as

an accident, *including continuous or repeated exposure to conditions*, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

(Emphasis added.)

The policies define "bodily injury" and "property damage" as follows:

"bodily injury" means [**16] bodily injury, sickness, or disease sustained by any person *which occurs during the policy period*, including death at any time resulting therefrom . . . .

"property damage" means (1) physical injury to or destruction of tangible property *which occurs during the policy period*, including the loss of use thereof at any time resulting therefrom; or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is *caused by an occurrence during the policy period*.

(Emphasis added.)

The policies also give Maryland "the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage."

**B. Must an "occurrence" be discovered within a policy period to trigger coverage?**

Maryland argued in its summary judgment motion that the definitions of "occurrence," "bodily injury," and "property [*495] damage," when read together, trigger its duty to defend Pilgrim only if the alleged property damage or bodily injury is "manifest" during the policy period and that the pleadings fail to allege a manifestation of harm within any policy period. The trial court agreed and granted [**17] Maryland's motion.

Pilgrim responds that the tort plaintiffs' pleadings allege that property damage and physical injury were caused by pollution from Pilgrim facilities and that Pilgrim operated the respective premises during time periods overlapping with some or all of Maryland's policies. Pilgrim argues that the allegations at least potentially allege physical or property damage occurring during the policy period.

Maryland argues that Texas case law has "consistently interpreted" similar policies to require a "manifestation trigger," citing *Dorchester Development Corp. v. Safeco Insurance Co.*, 737 S.W.2d 380, 383 (Tex. App.--Dallas 1987, no writ). Our review of Texas law indicates the issue is far from settled.

In *American Physicians Insurance Exchange v. Garcia*, the Texas Supreme Court declined to adopt a specific test for an "occurrence" for insurance policies. *See* 876 S.W.2d 842, 853 n.20 (Tex. 1994). Surveying the law of other jurisdictions, the Court noted at least five tests for when a harm occurs to trigger coverage under an insurance policy:

1. the "pure" or "strict" manifestation rule--"triggers coverage upon actual discovery of [**18] injury";

2. the "relaxed" manifestation rule--"triggers coverage in first policy period during which discovery of injury is possible";

3. the "exposure" rule--"triggers coverage in any policy period in which exposure to cause of injury occurred";

4. the "injury-in-fact" rule--"sets trigger in personal injury cases at point when body's defenses are 'overwhelmed'"; and

5. the "multiple" or "triple-trigger" rule--"requires coverage under all policies during period of continuing exposure and manifestation."

*Id.* (citations omitted). After noting *Dorchester* as limited Texas precedent for the "pure manifestation" approach, the Texas Supreme Court specifically declined "to select among these tests, or formulate [the Court's] own," because the outcome of *American Physicians* did not require resolution of the issue. *Id.*

Our research indicates only three Texas appellate decisions have addressed when harm occurs under an insurance policy. In *Dorchester*, a 1987 construction defect case, the Dallas Court of Appeals noted the lack of Texas authority and adopted the reasoning of Florida and Idaho decisions with identical policy provisions. 737 S.W.2d at 383. [**19] Summarizing these decisions, the *Dorchester* court opined that "no liability exists on the part of the insurer unless the property damage manifests itself, or becomes apparent, during the policy period." *Id.* (discussing *Travelers Ins. Co. v. C.J. Gayfer's and Co., Inc.*, 366 So. 2d 1199 (Fla. Dist. Ct. App. 1979), and *Millers Mut. Fire Ins. Co. v. Bailey, Inc.*, 103 Idaho 377, 647 P.2d 1249 (1982)). Based on the *Dorchester* plaintiff's admission that damages were *not* manifested during the policy period, the court held that there was no "occurrence" during the policy period. 737 S.W.2d at 383. Though *Dorchester*'s reasoning is not explicit, it equated "occurrence" with "manifestation" of harm and denied coverage to the insured.

In its second decision predating *American Physicians*, the Dallas Court of Appeals cited its prior *Dorchester* decision for the proposition that "coverage is not afforded unless an *identifiable* damage or injury, other than merely causative negligence, takes place during the policy period." *Cullen/Frost Bank v. Commonwealth Lloyd's, Ins. Co.*, 852 S.W.2d 252, 257 (Tex. App. [**20] --Dallas [*496] 1993, writ denied) (emphasis added). By focusing on when harm is identifiable, rather than actually discovered, *Cullen/Frost* indicates the Dallas court takes a "relaxed" manifestation approach. The court ruled for the insured and held there was coverage. Finally, the Austin Court of Appeals cited *Cullen/Frost* for the proposition that "property loss occurs when the injury or damage is manifested." *State Farm Mut. Auto Ins. Co. v. Kelly*, 945 S.W.2d 905, 910 (Tex. App--Austin 1997, writ denied). However, this observation is arguably *dicta*. Kelly was the good faith purchaser of a stolen automobile. The *Kelly* court refused to follow cited out-of-state authorities holding that the loss occurred "when the insured acquired the bad title, *i.e.*, at the time of purchase, a period not covered by the policy." *Id.* In rejecting this authority, the Austin court stated as its first reason that it "declined to follow this rationale because of the long-standing Texas precedent that ownership is not required for an insurable interest in this state." *Id.* As a *further* reason for its decision, the *Kelley* court wrote as follows:

> *Additionally*, [**21] Texas courts have held that property loss occurs when the injury is manifested. *See Cullen/Frost Bank v. Commonwealth Lloyd's*, 852 S.W.2d 252, 258 (Tex. App.--Dallas 1993, writ denied). Mr. Kelly's loss only became evident at the time his car was confiscated, not when he received bad title.
>
> 945 S.W.2d at 910 (emphasis added). The court ruled for the insured and held there was coverage.

In short, the case law governing when harm occurs under CGL policies is far from settled. The Texas Supreme Court has declined to adopt any test or fashion its own, the Dallas Court of Appeals has adopted a "relaxed" manifestation rule, [4] the Austin Court of Appeals has arguably adopted the Dallas court's approach, and other appellate courts have not yet addressed the subject. Furthermore, no Texas appellate court has addressed what test should be used to determine when harm occurs in toxic tort suits involving CGL policies that specifically include "continuous or repeated exposure to conditions" within the definition of an "occurrence."

> 4 Though *American Physicians* described *Dorchester* as "explaining" a "pure" manifestation approach, the *Dorchester* court never explicitly distinguished whether it was adopting a "pure" or "relaxed" manifestation rule. The later opinion, *Cullen/Frost*, effectively clarified its approach as "relaxed" manifestation when the court focused on whether the harm was "identifiable."

[**22] The Fifth Circuit Court of Appeals, in its most recent survey of Texas insurance law on the meaning of "occurrence," concluded that its "best *Erie* guess as to what Texas would choose as the event that triggers the insurer's duty to defend in asbestos personal injury cases under a uniform CGL policy is the exposure theory"--*i.e.*, that coverage is triggered in any policy period in which exposure to the cause of the harm occurred. *Guaranty Nat'l Ins. Co. v. Azrock Indus., Inc.*, 211 F.3d 239, 251-52 (5th Cir. 2000). Although the trial court in *Azrock* defined "injury" as "the date an asbestos-related condition or disease manifests or becomes identifiable," the Fifth Circuit Court of Appeals instead defined "injury" as "the subclinical tissue damage that occurs on inhalation of asbestos fibers." *Id.* at 244. Applying this "exposure" theory to the personal injury claims, the *Az-*

*rock* court remanded to the trial court to determine which of the personal injury suits, if any, alleged exposure to the defendant's asbestos-containing products during the relevant policy periods. *Id.* The *Azrock* court acknowledged that older Fifth Circuit cases [**23] had used the manifestation rule for property damage cases, however, and affirmed the trial court's application of the manifestation rule to the one underlying complaint alleging [*497] property damage. *Azrock*, 211 F.3d at 246-48. [5]

> 5 *In Snug Harbor, Ltd. v. Zurich Insurance*, the Fifth Circuit Court of Appeals determined that an "occurrence" takes place under Texas law when the injured party suffers damage, rather than at the time of the negligent act or omission causing the damage. 968 F.2d 538, 544 (5th Cir. 1992). In *American Home Assurance Co. v. Unitramp Ltd.*, the Fifth Circuit of Appeals opined that, under Texas law, property damage occurs within the meaning of a CGL policy when the damage becomes manifest. 146 F.3d 311, 313 (5th Cir. 1998). The court reasoned that "identifiable" is "synonymous with 'manifest' and 'apparent,'" which each mean "'capable of easy perception.'" *Id.* at 314 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 102 (1986)).

Because [**24] the Texas Supreme Court in *American Physicians* expressly declined either to adopt any of the tests enumerated within the opinion or to fashion a new test, we are not bound by any of the theories discussed above in analyzing the meaning of an occurrence under the Maryland policies.

Maryland urges us to apply the "pure" manifestation rule, while Pilgrim argues that an injury "occurs" under the policy when damage is actually sustained through exposure, not when it is later discovered. [6]

> 6 Maryland does not expressly use the term "pure" or "strict" manifestation in its argument. However, it essentially adopts that approach by arguing that the harm became manifest only after Pilgrim's testing revealed the harm, even if the contamination was capable of being determined from testing at an earlier point. Pilgrim's argument would fall within the "exposure" rule approach, though Pilgrim does not expressly use the term.

In an occurrence-based policy, the insured is covered for "all claims based on an event occurring [**25] during the policy period, regardless of whether the claim or occurrence is brought to the attention of the insured or made known to the insurer during the policy period." *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 918 (Tex. App.--Fort Worth 1988, writ denied). In contrast, a claims-made policy covers only injuries or damages that come to the attention of the insured and are made known to the insurer during the policy period. *Id.* Thus, a claims-made policy, which contemplates a fixed termination point, is less expensive than an occurrence-based policy, for which the insurer may have difficulty calculating premiums based on the costs of the insured risks. *Id.* at 923 (discussing the economic distinctions between "occurrence-based" and "claims-based" policies).

Pilgrim points out that the language of the Maryland policies is occurrence-based, contemplating comprehensive (and correspondingly more expensive) coverage, and argues that the court would drastically and retroactively reduce the value of the Maryland policies if it reads into the policies a "claims-based" requirement that the injury must actually be discovered within the policy period. [**26] We agree.

The Maryland policies in question neither use the word "manifest" nor state that injury or damage must be identified within the policies' time period. Each policy's definition of "occurrence" contemplates that covered injury or damage can arise from accidents of "continuous or repeated exposure" to chemicals, and each policy defines "bodily injury" or "property damage" as "bodily injury, sickness, or disease" or "physical injury to or destruction of tangible property" occurring during the policy period. Thus, the policies contemplate that harm caused by continuous exposure during a policy period will be covered by that policy.

We agree with the *Azrock* decision that, [HN7]for CGL policies covering continuous or repeated exposure to conditions, injury can occur as the exposure takes place. Ultimate complications from sustained exposure, on the other hand, would tend to define the scope of damages. We do not find it necessary to limit the exposure rule to physical injury, however. *Azrock* was constrained to follow Fifth Circuit precedent on property damage; we are faced with an issue of first impression. We find [*498] the Maryland policies' language, which defines an occurrence [**27] as harm caused by continuous or repeated exposure, transforms allegations of both physical injury *and* property damage caused by exposure to PCE during the policy periods into covered events.

Under well settled principles of insurance policy construction, "[HN8]in case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in [the] insured's favor." *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965). Thus, an insurer's duty to defend arises if the factual allegations against the in-

sured, when fairly and reasonably construed, state a cause of action potentially covered by the policy. *National Union*, 939 S.W.2d at 141.

At summary judgment, Maryland had the burden of proving that one of the policy's limitations or exclusions constituted an avoidance or affirmative defense. TEX. INS. CODE ANN. art 21.58(b) (Vernon Supp. 2000). Maryland established only that Pilgrim and the plaintiffs were first alerted to the existence of [**28] chemical contamination after the Maryland policies had expired. In each of the severed tort lawsuits, however, the plaintiffs alleged that Pilgrim released PCE and other chemicals from its facilities and that this contamination continuously exposed property, and in some cases individuals, to the chemicals. In each case, the plaintiffs seek damages for this exposure.

The *Sunblossom*, *Turk*, and *Agim* lawsuits allege that Pilgrim operated its facilities before, during, and after the Maryland policy periods. *Murad* alleges that Pilgrim began to operate its facility in early 1985, during and after Maryland's final policy period. *Briargrove*, however, alleges that Pilgrim ceased operating its facility in 1979 or 1980, before the effective date of any of the Maryland policies.

*Briargrove*'s pleadings, therefore, require us to determine whether the triggering event under the exposure rule is the *release* of contaminants or the *exposure* to those contaminants. If the trigger is Pilgrim's initial or ongoing *release* of PCE or other harmful chemicals, then the *Briargrove* lawsuit would not be covered by any of Maryland's policies; if the trigger is the *exposure* [**29] to the chemicals, then *Briargrove*'s pleadings potentially allege ongoing exposure to contaminants during some or all of the policy periods.

In *E&L Chipping Co., Inc. v. Hanover Insurance Co.*, the insured's woodchip pile caught fire. 962 S.W.2d 272, 275 (Tex. App.--Beaumont 1998, no pet.). The plaintiffs, surrounding landowners, alleged that the insured's attempt to extinguish the fire by spraying large quantities of water caused a runoff of contaminated water that polluted their downstream properties. *Id.* The insurance policy in question defined an occurrence as "'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" *Id.* The pleadings, however, alleged that, while the fire began before the policy period, ongoing damage from exposure to the resulting runoff continued into the policy period. *Id.* The court found that the policy did not require that the "occurrence" (the accident initially giving rise to the exposure) take place within the policy period. *Id.* However, because runoff *resulted* in contamination during the policy period, the court found a duty to defend even though the occurrence [**30] (the fire and its extinction) took place before the policy period. *Id.* [7]

7 The court found the fire occurred before the policy period. *Id.* Though it was unclear whether the extinction of the fire extended into the policy period, the court found the pleadings alleged that contamination from runoff continued through the policy period. *Id.*

Although *E&L Chipping* did not adopt a particular test for the triggering of coverage, [*499] its analysis is consistent with an exposure approach. Here, the Maryland policies do not define an occurrence as an event happening *within* a policy period, but as "an accident, including continuous or repeated exposure to conditions, which *results* in bodily injury or property damage." (Emphasis added.) The policies' time restriction is found in the definitions of "bodily injury" or "property damage," which require the *harm* to occur during the policy period. Following *E&L Chipping*, we find that the policies cover physical injury or property damage caused by exposure [**31] occurring during the policy periods, even if the contamination began before the policy periods. All five of the lawsuits allege continuous exposure to contaminants released by Pilgrim that seeped or leaked into the surrounding property. Potentially, at least, all of the pleadings allege property damage occurring during the policy period because of ongoing contamination or seepage.

Though it is possible to argue, from the pleadings, that the exposure occurred outside policy periods, the pleadings also support a claim for exposure occurring during policy periods. Because the pleadings potentially allege exposure during the policy periods and damages for this exposure, we conclude that Maryland owes Pilgrim a duty of defense, even if it should later become apparent that the contamination of which the plaintiffs complain occurred at a later point. *See, e.g.*, *Texas Property & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 604 (Tex. App.--Austin 1998, no pet.) (noting that "[HN9]the duty to defend is not affected by facts ascertained before suit, developed in the process of the litigation, or by the ultimate outcome of the suit") (citing *Maupin*, 500 S.W.2d at 635. [**32]

**III.**

**Whether Maryland's defense costs should be allocated**

Pilgrim also challenges the alternative argument in Maryland's motion for partial summary judgment that, if Maryland should owe a duty to defend, the court should allocate the cost of Pilgrim's defense among the various insurance carriers and Pilgrim. The trial court expressly granted, severed, and made final its summary judgment

solely on the ground of Maryland's duty to defend. Accordingly, we do not address the merits of the alternative argument in this appeal. *See* *Delaney v. University of Houston*, 835 S.W.2d 56, 58 (Tex. 1992) (declining to address legal arguments on which the district court did not base summary judgment).

**IV.**

**Conclusion**

We affirm that portion of the trial court's judgment severing the cause. Because exposure to PCE or other chemicals from Pilgrim's site could potentially have fallen within the Maryland policy periods under the tort plaintiffs' allegations, we reverse the remaining portion of the judgment, which rendered summary judgment on the ground that Maryland had no duty to defend, and remand the cause.

Lee Duggan, Jr., [8] Justice [**33]

8 The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

Panel consists of Justices Cohen, Nuchia, and Duggan.

**RX.COM INC., Plaintiff, v. HARTFORD FIRE INSURANCE CO., Defendant.**

**CIVIL ACTION NO. H-04-2645**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION**

**364 F. Supp. 2d 609; 2005 U.S. Dist. LEXIS 10957**

**March 28, 2005, Decided**

**SUBSEQUENT HISTORY:** Summary judgment denied by, Motion granted by, Motion to strike granted by, in part, Motion to strike denied by, in part Rx.com v. Hartford Fire Ins. Co., 2006 U.S. Dist. LEXIS 18811 (S.D. Tex., Mar. 29, 2006)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff insured sued defendant liability insurer for breach of contract and violations of Tex. Ins. Code Ann. art. 21.21 and 21.55, alleging that the insurer breached its liability insurance policy when it refused to defend the insured in an underlying suit. The insurer moved to dismiss the article 21.55 claim on the basis that it did not apply to an insured's demand for a defense against a third-party suit.

**OVERVIEW:** The insured argued that article 21.55 applied when an insured tendered a suit to its insurer for a defense. The insurer made three arguments as to why article 21.55 did not apply to the insured's claim for breach of the duty to defend: (1) the statute covered only "first party claims" and duty to defend claims were excluded as third-party claims; (2) the statute applied only to claims paid directly to policyholders or beneficiaries and a claim for a defense was a claim for indirect reimbursement paid to attorneys; and (3) article 21.55's structure and operation make it unworkable when applied to an insured's demand for a defense. The court rejected the insurer's arguments. The definition of "claim" contained in article 21.55 § 1(3) did not exclude claims based on the duty to defend. Article 21.55's requirement that claims be paid "directly to the insured" meant that the article applied to first-party claims, not to third-party claims. Because an insured's right to a defense was a first-party right, article 21.55 applied to the duty to defend. Courts that have applied article 21.55 to insurers who refused to pay defense costs have not encountered difficulty with "workability."

**OUTCOME:** The court denied the insurer's motion to dismiss.

**CORE TERMS:** insurer's, insured's, com, duty to defend, claimant, notice, insurance policy, party claims, lawsuit, prompt payment, prejudgment interest, attorney fees, proof of loss, beneficiary, paid directly, intermediate, notify, liability policy, liability insurer, refused to defend, federal district, statutory penalty, policyholder, unworkable, breached, deadlines, dicta, refused to pay, insured's defense, citations omitted

**LexisNexis(R) Headnotes**

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims***

[HN1]Fed. R. Civ. P. 12(b)(6) allows dismissal if a plaintiff fails to state a claim upon which relief may be granted. Rule 12(b)(6) dismissal is appropriate only if there is no set of facts that could be proven consistent with the complaint allegations that would entitle the plaintiff to relief. The court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. In order to avoid dismissal, however, a court need not accept as true conclusory allegations or unwarranted deductions of fact.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims***

[HN2]In considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a court must limit itself to the contents of the pleadings, with one important exception. Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.

***Insurance Law > Bad Faith & Extracontractual Liability > Refusals to Defend***

[HN3]Tex. Ins. Code Ann. art. 21.55 requires insurance companies to acknowledge, investigate, and pay an in-

sured's valid claims within statutory deadlines or face an additional 18 percent penalty.

***Civil Procedure > Federal & State Interrelationships > Erie Doctrine***
***Governments > Courts > Judicial Precedents***
***Real Property Law > Common Interest Communities > Condominiums > Management***
[HN4]A federal court is bound by Erie to rule as it believes the state's supreme court would. When making an Erie-guess in the absence of explicit guidance from the state courts, a court must attempt to predict state law, not to create or modify it. Federal courts look to precedents established by intermediate state appellate courts only when the state supreme court has not spoken on an issue. If "persuasive data" convinces a court that the state's highest court would decide otherwise, that court need not defer to lower state appellate decisions.

***Insurance Law > Claims & Contracts > Notice to Insurers > General Overview***
***Insurance Law > General Liability Insurance > Coverage > General Overview***
[HN5]Section 1 defines five terms used in Tex. Ins. Code Ann. art. 21.55. Claim means a first party claim made by an insured or a policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract that must be paid by the insurer directly to the insured or beneficiary. Tex. Ins. Code Ann. art. 21.55 § 1(3). Notice of claim means any notification in writing to an insurer, by a claimant, that reasonably apprises the insurer of the facts relating to the claim. Tex. Ins. Code Ann. art. 21.55 § 1(5). The statute does not define "first party claim."

***Insurance Law > General Liability Insurance > Obligations > General Overview***
[HN6]See Tex. Ins. Code Ann. art. 21.55 § 2.

***Insurance Law > General Liability Insurance > Obligations > General Overview***
[HN7]See Tex. Ins. Code Ann. art. § 21.55 § 3.

***Insurance Law > Bad Faith & Extracontractual Liability > Refusals to Defend***
[HN8]See Tex. Ins. Code Ann. art. § 21.55 § 6.

***Insurance Law > General Liability Insurance > Coverage > General Overview***
[HN9]See Tex. Ins. Code Ann. art. § 21.55 § 7.

***Insurance Law > Claims & Contracts > Policy Interpretation > General Overview***
***Insurance Law > General Liability Insurance > Coverage > General Overview***
[HN10]See Tex. Ins. Code Ann. art. § 21.55 § 8.

***Insurance Law > General Liability Insurance > Coverage > General Overview***
[HN11]The Texas Supreme Court defines a "first-party claim" as one in which an insured seeks recovery for the insured's own loss. By contrast, in a third-party claim, an insured seeks coverage for injuries to a third party.

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN12]It is true that the duty to defend is a piece of a liability insurance policy, and that liability insurance policies as a whole are often termed "third-party" policies. Precisely speaking, however, the duty to defend is a form of first-party insurance contained within the liability insurance policy.

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN13]An insurer owes the duty to defend to the insured, not to a third party, even when the policy also covers a third party's claims against that insured.

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN14]The United States District Court for the Southern District of Texas, Houston Division, joins most of the state and federal courts to have considered the issue in concluding that the duty to defend component of a liability policy is a first-party claim under Tex. Ins. Code Ann. art. § 21.55. The definition of "claim" contained in Tex. Ins. Code Ann. art. 21.55 § 1(3) does not exclude claims based on the duty to defend on the ground that they are third-party, rather than first-party, claims.

***Business & Corporate Law > Agency Relationships > Authority to Act > General Overview***
[HN15]It is axiomatic that what a principal does through an agent, he does himself. When a principal acts through an agent, it is as if the principal acts personally.

***Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN16]A claim for defense costs is either paid to, or for the benefit of, the insured. The "paid directly" language distinguishes first-party from third-party claims, but does not make a claim for a defense a third-party claim. In the typical third-party liability claim, an insurer pays the claimant on behalf of the insured who has wronged the claimant in some way. When the claim is for a duty to defend, by contrast, the insurer either pays the insured, who pays or has paid an attorney, or pays the attorney directly on behalf of the insured. Tex. Ins. Code Ann. art. 21.55, defined to apply to first-party claims, includes claims made by an insured or a policyholder or by a beneficiary named in the policy or contract. Article 21.55's requirement that claims be paid directly to the insured means that the article applies to first-party claims, not to third-party claims. Because an insured's right to a defense is a first-party right, article 21.55 applies to the duty to defend. Article 21.55's definition of "claim" reinforces this conclusion. Tex. Ins. Code Ann. art. 21.55 § 1(3).

***Insurance Law > Claims & Contracts > Costs & Attorney Fees > Failure to Defend***
***Insurance Law > Claims & Contracts > Costs & Attorney Fees > Failure to Pay Claims***
***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN17]Courts that have applied Tex. Ins. Code Ann. art. 21.55 to insurers who refuse to pay defense costs have not encountered difficulty with "workability."

***Insurance Law > General Liability Insurance > Obligations > Defense***
[HN18]The United States District Court for the Southern District of Texas, Houston Division, finds the Texas Supreme Court would apply Tex. Ins. Code Ann. art. 21.55 to an insured's demand for a defense.

**COUNSEL:** [**1] For RX.COM, Inc, Plaintiff: James L Cornell, Jr, Cornell & Pardue, Houston, TX; Patrick L Hughes, Haynes Boone LLP, Houston, TX.

For Hartford Fire Insurance Company, Defendant: Christine Kirchner, Steven Jon Knight, Chamberlain Hrdicka White, Houston, TX.

**JUDGES:** Lee H. Rosenthal, United States District Judge.

**OPINION BY:** Lee H. Rosenthal

**OPINION**

[*610] **MEMORANDUM AND ORDER**

Plaintiff, Rx.com, has sued its liability insurer, Hartford Fire Insurance Co., for breach of contract and violations of Articles 21.21 and 21.55 of the Texas Insurance Code, alleging that Hartford breached its liability insurance policy when it refused to defend Rx.com in an underlying suit. Hartford has moved to dismiss the article 21.55 claim on the basis that it does not apply to an insured's demand for a defense against a third-party suit. (Docket Entry No. 4). The parties have responded, replied, and argued the dismissal motion in a hearing before this court. [1] (Docket Entry Nos. 7, 8, 10, 16). Based on the pleadings, the motion, response, and replies, the arguments of counsel, and the applicable law, this court denies the motion to dismiss, for the reasons stated below.

1 Each party has also submitted several letter briefs arguing its position and updating the court on the appeals status of pertinent state and federal cases. They include letters from Knight, counsel for Hartford, of 2/11/05, 1/7/05, 12/20/04 and 9/29/04; letters from Cornell, counsel for Rx.com, of 2/14/08, 1/20/05, 12/27/04, 11/12/04 and 10/8/04.

[**2] **I. Background**

Rx.com is a Delaware corporation with its principal place of business in Texas. Hartford is a Connecticut corporation with its principal place of business in that state. Rx.com obtained a comprehensive general liability (CGL) policy from Hartford covering the period between October 28, 1999 and October 28, 2000. According to the complaint, "on or about May 15, 2000, a suit was filed against Rx.com." Rx.com provided Hartford timely notice of the suit. The next day, Hartford "acknowledged [*611] that it received the notice of Rx.com's loss, but later refused to indemnify or defend Rx.com." Rx.com retained its own counsel to defend the suit and made another demand for defense and indemnity on September 5, 2000. Hartford continued to deny that it owed Rx.com any duty to indemnify, but agreed to defend Rx.com under a reservation of rights agreement. Rx.com alleged

that the reservation of rights agreement created "a conflict of interest entitling Rx.com to select its own counsel at the expense of and to be paid by the carrier." Rx.com hired its own lawyer. (Docket Entry No. 1, P 9). Rx.com alleged that without its consent, Hartford retained a different attorney who filed [**3] a motion to substitute counsel and made an appearance in the case "without even checking with his new client -- in fact, doing so even after he was told otherwise." (*Id.*, P 11). On May 1, 2001, Hartford agreed to pay a "reasonable" rate for the initial work performed by the attorney Rx.com had hired. In this suit, Rx.com claims that Hartford has refused to pay invoices for the work the attorney performed from June 2000 to June 2001, totaling $ 603,919.97. (*Id.*, P 13).

## II. The Legal Standard

[HN1]Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) dismissal is appropriate only if there is no set of facts that could be proven consistent with the complaint allegations that would entitle the plaintiff to relief. *Scanlan v. Texas A & M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). The court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Id.* In order to avoid dismissal, however, a court need not "accept as true conclusory allegations or unwarranted deductions of fact." [**4] *Id.* (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)).

[HN2]In considering a Rule 12(b)(6) motion to dismiss, a court must limit itself to the contents of the pleadings, with one important exception. In *Collins*, 224 F.3d at 498-99, the Fifth Circuit approved the district court's consideration of documents the defendant attached to a motion to dismiss. In *Collins* and later in *Scanlan*, the Fifth Circuit made it clear that "such consideration is limited to documents that are referred to in the plaintiffs complaint and are central to the plaintiff's claim." 343 F.3d at 536, citing *Collins*, 224 F.3d at 498-99. Other courts approve the same practice, stating that "documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Assoc. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *see also Field v. Trump*, 850 F.2d 938, 949 (2d Cir. 1998); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994). [**5]

## III. Analysis

The parties vigorously contest the applicability of article 21.55 of the Texas Insurance Code, also known as the Prompt Payment of Claims Act. [HN3]Article 21.55 requires insurance companies to acknowledge, investigate, and pay an insured's valid claims within statutory deadlines or face an additional 18 percent penalty. Rx.com argues that article 21.55 applies when an insured tenders a lawsuit to its insurer for a defense. Hartford argues that article 21.55 applies only to "first party claims," not to the duty to defend an insured against a third-party lawsuit.

A number of Texas state courts -- and federal courts interpreting Texas law -- have addressed this same question and arrived at different answers. The only Texas Supreme Court decision approaching this issue suggests that article 21.55 [*612] applies to the duty to defend. In *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696, 714, 39 Tex. Sup. Ct. J. 965 (Tex. 1996), the Court addressed the assignment of an insured's right to recover against its insurer. The Court also briefly addressed a hypothetical third-party liability policy involving a plaintiff, "P," defendant, "D," and insurer, "I."

> When issues [**6] of coverage and the duty to defend arise, it is not unusual for I or D or both to attempt to adjudicate them before P's claim is adjudicated. Disputes between I and D can often by expeditiously resolved in an action for declaratory judgment while P's claim is pending. If successful, D should be entitled to recover attorney fees. D may also be entitled to recover a penalty against I equal to eighteen percent of the claim. TEX. INS. CODE. art. 21.55, § 6.

925 S.W.2d at 714 (internal citations omitted). The Texas Supreme Court's statement that a defendant "may" recover article 21.55 damages was clearly not central to the holding. This passage has, however, persuaded some courts that the Texas Supreme Court would interpret article 21.55 to apply to an insured's demand for a defense. *See, e.g.*, *Hous. Auth. of Dallas v. Northland Ins. Co.*, 333 F. Supp. 2d 595, 602-03 (N.D. Tex. 2004) (conducting an *Erie* analysis and concluding that article 21.55 applies to defense claims).

One intermediate Texas court has also applied article 21.55 to duty to defend claims. *See Northern County Mut. Ins. Co. v. Davalos*, 84 S.W.3d 314 (Tex. App. [**7] -- Corpus Christi, 2002), *rev 'd on other grounds*, 140 S.W.3d 685, 47 Tex. Sup. Ct. J. 786 (Tex. 2004). *Davalos* relied on the text of article 21.55 to find that the statute applied to an insurer's failure to defend. On review, the Texas Supreme Court reversed the appeals court's conclusion that Davalos's insurer breached prompt payment requirements. The Texas Supreme

Court expressly declined to reach the question of article 21.55's applicability:

> We conclude that Northern's conduct in this case did not violate the terms of article 21.55 whether or not that statute properly applies to a liability insurer who fails to promptly accept or reject its insured's defense. . . . Thus, we need not determine the scope of this statute to conclude that the court of appeals erred in affirming the award of damages and attorney's fees under it.

140 S.W.3d at 691. *Gandy* and *Davalos* are the only Texas authorities that Rx.com cites in support of its argument that article 21.55 applies.

Federal district courts in Texas have consistently agreed that article 21.55 applies to an insured's claim for a defense. In the last five years alone, over ten federal court decisions [**8] have held, with varying levels of analysis, that article 21.55 applies to claims such as Rx.com's allegation that its CGL insurer breached the duty to defend. [2]

> 2 *See Hous. Auth. of Dallas v. Northland Ins. Co.*, 333 F. Supp. 2d 595, 603 (N.D. Tex. 2004); *Travelers Indem. Co. of Conn. v. Presbyterian Healthcare Res.*, 313 F. Supp. 2d 648, 653 (N.D. Tex. 2004); *Mathews Heating & Air Conditioning L.L.C. v. Liberty Mut. Fire Ins. Co.*, 384 F. Supp. 2d 988, 2004 U.S. Dist. LEXIS 21899, 2004 WL 2451923, at *7 (N.D. Tex. Oct. 21, 2004); *Westport Ins. Group v. Atchley, Russell, Waldrop & Hlavinka*, 267 F. Supp. 2d 601, 632 n.19 (E.D. Tex. 2003); *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 2003 U.S. Dist. LEXIS 12447, 2003 WL 21662829, at *3 (N.D. Tex. July 15, 2003) *aff'd in part, rev 'd in part*, 382 F.3d 546 (5th Cir. 2004); *Luxury Living, Inc. v. Mid-Continent Cas. Co.*, 2003 U.S. Dist. LEXIS 24505, 2003 WL 22116202, at *20 (S.D. Tex. Sept. 10, 2003); *Mt. Hawley v. Steve Roberts Custom Builders, Inc.*, 215 F. Supp. 2d 783, 794 (E.D. Tex. 2002); *E & R Rubalcava Constr., Inc. v. Burlington Ins.Co.*, 148 F. Supp. 2d 746, 751 (N.D. Tex. 2001); *Sentry Ins. Co. v. Greenleaf Software, Inc.*, 91 F. Supp. 2d 920, 925 (N.D. Tex. 2000), *vacated*, 2000 U.S. Dist. LEXIS 20241, 2000 WL 33254495 (N.D. Tex. Apr 18, 2000); *Ryland Group, Inc. v Travelers Indem. Co.*, 2000 U.S. Dist. LEXIS 21412, 2000 WL 33544086, at *12 (W.D. Tex. Oct. 25, 2000); *see also Legacy Partners, Inc. v. Travelers Ins. Co.*, 2002 U.S. Dist. LEXIS 5620, 2002 WL 500771, at *5 (N.D. Cal. Mar. 29, 2002) (applying Texas law), *aff'd*, 83 Fed. Appx. 183, 2003 WL 22905287, at *1 (9th Cir. Dec. 9, 2003).

[**9] [*613] A recent opinion from an intermediate Texas appeals court squarely holds that article 21.55 does not apply to claims for a defense. In *TIG Insurance Co. v. Dallas Basketball Ltd.*, 129 S.W.3d 232 (Tex. App. -- Dallas 2004, pet. denied), the Dallas Court of Appeals rejected the dicta in *Gandy*, its sister court's holding in *Davalos*, and the conclusion of numerous federal district courts. The court found that article 21.55 does not apply to claims for a defense because such claims are third-party claims, not first-party claims. The court held that damages for refusing to defend an insured are breach of contract damages, not subject to article 21.55. Finally, the court ruled that the structure of article 21.55 makes it unworkable when applied to an insured's demand for a defense. On February 11, 2005, the Texas Supreme Court denied a petition to review the *Dallas Basketball* decision.

A recent unpublished Fifth Circuit decision also states, without discussion, that article 21.55 does not apply to claims for a defense. *See SingleEntry.com, Inc. v. St. Paul Fire & Marine Ins. Co.*, 117 Fed. Appx. 933, 2004 WL 2796534, at *5 (5th Cir. Dec. 7, 2004).

[**10] Although Fifth Circuit rules allow citation of unpublished cases, *see* 5th Cir. R. 47.5.4, *singleentry*.com's brief mention of article 21.55 contains no analysis. This unpublished opinion relies on a federal district court case for the conclusion that article 21.55 did not apply. *See* 117 Fed. Appx. 933, 2004 WL 2796534, at *5 (citing *Hartman v. St. Paul Fire & Marine Insurance Co.*, 55 F. Supp. 2d 600 (N.D. Tex. 1998)). The court in *Hartman* found article 21.55 inapplicable to breach of the duty to defend claims. The judge who wrote *Hartman* later reversed this view in *Travelers Indemnity Co. of Connecticut v. Presbyterian Healthcare Resources*, 313 F. Supp. 2d 648, 653 (N.D. Tex. 2004) and *Mathews Heating & Air Conditioning L.L.C. v. Liberty Mutual Fire Insurance Co.*, 384 F. Supp. 2d 988, 2004 U.S. Dist. LEXIS 21899, 2004 WL 2451923, at *7 (N.D. Tex. Oct. 21, 2004). The latter of these cases rejects the *Dallas Basketball* decision. The two subsequent, contrary holdings leave the vitality of *Hartman* and this aspect of *Singleentry.com* in doubt.

*Erie* principles require this court to apply Texas law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); [**11] *General Accident Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 288 F.3d 651, 653 (5th Cir. 2002). As noted, Texas intermediate courts addressing the issue conflict. In *Davalos*, the court found that article 21.55 did apply to claims for breach of

the duty to defend. In *Dallas Basketball*, a different appeals court reached the opposite conclusion. The Texas Supreme Court's statement in *Gandy* provides some guidance, but it is *dicta*. This court must make an "*Erie* guess" as to whether the Texas Supreme Court would apply article 21.55 to Rx.com's claim for breach of the duty to defend the underlying suit.

[HN4]A federal court "is bound by *Erie* to rule as it believes the state's supreme court would." *Ridglea Estate Condominium Assoc. v. Lexington Ins. Co.*, 398 F.3d 332, 337 (5th Cir. Jan. 21, 2005). "When making an Erie-guess in the absence of explicit guidance from the state courts, [this court] must attempt to predict state law, not to create or modify it." *Assoc. Inter. Ins. Co. v. Blythe*, 286 F.3d 780, 783 (5th Cir. 2002) (citation omitted). Federal courts look to precedents established by intermediate state appellate [**12] courts "only when the state supreme court has not spoken on an issue." *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 565 [*614] (5th Cir. 2004), citing *Webb v. City of Dallas*, 314 F.3d 787, 795 (5th Cir. 2002). If "persuasive data" convinces a court that the state's highest court would decide otherwise, that court need not defer to lower state appellate decisions. *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 558 (5th Cir. 2002). In making the "*Erie* guess," this court is guided by the statute itself, Texas Supreme Court and appellate court decisions applying that statute, and the reasoning from those and other federal courts' decisions.

**A. Article 21.55**

The purpose of article 21.55, according to Texas courts, is to "ensure prompt payment of insurance claims by penalizing the insurer when the insurer fails to follow the steps required by the article." *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 289 (Tex. App. -- San Antonio 2000, pet. denied). The statute "is simple and its language unambiguous." *Northwestern Nat. County Mut. Ins. Co. v. Rodriguez*, 18 S.W.3d 718, 721 [**13] (Tex. App. -- San Antonio 2000, pet. denied). [HN5]Section 1 defines five terms used in article 21.55. The key term for present purposes is "claim." "'Claim' means a first party claim made by an insured or a policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract that must be paid by the insurer directly to the insured or beneficiary." Art. 21.55 § 1(3). "'Notice of claim' means any notification in writing to an insurer, by a claimant, that reasonably apprises the insurer of the facts relating to the claim." Art. 21.55 § 1(5). The statute does not define "first party claim."

[HN6]Section 2 addresses when an insurer must acknowledge and investigate a claim:

> (a) Except as provided in Subsection (d) of this section, an insurer shall, not later than the 15th day after receipt of notice of a claim . . .
>
> > (1) acknowledge receipt of the claim;
> >
> > (2) commence any investigation of the claim; and
> >
> > (3) request from the claimant all items, statements, and forms that the insurer reasonable believes, at that time, will be required from the claimant. Additional requests may be made if during the investigation of the claim such additional [**14] requests are necessary.
>
> (b) If the acknowledgment of the claim is not made in writing, the insurer shall make a record of the date, means, and content of the acknowledgment.

Art. 21.55 § 2. The next section controls an insurer's decision to accept or reject a claim:[HN7]

> (a) Except as provided by Subsections (b) and (d) of this section, an insurer shall notify a claimant in writing of the acceptance or rejection of the claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer, in order to secure final proof of loss.
>
> (b) If the insurer has a reasonable basis to believe that the loss results from arson, the insurer shall notify the claimant in writing of the acceptance or rejection of the claim not later than the 30th day after the date the insurer receives all items, statements, and forms required by the insurer.
>
> (c) If the insurer rejects the claim, the notice required by Subsections (a) and (b) of this section must state the reasons for the rejection.

> (d) If the insurer is unable to accept or reject the claim within the period specified by Subsection (a) or (b) of this [**15] section, the insurer shall notify [*615] the claimant, not later than the date specified under Subsection (a) or (b), as applicable. The notice provided under this subsection must give the reasons the insurer needs additional time.
>
> (e) Not later than the 45th day after the date an insurer notifies a claimant under Subsection (d) of this section, the insurer shall accept or reject the claim.
>
> (f) Except as otherwise provided, if an insurer delays payment of a claim following its receipt of all items, statements, and forms reasonably requested and required, as provided under Section 2 of this article, for a period exceeding the period specified in other applicable statutes or, in the absence of any other specified period, for more than 60 days, the insurer shall pay damages and other items as provided for in Section 6 of this article.
>
> (g) If it is determined as a result of arbitration or litigation that a claim received by an insurer is invalid and therefore should not be paid by the insurer, the requirements of Subsection (f) of this section shall not apply in such case.

Art. § 21.55 § 3. Section 5(a) exempts several types of insurance policies from its requirements, [**16] none of which apply in this case. [3] If any insurer violates any of the above provisions after receiving notice of a claim, section 6 addresses the liability for damages:

> [HN8]In all cases where a claim is made pursuant to a policy of insurance and the insurer liable therefor is not in compliance with the requirements of this article, such insurer shall be liable to pay the holder of the policy, or the beneficiary making a claim under the policy, in addition to the amount of the claim, 18 percent per annum of the amount of such claim as damages, together with reasonable attorney fees. If suit is filed, such attorney fees shall be taxed as part of the costs in the case.

3 Section 5 states, "This article does not apply to: (1) workers' compensation insurance; (2) mortgage guaranty insurance; (3) title insurance; (4) fidelity, surety, or guaranty bonds; marine insurance as defined by Article 5.53 of this code; or (6) a guaranty association created and operating under Article 9.48 of this code." Art. 21.55 § 5(a).

[**17] Art. 21.55 § 6. [HN9]Section 7 states that the provisions of article 21.55 are cumulative, not exclusive, of any other statutory or common-law remedy. Art. 21.55 § 7. [HN10]Section 8 states that "this article shall be liberally construed to promote its underlying purpose which is to obtain prompt payment of claims made pursuant to policies of insurance." Art. 21.55 § 8.

Hartford makes three principal arguments as to why article 21.55 does not apply to Rx.com's claim for breach of the duty to defend: (1) the statute covers only "first party claims" and duty to defend claims are excluded as third-party claims; (2) the statute applies only to claims paid directly to policyholders or beneficiaries and a claim for a defense is a claim for indirect reimbursement paid to attorneys; and (3) article 21.55's structure and operation make it unworkable when applied to an insured's demand for a defense. This court considers each argument in turn.

**B. Is Demand for a Defense a "First-Party Claim?"**

Hartford contends that by its terms, article 21.55 cannot apply to a claim for a defense because such a claim is a third-party claim, not a first-party claim. As noted, section 1 of the Prompt Payment of Claims Act [**18] defines "claim" as "a first party claim. . . ." Art. 21.55 § 1(3). [HN11]The Texas Supreme Court defines a "first-party [*616] claim" as "one in which an insured seeks recovery for the insured's own loss." *Universe Life Ins Co. v. Giles*, 950 S.W.2d 48, 53 n.2, 40 Tex. Sup. Ct. J. 810 (Tex. 1997). By contrast, in a third-party claim, "an insured seeks coverage for injuries to a third party." *Id.*

In *Dallas Basketball*, the Dallas Court of Appeals held that a demand for a defense is not a first-party claim. [4] "The entire structure of article 21.55 presumes a tangible measurable loss suffered by the insured for which he seeks payment from the insurance company." 129 S.W.3d at 239. The court distinguished defense demands from first-party claims, noting that

> article 21.55 is entitled "Prompt Payment of Claims." A demand for a defense under a liability policy is not a claim for payment. It is a demand that the insurance company provide a legal defense to the

> insured as required by the policy. The insurance company is not required to send a payment to the insured, prompt or otherwise, in response to a claim for defense.

> 4 The court acknowledged that its decision was contrary to the holdings of many state and federal decisions and the Texas Supreme Court's *dicta* in *Gandy*.129 S.W.3d at 240-41 & n.2. The court refused to follow these decisions, characterizing them as devoid of analysis, only "cursorily" considered, and "faulty" in reasoning. *Id.*

[**19] *Id.* The *Dallas Basketball* court also rejected the argument that because an insurer's refusal to provide a defense forces its insured to pay for its own attorneys, a claim for breach of the duty to defend is a first-party claim. The court concluded that because "the insured does not receive any direct payment as required by article 21.55," a defense demand is not a first-party claim. *Id.* Rather, a claim for breach of the duty to defend is a common-law contract claim for damages, and not "a claim under an insurance policy." *Id.* at 240; *see* TEX. INS. CODE Art. 21.55 § 6.

Rx.com argues that under the "majority view," an insured's demand that its insurer provide a defense is a first-party claim. *See, e.g.*, *Westport Ins. Group v. Atchley, Russell, Waldrop & Hvalinka, L.L.P.*, 267 F. Supp. 2d 601, 632 n.19 (N.D. Tex. 2003) ("The benefits under a policy's duty to defend represent a type of first party insurance to which Texas prompt payment statutes apply."); *Mt. Hawley Ins. Co. v. Steve Roberts Custom Builders, Inc.*, 215 F. Supp. 2d 783, 794 (N.D. Tex. 2002) (discussing how "the duty to defend [**20] is a form of first-party insurance contained within the liability insurance policy"); *Luxury Living, Inc. v. Mid-Continent Cas. Co.*, 2003 U.S. Dist. LEXIS 24505, 2003 WL 22116202, at *20-*21 (S.D. Tex. Sept. 20, 2003) (noting that "while not unanimous on the subject, most courts in Texas have concluded" that defense claims are first-party claims). These decisions reason that although courts normally view claims asserted under liability policies as third-party claims, such policies can include both first-party and third-party claims. As one commentator has explained:

> [HN12]It is true that the duty to defend is a piece of a liability insurance policy, and that liability insurance policies as a whole are often termed "third-party" policies. Precisely speaking, however, the duty to defend is a form of first-party insurance contained within the liability insurance policy (internal citation omitted).

Ellen S. Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 Tex. Tech. L. Rev. 869, 914 n.317 (2000); *see also Ryland Group Inc. v. Travelers Indem. Co. of Ill.*, 2000 U.S. Dist. LEXIS 21412, 2000 WL 33544086, at *12 (W.D. Tex. Oct. 25, 2000) (noting although a claim [**21] for defense costs "may not be what is traditionally thought of as a first party claim, the claim does fit within the definition of 'claim' contained in [*617] Article 21.55."); *E & R Rubalcava Constr., Inc. v. Burlington Ins. Co.*, 148 F. Supp. 2d 746, 750 (N.D. Tex. 2001) ("Here, Burlington has refused to pay defense costs for which it is liable to Rubalcava. . . . This claim is now a first party claim and the statutory penalty under Art. 21.55 will apply to such sums.").

[HN13]An insurer owes the duty to defend to the insured, not to a third party, even when the policy also covers a third party's claims against that insured. *See, e.g.*, *Sentry Ins. Co. v. Greenleaf Software, Inc.*, 91 F. Supp. 2d 920, 925 (N.D. Tex. 2000), *vacated by agreed order*, 2000 U.S. Dist. LEXIS 20241, 2000 WL 33254495, at *1 (N.D. Tex. Apr. 18, 2000). In *Sentry*, the insurer argued that the policyholder's claim for a defense was not a first-party claim. The court found this argument to be "a ludicrous statement. Greenleaf is *the* insured party. It did not submit this claim for reimbursement 'for its health.' Greenleaf clearly intended for Sentry to come to its aid and defend this lawsuit . . [**22] . . Clearly this is a first party claim." *Id.* at 925.

Courts have also rejected the arguments, advanced by Hartford and set out in the *Dallas Basketball* opinion, that defense costs represent contract damages. *See, e.g.*, *Travelers Indem. Co. of Conn. v. Presbyterian Healthcare Res.*, 313 F. Supp. 2d 648, 653 (N.D. Tex. 2004) (noting that in the duty to defend context, courts have "resolved this precise issue" and found "such a claim would be viable"). [5]

> 5 As noted, the judge in *Presbyterian Healthcare* had previously ruled in another case that article 21.55 does not apply to defense claims. *See Hartman v. St. Paul Fire & Marine Ins. Co.*, 55 F. Supp. 2d at 604. *Hartman* is the sole cited federal district court case finding article 21.55 inapplicable. The judge who authored *Hartman* has retreated from that view in subsequent cases. *See Presbyterian Healthcare*, 313 F. Supp. 2d at 653; *Mathews*, 2004 U.S. Dist. LEXIS 21899, 2004 WL 2451923, at *7 (considering and rejecting arguments set out in *Dallas Basketball*).

[**23] [HN14]This court joins most of the state and federal courts to have considered the issue in concluding that the duty to defend component of a liability policy is a first-party claim under article 21.55. The definition of "claim" contained in article 21.55 § 1(3) does not exclude claims based on the duty to defend on the ground that they are third-party, rather than first-party, claims.

**C. Are Claims for a Defense Paid "Directly to the Insured?"**

Hartford argues that article 21.55 cannot apply to defense claims because the statute defines "claims" to require payment "by the insurer directly to the insured or the beneficiary." Art. 21.55 § 1(3). Because a demand for a defense requires the insurer to provide legal representation and not to pay a claimant an amount of money, Hartford contends that payments are not paid "directly to the insured" and cannot be subject to article 21.55. The court in *Dallas Basketball* analyzed the statute the same way and concluded that article 21.55 cannot apply to defense claims. "When an insurance company provides its insured with a defense, the company then controls the defense and pays the attorneys' fees associated with the case to the attorney [**24] engaged to represent the insured. The insured does not receive any direct payment as required by Article 21.55." 129 S.W.3d at 239. Article 21.55 "presumes a tangible, measurable loss suffered by the insured for which he seeks payment from the insurance company." *Id.* Hartford argues that an insured does not suffer a "loss" when it is denied a defense by its insurer, but only incurs an indirect diminution of time and money: "Any money paid by the insurance company necessarily goes to someone other than the insured. The mere fact that an insured [*618] may be inconvenienced by a third party's lawsuit against it -- such as paying attorneys [sic] fees, incurring time away from personal business affairs as a result of the time-intensive lawsuit, etc. -- does not transform the nature of the claim into a first party insurance claim." (Docket Entry No. 8, p. 7). [6]

> 6 It is unclear whether Hartford argues that claims for a defense are excluded from article 21.55 because the insurer reimburses its insured for the legal fees incurred in defending a lawsuit or because the insurer pays the attorneys directly, rather than the insured. The second argument appears to be foreclosed by state court decisions interpreting article 21.55. In *Dunn v. Southern Farm Bureau Casualty Insurance Co.*, 991 S.W.2d 467, 473 (Tex. App. -- Tyler, 1999 writ denied), the insurer argued that because article 21.55 defined "claimant" as a "person making a claim," it did not apply when a claimant is represented by an attorney. The court easily rejected this argument. [HN15]"It is axiomatic that what a principal does through an agent, he does himself. . . . When a principal acts through an agent, it is as if the principal acts personally." 991 S.W.2d at 473.

[**25] [HN16]A claim for defense costs is either paid to, or for the benefit of, the insured. The "paid . . . directly" language distinguishes first-party from third-party claims, but does not make a claim for a defense a third-party claim. In the typical third-party liability claim, an insurer pays the claimant on behalf of the insured who has wronged the claimant in some way. When the claim is for a duty to defend, by contrast, the insurer either pays the insured, who pays or has paid an attorney, or pays the attorney directly on behalf of the insured. Article 21.55, defined to apply to first-party claims, includes claims made by "an insured or a policyholder . . . or by a beneficiary named in the policy or contract." Article 21.55's requirement that claims be paid "directly to the insured" means that the article applies to first-party claims, not to third-party claims. Because an insured's right to a defense is a first-party right, article 21.55 applies to the duty to defend. *See* Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 Tex. Tech. L. Rev. at 914 n.317; *see also Rubalcava*, 148 F. Supp. 2d at 750; *Ryland Group*, 2000 U.S. Dist. LEXIS 21412, 2000 WL 33544086, [**26] at *12. Article 21.55's definition of "claim" reinforces this conclusion. *See* Art. 21.55 § 1(3); *see also Sentry*, 91 F. Supp. 2d at 925 (noting that a defense cost claimant "is *the* insured party [and] clearly intended for [its insurer] to come to its aid and defend this lawsuit").

The court in *Sentry Insurance* also pointed to another practical problem with interpreting the "paid . . . directly" language as Hartford advocates:

> Under this interpretation of the statute, anytime an insured seeks to enforce its policy and have the insurer fulfill its obligation to defend, the insurer can refuse, force the insured to defend the lawsuit, and swoop in at the last minute to "pay the insured" for its expenses and avoid fronting the defense costs. By failing to pay for Greenleaf's defense, Sentry is now obligated to pay the cost of that defense directly to Greenleaf.

91 F. Supp. 2d at 925. Finally, as Rx.com points out, Hartford's interpretation of this section would make the prompt payment statute meaningless in some of the most common first-party insurance situations. Health insurers, for example, often pay an insured's claims [**27] di-

rectly to hospitals, doctors, and other health care providers. The fact that the insurer pays claims for an insured's loss indirectly does not immunize that insurer from article 21.55.

**D. Is Article 21.55 Unworkable As Applied to Claims for a Defense?**

Citing *Dallas Basketball*, Hartford claims that article 21.55 cannot apply to defense demands. "Any attempt to apply [*619] the statute structure to a claim for defense is unworkable and, based on the language of the statute, clearly unintended by the Legislature." *Id.* at 239. Section 6 makes an insurer that violates article 21.55 liable for "the amount of the claim" and an additional 18 percent "of the amount of the claim." Hartford contends that a demand for a defense has no "amount" because it is only a request for a legal defense, not a claim for a specified amount of money. No "amount of such claim" can be determined until the insured obtains an attorney and receives a bill for services rendered. "It is apparent that the legislature did not intend the deadlines and penalties of article 21.55 to apply to claims for a defense." *Dallas Basketball*, 129 S.W.3d at 242.

In addition, Hartford argues that article 21.55's [**28] timing requirements do not make sense as applied to claims for a defense. Section 3 triggers an insurer's deadlines for accepting or rejecting claims. An insurer has 15 business days to notify the claimant, starting after the date the insurer receives all the information it requires "to secure final proof of loss." Art. 21.55 § 2(a). When an insured demands a defense from its insurer, the insured "has not necessarily incurred any legal expenses or suffered any actual loss." *Dallas Basketball*, 129 S.W.3d at 240. Hartford questions how an insured would submit a "proof of loss" as required by section 3(a) if there is no actual loss until an insured is forced to obtain counsel to defend against the suit that the insurer refused to defend.

Rx.com responds that the requirements of article 21.55 can easily apply to defense claims, as numerous courts have held. (Docket Entry No. 17). Under section 2(a), an insured must first submit a written notice of claim. This written notice triggers the insurer's duties to acknowledge and investigate a potential claim. If the insurer requests more information to establish details of the claim, statutory deadlines begin to run [**29] once the insurer receives all items reasonably required from the insured. Rx.com denies that the initial notice must contain a specified amount of the insured's defense costs. The article 21.55 definitions section does not define "proof of loss." Rx.com argues that each request for defense payment can be a proof of loss. Rx.com again offers a comparison to first-party health insurance: "In the case of health insurance, the doctor provides professional services for the insured for which the carrier is obligated to pay. If it does not, the carrier will be subject to Article 21.55. No 'final proof of loss' is involved." (Docket Entry No. 13). [7]

7 Rx.com also points to standard Texas auto and property insurance policies that have periodic payment components, noting that article 21.55 applies to both. (Docket Entry No. 23).

[HN17]Courts that have applied article 21.55 to insurers who refuse to pay defense costs have not encountered difficulty with "workability." *See, e.g.*, *Rubalcava*, 148 F. Supp. 2d at 750 [**30] (rejecting issue as to amount because the insurer "has refused to pay defense costs for which it is liable to Rubalcava. The amount of such costs is not before the Court and presumably will be presented to the fact finder"); *Sentry*, 91 F. Supp. 2d at 925 (finding that the insurer "failed to [defend the lawsuit]. Consequently, Greenleaf submitted its claim for reimbursement. [. . .] Sentry is liable for the statutory penalty of 18% as well as the actual costs incurred by Greenleaf in defending the . . . suit"); *Luxury Living*, 2003 U.S. Dist. LEXIS 24505, 2003 WL 22116202, at *21 (stating that the insurer has refused to provide a defense or pay defense costs incurred by the insured, and requiring the insurer to provide a defense going forward, reimburse the insured's defense costs incurred to date, and [*620] pay the statutory penalty on those costs plus reasonable attorneys' fees incurred in the duty to defend action). Like the insureds in *Rubalcava*, *Sentry*, and *Luxury Living*, Rx.com alleges that Hartford has failed to pay any defense costs. Courts can and have applied article 21.55 to such claims for defense costs.

A federal district court in Texas confronted a similar situation [**31] and reached the same result. In *Primrose*, 2003 U.S. Dist. LEXIS 12447, 2003 WL 21662829, at *3, *aff'd in part, rev'd in part*, 382 F.3d 546 (5th Cir. 2004), the trial court concluded that "there can be no question but that section 6's statutory penalties apply to claims made by an insured against a liability insurer for defense costs." 2003 U.S. Dist. LEXIS 12447, 2004 WL 21662829, at *2. Following the trial, a jury found that a third-party liability insurer violated article 21.55 when it refused to defend its insured. The district court rejected the insurers post-trial arguments that the court had improperly calculated prejudgment interest and article 21.55 penalties. 382 F.3d at 551. On appeal, the Fifth Circuit affirmed every ruling except the prejudgment interest calculation. Without mentioning the article 21.55 penalties, the Fifth Circuit reversed the trial court's ruling that prejudgment interest begins to accrue when the insurer breached the policy by refusing to defend plaintiffs. Instead, the Fifth Circuit made an "*Erie* guess" that the Texas Supreme Court would hold that prejudg-

ment interest accrues "based on the dates Plaintiffs paid each bill for attorney's fees rather [**32] than the date NAICO refused to defend Plaintiffs." *Id.* at 565. The court reasoned that the Texas Supreme Court would attempt to effectuate the goal of prejudgment interest, fully to compensate injured plaintiffs. The Fifth Circuit expressly refused to consider two unpublished contrary intermediate appellate decisions and relied instead on *dicta* in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531, 41 Tex. Sup. Ct. J. 268 (Tex. 1998). The Fifth Circuit concluded, "The goals of prejudgment interest laws, as expressed in *Johnson & Higgins*, are better served by a rule that such interest be calculated from the time a plaintiff actually loses the use of the money rather than when the actual breach occurred." *Id.* at 565. The Fifth Circuit did not address the Texas prompt payment statute, except to mention that the trial court had affirmed the jury's award of article 21.55 penalties, calculated in the same manner. *Id.* at 551. The insurer had argued and briefed its article 21.55 claims before the Fifth Circuit. Br. for Appellant at 55, *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 2003 WL 23917296 [**33] (5th Cir. Nov. 20, 2003) (No. 03-10861). The Fifth Circuit affirmed the district court's refusal to overturn the jury verdict imposing article 21.55 damages for an insurer's refusal to defend. [8]

8 Although the appellant argued the trial court erred in accruing prejudgment interest and article 21.55 penalties at the time of breach, rather than the time of loss, the Fifth Circuit apparently did not address the timing of article 21.55 penalties.

[HN18]This court finds the Texas Supreme Court would apply article 21.55 to an insured's demand for a defense.

**IV. Conclusion**

Hartford's motion to dismiss is denied.

SIGNED on March 28, 2005, at Houston, Texas.

Lee H. Rosenthal

United States District Judge

**SCURLOCK OIL COMPANY, Petitioner, v. MARIA C. SMITHWICK, INDIVIDUALLY ET AL., Respondents**

**No. C-4838**

**SUPREME COURT OF TEXAS**

**724 S.W.2d 1; 1986 Tex. LEXIS 606; 30 Tex. Sup. J. 74**

**November 26, 1986, Decided**

**SUBSEQUENT HISTORY:** [**1] Concurring Opinion June 25, 1986 (J. McGee). Rehearing Denied March 11, 1987.

**PRIOR HISTORY:** APPEAL FROM NUECES COUNTY, THIRTEENTH DISTRICT

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner oil company appealed a decision of the Court of Appeals (Texas), which affirmed a judgment finding petitioner 100 percent at fault in respondent heirs' wrongful death action against the oil company and a railroad. At issue was the admissibility of a "Mary Carter" agreement from a prior trial arising out of the same accident and the collateral estoppel or issue preclusion effect to be given to the jury findings made in the prior trial.

**OVERVIEW:** Two railroad employees were killed when an oil truck struck their vehicle. Wrongful death actions were filed in two counties against the railroad and the oil company. In the first case the heirs entered into a "Mary Carter" agreement with the oil company. The jury found the railroad 90 percent at fault. In the second case the heirs entered into a "Mary Carter" agreement with the railroad. The trial judge admitted the "Mary Carter" agreement from the prior trial as impeachment evidence in the second case. The jury found thew oil company 100 percent at fault. The court of appeals affirmed. On review, the court reversed and remanded for a new trial. The court held that the trial court erred in admitting the "Mary Carter" agreement from the prior trial and found that such error was not harmless. The court held that a judgment was final for the purposes of issue and claim preclusion despite the taking of an appeal. However, the court left to the trial judge's discretion whether to allow collateral estoppel and issue preclusion based upon findings in a prior trial when, as here, a "Mary Carter" type agreement was present.

**OUTCOME:** Finding that the admission of the "Mary Carter" agreement from the prior wrongful death trial was not harmless error, the court reversed the judgment of the court of appeals and remanded for a new trial. The court left to the trial judge's discretion whether to allow issue preclusion based on the jury's findings in the prior trial in light of the presence of a "Mary Carter" agreement.

**CORE TERMS:** settling, settlement, non-settling, issue preclusion, consolidation, disclosure, collateral estoppel, heirs, bias, oil, alignment, guaranty, railroad, settlement agreement, preclusion, unfair, fault, juror, prior trial, apportionment, admissible, impeach, lawsuit, harmful, driver, van, cross-examination, relitigation, discovery, waived

**LexisNexis(R) Headnotes**

***Contracts Law > Types of Contracts > Settlement Agreements***
***Evidence > Relevance > Compromise & Settlement Negotiations***
[HN1]The traditional Texas rule is that settlement agreements between the plaintiff and a co-defendant should be excluded from the jury. A contrary rule would frustrate the policy favoring the settlement of lawsuits. However, when a settling defendant retains a financial stake in a plaintiff's recovery, the excluding of evidence of that fact from the jury is harmful error.

***Civil Procedure > Settlements > Releases From Liability > Mary Carter Agreements***
***Civil Procedure > Trials > Jury Trials > Jurors > Selection > Voir Dire***
***Evidence > Relevance > Compromise & Settlement Negotiations***
[HN2]Impeachment is the proper method by which relevant portions of "Mary Carter" agreements may be brought to the jury's attention.

***Civil Procedure > Settlements > Releases From Liability > Mary Carter Agreements***
***Evidence > Relevance > Compromise & Settlement Negotiations***
[HN3]Tex. R. Evid. 408 states that evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, or invalidity of, the claim or its amount. However, the rule does not require exclusion when the evidence is offered for the purpose of proving bias or prejudice or interest of a witness or party.

***Criminal Law & Procedure > Appeals > Reviewability > Waiver > Admission of Evidence***
***Evidence > Procedural Considerations > Objections & Offers of Proof > Objections***
[HN4]Having properly objected, a party is not required to sit idly by and take its chances on appeal or retrial when incompetent evidence is admitted. That party is entitled to defend itself by explaining, rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving its objection.

***Civil Procedure > Trials > Jury Trials > Jurors > Selection > Challenges for Cause***
[HN5]While it is the rule that when a challenge for cause is overruled, a party is required to identify an unacceptable juror that he was forced to take, that rule is not applicable when the trial court improperly apportions peremptory challenges.

***Civil Procedure > Trials > Jury Trials > Jurors > Selection > Voir Dire***
[HN6]A trial court must determine, based upon information gleaned from pleadings, pretrial discovery, and representations made during voir dire examination, what antagonism, if any, exists between the parties.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN7]The Supreme Court of Texas adopts the rule that a judgment is final for the purposes of issue and claim preclusion despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo. The Supreme Court of Texas overrules Texas Trunk R. Co. v. Jackson, 85 Tex. 605, 22 S.W. 1030 (1893), and its progeny.

***Civil Procedure > Settlements > Settlement Agreements > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN8]Whether to allow collateral estoppel and issue preclusion based upon findings in a prior trial when a "Mary Carter" type agreement is present is left to the trial court's discretion.

**COUNSEL:** Mr. W. James Kronzer, Jr., Mr. Jack W. Tucker, Weitinger, Steelhammer & Tucker, Mr. Anthony Pletcher, Mr. James A. Smith, Attorneys for Petitioner.

Mr. William R. Edwards, Edwards, McMains, Constant & Terry, Mr. Kevin D. Cullen, Cullen, Carsner & Cullen, Mr. Lev Hunt, Hunt, Hermansen, McKibben & Barger, Attorneys for Respondents.

**JUDGES:** William Kilgarlin, Justice. Concurring opinion delivered June 25, 1986 by Justice McGee. Concurring Opinion by Justice Franklin Spears joined by Justice Gonzalez.

**OPINION BY:** KILGARLIN

**OPINION**

[*2] OPINION ON MOTION FOR REHEARING

Our opinion of June 25, 1986 is withdrawn and the following is sbustituted.

Two principal questions confront us: (1) the admissibility of a "Mary Carter" agreement from a prior trial which involved the same defendants but different plaintiffs; and, (2) the collateral estoppel or issue preclusion effect to be given to jury findings made in the prior trial.

As a result of a van/truck collision in Victoria County in December, 1982, two men were killed. The heirs of one man, [**2] George Smithwick, filed suit in Nueces County against Missouri Pacific Railroad Company, Scurlock Oil Company and its driver, Ernest Lewis, and Victoria Carrier Service and its driver, Ronnie Wayne Bounds. The other man killed in the accident was Clay Carroll Dove, and his heirs filed suit in Matagorda County against the same defendants.

The *Dove* case was tried first, resulting in a verdict favorable to the Dove heirs. In that case, the Dove heirs had entered into a "Mary Carter" agreement with Scurlock Oil Company. The Smithwick heirs, in their case, entered into a "Mary Carter" agreement with Missouri

Pacific. As impeachment evidence in the Smithwick case, the trial judge admitted the "Mary Carter" agreement between the Doves and Scurlock. Based on the jury verdict, the trial court rendered a $4,165,557 judgment for the Smithwicks against Scurlock Oil Company. The court of appeals affirmed that judgment. 701 S.W.2d 4. We reverse the judgment of the court of appeals and remand this cause to the district court of Nueces County for a new trial.

Smithwick and Dove were employees of Missouri Pacific Railroad Company. At the time of their death, they were being transported from [**3] the railroad's station in Bloomington, Texas, to Vanderbilt, Texas, where they were to perform duties for their employer. Scope and course of employment is not contested. Rather than use its own vehicles or employees, Missouri Pacific had engaged Victoria Carrier Service, and its driver, Bounds, to transport the men. At a point near a curve in the roadway, Bounds had pulled his vehicle off the opposite side of the road from which he was headed, and, it being nighttime, had left on the van headlights. A large oil transport truck, driven by Scurlock's employee, Lewis, was coming from the direction of Vanderbilt, headed toward Bloomington. The truck driver, seeing the lights ahead, pulled off on his side of the road, the side on which the van was stopped, and collided with the van, killing Smithwick and Dove.

In the Matagorda County action, brought by the Dove heirs, Scurlock entered into a guaranty with those heirs that they would recover at least 2.5 million dollars. A jury trial resulted in a finding that Missouri Pacific, through its borrowed servant, [*3] Bounds, was 90% negligent, and that Scurlock was 10% negligent. At the time that the Smithwick case went to trial in Nueces [**4] County, judgment was not yet final in *Missouri Pacific Railroad Co. v. Bert L. Huebner, Administrator of the Estate of Clay Carroll Dove, Deceased*, 704 S.W.2d 353 (Tex. App. -- Corpus Christi 1985, writ ref'd n.r.e.). Because *Dove* was still on appeal, Scurlock sought to abate the Smithwick trial until the Dove judgment became final, in order to benefit under a collateral estoppel theory from the jury's finding of Missouri Pacific's 90% negligence. The Nueces County District Court overruled the plea in abatement, and the Smithwick case proceeded to trial.

In this case, Missouri Pacific entered into a "Mary Carter" agreement with the Smithwick heirs, also guaranteeing a minimum recovery of 2.5 million dollars. Though the details of this agreement were not read to the Smithwick jury, the jury was advised during voir dire examination by Smithwick's lawyers of the Missouri Pacific guaranty, and the guaranty was commented on by Scurlock's lawyer during closing argument. Although the Smithwicks had non-suited Scurlock's driver, Lewis, who, by the time of trial, had retired, they called Lewis as an adverse witness, and after examining him as to the details of the accident, sought [**5] to impeach him with the "Mary Carter" agreement between the Doves and Scurlock, an instrument he had not signed. Scurlock, of course, interposed numerous objections to these questions of Lewis.

Thereafter, before resting, and without any witness on the stand, Smithwick's attorney was permitted, over objection, to state and read to the jury the following:

> Your Honor, this is the portion of Plaintiff's Exhibit 72 which has been offered and has been admitted by the Court. This is an agreement in Cause Number 83-H-0157-C, *Bert L. Huebner, Administrator of the Estate of Clay Carroll Dove, deceased, and on Behalf of Roselyn Helen Dove, Stephanie Rose Dove, and Trey Carroll Dove v. Missouri Pacific Railroad, et al.* -- and that just means others -- in the District Court of Matagorda County, Texas, 130th Judicial District. Agreement: 'This agreement is made and entered into for the purposes set forth fully below by the following parties. Bert L. Huebner, Administrator of the Estate of Clay Carroll Dove, deceased, acting on behalf of Roselyn Helen Dove, widow of Clay Carroll Dove, Stephenie Rose Dove and Trey Carroll Dove, the minor children of Clay and Roselyn Helen Dove, Mr. and [**6] Mrs. Homer Dove, parents of Carroll Dove and Scurlock Oil Company.
>
> On December 9, 1982, Clay Carroll Dove was killed while he was in the course and scope of his employment for Missouri Pacific Railroad Company. Mr. Dove went on duty at the railroad station in Bloomington, Texas, and he and his crew were told to go to Vanderbilt, Texas, to perform duties for the railroad. Scurlock Oil Company has agreed to accept the guaranty of Mr. Huebner on behalf of the remaining Dove family that Mr. Lewis and Scurlock Oil Company will never be required to pay more than Two Million Five Hundred Thousand Dollars in damages regardless of the verdict of the jury in this case.' And that's the end of that offer, Judge.

The court of appeals, in this case, determined that the examination of a non-party to establish an unquestionably prejudicial guaranteed settlement agreement from another trial, after that witness denied knowledge of the agreement, was erroneous. However, the court of appeals concluded that Scurlock had waived the error. The basis for the appellate court's conclusion that error had been waived was because Scurlock's lawyer, during closing arguments, had commented on both the Dove-Scurlock [**7] agreement and the MoPac-Smithwick agreement. We agree that the introduction of the Scurlock-Dove agreement was error. We disagree that Scurlock waived such error, and we further disagree with the additional conclusion of the court of appeals that such error was harmless because Scurlock did not complain of excessiveness of damages awarded the Smithwicks.

[*4] As we said in *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), "[HN1]the traditional Texas rule is that settlement agreements between the plaintiff and a co-defendant should be excluded from the jury. A contrary rule would frustrate the policy favoring the settlement of lawsuits." *Id.* at 857. However, in *Simmons*, we qualified that rule by saying that when a settling defendant retained a financial stake in a plaintiff's recovery, the excluding of evidence of that fact from the jury was harmful error. *Id.* at 858-59. In order to show bias, Scurlock was entitled, in this case, to impeach Missouri Pacific's testifying principals or agents as to the guaranty to the Smithwicks if those persons sought to aid the Smithwicks recover. *Clayton v. Volkswagenwerk*, 606 S.W.2d 15 (Tex. Civ. App. -- Houston [**8] [1st Dist.] 1980, writ ref'd n.r.e.). Of course, the Smithwicks preempted Scurlock by mentioning the matter during voir dire examination. *Clayton* prohibits voir dire disclosure of "Mary Carter" agreements, but, obviously, Scurlock would have no grounds to complain of error. Nevertheless, [HN2]impeachment is the proper method by which relevant portions of "Mary Carter" agreements may be brought to the jury's attention. In the Dove case, Missouri Pacific was similarly entitled to show Scurlock's guaranty to the Doves.

[HN3]Rule 408 of the Texas Rules of Evidence states:

> Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, or invalidity of, the claim or its amount.

However, the rule does not require exclusion when the evidence is offered for the purpose of proving bias or prejudice or interest of a witness or party. The Smithwicks argue that the "Mary Carter" agreement between Scurlock and the Doves was admissible to prove bias and interest of [**9] Lewis. We find this argument unpersuasive. The settlement agreement was entered into between Lewis' employer, Scurlock Oil Company, and the Doves. Lewis did not sign the agreement, and there was absolutely no showing that Lewis was in any way interested in the outcome of the Smithwick case because of his former employer's settlement with the Doves. *Cf. Hyde v. Marks*, 138 S.W.2d 619 (Tex. Civ. App. -- Fort Worth 1940, writ dism'd jdgm't correct). Further, were we to uphold the trial court's admitting the Dove-Scurlock agreement into evidence in the Smithwick trial, we would be discouraging any defendant faced with multiple trials from entering into a guaranty agreement in the first trial. This would be contrary to our policy favoring the settlement of lawsuits. *McGuire v. Commercial Union Insurance Co.*, 431 S.W.2d 347, 352 (Tex. 1968).

Next we consider whether Scurlock waived the error of admitting clearly incompetent evidence. [HN4]Having properly objected, Scurlock was not required to sit idly by and take its chances on appeal or retrial when incompetent evidence was admitted. *State v. Chavers*, 454 S.W.2d 395, 398 (Tex. 1970). Scurlock was entitled to defend itself by explaining, [**10] rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving its objection. *Id.* at 398; *Roosth and Genecov Production Co. v. White*, 152 Tex. 619, 629, 262 S.W.2d 99, 104 (1953). We conclude that Scurlock did not waive error.

We also must consider whether the error was harmful. Although it is a matter over which we have no jurisdiction, we would assume that under the circumstances, the verdict awarded the Smithwicks was not excessive. This does not mean, however, that the introduction of the Dove-Scurlock agreement was not harmful. The jury found 100% fault on Scurlock. In a case of closely contested liability, where the accident occurred off the road, on Lewis' side of the highway, and one of the investigating officers testified that Lewis said that he thought the van was coming on his side of the road and so he went off the highway, the effect of the introduction of the Dove-Scurlock agreement to the jury [*5] on the question of liability was clearly calculated to and undoubtedly did result in the rendition of a harmful judgment to Scurlock.

Scurlock additionally complains of the apportioning of peremptory challenges by the trial court. [**11] The trial court awarded the Smithwicks nine strikes, Scurlock six strikes, and Bounds/Victoria Carrier six strikes, who

struck separately. The court of appeals concluded that Scurlock, although having objected to the apportionment, had failed to preserve error by directing the court's attention to those jurors Scurlock was forced to accept because of the apportionment. [HN5]While it is the rule that when a challenge for cause is overruled, a party is required to identify an unacceptable juror that he was forced to take, we have recently held that rule is not applicable when the trial court improperly apportions peremptory challenges. *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734 (Tex. 1986). While disapproving of the basis utilized by the court of appeals in upholding the trial court's apportionment of peremptory challenges, we hold that under the authority of *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979), and *Garcia v. Central Power & Light Co.*, the trial court did not err in its apportionment of challenges.

[HN6]A trial court must determine, based upon information gleaned from pleadings, pretrial discovery, and representations made during voir dire examination, [**12] what antagonism, if any, exists between the parties. In this case, both Scurlock and Bounds/Victoria Carrier Service were seeking an abatement. Bounds/Victoria Carrier Service was antagonistic to Smithwick/Missouri Pacific on the issue of whether Bounds was a borrowed servant of Missouri Pacific. Furthermore, both Bounds and Scurlock denied that they were at fault, but each claimed that the other was at fault. In contrast, the Smithwicks claimed both Bounds and Lewis/Scurlock were at fault. Moreover, under the law at the time, the findings by the *Dove* jury did not have issue preclusion effect, because the judgment was not yet final.

The posture of the parties in this case differs from that in *Garcia v. Central Power & Light Co.* In *Garcia*, four defendants were clearly aligned against one plaintiff, all pointing the finger of culpability at that plaintiff, and making exculpatory statements on behalf of each other. 704 S.W.2d at 736. Thus, we held it improper to divide strikes ten for the defendants, and six for the plaintiffs. *Id.* However, in this case there was no such unity of position between the parties.

The trial judge, pursuant to Tex. R. Civ. P. 233, was required [**13] to determine whether any of the litigants aligned on the same side of the docket were antagonistic with respect to any issue to be submitted. We cannot say that Bounds and Scurlock were not so antagonistic to each other and to the Smithwicks, or the Smithwicks to them, based on the information the trial court had before it at the time it equalized strikes, that the apportionment of nine to six to six produced an unfair advantage for the Smithwicks.

Having concluded to remand this cause, we now turn to the last point argued by Scurlock -- that trial court judgments should be final for purposes of issue preclusion or collateral estoppel despite the pendency of an appeal. Currently, Texas is one of a limited number of jurisdictions that hold that a judgment is not final for preclusion purposes while an appeal is pending. It has not always been so. In *Thompson v. Giffin*, 69 Tex. 139, 143, 6 S.W. 410, 412 (1887), the supreme court stated "an appeal in our State does not vacate the judgment below, but merely suspends its execution. Hence the judgment, if competent to establish a plea of *res adjudicata*, could not be defeated for that purpose by a writ of error presented for its [**14] review" (emphasis original).

However, six years later, the supreme court determined that the *Thompson* language was dicta and unnecessary to that opinion. In *Texas Trunk R. Co. v. Jackson*, 85 Tex. 605, 22 S.W. 1030 (1893), after recognizing division among the states on the question, this court said "in view of the conflict of decisions we feel authorized to [*6] adopt the rule believed to be supported by the better reason, and most likely to secure the ends of justice." *Id.* at 607, 22 S.W. at 1031. While not delving into the reasoning or demonstrating how the ends of justice would be better served, this court nevertheless held that during pendency of appeal a judgment was deprived "of that finality of character necessary to entitle it to admission in evidence in support of the right or defense declared by it, and from this necessarily follows the insufficiency of a plea in bar, based on it." *Id.* at 608, 22 S.W. at 1032.

The established rule in federal courts is that a final judgment retains all of its res judicata consequences pending decision on appeal, except in the unusual situation in which the appeal actually involves a full trial de novo. *Prager* [**15] *v. El Paso National Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969). 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4433 at 308 at n.8 (1981). "Most courts adhere to the answer established in federal decisions. Despite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse." *Id.* at 313; *see also* 1B *Moore's Federal Practice* P 0.416[3] at 524, n.26.

The *Restatement (Second) of Judgments* also adopts the federal interpretation of finality for res judicata purposes, saying in section 13, comment (f), "the better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo."

Admittedly, there are disadvantages to the federal/restatement position. A judgment in a second case based on the preclusive effects of a prior judgment should not stand if the first judgment is reversed. *Butler v. Eaton*, 141 U.S. 240, 243, 11 S. Ct. 985, 35 L. Ed. 713 (1891); 18 *Federal Practice and Procedure, supra*, §

4433 at 311. This potentially could create two retrials, [**16] although that outcome is not automatic. *See* Restatement (Second) of Judgments § 16.

Nevertheless, current Texas law has greater potential for harm. All of the values served by res judicata are threatened by a rule that often requires relitigation of the same issues between parties, with the opportunity, as here, for conflicting results. Ironically, Texans are frequently the victims of their own law, as demonstrated by *Nowell v. Nowell*, 157 Conn. 470, 254 A.2d 889 (1969), *cert. denied*, 396 U.S. 844, 24 L. Ed. 2d 94, 90 S. Ct. 68 (1969). In that case, the Connecticut Supreme Court, relying on the Texas rule of nonpreclusiveness, determined that a Texas divorce decree, in which the husband was not ordered to pay his wife any support, although prior in date, did not bar a Connecticut judgment in which support was ordered. The reason was that the wife had appealed the Texas decree to the United States Supreme Court, and by Texas law it was not final. The Connecticut court said, "[a] Texas judgment which is pending appeal should not be given effect in another state because such a judgment is not final under Texas law." 254 A.2d at 894.

In this age of complex litigation, [**17] with multiple suits often arising from one occurrence, it ordinarily makes no sense to relitigate the same issues between the same parties, with the possibility of inconsistent results. Once litigated in a fair forum, that result should be binding. Currently, with issue preclusion not effective until all avenues of appeal have been exhausted, the victor in the first suit has little incentive to go to trial in a subsequent suit, and the first suit loser has every reason to procrastinate on appeal. Moreover, the waste of judicial time in relitigating already decided issues is apparent. Our trial courts are already overburdened with cases requiring initial determination without having to also retry questions already decided. Therefore, [HN7]we now adopt the rule of the *Restatement (Second) of Judgments* § 13, and hold that a judgment is final for the purposes of issue and claim preclusion "despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo." We overrule *Texas Trunk R. Co. v. Jackson* and its progeny.

[*7] Having broadly addressed Scurlock's point on the collateral estoppel or issue preclusion effect of the Matagorda County judgment, [**18] we must now decide whether issue preclusion will be applicable in this case. The resolution of this question requires us to weigh the public policy of encouraging settlements against the obvious prejudicial effects on a non-settling defendant in a "Mary Carter" situation. Such a settlement means the plaintiff and the settling defendant inevitably gang up on the non-settling defendant and jointly point the finger of liability. The settling defendant likewise argues for high damages, something usually foreign to defendants' advocacy.

Although the non-settling defendant may advise the jury of portions of the "Mary Carter" agreement, as we held in *Simmons*, we nevertheless conclude that a jury verdict in those situations is one having the potential of being obtained without full and fair litigation. How else can it be explained that the Dove jury found Missouri Pacific 90% at fault and the Smithwick jurors found Scurlock 100% at fault? Notwithstanding, for public policy reasons, we permit "Mary Carter" agreements in spite of the potential skewing of a non-settling defendant's liability. But, if we permit "Mary Carter" agreements in a prior trial in spite of such potential, and having [**19] just adopted the principle of finality of judgments for purposes of issue and claim preclusion in spite of a pending appeal, why shouldn't the findings of the prior trial be binding on future litigation of the same issues? The drafters of section 28, *Restatement (Second) of Judgments*, may well have considered this conflict when they stated:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> (3) a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (4) the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; . . .

As to [HN8]whether to allow collateral estoppel [**20] and issue preclusion based upon findings in a prior trial when a "Mary Carter" type agreement was present, we would leave to the trial court discretion in this area. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). But in exercising that discretion, the trial court should consider

certain fairness factors as outlined in *Parklane Hosiery*. Of those factors, the one applicable in terms of this case is the procedural factor of the effect of the "Mary Carter" agreement, unavailable to Missouri Pacific in the Dove case, that likely affected the quality of that trial and caused a different result. *Id.* at 332. Thus, arguably even had the Dove's judgment been final, issue preclusion or collateral estoppel could have been improper in this case. Nonetheless, the initial decision as to issue preclusion on retrial of this case because of the possibility that the prior "Mary Carter" agreement violated "fairness factors" will rest with the trial court upon proper application of *Parklane Hosiery*.

Smithwick's and Bounds/Victoria's motions for rehearing are overruled; Scurlock's motion for rehearing is granted as to the issue preclusion [**21] point. We reverse the judgment of the court of appeals and remand this cause to the trial court for proceedings consistent with this opinion.

William Kilgarlin, Justice

Concurring opinion delivered June 25, 1986 by Justice McGee.

Concurring Opinion by Justice Spears joined by Justice Gonzalez.

**CONCUR BY:** SPEARS; GONZALEZ

**CONCUR**

[*8] Franklin Spears, Justice.

My previous concurring opinion of June 25, 1986 is withdrawn and the following is substituted. I concur in the majority's judgment. I agree with the majority's holding that a trial court judgment is final for purposes of collateral estoppel despite the taking of an appeal. I would suggest as an alternative that we explore the practice of consolidation, when as in this case, our trial courts are faced with multiple suits involving the same issues and claims arising from one occurrence. Instead of numerous causes simultaneously proceeding to trial with the first to judgment precluding the relitigation of issues and claims, consolidation would avoid the evils of preclusion by offering each litigant his day in court.

Consolidation involves the joining of pending actions before one court that have "a common question of [**22] law or fact." Fed. R. Civ. Proc. 42(a). When employed, consolidation is within the court's discretion and should be invoked to foster convenience and economy in the administration of justice. *Feldman v. Hanley*, 49 F.R.D. 48 (D.C. N.Y. 1969). The procedural aspects of consolidation are well detailed. *See* Wright & Miller, FED. PRAC. & PROC. § 2381-2393 (1971 & Supp. 1986).

New York has successfully used consolidation when two actions are pending in separate counties which involve common questions of law and fact. A motion may be made in either county to consolidate, and generally once the decision to consolidate is made, the consolidated trial is litigated in the county in which jurisdiction was first invoked. *Woods v. County of Westchester*, 112 A.D.2d 1037, 492 N.Y.S.2d 829 (N.Y. App. Div. 1985); *Matter of Schneider*, 88 A.D.2d 619, 450 N.Y.S.2d 40 (N.Y. App. Div. 1982); *see also* N.Y. CIV. PRAC. LAW § 602 (McKinney 1976).

Other states, as well as New York, have enacted consolidation rules similar to F.R.C.P. 42. *See, e.g.*, ARK. R. CIV. P. 42; CAL. CIV. PROC. CODE § 1048 (West 1980); KAN. CIV. PROC. CODE ANN. § 60-242(a)(1983).

In order for consolidation [**23] to be available in Texas, amendments to the Texas Rules of Civil Procedure and possibly the venue statute are necessary. I suggest we study consolidation closely, with the idea of implementing the concept into our procedural practice. In addition to examining the practice of consolidation, I suggest that we also closely examine the use of Mary Carter agreements in our practice.

I am ready to hold Mary Carter agreements void as against public policy. This court has never directly upheld the validity of Mary Carter agreements. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978). In *General Motors Corp. v. Simmons*, this court reserved the question of the validity of Mary Carter agreements, specifically pointing out that "there is no contention in this case that the settlement agreement was void." 558 S.W.2d at 858. The court then observed that several jurisdictions have held Mary Carter agreements void and that Mary Carter agreements "'tend to undermine the adversary nature and integrity of the proceedings against the remaining defendant.'" *Id., quoting Reese v. Chicago B & Q R.R. Co.* [**24] , 55 Ill. 2d 356, 303 N.E.2d 382, 387 (1973).

Mary Carter agreements are a recent phenomenon, not becoming common until the early 1970s. While the majority of jurisdictions have approved Mary Carter agreements, at common law they were prohibited as maintenance and champerty. *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347, 350 (1971). As at common-law, Mary Carter agreements should be prohibited because they are inimical to the adversary system, and they do not promote settlement -- their primary justification.

In reality, a Mary Carter agreement is only a partial settlement between the plaintiff and one of the defendants in a multi-party lawsuit; the plaintiff still has a lawsuit against the non-settling defendants. Because

Mary Carter agreements are not a final resolution among all the parties, they do not preclude, or even discourage, further [*9] litigation. In fact, a typical Mary Carter agreement requires settling defendants to remain in the case, participate in the trial, and approve settlement offers with remaining defendants.

Indeed, Mary Carter agreements make further litigation more likely. Settling defendants pay plaintiffs more than they would in an ordinary [**25] settlement to have a chance to significantly reduce their damages or escape liability completely. Therefore, the remaining defendants must pay enough to cover the plaintiff's expected recovery and the settling defendant's expected reduction for providing the plaintiff with an inflated guarantee. Needless to say, non-settling defendants are going to be reluctant to pay more than their fair share of the damages. "A Mary Carter agreement thus will not encourage settlement of the plaintiff's remaining claim, and litigation is almost inevitable." Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779, 786 (1978).

Even today, the majority acknowledges that Mary Carter agreements are so unfair that they may preclude collateral estoppel from being applied in later lawsuits. The majority wisely holds that a trial court judgment is final for collateral estoppel purposes even though the judgment is on appeal. The majority, then, however, immediately backs away from applying this new rule because in trials where a Mary Carter agreement is present, the jury verdict "is one having the potential of being obtained without full and fair litigation." The absurdity of this [**26] situation is obvious. We today adopt a rule designed to promote judicial efficiency and clear the courts of needless relitigation, but we are prevented from reaping the benefits of the rule because of the presence of a Mary Carter agreement.

Mary Carter agreements also threaten the non-settling defendant's due process right to a fair trial. First, settling defendants have an incentive to perjure themselves, since they have a financial interest in the plaintiff's recovery. *Pellett v. Sonotone Corp.*, 26 Cal.2d 705, 160 P.2d 783, 789 (1945) (Traynor, J., dissenting). Second, Mary Carter agreements skew the presentation of the case to the jury. Jurors, unfamiliar with court proceedings, come to court expecting to see a contest between the plaintiff and the defendants, but instead see one of the defendants cooperating with the plaintiff or standing mute. Such cooperation is certainly detrimental to the non-settling defendant. Third, Mary Carter agreements give plaintiffs and settling defendants procedural advantages, the most egregious example being that plaintiffs can lead friendly settling defendants on cross-examination, and *visa versa*.

Mary Carter agreements also distort [**27] the deterrent effects of the tort system. Culpable defendants who make a "good deal" can end up paying little or nothing in damages.

While I strongly advocate eliminating Mary Carter agreements for the reasons detailed above, until that occurs they should be fully disclosed to the court and the jury to lessen their inequity. And before Mary Carter agreements can be disclosed, they must be discovered by the non-agreeing parties.

This court has never expressly held Mary Carter agreements discoverable. Clearly, though, they are. In *Simmons*, we held Mary Carter agreements admissible and relevant to show bias and interest of the parties. 558 S.W.2d at 858-59. Unprivileged relevant evidence is discoverable. Tex. R. Civ. P. 166b. Moreover, a Mary Carter agreement entered into after a discovery request should be disclosed pursuant to the duty to supplement discovery under Rule 166b(5)(a)(2). [1]

1 Illinois has gone as far as to require parties to a Mary Carter agreement to expose the agreement to the remaining parties and the court, even without a discovery request. *Gatto v. Walgreen Drug Co.*, 61 Ill.2d 513, 337 N.E.2d 23 (1973). Oregon, by statute, requires the claimant who enters into a covenant not to sue or not to enforce judgment with one joint tortfeasor to give notice of the terms to all remaining parties. Ore. Rev. Stat. § 18.455 (1977).

[**28] Mary Carter agreements should be disclosed to the trial court before trial or immediately after the agreement is formed. The trial court must know of Mary Carter [*10] agreements to fairly align the parties and equalize jury strikes. *Greiner v. Zinker*, 573 S.W.2d 884 (Tex.Civ.App. -- Beaumont 1978, no writ); *see also City of Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669, 673-74 (Tex. 1979). The court should also consider the Mary Carter alignments in determining whether to let a settling defendant lead the plaintiff's so-called adverse witnesses on cross-examination and *visa versa*. *See* Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779, 792 (1978).

In addition to the trial court, the jury should also know at the start of trial or immediately upon formation the fact and nature of any Mary Carter agreements. Knowing the settling defendant's financial interest will help the jury to understand the strange alignment of parties and to weigh the plaintiff's and settling defendant's evidence. *City of Houston v. Wallace*, 585 S.W.2d 669.

Moreover, the agreements should not be kept from the jury until the settling defendant begins to [**29] help the plaintiff against the non-settling defendant.

*Clayton v. Volkswagenwerk*, 606 S.W.2d 15 (Tex.Civ.App. -- Houston [1st Dist.] 1980, writ ref'd n.r.e.). While this court has limited introduction of Mary Carter agreements only to show the true interest and alignment of parties, it has never held the agreements admissible only to impeach after the settling defendant helps the plaintiff's case. *See* *City of Houston v. Wallace*, 585 S.W.2d 669; *Bristol-Myers*, 561 S.W.2d 801; *Simmons*, 558 S.W.2d 855.

Further, Tex. R. Evid. 408's bias or interest exception to the inadmissibility of settlement agreements is not so limited. Rule 408 allows evidence of settlement agreements to show "bias or prejudice or interest of a witness or a party," without limiting the exception only to impeachment. Unlike its federal counterpart, the Texas rule includes "interest" and "party," and not just "bias," "prejudice," and "witness."

> The purpose of this additional language in the Texas rule is to continue the strong judicial policy in Texas favoring the disclosure of Mary Carter agreements . . . . Because of the possibility of deception arising from such situations, Texas [**30] courts allow evidence of such agreements not only to impeach the settling party for bias or prejudice, but also to show directly and substantively the true interests and alignment of the parties.

BLAKELY, *Commentary to Article IV*, 20 HOUS. L. REV. 1 & 2, Texas Rules of Evidence Handbook 242 (1983). The language of Rule 408 indicates an intent to admit Mary Carter agreements before the settling defendant helps the plaintiff's case. Further, we stated in *General Motors v. Simmons* that "the financial interest of the parties and witnesses in the success of a party is a proper subject of disclosure by *direct evidence* or by cross-examination." 558 S.W.2d at 857 (emphasis added). We did not limit disclosure until after the settling defendant helps the plaintiff's case. Under Rule 408 and supreme court cases, evidence of Mary Carter agreements is admissible to show interest of the parties, not just to impeach evidence or arguments already given.

The jury should know of Mary Carters from the beginning of trial for several reasons. The jury can more fairly weigh the agreeing parties' self-serving evidence if it knows in advance of their financial alignment. Perhaps [**31] more importantly, early disclosure will enhance the jury's awareness of subtle and covert cooperation. Because agreeing parties are supposedly adverse, they can lead each other's witnesses on cross-examination. By leading questions, the plaintiff can easily elicit testimony from the settling defendant's witness favorable to the plaintiff and settling defendants and harmful to non-agreeing defendants. Could this be called the settling defendant helping the plaintiff's case? In addition, the infinite intangibles now known to greatly influence jurors such as the way attorneys treat witnesses and parties can be altered by the agreeing parties to sway the jury in their favor. Only if the jury knows of the parties' alignment from the beginning can it fairly understand the agreeing parties' altered behavior. Disclosure only after one party overtly helps the [*11] other may not overcome the cumulative prejudicial impression of these collusive actions. Even without any cooperation at trial, the jury is entitled to know the parties' true alignment and interest and should not be masked from the reality of a trial skewing conspiracy under the guise of promoting settlement.

Having [**32] stated that Mary Carter agreements should be disclosed to the court and jury *ab initio*, the next question is what parts, if not all, of the agreement should be admitted. The jury should know, clearly and explicitly, the agreement's essentials: (1) that the settling defendant will receive credits from the amount he paid or other financial benefits depending on the size of the verdict; (2) the formula by which such financial benefits are calculated; and (3) that the settling defendant is required to participate in trial (if applicable). Beyond these essentials, whether to admit the remainder of the agreement should be left to the judge's discretion under Tex. R. Evid. 403. Rule 403 provides that "if relevant, evidence may be excluded if its probative valve is substantially outweighed by the dangers of unfair prejudice, . . . or misleading the jury. . . ." Specifically, the trial judge should exclude the self-serving statements and attacks on non-agreeing parties so prevalent in Mary Carter agreements.

The difficult admissibility question is what to do with the settlement amount. The amount is probative to show the extent of the parties' interest. *See* *General Motors v. Simmons* [**33] , 558 S.W.2d at 857. Disclosing the amount, however, may mislead the jury into thinking the plaintiff is already satisfied or that the settling defendants admitted their liability. The court should apply Rule 403 to the particular facts to determine whether the need to know the full extent of the settling defendant's interest is substantially outweighed by the danger of the prejudice.

Although fully disclosing Mary Carter agreements to juries will ameliorate the unfairness to the non-settling defendants, it is not sufficient. First, it is difficult for jurors, who are not knowledgeable and sophisticated about trial procedure and tactics, to fully grasp the relationship between plaintiffs and settling defendants created by Mary Carter agreements. This is evidenced by

the different jury findings obtained in this case and in *Missouri Pacific v. Huebner*, 704 S.W.2d 353 (Tex.App. -- Corpus Christi 1985, writ ref'd n.r.e.). Even though these two cases arise from the same accident and their facts are identical, the jury here found Mo-Pac (the Mary Carter defendant) 0% negligent and Scurlock 100% negligent. In *Huebner*, the jury found Mo-Pac (there the non-settling defendant) [**34] 90% negligent and Scurlock 10% negligent. Only the Mary Carter agreement can account for these variations in the juries' findings.

Furthermore, even if juries fully understand the relationships created by Mary Carter agreements, they will be prejudiced by both the plaintiff and settling defendant constantly pointing their fingers at the remaining defendant. Disclosing Mary Carter agreements also does not take away the settling defendants' incentive to perjure themselves.

Lastly, the disclosure of Mary Carter agreements by itself may prejudice the jury. *Lum v. Stinnett*, 488 P.2d at 353. It is argued that disclosure harms non-settling defendants because they look unreasonable to the jury for not settling as the other defendant has done. Comment, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 ARK. L. REV. 570, 582 (1983). It is conversely argued though that disclosure hurts the plaintiff because the jury thinks that the plaintiff has received full satisfaction from the Mary Carter agreement for his injuries, or that the responsible party has already come forward. Comment, *Mary Carter Agreements: Unfair and Unnecessary*, *supra* [**35] , at 796. Whomever is prejudiced, the non-settling defendant and society are entitled to a fair trial "without hazarding the prospect that such considerations might affect the jury's verdict." *Lum v. Stinnett*, 488 P.2d at 353.

In conclusion, Mary Carter agreements are a threat to the integrity of our adversarial [*12] system and do not promote settlements. Mary Carter agreements do provide attorneys with a skilled litigation tool for tactical gamesmanship, but the judicial system is not a game. It is society's way of *fairly* resolving disputes.

**Albert SOTO, Appellant v. Dr. John N. PHILLIPS, LIBERTY MUTUAL FIRE INSURANCE CO., GROCERY SUPPLY CO./SWEENEY & CO., and Dr. Milton C. BUTLER, Appellees**

**Appeal No. 04-91-00408-CV**

**COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO**

**836 S.W.2d 266; 1992 Tex. App. LEXIS 2338**

**July 15, 1992, Delivered**
**July 15, 1992, filed**

**SUBSEQUENT HISTORY:** [**1] Original Opinion dated May 20, 1992 is Withdrawn and Replaced by the Court.

**PRIOR HISTORY:** Appeal from the 285th District Court of Bexar County. Trial Court No. 90-CI-10136. Honorable Rose Spector, Judge Presiding

**DISPOSITION:** MOTION FOR REHEARING OVERRULED; AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff former employee sought the review of the order of the 285th District Court of Bexar County (Texas), which granted defendant employer, workers' compensation carrier, and doctors' motions for summary judgment in plaintiff' suit alleging misconduct by defendants in plaintiff's earlier workers' compensation suit.

**OVERVIEW:** While awaiting the decision of a federal court in a suit alleging misconduct against defendants, employer, workers' compensation carrier, and doctors in his earlier workers' compensation suit, plaintiff former employee filed a suit involving the same claims and arising out of the same facts as he had asserted in federal court. After the federal court dismissed the state law claims, which included bribery, conspiracy, and breach of the duty of good faith and fair dealing, defendants filed motions for summary judgment seeking to dismiss the claims as being barred by res judicata and collateral estoppel. The court affirmed the granting of the summary judgment motions on the state law claims holding that because those claims could have been brought in an earlier state case involving the same parties, the claims were barred by res judicata. The court also held that the claims against defendant doctors were also barred because res judicata extended to the principal/agent relationship. Finally, the court held that an additional claim of perjury against defendants was not an ultimate issue that had been litigated previously and was not barred under collateral estoppel.

**OUTCOME:** The court affirmed in part and reversed in part the order of the lower court, which granted defendant employer, workers' compensation carrier, and doctors' motions for summary judgment in plaintiff former employee's suit alleging misconduct by defendants in plaintiff's earlier workers' compensation suit. Several of plaintiff's claims of misconduct were barred by res judicata, but one claim was not barred by collateral estoppel.

**CORE TERMS:** doctors, lawsuit, carrier, summary judgment, collateral estoppel, res judicata, res judicata, ref'd, causes of action, vicarious, bribery, litigated, writ denied, ultimate issues, truthfulness, perjury, workers' compensation, false testimony, subject matter, bad faith claims, vicariously, conspiracy, state-law, asserting, judicata, diagnose, privity, Res, injured person, take-nothing

**LexisNexis(R) Headnotes**

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN1]Res judicata bars relitigation of claims that were brought or could have been brought in an earlier case involving the same parties or their privies and the same subject matter.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN2]When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defen-

dant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what grouping constitutes a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

***Civil Procedure > Joinder of Claims & Remedies > Claims***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN3]The proper inquiry in a res judicata defense is not whether it was necessary to join the second claim with the first; the issue is whether the second claim arises from the same subject matter and could have been litigated in the original cause of action. The Texas Supreme Court has consistently held that res judicata applies to claims that might have been made in the earlier suit.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
***Torts > Vicarious Liability > General Overview***
[HN4]In situations of vicarious liability, with certain exceptions, a judgment for one of the persons in the vicarious relationship bars a later action against the other.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN5]If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other. A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless: 2. (a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or (b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

***Business & Corporate Law > Agency Relationships > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN6]When the allegation is that the parties were in a vicarious relationship a judgment for the principal bars a later suit against the agent. The converse is also true. Res judicata is available to a principal whose liability rests on derivative or vicarious responsibility for an actor's conduct, which was necessarily decided adversely to the claimant in an earlier suit against the actor. That is, a judgment for the agent bars a later suit against the principal.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN7]A party asserting collateral estoppel must establish that: (1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN8]Collateral estoppel applies even though the later case is based on a different cause of action.

***Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview***
[HN9]The credibility and truthfulness of a witness is an inherent issue in every case. Tex. R. Civ. P. 226(a) requires trial courts to instruct every civil jury that they are the sole judges of the credibility of the witnesses and the weight to be given their testimony. Tex. R. Civ. P. 226a(III).

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN10]The Texas Supreme Court says that collateral estoppel precludes litigation only of ultimate issues of fact, and the court defines ultimate issues in a way that does not cover the truthfulness or honesty of witnesses. Ultimate issues are those factual determinations submitted to a jury that are necessary to form the basis of a judgment.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN11]The truthfulness or honesty of a witness is not an ultimate issue on which a judgment is based. Collateral estoppel does not encompass a false-testimony claim.

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**JUDGES:** Sitting: Shirley W. Butts, Justice, David Peeples, Justice, Ron Carr, Justice

**OPINION BY:** PEEPLES

**OPINION**

[*267] **OPINION**

**ON APPELLANT'S MOTION FOR REHEARING**

The motion for rehearing is overruled. Our previous opinion of May 20, 1992, is withdrawn and replaced by the following.

Plaintiff Soto appeals from a take-nothing summary judgment. Defendants sought judgment on res judicata and [**2] collateral estoppel grounds based on two prior lawsuits involving the same underlying transaction. Defendants are Soto's former employer, the employer's workers' compensation carrier, and two doctors who testified at the first trial. We hold that res judicata bars Soto's first seven claims against all four defendants, and to that extent we affirm the summary judgment. Concerning Soto's eighth claim, we hold that neither res judicata nor collateral estoppel applies, and because the motions for summary judgment asserted no other grounds, we reverse and remand.

*The first suit.* Soto was injured while working for Grocery Supply Company. Liberty Mutual, the workers' compensation carrier, paid Soto benefits for a time, but eventually, after Drs. Phillips and Butler had examined him, Liberty Mutual stopped making payments. Soto filed a workers' compensation suit, which contained a count against the employer for wrongful termination. The case was tried to a jury, which found that Soto was entitled to less money than he had already received and that the employer had not wrongfully discharged him. The court awarded Soto future medical benefits but otherwise rendered a take-nothing [**3] judgment.

*The second suit.* Soto then filed suit in federal court, alleging that the appellees -- the carrier, the employer, Dr. Phillips, and Dr. Butler -- engaged in a conspiracy in which the carrier and the employer paid off the two doctors in exchange for favorable diagnoses. Soto pleaded two federal theories -- R.I.C.O. (18 U.S.C. § 1961 et seq.) and civil rights violations (42 U.S.C. §§ 1983, 1985). He also pleaded several pendent state-law causes of action -- bribery, conspiracy, and breach of the duty of good faith and fair dealing. The federal court dismissed the federal causes of action on the merits, saying that all the conduct alleged by Soto occurred prior to the original suit in state court, that his claims should have been asserted in that action, and that they were therefore barred by res [*268] judicata. The court also dismissed the state-law causes of action without stating whether the dismissal was on the merits. The Fifth Circuit affirmed in an unpublished opinion.

*The third suit.* While the federal court was considering the defendants' motions to dismiss, Soto filed the present lawsuit, based on the same fact situation and alleging essentially [**4] the same state-law theories as in the second suit. His petition alleged that the defendants intentionally deprived him of his rights under the workers' compensation act and breached the duty of good faith and fair dealing by: (1) denying him his choice of medical provider, (2) sending him to doctors who would improperly diagnose his injury, (3) failing to provide medical treatment under the act, (4) failing to pay weekly compensation, (5) failing to properly investigate the facts, (6) procuring and presenting false testimony before the Industrial Accident Board, and (7) violating the commercial bribery statute, TEX. PENAL CODE ANN. § 32.43 (Vernon 1989). Each of these seven allegations concerns actions that took place *before* the trial of the first lawsuit. In addition, Soto alleged that (8) the defendants obtained and presented false testimony *during* the trial of the first suit. Soto cites *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988), which created a cause of action for bad-faith denial of coverage or delay in payment of workers' compensation benefits.

After the federal court dismissed Soto's second lawsuit, all four defendants moved for [**5] summary judgment in this, the third case. Their motions urged that (1) the first two lawsuits barred the present claims under principles of res judicata and collateral estoppel, and (2) the jury's verdict in the first case (that Soto had been overpaid) exonerated them from Soto's allegations. Because the summary judgment did not specify the grounds on which it is based, we must affirm if any of the grounds urged in the motions are valid. *See* *Rogers v. Ricane Enter., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989).

**I. RES JUDICATA (CLAIM PRECLUSION).**

*A. Liberty Mutual and Grocery Supply.*

[HN1]Res judicata bars relitigation of claims that were brought or *could have been brought* in an earlier case involving the same parties (or their privies) and the same subject matter. *See Gracia v. RC Cola-7-UP Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984); *Texas Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979); *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 642 (Tex. 1971); RESTATEMENT (2D) OF JUDGMENTS §§ 24, 25 (1982). The first lawsuit and the present lawsuit involve two of the same parties (the carrier and the employer) and the same subject [**6] matter. The allegations in the present suit are sufficiently related to the underlying transaction from which the first suit arose. [1] Whatever may be the validity of the first seven claims Soto makes in this case -- an issue on which we express no opinion -- he could have *alleged* them in the first lawsuit. *See* TEX. R. CIV. P. 51. He did not have to wait until the [*269] workers' compensation suit was resolved to assert the other claims. *See Murray v. San Jacinto Agency Inc.*, 800 S.W.2d 826, 829 (Tex. 1990) ("Limitations on a first party claim appropriately begins to run at denial, not the date a separate suit to determine coverage under the contract is resolved"). Though *Murray* was decided after Soto's first suit was tried in December 1988, we see nothing in *Aranda* or other cases that prevented him from alleging his bad faith claims in the first suit. *See Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 n.1 (Tex. 1987).

1 The Restatement defines the scope of the transaction concerning which additional claims may not be litigated as follows:

§ 24. Dimensions of "Claim" for Purposes of Merger or Bar--General Rule Concerning "Splitting"

(1) [HN2]When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what grouping constitutes a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). Soto's first lawsuit and his first seven allegations in this suit are part of the same transaction for res judicata purposes even though he has alleged different harm and a different theory of recovery in this suit. *See id.* comment *c.*

[**7] Soto cites *Izaguirre v. Texas Employers' Ins. Ass'n*, 749 S.W.2d 550 (Tex. App.--Corpus Christi 1988, writ denied), which held that res judicata does not bar a bad faith claim arising from a workers' compensation case. The *Izaguirre* court stated, without analysing the res judicata cases, that it was not "necessary" for the claimant to make his bad faith claims in the underlying suit because the worker's compensation and bad-faith claims are "distinct." *Id.* at 555. But [HN3]the proper inquiry is not whether it was "necessary" to join the second claim with the first; the issue is whether the second claim arises from the same subject matter and *"could have been* litigated in the original cause of action. " *See Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985) (emphasis added). The Texas Supreme Court has consistently held that res judicata applies to claims that "might have been" made in the earlier suit. *See, e.g., Gracia v. RC Cola-7Up Bottling Co.*, 667 S.W.2d at 519; *Texas Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d at 771-72; *Abbott Laboratories v. Gravis*, 470 S.W.2d at 642.

Res judicata now prevents Soto from asserting his first [**8] seven claims, which arose *before* the first trial and could have been tried then, against Liberty Mutual and Grocery Supply in the present suit. We therefore affirm the trial court's summary judgment in favor of Liberty Mutual and Grocery Supply on the first seven allegations.

*B. Dr. Phillips and Dr. Butler.*

The two doctors were not parties in the first suit, but they can assert res judicata if they were in privity with a party. Soto's first five allegations pertain only to the carrier and the employer, and not to the doctors; but the sixth and seventh claims -- perjury and bribery before the Industrial Accident Board -- are allegations that implicate them. The doctors argue that for res judicata purposes they were in privity with the two defendants in the first suit because in effect Soto accused them of acting in concert with, or being agents of, the carrier and the employer. We agree.

Although Soto does not use the term "vicarious liability," he is asserting that the carrier and the employer are vicariously liable for false testimony and diagnoses by the doctors before trial. His petition alleges that the carrier and the employer "obtained" and "procured and [**9] presented" the doctors' perjured testimony; in this

he is alleging a vicarious relationship, in which the testifiers acted for the procurers.

[HN4]In situations of vicarious liability, with exceptions not involved here, a judgment for one of the persons in the vicarious relationship bars a later action against the other. *See* RESTATEMENT (2D) OF JUDGMENTS § 51(1) (1982). [2] A plaintiff may not pursue vicariously liable tort defendants one at a time in successive lawsuits. *See Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977); *Marange v. Marshall*, 402 S.W.2d 236, 241 [*270] (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.).

2 Section 51 reads in relevant part as follows:

> [HN5]If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.
>
> (1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:
>
> (a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or
>
> (b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.
>
> RESTATEMENT (2D) OF JUDGMENTS § 51 (1982).

[**10] [HN6]

When the allegation is that the parties were in a vicarious relationship, as it is here, a judgment for the principal bars a later suit against the agent. *See Hammonds v. Holmes*, 559 S.W.2d at 347; *Marange v. Marshall*, 402 S.W.2d 236. The converse is also true. Res judicata is available to a principal whose liability rests on derivative or vicarious responsibility for an actor's conduct which was necessarily decided adversely to the claimant in an earlier suit against the actor. *See Maxey v. Citizens Nat'l Bank*, 507 S.W.2d 722, 725-26 (Tex. 1974); *Eastland County v. Davisson*, 13 S.W.2d 673, 676-77 (Tex. Comm'n App.--1929, judgm't adopted); *Mendez v. Haynes Brinkley & Co.*, 705 S.W.2d 242 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.) (collateral estoppel); *Weaver v. City of Waco*, 575 S.W.2d 426, 430-31 (Tex. App.--Waco 1978, no writ); *Siratt v. City of River Oaks*, 305 S.W.2d 207, 209 (Tex. Civ. App.--Fort Worth 1957, writ ref'd). That is, a judgment for the agent bars a later suit against the principal.

Because the doctors allegedly acted as agents for the carrier and the employer, they are in privity with each other and may assert res [**11] judicata. *See Hammonds v. Holmes*, 559 S.W.2d at 347; RESTATEMENT (2D) OF JUDGMENTS § 51(1). Claims one through five did not pertain to the doctors, and res judicata bars claims six and seven against them.

**II. COLLATERAL ESTOPPEL (ISSUE PRECLUSION).**

Different principles govern Soto's eighth allegation -- that perjury and bribery occurred *during* the first suit. That claim could not have been made in the first suit, and res judicata therefore does not bar it. We must determine whether Soto is collaterally estopped from relitigating whether the doctors testified falsely in the first suit.

[HN7]A party asserting collateral estoppel must establish that

> (1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.

*Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990), quoting *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). [HN8]Collateral estoppel applies even though the later case is based on a different cause of action. *Wilhite v.* [**12] *Adams*, 640 S.W.2d 875, 876 (Tex. 1982). Because mutuality of estoppel is not required, the doctors can assert collateral estoppel defensively against Soto even though they were not parties in the first suit. *See Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d at 721.

The jury in the first suit has already decided whether the doctors testified falsely or truthfully, which is what Soto's eighth claim seeks to relitigate. It is inconceivable that the jury could have reached its verdict in the first suit without deciding which witnesses were telling the truth. [HN9]The credibility and truthfulness of a witness is an inherent issue in every case. Indeed, rule 226a requires trial courts to instruct every civil jury: "You are the sole judges of the credibility of the witnesses and the weight to be given their testimony." *See* TEX. R. CIV. P. 226a(III). Clearly the truthfulness of the witnesses was actually litigated and was essential to the first judgment.

But [HN10]the supreme court has said that collateral estoppel precludes litigation only of *ultimate* issues of fact, and the court defined ultimate issues in a way that

does not cover the truthfulness or honesty of witnesses. [**13] "Ultimate issues are those factual determinations submitted to a jury that are necessary to form the basis of a judgment." *Tarter v. Metropolitan Sav. & Loan Ass'n*, 744 S.W.2d 926, 928 (Tex. 1988). The court referred to a case distinguishing between ultimate issues and evidentiary issues in the context of special issue submission. *See Dreeben v. Sidor*, 254 S.W.2d 908 (Tex. Civ. App.--Amarillo 1952, writ ref'd n.r.e.). Under the *Tarter* definition, [HN11]the truthfulness or honesty of a witness is not an ultimate issue on which a [*271] judgment is based. We must hold that collateral estoppel does not encompass the false-testimony claim.

Defendants' motions for summary judgment did not urge the long-settled rule that testimony in a judicial proceeding, even if perjured or procured through bribery, is not actionable in a later civil case. *See Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 912-13 (1942); *Kale v. Palmer*, 791 S.W.2d 628, 632 (Tex. App.--Beaumont 1990, writ denied) (perjury not actionable even if it is part of conspiracy); *Chandler v. Gillis*, 589 S.W.2d 552, 554 (Tex. Civ. App.--El Paso 1979, writ ref'd n.r.e.); *Morris* [**14] *v. Taylor*, 353 S.W.2d 956, 958 (Tex. Civ. App.--Austin, writ ref'd n.r.e.), *cert. denied*, 371 U.S. 842, 9 L. Ed. 2d 78, 83 S. Ct. 71 (1962). This rule rests on the belief that the good accomplished by protecting witnesses and litigants generally from harassment outweighs the wrong or injury that may occasionally be done to a particular individual. [3] *See Reagan*, 166 S.W.2d at 913; *Clark v. Grigson*, 579 S.W.2d 263, 265 (Tex. Civ. App.--Dallas 1978, writ ref'd n.r.e.). A litigant cannot avoid this rule by pleading the case as one of bad faith and unfair dealing; nothing in the bad faith cases suggests an exception to the rule that "any communication made in the course of a judicial proceeding is absolutely privileged and immune from civil liability for damages." *Chandler v. Gillis*, 589 S.W.2d at 554; *accord, Clark v. Grigson*, 579 S.W.2d at 265. We do not apply this rule, however, because summary judgment may not be granted or affirmed on grounds not expressly mentioned in the motion. *See Birdwell v. Birdwell*, 819 S.W.2d 223, 229 (Tex. App.--Fort Worth 1991, writ denied); *Roberts v. Southwest Texas Methodist Hosp.*, 811 S.W.2d 141, 144-45 (Tex. App.--San [**15] Antonio 1991, writ denied).

3 The supreme court made essentially the same observation in a defamation case: "The administration of justice requires full disclosure from witnesses, unhampered by fear of retaliatory suits for defamation." *James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982).

Because Soto's first seven allegations concern actions occurring prior to the first trial and could have been alleged then, they are barred by res judicata. As to those claims we affirm the take-nothing summary judgment in favor of all four defendants. Because his eighth allegation, concerning perjury and bribery during the first lawsuit, does not rest on an ultimate issue necessarily determined by the jury in the first case, under *Tarter* he is not collaterally estopped from raising that issue in this case. As to the eighth allegation we reverse the judgment and remand the cause for further proceedings.

DAVID PEEPLES

Justice

**STATE AND COUNTY MUTUAL FIRE INSURANCE COMPANY, PETITIONER
v. WALTER A. MILLER, RESPONDENT**

**NO. 99-0501**

**SUPREME COURT OF TEXAS**

**52 S.W.3d 693; 2001 Tex. LEXIS 2; 44 Tex. Sup. J. 333**

**January 18, 2001, Delivered**

**PRIOR HISTORY:** [**1] ON PETITIONS FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.

**DISPOSITION:** Reversed in part and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner insurer and respondent insured sought review from the Court of Appeals for the Thirteenth District of Texas. The ruling reversed the trial court's ruling, which held that a prior related suit's declaratory judgment precluded respondent from asserting causes of action against petitioner relating to the insurance policy and the auto accident.

**OVERVIEW:** Respondent insured was in a car accident with an underinsured motorist. Petitioner insurer, the primary insurer of respondent's policy, had a separate reinsurance agreement covering that policy. Respondent settled with the underinsured motorist's carrier, and then submitted a demand to the reinsurer. The reinsurer paid respondent for his injuries in part, which respondent accepted. The reinsurer paid the remainder due, which respondent rejected. The reinsurer filed an interpleader suit. The reinsurer was found fully liable for respondent's underinsured claim. Respondent filed the instant suit asserting various theories such as delay in payment. The trial court granted summary judgment for petitioner. The court of appeals reversed. The supreme court held that res judicata did not bar respondent from asserting his claims, because the parties were not adverse in the prior action. Respondent was collaterally estopped from asserting any claims regarding liability under the policy. Respondent's extra-contractual claims as to liability were remanded. Also, collateral estoppel prevented the court of appeals from deciding whether the reinsurer was petitioner's reinsurer.

**OUTCOME:** The ruling was reversed in part and remanded.

**CORE TERMS:** collateral estoppel, reinsurer, res judicata, insurance policy, asserting, co-party, declaratory judgment action, cross-action, litigated, subject matter, reinsurance, cross-claim, final judgment, issue decided, summary judgment, compulsory counterclaims, misrepresentation, underinsured, permissive, extra-contractual, permission, present case, causes of action, claim arising, prior suit, writ denied, refused to accept, rendered judgment, pending action, misrepresented

**LexisNexis(R) Headnotes**

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN1]Res judicata, also known as claim preclusion, prevents the relitigation of a finally-adjudicated claim and related matters that should have been litigated in a prior suit.

***Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN2]Texas follows the transactional approach to res judicata. This approach mandates that a defendant bring as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the opposing party's suit. But when the parties are co-parties rather than opposing parties, the compulsory counterclaim rule and res judicata only act as a bar to a co-party's claim in a subsequent action if the co-parties had issues drawn between them in the first action.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN3]For the purposes of res judicata, co-parties have issues drawn between them and become adverse when one co-party files a cross-action against a second co-party.

***Civil Procedure > Pleading & Practice > Pleadings > Cross-Claims > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN4]A cross-claimant becomes a plaintiff for res judicata purposes, and is required to assert all claims against the cross-defendant arising from the subject matter of the original cross-claim.

***Civil Procedure > Pleading & Practice > Pleadings > Cross-Claims > General Overview***
[HN5]Tex. R. Civ. P. 97(e) provides that cross-claims against otherwise non-adverse parties are permissive, not compulsory.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN6]When asserted against a party who was actually a party in the first action, the doctrine of collateral estoppel bars relitigation of fact issues that were fully and fairly litigated and that were essential to the prior judgment. The issue decided in the prior action must be identical to the issue in the pending action.

***Insurance Law > Reinsurance > Notice Obligations***
[HN7]Under general reinsurance law, a policyholder may not bring any direct claims against a reinsuring company. Absent an agreement creating direct liability in the reinsurer, all claims under the policy must be asserted against the original insurance company. Tex. Ins. Code Ann. art. 5.75- 1(g).

***Insurance Law > Reinsurance > Rights Against Reinsurers***
[HN8]A person does not have any rights against a reinsurer that are not specifically set forth in the contract of reinsurance or in a specific agreement between the reinsurer and the person. Tex. Ins. Code Ann. art. 5.75-1(g).

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Law of the Case***
[HN9]The law of the case doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages.

**COUNSEL:** For Petitioner: Mr. Rick Fancher, Mr. Vaughan E. Waters, Thornton Summers Biechlin Dunham & Brown, Corpus Christi, TX.

For Respondent: Mr. Gary Norton, Austin, TX.

**OPINION**

[*694] **Per Curiam**

Three lawsuits arose out of a single automobile accident involving an insured, Walter Miller. This case concerns the preclusive effect to be given the final judgment issued in the first of these cases on this, the second case, which Miller filed against his insurance company, State and County Mutual Insurance Company. In the first case ("the *Windsor* suit"), which was a declaratory judgment action, the trial court held that Windsor Insurance Company was the reinsurer of an insurance policy that State and County Mutual had issued to Walter Miller. The court further held that only Windsor was liable to Miller under the policy. This ruling was affirmed on appeal. The trial court in the present case held that the *Windsor*-suit declaratory judgment precluded Miller from asserting causes [**2] of action against State and County Mutual relating to the insurance policy and the auto accident. The court of appeals reversed and held that neither res judicata nor collateral estoppel barred Miller's claims against State and County Mutual. 988 S.W.2d 326. Although [*695] most of Miller's claims against State and County Mutual involve issues that have already been resolved in a prior suit and are thus barred by collateral estoppel, some of Miller's claims allege that State and County Mutual misrepresented the nature of his insurance policy. With regard to these claims, we affirm the court of appeals' judgment and remand them to the trial court. With regard to the rest of Miller's claims, we reverse the court of appeals' judgment and render judgment that Miller take nothing.

Miller was injured in a car accident with an underinsured motorist. State and County Mutual, the primary insurer of Miller's insurance policy, had a separate reinsurance agreement with Windsor covering that policy. [1] Miller requested permission from Windsor to settle with the underinsured motorist's liability carrier, State Farm, for the applicable $ 20,000 limit. Windsor gave written permission to Miller [**3] to settle his bodily injury claim with State Farm, thereby allowing Miller to submit a claim under his own underinsured-motorist coverage. This permission was given in the name of "State and County Mutual Fire Insurance Company (Windsor Group)." Miller settled with State Farm, and then submitted a written demand to Windsor on behalf of himself, his wife, and their two minor children, for the total sum

of $ 300,000 (the full, per-occurrence limit of the policy).

> 1 Miller disputes that Windsor was the reinsurer of his insurance policy. That issue, however, has already been determined by a final judgment in the prior declaratory judgment action. *See* *Miller v. Windsor Ins. Co.*, 923 S.W.2d 91, 94 (Tex. App.--Fort Worth 1996, writ denied).

Windsor advanced $ 10,000 to Miller for his injuries, and Miller accepted the payment. Windsor then tendered the remaining $ 90,000 it contended was due under the policy. Miller refused to accept this payment. Windsor then filed an interpleader action in Tarrant [**4] County (the "*Windsor* suit"), seeking a declaration that the policy only entitled Miller to $ 100,000, and that the $ 90,000 payment - coupled with the $ 10,000 previously paid - would release Windsor from all liability under the policy. The trial court granted Windsor's motion for summary judgment and rendered judgment that Windsor was fully liable for Miller's underinsured claim in the amount of $ 100,000 (not the $ 300,000 Miller had previously demanded). The Second Court of Appeals affirmed, and this Court denied Miller's application for writ of error. *Miller v. Windsor Ins. Co.*, 923 S.W.2d 91, 97 (Tex. App.--Fort Worth 1996, writ denied).

While the *Windsor* suit was in the trial court in Tarrant County, Miller filed this suit in Nueces County against State and County Mutual, asserting various theories such as delay in payment and DTPA violations. The Nueces County suit was abated because of the pending *Windsor* suit. After the trial court rendered judgment in the *Windsor* suit, the trial court in this case granted summary judgment for State and County Mutual based on res judicata and collateral estoppel. The court of appeals reversed, holding that [**5] (1) any claims Miller could have filed against State and County Mutual in the *Windsor* suit would have been permissive cross-claims, not compulsory counterclaims, and therefore neither res judicata nor collateral estoppel bars Miller's claims in this case; and (2) the "law of the case" doctrine prevents the court from considering whether Windsor was State and County Mutual's reinsurer on this policy.

Both State and County Mutual and Miller filed petitions for review. State and County Mutual argues that the final judgment in the *Windsor* suit bars Miller's [*696] claims in this case under the doctrines of collateral estoppel, res judicata, and compulsory counterclaim. Miller responds that neither res judicata nor collateral estoppel applies because the issues in this case are different from the issues adjudicated in the *Windsor* suit, and that any claims he had against State and County Mutual at the time Windsor brought the declaratory judgment action were permissive cross-claims that were not required to be asserted in that case. In his petition for review, Miller asserts that the court of appeals erred by applying the "law of the case" doctrine to hold that Windsor was in fact [**6] the reinsurer of his policy.

[HN1]Res judicata, also known as claim preclusion, prevents the relitigation of a finally-adjudicated claim and related matters that should have been litigated in a prior suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). [HN2]Texas follows the transactional approach to res judicata. *Id.* at 630. This approach mandates that a defendant bring as a counterclaim any claim arising out of the transaction or occurrence that is the subject matter of the opposing party's suit. *Id.* But when the parties are co-parties rather than opposing parties, the compulsory counterclaim rule and res judicata only act as a bar to a co-party's claim in a subsequent action if the co-parties had "issues drawn between them" in the first action. *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 800 (Tex. 1992). [HN3]For the purposes of res judicata, co-parties have issues drawn between them and become adverse when one co-party files a cross-action against a second co-party. *See id.*

In the *Windsor* declaratory judgment action, Windsor was the plaintiff and State and County Mutual and Miller were defendants. As a [**7] result, Miller and State and County Mutual were co-parties in the *Windsor* suit. Therefore, if either Miller or State and County Mutual had filed a cross-action against the other in the *Windsor* suit, any claims arising from the same transaction or occurrence that was the subject matter of the cross-action would be barred by res judicata if not filed in the same suit. *See id.* [HN4]("The cross-claimant becomes a plaintiff for res judicata purposes, and is required to assert all claims against the cross-defendant arising from the subject matter of the original cross-claim."). Although Miller or State and County Mutual could have filed a cross-action against the other in the *Windsor* suit, neither party chose to, nor were they required to do so. *See* [HN5]TEX. R. CIV. P. 97(e) (providing that cross-claims against otherwise non-adverse parties are permissive, not compulsory); *see also* *Getty Oil*, 845 S.W.2d at 800. Because State and County Mutual did not file a cross-action in the *Windsor* suit, Miller was not required to assert a claim against State and County Mutual in that suit. Thus, Miller and State and County Mutual were not adverse in the *Windsor* suit, [**8] and res judicata does not bar Miller from asserting his claims here.

The trial court in this case also granted State and County Mutual's summary judgment motion on the basis of collateral estoppel, but the court of appeals reversed and held that collateral estoppel does not bar Miller from asserting his claims in this case. [HN6]When asserted against a party who was actually a party in the first action, the doctrine of collateral estoppel bars relitigation

of fact issues that were fully and fairly litigated and that were essential to the prior judgment. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 519 (Tex. 1998). The issue decided in the prior action must be identical to the issue in the pending action. *Getty Oil*, 845 S.W.2d at [*697] 802. Because Miller was actually a party in the *Windsor* suit, collateral estoppel will bar Miller's claims against State and County Mutual in this case if (1) the fact issues underlying his claims were fully and fairly litigated in the *Windsor* suit, (2) those factual findings were essential to the *Windsor* suit judgment, and (3) the issues decided in the *Windsor* suit are identical to [**9] those in the pending action.

[HN7]Under general reinsurance law, a policyholder may not bring any direct claims against a reinsuring company. Absent an agreement creating direct liability in the reinsurer, all claims under the policy must be asserted against the original insurance company. *See* TEX. INS. CODE art. 5.75- 1(g) [HN8]("A person does not have any rights against a reinsurer that are not specifically set forth in the contract of reinsurance or in a specific agreement between the reinsurer and the person."); *see also* *Malaysia British Assurance v. El Paso Reyco, Inc.*, 830 S.W.2d 919, 921 (Tex. 1992) ("If, as in this case, the reinsurance contract allows only the reinsured company to bring a claim against the reinsurer, the original insureds have no basis for a claim against the reinsurer."). Even though Miller should have contacted State and County Mutual, not Windsor, regarding payment of his claim, Miller corresponded with Windsor throughout the initial stages of the claims process, both seeking and accepting partial payment directly from Windsor. Yet when Windsor attempted to pay the remaining balance due under the policy, Miller refused [**10] to accept, forcing Windsor to file suit for a legal determination of Miller's rights and Windsor's liability under the policy.

The focus of the *Windsor* suit involved the extent to which Windsor - the reinsurer of the policy - was obligated to pay under the terms of the policy. Because Windsor's liability to Miller was derivative of and coexisted with State and County Mutual's liability to Miller, to the extent that obligations under the policy were litigated in the *Windsor* suit, Miller is now collaterally estopped from relitigating those issues. The trial court in the *Windsor* suit declared that, after Windsor paid Miller a total of $ 100,000, "any or all liability of an insurer under the terms and provisions of the said insurance policy, for damages caused by or resulting from the collision of June 1, 1994 [sic] . . . shall be deemed to have been fully satisfied, in accord with the policy's per person limit." Consequently, both Windsor's and State and County Mutual's liability under the policy was fully and fairly litigated in the *Windsor* suit, and the court's factual finding that only Windsor was liable to Miller under the policy was essential to the court's judgment. [**11] These issues are identical to Miller's claims in this case involving allegations that State and County Mutual has not made a timely and full payment under the policy. Thus, after comparing the issues decided in the *Windsor* suit with the issues involved in the present case, we hold that Miller is collaterally estopped from asserting any claims regarding liability under the policy.

However, Miller has also asserted extra-contractual claims against State and County Mutual that do not directly involve the question of liability under the policy. Rather, these claims concern State and County Mutual's conduct in issuing the policy and handling Miller's claim. For example, Miller's petition alleges that State and County Mutual:

(1) represented that the Personal Auto Policy had characteristics and benefits which it did not have under the circumstances that State and County Mutual has failed to perform its duties; and

(2) represented that State and County Mutual's services were of a particular [*698] standard, quality or grade contrary to its failures of performance of its duties.

While Windsor has been legally determined to be the only company liable under the insurance policy, [**12] whether State and County Mutual made these alleged misrepresentations is a different issue. Whatever the policy actually covers has already been determined by the judgment in the *Windsor* suit: Windsor is responsible for and has already tendered the actual amount owed under the policy. But whether State and County Mutual misrepresented the policy's coverage or made other misrepresentations has not yet been determined. We express no opinion with regard to the merit of these extra-contractual claims; we simply affirm the court of appeals' judgment and remand them to the trial court for consideration in light of this opinion.

The court of appeals also held that the "law of the case" doctrine prevented it from considering whether Windsor was State and County Mutual's reinsurer. Miller alleges that this conclusion is erroneous because [HN9]"the 'law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages," and this case is not a "subsequent stage" of the *Windsor* suit. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). We agree but hold that the [**13] court of appeals is nonetheless precluded from deciding whether Windsor was State and County Mutual's reinsurer based on the doctrine of collateral estoppel. Whether Windsor was the reinsurer of Miller's policy at the time of the accident is an issue that was finally resolved in the *Windsor* suit. Accordingly, we affirm the court of appeals' conclusion but for a dif-

ferent reason: collateral estoppel, not the "law of the case," prevents the court of appeals from deciding this issue.

Because Miller has not had a full and fair litigation of the extra-contractual claims, he is not barred from asserting them in this suit. But collateral estoppel does bar Miller from suing State and County Mutual regarding liability under the same policy that was the subject matter of the *Windsor* suit.

Pursuant to Texas Rule of Appellate Procedure 59.1 and without hearing oral argument, we reverse in part the court of appeals' judgment and render judgment that Miller take nothing with regard to all claims asserted in this cause of action except for those asserting misrepresentation, which we remand to the trial court for further consideration in accordance with this opinion.

OPINION DELIVERED: [**14] January 18, 2001

**SYSCO FOOD SERVICES, INC. AND SYSCO CORPORATION; HOECHST CELANESE CORP. SPECIALTY CHEMICAL GROUP, F/K/A VIRGINIA CHEMICALS, INC., GLOBE PRODUCTS CO., INC., LAMB-WESTON, INC., ALLIED CORP., UNIVAR CORP., VAN WATERS & ROGERS, INC., AND MCKESSON CORP., PETITIONERS v. BENJAMIN TRAPNELL, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLAS TRAPNELL, A MINOR, POLLY ANN HAUGH, AND JOHN HOGAN INTERESTS, INC. D/B/A FIRST FOODS COMPANY, INC., RESPONDENTS**

**No. D-3684**

**SUPREME COURT OF TEXAS**

**890 S.W.2d 796; 1994 Tex. LEXIS 112; 37 Tex. Sup. J. 1130; CCH Prod. Liab. Rep. P13,943**

**June 22, 1994, Delivered**

**PRIOR HISTORY:** [**1] ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioners, hash brown, apple pie, and potato whitener manufacturers, appealed the judgment of the Court of Appeals for the Thirteenth District (Texas), which affirmed in part and reversed in part a grant of summary judgment in their favor in respondent relatives' products liability suit alleging negligence, deceptive trade practices, strict liability, and breach of warranty after respondents' relative died from eating petitioners' products.

**OVERVIEW:** Petitioners, hash brown, apple pie, and potato whitener manufacturers appealed a judgment in respondent relatives' products liability action. The victim died after an allergic reaction to sulfites in foods served on a navy base. Respondent relatives brought suit against petitioners, alleging negligence, deceptive trade practices, strict liability, and breach of warranty and against the Navy, alleging negligence and failure to warn of sulfites. The state court granted summary judgment to respondent food company, and the appellate court reversed. The federal court held that the Navy was not liable. The trial court granted summary judgment to petitioners. The appellate court reversed in part and affirmed in part. On appeal, the court affirmed because a fact issue existed and collateral estoppel could not be applied because doing so would not further the doctrine's goals, despite the fact that the issue of whether potato whitener was in the salad had already been fully litigated in the federal action. The doctrine's purposes were not served because it would not conserve judicial resources, and it was unfair to respondent relatives given the procedural peculiarities of the case.

**OUTCOME:** The court affirmed the appellate court's order that petitioners, hash brown, apple pie, and potato whitener manufacturers, were not entitled to summary judgment in respondent relatives' products liability action against them because a fact issue as to causation remained. Further, the court held that the doctrine of collateral estoppel should not be applied because doing so would not serve the doctrine's goals under the circumstances.

**CORE TERMS:** whitener, collateral estoppel, potato, summary judgment, sulfite, food, fruit salad, apple pie, hash, filling, causation, relitigation, non-potato, lawsuit, relitigating, preclusion, unfairness, estopped, litigated, litigate, estoppel, tort claim, nonparty, fruit bowl, prior litigation, ultimate issue, precluding, abatement, privity, manufactured

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Appellate Review > General Overview***
***Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview***
***Civil Procedure > Summary Judgment > Standards > General Overview***
[HN1]In reviewing summary judgment evidence, the issue is whether the evidence establishes as a matter of law that there is no genuine issue of fact as to one or

more of the necessary elements of the plaintiff's cause of action. The standards in reviewing summary judgment evidence are: (1) the movant for summary judgment has the burden of showing that there is no genuine issue of fact and that it is entitled to judgment as a matter of law, (2) in deciding whether there is a material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true, (3) every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN2]The doctrine of collateral estoppel or issue preclusion is designed to promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation of issues. A party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action, and (3) the parties were cast as adversaries in the first action. Strict mutuality of parties is no longer required. To satisfy the requirements of due process, it is only necessary that the party against whom the doctrine is asserted was a party or in privity with a party in the first action.

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN3]Even where an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action is not precluded when the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action.

***Administrative Law > Sovereign Immunity***
***Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview***
***Torts > Public Entity Liability > Liability > Federal Tort Claims Act > Remedies***
[HN4]Under the Federal Tort Claims Act, the federal court generally applies the tort law of the state in which the incident occurred.

***Civil Procedure > Pleading & Practice > Motion Practice > Supporting Memoranda***
***Civil Procedure > Pleading & Practice > Pleadings > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel***
[HN5]A motion must stand or fall on the grounds expressly presented in the motion.

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**JUDGES:** GAMMAGE, PHILLIPS, HIGHTOWER, DOGGETT, CORNYN, SPECTOR, ENOCH

**OPINION BY:** BOB GAMMAGE

**OPINION**

[*797] JUSTICE GAMMAGE delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HIGHTOWER, JUSTICE DOGGETT, JUSTICE CORNYN and JUSTICE SPECTOR join.

I.

This case is a products liability death action. The defendants, manufacturers and suppliers of foods containing sulfites, obtained a summary judgment in the trial court. The court of appeals reversed in part and affirmed in part. 850 S.W.2d 529. We affirm.

II.

Susan Trapnell was a chronic asthmatic. She was allergic to sulfites, a food additive used to process and preserve food. Her reactions to sulfites ranged from "asthma attacks" to, in severe cases, "anaphylactic shock." After one particularly serious episode, Susan was referred to Dr. Ronald Simon, an expert in the diagnosis and treatment of sulfite sensitive persons. [1] After [*798] testing Susan, Dr. Simon concluded that she was extremely sensitive to sulfites. Dr. Simon advised Susan to avoid certain foods which commonly contain sulfites. He counseled her that when she ate at restaurants, [**3] she should ask whether sulfites were in the foods she wished to eat. In case she accidentally ingested sulfites, Susan always carried a hypodermic syringe of epinephrine.

1 In its order of September 14, 1990, discussed below, the federal court noted that researchers have found that as many as 500,000 Americans are sulfite sensitive.

On August 5, 1984, Susan, her husband, Benjamin, and their son, Nicholas, went to the Officer's Club at the Corpus Christi Naval Air Station to dine at the buffet. Before going through the buffet line, Benjamin asked one of the cooks whether any sulfites had been used in the preparation of the fruit salad. The cook, Robert Mangohig, responded that no sulfites had been used, but offered to get Mr. Trapnell some fresh fruit from the kitchen. Mr. Trapnell declined, and the Trapnells went through the buffet line. Susan allegedly served herself fruit from the fresh fruit bowl, hash browns, apple pie filling, and other foods. Within minutes after she began eating, Susan had a violent [**4] reaction. The Trapnells immediately tried to leave the Club and go to the hospital. Susan made it only to the Club's lobby before collapsing. Benjamin administered epinephrine from the emergency kit. Before E.M.S. arrived, Susan began having seizures. E.M.S. rushed Susan to the Naval Air Station Hospital, where she arrived with no pulse. At the hospital, emergency room personnel succeeded in bringing Susan's blood pressure back. For the next several days, Susan remained unresponsive to stimuli. Susan's brain activity ceased on August 9, and on August 10, the doctors pronounced her dead. No autopsy was performed.

In summary judgment evidence, experts stated that although sulfites can be ingested from many sources, including air pollution, in their opinion Susan died as a result of eating food containing sulfites. Specifically, they identified three foods that Susan had on her plate as potentially containing sulfites: potato whitener on the fruit salad, apple pie filling, and hash browns.

The sulfite manufacturers and other parties in the chain of distribution are as follows: Potato Whitener:

Hoechst Celanese Corporation, Specialty Group (formerly known as Virginia Chemicals, [**5] Inc.), manufactured sodium metabisulfite and sold it to John Hogan Interests d/b/a First Foods Company, Inc. First Foods manufactured potato whitener from the sodium metabisulfite it acquired from Hoechst Celanese and sold it to Nordhaus. Nordhaus sold potato whitener to Sysco Food Services, Inc. of Sysco Corporation. Sysco sold potato whitener to the Officer's Club.

Hash Browns:

Allied Corporation manufactured and sold sulfites to Univar Corporation. Univar sold the sulfites to Lamb-Weston, Inc. Lamb-Weston processed hash browns and sold them to Sysco. Sysco sold the hash browns to the Officer's Club.

Apple Pie Filling:

Allied manufactured sulfites and sold them to McKesson Chemical Company. McKesson then sold sulfites to Zero Pack. Zero Pack added sulfites to apples during processing and sold them to Globe. Globe manufactured apple pie filling and sold it to Labatt Institutional Supply Company. Labatt sold apple pie filling to the Officer's Club.

III.

On May 22, 1986, the Trapnells brought suit against Sysco and other defendants in state district court, alleging negligence, Deceptive Trade Practices, strict liability, and breach of warranty. On December 22, 1986, [**6] the Trapnells filed suit against the United States Department of the Navy under the Federal Tort Claims Act ("F.T.C.A."), 28 U.S.C.A. §§ 1346(b), 2671 *et seq.* (West 1993; West 1965 & Supp. 1994). The Trapnells claimed that the Navy was negligent in using sulfites and in failing to warn Susan of the sulfites in the food they prepared.

On March 30, 1989, the federal district court issued a stay order pending the conclusion of the state suit against the manufacturers and distributors. On June 16, 1989, upon the motion of the defendants, the state district [*799] court ordered an abatement in order for the defendants to try to intervene in federal court, have the federal court stay lifted, and have all the parties litigate all claims in federal court. In a September 26, 1989 order, the federal court denied the motion to intervene on the grounds that it did not have jurisdiction over the proposed intervenors. Relying on *Finley v. United States*, 490 U.S. 545, 555-56, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989), the federal court held that the Federal Tort Claims Act does not permit the assertion of pendent jurisdiction over additional parties as to which there is no independent [**7] basis for federal jurisdiction. It held that there was no independent basis for asserting federal

jurisdiction over the proposed intervenors in this case because diversity jurisdiction requires that each defendant be a citizen of a different state from the plaintiffs, and one of the defendants (namely Sysco) did not meet this requirement. [2]

2 The procedural inefficiency of this case is a product of *Finley*. In rejecting the doctrine of pendent party jurisdiction under the Federal Tort Claims Act, the U.S. Supreme Court stated that "the efficiency and convenience of a consolidated action will sometimes have to be foregone in favor of separate actions in state and federal courts." *Finley*, 490 U.S. at 555. In 1990, Congress prospectively changed the law to give federal courts "supplemental jurisdiction" over a plaintiff's state law claims against additional parties that form part of the same case or controversy under Article III of the United States Constitution as the federal tort claim. *See* 28 U.S.C.A. § 1367(a) (West 1993) (Pub. L. 101-650 § 310(c)); *see also* David D. Siegel, *Practice Commentary*, 28 U.S.C.A. 829, 831 (West 1993) (stating that the last sentence of § 1367(a) overrules *Finley*); Cami Rae Baker, *The Codification of Pendent and Ancillary Jurisdiction: Supplemental Jurisdiction*, 27 Tulsa L.J. 247, 251 (1991) (arguing that the legislative history of § 1367 indicates that its enactment was motivated by Congress' displeasure with the *Finley* decision). The procedural circumstances present in this case are rare and are unlikely to repeat themselves, given the fact that a federal court now has limited discretion to refuse to assert pendent party jurisdiction under § 1367(a). *See* 28 U.S.C.A. § 1367(c) (West 1993).

[**8] At this point, the proceedings were at a standstill. The state trial court refused several motions to vacate its order of abatement, for reasons that are not clear from the record. The plaintiffs filed a petition for writ of mandamus in the court of appeals in which they complained of the trial court's January 5, 1990 refusal to lift its abatement order. Holding that the abatement order unconstitutionally deprived plaintiffs of a forum under the "open courts" clause of the Texas Constitution, [3] the court of appeals ordered the trial court to lift the abatement order. *Trapnell v. Hunter*, 785 S.W.2d 426, 429 (Tex. App.--Corpus Christi 1990, original proceeding) (*Trapnell* I) (opinion issued February 1, 1990).

3 TEX. CONST. art. I, § 13.

On July 31, 1990, soon after the state court complied with the court of appeals' mandate and the case proceeded to trial, the trial court granted summary judgment as to one of the defendants, First Foods. First Foods' motion for summary judgment alleged that its product [**9] did not cause Susan Trapnell's death. During the appeal of the order granting First Foods' summary judgment, the federal court lifted its stay and proceeded to try the plaintiffs' F.T.C.A. claim against the Navy. [4] On September 14, 1990, the federal court, based on its finding that no potato whitener had been added to the fruit salad, held that the Navy was not liable and rendered judgment that the plaintiffs take nothing by their claims. On September 17, 1990, the state trial court granted First Foods' motion to sever all claims against it, including the cross-claims asserted by the other defendants, enabling the plaintiffs to immediately appeal the summary judgment. On April 25, 1991, the state court of appeals reversed First Foods' summary judgment because it concluded that the motion and response raised a fact issue regarding causation. *Trapnell v. First Foods Co.*, 809 S.W.2d 606, 611 (Tex. App.--Corpus Christ 1991, writ denied) (*Trapnell* II). The court of appeals refused to consider First Foods' argument that the plaintiffs were collaterally estopped from relitigating the federal court's finding that potato whitener was not added [*800] to the fruit salad, on the [**10] grounds that collateral estoppel was not raised as a basis for summary judgment in the trial court. *See Trapnell*, 809 S.W.2d at 608.

4 The case was tried to the court because a plaintiff who sues under the Federal Tort Claims Act is not entitled to a jury. *See* 28 U.S.C.A. § 2402 (West 1978); *O'Connor v. United States*, 269 F.2d 578, 585 (2d Cir. 1959).

Meanwhile, the trial court granted summary judgments in favor of all other defendants, who had asserted in their motions for summary judgment the grounds that (1) collateral estoppel barred relitigation of the federal court's finding that potato whitener was not in the fruit salad, as to the potato whitener defendants and (2) lack of causation as to the other defendants was proven as a matter of law. [5] The court of appeals reversed in part and affirmed in part. 850 S.W.2d 529, 532 (*Trapnell* III). We affirm the court of appeals. IV.

5 The dates of the various orders granting summary judgment are as follows: (1) for Lamb-Weston: February 8, 1991; (2) for Globe: April 8, 1991; (2) for Allied and Sysco: April 18, 1991; (3) for Hoechst Celanese: April 26, 1991; and (4) for Univar, Van Waters, and McKesson: May 13, 1991.

[**11] The central issues are: (1) whether the summary judgment evidence on causation raises a fact issue so as to prevent summary judgment in favor of the hash brown and apple pie filling defendants, and (2)

whether the federal court's finding that potato whitener was not in the fruit bowl precludes the Trapnells from litigating the issue in state court. [6]

> 6 We also examine whether the summary judgment evidence raised a fact issue as to causation by potato whitener, since in their motions for summary judgment, the potato whitener defendants asserted both collateral estoppel and the absence of a fact issue on causation as grounds.

A. CAUSATION

The first question is whether the summary judgment evidence raises a fact issue sufficient to preclude summary judgment in favor of the potato whitener, hash brown, and apple pie filling defendants. [HN1]In reviewing summary judgment evidence, the issue is whether the evidence establishes as a matter of law that there is no genuine issue of fact as to one or more of the necessary [**12] elements of the plaintiff's cause of action. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). The standards in reviewing summary judgment evidence are:

(1) The movant for summary judgment has the burden of showing that there is no genuine issue of fact and that it is entitled to judgment as a matter of law.

(2) In deciding whether there is a material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

(3) Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

*Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The issue here, then, is whether the three sets of defendants carried their burden in showing that there was no genuine issue of fact as to causation. To their response to the potato whitener defendants' motions for summary judgment, the Trapnells attached the affidavits of Dr. Ronald Simon, an expert in sulfite sensitivity who had treated Susan. Dr. Simon's affidavit of July 17, 1990 raises a fact issue about whether whitener was added to the fruit salad and whether it caused Susan Trapnell's death. Dr. Simon stated that [**13] Susan probably died from potato whitener on the fruit salad. Dr. Simon based his belief on (1) the rapidity of Susan's reaction, which was consistent with the ingestion of "loose sulfites" such as those contained in potato whitener; (2) his knowledge of the likely quantity of sulfites contained in particular food products in the United States, including potato whitener; and (3) his knowledge of the amount of sulfites needed to cause a fatal reaction in Susan. The Trapnells also attached to their response the affidavit of Dr. Steve Taylor, a biochemist and professor of food science and technology. Agreeing with Dr. Simon, Dr. Taylor stated that "the fruit salad is the only food consumed by Susan Trapnell that could have contained levels of sulfites sufficient to provoke or contribute to her severe response."

As to the hash brown and apple pie filling defendants, neither established their right to summary judgment by conclusively [*801] negating the element of causation. To their motions for summary judgment, the hash brown defendants attached the same July 17, 1990 affidavit made by Dr. Simon. In the affidavit, Dr. Simon stated that although he did not believe that the hashbrowns [**14] alone contained a sufficient quantity of sulfites to cause Susan's death, they could have contributed to her death in combination with sulfites from another source, in particular the potato whitener. Dr. Simon based this opinion on data concerning the usual levels of sulfites in particular foods, including a study on the sulfite levels in hash browns and other potato products by the California Food and Drug Administration. We believe that such testimony raises a fact issue on the issue of whether the hash browns caused or contributed to Susan's death.

The apple pie defendants also attached Dr. Simon's July 17, 1990 affidavit and Dr. Taylor's affidavit to their summary judgment motions. When both the affidavits are considered, they raise a fact issue as to the apple pie filling. A juror could believe Dr. Simon's estimate that the hashbrowns contained 8 milligrams of sulfite and also believe Dr. Taylor's use of a 12.5 milligram figure for the apple pie filling. Taken together, these figures add up to 20.5 milligrams of sulfite, more than the threshold amount of 20 milligrams that both experts stated would be necessary to provoke such a severe reaction in Susan. The submission of these [**15] affidavits by the hash brown and apple pie filling defendants addresses the element of cause-in-fact, but in their summary judgment motions, none of these defendants attempts to negate foreseeability, so we do not reach the issue. Because the hash brown and apple pie filling defendants' own summary judgment evidence raises fact issues on cause-in-fact and does not purport to conclusively negate proximate cause, neither set of defendants established their right to summary judgment.

B. COLLATERAL ESTOPPEL

The court of appeals held that the federal judgment does not preclude the Trapnells from relitigating in state court whether potato whitener was in the fruit bowl. 850 S.W.2d at 535. Although we do not agree with the court's reasoning, we agree that collateral estoppel should not be applied in this case because doing so would not promote the goals served by the doctrine.

[HN2]The doctrine of collateral estoppel or issue preclusion is designed to promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation of issues. *See* Lytle v. Household Mfg. Inc., 494 U.S. 545, 553, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990); [**16] Allen v. McCurry, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980); Montana v. United States, 440 U.S. 147, 153-54, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). A party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *See* Allen, 449 U.S. at 94-95; Hicks v. Quaker Oats Co., 662 F.2d 1158, 1166 (5th Cir. 1981); Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990); Tarter v. Metropolitan Sav. & Loan Ass'n, 744 S.W.2d 926, 927 (Tex. 1988); Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984). [7] Strict mutuality of parties is no longer required. *See* Allen, 449 U.S. at 94-95; Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 349-50, [*802] 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971); Eagle Properties, 807 S.W.2d at 721. To satisfy the requirements of due process, it is only necessary that the party *against* [**17] *whom* the doctrine is asserted was a party or in privity with a party in the first action. *See* Eagle Properties, 807 S.W.2d at 721; Benson v. Wanda Petroleum Co., 468 S.W.2d 361 at 363; Michael Kimmel, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 Geo. Wash. L. Rev. 1010, 1014 (1967).

7 Although some of the defendants argue that the federal law of collateral estoppel applies in this case, we need not decide the issue. We perceive little difference between the federal courts' formulation of the doctrine and our own. *Cf.* Eagle Properties, 807 S.W.2d at 721 (declining to determine which law governed collateral estoppel because the result was the same whichever law was applied). The defendants urge that federal law applies in an attempt to avoid the plaintiffs' argument that applying collateral estoppel in this case would violate their right to a jury trial under the Texas Constitution. Because we conclude that collateral estoppel should not be applied, any difference between federal and Texas collateral estoppel law concerning the issue of the right to a jury trial under the Texas Constitution is irrelevant.

[**18] The court of appeals held that collateral estoppel should not apply because the issue to be estopped was not fully and fairly litigated in the federal trial. However, the court of appeals reached this conclusion only after improperly characterizing the issue to be estopped as "causation," rather than the more narrow issue of whether potato whitener was added to the fruit salad. [8] Since collateral estoppel is an affirmative defense, the potato whitener defendants had the burden of pointing out the issue they wished to be estopped; in their motions for summary judgment and in their briefs before this Court, they have argued only that the limited issue of whether potato whitener was added to the fruit salad has already been litigated. They specifically deny asserting any preclusive effect to any determination of causation by the federal court.

8 The court of appeals initially properly characterizes the issue to be estopped, but alters it when it begins its collateral estoppel analysis. 850 S.W.2d at 535. It reads the federal court memorandum order as concluding that potato whitener did not cause Susan's death. 850 S.W.2d at 537. It is true that if potato whitener was not present, it could not have caused Susan's death, but such reasoning should not be used to expand the scope of the federal court's finding for collateral estoppel purposes. The federal court found only that the Officer's Club staff did not use potato whitener in preparing the fruit bowl, and therefore the Navy did not breach its duty to adequately respond to Benjamin Trapnell's question regarding the presence of potato whitener in the fruit salad. The court did not, and did not need to, reach the larger issue of whether, if potato whitener was present, it caused her death. Because the federal court held that there was no breach of the Navy's duty to respond to Benjamin Trapnell's question, it did not reach the damages element of the negligence claim, which would require that the plaintiffs prove not merely that potato whitener was present but that it caused Susan's death.

[**19] When the issue is properly identified, it becomes clear that this issue was fully and fairly litigated in the federal action. *See* 1B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 0.441[3.-3] (June 1983) ("The circumstances in which it can be said that the parties to suits in the federal courts lack a 'full and fair opportunity' to present their claims and defenses are probably very limited."). The issue was necessary to the federal court's judgment that the Navy did not breach its duty to Benjamin Trapnell to adequately respond to his question. The court stated in its September 14, 1990 order that "because this court finds that the Officer's Club staff did not use potato whitener in preparing the fruit bowl, Mangohig's response fulfilled that duty." There was no difference in the burdens of proof on this issue in the federal and state actions. *See* RESTATEMENT

(SECOND) OF JUDGMENTS §§ 28(4), 29 (1982) (stating that [HN3]even where an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action is not precluded when the party against whom preclusion is sought had a [**20] significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 7 (Tex. 1986) (citing the Restatement); Geoffrey C. Hazard, Jr., *Res Nova in Res Judicata*, 44 S. Cal. L. Rev. 1036, 1044 (1971) (arguing that relitigation of an issue may be warranted where the burden of proof on that issue differs between the first and second actions). Assuming without deciding that Texas law encompasses the theory of alternative liability or the other theories of collective liability urged by the plaintiffs, the plaintiffs still have the preliminary burden of proving by a preponderance of the evidence that Susan was exposed to the allegedly harmful product, i.e., potato whitener. *See* RESTATEMENT (SECOND) OF TORTS § 433B(2) & (3) (1982) (requiring the plaintiff to first prove that the defendants acted tortiously before shifting the burden to the defendants). The federal court, applying Texas [*803] tort liability law, [9] placed the same burden on the plaintiffs with respect to this issue.

9 [HN4]Under the Federal Tort Claims Act, the federal court generally applies the tort law of the state in which the incident occurred. *See Ferrero v. United States*, 603 F.2d 510, 512 (5th Cir. 1979) ("The components and measure of damages in FTCA claims are taken from the law of the state where the tort occurred . . . ."); *Johnson v. United States*, 576 F.2d 606, 610 (5th Cir. 1978) ("In deciding cases under this Act the federal courts generally apply state law, since the Act directs the federal courts to decide liability 'in accordance with the law of the place where the act or omission occurred.'").

[**21] We also disagree that the lack of joinder of all defendants in the first action adversely affected litigation of the issue of whether potato whitener was added to the fruit salad. Although the court of appeals correctly notes that joinder of the manufacturers and suppliers of the three food products would be advantageous to the plaintiffs on the general issue of causation, the same is not necessarily true regarding this narrower issue. The Trapnells had every incentive to litigate this issue, and indeed may have been aided by the absence of the other defendants in this regard; they did not have to be concerned with proving their case against the potato whitener defendants so strongly as to cast doubt upon their claims against the hash brown and apple pie defendants. [10]

10 *See also* Michael Kimmel, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 Geo. Wash. L. Rev. 1010, 1027 (1967) (arguing that "where the claimant to be estopped was also the claimant in the prior action, his inability to join the additional and future defendant is believed to be generally immaterial to the working of estoppel as to adverse findings because he 'had full opportunity to present the same issues now presented'").

[**22] Nevertheless, we agree with the court of appeals' resolution of this case because we do not believe that the purposes of the doctrine of collateral estoppel would be served by applying it to these facts. *Cf. Lytle*, 494 U.S. at 553 (holding that "the purposes served by collateral estoppel do not justify applying the doctrine in this case"). Applying collateral estoppel against the Trapnells would not conserve judicial resources, because the parties could still relitigate the issue of whether potato whitener caused Susan Trapnell's death. A fundamental principle of collateral estoppel is that it can only be asserted against one who was a party to or in privity with a party to the prior litigation. *See Blonder-Tongue*, 402 U.S. at 329 ("Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them . . . ."); *Eagle Properties*, 807 S.W.2d at 721 (holding that "it is only necessary that the party against whom the plea of collateral estoppel is being asserted be a party or in privity with a [**23] party in the prior litigation"); *Benson*, 468 S.W.2d at 363 ("Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy . . . ."). The non-potato whitener defendants were not parties to the prior federal case, and no one has asserted that they were in privity with the Trapnells or with the Navy. Consequently, if the Trapnells were precluded by collateral estoppel from proceeding against the potato whitener defendants, the non-potato whitener defendants would still be able to argue in their absence that potato whitener was in the fruit salad and that it, not their product, caused Susan's death. [11] The goal of conserving judicial resources by preventing [*804] relitigation, then, would not be served. *See Lytle*, 494 U.S. at 553. [12]

11 Indeed, the record indicates that the non-potato whitener defendants have already begun to litigate the potato whitener issue. Hoechst Celanese points out that some of the non-potato whitener defendants such as Allied argued issue preclusion to the trial court, and that all of the defendants joined in a reply brief filed in the court of

appeals that argued for preclusion. However, neither Globe nor Lamb-Weston has argued preclusion to this Court. Lamb-Weston specifically asserts that while it is not concerned with the estoppel issue, if this court upholds the court of appeals' reversal of its summary judgment, all defendants should be present in the subsequent trial so that it can fully explore all causation issues. Moreover, the same non-potato whitener defendants that argued issue preclusion below also presented evidence of potato whitener use and causation in their motions for summary judgment and in their appellate briefs to argue that their products did not cause Susan's death.

[**24]

12 In addition, issue preclusion is likely to further complicate the trial in state court. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29(6) (1982) (listing as a factor weighing against preclusion the fact that "treating the issue as conclusively determined may complicate determination of issues in the subsequent action.")

In addition, the goal of protecting defendants from being subjected to multiple lawsuits is simply not applicable to the facts of this case. *See Montana*, 440 U.S. at 153 (stating that the application of collateral estoppel protects parties "from the expense and vexation attending multiple lawsuits"); Steven C. Malin, *Collateral Estoppel: The Fairness Exception*, 53 J. Air L. & Com. 959, 965 (1988) (same). The potato whitener defendants themselves will not have to defend two suits. *Cf. Lytle*, 494 U.S. at 553 (holding that the goal of protecting parties from multiple lawsuits was not implicated).

Application of collateral estoppel also will not necessarily prevent the possibility of inconsistent findings. Since the non-potato whitener defendants are free to [**25] raise the potato whitener issue, the jury could exonerate the non-potato whitener defendants on the basis of a finding that the potato whitener was present and caused Susan Trapnell's death. *See Tarter v. Metropolitan Savings & Loan Ass'n*, 744 S.W.2d 926, 928 (Tex. 1988) (holding that the "doctrine of collateral estoppel applies when relitigation could result in an inconsistent determination of the same ultimate *issue*" (emphasis in original)).

Application of collateral estoppel also involves considerations of fairness not encompassed by the "full and fair opportunity" inquiry. *See Blonder-Tongue*, 402 U.S. at 328 (describing the "goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases"); *Benson*, 468 S.W.2d at 362-63 ("It has been said that the rule rests upon equitable principles and upon the broad principles of justice."). [13] Given the procedural uniqueness of this case, considerations of fairness are especially important. The Trapnells were prevented from filing all of their claims in one suit by case law that has subsequently been overruled by statute. If collateral estoppel were applied, the Trapnells [**26] would face a situation in which they would be foreclosed from litigating the potato whitener issue as to one set of defendants, yet the issue would remain in the case as a defense to the Trapnells' claims against the remaining defendants. Because of a previous suit in a forum dictated by statute, they would be deprived of the opportunity to have all three sets of defendants in one trial. [14]

13 *See also* 1B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 0.441[3.-4] (June 1983) ("The 'broad discretion [to protect against unfairness],' confirmed by *Parklane Hosiery Company v. Shore* speaks, then, to unfairness not embraced by the 'full and fair opportunity.'"); Michael Kimmel, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 Geo. Wash. L. Rev. 1010, 1024 (1967) (arguing that "fairness may well be, in a particular case, a legitimate reason for denying an estoppel which is otherwise applicable"); Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 Tex. L. Rev. 63, 64 (1988) ("The worthwhile goal of repose [afforded by collateral estoppel] must be limited, at least in part, by the more important goal of individual justice.").

[**27]

14 We acknowledge Sysco's concern that refusing to apply collateral estoppel may result in unfairness to it, because if it is found liable to the Trapnells, it cannot seek contribution from the Navy. The court of appeals' argument that the potato whitener defendants' contribution rights are intact because the Navy cannot assert collateral estoppel against them confuses contribution law with the law of collateral estoppel. 850 S.W.2d at 541 n.10. Sysco and the others would be prevented from seeking contribution from the Navy because their contribution claims are derivative of the Trapnells' claims against the Navy. Because of the adverse judgment they suffered in federal court, the Trapnells probably have no further cause of action against the Navy. It would follow that none of the defendants has a derivative cause of action against the Navy. *See Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 553 (Tex. 1981); *Brown & Root, Inc. v. Rust Eng'g*, 679 S.W.2d 576, 578 (Tex. App.-Texarkana 1984, writ ref'd n.r.e.); *Nacogdoches County v. Fore*, 655 S.W.2d 347, 350 (Tex. App.-

Tyler 1983, no writ). Although we recognize this potential unfairness, it is but one consideration in our analysis. *See* Geoffrey C. Hazard, Jr., *Res Nova in Res Judicata*, 44 S. Cal. L. Rev. 1036, 1043 (1971) (recognizing that collateral estoppel involves a "multiple factor analysis and [is] hence not reducible to categorical rules that have yes-no application"). Moreover, the cases suggest that the focus of our analysis should be unfairness to the party against whom collateral estoppel is being asserted, in this case the plaintiffs. *See, e.g.*, *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977); *Rachal v. Hill*, 435 F.2d 59, 62 (5th Cir. 1970); *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mutual Casualty Co.*, 411 F.2d 88, 93-94 (3rd Cir. 1969); *see also* Michael Kimmel, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 Geo. Wash. L. Rev. 1010, 1024 (1967) (arguing that the focus of the analysis should be on the party against whom the plea is asserted).

[**28] [*805] In sum, applying collateral estoppel in this case would fulfill none of the doctrine's purposes: it would neither conserve judicial resources nor prevent multiple lawsuits. In addition, applying collateral estoppel would be unfair to the Trapnells, whose procedural predicament is not of their own making. Our holding today is a narrow one, given the unusual procedural posture of this case and the fact that statutory changes make it unlikely that this situation will recur in the future. For these reasons, collateral estoppel should not be applied here. Consequently, we need not reach and neither approve nor disapprove of the court of appeals' holding that application of collateral estoppel would violate the Trapnells' right to trial by jury under the Texas Constitution. *See* TEX. CONST. art. 1, § 15; art. 5, § 10.

Finally, we must address Allied's complaint that the court of appeals ignored its argument that collateral estoppel bars relitigating the issue of whether the Navy was aware of the risks of sulfites in processed foods. Allied contends that this issue was fully and fairly litigated in the federal trial and that regardless of whether preclusive effect is given [**29] to the potato whitener issue, relitigation of this separate issue should be precluded. Allied argues that if the plaintiffs are estopped from relitigating this issue, their claim that the defendants engaged in a conspiracy to promote the use of sulfites and restrict the dissemination of information on its dangers fails.

Whatever the merits of this argument, we cannot hold for Allied because it did not assert collateral estoppel as a ground for summary judgment in its motion in the trial court. Although Allied's memorandum in support of the motion for summary judgment raised this argument, [HN5]a "motion must stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Ind. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). Consequently, we may not uphold summary judgment for Allied on this ground.

Because we find that there is a question of fact regarding the hash brown and apple pie filling defendants and the federal judgment does not preclude the Trapnells from litigating the issue of whether potato whitener was in the fruit salad, we affirm the judgment of the court of appeals.

Bob Gammage

Justice

OPINION DELIVERED: June 22, 1994

**CONCUR BY:** CRAIG ENOCH [**30] (In Part)

**DISSENT BY:** CRAIG ENOCH (In Part)

**DISSENT**

JUSTICE ENOCH, joined by JUSTICES GONZALEZ and HECHT, concurrring in part and dissenting in part.

I concur in the Court's judgment only to the extent that it remands the Trapnells' claims against the non-potato whitener defendants. I agree that there is a fact issue as to causation that precludes summary judgment in favor of the hash brown and apple pie filling defendants.

I also agree with the Court that the Trapnells had a full and fair opportunity to litigate in the federal lawsuit the issue of the presence of potato whitener in the fruit salad. *See supra*, at . I disagree, however, with the Court's conclusion that collateral estoppel does not apply to preclude *any* of the Trapnells' claims. Collateral estoppel cannot apply to the hash brown and apple pie filling defendants because they were not parties in the prior litigation or in privity with any parties in the prior litigation. *See Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990). However, there is no principled reason why collateral estoppel should not apply to preclude the Trapnells' claims against Sysco and Hoechst, the potato whitener [**31] defendants. The Court's misapplication of the doctrine of collateral estoppel is motivated by nothing more than the Court's desire to avoid what it perceives is an unfair result. The perceived unfairness, in fact, results from the Trapnells' failure to carry their burden of proof in the federal lawsuit, when, as the Court concedes, the Trapnells had every incentive in the world to fully litigate their claims regarding the potato [*806] whitener and its presence in the fruit salad. *See supra*, at . The Court's pronouncements today abandon any principled application of the

doctrine of collateral estoppel and confuse the fundamental precepts of the doctrine. I dissent.

Were Hoechst and Sysco the only defendants in this case, there can be little question that collateral estoppel would apply to preclude the Trapnells from relitigating the presence of potato whitener in the fruit salad. As perfunctorily professed by the Court, collateral estoppel applies to promote judicial efficiency and prevent multiple lawsuits and inconsistent findings. *See supra*, at . Judicial economy is served by precluding the Trapnells from relitigating facts that were essential to [**32] their judgment against the Navy, namely the presence of potato whitener in the fruit salad, and that are essential to their claims against Hoechst and Sysco in this case. Contrary to the Court's assertion that judicial economy is served only when collateral estoppel protects a party from defending multiple suits, *supra*, at , judicial economy is served by saving the courts' time and judicial resources from unnecessary relitigation of identical issues. Michael Kimmel, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 Geo. Wash. L. Rev. 1010, 1013 (1967). When, as in this case, collateral estoppel is asserted by a nonparty as a bar against a party to the prior litigation, judicial economy may be served only by preventing the waste of judicial time and resources on relitigating identical issues. *Id.*

Similarly, were Hoechst and Sysco the only defendants, they would face liability on inconsistent judgments. The federal court found that potato whitener had not been added to the fruit salad. Hoechst and Sysco may be liable only if the jury finds that potato whitener had been added to the fruit salad. Collateral estoppel in its [**33] most fundamental application must apply "when relitigation could result in an inconsistent determination of the same ultimate issue." *Tarter v. Metropolitan Savings & Loan Ass'n*, 744 S.W.2d 926, 928 (Tex. 1988). While the presence of potato whitener in the fruit salad is not an ultimate issue as to the non-potato whitener defendants in that their liability is not predicated on whether the potato whitener was added to the fruit salad, the presence of potato whitener is an ultimate issue for Hoechst and Sysco. These defendants, who would but for some unexplained reason otherwise be entitled to rely on collateral estoppel, cannot and face liability on inconsistent determinations of the same ultimate issue.

The Court not only ignores this potential for conflicting findings but also offhandedly dismisses the prejudice to the potato whitener defendants that results if they cannot assert collateral estoppel as a defense. If, contrary to the federal court's finding, the jury concludes that potato whitener had been added to the fruit salad, Sysco and Hoechst cannot seek contribution from the Navy. *See supra*, at , n.15. The Court ignores this unfairness stating only that [**34] it must be concerned with unfairness to the Trapnells, the party against whom collateral estoppel is asserted. Considering Hoechst and Sysco, where is the harm to the Trapnells in precluding them from relitigating against those defendants whose liability is predicated on the presence of potato whitener in the salad that which the Trapnells failed to prove in their first lawsuit?

Ignoring all of the precepts and stated goals of collateral estoppel, the Court gives no principled explanation for its departure today from the traditional application of the doctrine of collateral estoppel concerning the Trapnells' claims against Hoechst and Sysco. I would hold that Hoechst and Sysco were entitled to summary judgment on their defense of collateral estoppel. On remand, the remaining parties may litigate the presence or absence of potato whitener in the fruit salad without restriction and the jury may find that Susan Trapnell's death was caused by one or more of the sulfite containing products. It is only if the jury finds that potato whitener was the sole cause of Susan Trapnell's death that the Trapnells will recover nothing. There is nothing inherently unfair in precluding recovery against [**35] the potato whitener defendants in this action when the Trapnells failed to carry their burden of proof after a full and fair opportunity to [*807] litigate the potato whitener issue in the prior litigation.

Because I conclude that collateral estoppel precludes the Trapnells' claims against Hoechst and Sysco, I would also reach and decide the Trapnells' argument that application of the doctrine of collateral estoppel in this case violates the right to a jury trial under the Texas Constitution. *See* TEX. CONST. art. I, § 15; art. V, § 10. I would hold that a prior federal court determination may have preclusive effect such that relitigation of the issue before a jury in a state court may be foreclosed and that this estoppel does not violate the right to trial by jury. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335-37, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1978).

Craig Enoch

Justice

Opinion delivered: June 22, 1994.

**Texas Water Rights Commission, et al., Petitioners v. Crow Iron Works, et al., Respondents**

**No. B-7903**

**SUPREME COURT OF TEXAS**

**582 S.W.2d 768; 1979 Tex. LEXIS 291; 22 Tex. Sup. J. 382**

**May 30, 1979**

**PRIOR HISTORY:** [**1] From Travis County, Third District

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner Texas Water Rights Commission and others sought review of the order of the Texas Appeals Court, Travis County (3rd District) reversing the trial court order that respondent unutilized water right holders' action was res judicata.

**OVERVIEW:** Respondent unutilized water right holders brought suit against petitioner Texas Water Rights Commission to set aside petitioner commission's order denying respondents' petition to upgrade the water rights awarded them or their predecessors under the judgment entered in the Lower Rio Grande Valley water rights adjudication. The trial court upheld petitioner commission's determination that the matter was res judicata. The appellate court reversed and remanded the cause for trial on the merits. The court concluded that the doctrine of res judicata, coupled with the doctrine of lis pendens, precluded the recognition of the water rights asserted by respondents. The court reversed the appellate court and affirmed the order of the trial court.

**OUTCOME:** The court reversed the appellate court and affirmed the trial court. The court held that the claims of respondent unutilized water right holders were barred by the doctrines of res judicata and lis pendens.

**CORE TERMS:** water rights, lis pendens, res judicata, inception, predecessors, conveyance, notice, cause of action, custody, good faith, unutilized, real property, pendente lite, pendency, lawsuit, decree, irrigator, equitable claim, subject matter, actually litigated, litigated, tribunal, ref'd, right to use, state authority, use of water, final judgment, per acre, commencement, allotment

**LexisNexis(R) Headnotes**

***Civil Procedure > Remedies > Lis Pendens > General Overview***
***Real Property Law > Priorities & Recording > Lis Pendens***

[HN1]The lis pendens doctrine states that a court which has acquired jurisdiction of a cause of action is entitled to proceed to the final exercise of that jurisdiction without the interference of anyone with the subject matter or res before the court. Under this doctrine, one acquiring an interest in the property involved in a lawsuit takes the interest subject to the parties' rights as finally determined by the court.

***Real Property Law > Priorities & Recording > Lis Pendens***

[HN2]He who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title. The conveyance is not annulled but is subservient to the rights of the parties in the litigation. As to the rights of the parties, the conveyance is treated as if it never had any existence; and it does not vary them.

***Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview***
***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***

[HN3]A cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. The scope of res judicata is not limited to matters actually litigated; the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit.

**COUNSEL:** Mark White, Atty. Gen., Douglas G. Caroom, Asst. Atty. Gen., Austin, King, Waite & Guerra, Neal P. King, Mission, for petitioners.

Booth, Lloyd & Simmons, Frank R. Booth, Austin, Stubbeman, McRae, Sealy, Laughlin & Browder, James W. Wilson, Austin, for respondents.

**OPINION BY:** DENTON

**OPINION**

[*769] Crow Iron Works, L.M.B. Corp., Gustave Ring and Hidalgo County Water Control and Improvement District No. 15, respondents here (hereinafter "Crow Iron Works, et al."), brought suit against the Texas Water Rights Commission, petitioner here. Several water districts intervened on behalf of the Commission. The suit seeks to set aside a Commission order denying Crow Iron Works, et al.'s petition to upgrade water rights awarded them or their predecessors under the judgment entered in the Lower Rio Grande Valley water rights adjudication. State v. Hidalgo County W.C.I.D. No. 18, 443 S.W.2d 728 (Tex.Civ.App. Corpus Christi 1969, writ ref'd n. r. e.) (hereinafter "the Valley Water Case"). The primary issue is whether the judgment in the Valley Water Case is res judicata of the water rights asserted here. The trial court upheld the Commission's [**2] determination that the Valley Water Case is res judicata of Crow Iron Works, et al.'s claims. The court of civil appeals reversed and remanded the cause for a trial on the merits. 569 S.W.2d 638. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

The Valley Water Case was a massive adjudication brought by the State of Texas in October 1956 to determine rights to the use of the United States' share of the waters of the Rio Grande between the Falcon Reservoir and the Gulf of Mexico. The case involved approximately 3,000 named defendants and 850,000 acres of land. It was not completed until 1970 when this Court refused all applications for writ of error with the notation "no reversible error." [1]

1. Both the Valley Water Case and the decision in Valmont Plantations v. State of Texas contain thorough summaries of the history of water rights along the Rio Grande. 443 S.W.2d 728, 733-39; Valmont Plantations v. State of Texas, 346 S.W.2d 853, 855-78 (Tex.Civ.App. San Antonio 1961), Aff'd, 163 Tex. 381, 355 S.W.2d 502 (1962). These two landmark cases rectified the almost hopeless confusion in Texas water law prior to those decisions. We refer to them here for the historical background material relevant to the cause before us.

[**3] The State's fifth amended petition in the Valley Water Case prayed that "the Court determine the validity and priority in point of time of each and every right to appropriate, impound, divert and use waters of the Rio Grande claimed by Defendants" and that "the Court permanently enjoin those Defendants found without valid and subsisting water rights . . . from appropriating, impounding, diverting or using waters of the Rio Grande." On September 21, 1962, the trial court took judicial custody of the waters of the Rio Grande and filed a lis pendens notice in each of the four counties affected by the suit. The notice stated:

> (S)uch suit is a cause of action which affects any and all claim of right of land in Starr, Hidalgo, Willacy and Cameron Counties, Texas, alleging any nature of right to use waters of the Rio Grande River as of October 17, 1956, or thereafter . . . . (A)ll persons hereafter that may be interested in obtaining to any land such right or rights, if any, are hereby put on notice that said suit is pending, and that the nature of the law suit is such that the final judgment will determine the nature of such right . . . .

The trial court required "all persons [**4] owning real property outside of the organized districts, claiming right to use any of the waters of the Rio Grande to make themselves parties to the suit and submit to the jurisdiction of the Court." The trial court entered its final decree on August 1, 1966. The decree divided water rights into five classes and adopted a system of weighted priorities under which water would accrue faster to higher priorities than to lower priorities.

The court of civil appeals in the Valley Water Case affirmed in part and reversed in part. The court classified the water rights of irrigators into two classes: Class A (Legal) rights and Class B (Equitable) rights. Class A rights were given those persons who had complied with the appropriation statutes of the State or whose rights had been recognized by the State. Generally, use of water prior to the commencement [*770] of the Valley Water Case, coupled with a valid paper claim to water, entitled one to a Class A right. Class B rights were given those who had been making a good faith use of the waters of the Rio Grande for irrigation purposes prior to the commencement of the Valley Water Case, but who did not qualify as Class A users. Generally, [**5] good faith

use of water without a valid paper claim entitled one to a Class B claim.

Both Class A rights and Class B rights are entitled to an allotment of up to 2.5 acre-feet per acre, but water is credited to Class A rights at a 70% Faster rate than it is credited to Class B rights. As a practical matter, the difference between Class A rights and Class B rights is that in times of extreme drought when there is insufficient water to provide everyone with the full 2.5 acre-feet per acre allotment, Class B will suffer proportionally greater shortages than Class A rights.

Crow Iron Works, et al. purchased unutilized paper water rights from entities who were parties to the Valley Water Case. Crow Iron Works, L.M.B. Corp. and Hidalgo County W.C.I.D. No. 15 all purchased their rights from Louis B. Hexter, a party to the suit and a good faith irrigator prior to the inception of the suit. Hexter purchased these unutilized rights from Border Development Co. through Hidalgo County W.C.I.D. No. 1. The purchase occurred after the inception of the suit but before the lis pendens notice in 1962 and before the entry of final judgment in 1966. Similarly, Gustave Ring, a party to the suit, [**6] purchased his rights from Hidalgo and Willacy County W.C.I.D. No. 1, also a party to the suit. Gustave Ring was a good faith irrigator before the inception of the suit, but purchased these unutilized paper rights during the pendency of the suit. Both Hexter and Ring were awarded Class B rights in the Valley Water Case.

The court of civil appeals in the Valley Water Case discussed Hexter's claims in its per curiam unpublished supplemental opinion:

> A claim is made for a Class I (trial court) priority which would place these lands in Class A as established by this court. This claim is based upon the conveyance of a water right from Hidalgo County Water Control and Improvement District No. One to Border Development Company and then to Hexter.
>
> The date of this conveyance is long after the court took judicial custody of the American waters of the Rio Grande. See, statement relating to Hidalgo County Water Control and Improvement District No. Thirteen.
>
> Hidalgo County Water Control and Improvement District No. Thirteen . . . . It may be that such state authority as will control and regulate the waters of the Rio Grande after the determination of this suit would [**7] be empowered to make some adjustment in this situation, but Neither the trial court nor this court in the present cause can recognize contracts or actions taken by parties, pendente lite, while the Rio Grande waters were in judicial custody.

State v. Hidalgo County W.C.I.D. No. 18, No. 261 at 9, 10-11 (Tex.Civ.App. Corpus Christi 1969, writ ref'd n. r. e.) (unreported) (emphasis added).

With respect to Gustave Ring's claims under the rights conveyed by Hidalgo and Willacy W.C.I.D. No. 1, the court of civil appeals stated:

> It appears that subsequent to the filing of this suit and the trial court's action in taking judicial custody of the American waters of the Rio Grande, there were in some instances (Gustave Ring included) additional contracts executed by the district which, so it is contended, operated to vest a legal title to a water right in some of the Willacy County claimants. Because these contracts or purported conveyances were executed pendente lite, we cannot recognize them as forming a basis for an equitable claim or raising an equitable claim to a legal status.

443 S.W.2d at 754 (emphasis added).

The court of civil appeals judgment on rehearing in [**8] the Valley Water Case concludes:

> [*771] It is FURTHER ORDERED, ADJUDGED AND DECREED by the Court that any and all relief sought by any party hereto which is not specifically granted herein be, and the same is hereby denied.

Crow Iron Works, et al. contend that the court of civil appeals reserved the question of the status of their water rights by the above passages. This contention is without merit. We interpret the above passages as applications of the doctrine of lis pendens. We conclude that the doctrine of res judicata, coupled with the doctrine of lis pendens, precludes the recognition of the water rights asserted here.

Generally, the [HN1]lis pendens doctrine states that a court which has acquired jurisdiction of a cause of action is entitled to proceed to the final exercise of that jurisdiction without the interference of anyone with the subject matter or res before the court. See, 37 Tex.Jur.2d, Lis Pendens, § 1 (1962); Olds, Lis Pendens, Hous.L.Rev. 221 (1966). Under this doctrine, one acquiring an interest in the property involved in a lawsuit takes the interest subject to the parties' rights as finally determined by the court. 5 G. Thompson, Commentaries [**9] on the Modern Law of Real Property § 4508, at 391 (1924 & Supp.1958); 5 H. Tiffany, the Law of Real Property § 1294, at 82 (1939 & Supp.1979). Mr. Justice Joseph Story expressed the rule and rationale of lis pendens as follows:

> [HN2](H)e who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title . . . . (I)t is a rule founded upon a great public policy; for, otherwise, alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, Pendente lite, nihil innovetur ; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of the parties, the conveyance is treated as if it never had any existence; and it does not vary them.

1 J. Story, Equity Jurisprudence § 406 (6th ed. 1853) (footnotes omitted). Texas courts follow the lis pendens rule. Hartel v. Dishman, 135 Tex. 600, 145 S.W.2d 865 (1940); Rio Bravo Oil Co. v. Hebert, 130 Tex. 1, 106 S.W.2d 242 (1937).

In the Valley Water Case, the court exercised jurisdiction over all claims to [**10] water rights in the lower Rio Grande. The predecessors of Crow Iron Works, et al. were parties to this suit and therefore had notice of the extent of the lawsuit. During the pendency of the litigation the predecessors purchased unutilized paper water rights from the parties who owned them at the inception of the lawsuit. In this context, the language of the court of civil appeal's opinion in the Valley Water Case is nothing more than a pronouncement of the lis pendens doctrine. The court was protecting its power to determine the water rights as they existed at the inception of the litigation. The language indicates that persons were not allowed to litigate rights which they claimed as a result of contracts executed pendente lite. This by no means authorized the litigation of these rights at a later time. The language in the court of civil appeals opinion indicating that a state authority might be empowered "to make some adjustment in this situation" means that Crow Iron Works, et al. might seek to have that state agency recognize in them the portion of the rights their predecessors transferred to them. Nevertheless, this would afford them only those rights which the adjudication [**11] granted their predecessors who were the parties entitled to assert the rights at the inception of the litigation.

The doctrine of res judicata states that [HN3]a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. Steakley & Howell, Ruminations on Res Judicata, 28 Sw. L.J. 355 (1974). The scope of res judicata is not limited to matters actually litigated; the judgment in the first suit precludes a second action by the parties and their privies [*772] not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit. Griffin v. Holiday Inns of America, 496 S.W.2d 535 (Tex.1973); Abbott Laboratories v. Gravis, 470 S.W.2d 639 (Tex.1971); Ogletree v. Crates, 363 S.W.2d 431 (Tex.1963); Hanrick v. Gurley, 93 Tex. 458, 56 S.W. 330 (1900).

All the requirements of res judicata have been shown in this cause. Although the record does not reveal whether Crow Iron Works, et al.'s predecessors at the time of the inception [**12] of the litigation asserted the water rights in question here, they might have asserted these rights. We therefore hold that the judgment in the Valley Water Case is res judicata of the water rights asserted by Crow Iron Works, et al. Most of the policy considerations underlying the doctrine of res judicata, including the desirability of stable decisions and economy of court time, require this holding. See, Steakley & Howell, Supra at 358-59.

The judgment of the court of civil appeals is reversed and the judgment of the trial court is affirmed.

JOHNSON, J., not sitting.

**WINGFOOT ENTERPRISES D/B/A TANDEM STAFFING, PETITIONER v. MARLENY ALVARADO, RESPONDENT**

**NO. 01-0825**

**SUPREME COURT OF TEXAS**

**111 S.W.3d 134; 2003 Tex. LEXIS 118; 46 Tex. Sup. J. 959**

**September 18, 2002, Argued**
**July 3, 2003, Delivered**

**PRIOR HISTORY:** [**1] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS.
Alvarado v. Wingfoot Enters., 53 S.W.3d 720, 2001 Tex. App. LEXIS 5003 (Tex. App. Houston 1st Dist., 2001)

**DISPOSITION:** Reversed. Judgment rendered.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner temporary agency petitioned for review of the reversal by the Court of Appeals for the First District of Texas of the summary judgment for the temporary agency on respondent workers' compensation claimant's negligence claim. The claimant did not appeal from the judgment upon a jury verdict for the hiring employer or the affirmance of the entry of summary judgment for the temporary agency on the claimant's gross negligence claim.

**OVERVIEW:** The issue was whether the claimant could have more than one employer for purposes of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq. The judgment for the client was based on the jury's finding that the claimant was a borrowed employee. The claimant was covered by the client's workers' compensation policy, which was the claimant's exclusive remedy against the client. The State's highest court held that the claimant was also an employee of the temporary agency and was covered by its worker's compensation policy, leaving the claimant with no recovery under the common law. The temporary agency fell squarely within the Act's definition of employer. For purposes of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., a claimant could have more than one employer where a temporary agency furnished a worker to a client that controlled the details of the work at the time the worker was injured and where there was no agreement between the temporary agency and the client as to workers' compensation coverage. Cases to the contrary were wrongly decided.

**OUTCOME:** The intermediate court's judgment was reversed. Judgment was rendered for the temporary agency, and judgment was rendered providing that the claimant take nothing.

**CORE TERMS:** workers' compensation, exclusive remedy provision, temporary, leasing, coverage, general employer, industrial, entity, summary judgment, co-employer, contractor, provider, staff, insurance coverage, common-law, right to control, assigned, hired, subcontractor, borrowed servant, negligence claim, independent contractor, right-to-control, general contractor, law claims, definitions of employer, license holder, contracted, staffing, immune

**LexisNexis(R) Headnotes**

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
***Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN1]The general definitions section of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., defines an employer at Tex. Lab. Code Ann. § 401.011(18).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
***Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN2]See Tex. Lab. Code Ann. § 401.011(18).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
***Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN3]For purposes of the definition of an employer at Tex. Lab. Code Ann. § 401.011(18), an employer has "workers' compensation insurance coverage" if the employer has either obtained an approved insurance policy or secured the payment of compensation through self-insurance as provided under Tex. Lab. Code Ann. § 401.011(44) of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq. In the sections of the Act dealing with coverage election, "employer" is defined as a person who employs one or more employees. Tex. Lab. Code Ann. § 406.001.

***Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements***
[HN4]See Tex. Lab. Code Ann. § 401.011(44).

***Insurance Law > Life Insurance > Beneficiaries > General Overview***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview***
[HN5]See Tex. Lab. Code Ann. § 408.001(a).

***Torts > Negligence > Defenses > Contributory Negligence > General Overview***
***Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity***
[HN6]If an employer, i.e., "a person who employs one or more employees," under Tex. Lab. Code Ann. § 406.001, elects not to obtain workers' compensation insurance, that employer is subject to common-law negligence claims and may not assert certain defenses, including contributory negligence, assumed risk, or that the injury or death was caused by a fellow employee. Tex. Lab. Code Ann. § 406.033.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > General Overview***
[HN7]See Tex. Lab. Code Ann. § 401.012.

***Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview***
[HN8]Tex. Lab. Code Ann. § 401.011(12) of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., defines "course and scope of employment."

***Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview***
[HN9]See Tex. Lab. Code Ann. § 401.011(12).

***Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata***
[HN10]Res judicata prevents the relitigation of a claim or cause of action that has been finally adjudicated in an earlier suit, but only when the parties in the first suit are the same as those in the second suit or are in privity with them.

***Governments > Legislation > Interpretation***
***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN11]The appellate court applies the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., as written in determining workers' compensation issues.

***Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview***
[HN12]While it seems to be the rule that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing work, yet it seems to be held by the weight of authority that violation of instructions which are intended to limit the scope of employment will prevent a recovery of compensation.

***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN13]In examining the Texas Labor Code's overall scheme for workers' compensation and for protecting workers, the appellate court concludes that the decided bias of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., in favor of employers elect-

ing to provide coverage for their employees supports a conclusion that the Act permits more than one employer for workers' compensation purposes.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN14]Tex. Lab. Code Ann. § 92.002(7) recognizes that an employer may be in the business of providing temporary workers to others.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN15]See Tex. Lab. Code Ann. § 92.002(7).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN16]See Tex. Lab. Code Ann. § 92.002(3).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN17]See Tex. Lab. Code Ann. § 92.002(8).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN18]There is some regulation of temporary common worker employers under Tex. Lab. Code Ann. §§ 92.002, 92.011, 92.012, 92.022, 92.024, and 92.025, but it is not as extensive as the regulation of a staff leasing service provider under Tex. Lab. Code Ann. ch. 91.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN19]The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., by definition, does not cover the providers of temporary workers. Tex. Lab. Code Ann. § 91.001(14(a) and (D).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN20]See Tex. Lab. Code Ann. § 91.001(14)(A) and (D).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
***Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview***
[HN21]Tex. Lab. Code Ann. § 91.001(14) of the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., applies to arrangements in which the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force consists of assigned employees of the license holder.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview***
[HN22]The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., contemplates that one workers' compensation policy procured by the staff leasing service company will cover employees leased to a client company, and that both the leasing company and the client may rely on the exclusive remedy provision of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
[HN23]See Tex. Lab. Code Ann. § 91.006(a).

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
[HN24]Under Tex. Lab. Code Ann. § 91.042(d), a license holder elects for both itself and a client company whether to provide workers' compensation insurance.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
[HN25]The Texas Labor Code expressly addresses "co-employees" in the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq. Under Tex. Lab. Code Ann. § 91.001(14), staff leasing service companies do not meet the requirement of that Act unless employment responsibilities are in fact shared by the license holder and the client company. A contract between a staff leasing service company and a client must provide that the leasing company shares, as provided by Tex. Lab. Code Ann. § 91.032(b), with the client company the right of direction and control over employees assigned to a client's worksites. Section 91.032(a)(1).

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***

[HN26]See Tex. Lab. Code Ann. § 91.032(b)(1).

***Contracts Law > Types of Contracts > Lease Agreements > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
[HN27]Under the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., a staff leasing company makes the election of whether to provide workers' compensation insurance coverage for both itself and the client company for the employees it leases. If a leasing company elects coverage, its policy covers both the leasing company and its client company as to the leased employees.

***Insurance Law > Claims & Contracts > Premiums***
***Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview***
***Workers' Compensation & SSDI > Coverage > General Overview***
[HN28]The premium for workers' compensation coverage is determined under the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., based on the client company's experience rating for the first two years of the client company's contract. Tex. Code Ann. § 91.042(b). But thereafter, the client company may obtain coverage for the leased employees, and the premium may be based on other factors in the circumstances described in the Act. Tex. Lab. Code Ann. § 91.042(e). If the leasing company elects not to obtain workers' compensation coverage, both the leasing company and its client are subject to Tex. Lab. Code Ann. § 406.033 with regard to the leased employees. Section 406.033 permits negligence suits and prevents the assertion of certain common law defenses by employers. Tex. Lab. Code Ann. § 91.042(d).

***Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Contractors***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN29]The Texas Labor Code recognizes that a general contractor may procure workers' compensation coverage for subcontractors and subcontractors' employees. Tex. Lab. Code Ann. § 406.123(a). A motor carrier, defined at Tex. Lab. Code Ann. § 406.121(3), may provide workers' compensation to an owner operator, defined under Tex. Lab. Code Ann. § 406.121(4), and employees of an owner operator. Tex. Lab. Code Ann. § 406.123(c). Tex. Lab. Code Ann. § 406.121(a) provides that a written agreement to provide coverage makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of Texas. Tex. Lab. Code Ann. § 406.123(e).

***Real Property Law > Construction Law > Contractors & Subcontractors***
***Torts > Premises Liability & Property > General Premises Liability > Defenses > Independent Contractors***
***Workers' Compensation & SSDI > Coverage > General Overview***
[HN30]Provisions similar to Tex. Lab. Code Ann. § 406.123(e) were contained in prior legislation. 1989 Tex. Gen. Laws 1 and 1983 Tex. Gen. Laws 5210. That legislation has been construed to mean that when a premises owner agreed to procure workers' compensation coverage for its general contractor and the general contractor's subcontractor, a negligence suit by the subcontractor's employee against both the general contractor and the subcontractor was barred by the exclusive remedy provision of the workers' compensation legislation in effect in 1991.

***Contracts Law > Types of Contracts > Lease Agreements > Personalty Leases > General Overview***
***Workers' Compensation & SSDI > Benefit Determinations > General Overview***
***Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements***
[HN31]The Texas Labor Code expressly recognizes the existence of employers who engage in the business of providing temporary workers to others. The Texas Labor Code does not abhor the concept of two employers for workers' compensation purposes. The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., and Tex. Lab. Code Ann. § 406.123 (covering general contractors and subcontractors), like other workers' compensation provisions in the Texas Labor Code, encourage employers to obtain workers' compensation insurance coverage by providing benefits to the employer, including the exclusive remedy provision, if coverage is obtained. The Texas Staff Leasing Services Act. Tex. Lab. Code Ann. § 91.001 et seq., goes further and provides disincentives, such as removing common law defenses, if coverage is not obtained.

***Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview***
***Workers' Compensation & SSDI > Compensability > Injuries > General Overview***

***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Employees & Employers***

[HN32]The Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., has been adopted to provide prompt remuneration to employees who sustain injuries in the course and scope of their employment. The Act relieves employees of the burden of proving their employer's negligence, and instead provides timely compensation for injuries sustained on-the-job. In exchange for this prompt recovery, the Act prohibits an employee from seeking common-law remedies from his employer, as well as his employer's agents, servants, and employees, for personal injuries sustained in the course and scope of his employment. These purposes of the Act are carried out by recognizing that the express definitions of "employer" and "employee" and the exclusive remedy provision may apply to more than one employer.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
***Workers' Compensation & SSDI > Defenses > General Overview***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity***

[HN33]An employee injured while working under the direct supervision of a client company is conducting the business of both the general employer and that employer's client. The employee should be able to pursue workers' compensation benefits from either. If either has elected not to provide coverage, but still qualifies as an "employer" under the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., then that employer should be subject to common law liability without the benefit of the defenses enumerated in Tex. Lab. Code Ann. § 406.033. The purposes underlying the Act and its definitions of "employer" and "employee" indicate that the general employer is, and should be, an "employer" of a temporary worker even if a client company directs the details of that employee's work when the employee is injured.

***Governments > State & Territorial Governments > Claims By & Against***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview***

[HN34]In a number of jurisdictions other than Texas, either by statute or case law, both a general employer and one who borrows that employer's employee are immune from common-law suit under statutory provisions similar to Texas's exclusive remedy provision, if one or both maintain workers' compensation coverage.

***Labor & Employment Law > Employer Liability > Third Party Insurers***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***

[HN35]See Cal. Ins. Code § 11663.

***Governments > State & Territorial Governments > Claims By & Against***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law***

[HN36]Under the Alaska special employment doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned. It has been implied that both companies are immune from negligence claims.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law***

[HN37]Under Alabama law, there is a line of cases that for workers' compensation purposes a temporary services employee is the employee of both his or her general employer (i.e., the employment agency) and his or her special employer (i.e., the employer to which the employment agency assigned the employee to work.

***Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview***
***Workers' Compensation & SSDI > Coverage > General Overview***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview***

[HN38]Under Arizona law, when a labor contractor supplies or lends its employee to another employer, the result may be an arrangement in which one employee has two employers. The significance of this arrangement is that both employers are liable for workers' compensation and both are immune from tort liability for injuries received by the employee. The exclusivity of workers' compensation coverage as a remedy is based on the existence of an employment relationship. That relationship exists between the plaintiff and two employers. Thus, both the general and special employer are entitled to immunity under the exclusive remedy provision.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law***
[HN39]Under Oklahoma law, it has been held that a construction worker was the employee of both the lending and borrowing employer, and because the borrowing employer reimbursed the lender for compensation insurance costs, the borrower was immune from suit on common law claims.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN40]Under Rhode Island law, a general employer remains liable for workers' compensation benefits even though a special employer has control and direction over the employee's work and the employee is injured while operating equipment contrary to the general employer's instruction.

***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN41]The appellate court finds nothing in the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., that precludes applying its definitions to both a general employer that provides temporary workers and that employer's client company when the general employer, its client, and the employee fit within the express definitions. To the contrary, the purposes of the Act are promoted in giving effect to definitions of "employer" and "employee" when they fit both a provider of temporary workers and its client.

***Governments > Courts > Common Law***
***Labor & Employment Law > Employment Relationships > At-Will Employment > Employees***
***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview***
[HN42]The common law has been dramatically engrafted upon by the legislature. Where the common law is revised by statute, the statute controls. The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., can result as a practical matter in a split workforce, meaning that some employees have workers' compensation coverage while others do not. This does not deter the appellate court from applying the Act as written, even though there is a long common-law history prohibiting a split workforce.

***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN43]The Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., has express definitions of "employer" and "employee" that should be given effect when applicable, even if that results in an employee's having more than one employer for purposes of workers' compensation. As we have seen, nothing in the Act provides that there must be only one "employer" for workers' compensation purposes. Furthermore, nothing in the common-law decisions of the appellate court is at odds with the concept that an employee may have two employers for workers' compensation purposes.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN44]Generally, courts determine whether the subscribing company is the worker's employer under the right-of-control test. But that statement cannot be lifted out of context and stretched to mean that there can be only one "employer" for workers' compensation purposes.

***Torts > Vicarious Liability > Employers > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers***
[HN45]The concept that there can be two employers for workers' compensation purposes is not foreclosed by the right to control principles that we have articulated in the tort context in analyzing respondeat-superior and borrowed-servant principles. A general employee of one employer may become the borrowed servant of another with respect to some activities. The common-law principles that define when there will be vicarious liability are designed to assign liability for injury to third parties to the party who was directing the details of the negligent actor's conduct when that negligence occurred. Deter-

mining whether a general employer remains an "employer" for workers' compensation purposes while its employee is acting as the borrowed servant of another is not governed by the same concerns.

***Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview***
[HN46]At least two courts of appeals have concluded that the common-law right to control test does not deprive an employer of the benefit of the exclusive remedy provision in the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., when an employee is injured while the details of that employee's work are under the control of another.

***Workers' Compensation & SSDI > Benefit Determinations > General Overview***
***Workers' Compensation & SSDI > Coverage > Employment Relationships > Contractors***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview***
[HN47]Where a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' Compensation Commission, the worker's common law claim against that company is barred by the exclusive remedy provision in the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., even if control over the details of the work is in the hands of the other company with which that company has contracted.

***Labor & Employment Law > Employment Relationships > At-Will Employment > Employers***
***Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview***
***Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity***
[HN48]Smith v. Otis Engineering Corp., 670 S.W.2d 750 (Tex. Civ. App. 1984) and Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. Civ. App. 1991) were incorrectly decided. Because the holdings in Smith and Archem that there can be only one employer for workers' compensation purposes are at odds with the purposes and policies of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., those decisions are disapproved. The appellate court also disapproves of similar language in Coronado v. Schoenmann Produce Co., 99 S.W.3d 741 (Tex. Civ. App. 2003).

**JUDGES:** JUSTICE OWEN delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE JEFFERSON, JUSTICE SMITH and JUSTICE WAINWRIGHT joined. JUSTICE ENOCH filed a concurring opinion. JUSTICE SCHNEIDER did not participate in the decision.

**OPINION BY:** Priscilla R. Owen

**OPINION**

[*134] The issue in this case is whether an employee can have more than one employer [*135] for purposes of the Workers' Compensation Act and its exclusive remedy provision. [1] We conclude that there can be more than one employer, and that the trial court correctly granted summary judgment in favor of Wingfoot Enterprises d/b/a Tandem Staffing ("Tandem"), a temporary staffing provider that employed Marleny Alvarado. Because the court of appeals concluded otherwise, we reverse the court of appeals' judgment [2] and render judgment that Alvarado take nothing.

1 *See* TEX. LAB. CODE § 408.001.
2 53 S.W.3d 720.

[**2] **I**

Tandem is in the business of providing temporary general labor to various industrial companies. [3] Tandem had an oral agreement to provide temporary workers to Web Assembly, Inc. Under the agreement, Tandem had sole responsibility for all aspects of hiring, screening, and terminating employees sent to Web. Tandem was also responsible for paying the employees' salaries, unemployment taxes, social security taxes, and for withholding federal income taxes. However, there was no express agreement regarding workers' compensation coverage for the temporary employees. There was evidence that Web "assumed" that Tandem's fees were sufficient to cover the cost of workers' compensation insurance.

3 Tandem is not, however, a "staff leasing services company" as defined and regulated by the Staff Leasing Services Act. *See* TEX. LAB. CODE §§ 91.001 *et seq*.

Tandem gave its employees details about their job assignments at Web and provided basic safety equipment and training. Tandem [**3] also had supervisors on-site at Web to check employees in, to get them started work-

ing promptly, to issue them proper safety equipment, and to monitor their breaks and lunch hours. Web supervised the specific tasks performed by the temporary employees, but Tandem retained the right to determine which employees would perform a particular task for Web, could substitute a different employee to perform a particular task, and could reassign an employee to another task.

Tandem hired Marleny Alvarado and, shortly thereafter, assigned her to do manual assembly work at Web's manufacturing facility. Web, however, assigned Alvarado to operate a staking or stamping machine. It was against Tandem's policy for its workers to operate industrial machinery, a policy of which Alvarado was aware. Alvarado did not notify Tandem about this job assignment or that the job was unsuitable or unsafe, as she was required to do, but there was evidence that Tandem's on-site supervisor knew Alvarado was operating the machine. About two days after Alvarado began working at Web's facility, the tips of three of her fingers were severed while she was operating the machine.

At the time of Alvarado's injury, Tandem [**4] maintained workers' compensation insurance coverage for Alvarado and its other employees. Web also had workers' compensation insurance coverage for its employees. Alvarado applied for and received workers' compensation benefits under Tandem's policy, but she subsequently sued Tandem, claiming that it was negligent and grossly negligent in a number of ways, alleging generally that Tandem failed to properly train and supervise her, warn her of dangers, and provide her with a safe workplace. Alvarado also sued Web.

Tandem moved for summary judgment [*136] under both Rule 166a(c) and 166a(i), [4] arguing, among other things, that there was no evidence to support Alvarado's claims or, alternatively, that the Texas Workers' Compensation Act's exclusive remedy provision barred Alvarado's claims because Tandem was Alvarado's employer or co-employer at the time she was injured. The day before trial, the trial court granted both of Tandem's motions for summary judgment without stating its reasons. The trial court did not sever Tandem from the case, but proceeded with a jury trial only on Alvarado's claims against Web. Tandem did not participate in the trial. The jury found that Alvarado was Web's "borrowed [**5] employee" at the time she was injured. The charge instructed the jury that "one who would otherwise be in the general employment of one employer is a 'borrowed employee' of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about." Because Web had workers' compensation coverage, the trial court rendered final judgment in its favor based on the exclusive remedy provision of the Workers' Compensation Act. [5] That same judgment also made the prior summary judgments granted in favor of Tandem final, resulting in a take-nothing judgment against Alvarado.

4 TEX. R. CIV. P. 166a(c), (i).
5 *See* TEX. LAB. CODE § 408.001.

Alvarado appealed the summary judgment in favor of Tandem, but did not appeal the judgment in favor of Web. The court of appeals affirmed the summary judgment on Alvarado's gross negligence claim, but reversed the judgment on Alvarado's negligence claim, holding that there is some [**6] evidence to support that claim. [6] With regard to Tandem's contention that it is entitled to the protection of the exclusive remedy provision of the Workers' Compensation Act, the court of appeals concluded that an injured worker can have only one employer for workers' compensation purposes and found there is a fact question as to whether Tandem or Web was Alvarado's employer at the time she was injured, precluding summary judgment in Tandem's favor. [7] In so holding, the court of appeals applied a common-law "right to control" test and found that there is some evidence that both Tandem and Web had the right to control Alvarado's work when she was injured. [8] Because Alvarado did not appeal the adverse jury finding that she was Web's borrowed employee and because Tandem was not a party to the trial of that issue, the court of appeals did not address the jury's finding.

6 53 S.W.3d at 726-27.
7 *Id.* at 724-25.
8 *Id.*

Tandem filed a petition for review in this Court, [**7] reasserting both the exclusive remedy provision of the Workers' Compensation Act and, alternatively, the contention that there is no evidence that it was negligent. Alvarado does not seek review of the court of appeals' adverse judgment on her gross negligence claim. Therefore, the only claim before this Court is Alvarado's negligence claim against Tandem.

We granted Tandem's petition to resolve differing views among the courts of appeals as to whether a general employer [9] that provides workers' compensation coverage for an employee is precluded from relying on the exclusive remedy provision of the Workers' Compensation Act if the employee was injured while the details of [*137] the employee's work were under the control and supervision of another entity. [10] Because we conclude that Tandem was entitled to summary judgment based on the exclusive remedy provision, we do not consider Tandem's no evidence points.

9 We use the term "general employer" in this opinion to refer to a provider of temporary work-

ers that employs a worker who is then assigned to work for a client of the provider.

10 *Compare* Chapa v. Koch Ref. Co., 985 S.W.2d 158, 161 (Tex. App.-Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153, 43 Tex. Sup. Ct. J. 204 (Tex. 1999) (holding that workers' compensation was injured worker's exclusive remedy against both the leasing company and the client company because both provided workers' compensation benefits, the worker recovered benefits from the leasing company, and the client company had the right to control the employee's work activities), *and* Tex. Indus. Contractors, Inc. v. Ammean, 18 S.W.3d 828, 831 (Tex. App.-Beaumont 2000, pet. dism'd by agr.) (holding that general employer was entitled to rely on the exclusive remedy provision even though there was some evidence that premises owner exercised control over the injury-producing activity because the general employer had workers' compensation insurance, and the injured employee accepted benefits under that policy), *with* Coronado v. Schoenmann Produce Co., 99 S.W.3d 741, 753 (Tex. App.-Houston [14th Dist.] 2003, no pet.) (concluding that when "one entity borrows another's employee, workers' compensation law identifies one party as the 'employer' and treats all others as third parties"), Alvarado, 53 S.W.3d at 724-25 (holding that leasing company and client company were not co-employers of injured worker, and leasing company was not entitled to summary judgment based on the exclusive remedy provision because there was a fact question about whether the leasing company or the client company had the right to control the employee's activities when she was injured), Archem Co. v. Austin Indus., Inc., 804 S.W.2d 268, 270-71 (Tex. App.-Houston [1st Dist.] 1991, no writ) (holding that an employee can have only one employer for workers' compensation purposes and that is the person or entity with the "right to control" the employee at the time of the accident), *and* Smith v. Otis Eng'g Corp., 670 S.W.2d 750, 751-52 (Tex. App.-Houston [1st Dist.] 1984, no writ) (holding that the person or entity with the right to control the injured worker at the time of the accident is the only employer for workers' compensation purposes).

[**8] **II**

The starting point in our analysis is the Texas Workers' Compensation Act. [11] [HN1]The general definitions section of the Act defines an employer:

[HN2]"Employer" means, unless otherwise specified, a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage. The term includes a governmental entity that self-insures, either individually or collectively. [12]

11 TEX. LAB. CODE §§ 401.001 *et seq*.

12 *Id.* § 401.011(18).

[HN3]

For purposes of the foregoing definition, an employer has "workers' compensation insurance coverage" if the employer has either obtained an approved insurance policy or secured the payment of compensation through self-insurance as provided under the Act. [13] In the sections of the Act dealing with coverage election, "employer" [**9] is defined as "a person who employs one or more employees." [14]

13 Section 401.011(44) defines "Workers' Compensation insurance coverage":

> [HN4]"Workers' compensation insurance coverage" means:
>
> (A) an approved insurance policy to secure the payment of compensation;
>
> (B) coverage to secure the payment of compensation through self-insurance as provided by this subtitle; or
>
> (C) coverage provided by a governmental entity to secure the payment of compensation.

*Id.* § 401.011(44).

14 *Id.* § 406.001.

The exclusive remedy provision of the Act says, [HN5]"Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or [*138] employee of the employer for the death of or a work-related injury sustained by the employee." [15] But [HN6]if an employer, i.e., "a person who employs one or more employees," [16] elects not to obtain workers' compensation insurance, that employer is subject to common-law [**10] negligence claims and may not assert certain defenses, including contributory negligence, assumed risk, or that the injury or death was caused by a fellow employee. [17]

15 *Id.* § 408.001(a).

16 *Id.* § 406.001.

17 *Id.* § 406.033.

The Act also defines "employee":

(a) [HN7]In this subtitle, "employee" means each person in the service of another under a contract of hire, whether express or implied, or oral or written.

(b) The term "employee" includes:

(1) an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business;

(2) a person, other than an independent contractor or the employee of an independent contractor, who is engaged in construction, remodeling, or repair work for the employer at the premises of the employer; and

(3) a person who is a trainee under the Texans Work program established under Chapter 308.

(c) The term "employee" does not include:

[**11] (1) a master of or a seaman on a vessel engaged in interstate or foreign commerce; or

(2) a person whose employment is not in the usual course and scope of the employer's business. [18]

18 *Id.* § 401.012(a), (b), (c).

[HN8]The Workers' Compensation Act defines "course and scope of employment" to mean, in pertinent part, [HN9]an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. . . . [19]

19 *Id.* § 401.011(12).

Alvarado concedes that she is Tandem's employee for some purposes, and the summary judgment evidence conclusively establishes that she is. [**12] Tandem made all decisions regarding Alvarado's employment, including whether to hire her, fire her, and determining the client companies for whom she would work. Tandem paid Alvarado's salary, withheld taxes, and provided training and benefits. At the time she was injured, Alvarado was working at Web's facility pursuant to Tandem's direction, to serve Tandem's business purposes. While at Web, Tandem provided some degree of on-site supervision and required Alvarado to report any unsafe conditions to Tandem and any deviations in job assignment to Tandem.

But Alvarado contends that when Web took control of the details of her work, she ceased to be an employee of Tandem for workers' compensation purposes. She argues that when one entity "borrows" another's employee, workers' compensation law identifies one party as the employer and treats all others as third parties, citing *Smith v. Otis Engineering Corp.* [20] and *Archem* [*139] *Co. v. Austin Industrial, Inc.* [21] Alvarado therefore contends that there can be only one employer to which the exclusive remedy provision of the Act applies. Alvarado argues that because there is evidence that Web controlled the details of her work, and indeed, [**13] a jury found that Web was her employer after summary judgment had been rendered in favor of Tandem, summary judgment for Tandem was improper.

20 670 S.W.2d 750, 751 (Tex. App.-Houston [1st Dist. 1984], no writ).
21 804 S.W.2d 268, 269 (Tex. App.-Houston [1st Dist. 1991], no writ).

The jury's finding that Web was Alvarado's employer is not before us, and that finding is not binding on Tandem, who was not a party to the trial. [22] We agree, however, that there was summary judgment evidence that Web controlled the details of Alvarado's work at the time of her injury. Indeed, Tandem concedes as much. We assume, without deciding, that Alvarado was Web's borrowed employee because it had the right to control and did control the details of Alvarado's work at the time she was injured. The question we must decide is whether, for purposes of workers' compensation, a general employer like Tandem remains an "employer" within the meaning of the Act and thus whether the exclusive remedy [**14] provision can apply to both the general employer and one who has become an employer by controlling the details of a worker's work at the time of injury.

22 *Cf. Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652-53, 39 Tex. Sup. Ct. J. 351 (Tex. 1996) [HN10](*res judicata* prevents the relitigation of a claim or cause of action that has been finally adjudicated in an earlier suit, but only when the parties in the first suit are the same as those in the second suit or are in privity with them).

As we said in *Texas Workers' Compensation Insurance Fund v. Del Industrial, Inc.*, [HN11]we apply the Act as written in determining workers' compensation issues, [23] and it is the Act to which we must look as our starting point. Tandem, as Alvarado's general employer, and Alvarado fall squarely within the Act's definitions of employer and employee. [24] Tandem employed Alvarado and provided workers' compensation insurance coverage for her. [25] She was acting in furtherance of Tandem's business while she was working at its client company, [**15] Web. Although Tandem's president testified that he thought Alvarado was outside the course and scope of her employment because she was operating an industrial machine at the time of her injury in violation of Tan-

dem's company policy, that opinion does not undercut the undisputed facts. Tandem hired Alvarado for the purpose of sending her to its clients to work as a laborer. The fact that she disobeyed directives from Tandem about operating machinery while she was on the job did not take her out of the course and scope of her employment with Tandem. [26]

23 35 S.W.3d 591, 596, 43 Tex. Sup. Ct. J. 589 (Tex. 2000).
24 TEX. LAB. CODE. §§ 401.011(18), 406.011.
25 *See id.*
26 *See Md. Cas. Co. v. Brown*, 131 Tex. 404, 115 S.W.2d 394, 397 (Tex. 1938) [HN12]("While it seems to be the rule that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing work, yet it seems to be held by the weight of authority that violation of instructions which are intended to limit the scope of employment will prevent a recovery of compensation."); *Brown v. Forum Ins. Co.*, 507 S.W.2d 576, 577 (Tex. Civ. App.-Dallas 1974, no writ) (employee killed while flying a private plane in furtherance of employer's work was still in the course of his employment in spite of the company rule against using private or chartered aircraft in connection with work duties).

[**16] Neither the definitions of "employer" and "employee" under the Act nor the exclusive remedy provision expressly forecloses [*140] the possibility that there may be more than one employer. The definitions do not provide that a general employer ceases to be the employee's employer for workers' compensation purposes when another person exercises control over the details of the employee's work and the employee is thereby expressly or impliedly in the service of that third person under a contract of hire. [27] And [HN13]in examining the Labor Code's overall scheme for workers' compensation and for protecting workers, [28] we conclude that the Act's decided bias in favor of employers electing to provide coverage for their employees supports our conclusion that the Act permits more than one employer for workers' compensation purposes.

27 *See* TEX. LAB. CODE §§ 401.011(18), 406.001, 401.012(a).
28 *Del Indus., Inc.*, 35 S.W.3d at 593 (citing *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133, 37 Tex. Sup. Ct. J. 1001 (Tex. 1994)).

[**17] [HN14]The Texas Labor Code recognizes that an employer may be in the business of providing temporary workers to others. The Code defines [HN15]"Temporary common worker employer" as "a person who provides common workers to a user of common workers. The term includes a temporary common worker agent or temporary common worker agency." [29] The Code defines "common worker":

(3) [HN16]"Common worker" means an individual who performs labor involving physical tasks that do not require:

(A) a particular skill;

(B) training in a particular occupation, craft, or trade; or

(C) practical knowledge of the principles or processes of an art, science, craft, or trade. [30]

A "user of common workers" is also defined: [HN17]"'User of common workers' means a person who uses the services of a common worker provided by a temporary common worker employer." [31] [HN18]There is some regulation of temporary common worker employers under Chapter 92 of the Code, [32] but it is not as extensive as the regulation of a staff leasing service provider under Chapter 91 of the Code.

29 TEX. LAB. CODE § 92.002(7).

[**18]

30 *Id.* § 92.002(3)
31 *Id.* § 92.002(8).
32 *See id.* §§ 92.002, 92.011, 92.012, 92.022, 92.024, 92.025.

[HN19]The Staff Leasing Services Act, by definition, does not cover the providers of temporary workers. The term "Staff leasing services" [HN20]"does not include . . . temporary help . . . or . . . a temporary common worker employer as defined by Chapter 92." [33] [HN21]The Staff Leasing Services Act applies to arrangements in which "the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force consists of assigned employees of the license holder." [34]

33 *Id.* § 91.001(14)(A), (D).
[**19]
34 *Id.* § 91.001(14).

[HN22]The Staff Leasing Services Act contemplates that one workers' compensation policy procured by the staff leasing service company will cover employees leased to a client company, and that both the leasing

company and the client may rely on the exclusive remedy provision of the Workers' Compensation Act. [35]

35 *See id.* § 91.006(a) [HN23]("A certificate of insurance coverage showing that a license holder maintains a policy of workers' compensation insurance constitutes proof of workers' compensation insurance coverage for the license holder and the client company with respect to all employees of the license holder assigned to the client company."); *id.* § 91.042(d) [HN24](explaining that license holder elects for both itself and a client company whether to provide workers' compensation insurance).

[*141] Tandem does not qualify as a staff leasing service provider under the Staff Leasing Services Act because [**20] that Act was not intended to apply to providers like Tandem. However, the substantive provisions of and policies underlying the Staff Leasing Services Act are instructive. [HN25]The Labor Code expressly addresses "co-employees" in that Act. [36] Staff leasing service companies do not meet the requirement of that Act unless "employment responsibilities are in fact shared by the license holder and the client company." [37] A contract between a staff leasing service company and a client must provide that the leasing company "shares, as provided by Subsection (b), with the client company the right of direction and control over employees assigned to a client's worksites." [38] The referenced subsection (b) says:

(b) [HN26]Notwithstanding any other provision of this chapter, a client company retains responsibility for:

(1) the direction and control of assigned employees as necessary to conduct the client company's business, discharge any applicable fiduciary duty, or comply with any licensure, regulatory, or statutory requirement . . . . [39]

36 TEX. LAB. CODE §§ 91.001 *et seq*.
37 *Id.* § 91.001(14).
[**21]
38 *Id.* § 91.032(a)(1).
39 *Id.* § 91.032(b)(1).

As we explained in *Del Industrial, Inc.*, [HN27]under the Staff Leasing Services Act, a staff leasing company makes the election of whether to provide workers' compensation insurance coverage for both itself and the client company for the employees it leases. [40] If a leasing company elects coverage, its policy covers both the leasing company and its client company as to the leased employees. [41] [HN28]The premium for workers' compensation coverage is determined under the Staff Leasing Services Act based on the client company's experience rating for the first two years of the client company's contract. [42] But thereafter, the client company may obtain coverage for the leased employees, and the premium may be based on other factors in the circumstances described in the Act. [43] If the leasing company elects not to obtain workers' compensation coverage, both the leasing company [**22] and its client are subject to section 406.033 of the Code with regard to the leased employees. Section 406.033 permits negligence suits and prevents the assertion of certain common law defenses by employers. [44]

40 35 S.W.3d 591, 594, 43 Tex. Sup. Ct. J. 589 (Tex. 2000).
41 *Id.*
42 TEX. LAB. CODE § 91.042(b).
43 *Id.* § 91.042(e).
44 *Id.* § 91.042(d); *see also Del Indus., Inc.*, 35 S.W.3d at 594.

[HN29]The Labor Code also recognizes that a general contractor may procure workers' compensation coverage for subcontractors and subcontractors' employees. [45] And a motor carrier [46] may provide workers' compensation to an owner operator [47] and employees of an owner operator. [48] The Code [*142] provides that a written agreement [49] to provide coverage "makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state." [50] [HN30]Similar provisions were contained in prior [**23] legislation. [51] That legislation was construed to mean that when a premises owner agreed to procure workers' compensation coverage for its general contractor and the general contractor's subcontractor, a negligence suit by the subcontractor's employee against both the general contractor and the subcontractor was barred by the exclusive remedy provision of the workers' compensation legislation in effect in 1991. [52]

45 TEX. LAB. CODE § 406.123(a).
46 *Id.* § 406.121(3) (defining "Motor carrier").
47 *Id.* § 406.121(4) (defining "Owner operator").
48 *Id.* § 406.123(c).
49 *Id.* § 406.121(a).
50 *Id.* § 406.123(e).
51 *See* Act of Dec. 11, 1989, 71st Leg., 2d C.S., ch. 1, 1989 Tex. Gen. Laws 1, 15-16; *see also* Act of May 26, 1983, 68th Leg., R.S., ch. 950, 1983 Tex. Gen. Laws 5210, 5210-11.
52 *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 675-77 (Tex. App.-Texarkana 1997, no writ).

From an examination [**24] of Chapter 92, which expressly contemplates the existence of temporary com-

mon worker employers, the Staff Leasing Services Act, and the provisions of the Code that deal with general contractors, subcontractors, and their employees, we glean at least three things. First, [HN31]the Labor Code expressly recognizes the existence of employers who engage in the business of providing temporary workers to others. Second, the Labor Code does not abhor the concept of two employers for workers' compensation purposes. Third, the Staff Leasing Services Act and section 406.123 (covering general contractors and subcontractors), like other workers' compensation provisions in the Code, encourage employers to obtain workers' compensation insurance coverage by providing benefits to the employer, including the exclusive remedy provision, if coverage is obtained. The Staff Leasing Services Act goes further and provides disincentives, such as removing common law defenses, if coverage is not obtained.

We recognized the benefits of workers' compensation coverage to both employees and employers in *Hughes Wood Products, Inc. v. Wagner*. [53] We said there that:

[HN32]The workers' compensation act was adopted to provide [**25] prompt remuneration to employees who sustain injuries in the course and scope of their employment. . . . The act relieves employees of the burden of proving their employer's negligence, and instead provides timely compensation for injuries sustained on-the-job. . . . In exchange for this prompt recovery, the act prohibits an employee from seeking common-law remedies from his employer, as well as his employer's agents, servants, and employees, for personal injuries sustained in the course and scope of his employment. [54]

These purposes of the Act are carried out by recognizing that the express definitions of "employer" and "employee" and the exclusive remedy provision may apply to more than one employer. An employee in Alvarado's situation will be working for her general employer (i.e., the temporary staffing provider), but will also be subjected to laboring in the workplace and under [*143] the direction of the general employer's client company. Some client companies may carry workers' compensation insurance while others may not. [HN33]An employee injured while working under the direct supervision of a client company is conducting the business of both the general employer and that employer's [**26] client. The employee should be able to pursue workers' compensation benefits from either. If either has elected not to provide coverage, but still qualifies as an "employer" under the Act, then that employer should be subject to common law liability without the benefit of the defenses enumerated in section 406.033. Temporary workers by definition move from one client company to another. They do not know who will be directing their work from day to day. The only constant in their work is that they are employed by their general employer, to whom they look for payment of wages and their work assignments. The purposes underlying the Workers' Compensation Act and its definitions of "employer" and "employee" indicate that the general employer is, and should be, an "employer" of a temporary worker even if a client company directs the details of that employee's work when the employee is injured. Further, an employee should not be placed in the position of trying to determine, perhaps at his or her peril, which of two entities was his or her employer on any given day or at any given moment during a day.

53 18 S.W.3d 202, 206, 43 Tex. Sup. Ct. J. 595 (Tex. 2000).

[**27]

54 *Id.* at 206-07 (quoting *Darensburg v. Tobey*, 887 S.W.2d 84, 86 (Tex. App.-Dallas 1994, writ denied) (citing *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739, 24 Tex. Sup. Ct. J. 96 (Tex. 1980))); *Paradissis v. Royal Indem. Co.*, 507 S.W.2d 526, 529, 17 Tex. Sup. Ct. J. 163 (Tex. 1974); *see also Tex. Workers Comp. Commn v. Garcia*, 893 S.W.2d 504, 511, 38 Tex. Sup. Ct. J. 235 (Tex. 1995).

We note that [HN34]in a number of other jurisdictions, either by statute or case law, both a general employer and one who borrows that employer's employee are immune from common-law suit under statutory provisions similar to Texas's exclusive remedy provision, if one or both maintain workers' compensation coverage. [55]

55 *See generally* LARSON, LARSON'S WORKERS' COMPENSATION LAW § 67.04D (2003); *see also* CAL. INS. CODE § 11663 [HN35]("As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his or her payroll at the time of injury, in which case the insurer of the special employer is solely liable."); *Anderson v. Tuboscope Vetco, Inc.*, 9 P.3d 1013, 1017 (Alaska 2000) (stating that [HN36]under the special employment doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned and implying that both companies are immune from negligence claims); *Marlow v. Mid S. Tool Co., Inc.*, 535 So. 2d 120, 123 (Ala. 1988)

(stating that the court had established in [HN37]a line of cases that for workers' compensation purposes "a temporary services employee is the employee of *both* his or her *general employer* (i.e., the employment agency) and his or her *special employer* (i.e., the employer to which the employment agency assigned the employee to work")); *Araiza v. U.S. W. Bus. Res., Inc.*, 183 Ariz. 448, 904 P.2d 1272, 1276 (Ariz. Ct. App. 1995) [HN38]("When a labor contractor such as Manpower supplies or 'lends' its employee to another employer, the result may be an arrangement in which one employee has two employers. . . . The significance of this arrangement is that both employers are liable for workers' compensation and both are immune from tort liability for injuries received by the employee . . . ."); *Avila v. Northrup King Co.*, 179 Ariz. 497, 871 P.2d 748 (Ariz. Ct. App. 1994) ("The exclusivity of workers' compensation coverage as a remedy is based on the existence of an employment relationship. That relationship exists between [the plaintiff] and two employers . . . . Thus, both his general and special employer are entitled to immunity under [the exclusive remedy provision]."); *Ragsdale v. Wheelabrator Clean Water Sys., Inc.*, 1998 OK CIV APP 58, 959 P.2d 20, 22-23 (Okla. Ct. App. 1998); *Blacknall v. Westwood Corp.*, 307 Ore. 113, 764 P.2d 544, 545-47 (Or. 1988) [HN39](construction worker was the employee of both the lending and borrowing employer, and because the borrowing employer reimbursed the lender for compensation insurance costs, the borrower was immune from suit on common law claims); *cf. D'Andrea v. Manpower, Inc. of Providence*, 105 R.I. 108, 249 A.2d 896, 898-99 (R.I. 1969) [HN40](general employer remained liable for workers' compensation benefits even though special employer had control and direction over the employee's work and employee was injured while operating equipment contrary to the general employer's instruction).

[**28] [HN41] [*144] We find nothing in the Texas Workers' Compensation Act that would preclude applying its definitions to both a general employer that provides temporary workers and that employer's client company when the general employer, its client, and the employee fit within the express definitions. To the contrary, the purposes of the Act are promoted in giving effect to definitions of "employer" and "employee" when they fit both a provider of temporary workers and its client.

We think it prudent to emphasize that we are deciding today only whether there may be two employers for workers' compensation purposes when a provider of temporary workers furnishes a worker to a client that controlled the details of the work at the time the worker was injured and there was no agreement between the provider of temporary workers and the client regarding workers' compensation coverage. We are aware that there are decisions from Texas courts of appeals that have held that when an employer provides workers to client companies and agrees to procure workers' compensation coverage for those workers, the client company is considered to be the employer for purposes of the exclusive remedy provision of the workers' [**29] compensation law if the staffing provider actually procured such coverage and the employee was under the direct control of the client or was the client's borrowed servant. [56] In a case applying the law in effect before the Staff Leasing Services Act became effective, another court of appeals held that a client company who controlled the details of an employee's work when her injury occurred was an employer for purposes of the exclusive remedy bar, even though a leasing company carried the employee on its workers' compensation policy under an agreement with its client, and the leasing company was the insured rather than the client. [57] In another case applying the law in effect before the Staff Leasing Services Act became effective, a court of appeals held that an agreement regarding workers' compensation coverage that essentially would have met the requirements of the Staff Leasing Services Act, had it been in effect, was enforceable, and that the injured employee's suit against both the leasing company and its client was barred. [58] And another court of appeals has held that there can be co-employers for workers' compensation purposes when a temporary employment [*145] agency agreed in [**30] a written contract with its client to provide workers' compensation insurance for the temporary employee, and did in fact pay benefits, but the client controlled the details of the injured employee's work. [59] The court in that case held that the client was entitled to immunity based on the exclusive remedy provision of the Workers' Compensation Act. [60] None of the issues presented in the foregoing cases are before us today, and we express no opinion on those issues.

56 *Rodriguez v. Martin Landscape Mgmt. Inc.*, 882 S.W.2d 602, 605-06 (Tex. App.-Houston [1st Dist.] 1994, no writ); *Gibson v. Grocers Supply Co., Inc.*, 866 S.W.2d 757, 760 (Tex. App.-Houston [14th Dist.] 1993, no writ); *Marshall v. Toys-R-Us Nytex, Inc.*, 825 S.W.2d 193, 196 (Tex. App.-Houston [14th Dist.] 1992, writ denied); *Denison v. Haeber Roofing Co.*, 767 S.W.2d 862, 864-65 (Tex. App.-Corpus Christi 1989, no writ); *see also Guerrero v. Standard Alloys Mfg. Co.*, 566 S.W.2d 100, 102 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.) (holding

there was a fact question about whether client company had a right to control employee and therefore whether it could assert exclusive remedy provision based on workers' compensation policy obtained by general employer who supplied contract labor).

[**31]

57 *Pederson v. Apple Corrugated Packaging, Inc.*, 874 S.W.2d 135, 137-38 (Tex. App.-Eastland 1994, writ denied).

58 *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 840, 847 (Tex. App.-Houston [14th Dist.] 1996, writ denied); *see also Cherry v. Chustz*, 715 S.W.2d 742, 743-44 (Tex. App.-Dallas 1986, no writ) (holding that independent contractor could assert the exclusive remedy bar in a suit by its employee even though the company that retained the contractor paid the workers' compensation premiums).

59 *Garza v. Excel Logistics, Inc.*, 100 S.W.3d 280, 287-88 (Tex. App.-Houston [1st Dist.] 2002, pet. filed).

60 *Id.*

We turn to Alvarado's argument that the common-law doctrine of right to control should govern this case.

**III**

We recognized in *Del Industrial, Inc.* that [HN42]"'the common law has been dramatically engrafted upon by the Legislature. Where the common law is revised by statute, the statute controls.'" [61] In *Del*, we held that the Staff Leasing Services Act could result as a practical matter [**32] in a split workforce, meaning that some employees had workers' compensation coverage while others did not. [62] This did not deter us from applying the Act as written, even though there was a long common-law history prohibiting a split workforce. [63]

61 35 S.W.3d 591, 596, 43 Tex. Sup. Ct. J. 589 (Tex. 2000) (quoting *Bartley v. Guillot*, 990 S.W.2d 481, 485 (Tex. App.-Houston [14th Dist.] 1999, pet. denied)).

62 *Id.*

63 *Id.*

As discussed above, [HN43]the Workers' Compensation Act has express definitions of "employer" and "employee" that should be given effect when applicable, even if that results in an employee's having more than one employer for purposes of workers' compensation. As we have seen, nothing in the Act provides that there must be only one "employer" for workers' compensation purposes. Furthermore, nothing in the common-law decisions of this Court is at odds with the concept that an employee may have two employers for workers' compensation purposes.

We said in *Del Industrial, Inc.* that [**33] [HN44]"generally, courts determine whether . . . the subscribing company is the worker's employer under the right-of-control test," [64] citing our decision in *Thompson v. Travelers Indemnity Co. of Rhode Island.* [65] But that statement cannot be lifted out of context and stretched to mean that there can be only one "employer" for workers' compensation purposes. In *Thompson*, the issue was whether a jockey was an employee of the racetrack or an independent contractor. [66] The jockey sought to obtain workers' compensation benefits under the racetrack's policy, and the compensation carrier contested his status as an employee. We held that he was not an employee, but rather was an independent contractor. [67] Alvarado was not an independent contractor for Tandem, and no one in this case claims that she was. The evidence shows that Alvarado was hired by a temporary staffing company with all the indicia of an employee, worked for the staffing company at its client's place of business, and was directed in the details of her work by the client. Alvarado had two "employers" for workers' compensation purposes.

64 *Id.* at 595.

[**34]

65 789 S.W.2d 277, 278, 33 Tex. Sup. Ct. J. 478 (Tex. 1990).

66 *Id.*

67 *Id.* at 279.

[*146] Nor is [HN45]the concept that there can be two employers for workers' compensation purposes foreclosed by the right to control principles that we have articulated in the tort context in analyzing respondeat-superior and borrowed-servant principles. We have said that a general employee of one employer may become the borrowed servant of another with respect to *some* activities. [68] The common-law principles that define when there will be vicarious liability are designed to assign liability for injury to third parties to the party who was directing the details of the negligent actor's conduct when that negligence occurred. Determining whether a general employer remains an "employer" for workers' compensation purposes while its employee is acting as the borrowed servant of another is not governed by the same concerns, as we have set forth above.

68 *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537, 46 Tex. Sup. Ct. J. 142 (Tex. 2002) (plurality opinion) (citing *Sparger v. Worley Hosp., Inc.*, 547 S.W.2d 582, 583, 20 Tex. Sup. Ct. J. 143 (Tex. 1977) and *Producers Chem. Co. v. McKay*,

366 S.W.2d 220, 225, 6 Tex. Sup. Ct. J. 292 (Tex. 1963)).

[**35] In *Exxon Corp. v. Perez*, we addressed the parameters of the borrowed-servant doctrine in the context of the borrowing entity's claim that it was entitled to rely on the exclusive remedy provision of the former workers' compensation act. [69] Perez, an employee of Hancock, was injured on a jobsite and sued Exxon. Exxon contended that Perez was its borrowed servant, and that since it was a workers' compensation insurance subscriber, the exclusive remedy provision immunized it from common-law negligence claims. [70] We held that there was a fact question about whether Perez was Exxon's borrowed servant and that the trial court therefore should have submitted an issue to the jury. [71] We did not consider in any way whether Perez's employer, Hancock, would be precluded from relying on the exclusive remedy provision if Perez were found to be Exxon's borrowed servant.

69 842 S.W.2d 629, 630, 35 Tex. Sup. Ct. J. 1120 (Tex. 1992).
70 *Id.*
71 *Id.* at 630-31.

[HN46]At least two courts of appeals have concluded [**36] that the common-law right to control test did not deprive an employer of the benefit of the Act's exclusive remedy provision when an employee was injured while the details of that employee's work were under the control of another. The first of these cases, *Chapa v. Koch Refining Co.*, [72] was decided under the former version of the Texas Workers' Compensation Act. [73] Chapa was employed by an employee leasing company, Stafftek. Stafftek supplied Chapa as a worker to H & S, who in turn had been retained as an independent contractor by Koch. Chapa was injured on Koch's premises. Chapa's general employer, Stafftek, was a subscriber under the Workers' Compensation Act, as was H & S. Chapa sued Stafftek, H & S, and Koch. The court of appeals first held that Chapa was H & S's borrowed servant. [74] But because H & S provided coverage to Chapa under a workers' compensation policy, the court held that the exclusive remedy provision applied and "insulated [H & S] from suits for damages for personal injuries." [75] Chapa had received [*147] benefits, however, under Stafftek's policy, not H & S's. [76] The court of appeals concluded that the Act's exclusive remedy provision applied to Stafftek as [**37] well as H & S. [77] This Court reversed the court of appeals, but only with regard to its holdings as to Koch's liability. [78] None of the issues regarding workers' compensation or the exclusive remedy provision were before us.

72 985 S.W.2d 158 (Tex. App.-Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153, 43 Tex. Sup. Ct. J. 204 (Tex. 1999).
73 *See id.* at 161 (applying Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 4.01, 1989 Tex. Gen. Laws 32, *repealed by* Act of May 22, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1175 (current version at TEX. LAB. CODE § 408.001)).
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 157, 43 Tex. Sup. Ct. J. 204 (Tex. 1999).

In another case, *Texas Industrial Contractors, Inc. v. Ammean*, [79] Ammean was employed by Texas Contractors. Texas Contractors was hired as an independent contractor by Bayer. Ammean was injured while [**38] working on Bayer's premises. The court of appeals held that a reasonable jury could conclude that Bayer exercised actual control over Texas Contractor's activities that resulted in Ammean's injury. [80] The court nevertheless held that Texas Contractors was entitled to rely on the exclusive remedy provision of the Workers' Compensation Act because Texas Contractors had a workers' compensation policy and Ammean had received benefits under it. [81] The Beaumont Court of Appeals seems to have based its decision on the fact that the employee had elected to pursue a claim for workers' compensation from its employer rather than a common-law suit and was bound by that election. [82] That court concluded:

Ammean argues the exclusive remedy provision does not prevent him from recovering against Texas Contractors at common law because Bayer was his true employer since it controlled the details of his work and because he did not make an informed election of remedies. [HN47]Where, however, a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' [**39] Compensation Commission, the worker's common law claim against that company is barred by the Act's exclusive remedy provision, even if control over the details of the work is in the hands of the other company with which that company has contracted.

. . . .

In any event, Ammean brought this common law claim after he had sought and obtained, with the assistance of an attorney, workers' compensation benefits. No appeal was taken from the award. [83]

79 18 S.W.3d 828 (Tex. App.-Beaumont 2000, pet. dism'd by agr.).
80 *Id.* at 833-34.
81 *Id.* at 831.
82 *See id.*
83 *Id.* at 831-32.

Two other court of appeals decisions have applied reasoning that is at odds with the reasoning in *Chapa* and *Ammean*. In *Smith v. Otis Engineering Corp.*, decided under the [**40] former workers' compensation statutes, Smith was "in the general employ" of Stewart Well Service Company. [84] Smith was injured while he was unloading equipment from a truck owned by Otis Engineering. Otis's workers' compensation carrier provided benefits to Smith, which he accepted, and Smith executed a release in favor of Otis. Smith then sued Otis, Stewart Well Service, and another [*148] entity. Otis filed a motion for summary judgment, contending Smith was its borrowed servant as a matter of law and therefore that it was Smith's employer for purposes of the workers' compensation bar of common-law negligence claims. [85] The trial court granted Otis's summary judgment motion, but the court of appeals reversed, holding that whether Smith was Otis's borrowed servant was a fact issue. [86] Part of the rationale for that holding was the court's conclusion that the law "requires that one party be named the employer and all others be classified as third parties outside the purview of the workers' compensation law." [87] But the case the court cited for that proposition, *Associated Indemnity Co. v. Hartford Accident & Indemnity Co.*, [88] did not make such a holding, as the concurring opinion [**41] in the case before us today pointed out. [89] In fact, the decision in *Hartford* expressly said that it was not required to decide whether to "reject the dual-employment theory and apply the right-of-control test . . . ." [90]

84 670 S.W.2d 750, 751 (Tex. App.-Houston [1st Dist.] 1984, no writ).
85 *Id.*
86 *Id.* at 752.
87 *Id.* at 751.
88 524 S.W.2d 373, 376 (Tex. Civ. App.-Dallas 1975, no writ).
89 53 S.W.3d at 729 (Taft, J., concurring).
90 524 S.W.2d at 376.

The same court that decided *Smith* subsequently decided *Archem Co. v. Austin Industrial, Inc.* [91] In that case, Vallejo was employed by Austin Industrial, who supplied temporary labor. Austin Industrial's client was Archem, and Vallejo was injured while working at Archem's premises. Vallejo sued Archem and Austin, both of whom contended that because they were workers' compensation subscribers, Vallejo's claims were barred [**42] by the exclusive remedy provision. [92] Austin Industrial filed a motion for summary judgment, which the trial court granted. Citing its decision in *Smith*, the court of appeals reversed, saying that "where one entity 'borrows' another's employee, workers' compensation law identifies one party as the 'employer' and treats all others as third parties." [93] The court held that there was a fact question of whether Austin Industrial or Archem was Vallejo's employer at the time he was injured. [94]

91 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ).
92 *Id.* at 269.
93 *Id.*
94 *Id.* at 271.

The single employer theory from *Smith* and *Archem* was embraced in *Coronado v. Schoenmann Produce Co.* [95] That case did not concern a provider of workers to clients, but rather, which of two affiliated companies was the employer. [96] The court in that case stated that "for liability purposes, where one entity 'borrows' another's employee, [**43] workers' compensation law identifies one party as the 'employer' and treats all others as third parties." [97] The court ultimately held that there was no evidence that the defendant exercised any control over the details of the plaintiff's work at the time of the injury. [98]

95 99 S.W.3d 741 (Tex. App.-Houston [14th Dist.] 2003, no pet.).
96 *Id.* at 744.
97 *Id.* at 753.
98 *Id.* at 757.

The same court that decided *Smith* and *Archem* decided the case before us today. The author of the court of appeals' opinion in this case took the unusual but not unprecedented [*149] step [99] of concurring to the court's opinion. [100] JUSTICE TAFT criticized the court of appeals' prior decisions in *Smith* and *Archem* as being inconsistent with the purposes of the workers' compensation scheme enacted by the Legislature. [101] JUSTICE TAFT said that if he "were writing on a clean slate," [102] he would have reached a different result:

For these [**44] reasons, I reluctantly follow the rule we articulated in *Smith* and *Archem*. If I were writing on a clean slate, however, I would decide this case by adopting the holding of *Texas Industrial Contractors, Inc. v. Ammean*, 18 S.W.3d 828 (Tex. App.-Beaumont 2000, pet. [dism'd by agr.]) that,

[when], however, a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the

Texas Workers' Compensation Commission, the worker's common law claim against that company is barred by the [Labor Code's] exclusive remedy provision, even if control over the details of the work is in the hands of the other company with which that company has contracted.

99 *See* *Casso v. Brand*, 776 S.W.2d 551, 32 Tex. Sup. Ct. J. 366 (Tex. 1989) (Phillips, C.J., authoring both the majority opinion and a dissenting opinion).
100 53 S.W.3d at 727 (Taft, J., concurring).
101 *Id.* at 730.
102 *Id.*

[**45] *Id.* at 831; *Chapa v. Koch Refining Co.*, 985 S.W.2d 158, 161 (Tex. App.-Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153, 43 Tex. Sup. Ct. J. 204 (Tex. 1999). This result gives effect to the policy behind the workers' compensation statute, which deprives the injured employee of a subscriber of many common law rights in return for prompt compensation benefits and medical treatment. . . . Accordingly, I believe that applying the above holding to this case would yield a fairer result and comport with legislative intent. [103]

103 *Id.* at 730-31.

We agree with the concurring opinion in the court of appeals in this case that [HN48]*Smith* and *Archem* were incorrectly decided. Because the holding in *Smith* [104] and *Archem* [105] that there can be only one employer for workers' compensation purposes is at odds with the purposes and policies of the Workers' Compensation Act and with this opinion, we disapprove of those decisions. We also disapprove of similar language in *Coronado v. Schoenmann* [**46] *Produce Co.* [106] Alvarado was Tandem's employee for workers' compensation purposes because she and Tandem fell within the respective definitions of "employee" and "employer" under the Act. The fact that Web actually controlled the details of Alvarado's work at the time she was injured, and thus was also an employer within the meaning of the Act, does not preclude the applicability of the Act's provisions, including the exclusive remedy provision, to both Tandem and Web.

104 670 S.W.2d 750, 751 (Tex. App.-Houston [1st Dist.] 1984, no writ).
105 804 S.W.2d 268, 271 (Tex. App.-Houston [1st Dist.] 1991, no writ).
106 99 S.W.3d 741, 753 (Tex. App.-Houston [14th Dist.] 2003, no pet.).

* * * * *

For the foregoing reasons, the trial court properly granted summary judgment in favor of Tandem. Accordingly, we reverse the court of appeals' judgment and render judgment that Alvarado take nothing.

Priscilla R. Owen

Justice

**CONCUR BY:** Craig T. Enoch

**CONCUR**

[*150] [**47] JUSTICE ENOCH, concurring.

I agree with the Court that the "right-to-control" test should be rejected as the test to apply when determining who the "employer" is in the workers' compensation context. Unfortunately, though rejecting the test, the Court appears to rely on that test to conclude that Tandem is a joint employer in this case. [1] So, I must disagree with the Court's reasoning. Under the Texas Workers' Compensation Act, an "employer" is defined as a person who makes a contract of hire and has workers' compensation insurance coverage. [2] Because Tandem hired Alvarado and purchased workers' compensation insurance covering Alvarado, Tandem is an "employer" entitled to receive the benefit of the Texas Workers' Compensation Act's exclusive remedy provision. [3] Because I agree with the Court's judgment, I concur.

1 *See* ___ S.W.3d ___, ___.
2 TEX. LAB. CODE § 401.011(18).
3 *Id.* § 408.001(a).

Rather than rely on a shared right-to-control to determine under the workers' [**48] compensation statute who the employer is, I would follow the approach outlined by *Texas Industrial Contractors, Inc. v. Ammean*. [4] In *Ammean*, Richard J. Ammean was hired by Texas Industrial Contractors, but assigned to work at Bayer Corporation. [5] Ammean was injured at Bayer's facility and later filed and received workers' compensation benefits from Texas Industrial Contractors' carrier. [6] Ammean maintained that Bayer was his "employer" for workers' compensation purposes because Bayer controlled his work, thus, Texas Industrial Contractors was not immune from his suit for negligence. Not knowing if he was correct in his assessment, Ammean also brought a negligence action against Bayer. In deciding which entity qualified as Ammean's employer, the court stated:

[When] a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' Compensation Commission, the worker's common law claim against that company is barred by the Act's exclusive remedy provision, even if control over

the details of the work is in the hands of the [**49] other company with which that company has contracted. [7]

4 18 S.W.3d 828 (Tex. App.--Beaumont 2000, pet. dism'd by agr.).
5 *Id.* at 831.
6 *Id.*
7 *Id.*

My principal concerns with the Court's position are two-fold. First, it applies the right-to- control test - a test that leads to unfair results - to determine the "employer" for workers' compensation purposes. And second, under these circumstances, it concludes that Alvarado has joint employers - a holding that is neither supported nor predicted by relevant legislative enactments.

Using the right-to-control test is unfair because it leaves employees in Alvarado's circumstance at a loss as to whom they should look for compensation coverage. On the other hand, in these circumstances, though the actual employer procured workers' compensation [**50] for its employee [*151] and the employee actually received benefits from the policy, the employer would not know if it was the "employer" under the compensation act and thus is entitled to the act's exclusivity protection, until a court determines who controls the employee's particular activity. For example, in *Ammean*, were the court to have applied the right-to-control test, then Ammean could have sued Texas Industrial Contractors for negligence even though Ammean collected workers' compensation benefits under a policy paid for by that company.

Furthermore, in concluding that Alvarado has two employers for workers' compensation purposes because they exercise joint control, the Court applies the right-to-control test very broadly. This seems peculiarly inconsistent with the Court's application of this same right-to-control test in *St. Joseph's Hospital v. Wolff*, [8] in which a majority of the Court concluded that the status of "employer" was limited to the entity that was in immediate control of the specific details of the employee's work. The test applied in *Ammean*, I think, produces results more in keeping with Texas's workers' compensation scheme. And it is a more accurate [**51] test for determining who Alvarado's "employer" is for workers' compensation purposes.

8 94 S.W.3d 513, 537, 46 Tex. Sup. Ct. J. 142 (Tex. 2002) (plurality op.).

Texas's workers' compensation scheme was adopted and designed to benefit both the employee and the employer. [9] While it is true, as the Court states, that "nothing in the Act provides that there must be only one 'employer' for workers' compensation purposes," [10] it is not at all clear to me that the Legislature would permit a temporary employee to have two employers under the Act or that the "co-employer" relationship would further the purposes of the Act. [11]

9 *See, e.g.*, *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 206-07, 43 Tex. Sup. Ct. J. 595 (Tex. 2000); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739, 24 Tex. Sup. Ct. J. 96 (Tex. 1980).
10 ___ S.W.3d at ___.
11 *Id.* at ___.

[**52] In relying on "joint" control to conclude that Alvarado had two employers for workers' compensation purposes, the Court looks for guidance by reviewing other parts of the Texas Labor Code, specifically the Staff Leasing Services Act. [12] Section 91.042(c) of that Act states that the staff leasing company and its client company are co-employers for workers' compensation purposes. [13] Interestingly, though, the concept of "co-employers" has not been recognized by the Legislature beyond what it provided in the Staff Leasing Services Act. [14] Particularly, the Legislature has not added the concept to the Workers' Compensation Act. As well, the Legislature's recognition of "co- employer" status in the Staff Services Leasing Act is a specific statutory proviso designed solely for leased employee situations. [15] I note further that the Staff Leasing Act's enactment coincided with the litigation embodied in *Texas Workers' Compensation Insurance Fund v. Del Industrial, Inc.*, which was resolved by us in 2000. And the real issue in that case was over how to calculate insurance premiums [16] - an issue [*152] specifically addressed in the statute. [17] The Staff Leasing Act is as consistent with the [**53] conclusion that the Legislature did not intend to recognize, generally, that there could be more than one employer for worker's compensation purposes, as it is with the conclusion that the Legislature intends the workers' compensation scheme to recognize dual-employerships.

12 *Id.* at ___; TEX. LAB. CODE §§ 91.001-.063.
13 TEX. LAB. CODE § 91.042(c).
14 *Compare id.* § 91.042(c) *with id.* § 408.001(a). *See also Tex. Workers' Compensation Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 596, 43 Tex. Sup. Ct. J. 589 (Tex. 2000).
15 *Del Indus.*, 35 S.W.3d at 596.
16 *Id.* at 593-95.
17 *See* TEX. LAB. CODE § 91.042(b).

Furthermore, this case is not one of dual employers. Two entities are "co-employers" when they have joint control over an employee's work. Co-employers have been widely recognized in the labor and employment

context, as well as in the workers' compensation [**54] context. [18] But these cases reflect situations where the parties either had the intent to conduct business as "co-employers" or situations where the parties expressly contemplate a "co-employer" relationship. [19]

18 *See Garza v. Excel Logistics, Inc.*, 100 S.W.3d 280, 283-88 (Tex. App.--Houston [1st Dist.] 2002, pet. filed); *Ingalls v. Standard Gypsum, L.L.C.*, 70 S.W.3d 252, 258 (Tex. App.--San Antonio 2001, pet. denied); *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 847 (Tex. App.--Houston [14th Dist.] 1996, writ denied); *Gen. Accident Fire & Life Assurance Corp. v. Calla-way*, 429 S.W.2d 548, 549-51 (Tex. App.--Houston [1st Dist.] 1968, no writ).

19 *See, e.g.*, *Ingalls*, 70 S.W.3d at 258; *Brown*, 921 S.W.2d at 847.

For example, the facts in *Ingalls v. Standard Gypsum, L.L.C.* demonstrate an actual "co- employer" circumstance. [20] In *Ingalls*, two separate companies joined together to operate [**55] one facility. Accordingly, the employee was working for all parties at the time of his injury. But the relationship between Tandem and Web is entirely different. Tandem's business is providing temporary help. Web's business is manufacturing. Tandem assigned its employees on a temporary basis to work at Web's premises, but no joint undertaking between Tandem and Web ever existed.

20 *Ingalls*, 70 S.W.3d at 256-57.

As another example, in *Brown v. Aztec Rig Equipment, Inc.*, William Brown signed an employment agreement which declared that the staff leasing company, Administaff, Inc., and the client company, Aztec, were his "co-employers." [21] As mentioned above, the Legislature has now expressly addressed the circumstances of *Brown* in the Staff Leasing Services Act, which expressly allows a co- employer relationship. [22] And here, we are dealing with a temporary help provider, not a staff leasing company. [23] As well, Alvarado has no express agreement regarding co-employment.

21 *Brown*, 921 S.W.2d at 838.

[**56]

22 *See* TEX. LAB. CODE § 91.042(c).

23 *Brown*, 921 S.W.2d at 838.

Of course, in situations where the parties expressly contemplate a "co-employer" relationship, there is no reason to disregard such a relationship. [24] But I cannot assume that the Legislature intended for an employee to have two employers under the Texas Workers' Compensation Act when the Legislature has not expressly said so, generally, and has expressly said so only in one narrow business circumstance - staff leasing.

24 *See, e.g.*, *id.* at 847.

Furthermore, workers' compensation statutes in other jurisdictions have not only clearly recognized "co-employers" and provided the exclusivity defense to each, but those jurisdictions, with limited exceptions, require all employers to carry workers' compensation insurance, [25] which is not the case in Texas. For the Court to recognize [*153] "co-employer" [**57] status not only seems inconsistent with the Legislature's intent expressed in the third-party liability section of the Texas Act, [26] but also it may create ramifications significantly affecting Texas's unique workers' compensation scheme. I would not alter the Legislature's workers' compensation scheme so dramatically. That should be the Legislature's choice. Thus, I would not afford Tandem and Web "co-employer" status for purposes of the exclusivity defense unless the parties expressly contemplated such a relationship. [27]

25 *See, e.g.*, AR. REV. STAT. § 23-1022(A); CAL. LAB. CODE §§ 3601, 3602; OR. REV. STAT. § 656.018(3); R.I. GEN. LAWS § 28-29-2(3)(C); UTAH CODE ANN. §§ 35-1-43, 35-1-60.

26 TEX. LAB. CODE § 417.001.

27 *See Brown*, 921 S.W.2d at 847.

To determine whether one is immune from a negligence suit under Texas's workers' compensation [**58] scheme as an employer, I would reject the right-to-control test and adopt the test suggested in *Ammean*: whether the entity hired the employee and purchased workers' compensation insurance that covered the injured employee. And because I reject the right-to-control test, I necessarily reject the concept of "joint" control embodied in the Court's conclusion that a "co- employer" relationship exists in this case. Further, I do not agree that the Legislature permits such a concept, generally, under the workers' compensation scheme when it has expressly provided for one, but only in a narrow circumstance.

Tandem hired Alvarado and provided workers' compensation insurance that covered Alvarado's injury. Tandem is Alvarado's "employer" as defined by the Act and under the test outlined by *Ammean*. As such, Alvarado's common law claims against Tandem are barred by the Act's exclusivity provision. Accordingly, I concur in the Court's judgment.

Craig T. Enoch

Justice

**ZURICH AMERICAN INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, AND NATIONAL UNION FIRE INSURANCE COMPANY, PETITIONERS, v. NOKIA, INCORPORATED, RESPONDENT**

**NO. 06-1030**

**SUPREME COURT OF TEXAS**

**268 S.W.3d 487; 2008 Tex. LEXIS 766; 51 Tex. Sup. J. 1340**

**February 6, 2008, Argued**
**August 29, 2008, Opinion Delivered**

**SUBSEQUENT HISTORY:** Released for Publication December 5, 2008.

**PRIOR HISTORY:** [**1]

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS.

Nokia, Inc. v. Zurich Am. Ins. Co., 202 S.W.3d 384, 2006 Tex. App. LEXIS 7377 (Tex. App. Dallas, 2006)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner insurers brought an action against respondent manufacturer of wireless telephones seeking a declaration that the insurers had no duty to defend the manufacturer in class actions alleging that radiation from the manufacturer's telephones caused injury. Upon the grant of a petition for review, the insurers appealed the judgment of the Court of Appeals for the Fifth District of Texas which held that the insurers had a duty to defend.

**OVERVIEW:** Plaintiffs in the underlying actions alleged that the manufacturer's telephones emitted radio frequency radiation which caused biological harm on the cellular level. The insurers contended that the alleged harm did not constitute bodily injury as covered by the policies, and that the underlying claims sought nonradiating headsets rather than damages for personal injury. The Supreme Court of Texas held, however, that the insurers had a duty to defend the manufacturer in the underlying actions, except for one action in which monetary damages for personal injury were expressly disclaimed. The alleged injury at the cellular level was sufficient to allege a bodily injury and, while the underlying plaintffs sought the headsets, they also sought damages based on their physical exposure to radiation. Further, claims based on intentional torts which were not within policy coverage did not eliminate the insurers' duty to defend, since the claims for damages for bodily injury required the insurers' defense of the entirety of the actions. Also, underlying briefs which indicated that claims were only for economic damages were irrelevant in view of the plain language of the complaints.

**OUTCOME:** The judgment holding that the insurers had a duty to defend the manufacturer was modified to exclude one underlying action and, as modified, the judgment was affirmed.

**CORE TERMS:** bodily injury, duty to defend, insurer's, headset, coverage, biological, phone, insured's, radiation, cell, class actions, writ denied, warranty, personal injuries, property damage, redhibition, indemnify, cellphone, wireless, exposure, user's, purchasers, putative, cellular, brain, class member, product liability, compensatory damages, asbestos, manufacturer

**LexisNexis(R) Headnotes**

***Insurance Law > General Liability Insurance > Obligations > Defense***
***Insurance Law > General Liability Insurance > Obligations > Indemnification***

[HN1]In exchange for premiums paid, commercial general liability insurers typically promise to defend and indemnify their insureds for covered risks. The duty to defend is distinct from, and broader than, the duty to indemnify. An insurer must defend its insured if a plaintiff's factual allegations potentially support a covered claim, while the facts actually established in the underlying suit determine whether the insurer must indemnify its insured. Thus, an insurer may have a duty to defend but, eventually, no obligation to indemnify.

***Insurance Law > General Liability Insurance > Obligations > Defense***

[HN2]An insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of

those allegations. Thus, even if the allegations are groundless, false, or fraudulent, the insurer is obligated to defend. A court resolves all doubts regarding the duty to defend in favor of the duty, and the court construes the pleadings liberally. Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy. The duty to defend is not affected by facts ascertained before suit, developed in the course of litigation, or by the ultimate outcome of the suit. If a complaint potentially includes a covered claim, the insurer must defend the entire suit.

***Insurance Law > General Liability Insurance > Coverage > Bodily Injuries***

[HN3]Purely emotional injuries are not bodily injuries for liability insurance purposes. Bodily injury unambiguously requires an injury to the physical structure of the human body.

***Insurance Law > General Liability Insurance > Obligations > Defense***

[HN4]The label attached to a cause of action--whether it be tort, contract, or warranty--does not determine an insurer's duty to defend.

***Insurance Law > General Liability Insurance > Obligations > Defense***

[HN5]An insurer's duty to defend is not negated by the inclusion of claims that are not covered; rather, it is triggered by the inclusion of claims that might be covered. Over-inclusive allegations do not negate the duty to defend; the duty applies if there is a possibility that any of the claims might be covered.

***Insurance Law > Claims & Contracts > Policy Interpretation > Standardized Agreements***

[HN6]Courts stress the importance of uniformity when identical insurance provisions will necessarily be interpreted in various jurisdictions.

***Insurance Law > General Liability Insurance > Exclusions > Breach of Contract***

[HN7]Coverage under a commercial general liability insurance policy is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or work is not that for which the damaged person bargained. Pursuant to this understanding, certain exclusions are included within the standard commercial general liability policy for the express purpose of excluding coverage for risks relating to the repair or replacement of the insured's faulty work or products, or defects in the insured's work or product itself. These business risk exclusions, as they are commonly called, are intended to provide coverage for tort liability, not for the contractual liability of the insured for loss which takes place due to the fact that the product or completed work was not that for which the other party had bargained.

**COUNSEL:** For Zurich American Insurance Company, PETITIONER: Mr. Thomas R. Phillips, Mr. Joseph R. Knight, Ms. Jennifer Lee Cafferty, Baker Botts L.L.P., Austin, TX.; Mr. Philip R. King, Mr. Eric D. Stubenvoll, Mr. Darryl Durham, Mr. Jerome C. Studer, Meckler, Bulger & Tilson, LLP, Chicago, IL.; Mr. Jeffrey S. Levinger, Hankinson Levinger LLP, Dallas, TX.; Ms. Stephanie Dooley Nelson, Ms. Rebecca Lynn Visosky, Carrington Coleman Sloman & Blumenthal, L.L.P., Dallas, TX.; Ms. Allyson Newton Ho, Baker Botts L.L.P., Dallas, TX.

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For Nokia Incorporated, RESPONDENT: Mr. Brian D. Melton, Dallas, TX.; Mr. Eric J. Mayer, Ms. Alexandra Giselle White, Susman Godfrey L.L.P., Houston, TX.; Mr. Ian B. Cosby, Susman Godfrey LLP, Seattle, WA.

For Complex Insurance Claims Litigation Association, AMICUS CURIAE: Mr. D. Todd Smith, Austin, TX.

For CTIA-The Wireless Association, AMICUS CURIAE: Ms. Mary Olga Lovett, Greenburg Traurig LLP, Houston, TX.

**JUDGES:** CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, in which JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE

WILLETT joined. JUSTICE HECHT delivered a dissenting opinion, in which JUSTICE BRISTER joined.

**OPINION BY:** Wallace B. Jefferson

**OPINION**

[*488] A wireless telephone manufacturer, sued in a number of putative class actions alleging [*489] that radiation emitted by the phones caused biological injury, turned to its insurers, who had agreed to defend claims seeking damages because of bodily injury. After initially providing a defense, the insurers later sought a declaration that they had no duty to do so. Because we conclude that most of the underlying suits seek damages because of bodily injury, we modify the court of appeals' judgment and, as modified, affirm.

**I**

**Factual and Procedural Background**

Nokia, Incorporated, a Texas corporation, is the world's largest manufacturer of wireless telephone handsets. Nokia and other wireless telephone manufacturers were sued in a number of putative class action cases filed in various courts across the country. The consumer-plaintiffs in those [**2] cases alleged that radio frequency radiation (RFR) from wireless phones causes "biological injury."

Nokia tendered the defense of one of these cases to Zurich American Insurance Company, from which it had purchased several commercial general liability (CGL) insurance policies covering the years 1985-89 and 1995-2000. Zurich agreed to defend Nokia but reserved its right to later contest its obligation to defend or indemnify. Nokia's other insurers, National Union Fire Insurance Company [1] and Federal Insurance Company, [2] followed suit.

1 National Union issued several commercial general liability insurance policies to Nokia, covering 1989-1993, as well as three umbrella policies for the period 1998-2001.

2 Federal issued two general liability policies to Nokia, covering the period from 1999-2001, and six umbrella policies, covering 1995-2001.

Seeking to resolve the coverage issue, Zurich sued Nokia, National Union, and Federal in Dallas County and sought a declaration that Zurich had no duty to defend or indemnify Nokia and that Zurich was not responsible for defense or indemnity payments made by National Union or Federal. Zurich also sought contribution and subrogation against all defendants. [**3] National Union and Federal cross-claimed against Nokia asserting, among other things, that they had no duty to defend or indemnify Nokia.

The trial court granted the insurers' motion for summary judgment. After Nokia tendered new and amended complaints in the underlying actions, Zurich filed an amended motion for summary judgment. At issue in the various motions were the following five cases (the "MDL cases"):

1. *Pinney et al. v. Nokia, Inc., et al.*, MDL No. 1421, No. 01-MD-1421 (D. Md.), originally filed in the Circuit Court for Baltimore City, Maryland;

2. *Farina v. Nokia, Inc., et al.*, MDL No. 1421, No. 01-MD-1421 (D. Md.), originally filed in the Court of Common Pleas, Philadelphia County, Pennsylvania;

3. *Gilliam et al. v. Nokia, Inc.*, et al., MDL No. 1421, No. 01-MD-1421 (D. Md.), originally filed in the Supreme Court of the State of New York;

4. *Gimpelson et al. v. Nokia, Inc.*, et al. MDL No. 1421, No. 01-MD-1421 (D. Md.), originally filed in the Superior Court of Fulton County, State of Georgia; and

5. *Naquin et al. v. Nokia, Inc.*, et al., MDL No. 1421, No. 01-MD-1421 (D. Md.), originally filed in the Civil District Court, Parish of Orleans, State of Louisiana; [3]

[*490] plus a sixth action, [**4] *Dahlgren v. Audiovox Commc'ns. Corp., et al.*, Case No. 02-0007884, in the Superior Court of the District of Columbia.

3 The Judicial Panel on Multidistrict Litigation has transferred these cases to the District of Maryland for coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407; *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 170 F.Supp.2d 1356, 1358 (J.P.M.L. 2001).

The trial court granted Zurich's amended motion for summary judgment and signed a judgment declaring, in pertinent part, that Zurich, National Union, and Federal [4] had no duty to defend or indemnify Nokia in the MDL cases or in *Dahlgren.* The court ordered that Nokia take nothing on its counterclaims for declaratory relief regarding the duty to defend, breach of contract, failure to make prompt payment, breach of the duty of good faith and fair dealing, and for violation of article 21.21 of the Texas Insurance Code. The trial court severed the adjudicated claims, and Nokia appealed.

4 The parties stipulated that the trial court's ruling on Zurich's second motion for summary judgment would resolve the same issues as to National Union, Federal, and Nokia.

The court of appeals reversed as to [**5] the MDL cases, holding that, because (1) the complaints alleged claims for "bodily injury" and sought "damages because of bodily injury"; and (2) the "business risk" exclusions did not apply, the insurers had a duty to defend *Nokia*, 202 S.W.3d 384, 392. As to *Dahlgren*, in which the plaintiffs had explicitly disclaimed personal injuries and sought only economic and related equitable relief, the court of appeals affirmed the trial court's judgment and held that the insurers had no duty to defend Nokia. *Id.* at 392-93. Finally, the court of appeals held that, in light of its determination that the insurers had a duty to defend the MDL cases, the trial court's ruling that there was no duty to indemnify Nokia in those cases was premature. *Id.* at 393. Thus, the court of appeals reversed and remanded that portion of the trial court's judgment. [5] *Id.*

5 That same day, a different panel of the same court decided *Samsung Electronics America, Inc. v. Federal Insurance Co.*, 202 S.W.3d 372, 383-84 (Tex. App.--Dallas 2006, pet. granted) (recognizing a duty to defend *Farina*, *Pinney*, *Gilliam*, and *Gimpelson*, but not *Dahlgren*).

The insurers petitioned this Court for review, arguing that they had no duty [**6] to defend the MDL cases, as the complaints did not state claims for bodily injury or seek damages because of bodily injury. [6] We granted the petitions for review. [7] 2007 Tex. LEXIS 1022, 51 Tex. Sup. Ct. J. 126 (Nov. 30, 2007).

6 Nokia did not petition this Court for review of that part of the court of appeals' judgment holding that the insurers had no duty to defend Nokia in the *Dahlgren* case. TEX. R. APP. P. 53.1. Thus, that issue is not before us.

7 The Complex Insurance Claims Litigation Association and CTIA -- the Wireless Association (R) submitted amicus curiae briefs. TEX. R. APP. P. 11.

## II

## Duty to Defend

[HN1]In exchange for premiums paid, CGL insurers typically promise to defend and indemnify their insureds for covered risks. "[T]he duty to defend is distinct from, and broader than, the duty to indemnify." 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:1 (3d ed. 2007) ("COUCH ON INSURANCE"). An insurer must defend its insured if a plaintiff's factual allegations potentially support a covered claim, while the facts actually established in the underlying suit determine whether the insurer must indemnify its insured. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006). [**7] Thus, an insurer may have a duty to defend but, eventually, no [*491] obligation to indemnify. *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997).

In determining a duty to defend, we follow the eight-corners rule, also known as the complaint-allegation rule: [HN2]"an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations." *GuideOne*, 197 S.W.3d at 308. Thus, "[e]ven if the allegations are groundless, false, or fraudulent the insurer is obligated to defend." 14 COUCH ON INSURANCE § 200:19. We resolve all doubts regarding the duty to defend in favor of the duty, *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002), and we construe the pleadings liberally, *Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). "Where the complaint does not state facts sufficient to clearly bring the case within or without the coverage, the general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy." *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965) [**8] (citing George S. Golick, Annotation, *Liability Insurer -- Duty to Defend*, 50 A.L.R.2D 458, 504 (1956)); *see also* *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, No. 08-50042, 538 F.3d 365, 2008 U.S. App. LEXIS 16481, *6-*7 (5th Cir. Aug. 4, 2008) (noting that "[t]he rule is very favorable to insureds because doubts are resolved in the insured's favor"). The duty to defend is not affected by facts ascertained before suit, developed in the course of litigation, or by the ultimate outcome of the suit. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 829 (Tex. 1997); *see also* 14 COUCH ON INSURANCE § 200:19 (noting that duty to defend is unaffected by "what the parties know or believe the alleged facts to be, the outcome of the underlying case, or the merits of the claim"). If a complaint potentially includes a covered claim, the insurer must defend the entire suit. 14 COUCH ON INSURANCE § 200:1 ("Typically, even if only one claim in a complaint containing multiple claims could be covered, the insurer must defend the entire action and the insurer must demonstrate that all the claims of the suit fall outside the policy's coverage to avoid defending the insured.").

## III

## The Policies and the [**9] Pleadings A Bodily Injury

With this in mind, we turn to the policy language at issue here. The policies covered "all sums which [Nokia] shall become legally obligated to pay as damages be-

cause of . . . bodily injury" caused by an occurrence during the policy period. Some of the Zurich policies define bodily injury, some do not. Of those that do, bodily injury is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." [8] But this circular definition [9] is not helpful in answering the question [*492] before us: have the MML cases [10] alleged bodily injury?

> 8 This tracks the "bodily injury" definition contained in Section V of the standard CGL policy. 20 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 129.2(C)(1) (2d ed. 2002) (citing ISO Commercial General Liability Form CG 00020798, Copyright, Insurance Services Office, Inc., 1997). Some of the Federal and National Union policies contained a similar definition, and the insurers agree that any variation in wording does not affect our analysis here.
>
> 9 One commentator suggests that no definition is necessary: "It seems axiomatic that when one says 'bodily injury' intended to mean [**10] 'bodily injury,' then no further explanation is needed or required. In other words, bodily injury says what it says and means what it means--which is a simple statement of the plain meaning rule of judicial construction." 20 HOLMES' APPLEMAN ON INSURANCE § 129.2(C)(1)
>
> 10 Our analysis of the MDL cases in section III is limited to *Pinney*, *Farina*, *Gilliam*, and *Gimpelson*. *Naquin* is discussed separately in section IV.

None of the complaints use the term "bodily injury"; all are phrased in terms of "biological injury" or "biological effects." Thus, we must determine whether biological injuries or effects qualify as bodily injury. We have held that [HN3]purely emotional injuries are not "bodily injuries," *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997), and the insurers urge that this rule precludes relief here. But we also concluded that "'bodily injury' . . . unambiguously requires an injury to the physical structure of the human body," *id.*, and the MDL cases certainly allege that.

Each of the original and amended MDL complaints contains allegations that essentially mirror those set forth in the *Gilliam* amended complaint:

> This class action seeks damages and declaratory relief [**11] on behalf of plaintiff and a class of persons who purchased or leased wireless handheld telephones ("WHHPs"). . . . Through a common and uniform course of conduct, the defendants have manufactured, supplied, promoted, sold, leased and provided wireless service for WHHPs when they knew or should have known that their products generate and emit radio frequency radiation ("RFR") that causes an adverse cellular reaction and/or cellular dysfunction ("biological injury") through its adverse health effects on: calcium and ion distribution across the cell membrane; melatonin production; neurological function; DNA single and double strand breaks and chromosome damage; enzyme activities; cell stress and gene transcription; and the permeability of the blood brain barrier (hereinafter collectively described as the "health risk" and/or the "biological effects"). Through a common and uniform course of conduct, the defendants, acting individually and collectively, failed to adequately disclose to the consuming public the fact that WHHPs emit RFR that causes biological injury and a risk to the users' health. The purpose of this action is to hold accountable and to obtain maximum legal and equitable [**12] relief from those corporations and entities that are responsible for producing and placing into the stream of commerce WHHPs which create a health risk to users by causing biological injury.

The lengthy complaints assert that the named plaintiffs were exposed to RFR from their phones and thus were subjected to "RFR's biological effects and the risk to human health arising therefrom" and then discuss numerous studies linking RFR to adverse health consequences, including changes in the brain, headaches, heating behind the ear, sleep problems, and production of high levels of "heat shock proteins." In addition, the *Gimpelson* and *Pinney* original complaints assert that the plaintiffs "sustained biological injuries," and all of the amended complaints allege that the plaintiffs "sustained repeated biological injuries and/or harm" and "did incur biological injury and/or harm as a result of using Defendants WHHPs."

The court of appeals, relying on dictionary definitions and similar cases from other jurisdictions, concluded that injury at the cellular level was sufficient to allege a bodily injury under the policies at issue here. 202 S.W.3d at 389-90; *Samsung*, [*493] 202 S.W.3d at 379-80. The United [**13] States Court of Appeals for the Fourth Circuit, construing the *Pinney* complaint, reached the same conclusion, as did the Ninth Circuit, construing the *Gimpelson* amended complaint and others.

*VoiceStream Wireless Corp. v. Fed. Ins. Co.*, 112 F. App'x 553, 555-56 (9th Cir. 2004) (noting that "logic dictates that it is sufficient to allege injury to human cells. . . . The policy provisions do not explicitly *exclude* coverage for allegations of injury to human cells, and to construe cellular harm as insufficient would be to, in effect, read an additional exclusion into the policy"); *N. Ins. Co. v. Balt. Bus. Commcuns., Inc.*, 68 F. App'x 414, 419 (4th Cir. 2003) (holding that, "in alleging that persons using cell phones without headsets suffer from the radiation emitted by such phones, the Complaint alleges a 'bodily injury'" and noting that "Maryland courts have uniformly held that bodily injuries include those that occur at the minute, cellular level"). Like those courts and the court below, we conclude that the biological injuries alleged by the plaintiffs potentially state a claim for bodily injuries under the policies, much like the subclinical injuries alleged by plaintiffs who have [**14] been exposed to asbestos. *See* *Guar. Nat'l Ins. Co. v. Azrock Indus., Inc.*, 211 F.3d 239, 245, 250 (5th Cir. 2000) (concluding that "the subclinical tissue damage that results on inhalation of a toxic substance such as asbestos" triggered duty to defend and remanding for determination of whether pleadings alleged that exposure caused bodily injury, "even if the particular asbestos-related disease was not diagnosed until sometime after the policy expired"); 20 HOLMES' APPLEMAN ON INSURANCE 2D § 129.2(C)(1) ("Claimants injured from the exposure to asbestos are generally found to have sustained bodily injury on each inhalation of asbestos fibers" and "the rule is equally applicable to silicosis exposure and disease cases, as well as other types of chemical exposures."); *see also* 15 COUCH ON INSURANCE § 220:26 (noting that "the inhalation of asbestos causes immediate tissue damage, although the effects of that damage do not immediately manifest themselves, and such tissue damage is a 'bodily injury'"). We, of course, express no opinion on the merits of the underlying claims.

**B**

**Damages**

Because the policies cover "damages because of bodily injury," we must also examine whether the plaintiffs [**15] seek damages here. The insurers assert that the plaintiffs seek headsets, not damages, removing their claims from coverage. Nokia responds that the plaintiffs seek damages including, but not limited to, headsets, and those damages are squarely covered by the policy. We agree with Nokia.

Once again, the complaint allegations are dispositive. In each of the MDL cases, the plaintiffs seek damages, not merely headsets. The amended complaints include the following allegations:

> "This action is brought for monetary damages" (*Pinney*, *Gimpelson)*
>
> "The purpose of this action is . . . to obtain maximum legal and equitable relief" (*Gimpelson*, *Farina*, *Gilliam*, *Pinney)*
>
> "This class action seeks damages" (*Farina* and *Gilliam)*
>
> Requests for "compensatory damages including but not limited to amounts necessary to purchase a WHHP headset" (*Pinney*, *Gilliam*, and *Gimpelson);* "compensatory damages consisting, among other things, of the cost of headsets" (*Farina* and *Gilliam);* "actual damages of the plaintiffs and the classes and for all other relief, in an amount to [*494] be proved at trial, including, but not limited to, the costs of purchasing headsets for the WHHPs" (*Gilliam);* "actual damages of the plaintiff and the [**16] Class and for all other relief, in an amount to be proved at trial, including, but not limited to, the costs of purchasing headsets for the WHHPs" (*Farina).*

The original complaints contain virtually identical requests. Additionally, each of the original and amended complaints seeks punitive damages.

While the complaints note that headsets would eliminate users' exposure to RFR, the plaintiffs do not disclaim damages in favor of headsets. The Fourth Circuit, construing the *Pinney* original complaint, held that the allegations stated a claim for damages:

> On the face of the Complaint, the *Pinney* plaintiffs are seeking unspecified compensatory damages flowing from their bodily injuries, *i.e.*, harm suffered from radiation. Baltimore Business could therefore be potentially liable to the *Pinney* plaintiffs for any and all compensatory damages recoverable under Maryland law, including damages for already existing bodily injuries.

*N. Ins. Co.*, 68 F. App'x at 420.

The Ninth Circuit, considering the *Gimpelson* amended complaint (and unspecified others) also concluded that the complaints sought damages:

> The Defendant Insurers further argue that even if the underlying complaints allege present "bodily injury," [**17] the prayer for relief of the cost of a headset does not constitute a request for "damages because of bodily injury" because a headset would be inadequate relief for such injury. This argument is unpersuasive. First, the prayers for relief in the underlying actions do not solely ask for the cost of a headset, but rather "For compensatory damages *including but not limited to* amounts necessary to purchase a WHHP headset for each class member." (emphasis added). The *Gimpelson* Amended Complaint also seeks "maximum legal and equitable relief" for the alleged bodily injury, as well as punitive damages. Second, the policies themselves do not define the term "damages." To the extent that seeking damages, in part, in the form of a headset neither clearly falls within a policy provision, nor is clearly excluded by the text of the policy, the policies are ambiguous. As with "bodily injury," this ambiguity must be construed against the Defendant Insurers.

*Voicestream Wireless Corp.*, 112 F.App'x at 556-57 (footnote omitted).

The court of appeals examined whether headsets qualified as damages under the policies and concluded that, because the policy definition did not expressly include or exclude the [**18] costs of a headset as "damages because of bodily injury," and because the headsets were sought "on account of" or "by reason of" the plaintiffs' exposure to RFR, headsets were included within the category of damages "because of bodily injury." 202 S.W.3d at 391. We need not decide, however, whether headsets qualify as damages, because although each of the complaints seeks compensation for the cost of headsets, they also assert that the plaintiffs have been injured and seek damages based on their physical exposure to radiation. [11] Thus, we agree with [*495] the court of appeals' ultimate conclusion: the MDL cases seek damages.

> 11 For this reason, we disagree with the only case that has refused to recognize a duty to defend in these cases. A New York appellate court, in a three-sentence opinion, held that the "actions seek only economic damages measured by the cost of headphones that allegedly would block the allegedly dangerous radiation emitted by cell phones, and, while alleging the risk of physical harm, specifically disclaim seeking recovery for anything but the cost of the headphones." *Zurich-Am. Ins. Co. v. Audiovox Corp.*, 294 A.D.2d 194, 741 N.Y.S.2d 692, 692 (N.Y. App. Div. 2002).

**C**

**"Because of"**

The insurers [**19] also contend that, even if the MDL cases seek damages, those damages are not "because of" bodily injury. The complaint allegations are varied, but each includes at least one theory under which tort damages may be recovered. Every complaint alleges product liability, breach of implied warranty, and fraudulent concealment claims. Two of the four (*Gimpelson* and *Pinney)* assert negligence and civil conspiracy counts, and three (*Pinney*, *Farina*, and *Gilliam)* allege violations of the Maryland, Pennsylvania, and New York consumer protection acts, respectively. The amended complaints add battery claims. "[W]e have said that [HN4]the label attached to the cause of action--whether it be tort, contract, or warranty-does not determine the duty to defend." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 13 (Tex. 2007); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997); *see also* 14 COUCH ON INSURANCE § 200:19 ("It is the factual allegations instead of the legal theories alleged which determine the existence of a duty to defend."). Thus, in a case in which a plaintiff sought recovery on negligence theories, we held there was no duty to defend because, despite the negligence [**20] labels attached to the claims, the plaintiff had "alleged facts indicating that the origin of his damages was intentional behavior" and "made no factual contention that could constitute negligent behavior by [the defendant]." *Farmers*, 955 S.W.2d at 83.

But the factual allegations here support a duty. The pleadings allege both intentional conduct (Nokia knew of RFR's harmful effects and nonetheless intentionally sold its products to consumers) and negligence (Nokia should have known of RFR's harmful effects). The insurers argue that the intentional tort allegations defeat the duty to defend. Standing in isolation, they might. *Lamar Homes*, 242 S.W.3d at 8 ("We have further said that an intentional tort is not an accident and thus not an occurrence regardless of whether the effect was unintended or unexpected."). *But see King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 189, 193 (Tex. 2002) (noting that assault and battery exclusions would be unnecessary if such acts were not "occurrences"); *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 155-56 (Tex. 1999). We cannot, however, ignore the plaintiffs' other allegations when determining that duty. *See* 22 HOLMES' APPLEMAN ON INSURANCE 2D § 136.2(D) [**21] (noting

that, "when there are covered and non-covered claims in the same lawsuit, the insurer is obligated to provide a defense to the entire suit, at least until it can limit the suit to those claims outside of the policy coverage").

The putative class members include two or three groups (depending on which complaint is involved), one of which consists of future purchasers, [12] and the insurers contend that this negates the duty to defend, as it is impossible for future purchasers to have suffered damages due to bodily injury. This misconstrues the nature of the duty, however. [HN5]The duty to defend is not negated by the inclusion of [*496] claims that are not covered; rather, it is triggered by the inclusion of claims that might be covered. *Id.* § 136.4(B) (noting that "[t]o excuse the duty to defend, the complaint must unambiguously *exclude* coverage under the policy") (emphasis added). Because past purchasers are alleged to have suffered bodily injury and because they seek damages for those injuries already incurred, the suits fall within the policy language--even if the case also involves claims by those who have not yet purchased wireless telephones. Over-inclusive allegations do not negate [**22] the duty to defend; the duty applies if there is a possibility that *any* of the claims might be covered.

12 The other two are WHHP purchasers or lessees and those WHHP purchasers or lessees who purchased or leased WHHPs for use primarily by their minor children.

**D**

**Class Allegations**

Two of the MDL cases (*Gimpelson* and *Pinney*) assert that "no individual issues of injury exist, let alone predominate in this case, because membership in each class is premised only upon purchase or lease of a WHHP without a headset," and the insurers contend this statement disclaims damages for bodily injury. Alleging that there are no individual *issues* of injury, however, is not the same as stating that no individuals have been injured. In fact, each of the complaints quite clearly alleges the opposite, as outlined above. Nor is it dispositive that the proposed class includes only those purchasers who have not been diagnosed "with a brain related tumor or cancer of the eye." Excluding certain classes of injured purchasers does not mean that the putative class has abandoned all claims for damages because of bodily injuries. Although we have held that a "class [**23] action will rarely be an appropriate device for resolving" a personal injury claim, *Sw. Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 436 (Tex. 2000), the appropriateness of class certification is not at issue here and is not relevant to the duty to defend. *See Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1295-96 (11th Cir. 2006) (finding a duty to defend putative class action under Florida law and noting that "[i]f the duty to defend arises in spite of the uncertainty and impracticality of defending wholly meritless individual claims, we think it equally clear that the duty to defend is not defeated by some uncertainty as to the merits of a class certification" and "[t]he likelihood that a plaintiff will prevail in its covered claims or that a class will be certified does not enter into the calculus"). The question is whether the MDL complaints seek damages because of bodily injury, and we conclude that they do.

None of the MDL cases was filed in Texas, and none will be tried in Texas. The complaints allege violations of Maryland, Pennsylvania, New York, and Georgia law, respectively. Whether a class will be certified is ultimately a question for the MDL court, not us. [13] [**24] Every court that has analyzed in any detail the duty to defend the identical claims in these very cases--including the two federal circuit courts that have reached the issue--has held that such a duty exists. [14] [HN6]We have [*497] repeatedly stressed the importance of uniformity "when identical insurance provisions will necessarily be interpreted in various jurisdictions." *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 522 (Tex. 1995). Failing to recognize the duty here would mean that Nokia and Samsung--two Texas corporations (as well as any other manufacturer sued by its insurer in a Texas court)--would be deprived of a defense to which parties in other jurisdictions are entitled. We conclude that the MDL cases seek damages because of bodily injury.

13 According to Nokia, *Pinney*, *Gimpelson*, *Gilliam*, and *Naquin* have been voluntarily dismissed (without prejudice) by the plaintiffs, with no class being certified and without any settlement monies being paid.

14 *See VoiceStream Wireless Corp. v. Fed. Ins. Co.*, 112 F. App'x 553, 557 (9th Cir. 2004); *N. Ins. Co. v. Balt. Bus. Commc'ns., Inc.*, 68 F. App'x 414, 422 n.11 (4th Cir. 2003); [**25] *Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co.*, 423 F.Supp. 2d 587 (N.D. Tex. 2006); *Motorola, Inc. v. Associated Indem. Corp.*, 878 So. 2d 824, 837 (La. Ct. App. 2004), *writ denied*, 888 So.2d 207 (La. 2004); *writ denied* 888 So.2d 211 (La. 2004); and *writ denied* 888 So.2d 212 (La. 2004). *But see Zurich-Am. Ins. Co. v. Audiovox Corp.*, 294 A.D.2d 194, 741 N.Y.S.2d 692, 692 (N.Y. App. Div. 2002) (concluding, in a three-sentence opinion, that the "actions seek only economic damages measured by the cost of headphones that allegedly would block the allegedly dangerous radiation emitted by cell phones,

and, while alleging the risk of physical harm, specifically disclaim seeking recovery for anything but the cost of the headphones").

**E**

**Eight-Corners Rule**

The insurers urge us to consider extrinsic evidence in determining whether they must defend Nokia. Specifically, they assert that the *Pinney* plaintiffs filed briefs in the MDL indicating that their claims were not for bodily injury but solely for economic damages. The Fourth Circuit, applying Maryland law, declined to consider this evidence and gave two reasons for its decision. *N. Ins.*, 68 F. App'x at 421. First, the court noted that legal memoranda, unlike [**26] pleadings or affidavits, could not generally be used in another case as an evidentiary admission of a party. *Id.* at 421. Second, even if the memorandum were binding, the court noted that it would be obliged to read the document as a whole and, while some statements disclaimed bodily injury damages, others indicated that the *Pinney* plaintiffs were nonetheless seeking relief designed to address an already existing bodily injury. *Id.* at 422 (resolving the duty to defend in favor of the insured because "[e]xamined as a whole, the Memorandum fails to eliminate the potentiality that Baltimore Business could be liable to the *Pinney* plaintiffs for damages as a result of bodily injury").

To these reasons, we add a third: while Maryland has recognized exceptions, in some limited circumstances, to the eight-corners rule, Texas has not. In *Guideone Elite Insurance Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308-09 (Tex. 2006), we declined to recognize an exception to the eight-corners rule for "overlapping" evidence that implicated both coverage and the merits of the claim. There, the insurance company argued that extrinsic evidence conclusively proved that the alleged wrongdoer was not [**27] a church employee at the time of the wrongdoing (thereby eliminating coverage under the church's insurance policy), despite the plaintiff's allegations that he was. *Id.* at 308. We noted that some courts have recognized exceptions to the eight-corners rule and that the Fifth Circuit had opined that, were we to recognize such an exception, we would likely do so "'when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.'" *GuideOne*, 197 S.W.3d at 309 (quoting *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004) (describing case in which factual allegations "were not specific enough, even interpreted in the light most favorable to the insured, to possibly bring [*498] the claim within the negligence coverage of the policy" so that extrinsic evidence going solely to coverage could be examined)). Nokia urges that the *Pinney* statements, made in response to a motion to dismiss, go to the merits of the case and thus could not be considered under this [**28] exception. We need not reach this issue, however, because here it is not "initially impossible to determine whether coverage is potentially implicated"--it is. *Id.* As set forth above, the MDL cases allege damages because of bodily injury. Thus, even if we were to recognize this exception to the eight-corners rule, this case would not fit within its parameters. Accordingly, we decline to do so.

**IV**

***Naquin***

*Naquin*, however, presents a closer question. The original *Naquin* complaint, filed May 26, 2000 in Louisiana state court, potentially stated a claim for bodily injury and sought damages because of the alleged injuries. The putative class consisted of "all owners of cellular phones manufactured and/or distributed by any of the defendants." The complaint alleged that the phones "expose[d] plaintiffs to risk of damage and injury to their health and well being" and "potentially very significant long term health problems" due to transmissions "which direct[ed] potentially damaging transmission waves directly into the user's ear and brain." The complaint asserted that users had to purchase headsets or "risk extreme adverse long term health care consequences" including, but not limited to, anticipated [**29] anxiety, fear of brain damage and/or cancer." Plaintiffs asserted product liability, breach of warranty, misrepresentation, unfair trade practice, and redhibition [15] claims, and they sought, among other things, damages in "an amount sufficient" to purchase a headset, pay for the costs of medical monitoring, and compensate users for emotional distress.

15 Redhibition is a civil law claim defined as "[t]he voidance of a sale as the result of an action brought on account of some defect in a thing sold, on grounds that the defect renders the thing either useless or so imperfect that the buyer would not have originally purchased it." BLACK'S LAW DICTIONARY 1304 (8th ed. 2004).

After the case was transferred to the MDL, the *Naquin* plaintiffs amended their complaint, deleting "all claims under the Louisiana Unfair Trade Practices Laws, all claims for medical monitoring, all claims for emotional distress, pain and suffering, and . . . all claims for any individualized physical injury." The complaint, however, retained a product liability claim and still sought

"funds" based on the allegations therein. Moreover, the complaint still complained of bodily injury, with allegations of "nerve damage, [**30] cellular damage, cellular dysfunction and/or other injury to humans," including interference with "calcium and ion distributions, melatonin production, neurological effects, DNA single and double strand breaks and chromosome damage, enzyme activities, cell stress and gene transcription, and interference with function of the blood brain barrier." Although the plaintiffs disclaimed recovery for individualized physical injury, the allegations included claims of class-wide harm, including claims that the WHHPs "emit unseen RFR which enters the users' brain through the location of the antenna proximate to the users' bones, skull, head and brain exposing plaintiffs and all users to . . . injury to their health and well-being and unexpected changes in their physiology." Under our duty-to-defend law, because the amended complaint potentially stated a claim seeking damages because of [*499] bodily injury, the insurers still had a duty to defend the case.

The second amended complaint, however, changed that. While many of the allegations remained the same, the plaintiffs amended paragraph VI to read:

> All of the allegations of plaintiffs original Petition and Amended Complaint make claim solely in redhibition, [**31] and breach of warranty and under the Magnuson-Moss Warranty Improvement Act; 15 U.S.C. 35 et seq. All allegations which set forth or identify lack of warnings and other wrongs describe factual conduct but do not set forth claims. Plaintiffs do not make a products liability claim. The legal claims in the First Supplemental and Amending Complaint are solely those based upon redhibition, breach of warranty and the Magnuson-Moss Act.

We must decide whether this disclaimer precludes a duty to defend here. By deleting the product liability claims and asserting only Magnuson-Moss claims and Louisiana redhibition and breach of warranty claims--none of which permit recovery of personal-injury damages [16] -- and by clarifying that the remaining allegations summarize the facts but do not set forth claims, the second amended complaint unambiguously excludes coverage under the policies. 22 HOLMES' APPLEMAN ON INSURANCE 2d § 136.4(B). While the complaint is not a model of precision (*e.g.*, it asserts claimsfor fraud by concealment and civil conspiracy despite this initial disclaimer), plaintiffs have clearly alleged that their claims sound only in redhibition, breach of warranty, and under the Magnuson-Moss [**32] Act.

> 16 The Magnuson-Moss Warranty Act expressly excludes claims for personal injuries, subject to three exceptions not relevant here. 15 U.S.C. § 2311(b)(2). The Louisiana Products Liability Act provides the exclusive means of recovery for bodily injury claims, while common law redhibition and breach of warranty claims remain available for economic loss. John Kennedy, *A Primer on the Louisiana Products Liability Act,* 49 LA. L. REV. 565, 580 (1989); *Jefferson v. Lead Indus. Ass'n, Inc.*, 930 F. Supp. 241, 245 (E.D. La. 1997) (noting that "breach of implied warranty or redhibition is not available as a theory of recovery for personal injury, although a redhibition action is still viable against the manufacturer to recover pecuniary loss"), *aff'd*, 106 F.3d 1245 (5th Cir. 1997).

We recognize that "damages because of bodily injury" is susceptible to a broad definition. At least one court of appeals has concluded that the phrase is ambiguous: "One interpretation suggests that the insured is entitled to recover any damages that arise *because of bodily injury;* another suggests that the insured is only entitled to recover damages that are *derived from the bodily injury." State Farm Mut. Auto Ins. Co. v. Shaffer*, 888 S.W.2d 146, 148-49 (Tex. App--Houston [1st Dist.] 1994, writ denied). [**33] We recently held that prejudgment interest was recoverable under an insurance policy requiring the insurer to pay all sums the insured was legally entitled to recover "because of bodily injury or property damage." *Brainard v. Trinity Universal Ins. Co.,"* 216 S.W.3d 809, 814 (Tex. 2006). We rejected the insurer's argument that prejudgment interest was compensation for lost use of money, not damages from bodily injury, and noted that such a "rigid reading . . . would entail splitting hairs even among purely compensatory damages, such as those for mental anguish and loss of society." *Id.* Instead, we noted that the phrase merely underscored the fact that the insurance was compensatory, and we concluded that "while it is true that prejudgment interest accrues over time because of lost use of money, it is equally accurate to say that it constitutes additional compensatory damages [*500] for the insured's bodily injury and property damage." *Id.*

But even assuming that the *Naquin* plaintiffs' redhibition, Magnuson-Moss, and warranty claims seek damages "because of bodily injury," the policies exclude coverage for these claims because the only damages sought are economic ones relating to the allegedly [**34] defective product. The policies' business risk exclusions, [17] while inapplicable to personal injury claims,

preclude coverage for economic loss claims based on product defects:

> [HN7]Coverage under a commercial general liability insurance policy is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or work is not that for which the damaged person bargained. Pursuant to this understanding, certain exclusions have been included within the standard commercial general liability policy for the express purpose of excluding coverage for risks relating to the repair or replacement of the insured's faulty work or products, or defects in the insured's work or product itself. These "business risk" exclusions, as they are commonly called, are intended to provide coverage for tort liability, not for the contractual liability of the insured for loss which takes place due to the fact that the product or completed work was not that for which the other party had bargained.

9A COUCH ON INSURANCE § 129:16; *see also* *T.C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co.*, 784 S.W.2d 692, 694-95 (Tex. App.--Houston [14th Dist.] 1989, writ denied) [**35] ("The purpose of comprehensive liability insurance coverage is to provide protection to the insured for personal injury or for property damage caused by the completed product but not for the replacement and repair of that product."), *La Marche v. Shelby Mut. Ins. Co.*, 390 So.2d 325, 326 (Fla. 1980) (noting that "[t]he majority view holds that the purpose of this comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product"); *W. Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 475 N.E.2d 872, 878, 86 Ill. Dec. 493 (Ill. 1985) (noting that "'the policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident'") (quoting *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 796 (N.J. 1979)). Here, the disclaimer makes clear that the only injury complained of is a warranty-based economic loss asserted under Louisiana and federal law, and those claims are excluded from coverage. Thus, the duty to defend *Naquin* ended when the plaintiffs filed the second amended complaint. [18] 22 HOLMES' APPLEMAN ON INSURANCE § 136.2(D) ("[W]hen there are covered [**36] and non-covered claims in the same lawsuit, the insurer is obligated to provide a defense to the entire suit, at least until it can limit the suit to those claims outside of the policy [*501] coverage."). [19]

17 The relevant exclusions preclude coverage for "'property damage' to 'your product' arising out of it or any part of it," "property damage to the named insured's products arising out of such products or any part of such products," and "property damage . . . arising out of . . . [a] defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work.'"

18 The insurers urge us to consider extrinsic evidence in determining the duty to defend. Specifically, they assert that statements made by attorneys for the *Naquin* plaintiffs in response to a motion to dismiss should be considered in determining whether there is a duty to defend. For the reasons set forth in section III, we decline to do so.

19 We note too that this appears to be the first case to consider the *Naquin* second amended complaint. While the record copy of that complaint is undated, it appears to have been filed after the Louisiana court of appeals held that, under Louisiana law, there was a duty to defend *Naquin*. *Motorola, Inc. v. Associated Indem. Corp.*, 878 So.2d 824, 830 n.5 (La. Ct. App. 2004) [**37] (citing only the allegations of the original and first amended complaints and noting that the "allegations are characteristic of delictual or 'mixed' causes of action such as products liability actions," claims that were dropped from the second amended complaint), *writ denied*, 888 So.2d 206 (La. 2004); *writ denied* 888 So.2d 211 (La. 2004); and *writ denied* 888 So.2d 212 (La. 2004). Similarly, the Fourth Circuit's decision was limited to the *Pinney* complaint, and the Ninth Circuit considered *Gimpelson* and unspecified other complaints with the same allegations, which suggests that the *Naquin* second amended complaint may not have been among them. *Voicestream*, 112 F. App'x at 555 n.1 ("All of the underlying complaints, however, are substantially the same, and the parties do not contend otherwise."); *N. Ins. Co.*, 68 F. App'x at 416. *But see Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co.*, 423 F.Supp. 2d 587, 590 (N.D. Tex. 2006) (noting parenthetically that *Naquin* complaint had been amended a second time but failing to discuss specifics of the amendment, including disclaimer).

**V**

**Exclusions**

Those exclusions do not, however, preclude a duty to defend in the remaining cases. The relevant exclusions [**38] apply to "property damage to your product," "property damage . . . arising out of a defect, deficiency, inadequacy or dangerous condition in 'your product,'" and damages related to a product recall. We agree with the court of appeals, which held that these exclusions did not excuse the duty to defend: "[t]he underlying actions did not contain allegations of property damage to the cell phones or to 'impaired property' (defined as 'tangible property, other than your product or your work') or damages for the recall of the cell phones." 202 S.W.3d 384, 392. Our holding is in accord with other cases that have discussed the issue. *VoiceStream*, 112 F. App'x at 557 (holding that property damage exclusions did not apply "because the underlying complaints--liberally construed--allege bodily injury, not that the underlying plaintiffs' cell phones do not work for their intended purpose (i.e., making and receiving phone calls)"); *N. Ins. Co.*, 68 F. App'x at 422 n.11 (noting that three exclusions were inapplicable because they related to property damage, rather than bodily injury, and the fourth involved only products that had been recalled, unlike the wireless phones at issue); *Motorola, Inc.*, 878 So. 2d at 836 [**39] (concluding that "these exclusions relate only to loss of use or damage to property, including the cell phones at issue, and thus have no relevance to the 'bodily injury' claims at issue").

**VI**

**Conclusion**

As the Fourth Circuit concluded, the "plaintiffs are seeking remedies designed to eliminate already existing bodily injuries. While their claims may lack merit, we are unable to state with certainty that they do not seek 'damages because of bodily injury.'" *N. Ins. Co.*, 68 F. App'x at 421-22. Neither can we. We modify the court of appeals' judgment to provide that the duty to defend *Naquin* ended upon the filing of the second amended complaint and, as modified, affirm. TEX. R. APP. P. 60.2(b).

Wallace B. Jefferson

Chief Justice

**OPINION DELIVERED:** August 29, 2008

**DISSENT BY:** Nathan L. Hecht

**DISSENT**

[*502] JUSTICE HECHT, joined by JUSTICE BRISTER, dissenting.

When construing pleadings under the eight-corners rule to determine whether they state a claim an insurer must defend, we are to be liberal. [1] Liberal does not mean naive; it does not mean blind. The pleadings in the five putative class actions at issue here all allege that cellphone radiation causes bodily injury, although they never use that phrase. They call it "biological [**40] injury". Since the human body is totally biological [2] (as opposed to a human *being)*, the two phrases would seem to mean the same thing. [3] But American caselaw rarely refers to injuries to the human body as "biological injuries". Westlaw's computer databases identify maybe half a dozen such cases in the history of American jurisprudence, not counting the cases before us and a few others like them. Westlaw quits counting cases using the phrase "bodily injury" at 10,000. A pervasive, timeless consensus has formed around the use of "bodily injury". Why, then, all of a sudden, change to "biological injury" in pleading a handful of cellphone radiation cases?

1 *National Union Fire Ins. Co. of Pittsburgh v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) ("When applying the eight corners rule, we give the allegations in the petition a liberal interpretation.").

2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 218 (1981) (defining biological as "of or relating to biology or to life and living things: belonging to or characteristic of the processes of life").

3 The law does not afford damages for all bodily injuries. *See, e.g.*, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432-436, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997) [**41] (holding that a worker cannot recover under FELA for the injury of exposure to asbestos if he is disease and symptom free); *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 92-93 (Tex. 1999) (holding that a person exposed to asbestos cannot claim mental anguish damages for fear of contracting an asbestos-related disease if bodily injury is "latent and any eventual consequences uncertain"). The issue here, however, is not whether cellphone purchasers have actually suffered bodily injury, but whether class counsel have alleged they have.

There is an obvious answer. The cases are putative class actions. None of the named plaintiffs claims damages for personal injuries caused by cellphone radiation. Their damage claims are for not having been furnished headsets with their phones, at most a few dollars, certainly not worth the freight of the litigation. None of the cases has any value unless a class is certified aggregating millions of claims for headsets. A class cannot be certified if questions common to the class members do not

predominate. [4] Questions common to class members cannot predominate if class members claim individualized bodily injuries. [5] If the cases are to have [**42] any value, the pleadings must never breathe the words "bodily injury". They never do.

> 4 *E.g.*, FED. R. CIV. P. 23(b)(3); TEX. R. CIV. P. 42(b)(3).
>
> 5 *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 436 (Tex. 2000) ("Personal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve. *See generally [Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)]. Thus, the class action will rarely be an appropriate device for resolving them.").

Nokia's insurers argue that this omission establishes that they have no duty to defend the claims, but it doesn't. The insurance policies obligate them to defend claims for "damages because of bodily injury", and "biological injury" is close enough. But the insurers also argue that none of the damages sought are *because of* bodily injury, and on this point they are clearly right. None of the class action [*503] pleadings claims any specific damages other than for headsets that Nokia did not supply with the phones. Want of a cellphone headset is neither a bodily nor a biological injury. It is true, as the Court notes, that several of the damage claims are not specific [**43] -- the pleadings claim unspecified "monetary damages", "compensatory damages", "actual damages", "legal and equitable relief", etc. -- but none is inconsistent with the pleadings' meticulous avoidance of any claims for personal injuries. It is also true that the pleadings weasel that class members' damages are "including but not limited to", and "consisting, among other things, of" headsets and their value, but again, though the pleadings do not affirmatively exclude the possibility of other damages, neither do they ever identify any other actual damages. The Court makes the positive statement that the class action plaintiffs "seek damages based on their physical exposure to radiation." [6] This is simply incorrect. There are claims for headsets and their value, and claims for other unspecified damages. There are no claims for personal injury damages. The Court cites no example, and there is none.

> 6 *Ante* at .

Construing pleadings liberally, we must consider whether they state *potential* claims for damages because of bodily injury, even if they are ambiguous or inartful. [7] Under this very generous standard, the pleadings before us here do not. Suppose that a plaintiff sued the manufacturer [**44] of his car, alleging that its brakes were defectively designed and unreasonably dangerous, and claiming damages required for repairs. That would clearly not be a claim for damages because of bodily injury. If the plaintiff added that brakes had been known to fail, resulting in accidents, would that transform the case into one for bodily injury damages? Surely not. If the plaintiff asserted that he had himself been injured, but still claimed only repair damages, would that change the nature of the case? No. That is all we have in the present case. Class counsel allege very carefully that using cellphones without headsets can cause bodily injury, and therefore they want headsets or their value. This is not a claim for damages because of bodily injury.

> 7 *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006) ("A plaintiff's factual allegations that potentially support a covered claim is all that is needed to invoke the insurer's duty to defend . . . .").

This conclusion is unassailable for two reasons. One is that a person need only have purchased (or leased) a cellphone to be a member of the class claiming damages. He need not ever have actually used the [**45] phone. He could have bought it as a gift or lost it. His damages are completely unrelated to any possible personal injury, bodily or biological. He is like the plaintiff suing for defective brakes before an accident has happened. The other reason is that, as I have already said, damages because of bodily injury necessarily depend on whose body in particular has been injured, an individual inquiry that prevents predominance of common issues, precludes class certification, and destroys the value of the lawsuits. We should not consider that class counsel's pleadings potentially state a claim that would destroy the case altogether.

In any event, class counsel have removed all doubt as to their intentions. Several complaints assert: "No individual issues of injury exist". This can be true only if class members do not claim personal injuries. The Court's response to this statement is that "[a]lleging that there are [*504] no individual *issues* of injury... is not the same as stating that no individuals have been injured." [8] That is certainly true, but the insurers' duty to defend turns not on whether individuals may have been injured, but whether they *claim* injury. The insurers must defend claims for [**46] damages because of bodily injury, even if the claims prove to be unfounded; by the same token, they are not required to defend claims that have not been asserted, even if they exist somewhere. Class counsel stated in the MDL proceeding: "Plaintiffs are not seeking compensation for any personal injury suffered as a result of the use of cell phones." The Court's response is that class certification is not the issue.

[9] That, too, is true. But surely we must take counsel at their word as to what their claims are.

8 *Ante* at .
9 *Ante* at .

The Court cites an unpublished opinion of the Fourth Circuit and an unpublished opinion of the Ninth Circuit, each concluding that the cellphone radiation plaintiffs claim damages because of bodily injury. But neither adds anything to this Court's opinion. Specifically, neither quotes a single example of such a claim from class counsel's pleadings. Moreover, the courts that issued those opinions do not allow them to be treated as authoritative in any federal court in their respective circuits. [10] If the opinions are not binding even on their authors, it is not clear why this Court should rely on them for anything. The Court suggests that our decision on [**47] the insurers' duty to defend should not be out of step with other courts that have addressed the same issue, but courts have gone both ways. [11] We cannot help but be in step with some and out of step with others.

10 4th Cir. Local R. 32.1 (citation of unpublished dispositions) ("Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."); 9th Cir. R. 36-3(a) (citation of unpublished dispositions or orders) ("Not Precedent: Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").

11 *Compare* Zurich-American Ins. Co. v. Audiovox Corp., 294 A.D.2d 194, 741 N.Y.S.2d 692, 692 (N.Y. App. Div. 2002) (no duty to defend), *with* Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co., 423 F. Supp. 2d 587, 594 (N.D. Tex. 2006) (duty to defend), Motorola, Inc. v. Associated Indem. Corp., 878 So. 2d 824 (La. App. 1 Cir. 2004), *writ denied*, 888 So. 2d 206 (La. 2004), *and writ denied*, 888 So. 2d 211 (La. 2004), [**48] *and writ denied*, 888 So. 2d 212 (La. 2004) (duty to defend), *and* Motorola, Inc. v. Associated Indem. Corp., 878 So. 2d 838 (La. App. 1 Cir. 2004), *writ denied*, 888 So. 2d 207 (La. 2004), *and writ denied*, 888 So. 2d 211 (La. 2004), *and writ denied*, 888 So. 2d 212 (La. 2004) (duty to defend).

The most unfortunate aspect of today's decision in my view is that it handles the eight-corners rule in a way that rewards cute and clever pleading that strains credulity. The only difference between the five cases at issue is that in one, *Naquin*, class counsel was forthcoming, affirmatively disclaiming the personal injury damage claims that would destroy the lawsuit. [12] The Court concludes that the insurers need not defend that case.

12 *Naquin et al. v. Nokia Mobile Phones, Inc.*, MDL No. 1421, No. 01-MD-1421 (D. Md.) (second amended complaint) (E.D. La. Cause No. 00-2023).

The pleadings in the cellphone radiation class actions do not actually claim damages because of bodily injury, and they do not potentially include such claims because the [*505] claims would defeat the actions. The insurers should not be required to defend them.

Accordingly, I respectfully dissent.

Nathan L. Hecht

Justice

Opinion delivered: [**49] August 29, 2008

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CIVIL STATUTES
TITLE 32. CORPORATIONS
CHAPTER EIGHTEEN. MISCELLANEOUS

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

Tex. Rev. Civ. Stat. art. 1528e

# Art 1528e. Professional Corporation Act

## Title

Sec. 1. This Act shall be known and may be cited as "The Texas Professional Corporation Act."

## Sections, Subsections and Captions

Sec. 2. The division of this Act into sections and subsections and the use of captions in connection therewith are solely for convenience and shall have no legal effect in construing the provisions of this Act.

## Definitions

Sec. 3. As used in this Act, unless the context otherwise requires, the term:

(a) "Professional Service" means any type of personal service which requires as a condition precedent to the rendering of such service, the obtaining of a license, permit, certificate of registration or other legal authorization, and which prior to the passage of this Act and by reason of law, could not be performed by a corporation, including by way of example and not in limitation of the generality of the foregoing provisions of this definition, the personal services rendered by architects, attorneys-at-law, certified public accountants, dentists, public accountants, and veterinarians; provided, however, that physicians, surgeons and other doctors of medicine are specifically excluded from the operations of this Act, since there are established precedents allowing them to associate for the practice of medicine in joint stock companies.

(b) "Professional Corporation" means a corporation organized under this Act for the sole and specific purpose of rendering professional service and which has as its shareholders only individuals who themselves are duly licensed or otherwise duly authorized within this state to render the same professional service as the corporation.

(c) "Professional Legal Service" means any type of personal service rendered by attorneys-at-law which requires as a condition precedent to the rendering of such service within this state, the obtaining of a license, permit, certificate of registration, or other legal authorization and which prior to the passage of this Act and by reason of law could not be performed within this state by a corporation.

(d) "Professional Legal Corporation" means a corporation organized under this Act for the sole and specific purpose of rendering professional legal service and which has as its shareholders only individuals, professional legal corporations and foreign professional legal corporations each of which is duly licensed or otherwise duly authorized to render professional legal service; provided, however, any individual shareholder, director, officer, employee or agent of a professional legal corporation who renders professional legal service within this state must be duly licensed to render professional legal service within this state.

(e) "Foreign Professional Legal Corporation" means a professional corporation organized in a jurisdiction other than this state for the sole specific purpose of rendering professional legal service and which has as its shareholders only individuals, professional legal corporations and foreign legal professional corporations each of which is duly licensed or otherwise duly authorized to render professional legal service.

Articles of Incorporation

Sec. 4. (a) One or more individuals may incorporate a professional corporation by filing the original and a copy of Articles of Incorporation with the Secretary of State. One or more individuals may incorporate a professional legal corporation by filing the original and a copy of Articles of Incorporation with the Secretary of State. Except as provided by Subsection (b) of this section, no professional corporation organized under this Act shall render more than one kind of professional service. In addition to other provisions required or permitted by law, the Articles of Incorporation shall set forth:

(1) A statement that the corporation is a professional corporation; and

(2) A statement of the professional service to be rendered by the corporation.

(b) Professionals, other than physicians, engaged in related mental health fields such as psychology, clinical social work, licensed professional counseling, and licensed marriage and family therapy may form a professional corporation under this Act to perform professional services that fall within the scope of practice of those practitioners. When professionals engaged in related mental health fields form a corporation under this Act, the authority of each of the practitioners is limited by the scope of practice of the respective practitioner, and none can exercise control over the others' clinical authority granted by their respective licenses, whether through agreements, bylaws, directives, financial incentives, or other arrangements that would assert control over treatment decisions made by a practitioner. The state agencies exercising regulatory control over professions to which this subsection applies continue to exercise regulatory authority over the respective licenses of the professionals.

Applicability of Texas Business Corporation Act

Sec. 5. The Texas Business Corporation Act shall be applicable to professional corporations, except to the extent that the provisions of the Texas Business Corporation Act conflict with the provisions of this Act; and professional corporations shall enjoy the powers and privileges and be subject to the duties, restrictions and liabilities of other business corporations except insofar as the same may be limited or enlarged by this Act. A shareholder of a professional corporation, as such, shall have no duty to supervise the manner or means whereby the officers or employees of the corporation perform their respective duties. Shareholders of a professional corporation, as such, shall have no greater liability than do shareholders, as such, of other business corporations. This Act shall take precedence in the event of any conflict with the provisions of the Texas Business Corporation Act or the law. The filing fee for a document under this Act is the same as the filing fee for a similar document filed under the Texas Business Corporation Act.

Purpose

Sec. 6. A professional corporation may be organized under this Act only for the purpose of rendering one specific type of professional service and services ancillary thereto.

Sec. 7. Deleted by Acts 1991, 72nd Leg., ch. 901, § 49, eff. Aug. 26, 1991.

Name

Sec. 8. A professional corporation may adopt any name that is not contrary to the law or ethics regulating the practice of the professional service rendered through the professional corporation. A professional corporation may use the initials "P.C." in its corporate name in lieu of the word, or in lieu of the abbreviation of the word, "corporation," "company," or "incorporated."

Board of Directors

Sec. 9. No person not duly licensed or otherwise duly authorized to render the professional service of the corporation shall be a member of the Board of Directors.

Officers

Sec. 10. No person not duly licensed or otherwise duly authorized to render the professional service of the professional corporation may hold an office.

Sec. 11. Repealed by Acts 1991, 72nd Leg., ch. 901, § 52, eff. Aug. 26, 1991.

Issuance and Transfer of Shares

Sec. 12. A professional corporation may issue shares representing ownership of the capital of the professional corporation only to individuals, and in the case of a professional legal corporation, individuals, professional legal corporations and foreign professional legal corporations, which are duly licensed or otherwise legally authorized to render the same type of professional service as that for which the corporation was organized. Except to the extent provided in the Articles of Incorporation, the bylaws or any applicable stock purchase or redemption agreement, shares representing ownership of professional corporation capital shall be freely transferable by any shareholder to any other shareholder, or to the professional corporation which issued such shares or to any person, and in the case of a professional legal corporation, to any professional legal corporation or foreign professional legal corporation, who or which is not a shareholder, provided such person is duly licensed or qualified under the laws of this state, or in the case of a professional legal corporation, such person, professional legal corporation or foreign professional legal corporation is duly licensed or otherwise duly authorized to render professional legal service, and such transferee shall thereupon become a shareholder and be entitled to participate in the management, affairs, and profits of the professional corporation. Any restriction on the transfer of shares imposed by the Articles of Incorporation, the bylaws or any stock purchase or redemption agreement shall be written or printed on all certificates representing shares issued to shareholders, unless such restrictions are incorporated by reference pursuant to the provisions of the Texas Business Corporation Act.

Redemption of Shares

Sec. 13. A professional corporation shall have the power to redeem the shares of any shareholder, or the shares of a deceased shareholder, upon such terms as may be agreed upon by the Board of Directors and such shareholder or his personal representative, or at such price and upon such terms as may be provided in the Articles of Incorporation, the bylaws, or any applicable stock purchase or redemption agreement.

Legal Disqualification

Sec. 14. If any shareholder, officer or director of a professional corporation, or any agent or employee thereof who has been rendering professional service for or with it of the same type which such professional corporation was organized to render, becomes legally disqualified to render such professional service, he shall sever all employment with such professional corporation and shall terminate all financial interest therein forthwith; and such corporation shall thereupon purchase or cause to be purchased from him all shares owned by him in such professional corporation, at such price and upon such terms as may be provided in the Articles of Incorporation, the bylaws or any applicable stock purchase or redemption agreement; provided, however, that if he was the sole shareholder of the professional corporation, he may continue to act as officer, director and shareholder for the purposes of winding up the affairs of the corporation and effecting its dissolution, selling the assets of the corporation, or selling the outstanding shares of the corporation, but not for rendering any professional service. Likewise, if any person who is not licensed or duly authorized to render the pro-

fessional service which a professional corporation was organized to render should succeed to the interest of any shareholder of such professional corporation, the person holding such interest shall terminate all financial interest in such professional corporation forthwith; and such corporation shall thereupon purchase or cause to be purchased from such person all shares owned by such person in such professional corporation, at such price and upon such terms as may be provided in the Articles of Incorporation, the bylaws or any applicable stock purchase or redemption agreement; provided, however, that if such person has succeeded to all of the shares of the professional corporation, such person may act as officer, director and shareholder for the purposes of winding up the affairs of the corporation and effecting its dissolution, selling the assets of the corporation, or selling the outstanding shares of the corporation, but not for rendering any professional service.

Rendering of Professional Services

Sec. 15. A professional corporation may render professional service in this state only through its officers, employees and individual agents who are duly licensed to render such professional service in this state or through agents of the professional corporation that are themselves professional corporations that render such professional service only through officers and employees of the agent who are so licensed, and a professional legal corporation may render professional legal service in this state only through its officers, employees and individual agents who are duly licensed to render professional legal service in this state or through agents of the professional legal corporation that are themselves professional legal corporations or foreign professional legal corporations that render professional legal service in this state only through officers, employees and agents who are duly licensed to render professional legal service in this state; provided, however, that this provision shall not be interpreted to include within such prohibition employees such as clerks, secretaries, bookkeepers, technicians, nurses, assistants and other individuals who are not usually and ordinarily considered by custom and practice to be rendering professional service for which a license or other legal authorization is required; and further provided, that no person shall, under the guise of employment, practice a profession in this state unless duly licensed or otherwise legally authorized to practice that profession under the laws of this state.

Professional Relationships Not Affected

Sec. 16. The provisions of this Act shall not be construed to alter or affect the professional relationship between a person rendering professional service and a person receiving such service, and all such confidential relationships enjoyed under this state shall remain unchanged. Nothing in this Act shall remove or diminish any rights at law that a person receiving professional service shall have against a person rendering professional service for errors, omissions, negligence, incompetence or malfeasance. The corporation (but not the individual shareholders, officers or directors) shall be jointly and severally liable with the officer, employee or agent rendering professional service for such professional errors, omissions, negligence, incompetence or malfeasance on the part of such officer, employee or agent when such officer, employee or agent is in the course of his employment for the corporation.

Continuity of Existence

Sec. 17. Unless the Articles of Incorporation expressly provide otherwise, a professional corporation shall continue as a separate entity for all purposes and for such period of time as is provided in the Articles of Incorporation until dissolved by a vote of its shareholders. A professional corporation shall continue to exist regardless of the death, incompetency, bankruptcy, resignation, withdrawal, retirement or expulsion of any one or more of its shareholders or the transfer of any of its shares to any new holder or the happening of any other event which under the laws of this state and under like circumstances would cause a dissolution of a partnership, it being the intent of this Section that such professional corporation shall have continuity of life independent of the life or status of its shareholders. No shareholder shall have power to dissolve the professional corporation by his independent act of any kind.

Sec. 18. Repealed by Acts 2001, 77th Leg., ch. 757, § 17, eff. Sept. 1, 2001.

Exemption from Securities Laws

Sec. 19. The sale, issuance or offering of any capital stock of a professional corporation to persons permitted by the provisions of this Act to own such capital stock are hereby exempted from all provisions of the laws of this state, other than this Act, which provide for supervision, registration or regulation in connection with the sale, issuance or offering

of securities; and the sale, issuance or offering of any such capital stock to such persons shall be legal without any action or approval whatsoever on the part of any official or state regulatory agency authorized to license, regulate, or supervise the sale, issuance or offering of securities.

Foreign Professional Corporations

Sec. 19A. (a) A foreign professional legal corporation may apply for a certificate of authority to perform professional legal service in this state by filing an application in accordance with the Texas Business Corporation Act. The Secretary of State may not issue the certificate unless the name of the corporation or the name the corporation elects in this state meets the requirements of Section 8 of this Act. The corporation may not exercise in this state powers other than the powers provided by Section 7 of this Act. A shareholder, director, officer, employee, or agent of the corporation who renders professional legal service in this state on behalf of the corporation must be licensed or otherwise authorized to render professional legal service in this state.

(b) A certificate may not be issued to a corporation under this section unless the application for such certificate of authority includes a statement that the jurisdiction in which the corporation is incorporated would permit reciprocal admission of such corporation if it were incorporated in this state.

Effective Date

Sec. 20. This Act shall be effective on and after January 1, 1970.

Applicability; Expiration

Sec. 21. (a) Except as provided by Title 8, Business Organizations Code, this Act does not apply to a professional corporation to which the Business Organizations Code applies.

(b) This Act expires January 1, 2010.

**HISTORY:** Stats. 1969, 61st Leg. Sess., Ch. 779, effective January 1, 1970; Stats. 1975, 64th Leg. Sess., Ch. 92, § 1, effective April 30, 1975; Stats. 1977, 65th Leg. Sess., Ch. 630, § 1, effective August 29, 1977; Stats. 1979, 66th Leg. Sess., Ch. 120, § 16, 17, effective May 9, 1979; Stats. 1983, 68th Leg. Sess., Ch. 69, § 13, effective September 1, 1983; Stats. 1985, 69th Leg. Sess., Ch. 128, § 33, effective May 20, 1985; Stats. 1985, 69th Leg. Sess., Ch. 371, § 1 to 5, effective August 26, 1985; Stats. 1989, 71st Leg. Sess., Ch. 801, § 78, 79, effective August 28, 1989; Stats. 1991, 72nd Leg. Sess., Ch. 901, § 47 to 52, 78 to 82, effective August 26, 1991; Stats. 1999, 76th Leg. Sess., Ch. 1245, § 1, effective June 18, 1999; Stats. 2001, 77th Leg. Sess., Ch. 757, § 17, effective September 1, 2001; Stats. 2003, 78th Leg. Sess., Ch. 182, § 7, effective January 1, 2006.

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INSURANCE CODE
TITLE 4. REGULATION OF SOLVENCY
SUBTITLE D. GUARANTY ASSOCIATIONS
CHAPTER 462. TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION
SUBCHAPTER C. GENERAL POWERS AND DUTIES OF ASSOCIATION

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

Tex. Ins. Code § 462.112

§ 462.112. Board Access to Records of Impaired Insurer

The receiver or statutory successor of an impaired insurer covered by this chapter shall give the board or the board's representative:

(1) access to the insurer's records as necessary for the board to perform the board's functions under this chapter relating to covered claims; and

(2) copies of those records on the board's request and at the board's expense.

**HISTORY:** Acts 2005, 79th Leg., ch. 727 (H.B. 2017), § 1, effective April 1, 2007.

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SUBCHAPTER G. ASSOCIATION POWERS AND DUTIES RELATING TO COVERED CLAIMS

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

Tex. Ins. Code § 462.306

§ 462.306. Discharge of Policy Obligation

(a) The association shall discharge an impaired insurer's policy obligations, including the duty to defend insureds under a liability insurance policy, to the extent that the policy obligation is a covered claim under this chapter.

(b) In performing the association's statutory obligations, the association may also enforce a duty imposed on the insured or beneficiary under the terms of an insurance policy within the scope of this chapter.

**HISTORY:** Acts 2005, 79th Leg., ch. 727 (H.B. 2017), § 1, effective April 1, 2007.

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SUBCHAPTER G. ASSOCIATION POWERS AND DUTIES RELATING TO COVERED CLAIMS

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

Tex. Ins. Code § 462.309

§ 462.309. Stay of Proceedings; Certain Decisions not Binding

(a) To permit the association to properly defend a pending cause of action, a proceeding in which an impaired insurer is a party or is obligated to defend a party in a court in this state, other than a proceeding directly related to the receivership or instituted by the receiver, is stayed for:

(1) a six-month period beginning on the later of the date of the designation of impairment or the date an ancillary proceeding is brought in this state; and

(2) a subsequent period as determined by the court, if any.

(b) The stay applies to each party to the proceeding and the proceeding is stayed for all purposes.

(c) A deadline imposed under the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure is tolled during the stay. Statutes of limitation or repose are not tolled during the stay, and any action filed during the stay is stayed upon the filing of the action.

(d) The court in which the delinquency proceeding is pending has exclusive jurisdiction regarding the application, enforcement, and extension of the stay and may issue an injunction or another similar order to enforce the stay.

(e) The commissioner may bring an ancillary conservation proceeding under Section 443.401 for the purpose of determining the application, enforcement, and extension of the stay to an impaired insurer that is not domiciled in this state.

(f) With respect to a covered claim arising from a judgment, order, decision, verdict, or finding based on the default of an impaired insurer or an impaired insurer's failure to defend the insured, the association, on the association's own behalf or on behalf of an insured and on application, shall be entitled to:

(1) have the court or administrator that made the judgment, order, decision, verdict, or finding set aside the judgment, order, decision, verdict, or finding; and

(2) defend the claim on the merits.

**HISTORY:** Acts 2005, 79th Leg., ch. 727 (H.B. 2017), § 1, effective April 1, 2007; am. Acts 2007, 80th Leg., ch. 730 (H.B. 2636), § 3B.011(a), effective September 1, 2007; am. Acts 2007, 80th Leg., ch. 921 (H.B. 3167), § 9.011(a), effective September 1, 2007.

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STATE RULES
TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 3. Parties to Suits

Tex. R. Civ. P. 38 (2009)

Review Court Orders which may amend this Rule

Rule 38 Third-Party Practice

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 97. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

(d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

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Texas Rules


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STATE RULES
TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 4. Pleading
A. GENERAL

Tex. R. Civ. P. 51 (2009)

Review Court Orders which may amend this Rule

Rule 51 Joinder of Claims and Remedies

(a) *Joinder of Claims.* --The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 39, 40, and 43 are satisfied. There may be a like joinder of cross claims or third-party claims if the requirements of Rules 38 and 97, respectively, are satisfied.

(b) *Joinder of Remedies.* --Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

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Texas Rules


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STATE RULES
TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 4. Pleading
C. PLEADINGS OF DEFENDANT

Tex. R. Civ. P. 97 (2009)

Review Court Orders which may amend this Rule

Rule 97 Counterclaim and Cross-Claim

(a) *Compulsory Counterclaims.* --A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) *Permissive Counterclaims.* --A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim Exceeding Opposing Claim.* --A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) *Counterclaim Maturing or Acquired After Pleading.* --A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) *Cross-Claim Against Co-Party.* --A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(f) *Additional Parties.* --Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules 38, 39 and 40.

(g) Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same.

(h) *Separate Trials; Separate Judgments.* --If the court orders separate trials as provided in Rule 174, judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.