

# Winning Critical Evidentiary Battles with Trial Briefs

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## **Winning Critical Evidentiary Battles with Trial Briefs**

Dan Christensen

### **I. SCOPE.**

It is my intent that this paper be a brief, very informal, discussion of the practice of submitting trial briefs on the most important evidentiary issues confronting lawyers trying car wreck cases. The greatest value the paper has to offer is likely found in the appendices rather than the discussion itself. The appendices are template briefs that can easily be modified by the practitioner for use in their specific case shortly before, or even during, trial.

This paper is not meant to be a comprehensive discussion of briefing techniques or any one evidentiary issue, but rather, a general overview of some strategies and techniques that have worked well in the past for this particular lawyer.

If you are in need of a thorough, heavily annotated, treatise on this subject, this is not your resource. On the other hand, if you are interested in a useful collection of practice aides that can save you time and increase your chances of success on the main evidentiary issues found in car wreck trials, it is my hope this paper will benefit you.

### **II. NO-LEGALESE DISCLAIMER.**

I have stolen most, if not all, of my ideas and strategies from various authors, lawyers, friends and clients over several years. If I can recall who taught

me a specific method or gave me an idea, I will credit them appropriately. If you are one of the people who gave me an idea and I fail to properly credit you, you have my word that I will share all the royalties I earn from this paper with you.

### **III. HOW TO USE THE APPENDICES**

The 22 appendices to this paper are brief templates covering many evidentiary issues commonly found in car wreck litigation. Some of the briefs are short trial briefs, some are motions to exclude, and some are requests for instructions. Regardless of the form in which they appear, they can easily be modified or adapted to fit the needs of the lawyer.

The templates are not complete briefs, but rather, just short explanations of the law controlling the issue in question. Conspicuously absent from the brief templates are any facts or argument. The lawyer will have to tailor each brief to his or her case and check the law provided to ensure it is applicable to the circumstances present in the case and still good authority.

### **IV. WHAT IS A TRIAL BRIEF?**

A trial brief, as the term is used in this paper, is a short explanation of the law controlling a specific evidentiary issue present in a case. It is not the "Trial Brief" some courts demand that requires the lawyer to address the entire case, provide an analysis of significant factual, evidentiary, or legal issues, and set forth each element of the damage model.

The term “trial brief” for purposes of this paper means a single issue brief meant to efficiently present the party’s side on a particular evidentiary issue in the case. Some refer to these types of briefs as “pocket briefs.” Regardless of what one calls them, there is no universal structure or format for these briefs as long as the lawyer gets his point across clearly and concisely.

When I submit trial briefs, I typically like to start with a section entitled “Issue Presented”. This is often only one sentence that distills the issue being addressed in the context of the case at hand.

The next section I normally include is a “Facts” section that consists of a bullet list of facts that are particularly relevant to the issue being presented. If the attorney is briefing the issue before trial, but not planning on using the brief until during trial, this list of relevant facts may have to be modified to comport with the evidence adduced at trial.

The next section of the brief is typically the section discussing the law. This is the part of the brief that has been provided in general terms for you in the appendices. If there is a case or two mentioned in the brief that are particular strong for my side of the argument, I will attach those opinions to the brief. I will also highlight the relevant sections of the opinions for the judge’s convenience.

“Argument” is usually the next section of the brief where the lawyer applies the facts to the law and explains why his position on the issue should

prevail. Lastly, in a “Conclusion” section the lawyer briefly explains what he or she is asking from the court.

Regardless of whether the lawyer follows the format outlined above, the important thing is that the brief be as clear and concise as possible. If the brief is going to be presented during trial, this becomes even more important. The court needs to be able to identify the issue, understand the controlling authority and conclude in your favor in only a few minutes.

## **V. WHY SHOULD WE FILE A TRIAL BRIEF?**

- A. Helps us prepare.**
- B. Helps us present.**
- C. Gives the judge a favorable impression.**
- D. Gives the client a favorable impression.**
- E. Gives us an advantage over our opponent.**
- F. Helps the judge decide.**
- G. Helps us establish a record.**

## **VI. WHEN SHOULD WE FILE A TRIAL BRIEF?**

Like most trial strategy decisions, there is no one answer to the question of when we should file a brief on a particular issue. At times, it may be to our advantage to re-structure the brief as a motion to exclude and file it pre-trial. With a favorable ruling, we may resolve the case before trial, eliminate

the need for certain witnesses or evidence, or otherwise facilitate our pre-trial preparation.

Other times, it may be smarter to wait and not disclose the brief until the issue arises during trial. As discussed above, there can be benefits to presenting the trial brief during the trial when our opponent may not have anticipated the issue or prepared a response.

## **VII. CONCLUSION.**

Like most things dealing with trial strategy, there are numerous effective methods for using trial briefs in our cases. There is no one right answer on how to write the brief or when to file it. We can say, however, that using trial briefs smartly will better prepare the lawyer for trial. And, it is better to have a trial brief ready and not use it than need one and not have it.

## **APPENDIX A**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

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IN THE DISTRICT COURT

v.

\_\_\_\_\_ COUNTY, TEXAS

DON DAVIS,  
Defendant.

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY OF NO DRIVER’S LICENSE**

The fact that a driver does not have a valid driver’s license is not sufficient evidence alone to cast liability on him in a civil suit for damages for personal injuries arising from the operation of his car. Medina v. Salinas, 736 S.W.2d 224, 225 (Tex. App.—Corpus Christi 1987) (“Lack of a license does not, as a matter of law, make a driver liable or constitute a proximate cause of a collision.”). See also, Flanigan v. Carswell, 324 S.W.2d 835, 838 (Tex. 1959); Thompson v. Elder, 263 S.W.2d 321 (Tex. Civ. App.—Galveston 1953); Ferris v. Stableford, 248 S.W.2d 186 (Tex. Civ. App. 1952).

Rather, the proponent of the evidence must show that the fact the driver was unlicensed makes a fact of consequence (i.e., that the driver was negligent) more likely and that such negligence was causally related to the plaintiff’s alleged harm. Spratling v. Butler, 240 S.W.2d 1016 (Tex. 1951) (citing Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587 (Tex. 1947)). See also, Ferris, 248 S.W.2d at 189; Thompson, 263 S.W.2d at 323; TEX. R. EVID. 401.

Without a causal connection, any probative value gleaned from evidence regarding lack of a driver's license would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. See Tex. R. Evid. 403. In multiple circumstances, the courts have excluded evidence of lack of license when it is irrelevant to the cause of the alleged harm and merely confuses the jury. Zamarron v. Adame, 864 S.W.2d 173, 177 (Tex. App.—El Paso 1993); Houston v. Watson, 376 S.W.2d 23, 32 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref’d n.r.e.).

Respectfully submitted,

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SBN: 24010695

## **APPENDIX B**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING PRIOR CONVICTION AS RES JUDICATA**

A prior criminal conviction is admissible against a defendant in a civil case where the defendant pleaded guilty and the same act was involved in both the criminal and civil proceedings. Thomas v. Uzoka, 290 S.W.3d 437, 453 (Tex. App.—Houston [14th Dist.] 2009); Bowie v. Harris, 351 S.W.2d 668, 669 (Tex. Civ. App.—Waco 1961).

Texas Rule of Evidence 803 expands admissibility of evidence of prior convictions. Tex. R. Evid. 803(22) reads, “Judgment of previous conviction. Evidence of a judgment, entered after a trial or upon a plea of guilty..., adjudging a person guilty of a felony, is admissible to prove any fact essential to sustain the judgment of conviction.” McCormick v. Tex. Commerce Bank Nat’l Asso., 751 S.W.2d 887, 889 (Tex. App.—Houston [14th Dist.] 1988); Britt v. Cambridge Mut. Fire Ins. Co., 717 S.W.2d 476, 482 (Tex. App.—San Antonio 1986).

A plea of guilty must be validly entered to be admissible in a subsequent civil suit. Lucas v. Burrows, 499 S.W.2d 212, 214 (Tex. Civ. App.—Beaumont 1973) (citing Plains Transp., Inc. v. Isaacs, 361 S.W.2d 919, 925 (Tex.Civ.App., Amarillo, 1962, error ref. n.r.e. 367 S.W.2d 152 (Tex.1963))). Additionally, the proponent of the evidence has the burden to prove that the guilty plea was made in open court. Cox v. Bohman, 683 S.W.2d 757, 758 (Tex. App.—Corpus Christi 1984).

“A prior conviction may work as collateral estoppel in a subsequent proceeding if the identical issues for which estoppel is sought were litigated and directly determined in the prior criminal proceeding. McCormick, 751 S.W.2d at 889. When an “issue . . . was litigated and critical to the prior criminal conviction, [the convicted party] ‘is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict.’” Francis v. Marshall, 841 S.W.2d 51, 54 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992). Further, a plea of guilty, as opposed to a conviction after trial, also collaterally estops a plaintiff from re-litigating his guilt, since “a valid guilty plea serves as a full and fair litigation of the facts necessary to establish the elements of the crime.” State Farm Fire & Cas. Co. v. Fullerton, 118 F.3d 374, 378 (5th Cir. 1997); Johnston v. Am. Med. Int’l, 36 S.W.3d 572, 576 (Tex. App.—Tyler 2000); In re Briggs, 350 S.W.3d 362, 368 (Tex. App.—Beaumont 2011).

However, a prior not guilty finding in a criminal matter is not *res judicata* or collateral estoppel in a subsequent civil action involving the same fact issues. State v. Benavidez, 365 S.W.2d 638, 640 (Tex. 1963); Hair v. Pa. Life Ins. Co., 533 S.W.2d 387, 388 (Tex. Civ. App.—Beaumont 1975). This is true since there is a difference between criminal and civil proceedings with regard to quantum of proof, different subject matter, different consequences and technical differences of defendants. Id.; Kadyebo v. Chako, 2006 Tex. App. LEXIS 416, 4 (Tex. App. Fort Worth Jan. 19, 2006).

Respectfully submitted,

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Attorney for Plaintiff

## **APPENDIX C**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY OF SEATBELT USE**

A plaintiff whose negligence did not contribute to the incident should not have the damages awarded to them reduced or mitigated because of their failure to wear a seat belt. Carnation Co. v. Wong, 516 S.W.2d 116, 117 (Tex. 1974).

Prior to 2003, the Texas Transportation Code prohibited the introduction of evidence that the plaintiff was not wearing seatbelts or had failed to secure a child in a child safety seat. See former Tex. Transp. Code Ann. §§ 545.412(d), 545.413(g) (West). The state legislature repealed those sections of the Transportation Code applicable to cases filed on or after July 1, 2003. See Acts 11 June 2003, 78<sup>th</sup> Leg., ch. 204, 8.01, 2003 Tex. Sess. Law Serv. 863; Hodges v. Mack Trucks, Inc., 474 F.3d 188, 197 (5th Cir. 2006).

Even though the statutes prohibiting evidence of nonuse were repealed, nowhere does it state that such evidence is now *per se* admissible. Federal courts, interpreting Texas law, have understood the Texas legislature to allow the courts to decide the admissibility on a case by case basis. Idar v. Cooper Tire & Rubber Co., 2011 U.S. Dist. LEXIS 67779, at \*25-27 (S.D. Tex. 2011) (prohibiting the defense from introducing evidence of nonuse of restraints in an ejection case). Due to the repeal of Section 545.412(d) and 545.413(g), evidence of whether a seatbelt was in use may be admissible, provided it satisfies the other criteria of admissibility. To be admissible, the evidence must be relevant to a valid claim or defense. See Tex. Evid. R. 401-402.

The current state of the law in Texas is that evidence of a plaintiff's alleged negligence antedating the defendant's wrongful conduct is not admissible to reduce or mitigate the plaintiff's damages. Pool v. Ford Motor Co., 715 S.W.2d 629, 633 (Tex. 1986) (failure to wear available seat belts); Carnation Co., 516 S.W.2d at 117; Kerby v. Abilene Christian Coll., 503 S.W.2d 526, 528 (Tex. 1973) (driving with an open delivery van door); Haney Elec. Co. v. Hurst, 624 S.W.2d 602, 611, 9 (Tex. Civ. App.—Dallas 1981) (driving with a can of gasoline in the rear of a station wagon); Goldberg v. Dicks, No. 12-02-00053- CV, 2004 WL 253250, at \*15-16 (Tex. App.—Tyler Feb. 11, 2004) (riding in an open pickup truck bed); Quinius v. Estrada, 448 S.W.2d 552 (Tex. Civ. App.—Austin 1969); Sonnier v. Ramsey, 424 S.W.2d 684, 689 (Tex. Civ. App.—Houston [1st Dist.] 1968).

Failure to wear a seatbelt does not constitute comparative negligence in this case. “Negligence that merely increases or adds to the extent of the loss or injury occasioned by another's negligence is not such contributory negligence as will defeat recovery.” Kerby, 503 S.W.2d at 528 (Tex. 1973), Goldberg, 2004 WL 253250, at \*45. In order for nonuse of seatbelt to constitute comparative negligence, it would have to be a proximate cause of the occurrence in question. Block v. Mora, 313 S.W.3d 440 (Tex. App. – Amarillo 2009). This collision, clearly, was not caused by Plaintiff’s failure to wear a seatbelt.

Plaintiff’s nonuse of seatbelt also cannot constitute a failure to mitigate. In order for an act or omission to constitute a failure to mitigate, it must have occurred after the incident in question. Block 313 S.W.3d at 445, n. 6; RESTATEMENT (SECOND) OF TORTS §918(1), n. 31 (1977). Plaintiff’s alleged failure to wear a seatbelt, obviously, occurred before the incident in question.

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Attorney for Plaintiff

## **APPENDIX D**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY OF  
COMMENT ON DEFENDANT NOT ATTENDING TRIAL**

Texas law states that when a party fails to testify, the jury may consider it in weighing the evidence. Cent. Motor Co. v. Roberson, 139 S.W.2d 287, 291 (Tex. Civ. App. – Ft. Worth 1940).

“Failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party. The force of evidence is greatly increased by the failure of the opposite party to rebut it, where it is obvious that the means are readily accessible to him.” Fain v. Beaver, 478 S.W.2d 816, 820 (Tex. Civ. App.—Waco 1972); Moers v. Columbia Hosp., 2001 Tex. App. LEXIS 3696, at \*7-8 (Tex. App.—Amarillo 2001); Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 471 (Tex. App.—San Antonio 1998).

While the failure of a litigant to testify is not conclusive against him, it may be considered in determining an issue upon which the testimony would shed light. Boddy v. Canteau, 441 S.W.2d 906, 912 (Tex. Civ. App.—San Antonio 1969); H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975); King Constr. Co. v. Flores, 359 S.W.2d 919, 922 (Tex. Civ. App. 1962); Am. Gen. Ins. Co. v. Nance, 60 S.W.2d 280, 284 (Tex. Civ. App. 1933).

Respectfully submitted,

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## **APPENDIX E**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF IN SUPPORT OF PLAINTIFF’S OBJECTION TO DEFENDANTS’  
PROPOSED INSTRUCTION ON FAILURE TO MITIGATE**

As a general principle, compensatory damages, like medical expenses, “are intended to make the plaintiff ‘whole’ for any losses resulting from the defendant’s interference with the plaintiff’s rights.”<sup>1</sup> If, however, a plaintiff suffers losses that could have been avoided or minimized “at a trifling expense or with reasonable exertions”, then those losses cannot be recovered.<sup>2</sup> In those instances, a defendant may elect to plead the defense of failure to mitigate.

To prove a failure to mitigate, the defendant has the burden of proving (1) that plaintiff lacked due diligence in minimizing her damages, and (2) the amount that such failure increased plaintiff’s damages.<sup>3</sup> In other words, “[e]vidence must be developed which *clearly shows* a plaintiff’s failure to mitigate caused further damages, *and* the evidence must be sufficient to guide the jury in determining which damages were attributable to a plaintiff’s failure to mitigate.”<sup>4</sup>

The factors to consider in determining whether the plaintiff has been reasonable in his or her efforts to mitigate are the following: (1) the amount of harm that could result if plaintiff does not make efforts to mitigate, (2) the chance that such harm will result if nothing is done, (3) the cost or effort involved, (4) the plaintiff’s ability to provide the mitigation, and (5) the likelihood that such measures would be successful at mitigating plaintiff’s damages.<sup>5</sup>

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<sup>1</sup> Haygood v. De Escabedo, 356 S.W.3d 390, 394 (Tex. 2011) (citing Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994)) and **Restatement (Second) of Torts § 920A(2)**.

<sup>2</sup> Walker v. Salt Flat Water Co., 96 S.W.2d 231, 232 (Tex. 1936).

<sup>3</sup> U.S. Rest. Props. Operating L.P. v. Motel Enters., 104 S.W.3d 284 (Tex. App.—Beaumont 2003); Harris County v. Smoker, 934 S.W.2d 714, 722 (Tex. App.—Houston [1st Dist.] 1996) (holding against defendant because it “did not present any evidence of an amount by which Smoker’s damages were increased by her alleged failure to mitigate.”).

<sup>4</sup> Hygeia Dairy Co. v. Gonzalez, 994 S.W.2d 220, 225 (Tex. App.—San Antonio 1999) (emphasis provided).

<sup>5</sup> Restatement (Second) of Torts § 918(1), n. 31 (1977); Mondragon v. Austin, 954 S.W.2d 191, 195 (Tex. App.—Austin 1997).

Additionally, a failure to mitigate can only occur *after* the commission of the tort.<sup>6</sup> If plaintiff's alleged failure occurred before the incident in question, then such failure is properly pleaded as comparative responsibility.<sup>7</sup> To be comparatively negligent,<sup>8</sup> however, the plaintiff's failure must be a cause in fact of the occurrence in question.<sup>8</sup>

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<sup>6</sup> *Block v. Mora*, 314 S.W.3d 440, 445 n.6 (Tex. App.—Amarillo 2009); Restatement (Second) of Torts § 918(1) (1979), n. 31 (1977).

<sup>7</sup> *Block v. Mora*, *supra* at n.6.; *Hygeia Dairy Co.*, *supra* at 226.

<sup>8</sup> *Block v. Mora*, *supra* at 446.

## **APPENDIX F**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

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§

IN THE DISTRICT COURT

v.

\_\_\_\_\_ COUNTY, TEXAS

DON DAVIS,  
Defendant.

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF IN SUPPORT OF PLAINTIFF’S OBJECTION TO DEFENDANTS’  
PROPOSED INSTRUCTION ON FAILURE TO MITIGATE**

**I. ISSUE PRESENTED**

[PLAINTIFF] (hereinafter “Plaintiff”) brought this lawsuit against Defendants for personal injuries Plaintiff sustained in an automobile collision on [DATE]. During the months following the collision, Plaintiff sought medical care for her injuries from a number of medical providers. While Plaintiff had health insurance at the time of her treatment, her health insurance company did not pay for any of Plaintiff’s medical expenses associated with the collision. As a result, Plaintiff currently owes her medical providers the full amount of their bills.

Defendant argues that Plaintiff’s failure to use her health insurance to pay for her medical care constitutes a failure to mitigate her damages. As will be explained more fully below, even assuming Plaintiff was being offered coverage by her health insurance company, she has no duty to use her collateral source benefits under the circumstances present in this case simply so that Defendant can attempt to reduce its liability under CPRC §41.0105.

**II. THE LAW**

The defendant has the burden of proving (1) that plaintiff lacked due diligence in minimizing her damages, and (2) that the amount such failure increased plaintiff’s damages.<sup>9</sup> In other words, “[e]vidence must be developed which *clearly shows* a plaintiff’s failure to mitigate caused further damages, *and* the evidence must be sufficient to guide the jury in determining which damages were attributable to a plaintiff’s failure to mitigate.”<sup>10</sup>

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<sup>9</sup> *U.S. Rest. Prop. Op. v. Motel Enterprises, Inc.*, 104 S.W.3d 284 (Tex. App. – Beaumont 2003); *Harris Co. v. Smoker*, 934 S.W.2d 714, 722 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1996) (holding against defendant because it “did not present any evidence of an amount by which Smoker’s damages were increased by her alleged failure to mitigate.”).

<sup>10</sup> *Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 225 (Tex. App. – San Antonio 1999) (emphasis provided).

A failure to mitigate can only occur *after* the commission of the tort.<sup>11</sup> If plaintiff's alleged failure occurred before the incident in question, then such failure is properly pleaded as comparative responsibility.<sup>12</sup> To be comparatively negligent, however, the plaintiff's failure must be a cause in fact of the occurrence in question.<sup>13</sup>

“As a general principle, compensatory damages, like medical expenses, “are intended to make the plaintiff ‘whole’ for any losses resulting from the defendant’s interference with the plaintiff’s rights.”<sup>14</sup> If, however, a plaintiff suffers losses that could have been avoided or minimized “at a trifling expense or with reasonable exertions”, then those losses cannot be recovered.<sup>15</sup>

The factors to consider in determining whether the plaintiff has been reasonable in his or her efforts to mitigate are the following: (1) the amount of harm that could result if plaintiff does not make efforts to mitigate, (2) the chance that such harm will result if nothing is done, (3) the cost or effort involved, (4) the plaintiff's ability to provide the mitigation, and (5) the likelihood that such measures would be successful at mitigating plaintiff's damages.<sup>16</sup>

A plaintiff's refusal or failure to submit her medical expenses for payment by a third-party payor or insurer is necessarily not a failure to mitigate. *City of Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. App. – Ft. Worth 1958); RESTATEMENT (SECOND) OF TORTS §918(1), n. 31 (1977).

### **III. HEALTH INSURANCE**

In order to evaluate Plaintiff's due diligence after the occurrence in question and apply the above-listed factors, it is important that we first explain some basic principles common with most health insurance contracts, including Plaintiff's.

#### **a. Primary v. Secondary.**

In most every health insurance agreement between an individual insured and their health insurer, the health insurer reserves the right to deny benefits if it is not the primary payor. In an automobile collision, the automobile liability insurance carrier of the at-fault vehicle's owner is the primary insurance coverage for the collision. Therefore, the health insurance carrier for the injured victim is secondary and is entitled under the policy to deny coverage on that basis, until and unless the primary payor has paid its benefits.

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<sup>11</sup> *Block v. Mora*, 314 S.W.3d 440, 445 n. 6 (Tex. App. – Amarillo 2009); RESTATEMENT (SECOND) OF TORTS §918(1), n. 31 (1977).

<sup>12</sup> *Block v. Mora*, *supra* at n.6.; *Hygeia Dairy Co.*, *supra* at 226.

<sup>13</sup> *Block v. Mora*, *supra* at 446.

<sup>14</sup> *Haygood v. Escabedo*, 2001 Tex. LEXIS 514, \*10 (Tex. 2011) *citing* *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994) *and* RESTATEMENT (SECOND) OF TORTS §920A(2) (1977).

<sup>15</sup> *Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232 (Tex. 1936).

<sup>16</sup> RESTATEMENT (SECOND) OF TORTS §918(1), n. 31 (1977); *Mondragon v. Austin*, 954 S.W.2d 191, 195 (Tex. App. – Austin 1997).

**b. Pay and Pursue.**

In most every service provider agreement between a medical provider and a health insurer, the health insurer reserves the right to recoup any benefits it paid if, at some point later, it discovers it was not obligated to pay those benefits. The practice of paying benefits and then recouping them from the medical providers is called “Pay and Pursue”. When the health insurer recoups its prior payments from the medical providers, the medical providers are left trying to collect their bills from their patients. This is often unsuccessful, so the net effect of the practice of “pay and pursue” has been that most medical providers refuse to treat car wreck patients or other victims of negligence who submit to their health insurance.

**IV. ARGUMENT**

First and foremost, it is important to recognize two points: (1) Plaintiff’s health insurance company was not the primary insurer in this collision, and therefore, was not offering Plaintiff coverage, and (2) Plaintiff’s medical providers, fearing that any benefits they accepted from Plaintiff’s health insurer would simply be recouped due to “pay and pursue,” were not willing to submit the cost of Plaintiff’s care to her health insurer. Therefore, regardless of Plaintiff’s desires, she did not have the option to submit her medical expenses to her health insurer.

Assuming *arguendo* that Plaintiff did have the option to submit her medical expenses to her health insurer, she did not have the duty to do so.<sup>17</sup> Considering the above-listed factors in determining Plaintiff’s due diligence, it is clear that Plaintiff’s failure to use her health insurance does not constitute a failure to mitigate.<sup>18</sup>

If Plaintiff could have submitted to her health insurer and did not, the only resulting “harm” would be that Defendants would lose the benefit of escaping liability for the discounts the medical providers would have given the health insurer. Pursuant to CPRC §41.0105, Defendants enjoy the benefits of Plaintiff’s health insurer’s discounted reimbursement rates and escape liability for paying the full amount of the medical providers’ charges.<sup>19</sup> Because Plaintiff’s medical expenses were not paid by her health insurer, however, Defendant remains liable for the full value of her care.

The “harm” suffered by the Defendants is simply not being able to benefit from Plaintiff’s health insurer’s bargaining power with the medical providers and reap the benefits of their discounted reimbursement rates. The discounts that the medical providers give Plaintiff’s health insurers, however, are not intended for Defendants’ benefit. According to the Texas Supreme Court, these discounts are purely for the benefit

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<sup>17</sup> *City of Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. App. – Ft. Worth 1958); Restatement (Second) of Torts §918(1), n. 31 (1977).

<sup>18</sup> RESTATEMENT (SECOND) OF TORTS §918(1), n. 31 (1977).

<sup>19</sup> TEX. CIV PRACT. & REM. CODE §41.0105; *Haygood v. Escabedo*, 2011 Tex. LEXIS 514 (Tex. 2011).

of the health insurer.<sup>20</sup> Therefore, Defendants were not deprived of a benefit to which they were entitled simply because they were not able to employ the provisions of CPRC §41.0105.

Similarly, even if Plaintiff had accessibility to cheaper or free medical care, she would not be failing to mitigate if she elected to forgo such treatment.<sup>21</sup> It is Plaintiff's option as to where she treats, whom she treats with, and how she pays, or promises to pay, her medical providers; not the Defendants' who created the need for her treatment.<sup>22</sup>

Had Plaintiff's health insurers offered coverage for her medical expenses, Plaintiff would have had to pay a co-insurance and co-pay in order to obtain care. Plaintiff's deductible under her health plan is **thousands of dollars**. Additionally, her co-pay per visit is **\$50.00**, which would have quickly added up to over **\$500** dollars a month. Even if Plaintiff's health insurer offered coverage, Plaintiff could not have afforded to pay her co-insurance or co-pay at a time when she was injured, unable to work and facing mounting living expenses and vehicle repairs/replacement.<sup>23</sup>

Therefore, ironically, had Plaintiff's health insurer offered her coverage and her medical providers decided to use it, Plaintiff would *not* have been able to afford to obtain medical care. By not receiving necessary and timely medical care, Plaintiff's injuries would have worsened, her recovery would have prolonged, her pain and suffering would have increased, and her medical needs, in the end, would have been more extensive and expensive. Therefore, in the unique circumstances of this case, had Plaintiff obtained health insurance coverage like the Defendants claim she was obligated to do, Plaintiff's damages would actually have been higher.

## V. CONCLUSION

Plaintiff did not have the option to submit her medical expenses to her health insurer. Even if she did, however, she had no duty to do so and, under the circumstances, it would have resulted in her suffering increased damages. Therefore, Defendants should be prohibited from arguing, presenting evidence of, or getting an instruction on their claim that Plaintiff failed to mitigate her damages.

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<sup>20</sup> *Haygood v. Escabedo*, 2011 Tex. LEXIS 514, \*12-\*13 (Tex. 2011).

<sup>21</sup> *City of Fort Worth v. Barlow*, 313 S.W.2d 906, 911 (Tex. App. – Fort Worth 1958) (court found that plaintiff did not fail to mitigate simply because he failed to exercise options to receive cheaper or free care).

<sup>22</sup> *Id.*

<sup>23</sup> *Mondragon v. Austin*, 954 S.W.2d 191 (Tex. App. – Austin 1997) (considering the Plaintiff's financial situation and ability to mitigate in determining whether the Plaintiff employed due diligence in minimizing his damages).

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## **APPENDIX G**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY OF DEFENSE EVIDENCE  
AND ARGUMENT ON “POSSIBLE” ALTERNATE CAUSES**

COMES NOW, Plaintiff, and files this Brief Regarding Admissibility of Defense Evidence and Argument on “Possible” Alternate Causes and would respectfully show the Court as follows:

**I.**

With regards to proximate cause and cause-in-fact, for evidence to be admissible it must establish a causal connection based on reasonable medical probability, not mere conjecture, speculation, or possibility. Bradley v. Rogers, 879 S.W.2d 947, 953 (Tex. App.—Houston [14th Dist.] 1994); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397 (Tex. 1993); Arlington Mem'l Hosp. v. Baird, 991 S.W.2d 918, 922 (Tex. App.—Fort Worth 1999); Fennern v. Whitehead, 2010 Tex. App. LEXIS 4587 (Tex. App.—Austin 2010). The “possibility” that an event or condition might have caused damages from a medical viewpoint is not sufficient. Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988). It must be shown that the event or condition *probably* caused the injury. Niemann v. Refugio County Mem'l Hosp., 855 S.W.2d 94, 96 (Tex. App.—Corpus Christi 1993, no writ.). “Proof must establish causal connection beyond the point of conjecture. Verdicts must rest upon reasonable certainty of proof.” Lenger v. Physician’s Gen. Hosp., 455 S.W.2d 703, 706 (Tex. 1970), Morrell v. Finke, 184 S.W.3d 257 (Tex. App. – Fort Worth 2005).

**II.**

To be probative, expert testimony must be based on reasonable medical probability. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 500 (Tex. 1995). While the specific words “reasonable medical probability” need not be used, the testimony must demonstrate that, to a reasonable degree of medical certainty, the alleged illness or injury caused the harm in question. See Duff, 751 S.W.2d 175 (Tex. 1988); Otis Elevator Co. v. Wood, 436 S.W.2d 324, 331-32 (Tex. 1968); Bradley, 879 S.W.2d at 956; Mid-Continent Group v. Goode, 2011 Tex. App. LEXIS 6695 (Tex. App.—Amarillo 2011); Biggs v. Clyburn, 2003 Tex. App. LEXIS 4369, at \*12, \*2003 (Tex. App.—Houston [1st Dist.] 2003).

Expert testimony that is not based on a reasonable medical probability, but that instead relies on possibility, speculation, or surmise, does not assist the trier of fact and cannot support a judgment. Burroughs Wellcome Co., 907 S.W.2d at 500 (Tex. 1995); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997). This type of testimony should be excluded. “When evidence is so weak as to do no more than create a surmise or suspicion of the matter to be proved, the evidence is no more than a scintilla and, in legal effect, is no evidence.” Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007).

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## **APPENDIX H**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY  
OF EVIDENCE OF INSURANCE**

Texas Rule of Evidence 411 states that evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness. Tex. R. Ev. 411.

A clear reading of Rule 411 makes it clear that the rule pertains only to “liability” insurance. Evidence of other types of insurance may be admissible depending upon the facts of the case. See, Brownsville Pediatric Ass’n v. Reyes, 68 S.W.3d 184 (Tex. App. – Corpus Christi 2002); Thornhill v. Ronnie’s I-45 Truck Stop, Inc., 944 S.W.2d 780 (Tex. App. – Beaumont 1997).

Even if the evidence pertains to liability insurance, it is still admissible unless it is being introduced “upon the issue whether the person acted negligently or otherwise wrongfully.” The Rule goes on to give examples of instances in which evidence of liability insurance may be admissible, such as to prove “agency, ownership or control, if disputed, or bias or prejudice of a witness.”

- i. **Agency.** Cage Bros v. Friedman, 312 S.W.2d 532 (Tex. Civ. App. – San Antonio 1958) (permissible to question whether employees were covered by employer’s worker’s compensation policy to establish employees were working for employer).
- ii. **Ownership.** Jacobini v. Hall, 719 S.W.2d 396 (Tex. App. – Fort Worth 1986) (disputed issue was ownership of vehicle, therefore, evidence of insurance was admissible).
- iii. **Control.** Davis v. Stallones, 750 S.W.2d 235 (Tex. App. – Houston [1st Dist.] 1987) (control of wreckage was at issue so testimony about insurer’s control was admissible).
- iv. **Bias or prejudice.** If evidence of insurance would demonstrate bias or prejudice on the part of a party’s witness, such evidence may be admissible; United Cab

Co., Ins. v. Mason, 775 S.W.2d 783 (Tex. App. – Houston [1st Dist.] 1989) (testimony that plaintiff’s physician had conducted independent medical exams for insurance companies was not reversible); Barton Plumbing Co. v. Johnson, 285 S.W.2d 780 (Tex. Civ. App. – Galveston 1955) (evidence that defendants’ retained expert was a stockholder and director of defendant’s automobile liability insurer was admissible evidence of bias); Polk County Motor Co. v. Wright, 523 S.W.2d 432 (Tex. Civ. App. – Houston [1st Dist.] 1975) (plaintiff allowed to cross-examine defendant’s insurance adjuster regarding his employment with defendant’s insurer); Hammond v. Stricklen, 498 S.W.2d 356 (Tex. Civ. App. – Tyler 1973) (permissible to cross-examine witness as to bias even though such examination may disclose that defendant is insured); South Texas Natural Gas Gathering Co. v. Guerra, 469 S.W.2d 899 (Tex. Civ. App. – Corpus Christi 1971) (plaintiff’s counsel allowed to cross-examine defendant’s insurer’s investigator about his employment with insurer); Green v. Rudsenske, 320 S.W.2d 228 (Tex. Civ. App. – San Antonio 1959) (fact that witness to collision was involved in insurance business was not injecting insurance into the case).

The Rule applies not only to testimony and documents, but also to arguments and *voir dire* by counsel. Similar to testamentary evidence, comments during argument or *voir dire* about insurance are not prohibited as long as they are not made for the purpose of inferring that the other party was negligent or acted wrongfully. Cavnar v. Quality Control Parking, Inc., 678 S.W.2d 548 (Tex. App. – Houston [14th Dist.] 1984) (referring to one of the defense counsel as defendant’s “personal counsel” was not improper); Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App. – Tyler 1980) (arguing to jury that would like to inform them of certain facts, but can’t was not improper); Renegar v. Cramer, 354 S.W.2d 663 (Tex. Civ. App. – Austin 1962) (permissible for counsel to argue that the jury should not speculate as to who will pay a judgment or whether it will actually be paid); Montomery v. Vinzant, 297 S.W.2d 350 (Tex. Civ. App. – Fort Worth 1956) (permissible in most situations to use the term “representative” or “investigator” when referring to defendant’s insurer’s agents); Babcock v. Northwest Memorial Hosp., 767 S.W.2d (Tex. 1989) (permissible for plaintiff’s counsel to question prospective jurors on lawsuit crisis and liability insurance crisis); Nat’l Co. Mut. Fire Ins. Co. v. Howard, 749 S.W.2d 618 (Tex. App. – Fort Worth 1988) (plaintiff’s counsel properly allowed to question prospective jurors about tort reform advertising and insurance crisis).

Additionally, while Rule 411 may prohibit a party from informing the jury about the other party’s liability insurance under certain circumstances, the Rule does not preclude a party from informing the jury about their own insurance, or lack thereof. Hinton, 822 S.W.2d at 201. “We have found no authority, however, for the proposition that a party may not inform the jury of his or her own insurance coverage.” Hinton, 822 S.W.2d at 201. Other jurisdictions have agreed with this proposition. Vanoosting v. Sellars, 2012 Ill. App. LEXIS 474 (5<sup>th</sup> Dist., June 14, 2012) (error for trial court to prevent plaintiff from testifying that she did not seek frequent medical care because she did not have health insurance).

In the event that evidence is injected into the trial, the court may either grant a mistrial or give a curative instruction to the jury. Dennis v. Hulse, 362 S.W.2d 308 (Tex. 1962). In making a determination as to if a mistrial is necessary the court should 1) determine if the reference to insurance probably caused the rendition of an improper verdict; and 2) the probability that the mention of insurance caused harm exceeds the probability that the verdict was grounded on proper proceedings and evidence. Univ. of Tex. v. Hinton, 822 S.W.2d 197 (Tex. App.—Austin 1991), McGrede v. Coursey, 131 S.W.3d 189 (Tex. App.—San Antonio 2004). In the absence of a clear showing by the complaining party that any reference to insurance resulted in any harm or prejudice, refusal to declare a mistrial is not error. See Red Ball Motor Freight, Inc. v. Cordova, 332 S.W.2d 753, 757 (Tex. Civ. App.—Beaumont 1960); Southwestern Freight Lines v. McConnell, 269 S.W.2d 427, 430-31 (Tex. Civ. App.—El Paso 1954). Brownsville Pediatric Ass'n, 68 S.W.3d at 193 (Tex. App.—Corpus Christi 2002).

Often, the courts look to how the information concerning insurance was injected into the lawsuit in order to determine whether it was improper. For example, if a witness volunteers the information in response to a legitimate question not designed to elicit insurance information, then the courts are less inclined to declare mistrial. El Rancho Restaurants, Inc. v. Garfield, 440 S.W.2d 873 (Tex. Civ. App. – San Antonio 1969) (defense counsel elicited insurance information from one of plaintiff’s witnesses accidentally); Travis v. Vandergriff, 384 S.W.2d 936 (Tex. Civ. App. – Waco 1964) (defense counsel accidentally elicited insurance information from plaintiff during cross-examination); Grossman v. Tiner, 347 S.W.2d 627 (Tex. Civ. App. – Waco 1961) (defense counsel mistakenly elicited insurance information during cross-examination); Southwestern Freight Lines, 269 S.W.2d at 427 (Tex. Civ. App. – El Paso 1954) (defense counsel elicited insurance information on cross-examination). This is especially true if the movant’s own witness is the source of the information. Flatt v. Hill, 379 S.W.2d 926 (Tex. Civ. App. – Dallas 1964) (defendant’s own witness volunteered insurance information on cross-examination).

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## **APPENDIX I**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**TRIAL BRIEF REGARDING ADMISSIBILITY  
OF SETTLEMENT NEGOTIATIONS**

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. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, rebutting a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Tex. R. Evid. 408.

The trial court may exercise its discretion in determining whether certain communications constitute negotiations or agreements excludable from evidence. Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983) (citing Allen v. Avery, 537 S.W.2d 789, 791 (Tex. Civ. App. -- Texarkana 1976, no writ). The burden is on the party seeking to exclude the evidence on the basis it is part of a settlement negotiation. Vinson Minerals, Ltd. v. XTO Energy, Inc., 335 S.W.3d 344, 352 (Tex. App.—Fort Worth 2010) (citing TCA Bldg. Co. v. Nw. Res. Co., 922 S.W.2d 629, 636 (Tex. App.—Waco 1996)); Haney v. Purcell Co., 796 S.W.2d 782, 790 (Tex. App.—Houston [1st Dist.] 1990).

There are many instances when compromise evidence is admissible. Courts have been most willing to allow evidence of settlement negotiations in circumstances where such evidence shows bias or prejudice on the part of the testifying witness. Vinson Minerals, Ltd., 335 S.W.3d at 352; C & H Nationwide v. Thompson, 810 S.W.2d 259, 269 (Tex. App.—Houston [1st Dist.] 1991); Robertson Tank Lines, Inc. v. Watson, 491 S.W.2d 706 (Tex. Civ. App.—Beaumont 1973). Additionally, courts have also allowed evidence of compromise to impeach witness or party testimony or contention. Kan. City S. Ry. v. Carter, 778 S.W.2d 911, 913 (Tex. App.—Texarkana 1989); Spiritas v. Robinowitz, 544 S.W.2d 710, 722 (Tex. Civ. App.—Dallas 1976).

Finally if evidence of settlement negotiations or agreements is improperly admitted, the objecting party is allowed to then rebut the evidence with additional evidence regarding the negotiations or agreements without being deemed to have waived the objection. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 4 (Tex. 1986); Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 25 (Tex. 2008).

In the event evidence of settlement negotiations is admitted in error, such admission is usually curable by an instruction by the court to disregard. Beutel v. Paul, 741 S.W.2d 510 (Tex. 1987); Columbia Med. Ctr. of Las Colinas v. Bush, 122 S.W.3d 835, 862 (Tex. App.—Fort Worth 2003).

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## **APPENDIX J**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

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IN THE DISTRICT COURT

v.

\_\_\_\_\_ COUNTY, TEXAS

DON DAVIS,  
Defendant.

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING**  
**ADMISSIBILITY OF POLICE REPORTS**

Hearsay is defined as “[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Generally, under Texas law, hearsay is not admissible except as provided by statute or the Texas Rules of Evidence. TEX. R. EVID. 802. However, with regard to certain records, Texas Rule of Evidence 803 specifically states that “The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

**(6) Records of Regularly Conducted Activity.** A memorandum report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. “Business” as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

\* \* \*

**(8) Public Records and Reports.** Records, reports, statements or data compilations, in any form, of public offices or agencies setting forth:

- (A) The activities of the office or agency;
- (B) matters observed pursuant to duty imposed by law as to which there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
- (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;

unless the sources of information or other circumstances indicate lack of trustworthiness.”

In addition, Texas Rule of Evidence 805 states, “Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.”

Texas courts have consistently held that accident reports are admissible under Texas Rules of Evidence 803(6) and (8) as exceptions to the hearsay rule. Sciarrilla v. Osborne, 946 S.W.2d 919, 924 (Tex. App. – Beaumont 1997); Tex. Dep’t of Pub. Safety v. Struve, 79 S.W.3d 796 (Tex. App.—Corpus Christi 2002). “Public records are excepted from the hearsay exclusion if they (1) set forth fact-findings resulting from an investigation made pursuant to authority granted by law or (2) if they set forth matters observed under a legal duty about matters that there is a duty to report.” Tex. Dep’t of Pub. Safety v. Bond, 955 S.W.2d 441 (Tex. App.—Fort Worth 1997); Long v. Tex. Dep’t of Pub. Safety, 2000 Tex. App. LEXIS 236, (Tex. App.—Austin 2000).

The conclusions and opinions of the investigating officer are admissible. Salinas v. Allen, 2012 Tex. App. LEXIS 3396 (Tex. App.—Amarillo 2012); McRae v. Echols, 8 S.W.3d 797 (Tex. App.—Waco 2000). Similarly, hearsay statements within the report are admissible. There is no requirement in the rule that the person making the report made it on personal knowledge. Bordman v. State, 56 S.W.3d 63 (Tex. App.—Houston [14th Dist.] 2001) (citing Clement v. Tex. Dep’t of Pub. Safety, 726 S.W.2d 579, 581 (Tex. App.—Fort Worth 1986); Cano v. State, 2010 Tex. App. LEXIS 4177 (Tex. App.—Corpus Christi 2010)).

In considering Federal Rule 803(8)(C), upon which the Texas Rule was based, the 5<sup>th</sup> Circuit Court of Appeals has also held that the hearsay exception applies to investigative reports made by government agencies. Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992). Additionally, the United States Supreme Court held that as long as an investigatory report was based upon a factual investigation and satisfied the rule's trustworthiness requirement, conclusions or opinions contained therein should be admissible along with other portions of the report. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988).

Texas Rule of Civil Evidence 803(8) creates a presumption of admissibility of public records placing the burden on the party opposing the admission of the report to show its untrustworthiness and thus inadmissibility under the hearsay rule. See Hooker v. Tex. Dep’t of Pub. Safety, 2008 Tex. App. LEXIS 329 (Tex. App.—Beaumont 2008); Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669 (Tex. App. – Amarillo 1991); Tex. Dep’t of Pub. Safety v. Struve, 79 S.W.3d 796 (Tex. App.—Corpus Christi 2002). Federal law also supports the rule that the opposing party has the duty to prove untrustworthiness. Louque v. State Farm Fire & Cas. Co., 2007 U.S. Dist. LEXIS 55958 (E.D. La. 2007).

“Factors that may be useful in assessing trustworthiness include "(1) the timeliness of the investigation; (2) the special skill or expertise of the official; (3) whether a hearing was held and at what level; and (4) possible motivational problems[.]” Dresser v. Ohio Hempery, Inc., 2011 U.S. Dist. LEXIS 62757, 27-28 (E.D. La. June 13, 2011) (citing Advisory Committee Note, Fed. R. Evid. 803(8)(C)), Moss v. Ole S. Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir. 1991)).

In a civil case, a party does not have a right to confront the witness who prepared the report. The right to confront a witness applies to criminal proceedings only. Tex. Const. art. I, § 10 ; Tex. Dep't of Pub. Safety v. Duggin, 962 S.W.2d 76 (Tex. App.—Houston [1st Dist.] 1997). If a party wants to confront and cross examine a witness, they can request that they be subpoenaed. Id.

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## **APPENDIX K**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY OF WITNESS  
CLAIMING PROTECTION UNDER THE 5<sup>TH</sup> AMENDMENT**

The Fifth Amendment “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). It applies to both civil and criminal where the answer subjects the witness or party to a possibility of criminal responsibility. The privilege protects the witness as fully as it does for the defendant. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); *see also Lefkowitz v. Turley*, 414 U.S. 70 (1973).

It is for the Court to determine whether the claim of privilege is valid. *Hoffman v. United States*, 341 U.S. 479 (1951); *Ohio v. Reiner*, 532 U.S. 17, 19 (2001) (per curiam). The witness’s decision to invoke the privilege against self-incrimination is not absolute rather the trial court determines whether the assertion of the privilege is based upon good faith and is justifiable under all of the circumstances. Since the inquiry by the court is necessarily limited the witness need only show that a response is likely to be hazardous to him. *In re Speer*, 965 S.W.2d 41 (Tex. App.—Fort Worth 1998); *Maness v. Meyers*, 419 U.S. 449 (1975); *Kastigar*, 406 U.S. 441 (1972); *Dendy v. Wilson*, 179 S.W.2d 269 (1944).

The court may also decide if a narrower-inquiry would be more appropriate to avoid self-incrimination. *Texas Dep’t of Pub. Safety Officers Ass’n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995); *Marshall v. Ryder Sys.*, 928 S.W.2d 190, 196 (Tex. App.- Houston [14th Dist.] 1996). However, it is the witness’s burden to prove the basis for the claim. Tex. R. Civ. P. 166b(4); *Batson v. Rainey*, 762 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1988).

The party to a civil action must assert their Fifth Amendment privilege for each question or else the privilege will be presumed to be waived. *See In re Speer*, 965 S.W.2d at 46; *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App. - San Antonio 1995). The court must study each question for which the privileged is claimed to decide whether the answer would incriminate the witness. *Warford v. Beard*, 653 S.W.2d 908, 911 (Tex. App -

Amarillo 1983, no writ); *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.- Houston [1st Dist.] 1988).

The Fifth Amendment privilege against self-incrimination applies to documentary production, as long as the incriminating documents have a strong connection to the witness. See *In re Speer*, 965 S.W.2d at 47; *Warford*, 653 S.W.2d at 912. “A ‘strong connection to the witness’ means documents that ‘he himself wrote or which were written under his immediate supervision’.” See *In re Speer*, 965 S.W.2d 41; *Warford*, 653 S.W.2d at 912. The Supreme Court creates a zone of privacy to protect documents from production by summons or subpoena as long as they are in the owner’s possession. *United States v. Davis*, 636 F.2d 1028, 1042 (5th Cir. 1981) (citing *Boyd v. United States*, 116 U.S. 616 (1886)).

Texas Rules of Evidence 513(c) allows the questioning of a party to a civil case called to testify that would cause the assertion of the privilege against self-incrimination before the jury. *Smith v. Smith*, 720 S.W.2d 586, 594 (Tex. App.—Houston [1st Dist.] 1986). Therefore, civil juries may be aware of the fact that a defendant invoked his privilege against self -incrimination. *Warford v. Beard*, 653 S.W.2d 908, 911 (Tex. App - Amarillo 1983, no writ).

The Supreme Court has ruled that a jury may draw an adverse inference against a party to a civil case who pleads the Fifth Amendment. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Wil-Roye Inv. Co. II v. Wash. Mut. Bank, F.A.*, 142 S.W.3d 393, 405 (Tex. App.—El Paso 2004). “Refusal to answer questions by asserting the privilege is relevant evidence from which the finder of fact in a civil action may draw whatever inference is reasonable under the circumstances.” *Tex. Capital Secs., Inc. v. Sandefer*, 58 S.W.3d 760, 797 (Tex. App.—Houston [1st Dist.] 2001) (citing *Lozano v. Lozano*, 983 S.W.2d 787, 791 (Tex. App.—Houston [14th Dist.] 1998).

Furthermore, discovery proceedings in a civil suit shall not be delayed until a related criminal case is resolved. *Tex. Att’y General’s Office v. Adams*, 793 S.W.2d 771, 777 (Tex. App.—Fort Worth 1990). “[W]e deem it not good public policy to deny civil litigants their entitlement to a fully authorized discovery to assist in preparation of the civil lawsuit merely because criminal matters may be pending against some of the civil litigants.” *Id.*; *In re Johnson*, 2009 Tex. App. LEXIS 4234, 2 (Tex. App. - Beaumont June 11, 2009); *Kugle v. Daimlerchrysler Corp.*, 88 S.W.3d 355, 361-62 (Tex. App.—San Antonio 2002).

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## **APPENDIX L**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING PLAINTIFF'S OBJECTION TO  
DEFENSES' IMPROPER ARGUMENT**

Texas Rules of Civil Procedure 269 governs the parameters of a closing argument. Under that rule, attorneys are required to confine their arguments strictly to the evidence and to the arguments of opposing counsel. TEX. R. CIV. P. 269(e). *Lone Star Ford, Inc. v. Carter*, 848 S.W.2d 850, 853 (Tex. App.—Houston [14th Dist.] 1993).

“As such, counsel should be permitted wide latitude in arguing the evidence and reasonable inferences to the jury. *Anderson v. Vinson Exploration*, 832 S.W.2d 657, 667 (Tex. App.—El Paso 1992). As long as counsel's argument has some evidentiary basis or may be reasonably inferred from the evidence and is free of inflammatory remarks, it is proper. *La. & A.R. Co. v. Capps*, 766 S.W.2d 291, 294 (Tex. App.—Texarkana 1989); *Davidson v. Robbins*, 1997 Tex. App. LEXIS 6106, at \*25 (Tex. App.—Houston [14th Dist.] 1997).

“But the salutary right of counsel thus to speak his mind is subject to obvious limits, which excessive language may exceed -- either by connoting an idea or fact without support in the record or by its very character as inflammatory.” *Southwestern Greyhound Lines, Inc. v. Dickson*, 236 S.W.2d 115 (Tex. 1951); *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753, 758 (Tex. App. – Texarkana 1992, writ denied). If counsel uses inflammatory language or information not provided in evidence to influence the jury in their favor, and such argument is not in response to opposing counsel, then misconduct is established. When misconduct occurs, a reversal of the case is required, unless no injury resulted. It would be the duty of the court to motion to repress the improper statements. *Ramirez v. Acker*, 138 S.W.2d 1054 (Tex. 1940).

“Where the argument of counsel is so prejudicial or inflammatory that no instruction from the court would cure the error, the duty falls upon the trial court, not upon opposing counsel, to stop the argument and instruct the jury not to consider same. TEX. R. CIV. P. 269. This rule has long prevailed in this State, and has been approved many times. 41 TEX. JUR. 801; *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859 (Tex. App. – San Antonio 1990, writ denied). The same rule is present under the Federal Rules as well. *Hall v. Freese*, 735 F.2d 956 (5th Cir. 1984).

Common phrases used by defense counsel in stricken closing arguments have included “over-lawyered, litigious, sue-happy country” and “Lotto or Powerball or whatever they call it, let’s really roll the dice big.” *Schoon v. Looby*, 670 N.W.2d 885 (S.D. 2003); *Anderson v. Johnson*, 441 N.W.2d 675 (S.D. 1989); *Vanoosting v. Sellars*, 2012 Ill. App. LEXIS 474 (5<sup>th</sup> Dist., June 14, 2012)(counsel arguing that plaintiff’s claim for pain and suffering, in addition to her medical expenses, was “double dipping” was held to be improper argument).

Similarly, comments about plaintiff’s case being a waste of time and taxpayer’s money, an abuse of the legal process, an insult to the honor of the legal profession, or one of “those cases” where the plaintiff is simply trying to get something for nothing are improper and have resulted in new trials being granted. *Lioce v. Cohen*, 174 P.3d 970 (Nev. 2008); *Murphy v. Int’l Robotic Sys., Inc.*, 766 So.2d 1010, 1032 (Fla. 2000) (defense counsel likening plaintiff’s case to cashing in on a lottery ticket was improper); *State v. Cruz*, 800 A.2d 1243, 1252 (Conn. App. 2002) (prosecutor’s cross-examination of defendant, which involved comments suggesting that defendant wanted to win the lottery, was inappropriate).

“The judge and jury rely on the lawyers to present their arguments to help the jury sort out the evidence and understand how the law applies to the facts. Interposing remarks such as we see here add nothing to that objective and can only be meant to persuade the jury to decide the case based on passion and prejudice.” *Schoon*, 670 N.W.2d 885.

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## **APPENDIX M**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING WHETHER A SPECIFIC ACT/OMISSION  
CAN BE PLEADED AS NEGLIGENCE PER SE**

“[A] party relying upon a statutory violation should plead this reliance if he is to recover on that basis . . . . Further, the pleader should reasonably identify the statute relied upon.” Daughtery v. So. Pac. Trans. Co., 772 S.W.2d 81 (Tex. 1989) (citing Murray v. O & A Express, Inc., 630 S.W.2d 633 (Tex. 1982)).

In general, an act or omission can be pleaded as negligence *per se* if the statute defendant allegedly violated is intended to protect the class of persons to which the plaintiff belongs against the type of harm the plaintiff suffered. Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587 (Tex. 1947); Mo. P.R. Co. v. Am. Statesman, 552 S.W.2d 99 (Tex. 1977); Moughon v. Wolf, 576 S.W.2d 603 (Tex. 1978). Violations of municipal ordinances and administrative rules can also serve as the basis of a negligence *per se* allegation. Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546 (Tex. 1985); Cont'l Oil Co. v. Simpson, 604 S.W.2d 530 (Tex. Civ. App.—Amarillo 1980).

Under a negligence *per se* cause of action, the plaintiff must only prove an unexcused violation of a statute which caused plaintiff's damages. Impson v. Structural Metals, Inc., 487 S.W.2d 694 (Tex. 1972); State Bar of Texas, TEXAS PATTERN JURY CHARGES § 5.1 (2000). The statute establishes the standard of care, therefore, the jury is not required to determine whether the defendant had a duty to do or not do something or whether the defendant's conduct was reasonable.

The plaintiff pleading negligence *per se* shoulders the burden of proving that the defendant violated the statute and that the conduct violating the statute was the proximate cause of plaintiff's damages. Mo. P.R. Co., 552 S.W.2d at 102; Moughon, 576 S.W.2d 603. The defendant may claim that he has a legally acceptable excuse for violating the statute. Impson, 487 S.W.2d at 696. These excuses generally fall into one of five categories:

- (1) the violation is reasonable because of the actor's incapacity;
- (2) the defendant neither knows nor should know of the occasion for compliance;

- (3) the defendant is unable after reasonable diligence or care to comply;
- (4) the defendant is confronted by an emergency not due to his own misconduct;
- (5) compliance would involve greater risk of harm to the actor or to others.

Id. Such claim of excuse must be legally acceptable and must be supported by more than a mere scintilla of evidence. Id. Mere reasonableness will not constitute excuse. Id.

If the defendant's excuse is legally acceptable and supported by sufficient evidence, the plaintiff must then show that the violation did, in fact, constitute negligence. Id. While the defendant may have the burden to produce evidence of excuse, the defendant does not have to obtain a jury finding on the claimed excuse. S. Pac. Co. v. Castro, 493 S.W.2d 491 (Tex. 1973) (citing Hammer v. Dallas Transit Co., 400 S.W.2d 885 (Tex. 1966), and Phoenix Ref. Co. v. Powell, 251 S.W.2d 892 (Tex.Civ.App. 1952, writ ref'd n.r.e.)). "The rule in Texas is that one who seeks to excuse a statutory violation must present some evidence of a permissible excuse for his statutory violation, whereupon the party with the burden of persuasion on negligence . . . must obtain a jury finding that his adversary was negligent as measured by the common law or prudent man standard." L.M.B. Corp. v. Gurecky, 501 S.W.2d 300, 303 (Tex. 1973) (citing S. Pac. Co. v. Castro, 493 S.W.2d 491 (Tex. 1973)).

If the defendant's excuse is not legally acceptable or is not sufficiently supported by the evidence, the common law negligence theory should not be submitted, but rather, the court should instruct on negligence *per se*. Moughon, 576 S.W.2d 603; L.M.B. Corp., 501 S.W.2d at 303; Antee v. Sims, 494 S.W.2d 215, 217 (Tex. Civ. App.—Houston [14th Dist.] 1973).

Even if a plaintiff shows that the statute qualifies as one that can be properly pleaded as negligence *per se*, it is still within the court's discretion as to whether to instruct the jury on negligence *per se* or common law negligence or whether to include explanatory instructions, and if so, which ones. TEX. R. CIV. PROC. 277; Louisiana-Pacific Corp. v. Knighten, 976 S.W.2d 674 (Tex. 1998). Even after determining that the plaintiff is within the class of persons intended to be protected under the statute and even if the plaintiff suffered the kind of injury the Legislature intended to prevent, "[t]he court must still determine whether it is appropriate to impose tort liability for violations of the statute." Perry v. S.N., 973 S.W.2d 301, 305 (Tex. 1998) (citing Smith v. Merrit, 940 S.W.2d 602 (Tex. 1997)). The other factors that the courts have considered are:

(1) **Whether there is a duty to act or not act in common law or does the duty only exist under the statute.** If the statute is creating a duty where one previously did not exist, the court less likely to say the statute should be applied in the civil liability context. Perry v. S.N., 973 S.W.2d 301, 305 (Tex. 1998). "[R]ecognizing a new, purely statutory duty 'can have an extreme effect upon the common law of negligence' when it allows a cause of action where the common law would not." Id. (citing Leonard, The

Application of Criminal Legislation to Negligence Cases: A Reexamination, 23 SANTA CLARA L. REV. 427, 449 n. 92 (1983)).

(2) **Whether the statute clearly defines the conduct prohibited or required so as to put the public on notice of their duty.** If the statute does not clearly define the prohibited or required conduct, it cannot be pleaded as negligent *per se*. For example, a statute which merely requires people “who have cause to believe” a child is being abused to report such alleged abuse is too vague. Perry v. S.N., 973 S.W.2d 301 (Tex. 1998).

(3) **Whether applying negligence *per se* to the statute would create liability without fault.** If the statute only prohibits “knowing” conduct, then it is not imposing liability without fault and the factor would support the negligence *per se* pleading. Perry v. S.N., 973 S.W.2d 301 (Tex. 1998).

(4) **Whether negligence *per se* would impose ruinous liability disproportionate to the seriousness of the defendant’s conduct.** The lower the level of crime, the less chance the court will allow negligence *per se* as a cause of action.

(5) **Whether the injury resulted directly or indirectly from the violation of the statute.** When the injury is directly caused by the violation of the statute, the court is more likely to hold that negligence *per se* is appropriate. If the injury is indirect, the court is less likely to allow negligence *per se* pleading. Perry v. S.N., 973 S.W.2d 301 (Tex. 1998) (failure to report child abuse indirectly caused harm); Carter v. William Sommerville & Son, Inc., 584 S.W.2d 274 (Tex. 1979) (aiding and abetting indirectly caused harm). But, see El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987) (statute prohibiting sale of alcohol to intoxicated person who drove drunk and killed another was direct enough to be allowed as negligence *per se*) and Nixon v. Mr. Property Management Co., 690 S.W.2d 546 (Tex. 1985) (building ordinance requiring landowner to lock doors, they didn’t, and person was harmed was direct enough to be allowed as negligence *per se*).

(6) **Whether the statute contains language essentially requiring the defendant to act with ordinary care.** If a statute has language in it that requires the defendant to do or not do something “safely” or “reasonably and prudently”, then the jury is forced to simply determine whether the defendant acted with ordinary care and the statute is not properly a negligence *per se* statute. Borden, Inc. v. Price, 939 S.W.2d 247 (Tex.Civ.App. – Amarillo, 1997).

(7) **Whether the statute’s language imposes a “conditional” rather than an “absolute” duty.** If the statute establishes a “conditional” versus an “absolute” duty, it cannot be pleaded as negligent *per se*. For example, if a person only violates a statute IF certain circumstances are present, then the jury is forced to simply determine whether the defendant acted with reasonable care under those circumstances and the statute is not properly a negligence *per se* statute. Missouri-Kansas-Texas R.R. Co. v. McFerrin, 291 S.W.2d 931 (Tex. 1956).

(8) **Whether using the criminal statute to impose civil liability is contrary to the Legislature's intent.** If the Legislature has determined not to impose civil liability under certain circumstances during its debate about whether to pass a criminal statute, the court may not be willing to allow a negligence *per se* pleading. Smith v. Merritt, 940 S.W.2d 602 (Tex. 1997) (refusing to allow negligence *per se* cause against social host for serving alcohol to minor when Legislature considered such option and decided to limit criminal liability to just commercial provider).

Acts or omissions that can be pleaded as negligence *per se* include certain traffic violations, placement of telephone poles, railroad track regulations and certain municipal ordinances.<sup>24</sup>

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<sup>24</sup> (a) Sections 544.007 and 552.001, Tex Trans Code (Art 6701d, section 33(a)) requiring driver to yield right of way to pedestrian in crosswalk can be pleaded as negligence *per se*. Grant v. Jefferies, 497 S.W.2d 946 (Tex.Civ.App. – Amarillo 1973).

(b) Section 545.051, Tex Trans Code (Art 6701d, section 52) requiring a driver to keep his vehicle completely within the right half of the roadway can be pleaded as negligence *per se*. Moughon v. Wolf, 576 S.W.2d 603 (Tex. 1978).

(c) Section 545.251, Tex Trans Code (Art 6701d, section 86) requiring a driver to stop at a railroad crossing after the train had given an audible signal or after the train had become plainly visible can be pleaded as negligence *per se* – used as a comparative negligence argument in this case. So. Pac. Co. v. Castro, 493 S.W.2d 491 (Tex. 1973); Missouri-Kansas-Texas R.R. Co. v. McFerrin, 291 S.W.2d 931 (Tex. 1956).

(d) Section 545.301, Tex Trans Code (Art 6701d, section 93(a)) prohibiting someone from parking on the road when it is practicable to do so elsewhere can be pleaded as negligence *per se*. Murray v. O. & A. Express, Inc., 630 S.W.2d 633 (Tex. 1982).

(e) Sections 547.331 and 547.352, Tex Trans Code (Art 6701d, section 125(d)) requiring lights on vehicles can be pleaded as negligence *per se*. Murray v. O. & A. Express, Inc., 630 S.W.2d 633 (Tex. 1982).

(f) Sections 547.503-504, Tex Trans Code (Art 6701d, section 138(a) and (b)) requiring a vehicle parked on side of road to use hazards and to place flares or reflectors can be pleaded as negligence *per se*. Murray v. O. & A. Express, Inc., 630 S.W.2d 633 (Tex. 1982).

(g) Article 801(A) of the Texas Penal Code requiring a driver to drive on the right side of the road and not on the left unless at least 50 yards were clear can be pleaded as negligence *per se*. The Texas Company v. Betterton, 88 S.W.2d 1039 (Tex. 1936); L.M.B. Corp. v. Gurecky, 501 S.W.2d 300 (Tex. 1973).

(h) Trans Code section prohibiting passing within 100 feet of an intersection can be pleaded as negligence *per se*. Impson v. Structural Metals, Inc., 487 S.W.2d 694 (Tex. 1972).

(i) Trans Code section prohibiting an unlicensed driver to operate a vehicle can be pleaded as negligence *per se*. Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587 (Tex. 1947).

(j) Trans Code section prohibiting drag racing can be pleaded as negligence *per se*. Parrott v. Garcia, 436 S.W.2d 897 (Tex. 1969).

(k) State statute regulating placement of telephone poles can be pleaded as negligence *per se*. Alpine Telephone Corp. v. McCall, 184 S.W.2d 830 (Tex. 1944).

(l) State statute requiring railroad coach conductors to remove certain passengers from railroad cars can be pleaded as negligence *per se*. Texas & P. Ry. Co. Baker, 215 S.W. 556 (Tex.Com.App. – 1919, holding approved).

(m) Municipal ordinance in Dallas requiring property owners to keep doors and windows of vacant structures closed can be pleaded as negligence *per se*. Nixon v. Mr. Property Management Co., 690 S.W.2d 546 (Tex. 1985).

Acts or omissions that are not negligence *per se* include certain statutes involving reckless conduct, driving standards, and reporting requirement of child abuse.<sup>25</sup>

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(n) Article 6559a, Tex. Rev. Civ. Stat. Ann., requiring a 22 ft clearance area around railroad tracks can be pleaded as negligence *per se*. Missouri Pacific R.R. Co. v. American Statesman, 552 S.W.2d 99 (Tex. 1977).

<sup>25</sup> (a) Tex Trans Code (Art. 6701d, section 24) imposes liability only for reckless conduct. Louisiana-Pacific Corp. v. Knighten, 976 S.W.2d 674 (1998) (citing City of Amarillo v. Martin, 971 S.W.2d 426 (Tex. 1998)).

(b) Section 545.058, Tex Trans Code (Art 6701d, section 54A) requiring driver who uses shoulder to do so in safety cannot be pleaded as negligence *per se*. Cudworth v. South Texas Paisano Const. Co., 705 S.W.2d 315 (Tex.Civ.App. – San Antonio, 1986, writ ref'd n.r.e.); Borden, Inc. v. Price, 939 S.W.2d 247 (Tex.Civ.App. – Amarillo 1997).

(c) Section 545.057, Tex Trans Code (Art 6701d, section 55(b)) requires drivers who pass on right to do so safely cannot be pleaded as negligence *per se*. Borden, Inc. v. Price, 939 S.W.2d 247 (Tex.Civ.App. – Amarillo 1997).

(d) Section 545.060, Tex Trans Code (Art 6701d, section 60(a)) requiring drivers to change lanes safely cannot be pleaded as negligence *per se*. Borden, Inc. v. Price, 939 S.W.2d 247 (Tex.Civ.App. – Amarillo 1997).

(e) Section 545.062, Tex Trans Code (Art 6701d, section 61(a)) requiring a driver to “maintain an assured clear distance between the two vehicles, exercising due regard for the speed of such vehicles, traffic upon, and conditions of the street or highway, so that such motor vehicle can be safely brought to a stop without colliding with the preceding vehicle, or veering into other vehicles . . .” cannot be pleaded as negligence *per se*. Louisiana-Pacific Corp. v. Knighten, 976 S.W.2d 674 (Tex. 1998); Schwab v. Stewart, 390 S.W.2d 752 (Tex. 1965); Borden, Inc. v. Price, 939 S.W.2d 247 (Tex.Civ.App. – Amarillo 1997).

(f) Section 545.402, Tex Trans Code (Art 6701d, section 67) stating that “no person shall start a vehicle which is stopped, standing or parked unless and until such movement can be made with safety” cannot be pleaded as negligence *per se*. Franco v. Burtex Constructors, 586 S.W.2d 590 (Tex.Civ.App. – Corpus Christi 1979).

(g) Section 545.103-104, Tex Trans Code (Art 6701d, section 68(a)) states that “no person shall otherwise turn a vehicle from a direct course or move right or left on a roadway unless and until such movement can be made with safety” cannot be pleaded as negligence *per se*. Franco v. Burtex Constructors, 586 S.W.2d 590 (Tex.Civ.App. – Corpus Christi 1979); Booker v. Baker, 306 S.W.2d 767 (Tex.Civ.App. 1957) (saying art 68 not neg *per se*); Williams v. Price, 308 S.W.2d 185 (Tex.Civ.App. 1957) (no person shall start a vehicle or turn a vehicle on a roadway until it can be made with safety).

(h) Section 545.151, Tex Trans Code (Art 6701d, section 71(c)) requiring a driver to enter an intersection safely cannot be pleaded as negligence *per se*. Renfroe v. Ramsey, 477 S.W.2d 648 (Tex.Civ.App. – Houston [14th Dist.] 1972, no writ).

(i) Section 545.152, Tex Trans Code (Art 6701d, section 72) states that driver must yield right of way to approaching vehicle before turning left cannot be pleaded as negligence *per se*. Booker v. Baker, 306 S.W.2d 767 (Tex.Civ.App. 1957).

(j) Section 545.155, Tex Trans Code (Art 6701d, section 74) whether driver failed to yield the right of way entering street from private drive cannot be pleaded as negligence *per se*. Hemphill v. Meyers, 469 S.W.2d 327 (Tex.Civ.App. – Austin, 1971 no writ).

(k) Section 545.351, Tex Trans Code (Art 6701d, section 166(b) and (c)) requiring drivers to drive at a speed that is reasonable and prudent cannot be pleaded as negligence *per se*. Borden, Inc. v. Price, 939 S.W.2d 247 (Tex.Civ.App. – Amarillo 1997).

(l) Section 2.03 of the Texas Alcoholic Beverage Code prohibiting anyone from providing alcohol to a minor cannot be pleaded as negligence *per se*. Reeder v. Daniel, 2001 Tex. LEXIS 102 (Tex. 2001); Smith v. Merritt, 940 S.W.2d 602 (Tex. 1997).

(m) Section 261.101(a) and 261.109 of the Texas Family Code requiring everyone to report abuse to a child is not a negligence *per se* statute. Perry v. S.N., 973 S.W.2d 301 (Tex. 1998).

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## **APPENDIX N**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF IN SUPPORT OF PLAINTIFF’S OBJECTIONS TO DEFENDANTS’  
PROPOSED INSTRUCTION ON UNAVOIDABLE ACCIDENT AND SUDDEN  
EMERGENCY**

**I. Defendant did not plead any affirmative defenses or inferential rebuttals.**

Texas Rule of Civil Procedure 94 requires a responding party to plead all specifically enumerating affirmative defenses and “any other matter constituting an avoidance or affirmative defense.” Tex. R. Civ. P. 94. If a party is going to claim the fault of a non-party, unavoidable accident, or sudden emergency, it must affirmatively plead such claim or defense. Breaux v. Slocum, 438 S.W.2d 403 (Tex. App.—Beaumont 1968) (“The law is clear in this State that ‘unavoidable accident’ . . . must be plead in order to secure a submission of such issue.”); Kiel v. Mahan, 214 S.W.2d 865 (Tex. App.—Fort Worth 1948) (“To be entitled to an affirmative submission of the issue of unavoidable accident, a defendant must affirmatively plead such defense.”); Great Atl. & Pac. Tea Co. v. Garner, 170 S.W.2d 502 (Tex. App.—Dallas 1943) (unavoidable accident not raised by general denial and must be affirmatively pleaded).

**II. Defendant’s negligence caused the unavoidability and/or emergency.**

“An unavoidable-accident instruction must be supported by the evidence. Hicks v. Brown, 151 S.W.2d 790, 792 (1941); Hukill v. H.E.B. Food Stores, Inc., 756 S.W.2d 840, 843-44 (Tex. App.—Corpus Christi 1988). The instruction is proper only when there is evidence that the event was proximately caused by a condition beyond the defendant’s control and not by the negligence of any party to the event. Hill v. Winn Dixie Tex., Inc., 849 S.W.2d 802, 803 (Tex. 1992).” Towers of Town Lake Condo. Ass’n v. Rouhani, 296 S.W.3d 290, 300 (Tex. App.—Austin 2009).

Therefore, a party is not entitled to an unavoidable accident or sudden emergency instruction when their negligence is what made the collision unavoidable or created the emergency. Red Arrow Freight Lines, Inc. v. Smith, 93 S.W.2d 495 (Tex. App.—El Paso 1936). If, for example, the defendant was negligent in reacting to driving conditions or mechanical failures, he is not entitled to an unavoidable accident or sudden emergency instruction. Sherwin-Williams Paint Co. v. Card, 449 S.W.2d 317 (Tex. App.—San Antonio 1970) (Defendant admitted that he knew it had been raining for some time and that the pavement was wet and slippery, therefore, the known dangerous condition was to be considered in determining what constituted ordinary care, but it was no evidence of

unavoidable accident.); Brown v. Goldstein, 678 S.W.2d 539 (Tex. App.—Houston [14th Dist.] 1984) (defendant not entitled to sudden emergency or unavoidable accident instructions when he alleged a mechanical defect, not his conduct, caused collision); Meinen v. Mercer, 390 S.W.2d 36 (Tex. App.—Corpus Christi 1965) (driver who failed to stop on slick street not entitled to unavoidable accident instruction); McLeroy v. Stocker, 505 S.W.2d 615 (Tex. App.—Houston [1st Dist.] 1974) (driver with brake problem driving on slick road no entitled to unavoidable accident instruction).

The unavoidable accident instruction has been looked upon with disfavor by Texas courts because it is redundant and serves as an impermissible comment that tilts or nudges the jury one way or the other. “[C]ourts should refrain from submitting an unavoidable accident instruction... due to the risk that the jury will be misled or confused by the perception that the instruction represents a separate issue distinct from general principles of negligence.” Hill, 849 S.W.2d 802.

[T]o charge on an unavoidable accident is in effect to give the jury an attractive alternative to the difficult determination of negligence. Such a charge is a third alternative to both the negligence and causation by the parties, and as such constitutes an unconscious or hidden rebuttal to the essential issues to be determined, because it directs the jury away from the real issues submitted and the burden imposed by law of proof by the parties.

Hukill, 756 S.W.2d 840.

The unavoidable accident instruction, like the sudden emergency instruction, is subsumed in the standard negligence inquiry. (citations omitted). At best, these instructions are superfluous distractions that lead the jury away from determining negligence, and at worst, the reiteration of the negligence standard may be perceived by the jury as a subtle hint to find no negligence.

Reinhart v. Young, 906 S.W.2d 471, 472 (Tex. 1995).

Respectfully submitted,

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By: \_\_\_\_\_

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Attorney for Plaintiff

## **APPENDIX O**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF’S BRIEF IN OPPOSITION  
TO DEFENDANTS’ PROPOSED STIPULATIONS**

**I. Plaintiffs Are Not Required To Accept Defendants’ Proposed Stipulations**

“A stipulation is an agreement, admission, or [other] concession made in a judicial proceeding by the parties or their attorneys.” Shepherd v. Ledford, 962 S.W.2d 28, 33 (Tex. 1998); Paciwest, Inc. v. Warner Alan Props., L.L.C., 2012 Tex. App. LEXIS 4331 (Tex. App.—Fort Worth 2012); Left Gate Prop. Holdings, Inc. v. Scott, 2011 Tex. App. LEXIS 2574 (Tex. App.—Houston [1st Dist.] 2011); Fed. Lanes v. City of Houston, 905 S.W.2d 686, 689 (Tex. App.—Houston [1st Dist.] 1995).

Since a stipulation constitutes a binding contract between the parties and the court it will be given no more force than the parties intended it to have. Westridge Villa Apts. v. Lakewood Bank & Trust Co., 438 S.W.2d 891, 895 (Tex. Civ. App. – Fort Worth 1969, writ ref.d n.r.e.); U.S. Fire Ins. Co. v. Carter, 473 S.W.2d 2 (Tex. 1971); In re J.M., 352 S.W.3d 824 (Tex. App.—San Antonio 2011); Austin v. Austin, 603 S.W.2d 204, 207 (Tex. 1980).

The intention of the parties in a trial stipulation must be determined from the language used “in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues.” In the Interest of C.C.J., 244 S.W.3d 911, 921 (Tex. App.—Dallas 2008); Sitaram v. Aetna U.S. Healthcare of N. Tex., Inc., 152 S.W.3d 817, 824 (Tex. App.—Texarkana 2004); Discovery Operating, Inc. v. Baskin, 855 S.W.2d 884, 886-87 (Tex. App.—El Paso 1993); Mann v. Fender, 587 S.W.2d 188, 202 (Tex. Civ. App.—Waco 1979)).

A court will not construe a stipulation to effect admission of something intended to be controverted or to waive a right not plainly agreed to be relinquished. Univ. of Tex. Sys. v. Carter, 2008 Tex. App. LEXIS 1355 (Tex. App. Dallas Feb. 25, 2008) (citing U.S. Fire Ins. Co. v. Carter, 468 S.W.2d 151, 154 (Tex. Civ. App.—Dallas 1971); Jackson v. Lewis, 554 S.W.2d 21, 24 (Tex. Civ. App.—Amarillo 1977)).

To be valid, the stipulation must either be in writing and signed by the parties, or made in open court and entered of record. Tex. R. Civ. P. 11; Discovery Operating, Inc., 855 S.W.2d at 886; Ebner v. First State Bank of Smithville, 27 S.W.3d 287, 296 (Tex. App.—Austin 2000).

The Fifth Circuit held in U.S. v. Grassi, “a party may not preclude his adversary’s proof by an admission or offer to stipulate.” United States v. Grassi, 602 F.2d 1192, 1197 (5th Cir. 1979) (citing Parr v. United States, 255 F.2d 86, 88 (5th Cir.), cert. denied, 358 U.S. 824 (1958)). The reason for this rule is to allow “a party [the opportunity] to present to the jury a picture of events” which would fairly depict the party’s case. Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958). The Court noted that to substitute an admission or stipulation of liability in place of concrete evidence “might have the effect [of robbing] the evidence of much of its fair and legitimate weight.” Id. at 88.

## **II. The Trial Court Has the Discretion to Admit Evidence Regardless of Defendants’ Proposed Stipulations**

Regardless of the Court’s ruling on the enforcement of stipulations, the admission or exclusion of evidence during trial is left to the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. City of Brownsville v. Alvarado, 897 S.W.2d 750, 753 (Tex. 1995); Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 234 (Tex. 2007); Ethicon, Inc. v. Martinez, 835 S.W.2d 826, 831 (Tex. App.—Austin 1992). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” TEX.R. EVID. 401.

A party attempting to preclude evidence of a stipulated fact will inevitably argue that any evidence pertaining to the stipulated fact is not relevant. Grassi, 602 F.2d at 1196. However, the Fifth Circuit in Grassi, as well as the Advisory Committee Notes to the federal rules, both state that situations which call for the exclusion of evidence offered to prove a point conceded by the opponent should be decided based on Rule 403 considerations rather than under any general requirement that evidence is admissible only if directed to matters in dispute. See id.; Fed. R. Evid. 401 advisory committee’s notes.

All relevant evidence is admissible unless its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See id. Tex. R. Evid. 402, 403 (emphasis added). Thus, Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial. See Williams v. State, 958 S.W.2d 186, 196 (Tex. Crim. App. 1997); Gallo v. State, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). A trial court should only exclude evidence when there is a “clear disparity between the degree of prejudice of the offered evidence and its probative value.” Moses v. State, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003) (citing Mozon v. State, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999)).

Once a party objects to evidence on 403 grounds, the trial court must conduct a balancing test, weighing the danger of prejudice against the probative value of the evidence. See McLellan v. Benson, 877 S.W.2d 454, 457 (Tex. App.—Houston [1st Dist.] 1994); McCarthy v. Padre Beach Homes, Inc., 2003 Tex. App. LEXIS 7585, at \*7 (Tex. App.—Corpus Christi 2003). For a piece of evidence to constitute being unfairly prejudicial to a party, it must do more than have an adverse effect on a party’s case because most evidence offered by an opponent should have this effect. Grassi, 602 F.2d

at 1197; see also Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977), cert. denied, 435 U.S. 996 (1978), Ferrara & Dimercurio v. St. Paul Mercury, 240 F.3d 1, 7 (1st Cir. 2001). Evidence will only be considered unfairly prejudicial when it has an “undue tendency to suggest that a decision be made on an improper basis, commonly, though not necessarily, an emotional one” Grassi, 602 F.2d at 1197. If the evidence does not result in a decision based on an improper basis, a court should allow it before the jury.

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Attorney for Plaintiff

## **APPENDIX P**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING ADMISSIBILITY OF PRIOR  
UNRELATED HEALTHCARE TREATMENT**

In this case, the defense has produced no medical record, lay testimony or expert testimony that would relate Plaintiff's prior injuries, conditions or treatment to her injuries and treatment occurring after the incident in question. Notwithstanding this lack of causal connection, defense counsel wishes to present evidence and question witnesses regarding prior unrelated injuries and treatment.

Evidence of prior injuries, conditions or treatment is not admissible unless there is proof that the Plaintiff suffered from a definite infirmity prior to this incident and that there is evidence of a close causal connection between the infirmity suffered before the incident and the infirmity suffered after the accident. Transcon. Bus Sys., Inc. v. Scirratt, 376 S.W.2d 56, 63 (Tex. App.—Tyler 1964). The Texas Supreme Court has stated that it would "plainly be unjustified" to permit the jury to consider the effect of prior injuries without proof of a definite infirmity which caused the pain and suffering for which the Plaintiff seeks recovery in the present suit. Dallas R. & T. Co. v. Orr, 215 S.W.2d 862, 864 (Tex. 1948).

With regards to proximate cause and cause-in-fact, for evidence to be admissible it must establish a causal connection based on reasonable medical probability, not mere conjecture, speculation, or possibility. Bradley v. Rogers, 879 S.W.2d 947, 953 (Tex. App.—Houston [14th Dist.] 1994); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397 (Tex. 1993); Arlington Mem'l Hosp. v. Baird, 991 S.W.2d 918, 922 (Tex. App.—Fort Worth 1999); Fennern v. Whitehead, 2010 Tex. App. LEXIS 4587 (Tex. App.—Austin 2010). The "possibility" that an event or condition might have caused damages from a medical viewpoint is not sufficient. Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988). It must be shown that the event or condition *probably* caused the injury. Niemann v. Refugio County Mem'l Hosp., 855 S.W.2d 94, 96 (Tex. App.—Corpus Christi 1993) (Tex. App.—Corpus Christi 1993, no writ.). "Proof must establish causal connection beyond the point of conjecture. Verdicts must rest upon reasonable certainty of proof." Lenger v. Physician's Gen. Hosp., 455 S.W.2d 703, 706 (Tex. 1970), Morrell v. Finke, 184 S.W.3d 257 (Tex. App. Fort Worth 2005).

To be probative, expert testimony must be based on reasonable medical probability. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 500 (Tex. 1995). While the specific words “reasonable medical probability” need not be used, the testimony must demonstrate that, to a reasonable degree of medical certainty, the alleged illness or injury caused the harm in question. See Duff, 751 S.W.2d 175 (Tex. 1988), Otis Elevator Co. v. Wood, 436 S.W.2d 324, 331-32 (Tex. 1968), Bradley v. Rogers, 879 S.W.2d 947, 956 (Tex. App.—Houston [14th Dist.] 1994), Mid-Continent Group v. Goode, 2011 Tex. App. LEXIS 6695 (Tex. App.—Amarillo 2011); Biggs v. Clyburn, 2003 Tex. App. LEXIS 4369, at \*12, \*2003 (Tex. App.—Houston [1st Dist.] 2003).

Expert testimony that is not based on a reasonable medical probability, but that instead relies on possibility, speculation, or surmise, does not assist the trier of fact and cannot support a judgment. Burroughs Wellcome Co., 907 S.W.2d at 500 (Tex. 1995); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex. 1997). This type of testimony should be excluded. “When evidence is so weak as to do no more than create a surmise or suspicion of the matter to be proved, the evidence is no more than a scintilla and, in legal effect, is no evidence.” Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007).

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## **APPENDIX Q**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

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IN THE DISTRICT COURT

v.

\_\_\_\_\_ COUNTY, TEXAS

DON DAVIS,  
Defendant.

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF ON ADMISSIBILITY OF EVIDENCE REGARDING  
WHEN PLAINTIFF RETAINED COUNSEL**

Texas law states that the time when a plaintiff obtains counsel is generally “wholly immaterial and irrelevant” and inadmissible during litigation. Travis v. Vandergriff, 384 S.W.2d 936, 938 (Tex. Civ. App.—Waco 1964). Further, “bias or prejudice of the attorney representing the respective parties has no bearing and is not material.” Azar Nut Co. v. Caille, 720 S.W.2d 685, 688 (Tex. App.—El Paso 1986).

The trial court has the discretion to decide the scope and extent of cross-examination regarding any evidence, including the commencement of representation. Austin Rd. Co. v. Ferris, 492 S.W.2d 64, 74 (Tex. Civ. App.—Fort Worth 1973). When there is a possibility that the jury will misuse the testimony to prejudice the plaintiff, the trial court should exclude the evidence. Great Cent. Ins. Co. v. Cook, 422 S.W.2d 801, 810 (Tex. Civ. App.—Dallas 1967) (citing S. Truck Leasing Co. v. Manieri, 325 S.W.2d 912 (Tex. Civ. App.—Houston [1st Dist.] 1959)); Martinez v. Williams, 312 S.W.2d 742 (Tex. Civ. App.—Houston [1st Dist.] 1958).

“The general rule is that in a personal injury case evidence that a plaintiff is claims-minded is not admissible. The reason for such rule is stated as follows in Vol. 2, Texas Law of Evidence (Second Edition) McCormick and Ray, Sec. 1526 at page 375: “But where the defendant merely seeks to show that the plaintiff is a chronic personal injury litigant, the evidence will be excluded on the theory that its slight probative value is outweighed by the danger of unfairly prejudicing the claim of an innocent litigant.”” Austin Rd. Co., 492 S.W.2d at 74.

If the party, or witness to the party, is questioned on this issue, the court shall instruct the jury to disregard the witness’s answer. Travis, 384 S.W.2d at 939.

Courts in other jurisdictions have agreed that this evidence is inadmissible ruling that a plaintiff’s right to the legal system shouldn’t be discouraged and the ability to utilize the system shouldn’t be used to attempt to discredit a litigant with a jury. Carlyle v. Lai, 783 S.W.2d 925, 929 (Mo. Ct. App. 1989). “The right to seek the advice of counsel is so fundamental that, absent a justifiable reason and supporting evidence, counsel risk reversal when attempting to discredit a litigant by cross-examining him

about the time and circumstances of his having consulted an attorney to discuss and exercise his legal rights.” Id.

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## **APPENDIX R**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING USE OF DEMONSTRATIVE EXHIBITS**  
**NOT PREVIOUSLY DISCLOSED**

A party cannot object to the use of a trial exhibit on the basis that it was not produced pursuant to a discovery request nor can they compel an opponent to produce trial exhibits as it invades the work product privilege. Texas Rule of Civil Procedure 192.5 states that normally any material prepared or mental impressions developed in anticipation of litigation is considered work product and exempt from discovery or disclosure. TEX. R. CIV. P. 192.5.

Nonetheless the rules provide that a trial court has the inherent authority to hold a pretrial conference and require that parties to a lawsuit disclose trial exhibits. TEX. R. CIV. P. 166(l). The trial court has discretion to allow exhibits if used for the purpose of summarizing or emphasizing previously admitted evidence. TEX. R. EV. 1006; Markey v. State, 996 S.W.2d 226, 231 (Tex. App.—Houston [14th Dist.] 1999); Prestige Ford Co. v. Gilmore, 56 S.W.3d 73, 79 (Tex. App.—Houston [14th Dist.] 2001).

Absent a pretrial conference pursuant to Texas Rule of Civil Procedure 166, discovery requests for the production of trial exhibits have been held to violate the protections provided by the work product privilege as such exhibits implicitly reveal the attorney’s mental process and trial strategy. Tex. Tech Univ. Health Sci. Ctr. v. Schild, 828 S.W.2d 502 (Tex. App.—El Paso 1992). For an exemption to the work product privilege, the request for exhibits must be specific documents rather than a broad statement for what the attorney is planning to use as evidence. Id. at 504; Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989).

“However, if a demonstrative exhibit contains factual information that is not in evidence, it would be error to show the exhibit to the jury. A party may not make factual statements during closing argument, whether orally or visually, without any reference to or inference from the evidence. See Warren Petrol. Corp. v. Pyeatt, 275 S.W.2d 216, 218-19 (Tex. Civ. App.—Texarkana 1955).” Prestige Ford Co., 56 S.W.3d at 79

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## **APPENDIX S**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**BRIEF IN SUPPORT OF PLAINTIFF'S REQUEST FOR JURY  
INSTRUCTION/OR SANCTIONS BASED ON DEFENDANT'S SPOILIATION OF  
EVIDENCE**

“Once a party has notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim.” Offshore Pipelines v. Schooley, 984 S.W.2d 654, 666 (Tex. App.—Houston [1st Dist.] 1998). Notice of a potential claim arises when (1) a party actually anticipates litigation or, (2) a reasonable person in the party’s position would have anticipated litigation. Trevino v. Ortega, 969 S.W.2d 950, 956 (Tex. 1998) (Baker, J., concurring).

Spoilation is the improper destruction of evidence. Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993) (citing Black's Law Dictionary 1257 (5th ed. 1979)). Failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party. H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975). This presumption serves to insure that a litigant's rights are not impaired by another party's improper destruction of relevant evidence. Trevino, 969 S.W.2d at 953.

The Texas Rules of Civil Procedure expressly allow trial courts to sanction parties whenever a party abuses the discovery process. *See* Tex.R.Civ.P. 215 (3). Thus, if a party destroys or discards relevant evidence during the discovery process (any time after the initiation of the lawsuit), the trial court has the authority to sanction the spoliating party. Id. at 958. Pursuant to Texas law, trial judges have “broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions.” Trevino v. Ortega, 969 S.W.2d 950, 953 (Tex. 1998) (citing Watson v. Brazos Elec. Power Corp., Inc., 918 S.W.2d 639, 643 (Tex. App. -- Waco 1996, writ denied)) (holding that a trial court erred when it failed to give a spoliation instruction); Ramirez v. Otis Elevator, Co., 837 S.W.2d 405, 412 (Tex. App. - Dallas 1992, writ denied) (noting that the trial court possesses wide discretion in awarding discovery sanctions); see also Tex.R.Civ.P. 215(b).

A "spoliation instruction" tells the jury that, if a party has control over a piece of evidence and fails to retain or produce it, the jury should presume that the evidence would have been unfavorable to the party who controlled the evidence. McMillin v. State

Farm Lloyds, 180 S.W.3d 183 (Tex. App.—Austin 2005), *reh'g overruled*, (Dec. 2, 2005).

Courts may give two types of spoliation-presumption jury instructions: first, a rebuttable presumption that the destroyed evidence is unfavorable to the spoliating party, under which the burden shifts to the spoliating party to disprove the presumed fact, or second, “an adverse presumption that the evidence would have been unfavorable to the spoliating party,” under which instruction the burden does not shift, but remains on the non-spoliating party to prove his case. Trevino, 969 S.W.2d at 960-61 (Baker, J., concurring); *see also*, Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003).

When determining whether a spoliation-presumption instruction is appropriate, the legal inquiry involves considering: (1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator either negligently or intentionally spoliated evidence; and (3) whether the spoliation prejudiced the nonspoliator’s ability to present its case or defense. Trevino, 969 S.W.2d at 954-55. Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the nonproducing party had a duty to preserve evidence in question; there must be sufficient foundational showing that the party who destroyed evidence had notice both of potential claim and of evidence’s potential relevance thereto. Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201 (Tex. App.—Tyler 2005); *see also* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003).

A jury instruction regarding spoliation of evidence is proper when a party has deliberately destroyed evidence or has failed to either produce relevant evidence or explain its nonproduction. McMillin, 180 S.W.3d 183, *reh'g overruled*, (Dec. 2, 2005). The determination of whether a party destroyed evidence is a question of law for the court to decide. Miller v. Stout, 706 S.W.2d 785, 787-88 (Tex. App.—San Antonio 1986). Trial courts have broad discretion in taking measures to address spoliation of evidence. Wal-Mart Stores, Inc., 106 S.W.3d at 721; Trevino, 969 S.W.2d at 953.

Some Texas Courts have held it is error to refuse “to submit a spoliation instruction when the spoliating party had properly raised the issue.” Watson v. Brazos Elec. Power Coop. Inc., 918 S.W.2d 639, 643 (Tex. App. - Waco 1996 ,writ denied). Allowing counsel to address the issue of spoliation during final argument to the jury is not a sufficient substitution for the spoliation instruction and does not constitute harmless error. Wal-Mart Stores, Inc., 106 S.W.3d at 721. “The Court’s instructions become the law of the case and are to be accepted by the jury as the guide on which they must rely. . . . Argument by counsel will not replace instruction by the court.” Id.

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Attorney for Plaintiff

## **APPENDIX T**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

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IN THE DISTRICT COURT

v.

\_\_\_\_\_ COUNTY, TEXAS

DON DAVIS,  
Defendant.

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING SUBSEQUENT REMEDIAL MEASURES**

Texas Rule of Evidence 402 provides that all relevant evidence is admissible except as otherwise provided by statute or rule. Texas Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the relevance of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The evidence in question is "relevant" under that definition.

Texas Rule of Evidence 407(a) addresses the admissibility of subsequent remedial measures. Specifically,

- a) **Subsequent Remedial Measures.** When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. **This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.**

However, subsequent remedial measures taken by a third party, rather than by a party to the case, is admissible evidence to prove negligence. Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669, 676-77 (Tex. App.—Amarillo 1991); Herrington v. Hiller, 883 F.2d 411, 415 n. 11 (5<sup>th</sup> Cir. 1989) (applying Federal Rule of Evidence 407).

Additionally, Rule 407 does not demand exclusion if the evidence is offered for another purpose, such as to prove, among other things, feasibility and control. Tex.R.Evid. 407(a); Roosth & Genecov Prod. Co. v. White, 262 S.W.2d 99, 104-05 (Tex.1953) (discussing the principle and its exceptions). "For example, if the existence of one's duty to act depended upon his right to control a matter and a dispute existed as to which of two parties had that right, then evidence of one's party's amelioration of a condition (after an injury occurred) is admissible as evidence illustrating that the party

ameliorating the condition had control over the matter. Spurr v. La Salle Constr. Co., 385 F.2d 322, 327-28 (7th Cir. 1967) (applying the comparable federal rule); 2 J. WEINSTEIN, M. BERGER, & J. MCLAUGHLIN, WEINSTEIN'S EVIDENCE ¶ 407[04] (1996)"; see Lee Lewis Constr., Inc. v. Harrison, 64 S.W.3d 1 (Tex. App.—Amarillo 1999).

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SBN: 24010695

Attorney for Plaintiff

## **APPENDIX U**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF'S MOTION TO EXCLUDE EVIDENCE OF  
EXTENT OR AMOUNT OF PROPERTY DAMAGE**

Plaintiff respectfully moves this Court for an Order precluding Defendant from introducing any evidence, testimony or argument regarding the extent or amount of property damage incurred by either vehicle involved in the collision that serves as the basis of this lawsuit, unless the defense lays a proper foundation with expert testimony.

**STATEMENT OF FACTS**

1. This case involves a rear-end motor vehicle collision where the Defendant drove his vehicle into the rear of Plaintiff's vehicle.
2. Defendant has admitted that his vehicle contacted the Plaintiff's vehicle, therefore, the fact the vehicles collided is not an issue. (See Defendant's Response to Plaintiff's Request for Disclosure, attached as Exhibit A).
3. Additionally, Plaintiff's property damage claim has been settled, therefore, the amount of the damage is also not an issue in this case.
4. Defendant has not counter-claimed for any property damage to his vehicle.
5. Defendant has not designated any testifying expert witnesses. (See Defendant's Response to Plaintiff's Request for Disclosure, attached as Exhibit A).

**ARGUMENT**

**I. Evidence of the extent or amount of property damage is irrelevant.**

Because the fact of the collision and the damage to the vehicles involved are not at issue in this case, photographs of the vehicles, property damage invoices, or other evidence regarding the extent or amount of property damage is not relevant. Texas Rule of Evidence 401 defines relevant evidence as that which makes the existence of any *fact*

*of consequence* more or less probable to be relevant. Tex. R. Evid. 401. Evidence that fails to meet that definition is irrelevant and is inadmissible. Tex. R. Evid. 402.

In this case, the Defendant has admitted to the fact of the collision. The fact that the vehicles collided, the point of impact, and the angle of impact are not in dispute. Additionally, neither party has made a claim for property damage in this suit, so the extent or value of the damage to either vehicle is not at issue. Therefore, because neither the fact of the collision nor the amount of damage to the vehicles is at issue in this case, evidence discussing such issues does not make any *fact of consequence* more or less probable.

## **II. The evidence of the extent or amount of property damage lacks the requisite foundation and testimony.**

Because, as mentioned above, the fact of the collision and the damage to the vehicles are not issues in this case, the only conceivable purpose for evidence of the extent or amount of property damage is to invite the jury to speculate on the issue of injury causation (or absence thereof). To prove or disprove causation, however, the party must present competent evidence through competent witnesses after a proper foundation has been laid for the witnesses' testimony.

The defense has not designated any expert witnesses to testify as to causation or lack thereof. Instead, the defense will simply refer to the photographs or repair invoices for the vehicles and argue that the jury use their "common sense" and find that Plaintiff's injuries could not have been caused in this collision. Texas courts require testimony, not argument, to prove or disprove causation and damages. *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007); *Arlington Mem. Hosp. Foundation v. Baird*, 991 S.W.2d 918, 922 (Tex. App. – Fort Worth 1999, n.w.h.) (citing five Texas Supreme Court cases).

Interpreting the force of an impact from vehicle photographs and then assessing the likelihood of injury from such impact are tasks that can only be attempted by experts. Such matters are not within jurors' realm of common sense.<sup>26</sup> For example, the issue of determining the force of the impact in a two-vehicle collision has been debated in scientific literature for years.<sup>27</sup> Determining how much energy was transferred from the object vehicle to the target vehicle alone is extremely difficult to accomplish because

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<sup>26</sup> Aubrey, J.B., Laypersons' knowledge about the sequelae of minor head injury and whiplash, J. Neurol. Neurosurg. Psychiatry, Jul; 52(7):842-6 (1989) (study that indicated laypersons believed highly exaggerated speeds were necessary to produce even the most common physical symptoms reported in motor vehicle collisions).

<sup>27</sup> For example, see Robbins, Malcolm, et. al., Lack of Relationship Between Vehicle Damage and Occupant Injury, Technical Paper No. 970494, Society of Automotive Engineers (1997); Siegmund, Gunter, et. al., Characteristics of Specific Automobile Bumpers in Low-Velocity Impacts, Technical Paper No. 940916, Society of Automotive Engineers (1994); Bailey, Mark, et. al., Data and Methods for Estimating the Severity of Minor Impacts, Technical Paper No. 950352, Society of Automotive Engineers (1995); Freeman, Michael, et. al., A Review and Methodologic Critique of the Literature Refuting Whiplash Syndrome, SPINE, Vol. 24, No. 1, p. 86 (1999); Smith, John, et. al., An Analysis of 72 Real World Impacts – An Initial Investigation into Injury and Complaint Factors, Technical Paper No. 1999-01-0640, Society of Automotive Engineers (1999); Miller, David, Low Velocity Impact, Vehicular Damage and Passenger Injury, J. of Craniomandibular Practice, Vol. 16, No. 4, p. 226 (1998).

most of the vehicle crash tests are conducted with a vehicle and fixed object (rather than between two vehicles). Furthermore, most of the crash tests are performed at speeds exceeding 30 m.p.h., therefore, making it virtually impossible to extrapolate the crush values to lower speed collisions. Lastly, vehicles vary considerably in their ability to absorb certain impacts without showing damage. In fact, the same vehicle may show little damage after one type of impact, but extensive damage from another type of impact.

Even if it were possible to determine how much energy was transferred from one vehicle to another, it is usually impossible to then ascertain exactly how much energy was transferred to the occupant of the target vehicle (as opposed to how much energy was absorbed by the vehicle). To accurately compute this, we would need to inspect the actual vehicle inside to determine what, if any, internal components were affected in the collision. We would also need to know certain reported characteristics of the vehicle in question such as the seatback strength.

Assuming we could compute how much energy from the “bullet vehicle” reached the actual occupant of the target vehicle, we would then need to know exactly how the force caused the occupant to move. To calculate this, we would need to know things like how the occupant was seated, the position of their seatback, whether they were belted, their head position relative to the head rest, whether they anticipated the impact, and whether their head was turned. However, even in cases where all of the information is available, these computations can only be made by a properly qualified biomechanical expert or someone with biomechanical training.

But, even with a properly qualified biomechanical expert, we still would not know anything about injury causation unless we knew how such energy would affect *this specific occupant*. This is an extremely difficult question considering that everyone is different and has a different medical history. A person’s susceptibility to injury is affected by numerous factors to include things like height, weight, gender, age, and medical history.<sup>28</sup> Therefore, attempting to project anyone’s specific “injury threshold” using studies that employed subjects with different characteristics than the person in question is not helpful. Obviously, only experts with medical experience or training in epidemiology are able to testify as to the likelihood that the plaintiff’s injuries were caused by the collision in question, as opposed to an alternate cause.

Because of the uncertainty in accurately determining all of the variables involved in reconstructing the energy transfer involved in a two-vehicle collision and how it would affect a specific individual, respected and ethical experts recognize that they cannot use such methods to determine whether a specific person's injuries were caused in a particular

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<sup>28</sup> Schutt, C.H., et. al., Neck Injury to Women in Auto Accidents: A Metropolitan Plague, JAMA 206:2689-2693 (1968); Svensson, M.Y., et. al., The Influence of Seat-Back and Head Restraint Properties on the Head-Neck Motion During Rear-Impact, Accident Analysis and Prevention, 29(2):221-227 (1996); Sturzenegger, M., et. al., Presenting Symptoms and Signs After Whiplash Injury. The Influence of Accident Mechanisms, Neurology, p. 688-693 (Apr. 1994); Matsushita, T., et. al., X-ray Study of the Human Neck Motion Due to Head Inertial Loading, Technical Paper No. 942208, Society of Automotive Engineers (1994).

collision.<sup>29</sup> Courts all over the country have stricken “experts” who have attempted to make that leap.<sup>30</sup> This is largely because it is widely acknowledged in medical practice that a person's injuries are not correlated to the amount of damage to their vehicle.

The amount of damage sustained by the car bears little relationship to the force applied. To take an extreme example: If the car was stuck in concrete, the damage sustained might be very great but the occupants would not be injured because the car could not move forward, whereas, on ice, the damage to the car could be slight but the injuries sustained might be severe because of the rapid acceleration permitted.

MacNabb, I., Acceleration Extension Injuries of the Cervical Spine, *Journal Bone/Joint Surgery*, 46:A 1797-1799 (1964).

Much, if not most, of the information that we would need to know in order to make the necessary calculations to determine amount of force or occupant motion is absent in this case. However, even in cases where all of the information is available, these computations can only be made by a properly qualified biomechanical expert or someone with biomechanical training. As previously stated, the defense in this case has not designated any such experts.

Even had the defense hired biomechanical experts, however, in light of the fact that the scientific literature has stated there is no connection between property damage and extent of injuries, they would not be able to relate any force calculations to whether this specific Plaintiff was injured and, if so, to what extent. It would, therefore, be improper for the defense to show the jury photographs of property damage and argue that there is a connection, knowing the opposite to be true.

Because much of the science and literature surrounding the determination of injuries in “low-impact” collisions has only been around a few years, courts around the country are just now wrestling with the issues presented by misleading and unsupported

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<sup>29</sup> There are, however, less respected and ethical experts who are willing to try to testify that they can determine whether a specific person is injured simply by looking at the vehicle damages. For example, one of the more notorious expert witness “shops” which has made a healthy profit offering this sort of testimony is Biodynamic Research Corporation (BRC) in San Antonio, Texas. The various consultants with that organization have been stricken by courts all over the country numerous times. This author alone has record of them being stricken almost 50 times, however, that is probably a fraction of how many courts have actually struck their testimony for being scientifically unreliable.

<sup>30</sup> *Clemente v. Blumenberg*, 705 N.Y.S.2d 792 (N.Y. Sup. Ct. 1999) (court refused to allow witness to testify that rear-end impacts at 6 mph or less do not yield long-term injury because methodology was unreliable); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000) (affirming trial court’s ruling to exclude expert); *Tittsworth v. Robinson*, 475 S.E.2d 261 (Vir. 1996) (reversing trial court’s admission of expert testimony that the force of the collision was not enough to cause injury because such opinion was not based upon reliable methodology); *Cleland v. City of Lake Charles*, 840 So.2d 686 (La. App. 2003) (reversing trial court decision admitting testimony); *Suarez v. Egeland*, 801 A.2d 1186 (N.J. App. 2002) (reversing trial court decision admitting testimony); *Smelzer v. Norfolk & Western Railway Co.*, 105 F. 3d 299 (6th Cir. 1997), *Yorston v. Bailey*, (CV 95-17659, Ariz.Super.Ct. 1997), *Pinsker v. Cohen*, (CV 95-12419, Ariz.Super.Ct. 1997); *People v. Dellinger*, 163 Cal.App.3d 284 (1984).

property damage evidence. Many courts that have addressed this issue have found that such evidence is not admissible when it is not accompanied by supporting expert testimony to establish an adequate foundation.

For example:

*Davis v. Maute*, 770 A.2d 36 (Del. 2001) (reversible error to admit evidence of property damage and allow counsel to argue serious injuries could not have resulted from “minor” collision) (Attached as Exhibit C);

*Hastie v. Dohar*, 2002 Ohio App. LEXIS 808 (Ohio Ct. App. – 8<sup>th</sup> Dist. 2002) (finding trial court’s action proper in excluding photographs of property damage as well as argument correlating property damage and injury) (Attached as Exhibit D);

*Sloan v. Clemmons*, 2001 Del. Super. LEXIS 535 (Del. Super. 2001) (court excluded evidence of amount and extent of property damage, any evidence or argument correlating damage to injury, any evidence regarding force of impact or speed at impact, but allowed testimony of mechanisms of injury by expert witnesses) (Attached as Exhibit E);

*Hovis v. Hughes*, 2001 Del. Super. LEXIS 534 (Del. Super. 2001) (excluding evidence of property damage but allowing expert testimony about force of impact causing injuries) (Attached as Exhibit F);

The *Davis* court correctly found:

As a general rule, a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue. Absent such testimony, any inference by the jury that minimal damage to the Plaintiff’s car translates into minimal personal injuries to the Plaintiff would necessarily amount to unguided speculation.

*Davis*, 770 A.2d at 42.

Rather than employ the necessary experts and lay the proper foundation for the evidence regarding property damage, the defense typical strategy is to simply display photographs of minimal damage and invite the jury to use their “common sense,” implying that Plaintiff’s injuries must also be minimal or caused by some other event. The above courts recognize that, without the proper expert testimony, evidence of the extent or amount of property damage is inadmissible.

It is apparent from the number of courts rejecting “low-impact” expert testimony (see footnotes 4 and 5 *supra*) that (1) the low-impact/slight injury inference does not flow

naturally from “commonsense”, but is of a scientific or technical nature, and (2) the inference should not be drawn without such reliable expert testimony.

Plaintiff is not asking this Court to hold that photographs of damage to automobiles involved in accidents are *per se* inadmissible. In the appropriate circumstances, such photographs could be relevant to an issue in the case. But what is good for the goose ought to be good for the gander: It is clear Plaintiff could not, without the admission of supporting expert or medical testimony, simply introduce photographs of extensive damage to her automobile to satisfy her burden to prove her injuries were caused by that damage. Rather, she must introduce testimony making a connection between that damage and her injuries. The defense should be required to do the same.

Rather than employ the necessary experts and lay the proper foundation for the evidence regarding property damage, the defense seeks to simply display photographs of minimal damage and invite the jury to use their “common sense,” implying that Plaintiff’s injuries must also be minimal or caused by some other event. Certainly, if certain experts cannot take the stand and make these conclusions, certainly, defense counsel should not be able to testify to such matters in argument. Without the proper expert testimony, evidence of the extent or amount of property damage is inadmissible.

**III. The evidence of the extent or amount of property damage is misleading and its probative value is substantially outweighed by the danger of undue prejudice.**

Even assuming *arguendo* that the evidence regarding property damage was relevant, it still must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403. As discussed above, the evidence is probative of no issue in the case because the fact of the collision or the damage to the vehicles are not at issue in this case.

The evidence does, however, present a real danger of unfair prejudice and is misleading. By using the photographs to argue that the impact was minimal and, therefore, plaintiff’s injuries must also be minimal, the defense requires the jury to speculate about many matters outside the realm of their experience and common sense. Research has shown that if forced to guess, laypersons’ do not have an accurate understanding of the force necessary to cause minor head or whiplash injuries. See Aubrey, J.B., et. al., *Laypersons’ knowledge about the sequelae of minor head injury and whiplash*, J. NEUROL. NEUROSURG. PSYCHIATRY, Jul;52(7):842-6 (1989).

Because the defense is not presenting any expert testimony to establish a proper foundation for the evidence, the jury will be forced to speculate as to the meaning of the evidence. They will have to guess as to the magnitude of the impact based on the photos. Then, they will have to make various assumptions about how much energy passed on to the target vehicle. They will next have to speculate about how much of that energy was passed on to the plaintiff and how much was absorbed by his vehicle. Lastly, they will have to guess at how susceptible the plaintiff was to being injured from such a impact.

The defense's request to this jury to make inference upon inference requires the jury to go outside the evidence and employ speculation, conjecture, and suspicion. "[W]e believe that some suspicion linked to other suspicion produces only more suspicion, which is not the same as evidence." *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993). Just as the plaintiff cannot ask the jury to assume he was injured without some evidence to support it, the defense should not be allowed to simply flash a photograph of a vehicle and ask the jury to assume plaintiff was not injured.

The type of argument and implication which Defendants seek to employ is highly prejudicial. To an uninstructed juror, the inference that "no damage" equates with "no injury" is immediately appealing and logical. But, the variability of individual human subjects and their susceptibility to injury, as well as the infinite variety of potential forces involved in an uncontrolled collision make predicting injury to a specific individual virtually impossible. It is not a determination that can be made through a juror's common sense. To the contrary, it is very complex and technical question. And, as discussed above, courts all over the country have stricken "experts" who have attempted to testify that there is a way to correlate the amount of property damage to the existence or extent of injury to a particular individual. Moreover, the scientific and medical literature establishes that such inference is entirely false.

If the defense is permitted to introduce evidence of property damage and make the inference of no injury, the plaintiff will have no choice other than to produce rebuttal evidence. While the plaintiff does not believe evidence from either side about property damage is relevant in this case, if the defense is allowed to make this an issue, Plaintiff will have to address it. This will create a trial within a trial. One trial will be about whether Plaintiff is injured as a result of Defendant's negligent act. The other trial will be about whether a certain amount of property damage is required in order to cause injury to another.

Allowing the introduction of property damage in cases such as this one is also inefficient on a systematic level. Courts across Texas are busting at the seams with a deluge of "low-impact cases." It will continue to remain this way until the courts begin to require the defense to produce expert testimony to support their "use your common sense" arguments to the jury. If the defense is not required to produce evidence to support their inference, the cases will remain very cheap to litigate, and the defense will continue to offer medical expenses or less to these injured people. If the courts want to reduce the number of "low-impact cases" clogging their dockets, all they need to do is make the defense play by the Rules of Evidence. But, as long as the defense is permitted to show a photograph to the jury and tell them to use their "common sense," the defense cannot afford not to try as many of these cases as possible.

**CONCLUSION**

Based on the foregoing, Plaintiff requests this Court preclude Defendant from introducing any evidence regarding the extent or amount of property damage, unless the defense lays a proper foundation with expert testimony.

Respectfully submitted,

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## **APPENDIX V**

CAUSE NO. \_\_\_\_\_

PAUL PAYNE,  
Plaintiff,

v.

DON DAVIS,  
Defendant.

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§  
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§  
§  
§  
§

IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**BRIEF REGARDING THE USE OF LAY TESTIMONY**  
**TO PROVE INJURY CAUSATION**

To establish causation, the Plaintiff must offer some proof that the Defendants' conduct caused an event and that such event caused the Plaintiff to suffer compensable damages. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995). The element of causation is usually a question of fact for the jury to determine. Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989); Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995).

The Texas Supreme Court has held that lay testimony is adequate to prove causation in those cases in which general experience and common sense enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984). The Texas Supreme Court finds that lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation. Id. at 733-34 (citations removed).

Lay testimony highlighting a connection between two events which is apparent to a casual observer is evidence of causation. Jelinek v. Casas, 328 S.W.3d 526, 533 (Tex. 2010). We have allowed lay evidence to establish causation "in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition." Morgan, 675 S.W.2d at 733 (citing Lenger v. Physician's Gen. Hosp., 455 S.W.2d 703, 706 (Tex. 1970)); Jelinek, 328 S.W.3d at 533.

Thus, non-expert evidence alone is sufficient to support a finding of causation in limited circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence. See, Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 2005); Guevara v. Ferrer, 247 S.W.3d 662, 668-69 (Tex. 2007).

“Undoubtedly, the causal connection between some events and conditions of a basic nature (and treatment for such conditions) are within a layperson's general

experience and common sense. This conclusion accords with human experience, our prior cases, and the law in other states where courts have held that causation as to certain types of pain, bone fractures, and similar basic conditions following an automobile collision can be within the common experience of lay jurors.” Id. at 668.

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