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1. What are the statute of limitations for tort and contract actions as they relate to the transportation industry.

In Texas, the statute of limitations for suits for property damage and personal injury is two years. See Tex. Civ. Prac. & Rem. Code § 16.003(a). Conversely, contract actions are subject to a four-year statute of limitations. See Tex. Civ. Prac. & Rem. Code § 16.004(a). These statutes apply the same to the transportation industry as to other industries.

2. What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.

In response to the COVID-19 pandemic, the Supreme Court of Texas has issued forty-seven emergency orders. At the beginning of the pandemic, the Court's orders directed that, "Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent[] [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, … for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted[.]" See Twelfth Emergency Order Regarding COVID-19 State of Disaster, No. 20-9059 (Tex. Apr. 27, 2020). No Texas court has addressed the emergency orders in a written opinion, but the plain language implies that Texas courts have discretion to suspend the statute of limitations until 30 days after the end of the state of disaster invoked by the executive branch. However, the Court's most recent order omits the foregoing language and now limits the modification or suspension of deadlines to trial-related deadlines and procedures and deadlines and procedures for pretrial hearings, and now only applies to justice courts and municipal courts. Forty-Seventh Emergency Order Regarding COVID-19 State of Disaster, No. 22-9005 (Tex. Jan. 27, 2022). As such, courts no longer appear to have discretion to postpone limitations in any court.

3. Does your state recognize comparative negligence and if so, explain the law.

Texas uses a modified form of comparative negligence also referred to as proportionate responsibility. Meaning, that if you are found partially at fault for the alleged injury, then your damages can be reduced. For example, if a plaintiff is found to be 51% or more at fault for their own injuries, they will not recover damages. If plaintiff's negligence is not greater than defendants, their award is reduced by the proportion of negligence. Texas Civil Practice and Remedies Codes §33.001, 33.002, 33.003, and 33.012.

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4. **Does your state recognize joint tortfeasor liability and if so, explain the law.**

Texas follows modified joint and several liability. If a liable defendant's percentage of responsibility is less than 50%, then that defendant is only responsible for their percentage of responsibility. If a defendant's percentage of responsibility is greater than 50%, each liability defendant is jointly and serverally liable for damages recoverable by the claimant, or if the defendant acted with specific intent to do harm to others, acted in concert with another person to commit certain specified, intentional torts, including murder, sexual assault, fraud or other felonies of the third degree or higher. Tex. Civ. Prac. & Rem. Code § 33.013.

5. **Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.**

No, there is no pre-suit duty in Texas to disclose insurance policy information or limits. However, a pre-suit demand can be sent to an insurer that offers an unconditional settlement of the claim for an amount that falls within the applicable policy limits. If such a demand is sent and rejected but is one that a reasonably prudent insurer would have accepted under same or similar circumstances, and a court then enters a judgment against the insurer, then the insurer will be liable for the entire judgment. See, *G.A. Stowers Furniture Co. v. American Indemnity, Co.*, 15 S.W.2d 544 (Tex. 1929); *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998).

6. **Does your state have any monetary caps on compensatory, exemplary or punitive damages.**

Yes. Pursuant to Section 41.008 of the Texas Civil Practice and Remedies Code, if a plaintiff has proved by "clear and convincing evidence" they are entitled to exemplary damages, the exemplary damages award shall not exceed an amount equal to the greater of:

(1) (A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
(2) $200,000.[1]

For example, if a jury renders a verdict of $1,000,000 ($500,000 in economic damages, and $500,000 in non-economic damages), the most a plaintiff can recover in punitive damages would be $1,500,000 (($500,000 x 2) + $500,000)).

This limitation, however, does not apply to a recovery of exemplary damages based on certain conduct described as a felony under the Texas Penal Code if the conduct was committed "knowingly and intentionally". The specific Sections of the Texas Penal Code are set forth in subsections (c)(1)-(17).

7. **Has your state recently implemented any court reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

Texas has recently passed House Bill 19, which amends Chapter 72 of the Civil Practice & Remedies Code, which allows the court to bifurcate commercial vehicle collision trials, requiring that the defendant driver be found negligent before a punitive case can be presented on the motor carrier. If bifurcated, then no negligent hiring, training, supervision and retention claims can be asserted during the 1st phase of the trial. However, this

[1] Please note, however, that a Texas jury is not told of these limitations and may award amounts much higher than the cap allows.

only applies to suits filed after September 1, 2021.

The new law covers any vehicle being used for a commercial purposes in interstate or intrastate commerce to:

1) transport property or passengers;

2) deliver or transport goods; or

3) provide services.

It does *not* include a motor vehicle being used for personal, family, or household purposes at the time of the accident. It is important to note that a commercial motor vehicle as defined under HB 19 may not be the same as those regulated by the FMCSR or Chapter 644 of the Tex. Transportation Code. *CPRC Sec. 72.051(4).*

To bifurcate, the defendant has the burden to request the court to have the trial bifurcated. The court has no discretion to do so without first beign asked to do so. It must be bifurcated by the later of the 120th day after the filing of the original answer, or by the 30th day after the plaintiff amends the petition adding a claim or cause of action. *CPRC SEC. 72.052(a)*.

Once bifurcated, liability against the defendant driver and the amount of compensatory damages shall be determined by the trier of fact during the first phase. If applicable, liability for and the amount of exemplary damages shall then be determined by the trier of fact in the second phase. *CPRC SEC. 72.052(C-D).*

However, only after the driver is found negligent in the first phase will the plaintiff be allowed to proceed against the employer in the second phase on a claim that derives from the negligence of the driver, such as:

- Vicarious liability;
- Negligent hiring or training;
- However, unless there is a claim for gross negligence, these claims will be extinguished if there a stipulation of course and scope, meaning there will be no second phase against the company. *CPRC SEC. 72.052(E).*

If the carrier stipulates that the driver was working in the course and scope of employment at the time of the accident, the carrier's liability for the driver's negligence shall be based solely on vicarious liability, which eliminates the negligent hiring or training claim. The stipulation must be filed within the same period for filing the motion to bifurcate. *CPRC SEC. 72.0524(B).*

Nonetheless, a plaintiff can still bring an ordinary negligence claim against the carrier in the first phase if it does not derive from the driver's operation of the vehicle. *CPRC Sec. 72.054(f).* For example: negligent maintenance, possibly forced dispatch in violation of hours of service, and claims where the driver could potentially blame the company for the accident. However, except as otherwise provided, the stipulation precludes the plaintiff from presenting evidence of negligent entrustment in the first phase because it's predicated on a finding that the driver was negligent. *CPRC Sec. 72.054(b).*

Of course, there is an exception to the stipulation rule. *CPRC Sec. 72.054(c).* If the employer is subject to the FMCSR or Chapter 644 of the Tex. Transportation Code, then the following is admissible in the first phase only to prove, or defeat, a negligent entrustment brought against the employer and is the only evidence that may be presented on such a claim.

- Driver was not licensed.
- Driver was disqualified from driving.
- Driver subject to an out of service order.
- Driver in violation of a license restriction.

- Driver received a certificate of driver's road test.
- Driver was medically certified to operate the vehicle.
- Driver was operating the vehicle when prohibited.
- Driver was texting or using a handheld telephone.
- Driver refused to submit to a drug test during the two years preceding the accident.
- The employer allowed the driver to operate the vehicle when prohibited.
- The employer complied with drug testing requirements if the employee was impaired.
- The employer made the required investigations and inquiries as to the driver if the accident occurred on or before the employee's one year anniversary.
- The employer was subject to an out of service order.

Evidence of such failure is admissible in the first phase only if:

1) the evidence tends to prove the alleged failure to comply was a proximate cause of the bodily injury; and
2) the regulation or standard is
   i. specific and governs the defendant or property when at issue; or
   ii. is an element of a duty of care applicable to the defendant or property when at issue.
   iii. The plaintiff can still present evidence, in the second phase, on a claim for exemplary damages under Chapter 41relating to the driver's failure to comply. *CPRC SEC.72.053*.

HB19 also provides additional benefits for producing photographs and videos into evidence. Under this amendment, courts may no longer require expert testimony to admit into evidence a photograph or video of a vehicle or object involved in the accident, except as necessary to authenticate the same. Properly authenticated pictures or videos of a vehicle or object involved in the accident are presumed admissible, even if it tends to support or refute an assertion of severity of the damages or injury. *CPRC SEC.70.055.*

8. How many months generally transpire between the filing of a transportation related complaint and a jury trial.

In Texas, district courts and statutory county courts at law "should, so far as reasonably possible, ensure that all cases are brought to trial or final disposition in conformity with the following time standard: Within 18 months from appearance date." TX ST J ADMIN Rule 6. However, the Texas Office of Court Administration produces an Annual Statistical Report for the Texas Judiciary tracking the disposition of civil cases, and the last available report for calendar year 2020 reveals that the average disposition time of civil cases (from filing until trial or settlement) are taking approximately 20 months. Injury or damage cases each accounted for about a quarter of the nearly 193,000 civil cases filed in 2020, and more than 75 percent of these injury or damage cases involved a motor vehicle.

Generally, in Texas the period between the filing of a transportation related petition/complaint and a jury trial depends on the placement of the case on the court's trial docket, the level of the discovery control plan assigned the case, and whether there is a scheduling order entered in the case. The order of cases proceeding on a court's jury trial docket is first determined by the date and order in which the cases are filed by commencement of filing a petition. TEX. R. CIV. P. 27, 22-23. Due to the amount in controversy in most transportation cases usually being over $250,000, such cases are typically governed by a Level 3 discovery control plan, in which the trial court must, on a party's motion, or may on its own initiative, enter a scheduling order containing among other items, a discovery control plan and a trial setting. TEX. R. CIV. P 190.4, 166. Due to the State of Texas having 254 counties ranging in population from more than 4 million people (Harris County)

to just over 100 (Loving County), there are varying practices concerning how a court sets a case for jury trial. Some courts allow preferential or special trial settings, in which the parties and the court agree in a scheduling order that a jury trial will commence on a date certain. Other courts set cases for jury trial in the order in which the cases were filed by sending out a trial docket listing the cases going to trial in the order of filing (subject to a case being settled prior to commencement of trial or being continued upon motion) and requiring the parties of each case to be ready for a jury trial if called.

9. When does pre-judgment interest begin accumulating and at what percent rate of interest.

Section 304.102 of the Texas Finance Code provides for prejudgment interest in cases involving wrongful death, personal injury, and property damage. Personal injury includes mental anguish. Statutory prejudgment interest in wrongful death, personal injury, and property damage actions is computed at a rate equal to the post judgment interest rate applicable at the time of judgment [Tex. Fin. Code §304.103], which is defined as the prime rate published by the Board of Governors of the Federal Reserve System on the date of computation, with a floor of 5 percent and a ceiling of 15 percent [Tex. Fin. Code §304.003(c). The current interest rate for prejudgment interest in Texas is 5% per annum. Prejudgment interest is computed as simple interest, not as compound interest. See, Section 304.104 of the Texas Finance Code.

Prejudgment interest starts to accrue on either (1) the 180th day after the defendant receives written notice of the plaintiff's claim or (2) the day suit is filed, whichever is earlier. See, Section 304.104 of the Texas Finance Code. To trigger the start of the 180-day period, the claim must include a demand for compensation or an assertion of a right to be paid, although a demand for an exact amount or a list of every element of damages is not necessary. Tex. Fin. Code §304.104; Johnson & Higgins v. Kenneco Energy, 962 S.W.2d 507, 530–533 (Tex. 1998). Prejudgment interest stops accruing the day before the judgment is signed. See, Section 304.104 of the Texas Finance Code. If the defendant unconditionally tenders the entire amount that the plaintiff is entitled to, prejudgment interest stops accruing on the date of the tender. Settlement offers by Defendants can affect when prejudgment interest can begin to accrue. Tex. Fin. Code §304.105(a); *see* Johnson & Higgins v. Kenneco Energy, 962 S.W.2d 507, 530–533 (Tex. 1998). See also Tex. Fin. Code §304.105(b).

Prejudgment interest can be tolled if the parties execute a "standstill agreement". During the period of the standstill agreement, prejudgment interest is tolled.

Prejudgment interest is not recoverable on an award of future damages as provided in Section 304.1045 of the Texas Finance Code. Prejudgment interest is not recoverable on an award of punitive damages. See, Section 41.007 of the Texas Civil Practice and Remedies Code. In addition, if the defendant is entitled to an offset or credit, such as a settlement credit, the amount of the offset or credit should be deducted from the total damages before prejudgment interest is calculated. Sisters of Charity v. Dunsmoor, 832 S.W.2d 112, 118 (Tex. App.—Austin 1992, writ denied).

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

A. Pleading Requirement

Special or consequential damages, like medical expenses in the past and future, must be specifically

alleged. Tex. R. Civ. P. 56. [J&D Towing, LLC v. Am. Alt. Ins. Corp., 478 S.W.3d 649, 655 (Tex. 2016)].

B. Expert Opinion Required For Past Medical Expense Damages, Unless Plaintiff Complies With CPRC 18.001

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the **evidence** or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. [Tex. R. Evid. 702]

C. CPRC 18.001

To prove the amount of recoverable medical expenses, the claimant may use the statutory affidavit procedure to prove the cost and necessity of services under Chapter 18 of the Civil Practices and Remedies Code [*see* Tex. Civ. Prac. & Rem. Code §18.001]. That statute provides a model form for use by a custodian of medical records [Tex. Civ. Prac. & Rem. Code §18.002(b–1)]. Because Section 41.0105 of the Texas Civil Practice and Remedies Code limits the claimant to recovery of reimbursement rates, not billed rates, and insurance companies are in the best position to both know and negotiate those rates, subrogation agents for insurers may provide the required affidavits, and they need not be authored by either a medical provider or a records custodian for a medical provider [Gunn v. McCoy, 554 S.W.3d 645, 61 Tex. Sup. Ct. J. 1410, 1443–1445, 2018 Tex. LEXIS 560, at *51–*57 (Tex. 2018)].

The affidavit is, by statute, sufficient evidence to support a finding of fact that the amount charged was reasonable and that the service was necessary; however, if a counter-affidavit is served by an opposing party, the effect of the original affidavit is destroyed and evidence of the necessity and reasonableness of the services must be offered by some other method [*see* Tex. Civ. Prac. & Rem. Code §18.001(b)]. Once controverted, an affidavit as to reasonableness and necessity may not be admitted in evidence. *See* Hong v. Bennett, 209 S.W.3d 795, 801–804 (Tex. App.—Fort Worth 2006, no pet.).

The affidavit must include an itemized statement of the service and the charge [Tex. Civ. Prac. & Rem. Code §18.001(c)]. A copy of the affidavit must be served on each other party at least 30 days before the day on which evidence is first presented at the trial [Tex. Civ. Prac. & Rem. Code §18.001(d). A party intending to controvert a claim reflected by the affidavit must serve a counter-affidavit by a qualified expert that gives reasonable notice of the basis on which the party intends to controvert the claim. A copy of the counter-affidavit must be served on each other party not later than 30 days after the day the party receives the original affidavit, and at least 14 days before the day on which evidence is first presented at trial. With leave of court, the counter-affidavit may be served at any time before the commencement of evidence at trial [Tex. Civ. Prac. & Rem. Code §18.001(e), (f). In the context of controverting affidavits, the Texas Supreme Court in *In re Allstate Indem. Co*., 622 S.W.3d 870 (Tex. May 7, 2021), further explains that a qualified expert need not be a doctor. A qualified expert may be a nurse or other individual with experience in medical billing and coding. Id. A trial court's order striking a defendant's controverting affidavit and /or prohibiting defendant from offering evidence about the reasonableness of the medical expenses may entitle a defendant mandamus relief. Id.

As amended in 2013, Civil Practice and Remedies Code Section 18.001(d) provides that "[e]xcept as provided by the Texas Rules of Evidence, the records attached to the affidavit are not required to be filed

with the clerk of the court before the trial commences" [Tex. Civ. Prac. & Rem. Code §18.001(d)]. Texas Rule of Evidence 902 also was amended, effective September 1 2014, and no longer requires that the records and affidavit be filed with the court [*see* Tex. R. Evid. 902(10)]. Accordingly, under both the statute and the rule, the records should not be filed with the clerk.

Section 18.001 does not address the issue of causation between an event and the claimant's injuries and damages, only whether the medical treatment was necessary in light of the plaintiff's injuries [Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 425 (Tex. App.—Eastland 2006, no pet.). The statute does not provide that the evidence is conclusive, nor does it address the issue of causation.

D. "Paid or Incurred" - Limited Liability for Medical and Health Care Expenses

Recovery of medical or health care expenses is limited to the amount "actually paid or incurred" by or on behalf of a claimant [Tex. Civ. Prac. & Rem. Code §41.0105]. Section 41.0105 was enacted in part to reflect a common practice in the health care industry in which a hospital or other provider issues an invoice of initial "full" rates, but all parties involved understand that the provider will actually receive payment of some lesser amount approved by Medicare or other governments regulations, or by private insurers. The Texas Supreme Court, in acknowledging that the provider will receive payment of some lesser amount approved by Medicare or by private insurers, states this results in a "two-tiered structure" of "list rates" stated in initial invoices, and "reimbursement rates" that are actually paid to the providers [Haygood v. Garza de Escabedo, 356 S.W.3d 390, 393–394 (Tex. 2011)].

The limitations of Section 41.0105 apply only to *past* medical expenses, so a claimant seeking to recover *future* medical expenses need not offer evidence of the amounts that will actually be charged or collected by the providers for those services [Glenn v. Leal, 546 S.W.3d 807, 814–815 (Tex. App.—Houston [1st Dist.] 2018), *rev'd on other grounds*, 596 S.W.3d 769 (Tex. 2020) (per curiam)].

The Texas Supreme Court has rejected arguments by claimants that this violates the common law collateral source rule, noting that the benefit of the reduction inures to the insurer, not the insured [Haygood v. Garza de Escabedo, 356 S.W.3d 390, 394–396 (Tex. 2011)]. However, the Texas Supreme Court stressed that the collateral source rule continues to apply, so that the jury may not be told that these expenses will be covered in whole or in part by insurance, nor that a health care provider adjusted its charges because of insurance [Haygood v. Garza de Escabedo, 356 S.W.3d 390, 400 (Tex. 2011)].

If the provider sells an uninsured claimant's accounts receivable to a factoring company in order to obtain immediate payment, the claimant remains liable for the amount originally billed, so the claimant may recover that amount, not the discounted amount the provider received [Primoris Energy Servs. Corp. v. Myers, 569 S.W.3d 745, 762–763 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

The statute does not explain how that limitation is to be applied, whether post-verdict or pre-verdict. The Texas Supreme Court resolved the split in favor of requiring the adjustment pre-verdict, and stating that 41.0105 has evidentiary consequences, so that the list rates charged by the provider are simply irrelevant to the question of damages, and only the reimbursement rates actually charged and collected may be offered as evidence [Haygood v. Garza de Escabedo, 356 S.W.3d 390, 398–400 (Tex. 2011)].

E. For actions filed on or after September 1, 2019, amendments to 18.001 apply. Numerous changes to deadlines have been made, both to the service of the affidavit and to controverting the affidavit. Deadlines are more complicated, and it may be helpful to enter into a Rule 11 Agreement or Agreed Discovery Control

Plan whereby the parties simplify their own deadlines, something which clearly is now allowed under amendment.

Section 18.001 of the Civil Practice and Remedies Code is amended to clarify that an affidavit stating that the amount charged for a service was reasonable and that the service was necessary "is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action."

The amendments effectuate deadlines by when a party (or the party's attorney) offering an affidavit into evidence or a party controverting a claim in an affidavit must serve a copy of the affidavit or counteraffidavit on all other parties:

Significantly, Section 18.001 (d), provides that the affidavits of plaintiff must be served by the earlier of:

(1) 90 days after the date the defendant files an answer;
(2) the date the offering party must designate any expert witness under a court order; or
(3) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.

(d-1) Notwithstanding Subsection (d), if services are provided for the first time by a provider after the date the defendant files an answer, the party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit for services provided by that provider on each other party to the case by the earlier of:

(1) the date the offering party must designate any expert witness under a court order; o
(2) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.

(d-2) The party offering the affidavit in evidence or the party's attorney must file notice with the clerk of the court when serving the affidavit that the party or the attorney served a copy of the affidavit in accordance with this section. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk of the court before the trial commences.

(e) A party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record by the earlier of:

(1) 120 days after the date the defendant files its answer;
(2) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or
(3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure.

(e-1) Notwithstanding Subsection (e), if the party offering the affidavit in evidence serves a copy of the affidavit under Subsection (d-1), the party offering the counteraffidavit in evidence or the party's attorney must serve a copy of the counteraffidavit on each other party to the case by the later of:

(1) 30 days after service of the affidavit on the party offering the counteraffidavit in evidence;
(2) the date the party offering the counteraffidavit must designate any expert witness under a court order; or

(3) the date the party offering the counteraffidavit in evidence must designate any expert witness as required by the Texas Rules of Civil Procedure.

(f) The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. The counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action.

(g) The party offering the counteraffidavit in evidence or the party's attorney must file written notice with the clerk of the court when serving the counteraffidavit that the party or attorney served a copy of the counteraffidavit in accordance with this section.

(h) If continuing services are provided after a relevant deadline under this section:

(1) a party may supplement an affidavit served by the party under Subsection (d) or (d-1) on or before the 60th day before the date the trial commences; and

(2) a party that served a counteraffidavit under Subsection (e) or (e-1) may supplement the counteraffidavit on or before the 30th day before the date the trial commences.

(i) Notwithstanding Subsections (d), (d-1), (d-2), (e), (e-1), (g), and (h), a deadline under this section may be altered by all parties to an action by agreement or with leave of the court.

F. Future Medical Expenses

An award of future medical expenses is always speculative [Pipgras v. Hart, 832 S.W.2d 360, 365–366 (Tex. App.—Fort Worth 1992, writ denied)]. The plaintiff must show that in all reasonable probability, future medical care will be required and the reasonable cost of that care [Rosenboom Mach. & Tool, Inc. v. Machala, 995 S.W.2d 817, 828 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)].

The "reasonable probability rule" relieves the plaintiff of having to present precise evidence of future medical expenses. Moreover, the plaintiff may establish the probability and cost of the expenses without expert testimony [*see* Blankenship v. Mirick, 984 S.W.2d 771, 778–779 (Tex. App.—Waco 1999, pet. denied). The nature of the injuries and the injured party's condition at trial may also be considered in determining the amount of an award for future medical expenses [Pipgras v. Hart, 832 S.W.2d 360, 365–366 (Tex. App.—Fort Worth 1992, writ denied)].

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

Texas state law has not expressly adopted the self-critical analysis or self-evaluation privilege. Instead, in Texas the discoverability of an internal or investigative report of a transportation company later involved in litigation depends on whether the report is considered as "work product." The work product of a party or its representatives, is exempt from discovery. TEX. R. CIV. P. 192.5 (a), (b). The term "work product" includes (1) material prepared or mental impressions developed in anticipation of litigation or for trial, by or for a party or

its representatives, including the party's attorneys, employees, insurers, or agents, or (2) communications made in anticipation of litigation or for trial between a party and its representatives or among a party's representatives, including the party's attorneys, consultants, insurers, employees, or agents. Tex. R. 192.5(a); *In re National Lloyds Ins*., 532 S.W.2d 794, 803 (Tex. 2017); *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993). The materials or communications must have been prepared in anticipation of litigation – which involves a two-part test: First, the court must determine whether a reasonable person, based on the circumstances at the time of the investigation, would have anticipated litigation. *National Tank*, 851 S.W.2d at 203. Second, the court must determine whether the company believed in good faith that there was a substantial chance that litigation would follow and conducted the investigation for the purpose of preparing for the litigation. *Id*.

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

Yes, plaintiff has two different types of causes of action against motor carriers, vicarious liability (*respondeant superior*) and non-vicarious/direct negligence claims (hiring, training, retention, monitoring/supervision, etc.). Both of these claims can survive even if the motor carrier stipulates to liability if there is a gross negligence claim. However, if you can get summary judgment on plaintiff's gross negligence claim, the Texas Courts have ruled that non-vicarious negligence claims should be dismissed if gross negligence claims are dismissed because they become immaterial. In other words, non-vicarious negligence claims against an employer are mutually exclusive modes of recovery from *respondeant superior* when exemplary damages are not sought.

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

No, Texas does not have an independent cause of action for evidence spoliation. *See Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998). However, there are a wide range of sanctions and repercussions for spoliation under Texas law. Trial judges have "broad discretion to take measures" and are encouraged to review the particular facts of each individual case to determine the appropriate remedy for spoliation. *See id*. Other potential repercussions include an award of attorney's fees, dismissal of the lawsuit, an order prohibiting further discovery by the spoliating party, an order designating certain facts established, a contempt order, exclusion of the evidence, and striking pleadings. *See* Julie Pendery, *Spoliation of Evidence in Texas- 2019 Update*, COWLES THOMPSON (Jan. 8, 2019), https://www.cowlesthompson.com/resources/practice/commercial-litigation/spoliation-of-evidence-in-texas-2019-update/. More recently, the Texas Supreme Court has clarified that a spoliation jury instruction, which is often equated to a "death penalty" sanction, requires the spoliating party to have "*intentionally*" spoliated evidence. *See Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 23 (Tex. 2014).