

THE FIRST STEP IN NONSUBSCRIBER EMPLOYEE INJURY SUITS IS
DEFINING THE SCOPE OF THE EMPLOYERS' DUTY – IT AFFECTS
EVERYTHING.

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I. INTRODUCTION

The State of Texas allows Texas employers to opt out of the worker's compensation system. As an encouragement to be in the system, the Texas Legislature has limited nonsubscribers' defenses in employee injury suits.¹ Most importantly, nonsubscribers cannot raise the defense of contributory negligence.² Due to this limitation, plaintiff attorneys have historically believed that nonsubscriber claims were relatively easy to prove.

However, the Texas Supreme Court has held to the contrary: both historically and recently. Employers are not the insurer of their employees.³ In an action against a nonsubscriber, the plaintiff must prove every element of his or her negligence claim.⁴ The elements of a negligence cause of

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¹See TEX. LABOR CODE ANN. § 406.033(a) (Vernon 2006) ("In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that: (1) the employee was guilty of contributory negligence; (2) the employee assumed the risk of injury or death; or (3) the injury or death was caused by the negligence of a fellow employee.").

²*Id.* at § 406.033(a)(3); see *Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000) (employers are not entitled to submit negligence of employee).

³See *Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006).

⁴See TEX. LAB. CODE 406.033(d) ("In an action described by Subsection (a) against an employer who does not have workers' compensation insurance coverage, the plaintiff must prove

action are: (1) the defendant owed a particular duty to the plaintiff; (2) the defendant breached that legal duty; and (3) the breach of that legal duty proximately caused the plaintiff's injury.⁵

In defending nonsubscriber litigation, employers normally attack the proximate cause element. Before a fact finder can determine proximate cause, it should evaluate whether the employer breached a duty owed to the employee. Many employers do not attack the duty element because of their general and non-delegable duty to provide a reasonably safe workplace to employee. This article attempts to frame the duty inquiry so that both parties to a nonsubscriber suit can better evaluate the dispute.

II. PROXIMATE CAUSE IS THE NORMAL POINT OF ATTACK

Employers typically defend nonsubscriber claims on the proximate cause element of negligence. Proximate cause consists of foreseeability and cause-in-fact.⁶ Foreseeability is a necessary element of the plaintiff's case that is often not present in many employee injury cases. Foreseeability means that the actor should have anticipated the dangers that its negligent act created for others.⁷ "When work is done regularly by other employees without assistance, one element of proximate cause, that is, foreseeability, is not present and therefore the failure on the part of the employer to furnish extra help is not a proximate cause of the injury."⁸ The evidence is insufficient to establish foreseeability where there is no evidence that the work required was dangerous or that the employer should have anticipated any injury to the employee from the character of the work assigned.⁹

negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent's or servant's employment."); see also *Kroger v. Elwood*, 197 S.W.3d at 793; *Werner v. Colwell*, 909 S.W.2d 866, 868 (Tex. 1995); *Patino v. Complete Tire, Inc.*, 158 S.W.3d 655, 660 (Tex. App.—Dallas 2005, pet. denied).

⁵ See *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998).

⁶ See *Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996).

⁷ See *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *Hall v. Stephenson*, 919 S.W.2d 454, 466 (Tex. App.—Fort Worth 1996, writ denied).

⁸ *Fields v. Burlison Packing Company*, 405 S.W.2d at 111 (citing 38 TEX.JUR.2d, p. 277, §98).

⁹ See *Collins v. Baptist Hospital of Southeast Texas*, No. 09-98-069-CV, 2000 Tex.App. LEXIS 641 (Tex. App.—Beaumont January 27, 2000, no pet.) (not design. for pub.) (not foreseeable that nurse would be injured in lifting patient); *J. Weingarten, Inc. v. Sanderfer*, 490 S.W.2d 941, 946 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (not foreseeable that grocery clerk would be injured by squatting and placing two drinking glasses under a counter); *Fields v. Burlison Packing*, 405 S.W.2d at 105 (not foreseeable that female employee would be injured in

For example, in *Great Atlantic & Pacific Tea Co. v. Evans*, the plaintiff alleged that the defendant grocery store was negligent for requiring him to carry 100-pound sacks of potatoes without providing someone to assist him or without furnishing him mechanical means by which to haul the potatoes.¹⁰ The Texas Supreme Court held that the grocery store was not negligent as a matter of law and that the injury was not foreseeable:

Evans was a strong, robust young man. He was merely required to perform work that he had been doing for this same employer for several months before this occasion. He was doing the same character of work that other employees in other grocery stores constantly and generally did. . . . Evans cannot complain if A & P merely required him to do the usual and customary work required of persons in his line of employment, or, stated in another way, required by the character of the business in which he was employed. Finally, we think that the facts of this record fail, as a matter of law, to show that A & P ought to have foreseen that Evans would be injured by doing the character of work required of him in this instance.¹¹

Therefore, employers have rightfully defended employee injury claims on the basis that the employee's injury was not foreseeable where the employee was merely providing the character of work that the employee was hired to do.

Additionally, the Texas Supreme Court raised the importance of the cause-in-fact element of proximate cause in the context of employee injury claims. Most personal injury plaintiffs do not consider cause-in-fact as a difficult element to prove. For example, in a car accident, the plaintiff would not have been in the accident and would not have incurred any injury but for the alleged negligence of the defendant. Cause-in-fact is rather straightforward in this simplistic type of case. However, in the context of a work-related injury claim against a nonsubscriber, it is not so simple. Whether or not the employer had changed its conduct, the employee likely still had to complete the task that caused the injury. For example, notwithstanding additional assistance, an employee would still have had to move a heavy object. Would the employee have been injured if the employer had provided him with assistance, training, and/or warnings? That

moving 45 pounds of meat); *Great Atlantic & Pacific Tea Company v. Lang*, 291 S.W.2d 366 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e) (not foreseeable that grocery clerk would be injured moving 80 to 100 pound carton of toilet issue).

¹⁰ 142 Tex. 1, 175 S.W.2d 249, 250 (1943).

¹¹ *Evans*, 175 S.W.2d at 251 (cited with approval by Texas Supreme Court in *Werner*, 909 S.W.2d at 869).

is both the question and the burden that must be met by the injured employee.

A plaintiff has the burden to present competent evidence that his or her injury was the natural and probable result of the employer's negligence – not just that he or she was injured on-the-job.¹² An employee must have expert testimony linking the employer's conduct to the employee's injuries.¹³ In *Leitch v. Hornsby*, the Texas Supreme Court held that the employee always bears the burden to establish a causal connection between the employer's negligence and the employee's injury.¹⁴ The court went a step further, and held that, in lifting cases involving allegations of failure to provide proper equipment, the employee must satisfy this burden with *expert* testimony. The employee's doctor testified that the lifting accident caused the employee's back injury; however, he was non-committal concerning whether the use of a lifting belt would have actually prevented the injury.

The Texas Supreme Court held that there was no probative evidence that the employee's injury was proximately caused by the employer's failure to provide proper lifting equipment: “[even though] the foreseeability of a back injury in connection with regular lifting of heavy objects is judged by a reasonable person standard,” expert testimony connecting the injury to the alleged negligence is required because, “whether proper lifting equipment would have prevented the injury is not a question that can be answered by general experience.”¹⁵ The courts of

¹²See *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 822 (Tex. 2002) (reversing judgment for employee where no evidence showed that employer's negligence caused the employee's injuries, or otherwise stated, the employee did not produce any evidence that he would not have been injured even if safe practices were followed.); see also, *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995); *Texas Am. Bank v. Boggess*, 673 S.W.2d 398, 402 (Tex. App.--Fort Worth 1984, writ dism'd by agr.).

¹³See *Leitch*, 935 S.W.2d at 119 (Supreme Court reversed a judgment for a plaintiff in an employee lifting injury case where the employee produced no evidence of proximate cause holding that the question of whether proper lifting equipment would have prevented a back injury could not be answered by general experience, and it required expert testimony); *Lewis v. Randall's Food & Drug, L.P.*, Cause No. 14-03-00626-CV, 2004 WL 1834290 at *5 (Tex. App.--Houston [14th Dist.] August 17, 2004, reh'g denied September 16, 2004) (citing *Leitch* and holding that expert testimony required to show that “injury would have been prevented had someone been helping”); *Barraza v. Eureka Co.*, 25 S.W.3d 232-33 (Tex. App.--El Paso 2000, pet. denied) (expert evidence was necessary to support employee's claim that different machine would have avoided injury).

¹⁴See *Leitch*, 935 S.W.2d at 119.

¹⁵*Id.* at 119.

appeals have similarly required expert evidence linking the employer's negligent act with the employee's injury.¹⁶ Understandably, employers normally first look to proximate cause as the first line of defense in nonsubscriber cases and overlook the required duty element.

III. THE COURTS' DISCUSSION OF EMPLOYERS' DUTY TO EMPLOYEES CAUSED CONFUSION

Certainly, both elements of proximate cause are valid points of attack for nonsubscribers in defending against employee injury litigation. However, before a fact-finder ever gets to proximate cause, it must first decide that the defendant breached a specific duty owed by the employer to the employee. Duty can be a more difficult issue to argue due to the rather loose language that appellate courts use in their discussion of negligence. Courts typically begin the duty discussion by making some broad statements about an employer owing a nondelegable duty to provide a reasonably safe workplace. The courts then retreat from this broad duty language.

For example, in *Farley v. M.M. Cattle Co.*, the Texas Supreme Court dealt with a case where a cattle company provided a dangerous horse to an employee who was fifteen years-old and asked the employee to help herd cattle.¹⁷ Not surprisingly, the employee was injured while doing so. The Court started its negligence discussion by stating:

It is well established that an employer has certain nondelegable and

¹⁶ See, e.g., *Sanchez v. Marine Sports, Inc.*, No 14-03-00962-CV, 2005 Tex. App. LEXIS 10327 (Tex. App.--Houston [14th Dist.] December 13, 2005, no pet.) (affirmed directed verdict for employer where employee failed to show that the failure to instruct him, provide equipment, or supervise him was the cause in fact of his injuries – there was no evidence that any of those actions would have prevented his injury); *Sanders v. Home Depot U.S.A.*, No. 2-04-196-CV, 2005 Tex. App. LEXIS 3651 (Tex. App.--Fort Worth May 12, 2005, pet. denied) (affirmed summary judgment where employee had no expert evidence that if he had assistance in lifting a 90-pound treated post that he would not have been injured); *Patino v. Compete Tire, Inc.*, 158 S.W.3d 655, 661-22 (Tex. App.--Dallas 2005, pet. denied) (affirmed employer's no-evidence motion after holding: "evidence of a workplace injury is no evidence that, if [employer] had done something different, [employee] would not have been injured or would not have received the specific injuries he claimed."); *Azua v. Dr. Pepper Bottling Company of Texas*, No. 10-03-00371-CV, 2004 Tex. App. LEXIS 9554 (Tex. App.--Waco October 27, 2004, no pet.) (affirmed employer's no-evidence motion for summary judgment on employee's lifting injury claim because doctor's affidavit did not link the employer's negligence to the injury but only to the lifting).

¹⁷ 529 S.W.2d 751, 754 (Tex. 1975) overruled on other grounds, *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978).

continuous duties to his employees. Among these are the duty to warn employees as to the hazards of their employment and to supervise their activities, the duty to furnish a reasonably safe place in which to labor and the duty to furnish reasonably safe instrumentalities with which employees are to work.¹⁸

In light of this very broad language, why would any employer think of challenging the element of duty in any employee-injury suit? The Court went on in the next sentence to qualify this broad language:

Moreover, in measuring the employer's duty, the age and experience of the employee must be considered since it may be negligent to furnish a minor with, or fail to supervise the minor in the operation of, a certain instrumentality when to take the same action with a grown man or an experienced employee would not constitute negligence.¹⁹

After stating that employers had continuous duties to warn and supervise, the Court then stressed that employers do not necessarily have those duties if the employees are experienced. It is not surprising that employers have not typically challenged the duty element – employers owe a general duty. Determining the scope of the general duty to provide a reasonably safe workplace, however, is the key. Depending upon the case at issue, duty is ripe for disposition as a matter of law via summary judgment, directed verdict, or judgment notwithstanding the verdict. Simply stated, employers often do not owe the various duties that plaintiffs, and their experts, try to impose on them.

IV. PARTIES MUST FIRST DEFINE THE SCOPE OF THE EMPLOYERS' DUTY

In any nonsubscriber suit, both sides should carefully analyze the scope of the employers' duty. The threshold inquiry in a negligence case is duty, and the existence of a legal duty is a question of law for the court to decide.²⁰ An employer has a common law duty to use ordinary care in providing a safe workplace.²¹ This common law duty is the only duty that is applicable in nonsubscriber cases.

Often employees and their counsel cite to the Texas Labor Code and

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

²¹ See *Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006).

attempt to impose its duties upon employers in the context of employee injury suits. Section 411.103 provides that each employer shall:

- (1) provide and maintain employment and a place of employment that is reasonably safe and healthful for employees;
- (2) install, maintain, and use methods, processes, devices, and safeguards, including methods of sanitation and hygiene, that are reasonably necessary to protect the life, health, and safety of the employer's employees; and
- (3) take all other actions reasonably necessary to make the employment and place of employment safe.²²

However, Chapter 411 of the Labor Code limits a party's remedy for a violation of the chapter.²³ Section 411.004 provides that: "Except as specifically provided by Subchapter F, this chapter does not create an independent cause of action at law or in equity. This chapter provides the sole remedy for violation of this chapter."²⁴ Section 411.083 creates judicial relief for an employee whose employment is terminated or suspended in retaliation for reporting a violation to a telephone hotline.²⁵ Thus, the only statutory violation for which an employee may recover is the employee's retaliatory discharge for reporting the safety violation to a telephone hotline. Therefore, a plaintiff may not use Texas Labor Code section 411.103 to create duties in the context of a nonsubscriber suit.²⁶

The main legal issue to be determined is what is meant by the common law duty to provide a safe workplace. An employee may argue that the employer had a duty to: 1) train; 2) warn; 3) create safety policies and procedures; 4) monitor or supervise the employee; and 5) instruct the employee. However, depending upon the facts of the case, the employer may not owe any of these specific duties.

As an example, in *The Kroger Co. v. Elwood*, the Texas Supreme Court

²²TEX. LABOR CODE ANN. §411.103 (Vernon 2006).

²³See *Sanchez v. Marine Sports, Inc.*, No. 14-03-00962-CV, 2005 Tex. App. LEXIS 10327 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Foster v. Denton Indep. Sch. Dist.*, 73 S.W.3d 454, 462 (Tex. App.—Fort Worth 2002, no pet.).

²⁴TEX. LABOR CODE ANN. §411.104 (Vernon 2006).

²⁵See *Id.* at § 411.083.

²⁶See *Sanchez*, 2005 Tex. App. LEXIS 10327; *Foster*, 73 S.W.3d at 462.

recently held that the employer did not owe the employee any duty to train or warn regarding the hazards of loading groceries into vehicles.²⁷ The employee was a grocery clerk who was loading groceries into a customer's car when the customer closed the car door on the employee's hand.²⁸ The employee had his hand in the door because he had to keep one foot on the grocery cart to keep it from rolling down a hill.²⁹ The employee alleged that his employer had a duty to train him about loading on an incline, never warned him about the dangers of such work, and owed a duty to provide proper equipment—wheels that lock.³⁰ The Texas Supreme Court held that even though the employer owed a general duty to provide a safe workplace, it did not owe these specific duties:

In this case, there is no evidence that loading groceries on the sloped portion of Kroger's parking lot is an unusually dangerous job, nor is there evidence that other courtesy clerks sustained similar injuries while loading groceries on the sloped lot. Indeed, loading purchases into vehicles is a task performed regularly—without any special training or assistance—by customers throughout the grocery and retail industry. While there is evidence that grocery carts had rolled into vehicles due to the parking lot's slope and may have posed a foreseeable risk of damage to customers' vehicles, this is no evidence that the slope posed a foreseeable risk of injury to Kroger's employees. Elwood presented no evidence that his job required specialized training. Elwood testified that, prior to working at Kroger, he knew it was dangerous to place his hand in a vehicle's doorjamb. Moreover, there is no evidence that carts with wheel locks or additional personnel were necessary to safely load groceries.

Kroger had no duty to warn Elwood of a danger known to all and no obligation to provide training or equipment to dissuade an employee from using a vehicle doorjamb for leverage. Employers are not insurers of their employees.³¹

The Court essentially held that whether an employer owes a specific duty to an employee is dependent upon both the character of the work involved and the experience of the employee. Since the character of the work (loading groceries) was not dangerous or unusual, the employer had

²⁷ 197 S.W.3d at 793-94.

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *Id.*

no duty to train or warn the employee and had no duty to provide extra equipment where the work could have been done safely without the equipment.

A. An Employer Does Not Always Have A Duty To Train And Warn

An employer does not always have a duty to train and warn an employee. An employer has no duty to train an employee about a job function that is not specialized.³² An employer does not owe a duty to warn of hazards that are commonly known or already appreciated by the employee.³³ The duty to warn or caution an employee of a danger arises when: (a) the employment is of a dangerous character requiring skill and caution for its safe and proper discharge, and (b) the employer is aware of the danger and has reason to know the employee is unaware of the danger.³⁴

In *Allen v. A&T Transportation Co., Inc.*, a truck driver sued his employer when his truck went out of control and crashed.³⁵ The plaintiff alleged that his employer failed to train him and warn him about the proper operation of his truck when it was only partially loaded.³⁶ The trial court granted summary judgment. In affirming, the court of appeals held that there was no evidence that the accident was caused by an unexpected or dangerous condition and that the employer had no duty to warn the plaintiff of the truck's operation.³⁷ Further, due to the experience of the employee, the employer had no duty to warn:

Terry Allen contends that despite his prior experience, his employer had a nondelegable duty to warn him about the driving characteristics of liquid-filled tanker trucks when they are not fully loaded. He has directed us to no authority suggesting that when a company hires an individual who is experienced in a trade, they are then expected to train those people in that trade. Indeed, the cases cited above indicate the contrary.

....

This is not a situation where some unexpected or unusual danger existed about which the employer had knowledge and the employee did not. The

³² *See id.*

³³ *See id.* (citing *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d at 149).

³⁴ *See Allen v. A&T Transportation Co., Inc.*, 79 S.W.3d 65, 70 (Tex. App.--Texarkana 2002, pet. denied); *Lopez v. Ely*, 302 S.W.2d 957, 959 (Tex. Civ. App.--Austin 1957, no writ).

³⁵ 79 S.W.3d at 65.

³⁶ *See id.*

³⁷ *See id.*

summary judgment proof provides no evidence of facts that are necessary in order to support a conclusion that a duty existed in this case.³⁸

In *Sanders v. Home Depot U.S.A.*, the court of appeals affirmed a summary judgment where the plaintiff claimed that the employer failed to properly warn, train, or supervise him regarding the lifting of objects.³⁹ The court of appeals found that the employee's own knowledge and experience was very important:

[T]here is no evidence that appellees failed to do these things. Moreover, Sanders testified by affidavit that he had worked in the construction business and around construction materials for over twenty years, and he opined regarding the equipment or manpower appellees should have provided to enable him to lift the post safely. . . . Sanders' testimony is, if anything, evidence that he knew of the dangers associated with lifting a treated post and how to do it safely. Therefore, Sanders has not raised a fact issue concerning whether appellees' alleged failure to warn, supervise, or train him caused his injuries.⁴⁰

In *National Convenience Stores Inc. v. Matherne*, the court of appeals held that an employer had no duty to train its employee regarding safe driving habits where the employee was required to drive as a part of his job.⁴¹ The employee was an eighteen year old manager of a convenience store that was required to drive to the bank to make deposits.⁴² On one morning, the employee was involved in an automobile accident while driving to the bank and later died.⁴³ His estate sued the employer claiming that the employer was negligent in not providing the employee driving safety training, warnings about unsafe driving, or supervision of the employees' driving when it knew that the employee was unsafe.⁴⁴ The court of appeals held that the employer did not owe any of these specific

³⁸ *Id.*

³⁹ No. 2-04-196-CV, 2005 Tex. App. LEXIS 3651 (Tex. App.—Fort Worth May 12, 2005, pet. denied).

⁴⁰ *Id.* at *9.

⁴¹ *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d at 149 (cited as authority in *Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006)).

⁴² *See id.* at 147.

⁴³ *See id.*

⁴⁴ *See id.*

duties:

In this case, Ramon's job duties required him to drive a short distance to the bank in his own car. As a licensed and experienced driver, he was legally responsible, independent of his employment, for knowing and obeying traffic laws such as those regarding speed limits and observance of stop signs. Accordingly, we conclude that NCS had no duty to Ramon to adopt rules, or to provide warnings or training to impart the knowledge and induce the compliance required of every licensed driver.⁴⁵

The court of appeals therefore reversed the jury's verdict in favor of the plaintiff and rendered a take-nothing judgment for the employer. Employers do not always owe a duty to train or warn their employees.

B. An Employer Does Not Always Have A Duty To Adopt Safety Policies

An employee does not always have a duty to adopt safety policies. An employer has no duty to adopt safety rules where its business is neither complex nor hazardous, where the dangers incident to the work are obvious or are of common knowledge and fully understood by the employee.⁴⁶ In *Southerland v. Kroger Company*, the plaintiff sued his employer for a lifting injury while on-the-job at a food market.⁴⁷ As part of his work responsibilities, the plaintiff had to stoop over a cart, pick up a heavy box of detergent, and lift the detergent onto the counter. The plaintiff complained that his employer was negligent in failing to train him, failing to provide safety rules, and not providing a back safety belt.⁴⁸ The court of appeals affirmed a summary judgment for the defendant where it was undisputed that the defendant was performing his normal, everyday work and where similarly situated employees had performed the same character of work hundreds of times on other occasions without injury.⁴⁹ The court stated: "The law is clear that in cases like this, when it is uncontroverted that the lifting involved is not unusual and does not pose an increased threat of

⁴⁵ *Id.* at 149.

⁴⁶ See *Patino v. Complete Tire, Inc.*, 158 S.W.3d at 660; *Allen v. A&T Transportation Co., Inc.*, 79 S.W.3d 65, 70 (Tex. App.—Texarkana 2002, pet. denied); *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d at 149; *Sloan v. Leger Mill Co.*, 161 S.W.2d 333, 335-36 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.).

⁴⁷ 961 S.W.2d 471 (Tex. App.—Houston [1st Dist.] 1997, no writ).

⁴⁸ See *id.* at 472.

⁴⁹ See *id.*

injury, there is no negligence as a matter of law.”⁵⁰

In *Patino v. Complete Tire, Inc.*, the employee sued the employer for an injury he sustained while changing a tire.⁵¹ The employer filed a no-evidence summary judgment alleging that there was no evidence of any breach of any duty that the employer owed to the employee.⁵² The employee alleged that he was not properly trained and there were no safety policies, but failed to present any evidence regarding his experience or knowledge and the employer’s knowledge of the employee’s knowledge at the time of the incident.⁵³ Therefore, the court of appeals found that the employee failed to raise any evidence to support a claim regarding the employer’s duty to train or create safety policies.⁵⁴ Employers do not always owe a duty to create safety policies.

C. An Employer Does Not Always Have A Duty To Monitor Or Supervise

An employer does not always have a duty to monitor or supervise an employee. An employer has no duty to monitor and correct an experienced employee in the course of his or her assigned work.⁵⁵ An employer has no duty to instruct an experienced employee in the work in which the employee has been assigned.⁵⁶ Moreover, an employer has no duty to instruct an employee who is experienced in the work he or she is assigned.⁵⁷

In *National Convenience Stores Inc. v. Matherne*, the court of appeals held that an employer had no duty to monitor its employee’s driving habits where the employee was required to drive as a part of his job.⁵⁸ The court

⁵⁰ *Id.*

⁵¹ 158 S.W.3d at 658.

⁵² *See id.* at 659.

⁵³ *See id.* at 661.

⁵⁴ *See id.*

⁵⁵ *See Nat’l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d at 149, n.11.

⁵⁶ *See id.* at 149.

⁵⁷ *See W E. Grace Mgs. Co. v. Arp.*, 311 S.W.2d 278, 281 (Tex. Civ. App.-Dallas 1958, writ ref’d n.r.e.); *see also, Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349, 351 (Tex. 1998) (no duty to warn where matter was common knowledge to worker in products case); *Alashmawi v. IBP, Inc.*, 65 S.W.3d 162, 172 (Tex. App.-Amarillo 2001, pet. denied) (defendant had no duty to warn college trained chemist about danger of acid spills); *National Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.-Houston [14th Dist]. 1999, no pet.) (no duty to create safety rules, train, or warn employee who had drivers license about driving vehicle).

⁵⁸ *Nat’l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d at 149.

held that with regard to dangers that are ordinarily incident to driving a vehicle and require no special skills or knowledge, the employer has no duty to warn and no duty to monitor the employee's driving habits.⁵⁹ Stressing this point, the court stated: "we do not believe that [the employer] had a duty to [the employee] to monitor his driving record in order to protect him from his own unsafe driving habits by relieving him of his driving duties."⁶⁰ The court then concluded that evidence concerning the employer's monitoring of the employee's driving habits was irrelevant because it owed no such duty.⁶¹ Employers do not always have a duty to supervise their employees and confirm that they are doing their jobs safely.

D. An Employer Does Not Always Have A Duty To Provide Assistance

An employer does not always have a duty to provide assistance. It has no duty to provide equipment or assistance that is unnecessary to the job's safe performance.⁶² As an example, in *Fields v. Burlison Packing Co.*, the court of appeals affirmed a directed verdict for the employer after a jury awarded the employee damages for an injury to her back from lifting 45 pounds of raw meat.⁶³ The plaintiff alleged that the employer failed to provide her adequate assistance in manpower or lifting equipment. The court held that the employer had no duty to do so where the employee had a safe method to manually complete the task but choose to apply an unsafe method. The court stated:

The law does not require an employer to assign to each employee an assistant when the duties or work assignments of such employee may only occasionally require assistance and such assistance when needed is available on request or notice. The court in *Western Union Telegraph Co. v. Coker*, 204 S.W.2d 977 (Sup. Ct. 1947), said, "The employer is not liable when it has provided help and injury results from the act of the employee in voluntarily proceeding to do the work without assistance. The same is true when sufficient help is nearby and available and the employee does the

⁵⁹ *See id.*

⁶⁰ *Id.* at n. 11.

⁶¹ *See id.*

⁶² *See Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006) (citing *Allsup's Convenience Stores, Inc. v. Warren*, 934 S.W.2d 433,438 (Tex. App.--Amarillo 1996, writ denied)).

⁶³ 405 S.W.2d 105, 108 (Tex. Civ. App.--Fort Worth 1966, writ ref'd n.r.e.).

work alone without seeking or asking for assistance.’⁶⁴

The court held that there were at least two other safe alternatives that the employee could have picked: carrying smaller portions or sliding the tub of meat on the floor instead of lifting it.⁶⁵ Therefore, the employer had no duty to provide assistance.

The Texas Supreme Court addressed a similar claim in *Werner v. Colwell*, where an employee injured herself lifting meat with another employee and sued her employer for not providing adequate assistance.⁶⁶ The Court reversed a judgment for the employee stating:

The question here is . . . whether Eastex required Colwell and Lillie Hunter to load meat when they were an inadequate work force. Colwell in essence argues that one man was sufficient to load meat but that two women were not, without presenting any evidence regarding the physical ability of these women or of Karlo Werner. There is no evidence that two employees constituted an inadequate work force to do the required loading. . . . Because Colwell did not present any legally sufficient evidence regarding the adequacy of the work force on the date of her injury, the judgment of the court of appeals must be reversed.⁶⁷

Accordingly, an employer has a general duty to provide a safe workplace, but that does not mean that an employer has to provide several safe methods to complete a task or to provide the safest possible alternative. Where a task can be performed safely without assistance, assistance is not necessary, and the employer owes no further duty to the employee to provide additional manpower or equipment. There is no negligence when an employee is doing the same character of work that he or she has always done and that other employees are required to do.⁶⁸

⁶⁴ *Id.* at 108.

⁶⁵ *See id.* at 108-09.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995); *Great Atlantic & Pacific Tea Co., v. Evans*, 142 Tex. 1, 175 S.W.2d 249, 251 (1943); *Azubiike v. Fiesta Mart, Inc.*, 970 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

E. Employer's Duty Is Narrow Where Employee Alleges Premises Defect

An employer's duty concerning injuries caused by premises defects is narrow. To succeed in a premises liability suit, an invitee plaintiff must prove the following four elements: (1) actual or constructive knowledge of some condition on the premises by the owner/operator; (2) that the condition posed an unreasonable risk of harm; (3) that the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner/operator's failure to use such care proximately caused the plaintiff's injuries.⁶⁹ These elements are more stringent than a simple negligent activity theory, and most employees would prefer to frame their injuries in terms of negligence rather than premises defects. However, negligent activity and premises defect claims are separate theories that are inconsistent – the employee must choose one, the correct one, to pursue at trial.

It is important to determine whether the plaintiff's cause of action falls under a negligent activity or a premises defect theory.⁷⁰ As one court has stated,

It is true that a negligent activity is often more advantageous to the plaintiff than a premises liability theory because of additional elements that the plaintiff may be required to prove . . . Texas courts have found this distinction between negligence and premises liability cases: 'Cases involving potential liability for an on premises activity 'are properly charged as typical negligence cases,' while cases involving potential liability for an on-premises defect are properly charged as premises liability cases.'⁷¹

Under a negligent activity theory, the plaintiff must establish that he was injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity.⁷² In *Keetch v. Kroger Co.*, the Texas Supreme Court stated: "Recovery on a negligent activity theory

⁶⁹ See *Wal-Mart Stores, Inc. v. Gonzales*, 968 S.W.2d 934, 936 (Tex. 1998).

⁷⁰ See *Clayton W. Williams, Jr. Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997).

⁷¹ *Lucas v. Titus County Hosp. Dist.*, 964 S.W.2d 144, 153 (Tex. App.--Texarkana 1998, pet. denied per curiam).

⁷² See *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998); *Exxon Corp. v. Garza*, 981 S.W.2d 415, 420 (Tex. App.--San Antonio 1998, pet. denied).

requires that the person has been injured by or as a contemporaneous result of the activity itself, rather than by a condition created by the activity.”⁷³ However, if the employee’s injury was not caused contemporaneously with the employer’s activity, it is a premises defect.

The distinction between negligent activity and premises defect claims is neither novel nor recent.⁷⁴ The distinction has been well established in Texas since the turn of the century, and more recent cases are in accord.⁷⁵ The Texas Supreme Court has repeatedly recognized the distinction between a premises liability claim and a negligent activity claim.⁷⁶ “Because our Supreme Court has repeatedly ‘declined to eliminate all distinction between premises conditions and negligent activities,’ a court must determine whether [the employee’s] injuries resulted from a condition or an activity.”⁷⁷

For example, in *Laurel v. Herschap*, the plaintiff, an employee of an independent contractor, was injured when a latch on a crane broke, and a pipe fell on him.⁷⁸ The employer, a general contractor, ordered the independent contractor to stop the crane while the pipe was in the air.⁷⁹ The plaintiff sued the employer, but the trial court granted the defendant a summary judgment. The appellate court affirmed the summary judgment stating that this was a negligent activity case because the plaintiff’s injury was contemporaneous with the allegedly negligent act by the employer’s directing that work be stopped.⁸⁰ Analyzing the case solely as a negligent activity case, the appellate court held that the employer was not liable as it had no control that was connected with the failure of the latch which was not controlled by the employer.⁸¹

Further, if the plaintiff solely submits the incorrect theory to the jury, he or she has waived the valid claim. In *Williams v. Olivo*, the Texas Supreme Court held that where the facts of the case indicated that it was a premises

⁷³ 845 S.W.2d 262,264 (Tex. 1992).

⁷⁴ See *Sibai v. Wal-Mart Stores, Inc.*, 986 S.W.2d 702, 706 (Tex. App.--Dallas 1999, no pet.).

⁷⁵ See *id.* (citing case law history).

⁷⁶ See *id.* (citing numerous Supreme Court cases in addition to those cited above).

⁷⁷ *Garza*, 981 S.W.2d at 420.

⁷⁸ 5 S.W.3d 799, 800 (Tex. App.--San Antonio 1999, no pet.).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*; see also, *Wal-mart Stores, Inc. v. Garza*, 27 S.W.3d 64, 67 (Tex. App.–San Antonio, pet. denied) (similar holding in context of an injury to a customer/business invitee of the defendant).

defect case and was not a negligent activity case, that the trial court reversibly erred in submitting the case in the charge under a general negligence question.⁸² The court further stated, “Because premises defect cases and negligent activity cases are based on independent theories of recovery, a simple negligence question unaccompanied by the *Corbin* elements as instructions or definitions cannot support recovery in a premises defect case.”⁸³

Texas law applies the same general premises liability standard to cases involving an employee’s claims against a nonsubscriber employer as they do to any case involving an invitee plaintiff.⁸⁴ When an employee’s injury is caused by a premises defect, the scope of the duty and the breach is judged by the normal premises defect elements:

To prevail on her premises-liability claim, Jackson must prove that Fiesta failed to maintain a safe workplace The elements of a premises-liability action are well established: (1) actual or constructive knowledge by the owner of some condition on the premises; (2) that the condition posed an unreasonable risk of harm; (3) that the owner did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner’s failure to use such care proximately caused the plaintiff’s injuries. [citations omitted]. The employer’s standard of care for employees is therefore *the same* as the standard of care for

⁸² 952 S.W.2d 523, 529 (Tex. 1997).

⁸³ *Id.*

⁸⁴ See e.g., *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 240 (1955) (holding that “the nature of the duty of the landowner to use reasonable care to make his premises reasonably safe for the use of his invitees may, in all material respects be identical with the nature of the duty of the master to use reasonable care to provide his servant with a reasonably safe place to work”); *De Los Santos v. Healthmark Park Manor, L.P.*, Cause No. 06-05-0014-CV, 2005 WL 2315721 at *1 and n. 4 (Tex. App.–Texarkana September 23, 2005) (citing *Robinson* and holding in a nonsubscriber case that “although premises liability and employers liability are distinct fields of law,” “[e]mployees of an owner or occupier of premises are considered invitees of the employer”); *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 644 (Tex. App.–Houston [1st Dist.] August 31, 2005) (applying standard elements of premises liability claim to nonsubscriber case); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex. App.–Austin 1998, no pet) (same); *Villalobos v. Fiesta Mart, Inc.*, Cause No. 01-93-00969-CV, 1994 WL 543311 at * 1-2 (Tex. App.–Houston [1st Dist.] 1994) (not designated for publication) (same); *Moore v. J. Weingarten, Inc.*, 523 S.W.2d 445, 447-48 (Tex. Civ. App.–Beaumont 1975, writ ref’d n.r.e.) (same).

invitees generally.⁸⁵

A defendant's duty of reasonable care "is discharged if it either warned [plaintiff] of the condition or made the condition safe."⁸⁶ In other words, if an employee cannot support the elements of premises defect case where he or she is harmed by a premises defect, the employee cannot rely upon some more generalized duty to provide a safe workplace.

F. Conclusion On The Scope Of Employers' Duties

Although employers owe a general common law duty to provide a safe workplace, that does not mean that every employer has a duty to train, warn, instruct, supervise, create safety policies, or assist every employee for every work activity that they do. In fact, employers commonly have none of those specific duties. The inquiry depends upon both the character of work and the experience of the employee. If the character of work is not inherently dangerous or the employee is already experienced in the character of the work, the employer may not owe any of these specific duties. Accordingly, employers should evaluate the case-specific factors and should assert that they do not owe a duty. Potential avenues for asserting this defense are: special exceptions, traditional or no-evidence motion for summary judgment, motion in limine, motion to exclude an expert, motion for directed or instructed verdict, evidence objections, charge conference, motion for new trial, motion to disregard a jury finding, and a motion for judgment notwithstanding the verdict.

V. THE SCOPE OF THE DUTY IMPACTS THE ADMISSIBILITY OF EXPERT TESTIMONY

Plaintiffs in nonsubscriber cases commonly retain a safety expert to opine as to the duties the employer owed and whether the employer was negligent in not complying with that duty. However, in the context of nonsubscriber cases, often the employer does not owe the duties that form the basis for the plaintiff's experts' opinions. For example, a safety engineer or human factors expert may testify that an employer owed the following duties: to institute safety policies about general lifting, to train about general lifting, to supervise employees' lifting activities, and to

⁸⁵ *Jackson*, 979 S.W.2d at 71 (emphasis added).

⁸⁶ *Bill's Dollar Store, Inc. v. Bean*, 77 S.W.3d 367, 369 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

correct employees when they do not lift correctly. However, as shown above, an employer may not owe any of these duties where the lifting is not unusual in character or where the employee is experienced in lifting and understands the inherent dangers of lifting.

Where the employee's expert and the law are at odds regarding a duty owed, the employer should consider filing a motion to strike the expert and/or objecting to the expert's testimony on multiple bases. The admissibility of proffered expert testimony is appropriately a preliminary or "threshold" issue – courts are charged with a "gatekeeping" duty to exclude questionable expert testimony.⁸⁷ To survive this threshold inquiry, proffered expert testimony must come from a qualified witness and must be both relevant and reliable and must assist the trier-of-fact.⁸⁸ The burden of establishing admissibility is on the proponent of the proffered expert testimony – the employee.⁸⁹ Admissibility of expert testimony can often be challenged where the expert assumes duties for the employer that do not exist at law.

A. *Experts Are Not Allowed To Testify As To Duties*

An expert cannot testify as to what duties an employer owes to its employees. An expert may state an opinion on a mixed question of law and fact if the opinion is limited to the relevant issues and is based on proper legal concepts.⁹⁰ An issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.⁹¹ An expert, however, may not testify on pure questions of law.⁹² Thus, an expert is not allowed to testify directly to his understanding of the law, but may only apply legal terms to his understanding of the factual matters at issue.⁹³

⁸⁷ See *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997); see also TEX. R. EVID. 104.

⁸⁸ See *Gammill*, 972 S.W. 2d at 718-726; *E.I. du Pont de Nemours and Company, Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

⁸⁹ See *Gammill*, 972 S.W.2d at 718; *Robinson*, 923 S.W.2d at 557.

⁹⁰ See *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 619-20 (Tex. 1999).

⁹¹ See *Mega Child Care, Inc. v. Texas Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

⁹² See *id.*

⁹³ See *Welder v. Welder*, 794 S.W.2d 420, 433 (Tex. App.–Corpus Christi 1990, no writ).

Whether a duty exists is a question of law for a court to determine.⁹⁴ A plaintiff's expert cannot broaden an employer's duties where no duty exists at law,⁹⁵ and Texas courts hold that the common-law duties imposed by state law are not expanded by federal regulations.⁹⁶ For example, in *National Convenience Stores Inc. v. Matherne*, the court of appeals held that an employee's expert's opinion as to the employer's duty to create safety policies, train, and warn was no evidence:

Although an expert may testify to ultimate issues which are mixed questions of law and fact, such as whether particular conduct constitutes negligence, an expert is not competent to give an opinion or state a legal conclusion regarding a question of law because such a question is exclusively for the court to decide and is not an ultimate issue for the trier of fact. As noted above, a legal duty is a question of law. Thus expert testimony is insufficient to create a duty where none exists at law. Because Pearson's and Lehnherr's testimony is therefore insufficient to create a duty to provide driving rules, warnings, or training, we must determine whether such a duty exists at law.⁹⁷

Accordingly, a trial court should not allow an expert to testify as to what duties an employer does or does not owe.

B. Expert's Opinions Based On Duties That Do Not Exist Are Unreliable

Where an employee's expert opines about an employer's negligence based on assumed duties that do not exist at law, the expert's opinions are not reliable and are not admissible. Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Texas Rule of Evidence 702.⁹⁸ The reliability requirement focuses on the principles,

⁹⁴ See *Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006).

⁹⁵ See *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *J&C Drilling Co. v. Salaiz*, 866 S.W.2d 632, 639 (Tex. App.—San Antonio 1993, no writ).

⁹⁶ See, e.g., *Richard v. Cornerstone Constrs. Inc.*, 921 S.W.2d 465, 468 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

⁹⁷ *Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d at 149.

⁹⁸ See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d at 557.

research, and methodology underlying an expert's conclusions.⁹⁹ As it is impossible to set specific criteria for evaluating the reliability of expert testimony in non-scientific cases, it is within the trial court's discretion to determine how to assess reliability.¹⁰⁰ Moreover, reliability is an issue of admissibility for the trial court, not a weight-of-the-evidence issue for the fact finder.¹⁰¹

An expert's opinion is not reliable where it assumes legal concepts that are incorrect.¹⁰² In *Greenberg Traurig of N.Y. P.C. v. Moody*, a trial court introduced expert evidence regarding a defendant's failure to make certain disclosures that the expert assumed it had a duty to disclose.¹⁰³ On appeal, the court of appeals held that the expert's opinions were not reliable because they were based on a faulty premise of law:

Professor Long testified that based on the law firm's fiduciary duty to IFT's board of directors, Greenberg Traurig owed a duty to disclose J. Summers' fraudulent activities to the board. The Investors essentially assert that any breach of Greenberg Traurig's duty to disclose fraud to IFT's board resulted in their damages. However, Texas law provides otherwise. . . Thus, Professor Long's opinion about Greenberg Traurig's purported fiduciary duties to the Investors was contrary to both Texas and New York law and unreliable.¹⁰⁴

Moreover, Rule 705(c) provides that: "If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible."¹⁰⁵ An expert's opinion can rise no higher than the facts upon which it is based, and it cannot be based upon assumptions or unproven facts.¹⁰⁶ When an expert's

⁹⁹ See *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002).

¹⁰⁰ See *Weingarten Realty Invs. v. Harris County Appraisal Dist.*, 93 S.W.3d 280, 285 (Tex. App.—Houston [14th Dist.] 2002, no. pet.).

¹⁰¹ See *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999).

¹⁰² See, e.g., *Saldana v. Kmart Corp.*, 260 F.3d 228 (3rd Cir. 2001) (safety expert's testimony was no evidence where expert assumed a liability scheme that was incorrect).

¹⁰³ 161 S.W.3d 56, 96 (Tex. App. — Houston [14th Dist.] 2004, no. pet.).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 705(c).

¹⁰⁶ See *Sipes v. General Motors Corp.*, 946 S.W.2d 143 (Tex. App.—Texarkana 1997, no writ).

opinions are based upon assumed facts that vary materially from the actual, undisputed facts, the opinions are without probative value and cannot support a verdict or judgment.¹⁰⁷ Additionally, an expert's opinions cannot be based upon mere guess or speculation, and if so based, should be excluded.¹⁰⁸

Where a safety expert opines as to whether an employer was negligent and does so based upon alleged duties that do not exist in law, the expert's opinions are unreliable and should be stricken. Whether couched in terms of unreliable methods or facts, the expert's opinions are not based upon the law and are therefore inadmissible.

C. Expert's Testimony Regarding Incorrect Legal Duties Is Not Relevant And Its Prejudicial Value Outweighs Its Probative Value

An expert that assumes duties that do not exist, cannot offer relevant testimony. In the context of expert testimony, the question of relevancy "incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Evidence."¹⁰⁹ The expert's opinions that are premised on an erroneous view of the law, do not make any fact that is "of consequence to the determination more probable or less probable."¹¹⁰

An employee's expert that opines about an employer's negligence and standard of care may not assist the jury. An expert's testimony must "assist" the jury by providing information that the average juror would not know. Expert testimony is admissible to aid the jury in its decision, but it may not supplant the jury's decision.¹¹¹ "The question under Rule 702 is not whether the jurors know something about this area of expertise but whether the expert can expand their understanding of this area in any way that is relevant to the disputed issues in the trial."¹¹² When the jury is equally competent to form an opinion about the ultimate fact issues or the

¹⁰⁷ See *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Texas Industries, Inc. v. Vaughan*, 919 S.W.2d 798 (Tex. App.--Houston [14th Dist.] 1996, writ denied).

¹⁰⁸ See *Texas Industries, Inc. v. Vaughan*, 919 S.W.2d at 798; *Onwuteaka v. Gill*, 908 S.W.2d 276, 283 (Tex. App.--Houston [1st Dist.] 1995, no writ); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 447 (Tex. App.--Fort Worth 1997, no writ) ("[u]nless the expert provides supporting facts, his bare conclusion is not evidence.").

¹⁰⁹ *Gammill*, 972 S.W.2d at 720.

¹¹⁰ TEX. R. EVID. 401.

¹¹¹ See *Perkins v. State*, 902 S.W.2d 88, 93 (Tex. App.--El Paso 1995, pet. ref'd).

¹¹² *Glasscock v. Income Prop. Servs., Inc.*, 888 S.W.2d 176, 180 (Tex. App.--Houston [1st Dist.] 1994, writ dismissed by agr.).

expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony.¹¹³

In *K-Mart Corp. v. Honeycutt*, the Texas Supreme Court held that the trial court did not abuse its discretion by excluding the testimony of a plaintiff's "human factors and safety expert."¹¹⁴ The Court held that none of the expert's opinions would assist the jury to understand the evidence or to determine a fact issue involved in the case.¹¹⁵ In that case, Lisa Honeycutt was injured when several shopping carts were pushed into her back as she sat on the lower rail of a shopping cart corral that was missing the upper rail.¹¹⁶ Honeycutt's safety and human factors expert opined that: (1) the lack of a top railing created an unreasonable risk because it served as an invitation for people to sit on the lower railing; (2) Honeycutt's sitting on the lower railing was not unreasonable conduct; (3) the lack of a top railing caused Honeycutt's injuries; (4) the store employee did not receive proper training for pushing shopping carts; and (5) the store's employee did not keep a proper lookout while pushing the carts into the corral.¹¹⁷

The court held that the expert's opinions were not helpful to the jury because they involved matters that were within the jury's "collective common sense."¹¹⁸ The court reasoned that the expert was no more qualified to render those opinions than the jury and his testimony effectively invaded the province of the jury.¹¹⁹ As the issues involved matters within the "average juror's common knowledge," the Court held that the jury did not need any special interpretation of the facts to determine whether it was reasonable for Honeycutt to sit on the railing and whether the person who pushed the shopping carts into her was negligent.¹²⁰ The analysis of whether an expert's opinions assist a trier-of-fact is even more important where the expert's opinions regarding the duties owed by an

¹¹³ See *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000); see also *Lane v. Target Corp.*, No. C-05-306, 2006 U.S. Dist. LEXIS 23573 (S.D. Tex. April 3, 2006) (because jury did not need expert to evaluate dangerousness of a liquid on the floor, expert's opinion was not relevant: "Dr. Nelson would only serve as an advocate before the jury and would not bring 'the jury more than the lawyers can offer in argument.'").

¹¹⁴ 24 S.W.3d at 360.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 359.

¹¹⁸ *Id.* at 361.

¹¹⁹ See *id.*

¹²⁰ *Id.*

employer to employees are different from what the law provides.

Even if a court decides that an expert's testimony is reliable, relevant, and based upon accurate information, the court may still exclude his testimony under the provisions of Rule of Evidence 403.¹²¹ Texas Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."¹²² Accordingly, once a court finds that an expert's opinions are admissible, it has the additional burden to weigh the testimony against the danger of unfair prejudice, confusion of the issues, or possibility of misleading the jury.¹²³

The Texas Supreme Court held that a trial court has the *sua sponte* burden of determining whether the proffered expert's testimony's probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.¹²⁴ The Court stated:

Expert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert. "[T]o the jury an 'expert' is just an unbridled authority figure, and as such he or she is more believable." A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness. Consequently, a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert.¹²⁵

A trial court should seriously consider striking an expert under Rule 403

¹²¹ See *State v. Malone Serv. Co.*, 829 S.W.2d 763, 767 (Tex. 1992); *North Dallas Diagnostic Ctr. v. Dewberry*, 900 S.W.2d 90, 96 (Tex. App.--Dallas 1995, writ denied).

¹²² TEX. R. EVID. 403.

¹²³ See *Texas Workers' Com. Ins. Fund v. Lopez*, 21 S.W.3d 358, 363-64 (Tex. App.--San Antonio 2000, pet. denied).

¹²⁴ See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d at 557.

¹²⁵ *Id.* at 553. Importantly, the Court may have lowered the Rule 403 burden from "substantially outweighed" to just "outweighed." Compare *Id.* and TEX. R. EVID. 403; see also *Minnesota Mining and Manufacturing v. Atterbury*, 978 S.W.3d 183, 192 (Tex. App.--Texarkana 1998, pet. denied).

that assumes duties that do not exist. There is a real danger that the expert's opinions will be accepted because of the moniker of "expert" when his or her opinions are not based on the law or the correct facts. As shown above, there are many admissibility issues that arise when an employee's expert testifies about negligence or duty based upon "assumed" duties that are not supported in the law. Employers should be careful to present these issues to the trial court and to preserve error where need be.

VI. THE DUTY INQUIRY SHOULD IMPACT THE JURY CHARGE

Attorneys and trial courts are used to accustomed to utilizing the Texas Pattern Jury Charge for negligence cases. A typical jury question in a case alleging an employer's negligence may look similar to the following: "Did the negligence, if any, of the employer proximately cause the injury, if any, in question?"¹²⁶ The text of the charge would continue with the general definitions of negligence and proximate cause, which may include a sole cause instruction. The general definition of negligence in the charge would read as follows: "'Negligence' means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances."¹²⁷

Under the pattern jury charge there is no instruction or definition addressing what duties an employer does and does not owe to an employee. Problems arise as to whether the employer is entitled to instructions or definitions that instruct the jury as to the proper duties owed, and whether a trial court reversibly errs in submitting multiple negligence theories broadly when one or more of those theories do not apply.

A. Trial Courts May Have To Include Instructions Or Definitions On Duty

Where a trial court allows a plaintiff to submit evidence and argument concerning duties that do not apply as a matter of law, it should submit charge instructions or definitions that appropriately limit an employer's duties. The Texas Rules of Civil Procedure require a trial court to submit instructions that help frame the question: "The court shall submit such

¹²⁶TEX. PAT. JURY CHARGE 4.1.

¹²⁷TEX. PAT. JURY CHARGE 2.1.

instructions and definitions as shall be proper to enable the jury to render a verdict.”¹²⁸ Instructing a jury is an important aspect of charge practice. The Texas Supreme Court has stated: “It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law,”¹²⁹ and “[A] litigant today has the right to a fair trial before a jury properly instructed on the issues ‘authorized and supported by the law governing the case.’”¹³⁰ Thus, an employer has the right to have the jury properly instructed.

An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence.¹³¹ The trial court has considerable discretion in deciding what instructions are necessary and proper in submitting issues to the jury.¹³² When a trial court refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict.¹³³

A trial court can commit reversible error in failing to submit a proper instruction. For example, in *Hogue v. Blue Bell Creameries*, the plaintiff filed a lawsuit against her former employer alleging that she was fired in retaliation for filing a workers’ compensation claim.¹³⁴ Under workers’ compensation retaliation claims, the fact that the employee filed a worker’s compensation claim does not have to be the “sole” cause of the employee’s firing—it only has to “contribute” to the firing.¹³⁵ The plaintiff offered an instruction that would have cleared up any confusion about what causation was necessary, but the trial court denied the instruction.¹³⁶ The plaintiff lost and appealed. The court of appeals held that the trial court did err because the issue of causation was an important issue and the trial court should have

¹²⁸TEX. R. CIV. P. 277.

¹²⁹*Crown Life Ins. Co. v. Casteel*, 22 S.W.3d at 388.

¹³⁰*See Harris County v. Smith*, 96 S.W.3d at 234.

¹³¹*See Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *Greer v. Seales*, No. 09-05-001-CV, 2006 Tex. App. LEXIS 1524 (Tex. App.—Beaumont January 2, 2006, no pet. h.); *Hogue v. Blue Bell Creameries, L.P.*, 922 S.W.2d 566, 570-71 (Tex. App.—Texarkana 1996, writ denied); *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198, 207 (Tex. App.—Corpus Christi 1974, writ ref’d n.r.e.).

¹³²*See State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997); *Wichita Cty. v. Hart*, 917 S.W.2d 779, 783-84 (Tex. 1996).

¹³³*See Texas Workers’ Com. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000).

¹³⁴922 S.W.2d 566, 571 (Tex. App.—Texarkana 1996, writ denied).

¹³⁵*Id.*

¹³⁶*See id.*

charged the jury as to the plaintiff's correct burden of proof.¹³⁷

Where an employer's main defense is that it did not owe a duty to its employee, it is a highly contested case, and there is evidence that supports the employer's position, a trial court may reversibly err in failing to include appropriate limiting instructions on what duties an employer owes to its employee. The instruction, however, should be narrowly written. Instructions should only provide the minimal amount of information needed to guide a jury's decision making process.¹³⁸ The purpose of broad form charge submissions—simplifying the charge—would be undermined if a court were to submit complex instructions with each question.¹³⁹

Where a trial court allows multiple instructions or definitions on duty to a single broad form negligence question, a plaintiff may take the position that the instructions are impermissible comments on the weight of the evidence. Generally, an instruction should not constitute a comment on the weight of the evidence.¹⁴⁰ Texas Rule of Civil Procedure 277 states:

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.¹⁴¹

There are many types of comments on the weight of the evidence. The two most prevalent types of comments on the weight of the evidence that require reversal are 1) where the court submits an issue that suggests the trial court's opinion concerning the matter about which the jury is asked;¹⁴² and 2) where the court submits a question, instruction, or definition that assumes the truth of a material controverted fact, or exaggerated, minimized, or

¹³⁷ See *id.*; see also, *Watson v. Brazos Elec. Power Coop.*, 918 S.W.2d 639, 643-44 (Tex. App.-Waco 1996, no writ) (trial court erred in failing to submit spoliation instruction where supported by evidence).

¹³⁸ See *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 822 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.).

¹³⁹ See *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984).

¹⁴⁰ See *Acord v. General Motors Corp.*, 669 S.W.2d at 116.

¹⁴¹ TEX. R. CIV. P. 277.

¹⁴² See, e.g., *Southmark Management Corp. v. Vick*, 692 S.W.2d 157, 160 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.)

withdrew some pertinent evidence from the jury's consideration.¹⁴³

If a trial court submits five instructions on five allegations of specific duties, the plaintiff may argue that the trial court is tipping the jury off as to the trial court's opinion that the plaintiff's claims are not sufficiently supported. One prevalent type of comment on the evidence that requires reversal is where the court suggests its opinion about a matter given to the jury to decide. This normally occurs where a court adds unnecessary, surplus instructions to a jury question. For example, the Texas Supreme Court held that where several inferential theories address the same factual theory (e.g., icing on road was act of god and an emergency), the defendant is only entitled to a charge submission of one theory.¹⁴⁴ The stacking of inferential rebuttal theories on the same basic theory could amount to a comment on the weight of the evidence by the trial court.¹⁴⁵

In *Maddox v. Denks Chemical Corp.*, the court impermissibly instructed the jury that generally landowners are not liable for injuries to independent contractors.¹⁴⁶ The court of appeals held that even though the instruction was legally correct, it was an impermissible comment on weight of the evidence.¹⁴⁷ In reversing, the court stated, "we believe that such an instruction encouraged the jury to favor [the defendant's] evidence over [the plaintiff's], and thus it was reasonably calculated to cause and probably did cause the rendition of an improper verdict."¹⁴⁸ Accordingly, a trial court has a very narrow rope to walk in submitting instructions on duty. The

¹⁴³See, e.g., *Alvarez v. Missouri-Kansas-Texas R.R. Co.*, 683 S.W.2d 375, 377-78 (Tex. 1984); *Grenier v. Joe Camp, Inc.*, 900 S.W.2d 848, 850 (Tex. App.--Corpus Christi 1995, no writ); *Redwine v. AAA Life Ins. Co.*, 852 S.W.2d 10, 14 (Tex. App.--Dallas 1993, no writ); *Moody v. EMC Serv., Inc.*, 828 S.W.2d 237, 244 (Tex. App.--Houston [14th Dist.] 1992, writ denied); *Transamerica Ins. Co. Of Texas v. Green*, 797 S.W.2d 171, 175 (Tex. App.--Corpus Christi 1990, no writ); *First Nat'l Bank v. Jarnigan*, 794 S.W.2d at 61; *American Bankers Ins. Co. v. Caruth*, 786 S.W.2d 427, 434 (Tex. App.--Dallas 1990, no writ); *Lively Exploration Co. v. Valero Transmission Co.*, 751 S.W.2d 649, 653 (Tex. App.--San Antonio 1988, writ denied); see also *Hodges and Guy, The Jury Charge in Texas Civil Litigation*, 34 TEXAS PRACTICE §6, pg 34 (1988) ("In connection with the submission of a question, the error most frequently found to constitute comment on the weight of the evidence is the assumption of a controverted fact--that is, commenting by implicitly advising the jury that a fact is established when it is actually in dispute.").

¹⁴⁴See *Dillard v. Texas Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005).

¹⁴⁵See *id.*

¹⁴⁶930 S.W.2d 668, 671-72 (Tex. App.--Houston [1st Dist.] 1996, no writ).

¹⁴⁷See *id.*

¹⁴⁸*Id.*; see also *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984); *Levermann v. Cartell*, 393 S.W.2d 931, 935 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.).

defendant is entitled to a charge that properly instructs the jury, but the plaintiff is entitled to a charge where the trial court does not comment on the weight of the evidence.

Furthermore, depending upon the wording of the instruction, the trial court could assume that a specific duty does not exist when there is a fact question. The second prevalent type of comment on the evidence that requires reversal is where a court assumes as true a material fact and fails to submit a question on it. In *Transamerica Insurance Company of Texas v. Green*, the court submitted an issue that assumed the plaintiff's wage rate estimate.¹⁴⁹ The appellate court reversed the verdict stating that the jury should have been allowed to decide the plaintiff's wage rate.¹⁵⁰

In *First National Bank of Amarillo v. Jarnigan*, the trial court improperly assumed that drafting multiple legal documents was a single transaction.¹⁵¹ This issue was controverted and should have gone to the jury.¹⁵² In *Texas Employers Insurance Association v. Percell*, the court mistakenly submitted several issues that assumed the plaintiff had injuries.¹⁵³ The trial court's assumption of a controverted fact required reversal.¹⁵⁴ In *Associates Investment Company v. Cobb*, a court erred in assuming that the buyer of a truck lost 440 working days after the conversion of his truck by the defendant.¹⁵⁵ There are other cases where the trial court assumed a controverted fact and caused a reversal of the judgment.¹⁵⁶ Accordingly, a trial court should be very careful regarding the wording of an instruction on duty. Where the underlying facts that would trigger a duty (i.e., whether the employee was experienced) are in dispute, the court should not submit an instruction that assumes the duty does or does not exist.

¹⁴⁹797 S.W.2d at 175.

¹⁵⁰*Id.*

¹⁵¹794 S.W.2d at 61-62.

¹⁵²*Id.*

¹⁵³594 S.W.2d 182, 183-84 (Tex. Civ. App.--Amarillo 1980, writ ref'd n.r.e.).

¹⁵⁴*Id.*

¹⁵⁵386 S.W.2d 578 (Tex. Civ. App.--Beaumont. 1964, no writ).

¹⁵⁶See *Mooney v. Aircraft v. Altman*, 772 S.W.2d 540, 541-43 (Tex. App.--Dallas 1989, writ denied); *Aetna Casualty & Surety Co. v. Martin Surgical Supply Co.*, 689 S.W.2d 263, 272 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Shihab v. Express-News Corporation*, 604 S.W.2d 204, 210-11 (Tex. Civ. App.--San Antonio 1980, writ ref'd n.r.e.); *Otto Vehle & Reserve Law Officers Ass'n v. Brenner*, 590 S.W.2d 147, 150 (Tex. Civ. App.--San Antonio 1979, no writ).

B. Broad Form Use May Not Be Feasible In Some Nonsubscriber Cases

A trial court may not be able to use a single broad form liability question where one of the plaintiff's liability theories is unavailing because it is premised upon a duty that does not exist. The Texas Rules of Civil Procedure state that the trial court "shall, *whenever feasible*, submit the cause upon broad-form questions."¹⁵⁷ The Texas Supreme Court defined "whenever feasible" to mean "in any or every instance in which it is capable of being accomplished."¹⁵⁸ However, the Court acknowledged that broad form is not appropriate and is reversible error when one broad form question submits multiple theories of liability and one or more of those theories are not permissible. In *Crown Life Insurance Company v. Casteel*, a single broad form liability question commingled valid and invalid liability theories, and the party complaining of such on appeal made a timely and specific objection.¹⁵⁹ The Texas Supreme Court concluded that the error was harmful because the erroneous submission affirmatively prevented the appellant from isolating the error and presenting its case on appeal:

When a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.¹⁶⁰

¹⁵⁷TEX. R. CIV. P. 277 (emph. added); *see also Texas Department of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("Unless extraordinary circumstances exist, a court must submit such broad-form questions.").

¹⁵⁸*Id.*

¹⁵⁹*See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

¹⁶⁰*Id.* at 388. The Court cited to its previous holding in *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W. 1015, 1016 (1923). In *Lancaster*, the trial court submitted a negligence issue with instructions regarding three distinct theories of negligence liability. *Id.* at 1015-16. After the jury returned a verdict for the plaintiff, the defendant established on appeal that one of the theories was improperly submitted. The court of appeals held, however, that the error was harmless because the verdict could have been based on one of the other properly submitted theories. The Supreme Court disagreed:

The jury may have found for [plaintiff] on each of the two issues properly submitted. On the other hand, as authorized by the pleading and the charge of the court, they may have found for [plaintiff] only on the issue that was improperly submitted. In order for courts to be able to administer the law in such cases with reasonable certainty and to lay down and maintain just and practical rules for determining the rights of parties, it is necessary that the issues made and submitted to juries, and upon which they are required to pass, be authorized and supported by the law governing the case.

Since *Casteel*, the Court has reaffirmed and broadened that holding. In *Harris County v. Smith*, the Court expanded the *Casteel* rule to broad form damage questions where there is no evidence to support one of the elements of damage submitted.¹⁶¹ In *Romero v. KPH Consolidated, Inc.*, the Court expanded the *Casteel* rule to include an apportionment question that was conditioned upon multiple liability questions where there was no evidence to support one of the liability theories.¹⁶²

In the context of employee-injury cases, if the jury answers a broad-form negligence issue in the affirmative, an employer does not know whether the jury has found that it breached an actual duty owed or one that the employer never actually owed to the employee. This is especially harmful where the plaintiff pleads theories of negligence that are based on faulty duty assumptions, submitted evidence concerning those faulty theories, and argues the faulty theories in closing argument.

In the example of an employee injury suit, a plaintiff claimed that he should have been warned about the dangers of lifting a thirty pound box. The plaintiff offered, and the trial court admitted, the plaintiff's expert testimony that the employer owed a duty to warn about the dangers of lifting. Further, the plaintiff's attorney argued that the jury should find the broad form negligence question in the affirmative based on the employer's failure to warn the employee about lifting. The jury finds in the affirmative. If the employer owed no duty to warn, how does a defendant or a court know that the jury based its affirmative answer on the duty to train, which was not owed, or some other duty that may have been owed, such as the duty to provide assistance? Under this situation, out of fairness it seems that the *Casteel* rule should apply, and the court of appeals should reverse and remand the case for a new trial.

In *Laredo Medical Group Corp. v. Mirales*, the court of appeals held that the trial court erred in submitting broadly one cause of action (Sabine Pilot) where there was no evidence to support three of the four factual theories under that cause of action.¹⁶³ An older Texas Supreme Court case supports the reasoning of *Laredo*.¹⁶⁴ It held that it was harmful error where

Id. at 1016.

¹⁶¹ 96 S.W.3d 230 (Tex. 2002).

¹⁶² 166 S.W.3d 212, 225-27 (Tex. 2005).

¹⁶³ 155 S.W.3d 417 (Tex. App.—San Antonio 2004, pet. denied); but see *Columbia Medical Center v. Bush*, 122 S.W.3d 835, 858 (Tex. App.—Fort Worth 2003, pet. denied) (court held that *Casteel* did not apply to different negligence factual theories that were submitted broadly.).

¹⁶⁴ See *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W. 1015, 1016 (1923).

multiple factual negligence theories were submitted in one broad form question, and one of the theories was incorrectly submitted.¹⁶⁵ Accordingly, an objection to the trial court's broad-form use may reverse a case when a plaintiff submits evidence and argument concerning a duty that the employer does not owe.

To cure this problem, a trial court may submit the plaintiff's various liability theories separately and distinctly. The Texas Supreme Court held that a trial court does not reversibly err in submitting issues separately and distinctly where the granulated questions contain the proper elements of the theory.¹⁶⁶ Accordingly, the trial court will not commit reversible error by submitting liability questions separately to ensure that an employer can discern on what theory the jury is finding it liable. However, it may be reversible error to submit one broad form question when the employee pled, submitted evidence, and argued theories that are not applicable to the facts giving rise to the cause of action.

VII. CONCLUSION

When employees and employers evaluate nonsubscriber claims, they should begin by analyzing whether the employer breached a specific duty actually owed to the employee. Depending upon the facts of the case, an employer's duty to an employee can be quite narrow. Where there is no evidence that the employer breached a specific duty owed, the employer should challenge the duty allegations by filing a dispositive motion such as a motion for summary judgment, a directed verdict motion, or a motion for judgment notwithstanding the verdict.

The narrowness of the duty can also affect the admissibility of expert evidence. An employer should object if an employee's expert begins to testify about what duties the employer owes to an employee or testifies about the standard of care of duties that are not owed. A trial court should

¹⁶⁵*Id.* (citing with approval by *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000)).

¹⁶⁶*See H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 260 (Tex. 1992); *see also Escoto v. Estate of Ambriz*, No. 13-02-00171-CV, 2006 Tex. App. LEXIS 4961, *39-40 (Tex. App.—Corpus Christi June 8, 2006, no pet.); *Rosell v. Central West Motor States, Inc.*, 89 S.W.3d 643, 653-55 (Tex. App.—Dallas 2002, pet. denied); *Isern v. Watson*, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, writ denied); *Miller v. Wal-Mart Stores, Inc.*, 918 S.W.2d 658, 663-64 (Tex. App.—Amarillo 1996, writ denied); *Sanchez v. Excelo Bldgs. Maintenance*, 780 S.W.2d 851, 853-54 (Tex. App.—San Antonio 1989, no writ); *but see Exxon Pipeline Co. v. Zwahr*, 35 S.W.3d 705, 713 (Tex. App.—Houston [1st Dist.] 2000), *rev'd on other grounds*, 88 S.W.3d 623 (Tex. 2002).

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not allow an expert to testify when he or she assumes duties apply that are not supported by the law.

Furthermore, the duty inquiry may affect how the case is submitted to the jury. Where a trial court submits a broad form negligence question, there can be several issues. If the employee pled theories of liability that depend on duties that do not exist, and there is evidence and argument in support of breaches of those non-existent duties, then the employer will not know if the jury answers in the affirmative to the question based on a breach of a duty owed or one that is not owed. To remedy this problem, a trial court should submit each of the employee's negligence theories separately and distinctly. Moreover, the court should properly instruct the jury in each of those questions about the appropriate duty owed and when it is not owed.

Nonsubscriber cases are much more complicated than most attorneys think. The complication is, at least in no small part, due to the breadth of the language used by courts in discussing duty. However, if the employer's duty may actually be quite narrow. Accordingly, an employer and an employee must have a good understanding of the law of duty to properly evaluate the case, to admit and object to the admission of evidence, and in crafting a charge that avoids the pitfalls that may create reversible error.