LIABILITY FOR THE ACTS OF OTHERS

Many, many thanks to Tom Riney, of Riney & Mayfield, LLP of Amarillo. Tom let me borrow his learned and thorough, and try as I might to improve or expound upon what he had written, with few exceptions I could not. Given the audience here, though, I felt obliged to change his title, which was "Picking the Deep Pocket."

I. Liability of a principal for an agent

An agent can bind a principal only if the agent has actual or apparent authority to do so. *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (orig. proceeding). An agent's authority to act on behalf of a principal depends on words or conduct by the principal either to the agent (actual authority) or to a third party (apparent authority). *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007).

To establish an agency relationship under Texas law, one must present evidence showing that the alleged principal intended for another to act for him, and the supposed agent intended to accept that authority and act upon it. *First State Bank, N.A. v. Morse*, 227 S.W.3d 820, 830 (Tex. App.—Amarillo 2007, no pet.). The party who asserts agency has the burden of proving it. *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (citing *Buchoz v. Klein*, 184 S.W.2d 271, 271 (Tex. 1944). A good-faith belief on the part of a third party that a person with whom it is dealing is the agent of another is not enough to bind the purported principal. *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 783 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A principal is not bound by an arbitration clause if the party seeking arbitration cannot prove that the person signing the agreement with the arbitration clause had sufficient authority to bind the principal to the agreement. *Paragon Indus. Applications, Inc. v. Stan Excavating, LLC*, 432 S.W.3d 542, 548-49 (Tex. App.—Texarkana 2014, no pet.).

An agent is generally personally liable for the agent's own fraudulent or tortious acts, even when acting within the course and scope of the agency. *See Hull v. South Coast Catamarans, L.P.*, 365 S.W.3d 35, 44-45 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). An exception applies in claims for tortious interference with contract. An agent is not liable for the tortious interference unless the plaintiff shows the agent acted willfully and intentionally to serve the agent's personal interest at the corporation's expense. Proof of mixed motives, *i.e.*, benefitting both the agent and the corporation, is insufficient. The plaintiff must show that the agent acted solely in the agent's own interest and so contrary to the principal's best interest that his or her actions could have only been motivated by personal interest. *See Alviar v. Lillard*, 854 F.3d 286, 289-90 (5th Cir. 2017; *Powell Industries, Inc. v. Allen*, 985 S.W.2d 455, 456-57 (Tex. 1998).

Jury instructions on authority are found at Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment PJC 101.4 (2016).

A. Vicarious liability in the employment context

1. Nondelegable duty

When a duty is imposed by law on the basis of concerns for public safety, the party owing that duty cannot escape that duty by delegating it to an independent contractor. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992). These duties are considered "nondelegable." *Edwards v. Hammerly Oaks, Inc.*, 908 S.W.2d 270, 273 (Tex. App.—Houston [1st Dist.] 1995), aff'd as modified, 958 S.W.2d 387 (Tex. 1997).

A nondelegable duty can be imposed by statute, regulation, or common law. *See, e.g., MBank El Paso, N.A.*, 836 S.W.2d at 152-53 (holding that secured creditor pursuing nonjudicial repossession under Tex. Bus. & Comm. Code Ann. § 9.503, predecessor to § 9.609, had nondelegable duty to avoid breach of peace); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 38 (Tex. App.—Fort Worth 2002, no pet.) (holding that Federal Motor Carrier Safety Regulations required certified interstate motor carrier to take complete responsibility for operation of leased equipment); *Rainbow Express, Inc. v. Unkenholz*, 780 S.W.2d 427, 432 (Tex. App.—Texarkana 1989, writ denied) (under vice-principal theory, lessee of trucks was liable for acts of lessor because former motor-vehicle statute imposed nondelegable duty on lessee to maintain and repair trucks). *Fort Worth Elevators Co.*, 70 S.W.2d at 401 (employer has a nondelegable duty to select careful and competent employees, to provide a safe workplace for its employees and to furnish reasonably safe machinery and tools for its employees).

A principal has a nondelegable duty to avoid harm to third parties due to negligence of an independent contractor who performs work that is "inherently dangerous." *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2006). "Inherently dangerous work" refers to work that will probably result in injury to a third person or the public. *Agricultural Warehouse, Inc. v. Uvalle*, 759 S.W.2d 691, 694-95 (Tex. App.—Dallas 1988), writ denied, 779 S.W.2d 68 (Tex. 1989). A principal who hires an independent contractor to perform work that is inherently dangerous is liable for the negligence of the independent contractor, no matter how skillfully the work is performed. *Id.* at 696. Inherently dangerous activities are generally those that are dangerous in their normal, non-defective state. *Central Ready Mix Concrete Co., Inc. v. Islas*, 228 S.W.3d 649, 652 (Tex. 2007); *see also Kolius v. Center Point Energy Houston Elec., LLC*, 422 S.W.3d 861, 867-70 (Tex. App.—Houston [14th Dist.] 2014, no pet.). It is unclear if the determination on whether an activity is inherently dangerous is a question of fact or question of law. *Id.* at 868. Texas courts have found very few activities so inherently dangerous as to impose a nondelegable duty. *Central Ready Mix Concrete Co., Inc. v. Islas*, 228 S.W.3d at 652.

An employer has a nondelegable and continuous duty to provide a safe

workplace. *See Kroger v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975). As the Texas Supreme Court has explained, the "standard of conduct required of the employer is ordinary care based on negligence principles." *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993). When a landowner is also an employer and the invitee is also its employee, this additional relationship may give rise to additional duties, such as a duty to provide necessary equipment, training, or supervision, some of which are nondelegable. *See Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 215 (Tex. 2015). As part of the general "duty to provide a safe workplace," courts have delineated numerous specific duties, including:

- the duty to furnish and maintain safe machinery and instrumentalities with which to work, *see Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 186 n.45 (Tex. 2004); *Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995); *Farley*, 529 S.W.2d at 754.
- the duty to warn employees of hazards associated with employment, *see Elwood*, 197 S.W.3d at 794; *Farley*, 529 S.W.2d at 754.
- the duty to provide safety equipment or assistance, *id.*
- the duty to make inspections to ensure equipment does not become unsafe or defective, *see Prunty v. Bland*, 545 S.W.2d 881, 884 (Tex. Civ. App.--Houston [1st Dist.] 1970, writ ref'd n.r.e.); *see also Forrest v. Vital Earth Res.*, 120 S.W.3d 480 (Tex. App.–Texarkana 2003, pet. denied).
- the duty to instruct employees in the safe use and handling of products and equipment, *Patino v. Complete Tire, Inc.*, 158 S.W.3d 655, 660 (Tex. App.--Dallas 2005, pet. denied); *Castillo v. Gared, Inc.*, 1 S.W.3d 781, 786 (Tex. App.–Houston [1st Dist.] 1999, pet. denied).
- the duty to adequately hire, train and supervise employees, *id.*

2. Respondeat superior

Employers are generally only liable for the acts of their employees that fall within the course and scope of their employment. *Moser v. Davis*, 79 S.W.3d 162, 167 (Tex. App.—Amarillo 2002, no pet.). To show course and scope of employment, three elements must be satisfied: (1) the act must be within the scope of the general authority of the servant, (2) the act must be in furtherance of the employer's business, and (3) the task must be for the accomplishment of the object for which the servant is employed. *Id*. If each of the three elements are established, then liability may be imposed even though the specific act was unauthorized or done contrary to express orders. *Id*. Thus, a legal secretary who completed the preparation of the wills and assisted in the execution of those wills without the knowledge of the attorney was not acting in the course and scope of her employment because she did not have the authority to practice law. *Id*. at 168.

In cases involving misrepresentation or misappropriation of funds, the requirement that the act must be in furtherance of the employer's business can be crucial. In *Millan v. Dean Witter Reynolds, Inc.*, 90 S.W.3d 760 (Tex. App.—San Antonio 2002, pet. denied), a financial broker was acting within the scope of his authority when he opened an account for his mother with Dean Witter and received deposits into that account. When he began stealing money from his mother's accounts, however, he was acting beyond the scope of that authority. While he was acting in the furtherance of his employer's business in opening the account and depositing money into it, he exceeded the scope of his authority with his subsequent dishonest acts. *Id*. at 768. Likewise, in *Newman*, 2011 WL 4916434, an agent's misconduct took place outside his authority and his wrongful acts were not in furtherance of the principal's business. Specifically, the insured agreed to purchase a $200,000 annuity but the agent obtained a policy for $125,000 and kept
$75,000 himself. Even though the principal received a $125,000 policy out of the transaction, the wrongful acts were not in furtherance of the principal's business because the principal was deprived of the money the agent wrongfully retained. There is a distinction between defrauding a customer to reap a benefit for the principal and defrauding a customer to reap a benefit for oneself. *Id*. at *7.

Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of an employee committed in the course of his employment even though the employer may be free from personal tortious conduct. *Newspapers, Inc v. Love*, 380 S.W.2d 582, 588-89 (Tex. 1964). Vicarious liability is based on the contractual relationship between the employee and the employer that gives the employer the right to control the details by which the employee performs his job. *Id*. The plaintiff must prove the tortfeasor was an employee in order to hold the employer vicariously liable under respondeat superior. *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998). A party seeking to hold a third party responsible under a respondeat superior theory has the burden of securing a jury finding on that theory if not conclusively proved by the evidence. *Patterson v. Brewer Leasing, Inc.*, 490 S.W.3d 205, 218 (Tex. App.—Houston [1st Dist.] 2016, no pet.). When a business hires an independent contractor and requires that contractor's employees to meet the requirements of a substance abuse program, the business is not responsible for negligence of a drug-testing administrator if there is no evidence that the business retained the right to control the work of that administrator or that it authorized the administrator to act on its behalf; these are the two essential elements of agency. *See Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 589-90 (Tex. 2017). Special rules of respondeat superior may apply in trucking cases under federal and state law. *See. e.g., Patterson*, 490 S.W.3d 205. The test to prove the existence of an employer-employee relationship is the existence of an employer's contractual

right to control the details of the manner and method by which the employee conducts the employer's business. *Love*, 380 S.W.2d at 588-89. In an employer-employee relationship, the employer normally will control when and where to begin work, the regularity of hours and the amount of time spent on particular aspects of work, the physical method or manner of accomplishing an end result, and the type of tools and appliances used to perform the work. *Dougherty v. Gifford*, 826 S.W.2d 668, 678 (Tex. App.—Texarkana 1992, no writ). The doctrine of respondeat superior does not apply unless the alleged employer has the right to control the details by which the required performance is achieved. *Carter Publications v. Davis*, 68 S.W.2d 640, 643 (Tex. Civ. App.—Waco 1934, writ ref'd); *see American Nat'l Ins. Co. v. Denke*, 95 S.W.2d 370, 373 (Tex. 1936).

An employer's alleged exercise of control over the details of the employee's performance is evidence of the contractual right of control if there is no express contract or the terms of the agreement are indefinite or unclear as to the right of control. *Love*, 380 S.W.2d at 590-92. But the actual exercise of control over the details of a purported employee's actions is not the ultimate inquiry and does not necessarily control the employer's liability, unless the control is exercised at the precise time the relevant negligent act or omission occurs. *Love*, 380 S.W.2d at 590. *See also Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 44 (Tex. App.—Fort Worth 2002, no pet.).

Proof that a purported employee was performing services peculiar to the business of the alleged employer establishes a prima facie showing that the relationship of master-servant existed in the absence of evidence establishing a different relationship. *Love*, 380 S.W.2d at 591-92.

There is frequently a dispute as to whether a person is an employee or an independent contractor. If the right of control does not extend beyond the result to be achieved and the ultimate performance of the contract, a master-servant relationship does not exist and the doctrine of respondeat superior does not apply. *St. Joseph Hosp.*, 94 S.W.3d at 542; *Harrison v. Humphries*, 567 S.W.2d 884, 887 (Tex. Civ. App.—Amarillo 1978, no writ). Similarly, if the contract provides for an independent contractor relationship and does not give the person the right to control the details of the work, the contract is proof of an independent contractor relationship. *Love*, 380 S.W.2d at 590. Factors that should be considered in determining whether a worker is an independent contractor are: (1) the independent nature of the business; (2) the obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the right to control the progress of the work, except as to the final results; (4) the time for which the person is employed; and (5) the method of payment, whether by time or by the job. *Texas A&M Univ. v. Bishop*, 156 S.W.3d 580, 584 (Tex. 2005).

A person who entrusts work to an independent contractor, but retains control of any part of the work, is subject to liability for physical harm to others to whom he owes a duty to exercise

reasonable care if the harm is caused by the failure to exercise that control with reasonable care. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001); *Morris*, 78 S.W.3d at 44. Written agreements with the independent contractor can be important. Even though an independent contractor was required to follow results-oriented procedures, meet deadlines and periodically report on the progress of the work, the employer was not responsible because the independent contractor had discretion as to the operative details of the work. *White v. DR & PA Deliverance, Ltd.*, No. 01-12-00227-CV, 2014 WL 767218, at *4-6 (Tex. App.—Houston [1st Dist.] Feb. 25, 2014, no pet.) (mem. op.).

The employee does not need authority to do the particular act. The employer may be liable even if the act was contrary to the express directions of the employer. *J. C. Penney Co., Inc. v. Oberpriller*, 170 S.W.2d 607, 610 (Tex. 1943). Furthermore, an employer will not be relieved from liability simply because the employee is intoxicated at the time of the occurrence. *G. & H. Equip. Co., Inc. v. Alexander*, 533 S.W.2d 872, 876-77 (Tex. Civ. App.—Fort Worth 1976, no writ).

Ordinarily, an intentional tort, such as false imprisonment or assault, is not within an employee's course and scope of employment. If such torts are committed in the accomplishment of a duty entrusted to the employee and not because of personal animosity, the employer may be liable, even if contrary to express policies. *Cowboys Concert Hall–Arlington, Inc. v. Jones*, No. 02-12-00518-CV, 2014 WL 1713472, at *9-10 (Tex. App.—Fort Worth ay 1, 2014, pet. denied) (mem. op.). An employer may be responsible for an assault if the employer places the employee in a position that involves the use of force. Thus, while an employer may be liable for the conduct of a bouncer in a bar (*Cowboys Concert Hall–Arlington, Inc. v. Jones*), an auto dealership was not liable under respondeat superior for an alleged assault by a car salesman while giving a customer a ride to her home. *Ogunbanjo v. Don McGill of West Houston, Ltd.*, No. 01-13-00406-CV, 2014 WL 298037, at *3-4 (Tex. App.—Houston [1st Dist.] Jan. 28, 2014, no pet.) (mem. op.).

The thread of vicarious liability running from the employee to the employer is severed if the employee deviates from the course and scope of employment, even if the deviation is only for a short period of time. An employee ceases to act for an employer whenever the employee stops pursuing the employer's work to engage in personal activities, and the responsibility for the employee's acts is then on the employee alone. *Galveston, H. & S. A. Ry. Co. v. Currie*, 96 S.W. 1073, 1074-75 (Tex. 1906). But an employee has not deviated from his employment simply because the employee's conduct serves his own purposes or that of a third party, as well as the employer's. The employer is liable if the act is within the service of the employer in any respect. *Best Steel Bldgs., Inc. v. Hardin*, 553 S.W.2d 122, 128 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

An employer's objection to an employee's deviation from his

employment is not material so long as the deviation involves only the pursuit of some concern other than the employer's business. *See Mitchell v. Ellis*, 374 S.W.2d 333, 336 (Tex. Civ. App.—Fort Worth 1963, writ ref'd). However, it is assumed an employee is acting for the employer if the employer permits the employee to attend to personal affairs while also attending to the employer's business. The employer may escape liability only on a clear showing that the employee could not have been serving the employer directly or indirectly at the time the negligent conduct occurred. *Smith v. Conner*, 211 S.W.2d 630, 632 (Tex. Civ. App.—Galveston 1948, no writ). Once the presumption that the employee is acting in the course and scope of employment is rebutted by the introduction of positive contrary evidence, the mere facts of ownership of a vehicle and employment are insufficient to give rise to an inference that the employee was acting within the scope and course of employment. The burden shifts to the plaintiff to introduce independent evidence on this issue. *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 358 (Tex. 1971).

An employee is not engaged in the employer's business while returning to the "path of duty." The return is incident to the departure, and the employee is no more engaged in the employer's business while returning to it than the employee was while departing from it. *Southwest Dairy Prods. Co. v. De Frates*, 125 S.W.2d 282, 283-84 (Tex. 1939). The test is whether the employee was engaged in the employer's business at the time of the incident, not whether the employee was on the way to resuming it. *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202, 212 (Tex. App.— Amarillo 1996, no writ).

Generally, an employee is not within the course and scope of employment while traveling to and from work. But this might not be true if the employer has the right to control the employee in the performance of the activity at the instant of the negligent conduct or omission. *See Parmlee v. Texas & New Orleans R.R. Co.*, 381 S.W.2d 90, 93-94 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); *Upton v. Gensco, Inc.*, 962 S.W.2d 620, 621-22 (Tex. App.—Fort Worth 1997, pet. denied). Under the "special mission" exception to the general rule, an employer may be liable for the negligence of an employee who has undertaken a mission for the employer on the way to or from work. An employee is on such a mission when he is not simply traveling from his home to the normal place of employment, or returning from the normal place of employment to home for his own purposes, but rather is traveling from home or returning to it on a special errand, either as part of the employee's regular duties or at the specific order or request of the employer. To be on a special mission, the employee must either be under the control of or acting in furtherance of the employer's business. *Direkly v. ARA Devcon, Inc.*, 866 S.W.2d 652, 654-55 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.); *Soto v. Seven Seventeen HBE Corp.*, 52 S.W.3d 201, 206-07 (Tex. App.—Houston [14th Dist.] 2000, no pet.). For example, an employee who was

driving to an out-of-town seminar that he was required to attend for the benefit of the employer was within the course and scope of employment because he was under the direction and control of the employer and was on a "special mission" for the employer at the time of the accident. *Chevron, U.S.A., Inc. v. Lee*, 847 S.W.2d 354, 356 (Tex. App.—El Paso 1993, no writ).

If an employee neglects to perform a duty that is required by the employer when pursuing his own affairs, such as safeguarding a dangerous instrument or agency, the deviation does not relieve the employer of liability, but rather forms the basis of that liability. *See Smith v. Koenning*, 398 S.W.2d 411, 416-17 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

We may soon have some guidance from the Texas Supreme Court on the "special mission" doctrine. The court heard oral arguments on December 6, 2017 in *Painter v. Amerimex Drilling I, Ltd.*, 511 S.W.3d 700 (Tex. App.—El Paso 2015, pet. granted). Amerimex was sued by an injured employee and the representatives of two other employees who were killed in an automobile accident while riding in a vehicle driven by a "driller" after working a shift on a drilling rig and while in transit to a bunkhouse provided by Amerimex located thirty to forty miles from the drilling rig. Amerimex obtained a summary judgment on the ground that lack of evidence of its control over the driller at the time of the accident defeated vicarious liability.

The El Paso Court first noted the "coming and going rule," which precludes vicarious liability for an employee traveling to and from work as the employee is generally considered not to be in the course and scope of employment. The court further noted that Texas had carved out an exception to the coming and going rule for travel to and from drilling rigs in remote locations in workers' compensation cases. While the plaintiffs argued for a "remote drilling site" exception to the coming and going rule, the El Paso Court thought the facts more closely described a "special mission," which is a specific errand that an employee performs for his employer, either as part of his duties or at his employer's request. The plaintiffs contended that the driller's mission was to transport his crew to and from the company-provided houses in aid of getting his full crew to the drilling site each day. The employer encouraged the carpool by participating in paying a bonus to the driller for transporting the crew. Special mission cases, however, require the employer to control either the particular means of transportation or the route. Because there was no evidence of control, the summary judgment was affirmed. A decision by the Supreme Court may clarify whether control is a necessary element in a situation where there is evidence that the employee was acting in the furtherance of the employer's business at the time of the applicable act.

Jury questions and instructions on employees, scope of employment, and independent contractor are found at

Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts PJC 10.1-10.10 (2016).

B. General agency.

1. Actual authority

Under the doctrine of actual authority, a principal may be held vicariously liable for the contracts and torts of its agent acting within the scope of the agent's authority. *See Great Am. Life Ins. Co. v. Lonze*, 803 S.W.2d 750, 754 (Tex. App.—Dallas 1990, writ denied). A parent corporation may be an agent of its subsidiary and the subsidiary may, therefore, be liable for punitive damages because of the malice of the parent. *HMC Hotel Properties II Ltd. P'ship v. Keystone-Texas Property Holding Corp.*, No. 04-10-00620-CV, 2011 WL 5869608, at *20 (Tex. App.—San Antonio Nov. 23, 2011), *rev'd on other grounds*, 439 S.W.3d 910 (Tex. 2014). Actual authority is authority the parincipal intentionally confers on the agent, or intentionally or negligently allows the agent to believe the agent possesses. *Expro Americas, LLC v. Sanguine Gas Exploration, LLC*, 351 S.W.3d 915, 921 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Actual authority may be express or implied. Express authority is authority delegated to an agent by words that directly authorize the agent to do an act or series of acts. *Hall Dadeland Towers Assocs. v. Hardman*, 736 F. Supp. 1422, 1429 (N.D. Tex. 1990).

Actual authority may be expressly conveyed to an agent either orally or in writing. *Builders Transp., Inc. v. Grice-Smith*, 167 S.W.3d 1, 12 (Tex. App.—Waco 2005), *judgm't withdrawn and superceded on reh'g*, 167 S.W.3d 18 (Tex. App.—Waco 2005, pet. denied). Any powers conferred on an agent by written instrument must be strictly construed. The authority granted by a written instrument may not be extended beyond the express terms of the instrument or what is necessary to carry out the authority expressly granted in the instrument. *Gittings, Neiman-Marcus, Inc. v. Estes*, 440 S.W.2d 90, 93 (Tex. Civ. App.—Eastland 1969, no writ). For example, in *Verizon Corporate Servs. Corp. v. Kan-Pak Sys.*, Inc., 290 S.W.3d 899 (Tex. App.—Amarillo 2009, no pet.), the court concluded that a waste consultant did not have actual authority to contract for waste compacting services on behalf of the owner because the consulting agreement expressly stated that the consultant was not authorized to enter into any agreement or contract for services on behalf of the owner. *Id.* at 904-05.

Actual authority may be implied from the parties' conduct or from the facts and circumstances surrounding the transaction in question. *Expro Americas, LLC*, 351 S.W.3d at 921. But the assertion of an agency relationship by an alleged agent, without more, does not prove the existence of a principal- agent relationship or establish the scope of the purported agent's authority. *Id*. An agency relationship may be implied by the conduct of the parties under the circumstances, particularly when the agent acts as a go-between for the principal and a third party. *Grace Cmty. Church v. Gonzales*, 853 S.W.2d 678, 680

(Tex. App.—Houston [14th Dist.] 1993, no writ); *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1297 (5th Cir. 1994).

To prove actual authority, there must be evidence that either "(1) the principal intentionally conferred authority on another to act as its agent, or (2) the principal intentionally, or by a want of due care, allowed the agent to believe that he possessed authority to act as the principal's agent." *Reliant Energy Servs., Inc.*, 336 S.W.3d at 783 (citing *2616 S. Loop L.L.C. v. Health Source Home Care, Inc.*, 201 S.W.3d 349, 356 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Thus, to determine whether a party has actual authority, "the words and conduct by the principal to the alleged agent regarding the alleged agent's authority to act for the principal" is examined. *Id*. (citing *Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 550 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

The scope of an agent's authority is often a key issue. A principal is responsible only for the contracts and torts of the agent if the agent was acting within the scope of the agent's authority. *National Western Life Ins. Co. v. Newman*, No. 02-10-00133-CV, 2011 WL 4916434, at *6 (Tex. App.—Fort Worth Oct. 13, 2011, pet. denied); *Great Am. Life Ins. Co.*, 803 S.W.2d at 754.

An agent who does not have express authority may bind the principal because of implied powers. Implied powers are those powers incidental to the powers expressly given and necessary to accomplish the purpose(s) of the express powers. *Cherokee Water Co. v. Forderhause*, 727 S.W.2d 605, 613 n.6 (Tex. App.—Texarkana 1987), *rev'd on other grounds*, 741 S.W.2d 377 (Tex. 1987). Implied powers include only those contracts and acts that are incidental to the management of the particular business with which the agent has been entrusted because an agent's authority is presumed to coexist with the business the principal has entrusted to the agent's care. *In re ADM Investor Servs., Inc.*, 304 S.W.3d at 374. An agent who does not have express authority cannot have implied authority because implied authority is the authority necessary to accomplish the purpose(s) of the express powers the principal expressly delegated to the agent. *Expro Americas*, LLC, 351 S.W.3d at 921. But, where a principal gave actual authority to an agent to retain a company to replace a pump, he gave him the implied authority to allow the company to complete the work beyond the two days originally estimated and at a higher cost than discussed and anticipated. *Continental Exploration, LLC v. Banner Well Serv. LLC*, No. 07-12-00216-CV, 2014 WL 237512, at *3 (Tex. App.—Amarillo Feb. 27, 2014,reh'g overruled).

Implied authority is actual authority circumstantially proved. *City of San Antonio v. Aguilar*, 670 S.W.2d 681, 683-84 (Tex. App.—San Antonio 1984, writ dism'd). Where a bank promoted an employee to executive vice president and was shown to be the chief executive officer of the bank, he had implied authority to withdraw bank funds from another bank, even though such authority may not have been expressly conferred. *Insurance Co. of N. Am. v. Fredonia State*

Bank, 469 S.W.2d 248 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). Also, a sales agent had implied authority to make reasonable warranties at the time of sale concerning the quality and performance of the products he sold. *Houston Packing Co. v. Spivey*, 333 S.W.2d 423, 427 (Tex. Civ. App.—Eastland 1960, no writ). But the authority to take purchase orders subject to a principal's approval did not give an agent implied authority to accept returns of used goods. *Wichita Frozen Food Lockers, Inc. v. Nat'l Cash Register Co.*, 176 S.W.2d 161, 161 (Tex. 1943).

2. Apparent authority

Apparent or implied authority is based on estoppel. *Gaines*, 235 S.W.3d at 182. It arises from either (1) a principal knowingly permitting an agent to hold himself out as having authority, or (2) by a principal's actions which lack such ordinary care as to clothe an agent with the "indicia of authority," leading a reasonably prudent person to believe the agent has the authority he purports to exercise. *Id*. A prerequisite to a finding of apparent authority is evidence of conduct by the principal, relied upon by the party asserting it, which would lead a reasonably prudent person to believe an agent had authority to act. *Ames v. Great S. Bank*, 672 S.W.2d 447, 450 (Tex. 1984). A principal's full knowledge of all material facts is essential to establish a claim of apparent authority. *Gaines*, 235 S.W.3d at 182.

Only the conduct of the principal is relevant to establish a claim of apparent authority. *Id*. Neither representations by the purported agent nor the mere speculations of a third party are evidence of apparent authority. *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 916 (Tex. App.—Dallas 2008, no pet.). Indeed, without acts of the principal, acts of a purported agent which may mislead persons into false inferences of authority, however reasonable, cannot serve as a predicate for apparent authority. *CNOOC Se. Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889, 899 (Tex. App.—Dallas 2007, pet. denied).

A party dealing with an agent must ascertain the fact and the scope of the agent's authority. If he deals with an agent without having made such a determination, he does so at his own risk. *Argyle ISD ex. rel. Bd. of Trustees*, 234 S.W.3d 229, 240 (Tex. App.—Fort Worth 2007, no pet.).

Anchor Crane & Hoist Serv. Co. v. Sumrall Pers. Serv., Inc., 620 S.W.2d 653 (Tex. Civ. App.—Dallas 1981, no writ), illustrates the application of apparent authority. A personnel agency seeking to place an engineer with a company contacted the president of the company who explained that his manager conducted all employment interviews and referred the personnel representative to the manager. After several contacts with the manager, including a discussion regarding the payment of a placement fee to the personnel agency, the agency referred the engineer to the company and the company subsequently hired the engineer. In a suit to collect the placement fee, the court ruled that, by his statements and his referral of the call to his manager, the company president clothed the manager with apparent

authority to hire the engineer and to negotiate a placement fee. *Id*. at 654.

The doctrine of apparent authority does not apply to the acts of a public officer. The powers and duties of public officers are defined and limited by law. Authority of a public officer to act must be expressly authorized by law or implied from the law. *In re J.P.*, 296 S.W.3d 830, 836 (Tex. App.—Fort Worth 2009, no pet.).

3. Estoppel by silence

A principal may also be responsible for the acts of another person under the doctrine of estoppel by silence. Estoppel by silence is closely related to apparent authority, as both are based upon concepts of estoppel. The elements of estoppel are:

(1) a false representation or concealment of material facts;
(2) made with knowledge, actual or constructive, of the facts;
(3) the party to whom the representations are made must have been without knowledge or the means of knowledge of the real facts;
(4) made with the intention that it should be acted on; and
(5) the party to whom it was made must have relied or acted on it to his prejudice.

Traylor v. Gray, 547 S.W.2d 644, 652 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). Estoppel can arise by silence when there is a duty to speak. *Id*. When estoppel is based on silence or inaction, the fourth element is met by showing turpitude or negligence connected with silence or inaction on the part of the party to be estopped. Thus, where a cotton buyer learned that a ginner misrepresented to a cotton grower that a contract had been accepted by the buyer and the buyer knew that the growers were relying upon the misrepresentation but remained silent, the growers were entitled to recover damages based on estoppel by silence, even though the ginner had no actual or apparent authority with respect to the alleged contract. *Id*.

4. Ratification

Ratification is a principal's subsequent affirmation of a prior unauthorized act that was not legally binding on the principal but performed for the principal's benefit. Ratification imposes vicarious liability on the principal for the acts of its agent which are outside the scope of the agent's authority, or for the acts of a nonagent, if the principal adopts or confirms those acts. *Facciolla v. Linbeck Constr. Corp.*, 968 S.W.2d 435, 440 (Tex. App.—Texarkana 1998, no pet.). Once ratified, a formerly unauthorized act is treated as if it had originally been authorized. *See Verizon Corporate Servs. Corp*,. 290 S.W.3d at 906.

Ratification occurs, for example, when a principal, with no knowledge of the transaction at the time it occurred, retains the benefits of an agent's unauthorized transaction after acquiring full knowledge of the transaction. *Willis v. Donnelly*, 199 S.W.3d 262, 273 (Tex. 2006). Ratification requires the principal to have full knowledge of all material facts pertaining to the transaction prior to any

affirmation of the act. *Leonard v. Hare*, 336 S.W.2d 619, 621 (Tex. 1960). Ratification only applies if the act was performed for the benefit of the principal; it does not apply if the act was performed for the benefit of the agent or a third party. *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.). *See also St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 536-37 (Tex. 2002).

Ratification generally arises when an agent exceeds the agent's authority. *See Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980). Ratification generally presupposes that the principal has an agent who, by agreement, is authorized to act on the principal's behalf. *Willis*, 199 S.W.3d at 273. Nevertheless, a principal may ratify the acts of a person who is not actually an agent of the principal. *Walker Ins. Servs.*, 108 S.W.3d at 552 n.9.

Although ratification most frequently arises in contract actions, it can also form the basis for tort liability against a principal. *See, e.g., Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 480-81 (Tex. App.—Austin 2000, pet. denied); *Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 789 (Tex. App.—El Paso 1996, writ denied).

Ratification by the principal may be made expressly or it may be implied from a course of conduct. *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 343 (Tex. App.—Fort Worth 2003, pet. denied). A common example of an explicit ratification is by corporate resolution ratifying prior acts of corporate officers. Ratification may also be inferred from the principal's course of conduct or affirmative failure to repudiate the unauthorized act of the alleged agent. *Diamond Paint Co. of Houston v. Embry*, 525 S.W.2d 529, 535 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). The principal must have full knowledge of all material facts if ratification is based on the principal's silence. *Lang v. Lee*, 777 S.W.2d 158, 162 (Tex. App.—Dallas 1989, no writ). For example, a guarantor ratified the acts of an employee who may not have had prior authority to issue a letter of guaranty when the guarantor paid invoices submitted to it by the creditor to which the guaranty was given. The guarantor was subsequently held liable when additional invoices covered by the letter of guaranty were not paid by the guarantor. *Buffalo Sav. & Loan v. Trumix Concrete Co.*, 641 S.W.2d 650, 653 (Tex. App.—Corpus Christi 1982, no writ).

An act may not be ratified in part and rejected in part because the act of ratification extends to the entire transaction. *Plains Cotton Co-op. Ass'n v. Wolf*, 553 S.W.2d 800, 804 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

The party alleging ratification has the burden of pleading and proving that the principal ratified the unauthorized acts of the agent. *Walker Ins. Servs.*, 108 S.W.3d at 552 n.8. A presumption of ratification arises if the unauthorized act proves to be beneficial to the principal and the benefits have been retained by the principal. *Verizon Corporate Servs. Corp.*, 290 S.W.3d at 906.

Generally, the issue of ratification is a factual question which is submitted to

the jury for determination. *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965). However, ratification may be determined as a matter of law when it is shown by undisputed evidence. *Jackson v. Gray*, 558 S.W.2d 138, 139 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

A jury instruction on ratification is found at Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment PJC 101.5 (2016).

C. Liability for acts of a partner

A partnership is liable for loss or injury to a person caused by or incurred as a result of the wrongful act or omission or other actionable conduct of a partner acting (1) in the ordinary course of the business of the partnership or (2) with the authority of the partnership. TEX. BUS. ORGS. CODE ANN. § 152.303. This statute is applicable to a limited partnership. TEX. BUS. ORGS. CODE ANN.
§ 153.003(a); *Doctor's Hosp. at Renaissance Ltd. v. Andrade*, 493 S.W. 3d 545, 547-48 (Tex. 2016). The "ordinary course of the partnership's business can be a key issue." The Andrades sought to impose liability on a partnership that owned a hospital based upon the alleged negligence of a physician in the delivery of a child because that physician was a limited partner in the partnership owning the hospital. The Supreme Court accepted the limited partnership's argument that it was in the business of providing and operating medical facilities, not practicing medicine. *Doctor's Hosp.*, 493 S.W. 3d at 548. The court likewise found that the physician was not acting within the authority of the partnership based in part upon the language of the partnership agreement which authorized the general partner, but not the limited partners, to act on behalf of the entity. *Id.* at 550-51. The court further noted that actions taken with the authority of the partnership would typically follow from actions "in the ordinary course of the business of the partnership." *Id.* at 551.

D. Vice principal

The vice-principal doctrine allows a party to hold a corporation directly liable for the acts of certain corporate agents commonly referred to as "vice-principals." *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 253 (Tex. 2009). Under this theory, the negligence, gross negligence, or malicious conduct of certain agents is treated as the conduct of the principal. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406-07 (Tex. 1934), overruled on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The corporation is liable for exemplary damages only if it: (1) authorizes or ratifies an agent's action; (2) maliciously hires an unfit agent; or (3) acts with malice through a vice-principal. *Qwest Int'l Commc'ns, Inc. v. AT&T Corp.*, 167 S.W.3d 324, 326 (Tex. 2005). The vice-principal theory is most often invoked in cases involving exemplary damages for the gross negligence of a corporation's employee or for liability for exemplary damages to a third party. *See, e.g., Bennett v. Reynolds*, 315 S.W.3d 867, 883 (Tex. 2010); *Hammerly Oaks, Inc. v.*

Edwards, 958 S.W.2d 387, 390-92 (Tex. 1997).

The vice-principal doctrine differs from respondeat superior in that the negligent acts of the vice-principal are treated as the very acts of the principal. *See Waring v. Harris*, 221 S.W.2d 345, 346 (Tex. Civ. App.—Austin 1949, writ ref'd).

There are four classes of employees who may be vice-principals under Texas law: (1) corporate officers; (2) those who have the authority to employ, direct, and discharge servants of the master; (3) those engaged in the performance of nondelegable or absolute duties of the master; and (4) those to whom the master has delegated the management of all or part of its business. *Bennett*, 315 S.W.3d at 884. Whether an employee attains the status of a vice-principal ordinarily is a question for the jury. *Funk Farms, Inc. v. Montoya*, 736 S.W.2d 803, 806 (Tex. App.— Corpus Christi 1987, writ ref'd n.r.e.). An employee's title alone is not dispositive of whether he is a vice- principal. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 138 (Tex. 2012).

The status of a vice-principal who was the highest ranking manager at a facility was sufficient to impute liability to the corporation with regard to actions taken in the workplace, regardless of whether the agent acted within the scope of employment. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999). The Supreme Court noted there was no evidence that the outrageous conduct of the manager was motivated by personal animosity rather than a misguided attempt to carry out job duties. *Id*.

There must be a breach of duty by the vice- principal for the corporate principal to be liable under the doctrine of vice-principal. The tortious conduct must be within the scope of the general authority of the vice-principal and must further the employer's business and the object for which the vice-principal was employed. *Oberpriller*, 170 S.W.2d at 610; *Rhodes, Inc. v. Duncan*, 623 S.W.2d 741, 744 (Tex. App.—Houston [1st Dist.] 1981, no writ).

The liability of a corporation is limited to acts which are referable to the company's business to which the vice-principal is expressly, impliedly, or apparently authorized to transact. *Rhodes, Inc.*, 623 S.W.2d at 744. Although a corporation allowed a store manager to conduct personal business activities at its store and paid him a lower salary in light of this arrangement, his actions in obtaining investments in his personal real estate ventures from employees of the store were not in the furtherance of the corporation's business. The fact that a corporation might directly or indirectly benefit from such unauthorized act would not, standing alone, render a corporation liable. *Id*.

A jury question and related instructions for imputing gross negligence to a corporation are found at Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts PJC 10.14C (2016). The current version suggests the jury can be asked whether the employee was a "vice-principal" or employed "in a managerial capacity."

E. Joint enterprise

Joint enterprise makes each party to an enterprise the agent of the other and imputes responsibility for the negligence of one to the other members of the enterprise. *Texas Dep't. of Transp. v. Able*, 35 S.W.3d 608, 613 (Tex. 2000). Texas adopted joint enterprise in *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 14 (Tex. 1974). There are four elements of joint enterprise:

(1) an agreement, express or implied, among the members of the group;

(2) a common purpose to be carried out by the group;

(3) a community of pecuniary interest in that purpose among the members; and

(4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

The most troublesome element seems to be "community of pecuniary interest." A common interest in a profitable outcome is not sufficient. *See St. Joseph Hosp.*, 94 S.W.3d at 525-34; *Motloch v. Albuquerque Tortilla Co.*, 454 S.W.3d 30, 35-37 (Tex. App.—Eastland 2014, no pet.).

Although joint enterprise was most frequently used as a theory in automobile accident cases to impute the negligence of the driver to a passenger, some cases have expanded the use to other types of cases. *See, e.g., Able*, 35 S.W.3d at 613-16 (Texas Department of Transportation and a transit authority were found to be involved in a joint enterprise regarding a highway project, making TXDOT liable in a wrongful death case arising out of a highway accident.)

Joint enterprise is theoretically different than a joint venture although the elements are essentially the same. The term "joint venture" tends to be applied in contract cases. *Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981); *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978); *Taylor v. GWR Operating Co.*, 820 S.W.2d 908, 911 (Tex. App.—Houston [1st Dist.] 1991, writ denied). The Texas Supreme Court recently used the term "joint venture" in a tort context but cited cases that specifically discussed "joint enterprise" in support of its listing of the elements of a "joint venture." The Court even noted that Plaintiff's counsel expressly disclaimed any claim for "joint enterprise" during oral arguments in the Supreme Court. See Parker, 514 S.W.3d at 225-26.

A jury question and instruction on joint enterprise is found at Texas Pattern Jury Charges— General Negligence & Intentional Personal Torts PJC 10.11 (2016).

F. Piercing the corporate veil

"Piercing the corporate veil" is a remedy that can be used to impose vicarious liability on a party for the acts of a corporation. It is often utilized to impose liability on an individual who owns all or part of the corporation when the corporation does not have sufficient assets to satisfy a claim.

Shareholders in a corporation are shielded from liability for the obligations of the corporation. Avoidance of personal

liability is not only sanctioned by the law, it is an essential reason that many people choose to incorporate their business. *Willis*, 199 S.W.3d at 271. The corporate form can be disregarded, however, under the following circumstances:

(1) the corporate form was used to perpetrate a fraud;
(2) the corporation was organized and operated as a mere tool or business conduit of another ("alter ego");
(3) the corporate form was used to evade an existing legal obligation;
(4) the corporate form was used to achieve or perpetuate a monopoly;
(5) the corporate form was used to circumvent a statute; or
(6) the corporate form was used to protect a crime or to justify a wrong.

See Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1986).[1] The six theories are separate and distinct. If a theory is not specifically pleaded, it is waived. *Town Hall Estates-Whitney, Inc. v. Winters*, 220 S.W.3d 71, 86 (Tex. App.—Waco 2007, no pet.). Each of these bases for disregarding the corporate form involves some type of wrongdoing, injustice, or inequity. *Wilson v. Davis*, 305 S.W.3d 57, 69 (Tex. App.—Houston [1st Dist.] 2009, no pet.). The different bases for disregarding the corporate form typically involve questions of fact. Thus, the decision on whether to pierce the corporate veil is ordinarily for the jury. *Castleberry*, 721 S.W.2d at 277. However, when all the material facts are undisputed, the application of the doctrine of alter ego is a question of law. *Tigrett v. Pointer*, 580 S.W.2d 375, 379 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

The holding in *Castleberry* was modified by the Legislature. That legislative modification is now found at Tex. Bus. Orgs. Code Ann. § 21.223. Essentially, the statute requires a finding that one of the six Castleberry factors must have been used to perpetrate an "actual fraud" primarily for the purpose of the individual. "Actual fraud" for the purposes of alter ego involves dishonesty of purpose or intent to deceive. *Latham v. Burgher*, 320 S.W.3d 602, 607 (Tex. App.—Dallas 2010, no pet.). Under *Castleberry* and previous decisions, the corporate fiction could be disregarded without showing common-law fraud or deceit when the circumstances amounted to constructive fraud. Constructive fraud is "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its

---

[1] In a footnote, the Supreme Court identified "inadequate capitalization" as a theory justifying disregard of the corporate entity. *Castleberry*, 721 S.W.2d at 273 n.3. Some cases cite *Castleberry* as listing seven factors. *See, e.g., Menetti v. Chavers*, 974 S.W.2d 168, 172 (Tex. App.—San Antonio 1998, no pet.) It is not always clear whether Texas courts view inadequate capitalization as an actual theory or simply a factor contributing to one of the other grounds for piercing the corporate veil. *See, e.g., Tigrett v. Pointer*, 580 S.W.2d 375, 382 (Tex. Civ. App.— Dallas 1978, writ ref'd n.r.e.).

tendency to deceive others, to violate confidence or to injure the public interest." *Castleberry*, 721 S.W.2d at 273. The statute does not, however, require findings of the traditional elements of common-law fraud such as the elements of misrepresentation or omission. *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908-10 (Tex. App.—Dallas 2008, pet. denied); *Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 432 (Tex. App.—Houston [1st Dist.] 2007, pet. granted, judgm't vacated w.r.m.).

The statute further modified Castleberry by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against shareholders or owners. *Aluminum Chems. (Bol.), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67 n.3 (Tex. App.—Texarkana 2000, no pet.).

Tort cases are generally unaffected by the statute. Thus, in a tort case, a plaintiff does not need to prove an actual fraud but only a showing of injustice if one of the six factors is otherwise proved.

Evidence of alter ego includes (1) the payment of alleged corporate debt with personal checks or other comingling of funds, (2) representations that the individual will financially back the corporation, (3) the diversion of company profits to the individual for the individual's personal use, (4) inadequate capitalization, and (5) any other failure to keep corporate and personal assets separate. *Dodd v. Savino*, 426 S.W.3d 275, 291 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Courts are often more reluctant to disregard the corporate entity in breach of contract cases as compared to tort cases. *See Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 375 (Tex. 1984). To hold a defendant vicariously liable by piercing the corporate veil in a contract-related case, the plaintiff must prove the defendant committed actual fraud against the plaintiff for the defendant's direct personal benefit, regardless of the piercing theory pleaded. *See* Tex. Bus. Orgs. Code Ann. § 21.223(b); *Willis*, 199 S.W.3d at 272. The rationale is a plaintiff in a contract case ordinarily has an opportunity to investigate the financial strength of the corporation while dealing with it in a business transaction, and that contracting parties have a responsibility to know with whom they are dealing. *See Castleberry*, 721 S.W.2d at 279; *Miles v. Am. Tel. & Tel. Co.*, 703 F.2d 193, 195 (5th Cir. 1983).

The remedy of veil piercing is available against a limited liability company. While the statute does not specifically apply to a limited liability company, claimants seeking to pierce the veil of a limited liability company must meet the same requirements as if the entity were a corporation. *Shook v. Walden*, 368 S.W.3d 604, 621 (Tex. App.—Austin 2012, pet. denied). At least one court has held that the alter ego theory of veil piercing does not apply to limited partnerships. *Peterson Group, Inc. v. PLTQ Lotus Group, LP*, 417 S.W.3d 46, 56-57 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

"Reverse veil piercing" may be available to impose liability on a

corporation for the acts of an individual based on the alter ego doctrine. *See, e.g., Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 643 (5th Cir. 1991); *Zahra Spiritual Trust v. U.S.*, 910 F.2d 240, 244 (5th Cir. 1990).

The theory of "single business enterprise" was once advanced as a basis for imposing liability on a corporation for the debts of another where the two entities integrated their resources to achieve a common business purpose. *See, e.g., Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534, 536 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). The single business enterprise theory was rejected by the Texas Supreme Court, however, in *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 450-56 (Tex. 2008).

Jury questions and instructions on piercing the corporate veil may be found at Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment PJC 108.1-108.7 (2016).

II. Conspiracy and other grounds of participatory liability

A. Conspiracy

Civil conspiracy imposes joint and several liability on those who participate in an agreement to commit a tort. *See Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979). The goal of a conspiracy allegation is to extend tort liability beyond the active wrongdoer to those who merely planned, assisted, or encouraged the wrongdoer's acts. *See Carroll*, 592 S.W.2d at 925-26. If a civil conspiracy is established, each co-conspirator is responsible for the actions of each of the other co-conspirators in furtherance of the conspiracy. Each element of the underlying tort is imputed to each participant. *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983). Generally, each person in the conspiracy is responsible for the acts of the others that were done in furtherance of the common purpose. *Carroll*, 592 S.W.2d at 926. To prove conspiracy, the plaintiff must show:

(1) the defendant combined with one or more persons;

(2) the object of the combination was to accomplish an unlawful purpose or a lawful purpose by unlawful means;[2]

(3) the members reached a meeting of the minds on the object or course of action;

(4) one of the members committed an unlawful, overt act to further the object or course of action; and

(5) the plaintiff suffered injury as a proximate result of the wrongful act.

Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005); *Crouch v. Trinque*, 262 S.W.3d 417, 426 (Tex. App.—Eastland 2008, no pet.).

Conspiracy requires specific intent. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996). The parties

---

[2] There can be no conspiracy to accomplish a lawful purpose by lawful means, even when the defendants acted with malice. *Brown v. Am. Freehold Land Mortg. Co.*, 80 S.W. 985, 987 (Tex. 1904).

to the conspiracy must be aware of the harm or wrongful conduct at the beginning of the agreement. *Id*. Because the conspiracy itself requires intent, the underlying tort for a conspiracy must be an intentional tort. *Id*. at 617. A plaintiff has no claim for conspiracy if no intentional tort was committed. *Id*. For example, a party cannot conspire to be negligent. *Tri*, 162 S.W.3d at 557.

The "gist" of a civil conspiracy is the injury that is intended to be caused. Proof of joint intent to engage in the conduct that resulted in the injury does not, without more, establish a cause of action for conspiracy. The parties must be aware of the harm or wrongful conduct at the inception of the agreement. *See Wooters v. Unitech Int'l, Inc.*, 513 S.W.3d 754, 762 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

A conspiracy inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement. *See First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). Wrongful acts by one member of a conspiracy that occurred before the agreement creating a conspiracy do not support liability for each member of the conspiracy as to the prior acts. For a conspirator to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must have caused the damages claimed. Thus, while an attorney may have agreed with another attorney to cover up a theft of client funds by the first attorney, this is neither evidence of a conspiracy to steal the money nor evidence that a conspiracy caused the damages to the client. Id. at 223-24.

Conspiracy is not an independent tort. Rather, it is simply a way to extend liability beyond the primary actor to others who agreed to act toward a common goal. *Carroll*, 592 S.W.2d at 925-26. If the underlying claim fails because the plaintiff cannot prove one of its elements, the conspiracy claim also fails. *See Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 930-31 (Tex. 2010).

Conspiracy is based on participation in a statutory violation or underlying tort, other than negligence, that would have been actionable against at least one of the conspirators individually. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996);
International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 581 (Tex. 1963). Conspiracy cannot be based on an improper motive in performing a lawful action. *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.).

Proof of a combination by itself does not create liability. A party must have knowledge of the conspiracy's object and purpose, had a meeting of mind with at least one other conspirator to accomplish that object and purpose and intend to bring about the injury. *See Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856-57 (Tex. 1968). The plaintiff must show that the party intended to cause injury or was

aware of the harm likely to result from the wrongful conduct at the inception of the combination or agreement. *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995). Liability for conspiracy results from the act(s) done to further the conspiracy, not the conspiracy itself. *Carroll*, 592 S.W.2d at 925.

Conspiracy claims are often proved by circumstantial evidence. In reviewing circumstantial evidence, courts review the totality of the known circumstances. A conspiracy finding depends upon the reasonableness of the inferences drawn from the circumstances, based on deduction of proven facts. An inference is not reasonable if it is susceptible to multiple, equally probable inferences, requiring the fact finder to guess in order to reach a conclusion. An inference is not reasonable if its sole support consists of other inferences or suspicions. *See Wooters*, 513 S.W.3d at 761-62.

Two or more businesses can conspire with each other. *See, e.g., Berry v. Golden Light Coffee Co.*, 327 S.W.2d 436, 440 (Tex. 1959) (coffee company conspired with truck hauler to evade motor carrier laws); *Remenchik v. Whittington*, 757 S.W.2d 836, 840-41 (Tex. App.—Houston [14th Dist.] 1988, no writ) (general partner conspired with construction company to overcharge on project). A single entity cannot conspire with itself. *Fisher v. Yates*, 953 S.W.2d 370, 382 (Tex. App.—Texarkana 1997, pet. denied). The Texas Courts of Appeals are split on whether a parent company can conspire with its wholly-owned subsidiary. The Fourteenth Court of Appeals held that a parent company cannot conspire with its wholly-owned subsidiary. *Atlantic Richfield Co. v. Misty Prods., Inc.*, 820 S.W.2d 414, 420-21 (Tex. App.—Houston [14th Dist.] 1991, writ denied). On the other hand, the Dallas, San Antonio, Texarkana, and Tyler Courts of Appeals held that a parent company is capable of conspiring with its wholly-owned subsidiary to commit a tort. *Grizzle v. Texas Commerce Bank, N.A.*, 38 S.W.3d 265, 284 (Tex. App.—Dallas 2001), *rev'd in part on other grounds*, 96 S.W.3d 240 (Tex. 2002); *Holloway v. Atlantic Richfield Co.*, 970 S.W.2d 641, 644 (Tex. App.—Tyler 1998, no pet.); *Valores Corporativos, S.A. de C.V. v. McLane Co.*, 945 S.W.2d 160, 168 n.6 (Tex. App.—San Antonio 1997, writ denied); *Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 447 (Tex. App.—Texarkana 1993, writ denied). These courts held that the decision of the United States Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), was limited to conspiracy claims brought under the Sherman Antitrust Act and did not apply to common-law tort actions.

An agent cannot conspire with his principal. *Bradford v. Vento*, 48 S.W.3d 749, 761 (Tex. 2001). The acts of an agent and his principal are the acts of a single entity and cannot constitute a conspiracy. *Lyons v. Lindsey Morden Claims Mgmt., Inc.*, 985 S.W.2d 86, 91 (Tex. App.—El Paso 1998, no pet.). Because a corporation cannot conspire with itself, corporate agents cannot conspire with each other when they participate in corporate action. *Crouch*, 262 S.W.3d at 427. But a corporation can conspire with its agent if

the agent is acting in a capacity other than as a corporate agent or is acting for personal purposes. *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 138 (Tex. App.—Texarkana 2000, no pet.); *Fojtik v. First Nat'l Bank of Beeville*, 752 S.W.2d 669, 673 (Tex. App.—Corpus Christi 1988, writ denied, 775 S.W.2d 632 (Tex. 1989).

The plaintiff in a conspiracy claim can recover the types of actual damages that are available for the underlying tort. *See Tilton*, 925 S.W.2d at 681. The damages recoverable in an action for civil conspiracy are those that result from the commission of the wrong, rather than the conspiratorial agreement. *Carroll*, 592 S.W.2d at 925. The plaintiff may recover exemplary damages only if the underlying tort permits the recovery of exemplary damages. *See, e.g., Akin*, 661 S.W.2d at 921.

Attorney immunity is an affirmative defense to a conspiracy theory against an attorney if the claim against the attorney is based on actions within the scope of representation of the client during litigation if the conduct is not entirely foreign to the duties of an attorney. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 482-83 (Tex. 2015). The attorney has the burden to prove that his alleged wrongful conduct is part of the discharge of his duties to his client. *Id.* at 484.

There is some question about the proper limitations period for a conspiracy action. Many courts of appeals have held that claims for conspiracy are governed by a two-year statute of limitations. *See, e.g., Navarro v. Grant Thornton, LLP*, 316 S.W.3d 715, 719 (Tex. App.—Houston [14th Dist.] 2010, no pet); *G. Prop. Mgmt.*, Ltd. v. Multivest Fin. Servs. of Tex., Inc., 219 S.W.3d 37, 44 (Tex. App.—San Antonio 2006, no pet); *Prostok v. Browning*, 112 S.W.3d 876, 899 (Tex. App.—Dallas 2003), *aff'd in part, rev'd in part on other grounds*, 165 S.W.3d 336 (Tex. 2005); *Jackson v. W. Telemarketing Corp. Outbound*, 245 F.3d 518, 523 (5th Cir. 2001); *Fisher v. Yates*, 953 S.W.2d 370, 381 (Tex. App.—Texarkana 1997, pet. denied); *Nelson v. Am. Nat'l Bank of Gonzalez*, 921 S.W.2d 411, 415 (Tex. App.— Corpus Christi 1996, no writ); *Allen v. City of Midlothian*, 927 S.W.2d 316 (Tex. App.—Waco 1996, no writ); *Stevenson v. Koutzarov*, 795 S.W.2d 313, 318 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *Cathey v. First City Bank of Aransas Pass*, 758 S.W.2d 818, 822 (Tex. App.—Corpus Christi 1988, writ denied).

The view that conspiracy has a two-year limitations period probably arose at a time when the limitations period on fraud was thought to be two years. For example, the *Cathey* case[3] relied in part on *Starling v. Hill*, 121 S.W.2d 648 (Tex. Civ. App.— Waco 1938, no writ), to support its position that conspiracy has a two-year limitations period. However, the Starling court did not say that a two- year statute of limitations applied to conspiracy. The court said that a two-year limitations period applied to conspiracy to defraud. *See Starling*, 121 S.W.2d at 650. In *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d at 579, the court

[3] The Cathey case is one of the most frequently cited cases for a two-year limitations period for conspiracy.

held the limitations period for conspiracy by a fiduciary based on fraud was two years, citing *Glenn v. Steele*, 61 S.W.2d 810 (Tex. 1933), a fraud case not involving conspiracy. In *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 764-65 (Tex. 1987), another case applied the two-year limitations period for fraud.[4] But the court did not suggest that conspiracy had its own statute of limitations.

It may be that conspiracy does not have its own limitations period because it is not a separate cause of action. The limitations period for a conspiracy claim may be the same as the limitations period for the underlying tort. Other jurisdictions apply the statute of limitations for the underlying tort, not a separate limitations period for conspiracy. *See, e.g., Aaroe v. First Am. Title Ins. Co.*, 271 Cal. Rptr. 434, 436 (Cal. Ct. App. 1990) (California has three-year limitations period for fraud claim; conspiracy-to-defraud claim has same period); *Austin v. House of Vision*, Inc., 243 N.E.2d 297, 299 (Ill. App. Ct. 1968) (Illinois has four- year limitations period for antitrust claim; conspiracy to violate antitrust laws has same period).

The discovery rule applies to a conspiracy claim when the discovery rule would apply to the underlying tort. *See Prostok*, 112 S.W.3d at 896. For example, the discovery rule potentially tolls the limitations period in a conspiracy claim involving fraud. *Cathey*, 758 S.W.2d at 822 n.3.

A jury question and related instructions on conspiracy are found at Texas Pattern Jury Charges— Business, Consumer, Insurance & Employment PJC 109.1 (2016).

B. Other grounds for participatory liability

The Restatement (Second) of Torts § 876 (1979) describes three bases for imposing vicarious liability for "aiding and abetting":

(1) assisting or encouraging;

(2) assisting and participating; and

(3) concert of action.

The three different theories of liability have different elements.

This section of the Restatement has been discussed by the Texas Supreme Court, but it has not been adopted in Texas. *See Juhl v. Airington*, 936 S.W.2d 640, 643-45 (Tex. 1996). The Texas Supreme Court has not expressly decided whether Texas recognizes a cause of action for aiding and abetting. *See Parker*, 514 S.W.3d at 224.

The Court previously declined to decide this issue in *Bradshaw v. Steadfast Fin., L.L.C.*, 395 S.W.3d 348 (Tex. App.—Fort Worth 2013), *aff'd in part, rev'd in part*, 457 S.W.3d 70 (Tex. 2015). The court held that the plaintiff's derivative liability claim against Range was untenable as a matter of law because it had no relationship with the plaintiff, except in an arm's length transaction. *Bradshaw* alleged that Range had conspired with and aided and abetted the holder of executive rights in a negotiation

---

[4] The limitations period for fraud was explicitly set at four years in 1999. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a).

of an oil and gas lease on terms that were allegedly unfavorable to Bradshaw, a non-participating royalty interest owner. The court noted Range's interests in negotiating the lease were adverse to both Steadfast and Bradshaw because Range was trying to obtain the deal that was most favorable to Range. Knowledge of the non-participating royalty interest and of tensions between Bradshaw and Steadfast was insufficient to impute Steadfast's liability claim, if any, to Range. The court held that adopting such a theory of liability would result in the extension of a derivative fiduciary duty to the other side of the bargaining table in a number of situations. An arm's length negotiation would become essentially non-existent.

While not using the term "aiding and abetting," the Texas Supreme Court has held that when a third party knowingly participates in the breach of a duty of a fiduciary, that third party becomes a joint tortfeasor with the fiduciary and becomes liable as a joint tortfeasor. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). *See also Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.). Texas courts have declined to adopt a cause of action for aiding and abetting a breach of fiduciary duty for the rendition of legal advice to an alleged joint tortfeasor client. *Span Enters. v. Wood*, 274 S.W.3d 854, 858-59 (Tex. App.—Houston [1st Dist.] 2008, no pet.). *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580-81 (Tex. App.—Dallas 2007, no pet.). The Kinzbach rule does not apply if a third party is doing what he has the legal right to do, i.e., the defense of legal justification or privilege is applicable. *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 863 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

After stating that Texas has recognized a cause of action for conspiracy to breach a fiduciary duty in transactions in which a third party knowingly participates in an employee's breach of fiduciary duty under *Kinzbach*, a Houston Court of Appeals recently held that the basis for liability for such a breach is limited by society's legitimate interest in encouraging competition. An employee does not violate a fiduciary duty by formulating plans to compete. Accordingly, the Court held that the evidence merely showed that the alleged co-conspirator knowingly participated only in lawful preparation to compete and not an lawful breach of duty. *See Wooters*, 513 S.W.3d at 763-64.

In *Hunter Buildings & Mfg., LP v. MBI Global, LLC*, 436 S.W.3d 9 (Tex. App.—Houston [14th Dist.] 2014, pet. denied), a jury found two individuals failed

to comply with their fiduciary duty to Global and that the corporate defendants knowingly participated in those breaches. The jury did not find a conspiracy, however, and assigned zero percent of responsibility to the individuals. The Court of Appeals noted it could find no Texas case addressing (1) the distinction between civil conspiracy and knowing participation in a breach of fiduciary duty, or (2) the issue of whether a knowing-participation finding, by itself,

makes the party breaching his fiduciary duty liable for damages caused by the party who knowingly participated in the breach of fiduciary duty. The Court presumed, without deciding, that the jury's breach-of-fiduciary duty findings and its knowing-participation findings made the defendants jointly and severally liable for the damages found by the jury and for the breaches of fiduciary duty by the individuals, but found that the zero-responsibility findings showed that the only damage findings on which a judgment could be based was a finding of damages proximately caused by the corporate defendants' misappropriation of trade secrets rather than the breach of fiduciary duties. Thus, the findings of zero-percent responsibility should not have been disregarded by the trial court. *Id.* at 15-17.