UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

The 31st Annual Conference on State and Federal Appeals

June 10-11, 2021
Webcast

"What'd I Miss?"—An Update on the Texas Pattern Jury Charges

Hon. Daniel E. Hinde

Author Contact Information:
Hon. Daniel E. Hinde
Schiffer Hicks Johnson, PLLC
Houston, Texas

dhinde@shjlawfirm.com

"WHAT'D I MISS?"

An Update on the Texas Pattern Jury Charges[1]

By Hon. Daniel E. Hinde
Chair, State Bar of Texas Pattern Jury Charges—Oversight Committee
Former Judge, 269th District Court

I. INTRODUCTION

Decades ago, the State Bar established a committee to draft a collection of standardized proposed jury questions and instructions for lawyers and courts to use in preparing jury charges. This resulted in the Texas Pattern Jury Charges, commonly referred to as the "Texas PJCs." There are now seven State Bar PJC committees that revise and publish nine separate volumes of the Texas PJCs. The PJC Criminal Committee edits and publishes four volumes focused on criminal jury charges. As for the civil PJCs, there are five committees who each edit and publish the remaining five PJC volumes. Those five volumes are:

(1) PJC—General Negligence, Intentional Personal Torts & Workers' Compensation ("PJC—Negligence");

(2) PJC—Malpractice, Premises & Products ("PJC—Malpractice");

(3) PJC—Business, Consumer, Insurance & Employment ("PJC—Business");

(4) PJC—Family & Probate ("PJC—Family"); and

(5) PJC—Oil & Gas.

The seventh committee is the PJC Oversight Committee. The Oversight Committee's

[1] This paper contains excerpts and screenshots from the 2020 editions of the TEXAS PATTERN JURY CHARGES. The State Bar of Texas holds the copyrights to all nine volumes of the TEXAS PATTERN JURY CHARGES, and the excerpts and screenshots in this paper are being used with the permission of the State Bar of Texas.

responsibility is to review all proposed revisions to the PJC volumes for consistency across all of the volumes and accuracy of the proposed charges, questions, instructions, and comments.

Generally, the civil PJC committees follow a two-year publication schedule. Within the past six months, four of those committees (PJC Negligence, PJC Malpractice, PJC Business, and PJC Oil & Gas) published their 2020 editions. The PJC Family Committee published its 2020 edition earlier in 2020. This paper will summarize several of the notable changes in the five civil volumes.

II. CHANGES COMMON TO MULTIPLE VOLUMES

While a great bulk of each PJC volume focuses on issues and subjects specific to that volume's subject matter, they also contain some charges, questions, instructions, and comments common to some or all of the other volumes. In the 2020 editions, several changes were made to matters common to all civil volumes, as well as others that affected a more limited subset of the volumes. A good place to start the discussion is the changes common to all of the civil volumes.

A. Changes Common to All Civil PJC Volumes

1. Discussion of broad-form submissions

First, because the Supreme Court amended Tex. R. Civ. P. 277, the civil volumes revised the comments on broad-form submissions.

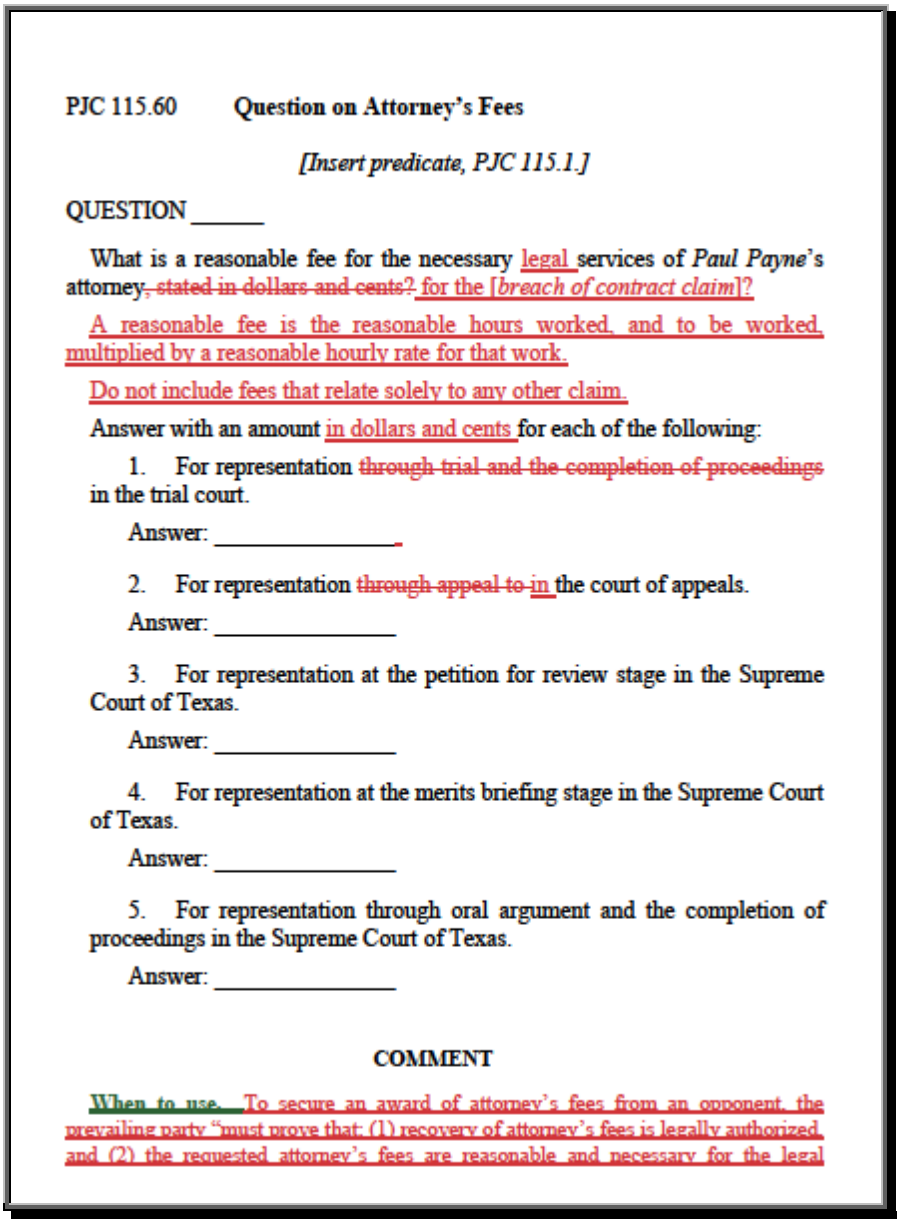
2. Preservation of error

Second, the committees revised the discussion on preservations of error. *See* PJC—Negligence 32.1; PJC—Malpractice 86.1; PJC—Business 116.1; PJC—Family 251.1;

PJC—Oil & Gas 314.1.

3. Attorneys' fees

Third, after the Supreme Court handed down its decision in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019), the Oversight Committee formed a cross-volume subcommittee to review the question and instruction on attorneys' fees and propose any changes if necessary. The subcommittee and the civil volumes ultimately revised the question, instruction, and comments on attorneys' fees in each of the civil volume. *See* PJC—Negligence 7.8; PJC—Business 115.60; PJC—Family 250.1; PJC—Oil & Gas 313.33. Here is the revised question and instruction on attorneys' fees, taken from PJC—Business 115.60:



PJC 115.60 **Question on Attorney's Fees**

[Insert predicate, PJC 115.1.]

QUESTION _____

What is a reasonable fee for the necessary legal services of *Paul Payne*'s attorney~~, stated in dollars and cents?~~ for the [*breach of contract claim*]?

A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation ~~through trial and the completion of proceedings~~ in the trial court.

Answer: _____

2. For representation ~~through appeal to~~ in the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

~~When to use.~~ To secure an award of attorney's fees from an opponent, the prevailing party "must prove that: (1) recovery of attorney's fees is legally authorized, and (2) the requested attorney's fees are reasonable and necessary for the legal

PJC—Business 115.60.

The revisions to the attorneys' fee charge and the discussion of broad-form submission and error preservation reflect the hard work of all of the committees in updating provisions common to all of the volumes. But this collaborative approach was not limited to issues that addressed all volumes. Some issues are addressed in some, but not all, of the volumes, such as contracts (PJC—Business and PJC—Oil & Gas) and pre-existing

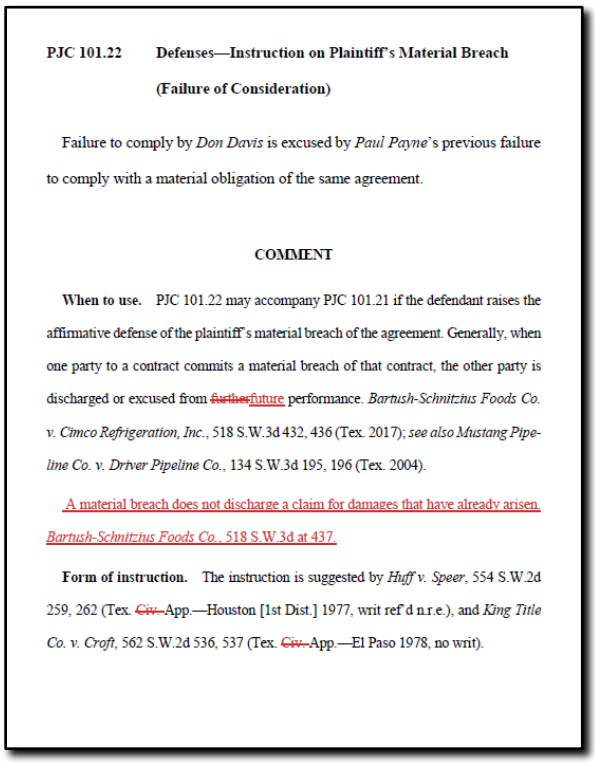
conditions (PJC—Negligence and PJC—Malpractice). And on those issues, the affected volumes worked together to publish revisions in their respective editions.

B. Contracts

Turning first to contracts, the Business and Oil & Gas Committees published revisions on the issues of material breach and anticipatory repudiation.

1. Material breach

As an initial matter, the volumes revised the comments for plaintiff's material breach found in PJC—Business 101.22 and PJC—Oil & Gas 312.2 to reflect the elements as listed in *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004). Here is the PJC—Business version:



PJC 101.22 Defenses—Instruction on Plaintiff's Material Breach (Failure of Consideration)

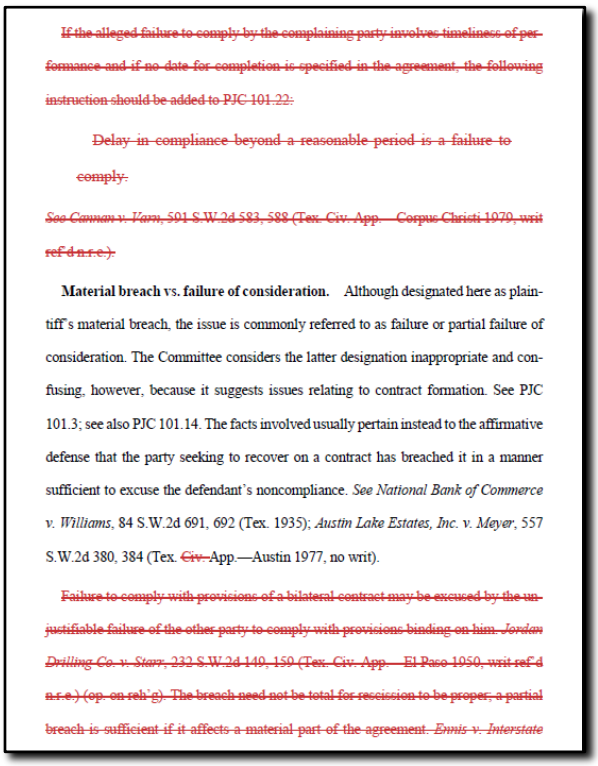
Failure to comply by *Don Davis* is excused by *Paul Payne*'s previous failure to comply with a material obligation of the same agreement.

COMMENT

When to use. PJC 101.22 may accompany PJC 101.21 if the defendant raises the affirmative defense of the plaintiff's material breach of the agreement. Generally, when one party to a contract commits a material breach of that contract, the other party is discharged or excused from ~~further~~future performance. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017); *see also Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004).

A material breach does not discharge a claim for damages that have already arisen. *Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 437.

Form of instruction. The instruction is suggested by *Huff v. Speer*, 554 S.W.2d 259, 262 (Tex. ~~Civ.~~ App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.), and *King Title Co. v. Croft*, 562 S.W.2d 536, 537 (Tex. ~~Civ.~~ App.—El Paso 1978, no writ).



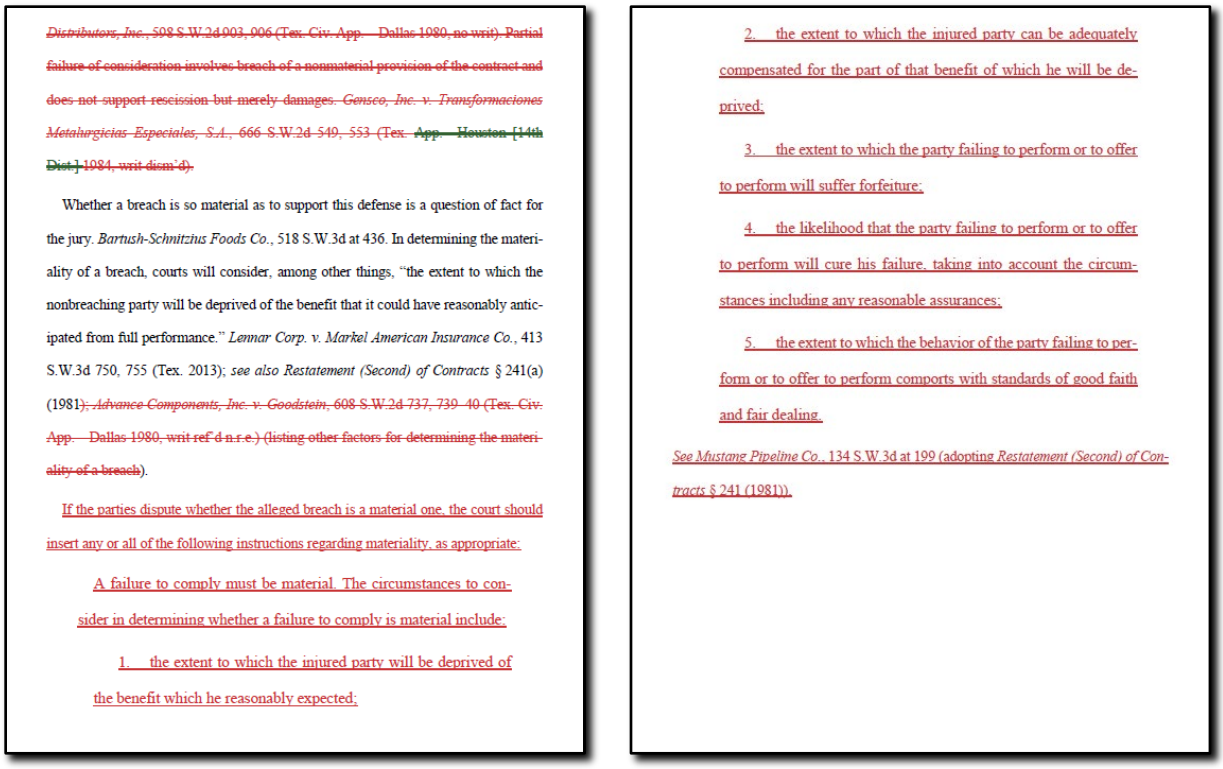
~~If the alleged failure to comply by the complaining party involves timeliness of performance and if no date for completion is specified in the agreement, the following instruction should be added to PJC 101.22:~~

~~Delay in compliance beyond a reasonable period is a failure to comply.~~

~~*See Cannan v. Varn*, 501 S.W.2d 583, 588 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.).~~

Material breach vs. failure of consideration. Although designated here as plaintiff's material breach, the issue is commonly referred to as failure or partial failure of consideration. The Committee considers the latter designation inappropriate and confusing, however, because it suggests issues relating to contract formation. See PJC 101.3; see also PJC 101.14. The facts involved usually pertain instead to the affirmative defense that the party seeking to recover on a contract has breached it in a manner sufficient to excuse the defendant's noncompliance. *See National Bank of Commerce v. Williams*, 84 S.W.2d 691, 692 (Tex. 1935); *Austin Lake Estates, Inc. v. Meyer*, 557 S.W.2d 380, 384 (Tex. ~~Civ.~~ App.—Austin 1977, no writ).

~~Failure to comply with provisions of a bilateral contract may be excused by the unjustifiable failure of the other party to comply with provisions binding on him. *Jordan Drilling Co. v. Starr*, 232 S.W.2d 140, 150 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.) (op. on reh'g). The breach need not be total for rescission to be proper, a partial breach is sufficient if it affects a material part of the agreement. *Ennis v. Interstate*~~



Distributors, Inc., 598 S.W.2d 903, 906 (Tex. Civ. App.—Dallas 1980, no writ). Partial failure of consideration involves breach of a nonmaterial provision of the contract and does not support rescission but merely damages. *Gensco, Inc. v. Transformaciones Metalurgicas Especiales, S.A.*, 666 S.W.2d 549, 553 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

Whether a breach is so material as to support this defense is a question of fact for the jury. *Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436. In determining the materiality of a breach, courts will consider, among other things, "the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance." *Lennar Corp. v. Markel American Insurance Co.*, 413 S.W.3d 750, 755 (Tex. 2013); *see also Restatement (Second) of Contracts* § 241(a) (1981); *Advance Components, Inc. v. Goodstein*, 608 S.W.2d 737, 739–40 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (listing other factors for determining the materiality of a breach).

If the parties dispute whether the alleged breach is a material one, the court should insert any or all of the following instructions regarding materiality, as appropriate:

A failure to comply must be material. The circumstances to consider in determining whether a failure to comply is material include:

1. the extent to which the injured party will be deprived of the benefit which he reasonably expected;

2. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

3. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

4. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account the circumstances including any reasonable assurances;

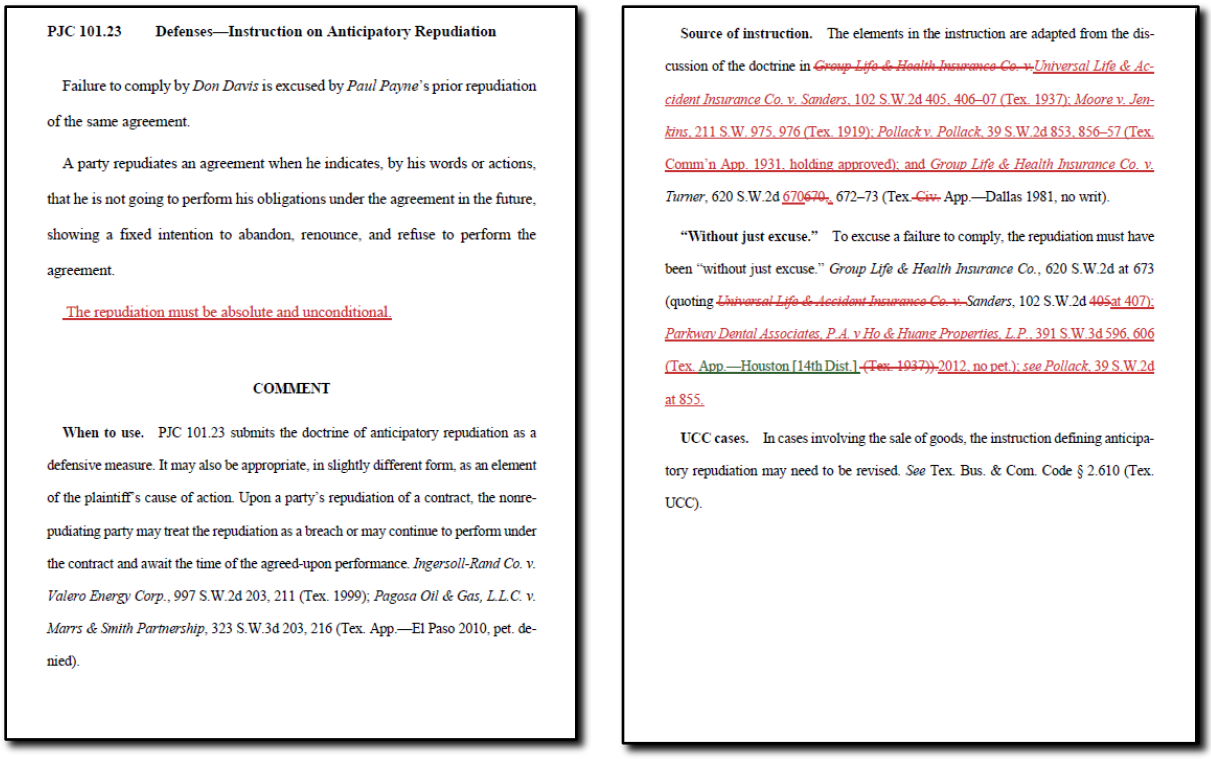
5. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See Mustang Pipeline Co., 134 S.W.3d at 199 (adopting *Restatement (Second) of Contracts* § 241 (1981)).

PJC—Business 101.22; *accord* PJC—Oil & Gas 312.2.

2. Anticipatory repudiation

Additionally, the two volumes updated the instruction and comments for anticipatory repudiation in PJC—Business 101.23 and PJC—Oil & Gas 312.3:



PJC 101.23 Defenses—Instruction on Anticipatory Repudiation

Failure to comply by *Don Davis* is excused by *Paul Payne*'s prior repudiation of the same agreement.

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform the agreement.

The repudiation must be absolute and unconditional.

COMMENT

When to use. PJC 101.23 submits the doctrine of anticipatory repudiation as a defensive measure. It may also be appropriate, in slightly different form, as an element of the plaintiff's cause of action. Upon a party's repudiation of a contract, the nonrepudiating party may treat the repudiation as a breach or may continue to perform under the contract and await the time of the agreed-upon performance. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 211 (Tex. 1999); *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith Partnership*, 323 S.W.3d 203, 216 (Tex. App.—El Paso 2010, pet. denied).

Source of instruction. The elements in the instruction are adapted from the discussion of the doctrine in ~~*Group Life & Health Insurance Co. v.*~~ *Universal Life & Accident Insurance Co. v. Sanders*, 102 S.W.2d 405, 406–07 (Tex. 1937); *Moore v. Jenkins*, 211 S.W. 975, 976 (Tex. 1919); *Pollack v. Pollack*, 39 S.W.2d 853, 856–57 (Tex. Comm'n App. 1931, holding approved); and *Group Life & Health Insurance Co. v. Turner*, 620 S.W.2d 670~~,~~ 672–73 (Tex. ~~Civ.~~ App.—Dallas 1981, no writ).

"Without just excuse." To excuse a failure to comply, the repudiation must have been "without just excuse." *Group Life & Health Insurance Co.*, 620 S.W.2d at 673 (quoting ~~*Universal Life & Accident Insurance Co. v.*~~ *Sanders*, 102 S.W.2d ~~405~~at 407); *Parkway Dental Associates, P.A. v Ho & Huang Properties, L.P.*, 391 S.W.3d 596, 606 (Tex. App.—Houston [14th Dist.] ~~(Tex. 1937))~~ 2012, no pet.); *see Pollack*, 39 S.W.2d at 855.

UCC cases. In cases involving the sale of goods, the instruction defining anticipatory repudiation may need to be revised. *See* Tex. Bus. & Com. Code § 2.610 (Tex. UCC).

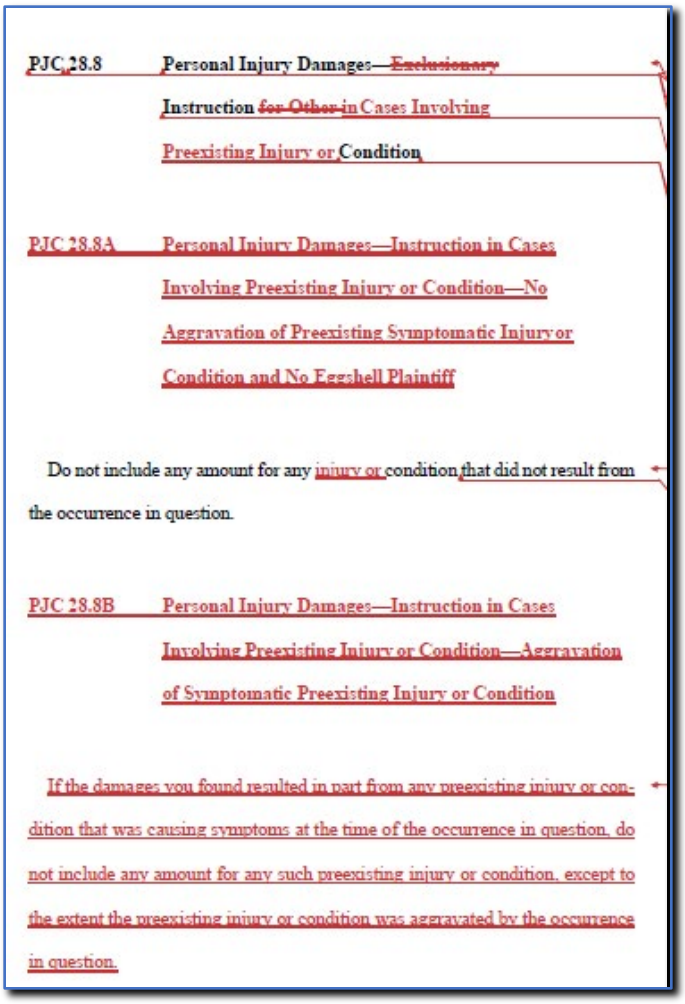
PJC—Business 101.23; *accord* PJC—Oil & Gas 312.3.

C. Pre-Existing Conditions

Cross-volume collaboration did not end with contracts. The PJC Negligence and PJC Malpractice Committees also worked together on the issue of pre-existing conditions.

1. Other conditions and preexisting conditions that are aggravated

First, the Negligence and Malpractice Committees revised the exclusionary instructions and comments for other conditions and for a preexisting condition that is aggravated. In the PJC—Negligence volume, these previously were found in PJC—Negligence 28.8 and 28.9 but were renumbered to 28.8A and 28.8B:



PJC 28.8 Personal Injury Damages—~~Exclusionary~~ Instruction ~~for Other~~ in Cases Involving Preexisting Injury or Condition

PJC 28.8A Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—No Aggravation of Preexisting Symptomatic Injury or Condition and No Eggshell Plaintiff

Do not include any amount for any injury or condition that did not result from the occurrence in question.

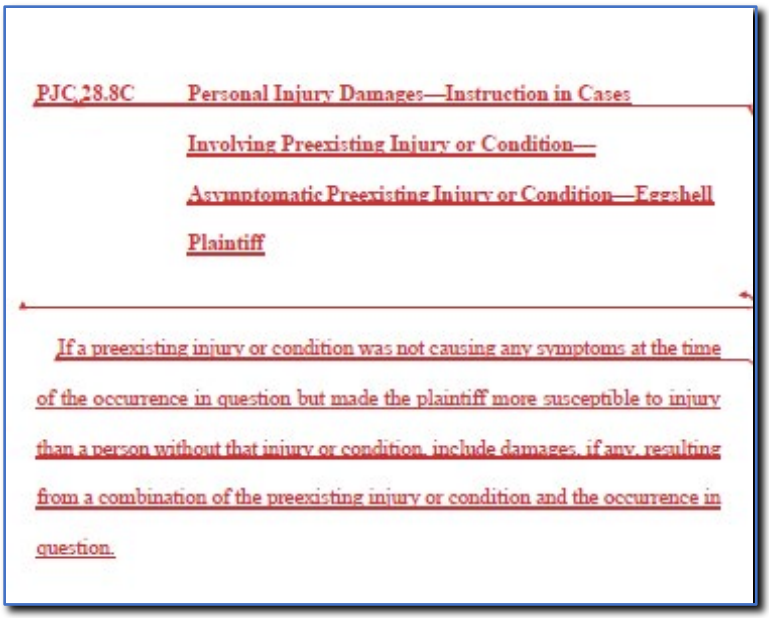
PJC 28.8B Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—Aggravation of Symptomatic Preexisting Injury or Condition

If the damages you found resulted in part from any preexisting injury or condition that was causing symptoms at the time of the occurrence in question, do not include any amount for any such preexisting injury or condition, except to the extent the preexisting injury or condition was aggravated by the occurrence in question.

PJC—Negligence 28.8A, 28.8B; *accord* PJC—Malpractice 80.7A-.B.

2. Asymptomatic preexisting conditions

More significantly, the two volumes drafted a new instruction for asymptomatic preexisting injury or condition (often referred to as the "eggshell plaintiff"). The PJC Negligence Committee added this new instruction as PJC—Negligence 28.8C:



PJC 28.8C Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—Asymptomatic Preexisting Injury or Condition—Eggshell Plaintiff

If a preexisting injury or condition was not causing any symptoms at the time of the occurrence in question but made the plaintiff more susceptible to injury than a person without that injury or condition, include damages, if any, resulting from a combination of the preexisting injury or condition and the occurrence in question.

PJC—Negligence 28.8C; *accord* PJC—Malpractice 80.7C. The volumes revised the comments on preexisting conditions to reflect the changes, including a new comment on the use of the instruction for asymptomatic preexisting injury or condition. Lawyers and judges should review these comments carefully when considering whether and how to charge the jury on preexisting conditions.

But while the PJC committees worked collaboratively on several cross-volume issues, they also made changes to several provisions unique to their own volumes.

III. PJC—General Negligence, Intentional Personal Torts, and Workers Compensation

The 2020 edition of the PJC—Negligence volume updated provisions on negligence, negligent entrustment, private nuisance, and damages. But in addition to tackling those issues, the 2020 edition took a new approach to claims governed by pre-2003 law.

A. Pre-2003 Law

Since 2003, when the Legislature passed a package of major tort-reform laws, the Negligence volume has included several alternative questions and instructions for cases governed by pre-tort-reform law. Because the statute of limitations for claims by minors is tolled until they reach 18, it was possible even recently that a party injured before 2003 might still be able to assert claims governed by pre-2003 law. But 18 years have now passed, so the need for including questions and instructions on pre-2003 law has diminished to such a negligible level that the Negligence Committee decided to remove most of the questions and instructions on pre-2003 law throughout the volume.

B. Basic Negligence and the Uninsured/Underinsured Motorist

But the Committee also revised certain questions, instructions, and comments on specific issues. First, the Committee revised the comment for the Basic Negligence question found in PJC—Negligence 4.1 and the Proportionate Responsibility question found in PJC—Negligence 4.4 to include a discussion of uninsured/underinsured motorist cases (also known as "UM/UIM cases").

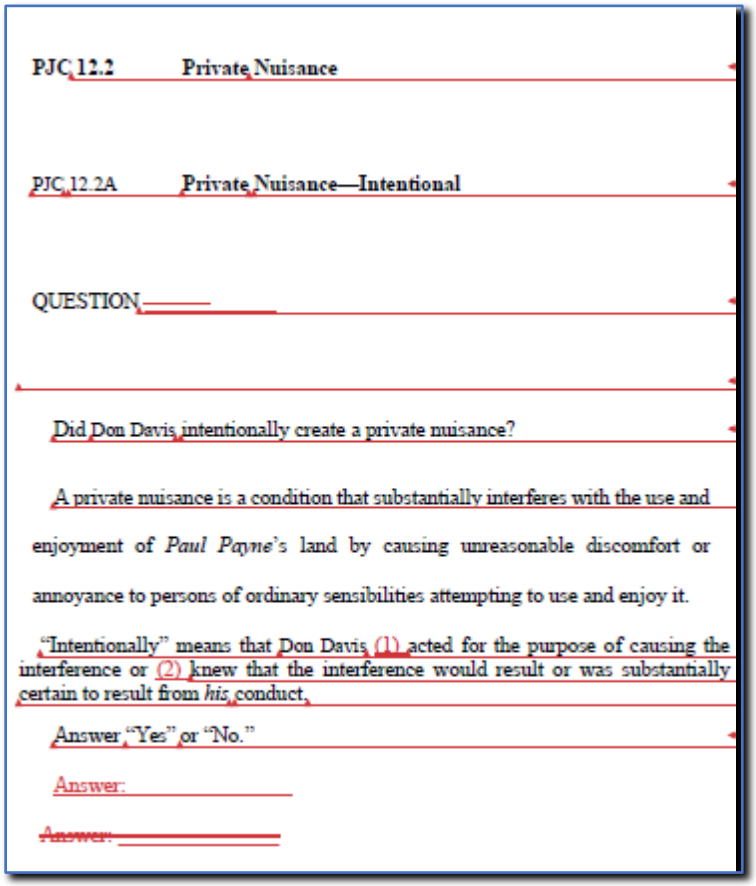
C. Negligent Entrustment

Next, the Negligence Committee revised the question, instruction, and comment on Negligent Entrustment found in PJC—Negligence 10.12. Revised 10.12 updates the question and instructions to reflect the injury-versus-occurrence language that the Negligence Committee added to other negligence questions after the Supreme Court handed down its decision in *Nabors Well Services, Ltd. v. Romero*, 456 S.W.3d 553 (Tex. 2015). As for the comments, the Negligence Committee updated case citations, expanded

the discussions of unlicensed drivers and proximate cause, and added a discussion of an employer's duty to investigate the qualifications and competence of its employees and independent contractors.

D. Private Nuisance-Intentional

Also, the Committee revised the instruction for Private Nuisance—Intentional found in PJC—Negligence 12.2A to better differentiate the elements required to prove intentional nuisance:



PJC 12.2 Private Nuisance

PJC 12.2A Private Nuisance—Intentional

QUESTION

Did Don Davis intentionally create a private nuisance?

A private nuisance is a condition that substantially interferes with the use and enjoyment of *Paul Payne*'s land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

"Intentionally" means that Don Davis (1) acted for the purpose of causing the interference or (2) knew that the interference would result or was substantially certain to result from *his* conduct.

Answer "Yes" or "No."

Answer:

~~Answer:~~

PJC—Negligence 12.2A.

E. Property Damages

Finally, the Negligence Committee revised the comment to the question on Property

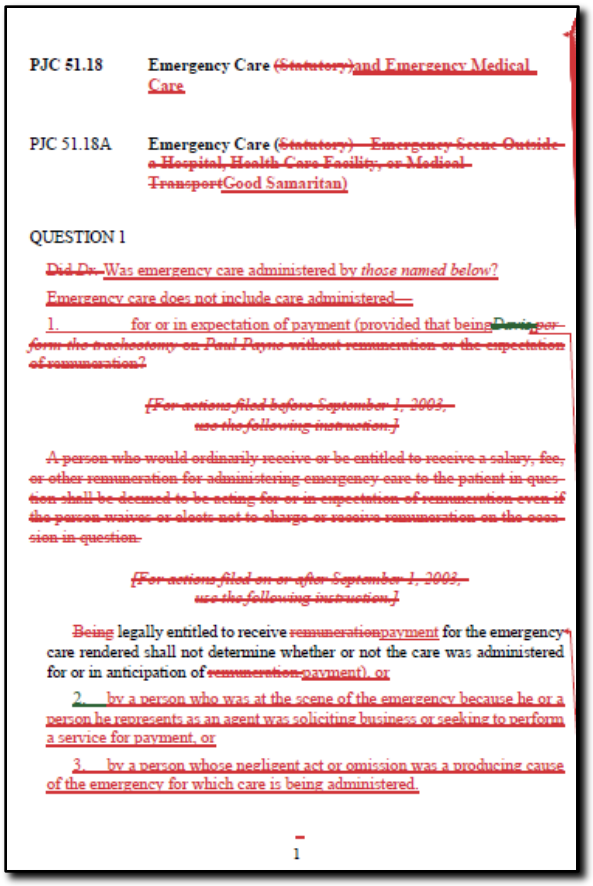
Damages—Total Destruction of Property (found in PJC—Negligence 31.3) to add a short discussion about salvage value.

IV. PJC—MALPRACTICE, PREMISES, AND PRODUCTS

Like the PJC Negligence Committee, the PJC Malpractice Committee took on several volume-specific issues, including emergency care, joint-and-several liability, damages for future medical care, and some of the predicates for avoiding the statutory caps on exemplary damages.

A. Emergency Care

First, the Malpractice Committee revised PJC—Malpractice 51.18, which addresses emergency care, to reflect new legislation clarifying when the willful-and-wanton standard applies. The PJC Malpractice Committee also renamed 51.18 as "Emergency Care and Emergency Medical Care" and split it into two subparts: 51.18A for "Emergency Care (Good Samaritan" and 51.18B for "Emergency Medical Care." Here are the changes to the questions and instructions for PJC—Malpractice 51.18A:



PJC 51.18 Emergency Care ~~(Statutory)~~and Emergency Medical Care

PJC 51.18A Emergency Care ~~(Statutory) Emergency Scene Outside a Hospital, Health Care Facility, or Medical Transport~~(Good Samaritan)

QUESTION 1

~~Did Dr.~~ Was emergency care administered by *those named below*?

Emergency care does not include care administered—

1. for or in expectation of payment (provided that being ~~Davis per-form the tracheotomy on Paul Payne without remuneration or the expectation of remuneration~~?

~~*[For actions filed before September 1, 2003, use the following instruction.]*~~

~~A person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering emergency care to the patient in question shall be deemed to be acting for or in expectation of remuneration even if the person waives or elects not to charge or receive remuneration on the occasion in question.~~

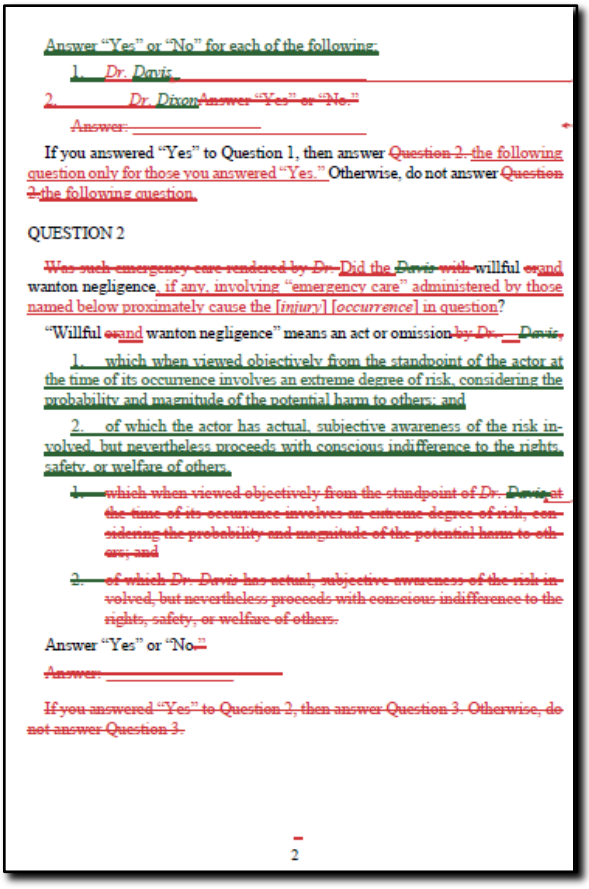
~~*[For actions filed on or after September 1, 2003, use the following instruction.]*~~

~~Being~~ legally entitled to receive ~~remuneration~~payment for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of ~~remuneration~~ payment), or

2. by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for payment, or

3. by a person whose negligent act or omission was a producing cause of the emergency for which care is being administered.

1



Answer "Yes" or "No" for each of the following:

1. *Dr. Davis* _____

2. *Dr. Dixon*~~Answer "Yes" or "No."~~

~~Answer:~~ _____

If you answered "Yes" to Question 1, then answer ~~Question 2~~ the following question only for those you answered "Yes." Otherwise, do not answer ~~Question 2~~ the following question.

QUESTION 2

~~Was such emergency care rendered by *Dr.*~~ Did the ~~*Davis* with~~ willful ~~or~~and wanton negligence, if any, involving "emergency care" administered by those named below proximately cause the *[injury]* *[occurrence]* in question?

"Willful ~~or~~and wanton negligence" means an act or omission ~~by *Dr.* *Davis*~~,

1. which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

2. of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

~~1. which when viewed objectively from the standpoint of *Dr. Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and~~

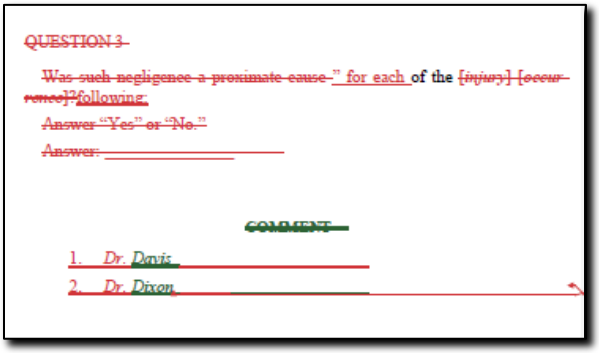
~~2. of which *Dr. Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.~~

Answer "Yes" or "No."

~~Answer:~~ _____

~~If you answered "Yes" to Question 2, then answer Question 3. Otherwise, do not answer Question 3.~~

2



~~QUESTION 3~~

~~Was such negligence a proximate cause~~ " for each of the ~~*[injury]* *[occurrence]*~~? following:

~~Answer "Yes" or "No."~~

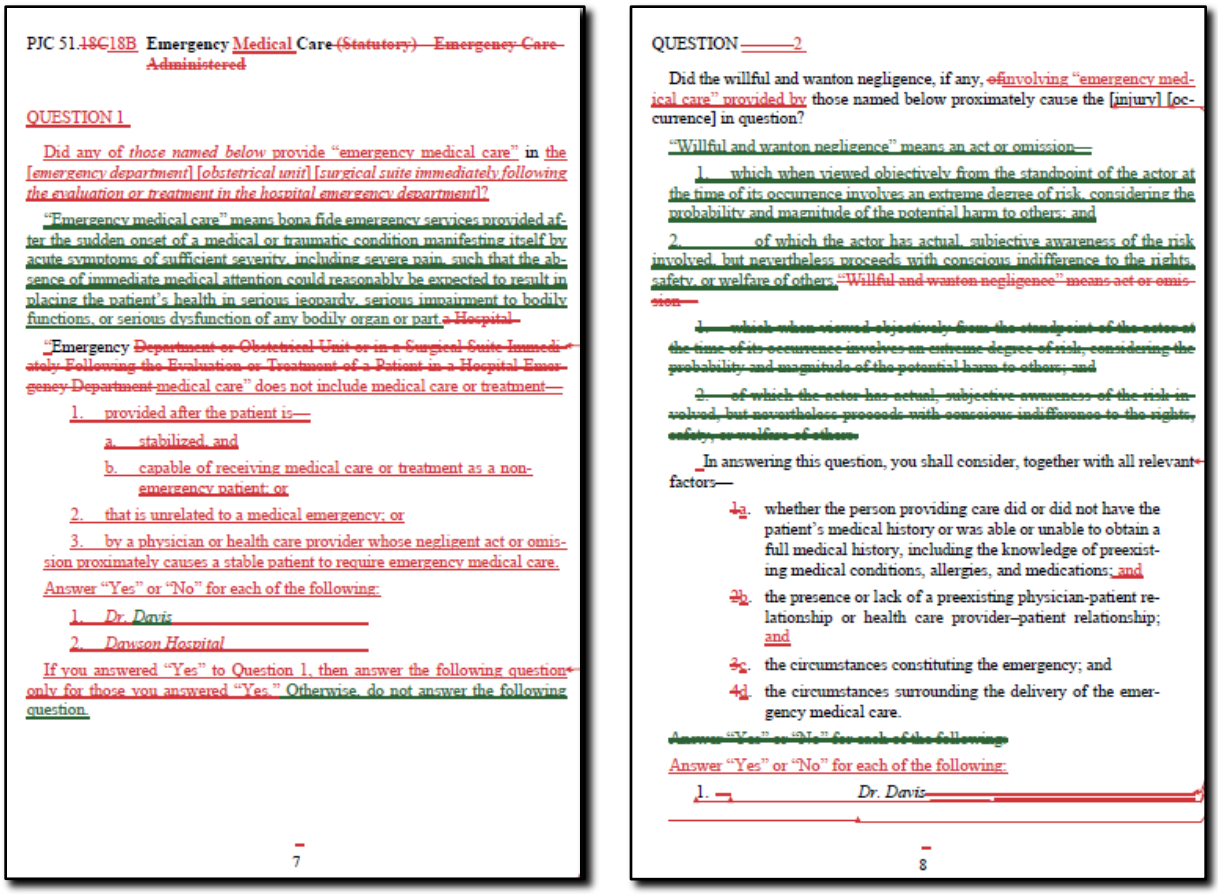
~~Answer:~~ _____

~~COMMENT~~

1. *Dr. Davis* _____

2. *Dr. Dixon* _____

PJC—Malpractice 51.18A. And here are the changes to the questions and instructions in PJC—Malpractice 51.18B:



PJC 51.~~18C~~18B Emergency Medical Care ~~(Statutory) Emergency Care Administered~~

QUESTION 1

Did any of *those named below* provide "emergency medical care" in the *[emergency department] [obstetrical unit] [surgical suite immediately following the evaluation or treatment in the hospital emergency department]*?

"Emergency medical care" means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. ~~a Hospital~~

"Emergency ~~Department or Obstetrical Unit or in a Surgical Suite Immediately Following the Evaluation or Treatment of a Patient in a Hospital Emergency Department~~ medical care" does not include medical care or treatment—

1. provided after the patient is—
   a. stabilized, and
   b. capable of receiving medical care or treatment as a non-emergency patient; or
2. that is unrelated to a medical emergency; or
3. by a physician or health care provider whose negligent act or omission proximately causes a stable patient to require emergency medical care.

Answer "Yes" or "No" for each of the following:

1. *Dr. Davis* _____
2. *Dawson Hospital* _____

If you answered "Yes" to Question 1, then answer the following question only for those you answered "Yes." Otherwise, do not answer the following question.

7

QUESTION ____2

Did the willful and wanton negligence, if any, ~~of~~involving "emergency medical care" provided by those named below proximately cause the [injury] [occurrence] in question?

"Willful and wanton negligence" means an act or omission—

1. which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. ~~"Willful and wanton negligence" means act or omission—~~

~~1. which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and~~

~~2. of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.~~

In answering this question, you shall consider, together with all relevant factors—

~~1~~a. whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications; and

~~2~~b. the presence or lack of a preexisting physician-patient relationship or health care provider–patient relationship; and

~~3~~c. the circumstances constituting the emergency; and

~~4~~d. the circumstances surrounding the delivery of the emergency medical care.

~~Answer "Yes" or "No" for each of the following:~~

Answer "Yes" or "No" for each of the following:

1. ~~_____~~ *Dr. Davis* _____

8

PJC—Malpractice 51.18B.

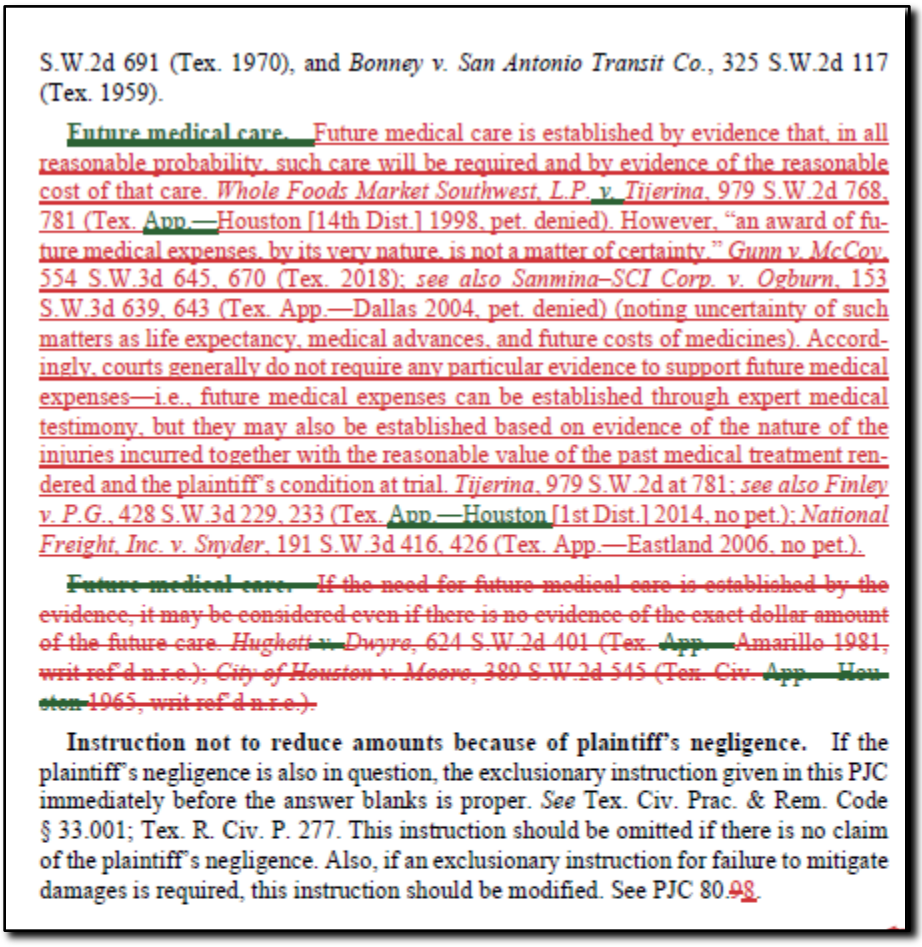
B. Joint-and-Several Liability

Turning to joint-and-several liability, the Malpractice Committee revised the charge for capital murder as a ground for joint-and-several liability found in PJC—Malpractice 72.3 to include an additional category of capital murder added to TEX. PENAL CODE § 19.03—murdering an individual ten years of age or older but younger than fifteen years of age.

C. Future Medical Care

Next, the Malpractice Committee updated the comments for personal injury damages in PJC—Malpractice 80.3 to clarify evidentiary requirements for future medical

care.



S.W.2d 691 (Tex. 1970), and *Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117 (Tex. 1959).

Future medical care. Future medical care is established by evidence that, in all reasonable probability, such care will be required and by evidence of the reasonable cost of that care. *Whole Foods Market Southwest, L.P. v. Tijerina*, 979 S.W.2d 768, 781 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). However, "an award of future medical expenses, by its very nature, is not a matter of certainty." *Gunn v. McCoy*, 554 S.W.3d 645, 670 (Tex. 2018); *see also Sanmina–SCI Corp. v. Ogburn*, 153 S.W.3d 639, 643 (Tex. App.—Dallas 2004, pet. denied) (noting uncertainty of such matters as life expectancy, medical advances, and future costs of medicines). Accordingly, courts generally do not require any particular evidence to support future medical expenses—i.e., future medical expenses can be established through expert medical testimony, but they may also be established based on evidence of the nature of the injuries incurred together with the reasonable value of the past medical treatment rendered and the plaintiff's condition at trial. *Tijerina*, 979 S.W.2d at 781; *see also Finley v. P.G.*, 428 S.W.3d 229, 233 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *National Freight, Inc. v. Snyder*, 191 S.W.3d 416, 426 (Tex. App.—Eastland 2006, no pet.).

~~**Future medical care.** If the need for future medical care is established by the evidence, it may be considered even if there is no evidence of the exact dollar amount of the future care. *Hughett v. Dwyre*, 624 S.W.2d 401 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); *City of Houston v. Moore*, 389 S.W.2d 545 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).~~

Instruction not to reduce amounts because of plaintiff's negligence. If the plaintiff's negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the plaintiff's negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. See PJC 80.~~9~~8.

PJC—Malpractice 80.3 cmt.

D. Exemplary Damages

Finally, the Malpractice Committee revised the instructions in several of the questions for avoiding the statutory cap on exemplary damages to clarify the required state of mind. *See* PJC—Malpractice 85.5-.8, 85.11A-C.

For example, in PJC—Malpractice 85.5 and 85.6—which provide charges for murder and capital murder as grounds to disregard the exemplary-damages cap—the revised comments add:

> **Culpable mental state.** Capital murder and murder are result-of-conduct offenses, which means the culpable mental state relates to the result of the conduct, i.e., the causing of the death. *Roberts v. State*, 273 S.W.3d 322, 328–29 (Tex. Crim. App. 2008); *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (citing *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994)).

PJC—Malpractice 85.5-.6. The 2020 PJC Malpractice volume added similar comments tailored to aggravated kidnapping,[2] aggravated assault,[3] injury to a child,[4] injury to an elderly individual,[5] and injury to a disabled individual.[6]

V. PJC—BUSINESS, CONSUMER, INSURANCE, AND EMPLOYMENT

The PJC Business Committee was also busy. The revisions in the 2020 edition of the PJC—Business volume addressed areas as diverse as fraud, employment claims, the doctrine of piercing the corporate veil, defamation, and damages.

A. Fraud

The Business Committee made two changes related to claims for fraud.

1. Common-law fraud

First, the Business Committee revised the reliance element in the instruction for common-law fraud found in PJC—Business 105.2 to address the potential for instructing the jury that the plaintiff's reliance on a misrepresentation must be justifiable. At first glance, the revised instruction looks simple:

[2] PJC—Malpractice 85.7.
[3] PJC—Malpractice 85.8.
[4] PJC—Malpractice 85.11A.
[5] PJC—Malpractice 85.11B.
[6] PJC—Malpractice 85.11C.

PJC 105.2 **Instruction on Common-Law Fraud—Intentional Misrepresentation**

Fraud occurs when—

1. a party makes a material misrepresentation, and

~~and~~

2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party [*justifiably*] relies on the misrepresentation and thereby suffers injury.

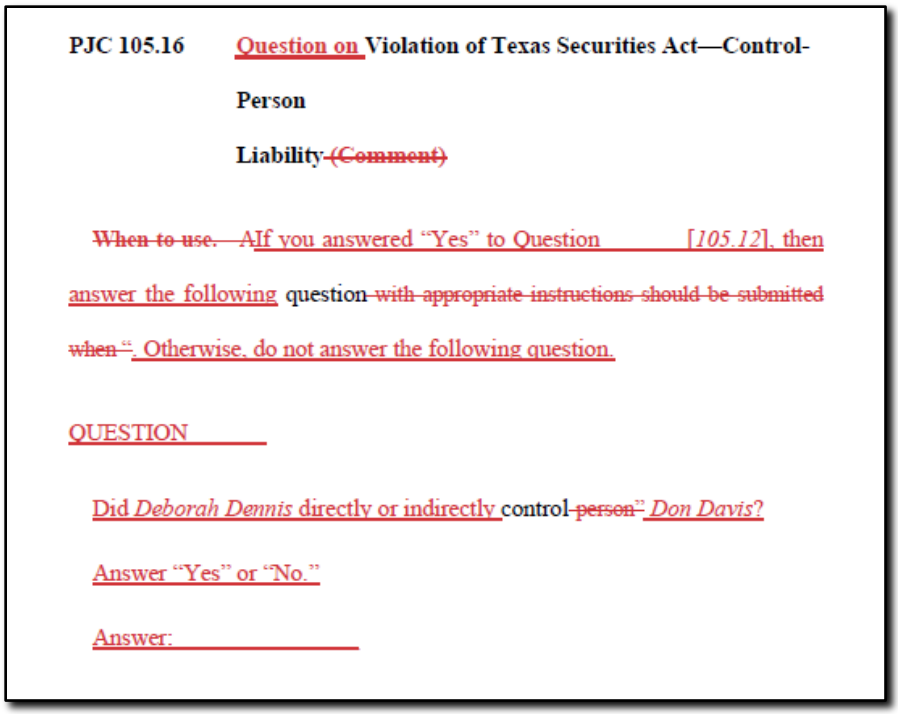
"Misrepresentation" means—

[Insert appropriate definitions from PJC 105.3A–105.3E.]

PJC—Business 105.2. But the members of the PJC Business Committee devoted a great deal of work and engaged in much debate in the process that led to this revision. To explain it, the Business Committee also extensively revised the comments to PJC—Business 105.2 to discuss whether case law requires that a plaintiff's reliance be justifiable. When drafting jury charges for common-law fraud, attorneys and judges should review the revised comments concerning whether reliance must be justified.

2. Control-person liability under the Texas Securities Act

Next, the PJC Business Committee revised PJC—Business 105.16. Previously, PJC—Business 105.16 only provided a comment on control-person liability under the Texas Securities Act. The 2020 edition adds a question:



PJC 105.16 Question on Violation of Texas Securities Act—Control-Person Liability ~~(Comment)~~

~~When to use.~~ ~~A~~If you answered "Yes" to Question [105.12], then answer the following question ~~with appropriate instructions should be submitted when~~ ". Otherwise, do not answer the following question.

QUESTION

Did *Deborah Dennis* directly or indirectly control ~~person~~ *Don Davis*?

Answer "Yes" or "No."

Answer:

PJC—Business 105.16. It also updates the comments. *See id.* cmt.

B. Employment

Turning to employment claims, the Business Committee updated questions, instructions, and comments for several employment-law issues.

1. The "cat's paw" theory

First, the Committee added discussions of the so-called "cat's paw" theory of liability to the comments in PJC—Business 107.4-.6, 107.9, 107.11A. The comments vary in depth depending on the particular charge, but one of the more extensive discussions is found in PJC—Business 107.6 ("Question and Instruction on Unlawful Employment Practices"):

> **Imputing bias of someone other than final decisionmaker to employer ("cat's paw theory").** Discriminatory animus by a person other than the decisionmaker may be imputed to an employer if evidence indicates that the person in question possessed leverage or exerted influence over the

decisionmaker. *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 593 (Tex. 2008) (citing *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226 (5th Cir. 2000)). *See, e.g.*, *Williams-Pyro, Inc. v. Barbour*, 408 S.W.3d 467, 480 (Tex. App.—El Paso 2013, pet. denied) (proper to impute ageist bias of production manager to employer based on evidence he influenced ultimate decision); *Gonzalez v. Champion Technologies, Inc.*, 384 S.W.3d 462, 474 (Tex. App.—Houston [14th Dist.] 2012, re'hrng overruled) ("[I]t is not outside the realm of possibility that Tarver, as head of the maintenance department, could have had as much influence over the firing of a member of that department as he claimed to have." (citations omitted)). *Cf. Staub v. Proctor*, 562 U.S. 411, 419–20, 131 S. Ct. 1186, 1192–93 (2011) (rejecting suggestion that discriminatory bias must be shown for ultimate decisionmaker and allowing for possibility that bias by other supervisors who influenced the decision could be a proximate cause of an adverse employment action) (USERRA case); *Tawil v. Cook Children's Healthcare System*, 582 S.W.3d 669, 689 (Tex. App.—Fort Worth 2019, no pet.) (workers' compensation retaliatory discharge case).

If the "cat's paw theory" of liability is properly invoked, the following instruction may be given as part of the definition of "motivating factor":

> You may find that [*race, color, disability, religion, sex, national origin, or age*] was a motivating factor in *Don Davis*'s decision to [*fail or refuse to hire, discharge, or (describe other adverse employment action)*] *Paul Payne* even if there is no evidence of discriminatory bias on the part of *Don Davis* if *Paul Payne* proves that another individual exhibited such discriminatory bias and had leverage or exerted influence over *Don Davis*'s decision to [*fail or refuse to hire, discharge, or (describe other adverse employment action)*] *Paul Payne*. *Paul Payne* is not required to prove that *Don Davis* knew or should have known of the other individual's discriminatory bias.

PJC—Business 107.6 cmt.; *see also* PJC—Business 107.4-.5, 107.9, 107.11A cmts.

2. Discrimination on the basis of sex

Second, the Committee updated the discussion of sex discrimination in PJC—Business 107.6 to include transgender status or sexual orientation to align with the recent U.S. Supreme Court decision in *Bostock v. Clayton County*, ___ U.S. ___, 140 S. Ct. 1731, 1747 (2020).

3. Disability discrimination

Third, the Business Committee updated the question, instruction, and comment on disability in PJC—Business 107.11, splitting 107.11 into a provision focused on actual disability (PJC—Business 107.11A) and one focused on "regarded as" disability (PJC—Business 107.11B).

C. Chapter 108: Piercing the Corporate Veil

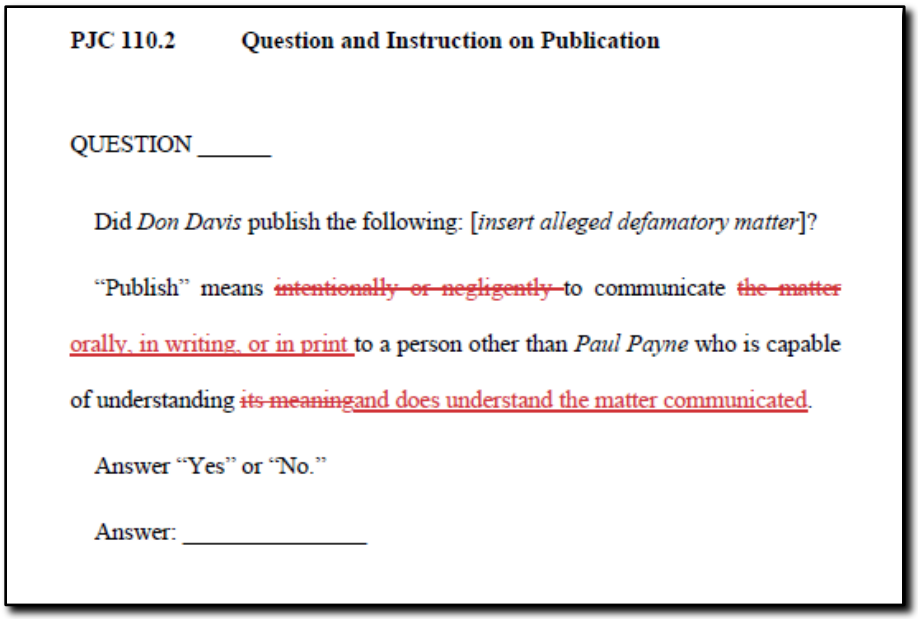
Fourth, the Business Committee substantially revised Chapter 108, which addresses piercing the corporate veil. The Committee reorganized the chapter to better differentiate between situations in which piercing is governed by statute and situations in which it is governed by the common law. In alignment with this framework, Chapter 108 now includes instructions for either statutory or common-law piercing under each charge. Revised Chapter 108 also updates the commentary throughout.

D. Chapter 110: Defamation, Business Disparagement, and Invasion of Privacy

As with Chapter 108, the Business Committee also revised Chapter 110, which addresses defamation, business, disparagement, and invasion of privacy. The Committee revised the chapter to improve consistency and clarity across comments and to reflect new case law, particularly the Texas Supreme Court's decision in *Dallas Morning News v. Tatum*, 554 S.W.3d 614 (Tex. 2018). The revisions also led to the deletion of former PJC—Business 110.9-.14.

1. "Publish"

More particularly, the Committee revised the definition of "publish" in PJC—Business 110.2:



PJC 110.2 Question and Instruction on Publication

QUESTION _____

Did *Don Davis* publish the following: [*insert alleged defamatory matter*]?

"Publish" means ~~intentionally or negligently~~ to communicate ~~the matter~~ orally, in writing, or in print to a person other than *Paul Payne* who is capable of understanding ~~its meaning~~and does understand the matter communicated.

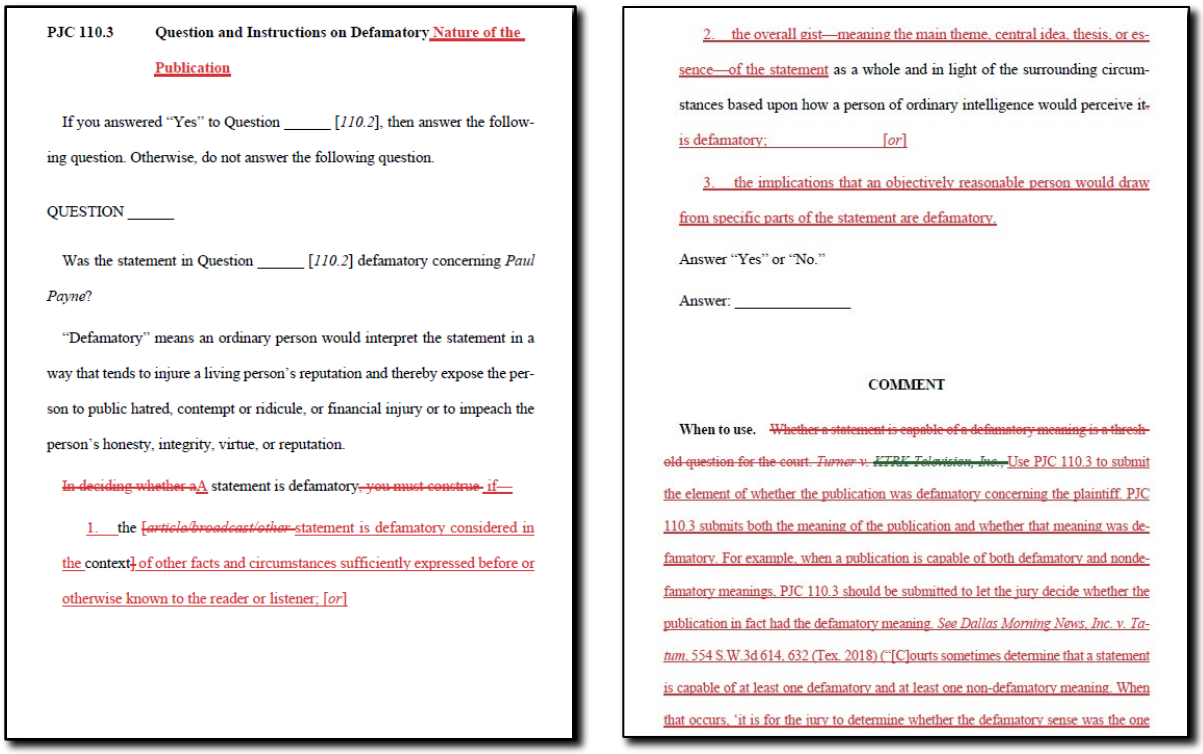
Answer "Yes" or "No."

Answer: _____

PJC—Business 110.2.

2. "Defamatory" and "falsity"

The Committee also revised the instructions and substantially updated the comments for "defamatory" found in PJC—Business 110.3 and "falsity" in PJC—Business 110.4. Here are the changes to the instructions for "defamatory" in PJC—Business 110.3:



PJC 110.3 Question and Instructions on Defamatory Nature of the Publication

If you answered "Yes" to Question _____ [*110.2*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the statement in Question _____ [*110.2*] defamatory concerning *Paul Payne*?

"Defamatory" means an ordinary person would interpret the statement in a way that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach the person's honesty, integrity, virtue, or reputation.

~~In deciding whether a~~A statement is defamatory~~, you must construe~~ if—

1. the [~~article/broadcast/other~~ statement is defamatory considered in the context~~]~~ of other facts and circumstances sufficiently expressed before or otherwise known to the reader or listener; [*or*]

2. the overall gist—meaning the main theme, central idea, thesis, or essence—of the statement as a whole and in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it~~.~~ is defamatory; [*or*]

3. the implications that an objectively reasonable person would draw from specific parts of the statement are defamatory.

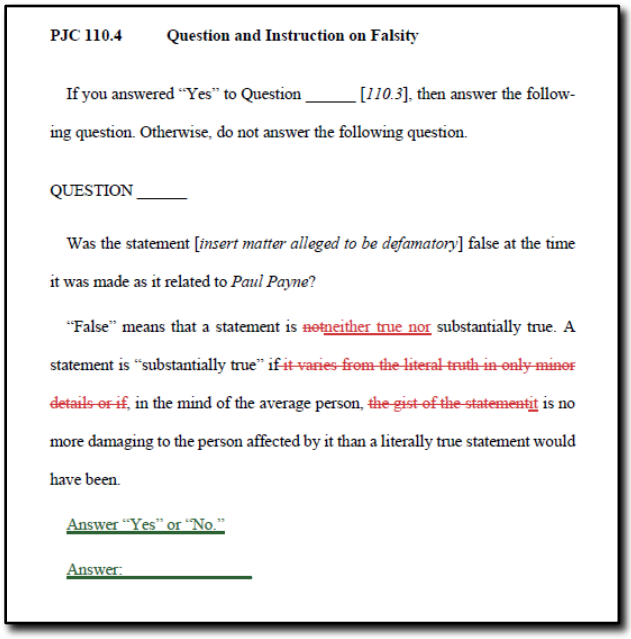
Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. ~~Whether a statement is capable of a defamatory meaning is a threshold question for the court. *Turner v. KTRK Television, Inc.*,~~ Use PJC 110.3 to submit the element of whether the publication was defamatory concerning the plaintiff. PJC 110.3 submits both the meaning of the publication and whether that meaning was defamatory. For example, when a publication is capable of both defamatory and nondefamatory meanings, PJC 110.3 should be submitted to let the jury decide whether the publication in fact had the defamatory meaning. *See Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 632 (Tex. 2018) ("[C]ourts sometimes determine that a statement is capable of at least one defamatory and at least one non-defamatory meaning. When that occurs, 'it is for the jury to determine whether the defamatory sense was the one

PJC—Business 110.3. And here are the changes to the instructions for "falsity" in PJC—Business 110.4:



PJC 110.4 Question and Instruction on Falsity

If you answered "Yes" to Question _____ [*110.3*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the statement [*insert matter alleged to be defamatory*] false at the time it was made as it related to *Paul Payne*?

"False" means that a statement is ~~not~~neither true nor substantially true. A statement is "substantially true" if ~~it varies from the literal truth in only minor details or if~~, in the mind of the average person, ~~the gist of the statement~~it is no more damaging to the person affected by it than a literally true statement would have been.

Answer "Yes" or "No."

Answer: _____

PJC—Business 110.4.

3. Satire or parody

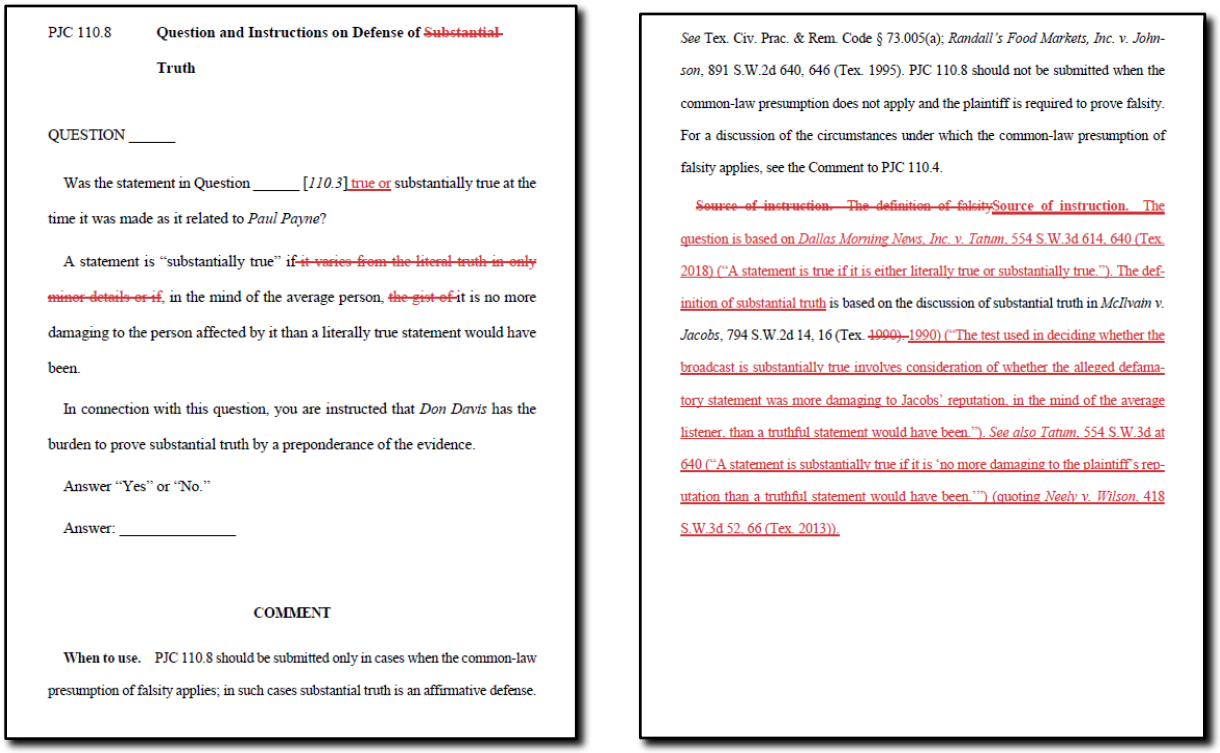
Moreover, the Committee added a comment (as well as an alternate question and instruction) for satire or parody in PJC—Business 110.5-.6.

> **Satire or parody.** By nature of a satire or parody, the defendant generally knows that the statements in the satire or parody are false. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004). But satire and parody are nonetheless protected and may not be the basis of a defamation claim when the statements in the satire or parody, taken as a whole, would not be reasonably understood as describing actual facts. *See* PJC 110.3 Comment. When a satire or parody is reasonably understood as describing actual facts, the fault inquiry is altered to ask not whether the defendant had the requisite degree of fault with respect to the falsity and defamatory nature of the publication, but whether the defendant had the requisite degree of fault with respect to the publication's being taken as describing actual facts. *See Isaacks*, 146 S.W.3d at 163 (in context of actual malice fault standard).
>
> When the allegedly defamatory publication is a satire or parody, substitute the following question:
>
> QUESTION _____
>
> Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the [*article/broadcast/other context*] contained in Question _____ [*110.2 or 110.3*] would be reasonably understood by a person of ordinary intelligence as stating actual fact?
>
> "Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.
>
> Answer "Yes" or "No."
>
> Answer: _____

PJC—Business 110.5 cmt. (The Comment for PJC—Business 110.6—which covers actual malice—has a slightly different alternate question based on the higher burden of persuasion—clear and convincing evidence.)

4. Truth

Finally, the Business Committee revised the question, instruction, and comment on the issue of truth in PJC—Business 110.8:



PJC 110.8 **Question and Instructions on Defense of ~~Substantial~~ Truth**

QUESTION _____

Was the statement in Question _____ [*110.3*] true or substantially true at the time it was made as it related to *Paul Payne*?

A statement is "substantially true" if ~~it varies from the literal truth in only minor details or if~~, in the mind of the average person, ~~the gist of~~ it is no more damaging to the person affected by it than a literally true statement would have been.

In connection with this question, you are instructed that *Don Davis* has the burden to prove substantial truth by a preponderance of the evidence.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.8 should be submitted only in cases when the common-law presumption of falsity applies; in such cases substantial truth is an affirmative defense.

See Tex. Civ. Prac. & Rem. Code § 73.005(a); *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). PJC 110.8 should not be submitted when the common-law presumption does not apply and the plaintiff is required to prove falsity. For a discussion of the circumstances under which the common-law presumption of falsity applies, see the Comment to PJC 110.4.

~~**Source of instruction. The definition of falsity**~~**Source of instruction.** The question is based on *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 640 (Tex. 2018) ("A statement is true if it is either literally true or substantially true."). The definition of substantial truth is based on the discussion of substantial truth in *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. ~~1990).~~ 1990) ("The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to Jacobs' reputation, in the mind of the average listener, than a truthful statement would have been."). *See also Tatum*, 554 S.W.3d at 640 ("A statement is substantially true if it is 'no more damaging to the plaintiff's reputation than a truthful statement would have been.'") (quoting *Neely v. Wilson*, 418 S.W.3d 52, 66 (Tex. 2013)).

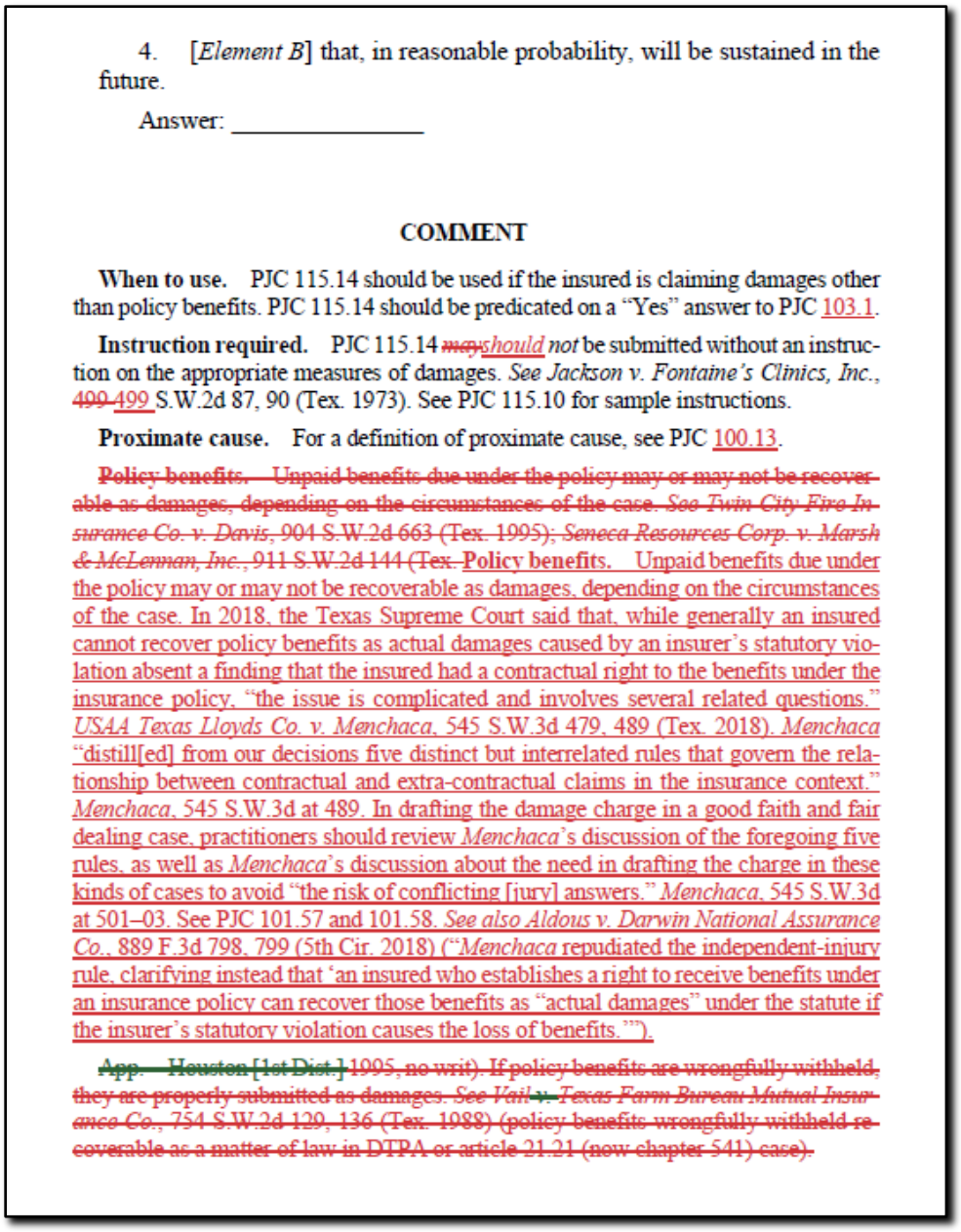
PJC—Business 110.8.

E. Damages

In addition to revising the liability matters described above, the PJC Business Committee also made some changes to certain damages charges.

1. Damages for the breach of the duty of good faith and fair dealing

First, in PJC—Business 115.14—which addresses actual damages for breach of the duty of good faith and fair dealing in insurance cases—the Committee revised the discussion in the comments on unpaid benefits:



4. [*Element B*] that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.14 should be used if the insured is claiming damages other than policy benefits. PJC 115.14 should be predicated on a "Yes" answer to PJC 103.1.

Instruction required. PJC 115.14 ~~may~~*should not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, ~~499~~ 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.10 for sample instructions.

Proximate cause. For a definition of proximate cause, see PJC 100.13.

~~**Policy benefits.** Unpaid benefits due under the policy may or may not be recoverable as damages, depending on the circumstances of the case. *See Twin City Fire Insurance Co. v. Davis*, 904 S.W.2d 663 (Tex. 1995); *Seneca Resources Corp. v. Marsh & McLennan, Inc.*, 911 S.W.2d 144 (Tex.~~ **Policy benefits.** Unpaid benefits due under the policy may or may not be recoverable as damages, depending on the circumstances of the case. In 2018, the Texas Supreme Court said that, while generally an insured cannot recover policy benefits as actual damages caused by an insurer's statutory violation absent a finding that the insured had a contractual right to the benefits under the insurance policy, "the issue is complicated and involves several related questions." *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2018). *Menchaca* "distill[ed] from our decisions five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims in the insurance context." *Menchaca*, 545 S.W.3d at 489. In drafting the damage charge in a good faith and fair dealing case, practitioners should review *Menchaca*'s discussion of the foregoing five rules, as well as *Menchaca*'s discussion about the need in drafting the charge in these kinds of cases to avoid "the risk of conflicting [jury] answers." *Menchaca*, 545 S.W.3d at 501–03. See PJC 101.57 and 101.58. *See also Aldous v. Darwin National Assurance Co.*, 889 F.3d 798, 799 (5th Cir. 2018) ("*Menchaca* repudiated the independent-injury rule, clarifying instead that 'an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation causes the loss of benefits.'").

~~App. — Houston [1st Dist.] 1995, no writ). If policy benefits are wrongfully withheld, they are properly submitted as damages. *See Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129, 136 (Tex. 1988) (policy benefits wrongfully withheld recoverable as a matter of law in DTPA or article 21.21 (now chapter 541) case).~~

PJC—Business 115.14 cmt.

2. Damages for misappropriation of trade secrets

Second, in PJC—Business 115.55—which provides a charge for actual damages for misappropriation of trade secrets—the Committee updated the comment in a variety of ways, including a short, new discussion of multiple damage remedies:

> **Multiple damage remedies.** The availability of multiple damage remedies in Tex. Civ. Prac. & Rem. Code § 134A.004 does not allow for a trial court to "cumulate them all in violation of the one-satisfaction rule." *TMRJ*, 540 S.W.3d at 209.

PJC—Business 115.55 cmt.

VI. PJC—OIL AND GAS

Like the other civil committees, the PJC Oil & Gas Committee made several revisions to the 2020 edition of PJC—Oil & Gas. The changes focused on the use of the surface estate, the accommodation doctrine, statutory waste, the duty of the executive, and certain items of damages.

A. Chapter 302: Improper Use of Real Property

In the chapter on improper use of real property, the PJC Oil & Gas Committee revised two existing charges and added two charges related to statutory waste.

1. Negligent use of the surface estate

First, in PJC—Oil & Gas 302.2, which addresses claims of unreasonable use of the surface estate, the Committee added a discussion of negligent use of the surface estate to the comments:

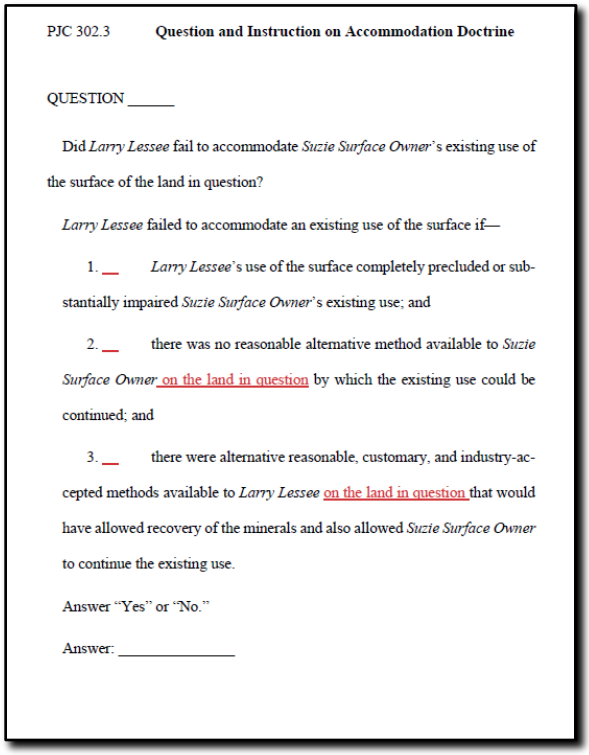
> **Negligent use of surface estate.** A claim may be based on negligent use of the surface, rather than unreasonable use of the surface. *Brown*, 344 S.W.2d at 865, 866 ("[I]f the lessee negligently and unnecessarily damages the lessor's land, either surface or subsurface, his liability to the lessor is no different from what it would be under the same circumstances to an adjoining landowner."); *see also Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 614 (Tex. 2016) (duty owed is "duty to do what a person of ordinary prudence in the same or similar circumstances would have done"); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) ("A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary."). For basic negligence questions, see the current edition of State

Bar of Texas, *Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation*, ch. 4.

PJC—Oil & Gas 302.2 cmt.

2. The accommodation doctrine

Second, the Committee revised the question and comment on the accommodation doctrine in PJC—Oil & Gas 302.3:



PJC 302.3 **Question and Instruction on Accommodation Doctrine**

QUESTION _____

Did *Larry Lessee* fail to accommodate *Suzie Surface Owner*'s existing use of the surface of the land in question?

Larry Lessee failed to accommodate an existing use of the surface if—

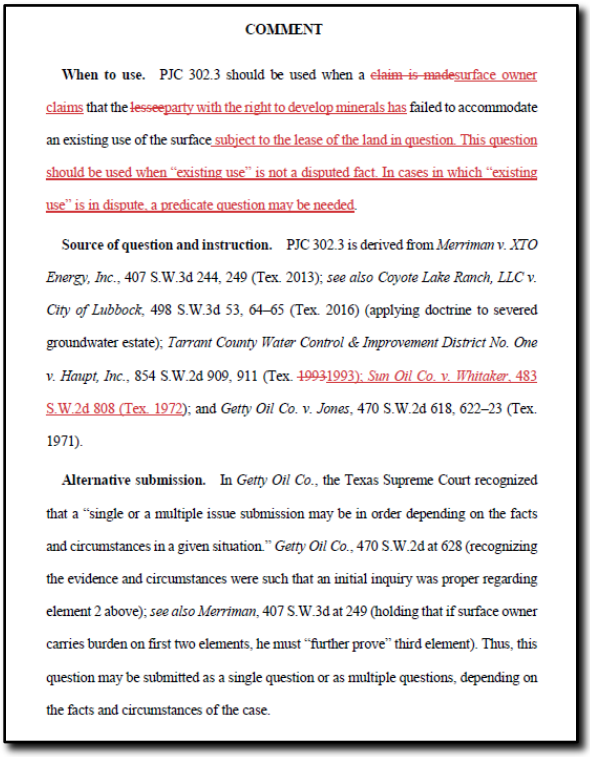
1. ___ *Larry Lessee*'s use of the surface completely precluded or substantially impaired *Suzie Surface Owner*'s existing use; and

2. ___ there was no reasonable alternative method available to *Suzie Surface Owner* on the land in question by which the existing use could be continued; and

3. ___ there were alternative reasonable, customary, and industry-accepted methods available to *Larry Lessee* on the land in question that would have allowed recovery of the minerals and also allowed *Suzie Surface Owner* to continue the existing use.

Answer "Yes" or "No."

Answer: _____



COMMENT

When to use. PJC 302.3 should be used when a ~~claim is made~~surface owner claims that the ~~lessee~~party with the right to develop minerals has failed to accommodate an existing use of the surface subject to the lease of the land in question. This question should be used when "existing use" is not a disputed fact. In cases in which "existing use" is in dispute, a predicate question may be needed.

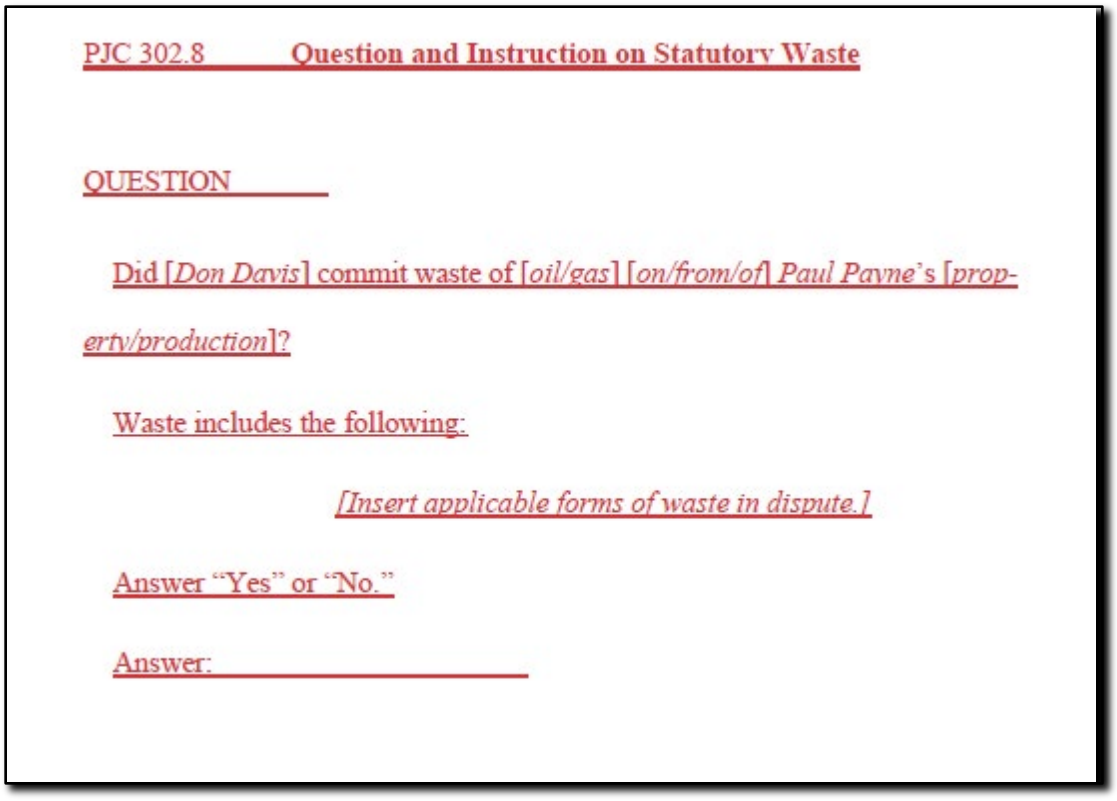
Source of question and instruction. PJC 302.3 is derived from *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *see also Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64–65 (Tex. 2016) (applying doctrine to severed groundwater estate); *Tarrant County Water Control & Improvement District No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. ~~1993~~1993); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); and *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622–23 (Tex. 1971).

Alternative submission. In *Getty Oil Co.*, the Texas Supreme Court recognized that a "single or a multiple issue submission may be in order depending on the facts and circumstances in a given situation." *Getty Oil Co.*, 470 S.W.2d at 628 (recognizing the evidence and circumstances were such that an initial inquiry was proper regarding element 2 above); *see also Merriman*, 407 S.W.3d at 249 (holding that if surface owner carries burden on first two elements, he must "further prove" third element). Thus, this question may be submitted as a single question or as multiple questions, depending on the facts and circumstances of the case.

PJC—Oil & Gas 302.3.

3. Statutory waste claims

Turning to new charges, the PJC Oil & Gas Committee added a question and instruction for claims for statutory waste in new PJC—Oil & Gas 302.8. The jury question and instruction are:



PJC 302.8 Question and Instruction on Statutory Waste

QUESTION

Did [*Don Davis*] commit waste of [*oil/gas*] [*on/from/of*] *Paul Payne*'s [*property/production*]?

Waste includes the following:

[Insert applicable forms of waste in dispute.]

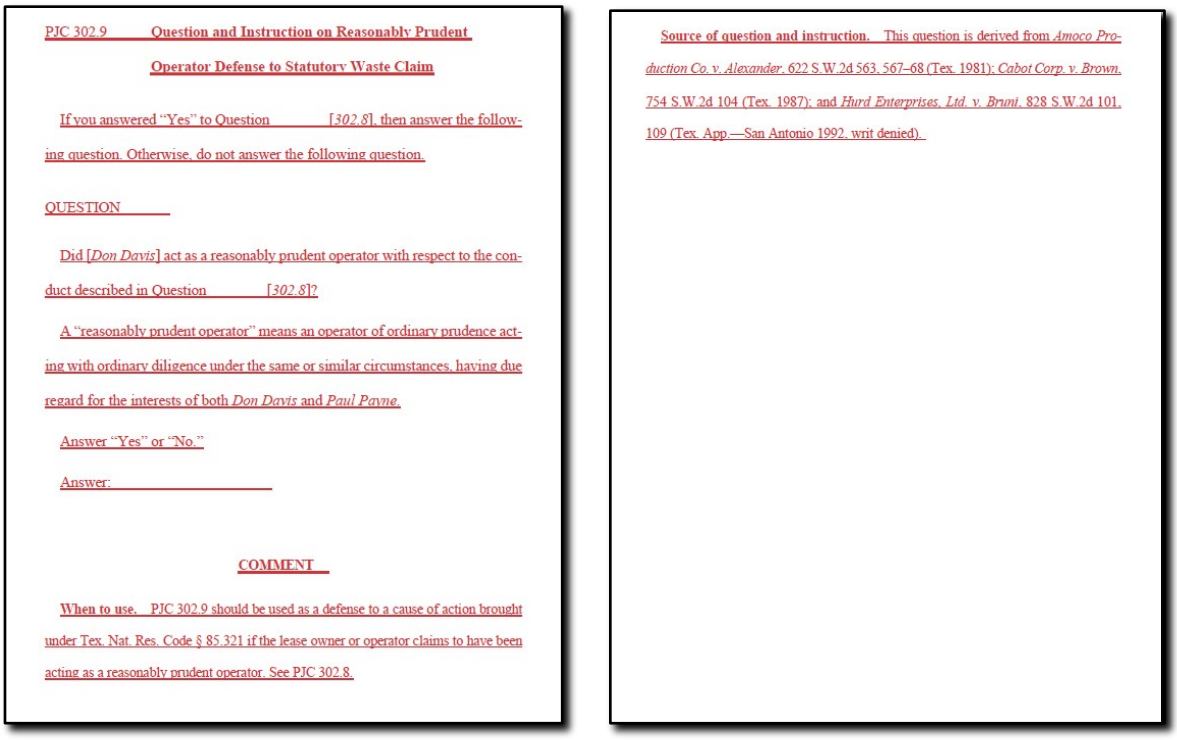
Answer "Yes" or "No."

Answer: _____

PJC—Oil & Gas 302.8. The Oil & Gas Committee also added an extensive comment to this new charge, which readers should review before using the new question and instruction.

4. The reasonably-prudent-operator defense

Relatedly, the Committee also added a new charge for the reasonably-prudent-operator defense to statutory waste claims in PJC—Oil & Gas 302.9:



PJC 302.9 **Question and Instruction on Reasonably Prudent Operator Defense to Statutory Waste Claim**

If you answered "Yes" to Question _____ [*302.8*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did [*Don Davis*] act as a reasonably prudent operator with respect to the conduct described in Question _____ [*302.8*]?

A "reasonably prudent operator" means an operator of ordinary prudence acting with ordinary diligence under the same or similar circumstances, having due regard for the interests of both *Don Davis* and *Paul Payne*.

Answer "Yes" or "No."

Answer: _____

COMMENT

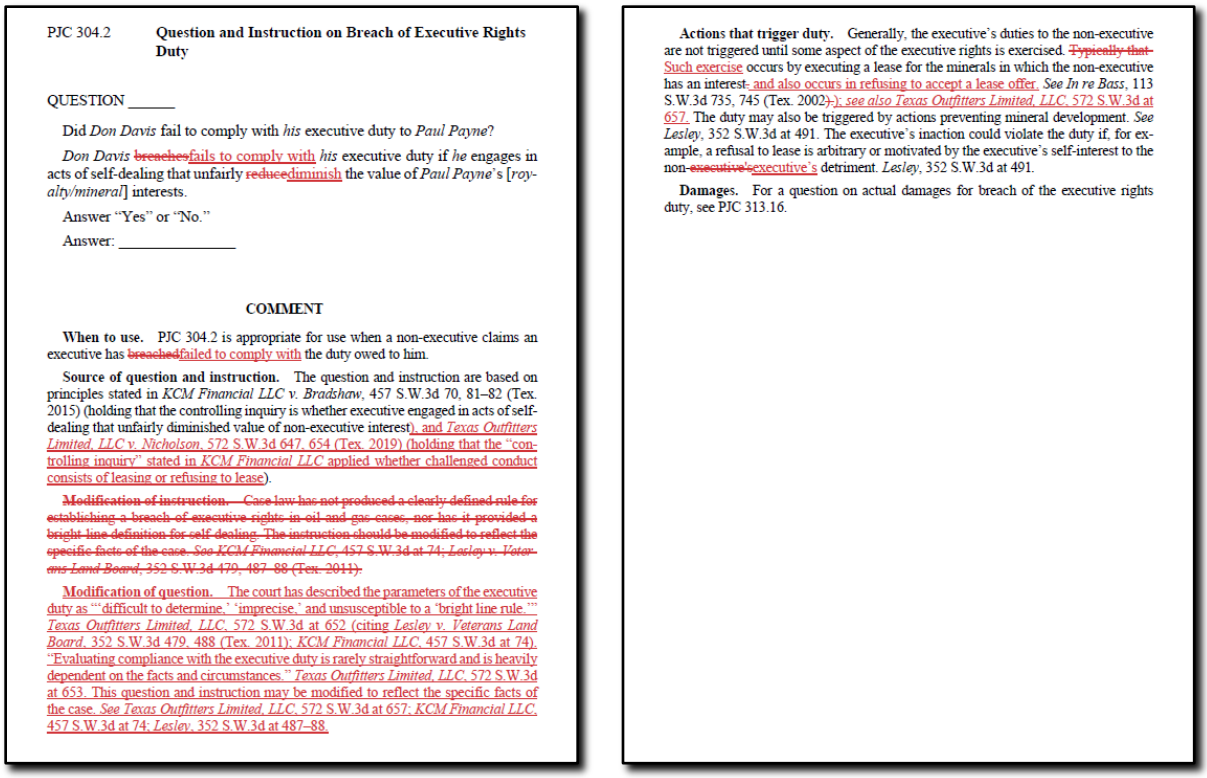
When to use. PJC 302.9 should be used as a defense to a cause of action brought under Tex. Nat. Res. Code § 85.321 if the lease owner or operator claims to have been acting as a reasonably prudent operator. See PJC 302.8.

Source of question and instruction. This question is derived from *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 567–68 (Tex. 1981); *Cabot Corp. v. Brown*, 754 S.W.2d 104 (Tex. 1987); and *Hurd Enterprises, Ltd. v. Bruni*, 828 S.W.2d 101, 109 (Tex. App.—San Antonio 1992, writ denied).

PJC—Oil & Gas 302.9

B. Executive Rights

Chapter 304 of the PJC—Oil & Gas volume addresses claims for breach of the duty of the executive. In the 2020 edition, the Oil & Gas Committee revised the discussion of the executive's duty in PJC—Oil & Gas 304.1 and revised the question and comment for breach of the executive's duty in PJC—Oil & Gas 304.2. Readers should review the revised discussion in PJC 304.1. The revised question and comment in PJC—Oil & Gas 304.2 is:



PJC 304.2 **Question and Instruction on Breach of Executive Rights Duty**

QUESTION _____

Did *Don Davis* fail to comply with *his* executive duty to *Paul Payne*?

Don Davis ~~breaches~~fails to comply with *his* executive duty if *he* engages in acts of self-dealing that unfairly ~~reduce~~diminish the value of *Paul Payne*'s [*royalty/mineral*] interests.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 304.2 is appropriate for use when a non-executive claims an executive has ~~breached~~failed to comply with the duty owed to him.

Source of question and instruction. The question and instruction are based on principles stated in *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 81–82 (Tex. 2015) (holding that the controlling inquiry is whether executive engaged in acts of self-dealing that unfairly diminished value of non-executive interest), and *Texas Outfitters Limited, LLC v. Nicholson*, 572 S.W.3d 647, 654 (Tex. 2019) (holding that the "controlling inquiry" stated in *KCM Financial LLC* applied whether challenged conduct consists of leasing or refusing to lease).

~~**Modification of instruction.** Case law has not produced a clearly defined rule for establishing a breach of executive rights in oil and gas cases, nor has it provided a bright line definition for self-dealing. The instruction should be modified to reflect the specific facts of the case. *See KCM Financial LLC*, 457 S.W.3d at 74; *Lesley v. Veterans Land Board*, 352 S.W.3d 479, 487–88 (Tex. 2011).~~

Modification of question. The court has described the parameters of the executive duty as "'difficult to determine,' 'imprecise,' and unsusceptible to a 'bright line rule.'" *Texas Outfitters Limited, LLC*, 572 S.W.3d at 652 (citing *Lesley v. Veterans Land Board*, 352 S.W.3d 479, 488 (Tex. 2011); *KCM Financial LLC*, 457 S.W.3d at 74). "Evaluating compliance with the executive duty is rarely straightforward and is heavily dependent on the facts and circumstances." *Texas Outfitters Limited, LLC*, 572 S.W.3d at 653. This question and instruction may be modified to reflect the specific facts of the case. *See Texas Outfitters Limited, LLC*, 572 S.W.3d at 657; *KCM Financial LLC*, 457 S.W.3d at 74; *Lesley*, 352 S.W.3d at 487–88.

Actions that trigger duty. Generally, the executive's duties to the non-executive are not triggered until some aspect of the executive rights is exercised. ~~Typically that~~ Such exercise occurs by executing a lease for the minerals in which the non-executive has an interest~~.~~ and also occurs in refusing to accept a lease offer. *See In re Bass*, 113 S.W.3d 735, 745 (Tex. 2002~~).~~); *see also Texas Outfitters Limited, LLC*, 572 S.W.3d at 657. The duty may also be triggered by actions preventing mineral development. *See Lesley*, 352 S.W.3d at 491. The executive's inaction could violate the duty if, for example, a refusal to lease is arbitrary or motivated by the executive's self-interest to the non-~~executive's~~executive's detriment. *Lesley*, 352 S.W.3d at 491.

Damages. For a question on actual damages for breach of the executive rights duty, see PJC 313.16.

PJC—Oil & Gs 304.2.

C. Damages

Finally, the PJC Oil & Gas Committee updated two charges related to damages.

1. Physical injury to real property.

First, the Committee updated the discussion of recoverable damages for claims involving physical injury to real property in the comments to PJC—Oil & Gas 313.5.

2. The intrinsic value of trees.

Second, in the charge for diminution of market value found in PJC—Oil & Gas 313.8, the Committee revised the comments to suggest a potential question and instruction on the intrinsic value of trees.

VII. PJC—FAMILY AND PROBATE

Finally, unlike the other civil PJC committees, the PJC Family & Probate

Committee published the hardcopy of its 2020 edition before last year's Conference on State and Federal Appeals. But because of some amendments to the Family Code and Rule 277, the Committee published online a limited set of revisions to the electronic version of the PJC—Family & Probate volume.

A. "Decreed" Changed to "Granted"

As an initial matter, to clarify jury instructions throughout the PJC—Family volume, the PJC Family Committee revised the volume to replace "decreed" with "granted."

B. Rights of Parents Appointed Conservators

Turning to more specific changes, the Family Committee revised several instructions on rights of parents appointed conservators for suits affecting the parent-child relationship to reflect revisions to the Texas Family Code. *See* PJC—Family 215.6, 215.11-.12. In PJC—Family 215.6, the Committee revised the description of the right to attend school activities to expressly include school lunches, performances, and field trips. As for PJC—Family 215.11-.12, which provide instructions for sole managing conservators and nonparent managing conservators, the Committee added an additional right to the list of managing conservators' rights and duties: "The right to apply for a passport for the child, renew the child's passport, and maintain possession of the child's passport." PJC—Family 215.11-.12.

C. Updates to Conform to Amended Rule 277

Finally, to align with recent amendments to Tex. R. Civ. P. 277, the Family Committee revised PJC—Family 218.1A-B, 218.2B, 218.3B, 218.3C to provide for separate jury questions for each parent and each child on each individual statutory ground

for termination of the parent-child relationship, as well as whether termination is in the best interests of the child.

VIII. CONCLUSION.

As this discussion shows, the various PJC committees made numerous substantial changes to the civil PJC volumes over the last year. The members of these committees invested substantial time and energy working to stay abreast of the law and improve the Texas Pattern Jury Charges. And they continue to do so. While the 2020 editions incorporate several updates to a variety of charges, the various PJC committees have other ongoing projects that have not reached completion. The committees continue to work on these other projects with the goal of having them ready for the 2022 editions. Stay tuned!