probably waived your right to a jury trial. *Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, 2015 Tex. App. LEXIS 3209, 14-16 (Tex. App.—Dallas Apr. 1, 2015, pet. denied).

The same waiver of a previously invoked demand for a jury trial can happen with regard to a claim for attorney's fees under 42 U.S.C. §§1983, 1988. *Jefferson County v. Ha Penny Nguyen*, 2015 Tex. App. LEXIS 8052, *74-75 (Tex. App.—Beaumont July 31, 2015). So if you intend to have the jury determine attorney's fees, and the other side does not ask the jury to find her fees, remember to object to the other side's "post-trial request to have the court decide her attorney's fees." *Id.* Otherwise, the court of appeals may "conclude that [Insert Your Name Here] failed to preserve its argument for appellate review regarding the denial of the right to have attorney's fees decided by the jury."

Sanctions

Hopefully, none of us will ever face an order for sanctions; quite frankly, I hope that none of us will ever feel the need to seek the same. But in that unhappy event, if the trial court does order sanctions under Rule 13, keep in mind that it must specify the "particulars of [good cause for the same] . . . in the sanctions order." Tex. R. Civ. P. 13. But if it does not do so, and if the sanctioned party does not object to that lack of specification, it will have waived its right to complain about that lack of specificity on appeal. *Mann v. Kendall Home Builders Constr.*, 2015 Tex. App. LEXIS 3246, 7-8 (Tex. App.–Houston [14th Dist.] Apr. 2, 2015); John *Kleas Co. v. Prokop*, 2015 Tex. App. LEXIS 3162, 34 (Tex. App.–Corpus Christi Apr. 2, 2015). In the Austin Court, waiting until the motion for new trial to do so may be too late. *Prokop*, citing *Connell Chevrolet Co., Inc. v. Leak*, 967 S.W.2d 888, 895 (Tex. App.—Austin 1998, no pet.) and *Land v. AT & S Transp., Inc.*, 947 S.W.2d 665, 667 (Tex. App.—Austin 1997, no writ).

Take Advantage of the Periodic Reminders

Remember to take advantage of my biweekly newsletter on error preservation. **Link to Steve's Error Preservation Newsletter** In five or ten minutes, or maybe less, you can scan the case categories and operative phrases (which I put in bold) to see if anything jumps out at you as pertinent to your docket. I still don't charge for, or accept advertising for, the thing, so it's painless to access. ■

Liabilty Waiver for Gross Negligence: Enforceable in Texas?

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CAN A CONTRACTING PARTY prospectively waive a claim for gross negligence? The Supreme Court of Texas has not ruled on this important issue and the Legislature has not directly addressed it.[1] Until the point is definitively resolved, inconsistent court of appeals opinions give litigators a wide range of potential doctrinal and policy arguments, which this article surveys.

The closest the Supreme Court of Texas has come to the issue was *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, which held that in the context of workers' compensation, public policy does not prohibit insurance coverage of exemplary damages for gross negligence.[2] Justice Hecht's concurrence acknowledged that "[o]utside the insurance context, it is worth noting that this Court has suggested that a person's pre-injury waiver of another's liability for gross negligence is against public policy while holding that a post-injury waiver is not."[3]

Intermediate court opinions, before and after *Fairfield*, fall into one of three "buckets" -- (1) holding that a valid pre-accident release or waiver of negligence includes gross negligence because the claims are not separable; (2) holding that a valid pre-accident release or waiver of liability for negligence does not include gross negligence because the claims are separable; and (3) holding a pre-accident release or waiver of liability for gross negligence is against public policy and therefore void and without legal effect.[4]

The first bucket—that negligence and gross negligence are not separable claims, and therefore a release of liability for negligence is a release of liability for gross negligence—includes the influential San Antonio and Houston (First) Courts of Appeals.[5] But the Houston (Fourteenth) court holds that

[1] *Van Voris v. Team Chop Shop*, LLC, 402 S.W.3d 915, 92, 926 (Tex. App.—Dallas 2013, no pet.) (citing *Atl. Richfield Co. v. Petrol. Pers., Inc.*, 768 S.W.2d 724, 726 n.2 (Tex. 1989); *see generally Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008).

[2] *Fairfield*, 246 S.W.3d 670.

[3] *Id.* at 687 (Hecht, J., concurring) (citing *Mem'l Med. Ctr. of E. Tex. v. Keszler*, 943 S.W.2d 433, 435 (Tex. 1997) (per curiam)).

[4] *See Benavidez v. University of Tex.–Pan Am.*, No. 13-13-00006-CV, 2014 WL 5500469 at *6 (Tex. App.—Corpus Christi Oct. 30, 2014) (mem. op.).

[5] *See Tesoro Petroleum Corp. v. Nabors Drilling U.S.*, 106 S.W.3d 118, 127 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 722 (Tex. App.—San Antonio 1994, writ denied).

negligence and gross negligence are two separable causes of action, meaning that a waiver or release of negligence does not include gross negligence.[6]

The public-policy bucket, at present, enjoys the most support in the courts of appeals.[7] These courts generally use a version of the balancing test provided by *Fairfield*. On one hand, the court considers the reasonable expectations of the parties and the value of certainty in enforcement of contracts, and on the other hand, the extent to which the agreement frustrates important public policy, such as (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.[8]

The Dallas Court of Appeals suggested another approach to public policy in *Van Voris v. Team Chop Shop, LLC*. After reviewing whether a waiver that uses only the word "negligence" and not the words "gross negligence" may be against public policy because it does not provide fair notice as required by Texas law, the court concluded: "***Texas's strong public policy prohibiting extraordinary risk-shifting provisions absent fair notice*** and the legislature's mandates regarding proof of gross negligence and recovery of related exemplary damages, lead us to conclude the release [plaintiff] signed did not release his gross negligence claims."[9]

Until the Texas Supreme Court addresses the issue, and following the lead of the Dallas court in *Van Voris*, the one clear take-away for parties seeking to enforce these clauses is "the more notice, the better." If the clause expressly says "gross negligence," and the document makes clear that the signatory understands the waiver and its scope, the chances of enforcement are enhanced, even if the court has concerns about public policy.

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[6] *Olin Corp. v. Dyson*, 678 S.W.2d 650, 659 (Tex. App.—Houston [14th Dist.] 1984), rev'd on other grounds, 692 S.W.2d 456 (Tex. 1985). *Rosen v. Nat'l Hot Rod Ass'n*, No. 14-94-00775-CV, 1995 WL 755712, at *7 n.1 (Tex. App.—Houston [14th Dist.] Dec. 21, 1995, writ denied) (not designated for publication).

[7] See *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 336 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ); *Tex. Moto–Plex, Inc. v. Phelps*, No. 11-03-00336-CV, 2006 WL 246520, at *2 (Tex. App.—Eastland Feb. 2, 2006, no pet.) (mem. op.); *Rosen v. Nat'l Hot Rod Assoc.*, No. 14-94-00775-CV, 1995 WL 755712, at *7 n.1. (Tex. App.—Houston [14th] Dec. 21, 1995, no writ) (not designated for publication); *cf. Akin v. Bally Total Fitness Corp.*, No. 10-05-00280-CV, 2007 WL 475406, at *3 n.1 (Tex. App.—Waco Feb. 14, 2007, pet. denied) (mem. op.) (stating most courts hold preinjury waivers of gross negligence are void and listing cases; concluding pre-injury waiver of negligence did not preclude proof of gross negligence).

[8] *Fairfield*, 246 S.W.3d at 663, 664, n.19; *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915, 926 (Tex. App.—Dallas 2013, no pet.)

[9] *See Van Voris*, 402 S.W.3d at 926 (emphasis added).

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Almost Fifty Shades of Grey: Leading Questions on Direct Examination

by Dabney Bassel and Connie Hall

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THE RULE IS don't lead your witness on direct. Like many simply stated rules, it's easier to recite than apply.

Evidence Rule 611 controls when leading questions may be asked but states no test to determine when a question is leading.

Texas Rule of Evidence 611(c) provides, "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony." The Rule goes on, "[o]rdinarily leading questions should be permitted on cross-examination" and "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."[1]

So, what is a leading question?

Courts frown on leading questions because they "enable[] the examiner to lead even an honest witness in such manner as to give to the testimony a false color, and it may be, to grossly distort it."[2] A leading question undermines the proper approach to direct examination with phrasing that suggests the answer that counsel desires.[3]

There, however, is no set boundary to mark when a question goes from asking for a response to simply asking for agreement. Improper leading questions are often "framed so that a yes or no answer will enable the witness to merely echo the words of counsel . . . ."[4] But not every yes or no question is leading——the flaw is not the brevity of the answer sought

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[1] Tex. R. Evid. 611. *See also*, Fred A. Simpson & Deborah J. Selden, *Leading Questions as a Ground for Appeal*, 12 App. Advoc. 14 (Winter 1998) (outlining when a witness is adverse and may be led.). For those with a burning desire to know more about leading questions, the same authors chart Texas jurisprudence on the topic back to the 1860's. *See* Fred A. Simpson &, Deborah J. Selden, *Objection: Leading Question!*, 61 Tex. B.J. 1123 (December 1998).

[2] *San Antonio & A. P. Ry. v. Hammon*, 92 Tex. 509, 50 S.W. 123, 124 (1899).

[3] *GAB Bus. Servs., Inc. v. Moore*, 829 S.W.2d 345, 351 (Tex. App.–-Texarkana 1992, no pet.).

[4] *Id.*