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TEXAS LEGISLATION – RECENT BILLS THAT PASSED

HB 19 – Procedure, Evidence, and Remedies in Civil Actions Involving Commercial Motor Vehicle Accidents (Companion: SB 17)

- *Summary*: HB 19, filed by Rep. Jeff Leach (R – Plano), amends the CPRC to provide specific procedural and evidentiary guidelines for cases arising out of motor vehicle accidents, especially commercial motor vehicle accidents. The version of HB 19 voted out of committee addressed the following topics (among other things):
  - *Bifurcated trials*: Much like the bifurcation process under section 41.009 of the CPRC, if requested by a defendant no later than the 120th day after the date the defendant bringing the motion files the defendant's original answer, HB 19 would require a bifurcated trial in commercial motor vehicle accident actions when a claimant seeks to recover exemplary damages. In the first phase of a bifurcated trial, the trier of fact would determine liability and the amount of compensatory damages. In the second phase, the trier of fact would determine liability for and the amount of exemplary damages.
  - *Violation of regulatory standards*: HB 19 provides that, in a civil action involving a commercial motor vehicle, a defendant's failure to comply with a regulation or standard would be admissible into evidence in the first phase of a bifurcated trial only if, in addition to complying with other requirements of law: (1) the evidence tends to prove that failure to comply with the regulation or standard was a proximate cause of the bodily injury or death for which damages are sought; and (2) the regulation or standard is specific and governs, or is an element of a duty of care applicable to, the

defendant, the defendant 's employee, or the defendant 's property or equipment when any of those is at issue in the action. However, nothing in HB 19 would prevent a claimant from pursuing a claim for exemplary damages relating to the defendant's failure to comply with other applicable regulations or standards, or from presenting evidence on that claim in the second phase of a bifurcated trial.

- *Direct actions against an employer:* Under HB 19, in a civil action involving a commercial motor vehicle, an employer defendant 's liability for damages caused by the ordinary negligence of a person operating the defendant 's commercial motor vehicle shall be based only on respondeat superior if the defendant stipulates that, at the time of the accident, the person operating the vehicle was: (1) the defendant's employee; and (2) acting within the scope of employment. If an employer defendant stipulates that the defendant's employee with acting within the scope of employment and the trial is bifurcated, a claimant may not, in the first phase of the trial, present evidence on an ordinary negligence claim against the employer defendant that requires a finding by the trier of fact that the employer defendant's employee was negligent in operating a vehicle as a prerequisite to the employer defendant being found negligent in relation to the employee defendant's operation of the vehicle. A claimant would not be prevented from pursuing: (1) an ordinary negligence claim against an employer defendant for negligence in maintaining the commercial motor vehicle involved in an accident; (2) an ordinary negligence claim against an employer defendant for another claim that does not require a finding of negligence by an employee as a prerequisite to an employer defendant being found negligent for its conduct or omission, or from presenting evidence on that claim in the first phase of a bifurcated trial; or (3) a claim for exemplary damages arising from an employer defendant's conduct or omissions in relation to the accident that is the subject of the action, or from presenting evidence on that claim in the second phase of a bifurcated trial.
- *Admissibility of visual depictions of all motor vehicle accidents*: Under HB 19, in civil actions involving a motor vehicle, a court may not require expert testimony for admission of evidence of a photograph or video of a vehicle or object involved in accident. If properly authenticated under the Texas Rules of Evidence, a photograph or video of a vehicle or object involved in an accident is presumed admissible, even if the photograph or video tends to support or refute an assertion regarding the severity of damages or injury to an object or person involved in the accident that is the subject of a civil action under HB 19.
- On the House floor and in the Senate, HB 19 was amended to:
  - *Further define "claimant"*: The term would include "a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, and an intervenor. The term does not include a passenger in a commercial motor vehicle unless the person is an employee of the owner, lessor, lessee, or operator of the vehicle."
  - *Bifurcated trial motion:* Requests to bifurcate a trial must be brought on or before the later of: (1) the 120th day after the date the defendant bringing the motion files the defendant's original answer; or (2) the 30th day after the date a claimant files a pleading adding a claim or cause of action against the defendant bringing the motion.

- *Direct actions against an employer:* Notwithstanding the restrictions already in the bill, even when an employer stipulates to liability and the trial is bifurcated, if an employer-defendant is regulated by the Motor Carrier Safety Improvement Act of 1999 or Chapter 644 of the Transportation Code, a party may present any of the following evidence in the first phase of a trial that is bifurcated if the evidence is applicable to the defendant:
  - (1) whether the employee who was operating the employer-defendant's commercial motor vehicle at the time of the accident that is the subject of the civil action: (A) was licensed to drive the vehicle; (B) was disqualified from driving the vehicle under 49 C.F.R. Section 391.15 or a corresponding Texas law; (C) should not have been allowed by the employer-defendant to operate the vehicle under 49 C.F.R. Section 382.701(d) or a corresponding Texas law; (D) was medically certified as physically qualified to operate the vehicle under 49 C.F.R. Section 391.41 or a corresponding Texas law; or (E) was operating the vehicle when prohibited from doing so under 49 C.F.R. Section 382.201, 382.205, 382.207, or 382.215 or a corresponding Texas law;
  - (2) whether the employer-defendant had complied with 49 C.F.R. Section 382.301 or a corresponding Texas law in regard to controlled-substance testing of the employee who was operating the employer's commercial motor vehicle at the time of the accident that is the subject of the civil action if the employee was impaired because of the use of a controlled substance at the time of the accident;
  - (3) whether the employer-defendant failed to comply with 49 C.F.R. Section 382.201, 382.205, 382.207, 382.215, 382.701(d), 390.13, 391.15, 391.21, 391.23(a), 391.25, 391.31, 391.33, 391.41, or 383.51 or a corresponding Texas law; and
  - (4) whether the employer-defendant failed to comply with 49 C.F.R. Section 395.3 or 395.5 or a corresponding Texas state if the employer-defendant had knowledge of the failure to comply at the time of the accident.
- If a civil action is bifurcated under Section 72.052, evidence admissible under the bill would be: (1) admissible in the first phase of the trial only to prove ordinary negligent entrustment by the employer-defendant to the employee who was driving the employer-defendant's commercial motor vehicle at the time of the accident; and (2) the only evidence that may be presented by the claimant in the first phase of the trial on the negligent entrustment claim.

o *Commercial Automobile Insurance Report*. The Texas Department of Insurance would be required to conduct a study each biennium on HB 19's effect on premiums, deductibles, coverage, and availability of coverage for commercial automobile insurance. A report of the results of the survey would have to be submitted to the Legislature no later than December 1 of each even-numbered year for the preceding biennium. This section of the bill would expire on December 31, 2026.

o *<u>Effective date</u>:* September 1, 2021. The changes in law addressed in HB 19 would apply only to a cause of action commenced on or after the effective date.

SB 219 – Civil Liability and Responsibility for the Consequences of Defects in Plans, Specifications, or Related Documents for Construction and Repair of Real Property Improvements

- **Summary:** SB 219, filed by Sen. Bryan Hughes (R – Mineola), amends the Business & Commerce Code to establish that a contractor (as defined under the bill) is not responsible for the consequences of defects in, and may not warranty the accuracy, adequacy, sufficiency, or suitability of, plans, specifications, or other design or bid documents for the construction (as defined under the bill), or repair of any improvement to real property provided to the contractor by the person with whom the contractor entered into the contract or another on that person's behalf.
- SB 219 also requires a contractor to make a written disclosure to the other contracting party of the existence of any known defect in the plans, specifications, or other design or bid documents discovered by the contractor before or during construction. The bill also establishes that a contractor who fails to disclose such a condition may be liable for defects that result from the failure to disclose. Further, SB 219 prohibits these protections from being waived by contract.
- SB 219 also amends the Government Code to prohibit an applicable governmental entity from requiring in a contract for engineering or architectural services related to the construction or repair of an improvement to real property, or in a contract related to the construction or repair of an improvement to real property that contains engineering or architectural services as a component part, that such services be performed to a level of professional skill and care beyond that which would be provided by an ordinarily prudent engineer or architect with the same professional license under the same or similar circumstances. The bill does not prevent a party to a contract for engineering or architectural services from enforcing specific obligations in the contract that are separate from the standard of care.
- In committee and on the Senate floor, SB 219 was amended to include provisions stating that the provisions do not apply to the construction, repair, alteration, or remodeling of an improvement to real property if: (1) the construction, repair, alteration, or remodeling is performed under an "involved contractor" contract; and (2) the part of the plans, specifications, or other design or bid documents for which the contractor is responsible under the contract is the part alleged to be defective. The amended version of SB 219 also provides that design services provided under an "involved contractor" contract would be subject to the same standard of care requirements provided in section 130.0021 of the CPRC.
- As amended, SB 219 does not apply to a contract between a person and a contractor under which the contractor agrees only to review plans, specifications, or other design or bid documents but is not responsible for any portion of the construction, repair, alteration, or remodeling of the improvement to the real property.
- The House amended SB 219 to include the following changes:
  1. Revised the waiver provisions to make them general instead of specifically referred to a contractor, subcontractor, and owner.
  2. Omitted the provision establishing an exception for a contract between a person and a contractor under which the contractor agrees only to review plans, specifications, or

other design or bid documents but is not responsible for any portion of the construction, repair, alteration, or remodeling of the improvement to the real property, and replaces it with a provision excepting the portion of a contract between a person and a contractor under which the contractor agrees to provide input and guidance on plans, specifications, or other design documents to the extent that the contractor's input and guidance are provided as the signed and sealed work product of an applicably licensed or registered person and the work product is incorporated into the plans, specifications, or other design documents used in construction;
3. Revised the applicability of the provision establishing standard of care requirements for design services provided under certain excepted contracts to include new exceptions;
4. Limited the defects to which the bill's liability and responsibility limitation applies to only those in design documents, rather than design and bid documents;
5. Changed the persons whose documents a contractor is not liable and responsible for from the person with whom the contractor entered into the contract or another person on behalf of the person with whom the contractor entered into the contract to *any person* other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier;
6. Provided that a contractor must disclose certain inaccuracies, inadequacies, and other insufficiencies, in addition to defects;
7. Included provisions establishing the meaning of ordinary diligence and establishing that a disclosure by a contractor is made in the contractor's capacity as a contractor and not as a licensed professional;
8. Expanded the definition of "critical infrastructure facility" to include (1) equipment, facilities, devices, structures, and buildings used or intended for use in the storage of certain natural resources and the gathering, transportation, treating, storage, or processing of CO2; and (2) commercial airport facilities used for the landing, parking, refueling, shelter, or takeoff of aircraft, maintenance or servicing of aircraft, aircraft equipment storage, or navigation of aircraft;
9. Replaced references to the term "involved contractor contract" with references to "design-build contract"; and
10. Included definitions of "design" and "engineering, procurement, and construction contract."

- *Effective date:* September 1, 2021. The changes in the law addressed in SB 219 would apply only to a contract entered into on or after the effective date.

HB 2064 – Amount of Hospital or Physician Liens on Certain Causes of Action or Claims

- **Summary:** HB 2064, filed by Rep. Jeff Leach (R – Plano), amends section 55.004(b) of the Property Code to add a new subsection (3) and provides another method for calculating the amount of a hospital lien. Under HB 2064, a hospital lien will be the lesser of: (1) the amount of the hospital's charges for services provided to the injured individual during the first 100 days of the injured individual's hospitalization; or (2) 50 percent of all amounts recovered by the injured individual through a cause of action,

judgment, or settlement described by Section 55.003(a); or *(3) the amount awarded by the trier of fact for the services provided to the injured individual by the hospital less the pro rata share of attorney's fees and expenses the injured individual incurred in pursuing the claim.*

- *Effective date:* Because HB 2064 passed by a two-thirds vote of all members elected to each house, the bill will be effective on the day the Governor signs it.

SB 232 – Service of Expert Reports for Health Care Liability

- **Summary:** SB 232, filed by Sen. Nathan Johnson (D – Dallas), amends Chapter 74 of the CPRC by adding a "preliminary determination for expert report requirement" (section 74.353) that includes the following elements:
  1. On motion of a claimant filed no later than 30 days after the date the defendant's original answer is filed, a court may issue a preliminary determination regarding whether a claim made by the claimant is a health care liability claim.
  2. If a court determines that a claim is a health care liability claim, the claimant shall serve an expert report as required by section 74.351 no later than the later of: (1) 120 days after the date each defendant's original answer is filed; (2) 60 days after the date the court issues the preliminary determination; or (3) a date agreed to in writing by the affected parties.
  3. If a court does not issue a preliminary determination before the 91st day after the date that a claimant files a motion, the court shall issue a preliminary determination that the claim is a health care liability claim. A preliminary determination would be subject to interlocutory appeal by either the claimant or defendant.
  4. If an interlocutory appeal results in an appellate court reversing a trial court's preliminary determination that a claim is not a health care liability claim, the claimant shall serve an expert report as required by Chapter 74 of the CPRC no later than 120 days after the date that the appellate court issues an opinion reversing the preliminary determination. A preliminary determination applies only to the issue of whether a claimant is required to serve an expert report under Chapter 74.
- SB 232 also amends section 51.014 of the CPRC to add orders regarding preliminary determinations to the list of appealable interlocutory orders.
- *Effective date:* September 1, 2021. The changes in the law addressed in SB 232 apply to actions commenced on or after the effective date.