ALLEGING AND PROVING VICARIOUS LIABILITY

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State Bar of Texas
21st ANNUAL ADVANCED
EVIDENCE AND DISCOVERY COURSE
April 24 - 25, 2008 — *Houston*
May 22 - 23, 2008 — *San Antonio*

CHAPTER 19

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From 1992 to 1994, Siegel was an associate in the Washington, D.C. office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property and environmental matters.

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending federal statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an AUSA in 1999. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws invalidating state and local rules against disclosing the immigration status of aliens to federal law enforcement from constitutional attack under the Tenth Amendment.

In 2000-01, Siegel was detailed to serve as Special Counsel on the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, campaign finance, criminal justice and immigration issues.

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In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. Recent victories include the Fifth Circuit's grant of rehearing *en banc* to determine standards governing motions to transfer under 28 U.S.C. § 1404(a), Fifth Circuit affirmance of a plaintiff's verdict in a complex toxic exposure case, a favorable decision in a case of first impression in federal district court in San Francisco under the Warsaw Convention regarding a carrier's failure to provide in-flight medical assistance, and Fifth Circuit affirmance of a district court decision enjoining efforts to alter the U.S. Congressional ballot in 2006 as violative of Texas state law and the Constitution's Qualifications Clause.

Siegel has written law review articles, Op-ed pieces, and articles for *Litigation*, the magazine of the ABA's Litigation Section, where he serves on the Editorial Board. He has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and elsewhere, and as a speaker at CLE seminars and workshops. In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

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ALLEGING AND PROVING VICARIOUS LIABILITY

Introduction

This article discusses the rationale behind vicarious liability, the elements necessary for the plaintiff to establish it, typical cases and fact patterns where the doctrine is likely to be raised, and other related issues.

What is vicarious liability?

> "The common law has long recognized that liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them."

St. Joseph Hospital v. Wolff, 94 S.W.3d 513, 540 (Tex. 2002).

Rationales for Vicarious Liability

> "A multitude of very ingenuous reasons have been offered for vicarious liability of a master: he has a more or less fictitious 'control' over the behavior of the servant; he has 'set the whole thing in motion,' and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it – or, more frankly and cynically, 'In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket.' None of these reasons is so self-sufficient as to carry conviction, although they are all in accord with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss...
>
> *What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk.* The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harms to others through the torts of employees, and sought to profit by it, *it is just* that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large."

Id. at 540-41 (Tex. 2002) (quoting Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 499-501 (5th ed 1984) (emphasis in original).

The Test for Vicarious Liability is the Right of Control

1. Vicarious liability hinges on the right of control the defendant exercises over the tortfeasor. *See id.* at 542; *Golden Spread Council, Inc. # 562 of the Boy Scouts of America v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996) ("the right of control remains the 'supreme test' for whether the master-servant relationship exists"); *Exxon Corp. v. Quinn*, 726 S.W. 2d 17, 19-20 (Tex. 1987) (premises owner has no liability to employees of independent contractor absent control over on-premises activity by owner); *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 585-88, 592 (Tex. 1964) ("The true test remains the right of control").

2. The right of control is distinct from the exercise of control: "Certainly, if the right of control of details has a contractual basis, the circumstances that no actual control was exercised will not absolve the master of liability. Conversely, an occasional assertion of control should not destroy a settled relationship agreed to by the

parties." *St. Joseph Hospital*, 94 S.W.3d at 541 (quoting *Love*, 380 S.W.2d at 589).

3. Actual control may be evidence of alleged agreed-upon control, or of the fact that a contract disclaiming control is inoperative or a sham. *Love*, 380 S.W.2d at 590-92.

Examples of Vicarious Liability

1. Respondeat Superior – Employer as Vicariously Liable for Torts Committed by Employee

   a. Employee's Action Must be in Course and Scope of Employment

   "Generally, a master is vicariously liable for the torts of its servants committed in the course and scope of their employment."

   GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 608 (Tex. 1999); *accord Goodyear Tire and rubber Co., v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007); *Medina v. Herrera*, 927 S.W.2d 597, 601 (Tex. 1996); *Heritage Housing Development, Inc. v. Carr*, 199 S.W.3d 560, 565 (Tex. App. – 1st Dist 2006).

   b. The Course and Scope Analysis

   i. "The primary test for determining whether an employee is acting within the course and scope of employment is whether the employer has the right to direct and control the employee's performance at the time of the alleged negligent act."

   Arbelaez v. Just Brakes Corp., 149 S.W.3d 717, 720 (Tex. App. – Austin 2004).

   ii. "To ultimately prove that an employee acted within the course and scope of employment... [the plaintiff] must prove at trial that the act was (1) within the general authority given to the employee; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed." *Id.; accord Mayes*, 236 S.W.3d at 757; *Cortez v. HCCI-San Antonio, Inc.*, 131 S.W.2d 113, 121-22 (Tex. App. – San Antonio 2004, aff'd 159 S.W.3d 87 (2005)); *Mayes v. Goodyear Tire and Rubber Co.*, 144 S.W.3d 50, 55 (Tex. App. – Houston [1st Dist] 2004); *Ginther's v. Domino's Pizza, Inc.*, 93 S.W.3d 300 (Tex. App. – Houston [14th Dist] 2002, rev. denied); *White v. Liberty Eylau School Dist.*, 880 S.W.2d 156, 158 (Tex. App. – Texarkana 1994, writ denied).

   iii. "If an employee deviates from the performance of his duties for his own purposes, the employer is not responsible for what occurs during that deviation." *Mayes*, 236 S.W.3d at 757 (employee drove company truck to buy cigarettes on personal errand and was therefore not acting in course and scope); *but see Arbelaez*, 149 S.W.3d at 722 ("Even if [the employee] was personally benefited to some degree by [the errand] his actions could still be within the course and scope of his employment").

   c. Common fact patterns

   i. The wayward driver…

      1. Was the employee driver "on the clock?"
      2. Was the employee asked or instructed to make the trip in question?
      3. Was the employee paid for the work?

4. What was the purpose of the trip – work-related or purely a personal errand? "
5. Was the car temporarily or permanently on loan from the employer?
6. Were personal friends involved?
7. Were alcohol or drugs involved?

See Arbelaez, Cortez, Mayes, supra.

ii. <u>The employee who loses it... or, what to do about intentional torts</u>

1. Was the employee's action, though tortious, of the same general nature as that authorized, or incidental to authorized conduct?

   Zarzana v. Ashley, 218 S.W.3d 152, 159 (Tex. App. – Houston [14th Dist.] 2007) (Meineke employee's sale of counterfeit inspection sticker not within scope of employment because Meineke not in the business of selling real or fake inspection stickers: "An employee's intentional, tortuous conduct falls within the scope of employment when the conduct, even if contrary to express orders, is of the same general nature as that authorized or incidental to the conduct authorized"); *GT Management, Inc. v. Gonzalez*, 106 S.W.3d 880, 884 (Tex. App. – Dallas 2003) ("an employer may be vicariously liable for an intentional tort when the act... is committed in the accomplishment of a duty entrusted to the employee, rather than because of personal animosity"); *Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 776-77 (Tex. App. – Texarkana 1995, writ denied) (defamation of employee in the course of investigation within the course and scope; "the statements made by [the employees] about [the target of the investigation] were made in their effort to investigate her conduct as their subordinate... All of their activities were the kind that a manager was expected to conduct and were within the scope of their employment")

2. To what extent was the tort apparently motivated by personal animosity?

   "It is not ordinarily within the scope of a servant's authority to commit an assault on a third person... Usually, assault is the expression of personal animosity and is not for the purpose of carrying on the master's business." *Peek v. Equipment Serv.*, 906 S.W.2d 529, 532 (Tex. App. – San Antonio 1995) (employee's murder of customer during a sales call not within course and scope); *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 407 (Tex. App. – Corpus Christi 1987, writ denied) (assault not within course and scope); *but see GT Management*, 106 S.W.3d at 884 (employer of bouncers liable for injuries caused by bouncers: "Here, fights occurred at the club, sometimes three or four per night, and the bouncers duties were to break up the

fights and walk the parties out of the club. The bouncers were expected to signal for back-up with their flashlights when the fights occurred. The bouncers used choke holds to control the patrons. The bouncers were hired primarily on the basis of their size. Thus, the evidence tends to show that the bouncers were authorized to use force, and their assault of [plaintiff] was incidental to the use of that force"); *Houston Transit Co. v. Felder,* 208 S.W.2d 880, 881-82 (Tex. 1948) (assault that followed immediately after accident where transit employee began encounter with plaintiff by seeking to obtain information for employer within course and scope).

3. How close in time was the intentional tort to work-related actions – or, put differently, did the tort arise *immediately* from performance of job duties?

   Garrett v. Great Western Dist. Co., 129 S.W.3d 797, 800-01 (Tex. App, -- Amarillo 2004, rev. denied) (bar fight that occurred too remotely from employees' last performance of duties not imputable to employer: "Moreover, we take care to highlight the concept of proximity implicit within this rule. It is not enough that the tort can simply be traced back to the performance of one's duties…if the connection is too remote then the employer is not responsible;" "Nor is it evidence that that the assault… arose immediately from the performance of those duties"); *Dieter v.*, 739 S.W.2d at 407 ("When the servant turns aside, for however short a time, from the prosecution of the master's work to engage in an affair wholly his own, he ceases to act for the master, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone") (quoting *Tierra Drilling Corp. v. Detmar*, 666 S.W.2d 661, 666 (Tex. App. – Corpus Christi 1984) (quoting *Galveston, Houston & San Antonio Railway v. Currie*, 96 S.W. 1073 (1906))).

iii. Police Officers as Security Guards

Was the officer enforcing general law, or acting at employer's direction to protect employer's interests?

"In determining whether a police officer acted as the employee of a private employer or in an official capacity, we 'analyze the capacity in which the officer acted at the time he committed the acts for which the complaint is made.' *Morgan v. City of Alvin*, 175 S.W.3d 408, 416 (Tex. App. – Houston [1st Dist.] 2004). 'If the officer is performing a public duty, such as the enforcement of general laws, the officer's private employer incurs no vicarious responsibility for that officer's acts, even though the employer may have directed the activities.' *Mansfield v. C.F. Bent Tree Apt., Ltd P'ship*, 37 S.W.3d 145, 150 (Tex. App. – Austin 2001)… However, '[I]f the officer was engaged in protecting the

employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by the employer,... the trier of fact decides whether the officer was acting as a public officer or as a servant of the employer"). *Mansfield*, 37 S.W.3d at 150." *Ogg v. Dillards, Inc.*, 239 S.W.3d 409, 418 (Tex. App. – Dallas 2007, pet. filed).

"'If an off-duty officer observes a crime, as a matter of law, he becomes an on-duty officer for purposes of determining whether or not a private employer is vicariously liable for the officer's actions.'" *Id.* (quoting *Morgan*, 175 S.W.3d at 417).

iv. Health Care Claims

1. Control of Care is Key: The caregiver or entity that controls the details of the plaintiff's care is the one that is directly or vicariously liable. *See Wolff*, 94 S.W.3d at 542-43; *Heritage Housing,* 199 S.W.2d at 567; *accord, e.g., Chandler v. Cash*, 20 S.W.3d 69, 72 (Tex. App. – Texarkana 2000, pet. denied) (contract between doctor and hospital obligating doctor to staff hospital emergency room with physicians and "orient them to their duties, direct their activities, and supervise and review their work" insufficient to impose vicarious liability where individual physicians controlled details and methods of work).

2. Course and Scope Can Shift Instantaneously: "At the very moment" neurologist commenced sexual contact with patient, which occurred during neurological exam, he ceased to act within the course and scope of his employment and clinic ceased to be vicariously liable. *See Buck v. Blum,* 130 S.W.3d 285, 289-90 (Tex. App. – Houston [14th Dist.] 2004).

3. Doctors are Usually Independent Contractors: "As a general rule, physicians are considered to be independent contractors with regard to the hospitals at which they enjoy staff privileges. It follows that hospitals are not liable for the negligent acts or omissions of independent physicians." *Espalin v. Childrens Med. Ctr. of Dallas*, 27 S.W.3d 675, 684 (Tex. App. – Dallas 2000) (citations omitted); *Baptist Mem. Hosp. System v. Sampson*, 969 S.W.2d 945, 948 (Tex. 1998) ("A hospital is ordinarily not liable for the negligence of a physician who is an independent contractor").

4. Examples of Vicarious Liability:

a. Ostensible agency

"[A] hospital may be vicariously liable for the medical malpractice of independent contractor physicians when plaintiffs can establish the elements of ostensible agency." *Sampson*, 969 S.W.2d at 948. Plaintiff must show that (1) he had a

reasonable belief that that the physician was the agent or employee of the hospital, (2) such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold herself out as the hospital's agent or employee, and (3) plaintiff justifiably relied on the representation of authority. *See id.* (citing RESTATEMENT (SECOND) OF AGENCY § 267 (1958)); *accord Garrett v. L.P. McCuistion Comm. Hosp.*, 30 S.W.3d 653, 655-57 (Tex. App. – Texarkana 2000) (plaintiff's assumption that radiologist was agent of hospital, based on her experience as nurse, insufficient to show affirmative step by hospital holding radiologist out as agent or employee); *Espalin*, 27 S.W.3d at 684-85 (patient's assumptions insufficient in absence of affirmative act by hospital). Hospitals often expressly disclaim agency in patient forms and elsewhere. *See, e.g., Espalin*, 27 S.W.3d at 684-85 (quoting hospital form disclaiming agency)

b. <u>Acting Through Professional Associations</u>

Battaglia v. Alexander, 177 S.W.3d 893, 372, 376 (Tex. 2005) (professional associations that contracted with hospital to provide anesthesia services vicariously liable for members and employees' malpractice); *Kettle v. Baylor Med. Ctr. at Garland*, 232 S.W.3d 832, 842 (Tex. App. – Dallas 2007, pet. filed) (professional associations are, by statute (Professional Association Act, Art. 1528f, § 24), jointly and severally liable with their officers and employees acting in the course and scope).

5. <u>Expert reports</u>: No report under Civ. Prac. & Rem. Code § 74.351 is required against an entity that is sued as vicariously liable; a report describing the negligence of the actual caregivers is sufficient. *See Univ. of Texas Southwestern Med. Ctr. v. Dale*, 188 S.W.3d 877, 878-79 (Tex. App. – Dallas 2006); *but see Kettle*, 232 S.W.3d at 842 (expert report required for vicarious liability claims against professional association, since statute applies to "each health care provider against whom a claim is asserted" and since associations are, by statute,

jointly and severally liable with their members acting in the course and scope)

v. Insurance-related Claims

1. Did the agent make misrepresentations about coverage?

   "An insurance company is generally liable for any misconduct by an agent that is within the actual or apparent scope of the agent's authority... Celtic does not contend that Harrell's misrepresentations were so absurd that no reasonable person could have believed Harrell was acting within the scope of his authority. Nor does Celtic assert any other challenge to the jury's finding that Coats had authority to explain the policy... Celtic cannot escape liability on the basis that it did not authorize particular representations concerning the policy." *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994); *accord Royal Globe Ins. Co. v. Bar Consultants*, 577 S.W.2d 688, 693-94 (Tex. 1979).

2. Did insurance company control alleged tortfeasor?

   An insurer is not liable for the malpractice of an attorney hired by the insurer to defend the insured; the attorney is an independent contractor with control over the defense of the case, negating vicarious liability. *State Farm Mutual Auto. Ins. Co.*, 980 S.W.2d 625, 627-28 (Tex. 1998).

d. Question is not whether employee obeyed employer's instructions: "The Supreme Court determined more than a century ago that an employer is liable for the torts of its employees committed while acting within the scope of their employment, 'although [the employer] may have expressly forbidden the particular act.' The principle that an employer can be liable for the acts of an employee done in violation of the employer's policies still obtains." *Builders Transport, Inc. v. Grice-Smith*, 167 S.W.3d 1, 11-12 (Tex. App. – Waco 2005, op. withdrawn and superseded, 167 S.W.3d 18) (quoting *Intl. & Great N. R.R. v. Anderson*, 17 S.W. 1039, 1040 (1891)).

e. Joint Masters: "The Whites argue that, although Brantley was clearly under the control of the transportation department when the accident occurred, the summary judgment evidence shows that she was also under the control of the school district. A person may be the servant of two employers at one time as to one act if the service to one does not involve an abandonment of the service to the other. RESTATEMENT (SECOND) OF AGENCY § 226 (1958). If there is evidence of joint control of Brantley by the transportation department and the school district, a finding that Brantley was the employee of the school district when the accident occurred would be proper. *Gulf Oil Corp. v. Williams*, 642 S.W.2d 270, 272 (Tex. App. – Texarkana 1982)." *White*, 880 S.W.2d at 159.

f. Borrowed Employees: Employers who borrow employees from other employers may have respondeat superior liability to third parties. *See*

Heritage Housing, 199 S.W.3d at 565-66. The same test of control dictates liability: "[U]nder the borrowed employee doctrine, whether a general employee of one employer has become the borrowed employee of another employer hinges on whether the other special employer has the right to direct and control the employee with respect to the details of the particular work at issue. The test is whether the borrowing employer has the right to control the progress, details, and methods of operation of the work. *Limestone Prods., Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002)." *Id.* at 565.

g. Joint Ventures: "In a joint venture, all the entities engaged in the venture may be jointly and severally liable for the conduct of their employees because they share control over the details of the employees' work." *Heritage Housing*, 199 S.W.3d at 566 (citing *Battaglia*, 177 S.W.3d at 372, 376 (finding two professional associations providing anesthesia services to hospital jointly and severally liable because they were engaged in joint venture)).

h. Question of fact, not law: "[T]he question of whether an employee is acting within the course and scope of his employment is not usually a question of law. Rather, it is generally a fact question for the jury, particularly when more than one inference may be drawn from the evidence." *Mayes v. Goodyear Tire and Rubber Co.*, 144 S.W.3d 50, 56 (Tex. App – Houston [1st Dist] 2004, rev'd on other grounds, 236 S.W.3d 754 (Tex. 2007)).

i. Punitive Damages: Exemplary damages are not automatically available based on respondeat superior; they are available against corporations based on the act of an employee only where (1) the corporation authorized the commission and manner of the act, or (2) the employee was unfit and the corporation was reckless in employing him, or (3) the employee was employed in a managerial capacity and was acting in the scope of employment, or (4) the employer or a manager of the employer ratified or approved the act. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997) (quoting RESTATEMENT OF TORTS § 909 (1939)). Acts by corporate "vice principals" will bind the company for punitive damages purposes, and a vice principal "encompasses four classes of corporate agents: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a master has confided the management of the whole or a department or division of his business." *Id.*

2. Family Relationships

a. Parents and Children

i. No *per se* liability at common law

Parents are not *per se* liable under the common law for the torts of their minor children. *See In the Matter of D.M.*, 191 S.W.3d 381, 388-89 (Tex. App. – Austin 2006, rev. denied) ("At common law, the parent-child relationship was not considered a proper basis for imposing vicarious liability on parents for their delinquent behaviors"); *Rodriguez v. Spencer*, 902 S.W.2d 37, 42 (Tex. App. – Houston [1st Dist.] 1995) ("the mere fact of paternity or maternity does not make a parent liable to third parties for the torts of his or her minor child. As a general rule, minors are civilly liable for

their own torts") (citations omitted); *accord Villacana v. Campbell*, 929 S.W.2d 69, 75 (Tex. App. – Corpus Christi 1996, writ denied) (same concerning adult child living with parents).

ii. Exceptions

1. Reasonable Foreseeability: "We conclude that a parent's duty to protect third parties from the acts of a parent's minor children depends on whether the injury to the third party is reasonably foreseeable under the circumstances as evidenced by the parent's knowledge, consent, sanction, or participation in the child's activities." *Rodriguez*, 902 S.W.2d at 43. "Actual knowledge is not required if the parent should, under the circumstances, reasonably anticipate the consequences of his or her actions." *Id.* at 42; *accord Cohen v. Hoose*, 2007 WL 3034938 at * 1 (Tex. App. – Beaumont 2007); *Isbell v. Ryan*, 983 S.W.2d 335, 339 (Tex. App. – Houston [14th Dist.] 1998); *Childers v. A.S.*, 909 S.W.2d 282 (Tex. App. – Ft. Worth 1995)

   Relevant Foreseeability questions:

   a. Did minor demonstrate propensities to commit torts?
   b. Did parents discipline or otherwise attempt to control minor?
   c. Did tort occur on parents' premises?
   d. Had third parties previously complained?

   See Rodriguez, Cohen, Isbell, Childers, supra.

2. Statutory Liability: Family code provisions require parental restitution when their children commit delinquent behavior and the parents cannot establish that they undertook good faith efforts to prevent the conduct in question. *See Matter of D.M.*, 191 S.W.3d at 388-90.

b. Spousal Liability: Marital status is insufficient to impute liability, though an ordinary joint enterprise may be shown by the specific facts of the case. *See Wilkinson v. Stevision*, 514 S.W.2d 895, 897-98 (Tex. 1974).

3. Independent Contractors

a. General Rule of Non-liability: Parties who hire independent contractors ordinarily are not liable to injured employees of independent contractor or to third parties. *See Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 6 (Tex. 1990); *Heritage Housing*, 199 S.W.2d at 565.

b. Liability based on retained control:

Vicarious liability may be premised on control retained by the contracting party: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Lee Lewis*

Construction, Inc., v. Harrison, 70 S.W.3d 778, 783 (Tex. 2002) (quoting RESTATEMENT (SECOND) OF TORTS § 414 (1965), adopted in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (1985)).

c. Vicarious or Direct Liability?

More akin to negligent supervision, though tort is committed by another: "When the general contractor exercises some control over a subcontractor's work he may be liable unless he exercises reasonable control in supervising the subcontractor's activity." *Id.* (quoting *Redinger,* 689 S.W.2d 418); *compare Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788,791 (Tex. 2006) (describing as vicarious liability) *with Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735 (Tex. 1999) (describing as negligent supervision).

d. Scope of Liability: "The general contractor's duty of care is commensurate with the control it retains over the independent contractor's work." *Lee Lewis Construction*, 70 S.W.3d at 783. *See, e.g., Read*, 990 S.W.2d at 734-36 (retention of control over in-home sales of vacuum cleaners conferred liability for sexual assault by salesman, where company failed to check salesman's employment background and criminal history: "Read merely asserts that Kirby, having retained control over vacuum cleaner sales by requiring in-home demonstrations, has a duty to exercise its control reasonably).

e. Forms of Retained Control: "A general contractor can retain the right to control an aspect of an independent contractor's work or project so as to give rise to a duty of care to that independent contractor's employees in two ways: by contract or by actual exercise of control... The distinction remains important, however, because determining what a contract says is generally a question of law for the court, while determining whether someone exercised actual control is generally a question of fact for the jury." *Lee Lewis Construction*, 70 S.W.3d at 783.

f. General Direction Not Enough to Confer Liability: "[A]n employer may become liable for the independent contractor's tortious acts only if the employer controls the details or methods of the independent contractor's work to such an extent that the contractor cannot perform the work as it chooses." *Fifth Club*, 196 S.W.3d at 792 (club not liable for assault by bouncer because it did not direct how bouncer's work was to be performed) (citing *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 155-56 (Tex. 1999)).

The Role of Statutory Law

Vicarious liability can effectively be created by a statute imposing a nondelegable duty to ensure safety in certain circumstances. *See, e.g., Mbank El Paso, N.A. v. Sanchez,* 836 S.W.2d 151, 153-54 (1992) (§ 9-503 of UCC imposes duty on secured creditors to ensure peace is not breached during nonjudicial repossession of goods that cannot be delegated to independent contractors; bank vicariously liable for repossession company's breach of peace); *First Professionals Ins. Co., Inc. v. Heart and Vascular Inst. of Tex.*, 182 S.W.3d 6, 12 (Tex. App. – San Antonio 2005, rev. denied) (noting statutory imposition of vicarious liability on professional associations for actions of officers and employees under Professional Association Act, Art. 1528f, § 24). Similarly, vicarious liability can be delimited by statute. *See, e.g., N.P. v. Methodist Hosp.*, 190 S.W.3d

217, 225-26 (Tex. App. – Houston [1st Dist] 2006, rev. denied) (Civ Prac. & Rem. Code § 81.003, establishing vicarious liability by mental health services provider where employee repeatedly assaults same patient, precludes vicarious liability for other claims under chapter 81).

Indemnity Based on Vicarious Liability

"Common law indemnity survives in Texas…in negligence actions to protect a defendant whose liability is purely vicarious in nature." *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.*, 127 S.W.3d 134, 138 (Tex. App. – Houston [1st Dist.] 2003) (citing *Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc.*, 751 S.W.2d 179, 180 (Tex. 1988)). Thus, a defendant found vicariously liable on the basis of an employee's or agent's wrongdoing has a claim for indemnity against the agent or employee. *See id.* at 139 (insurance agency has indemnity claim against agent for agent's misrepresentations to policy-holder).

Insurance Coverage of Vicarious Liability

An insured's provision of notice of claims against physicians to the carrier was not notice of vicarious liability claims against the medical group, such that timely notice of the former could serve as adequate notice of the latter; vicarious liability claims against group were inherently separate and required separate timely notice. *See Professionals Ins. Co.*, 182 S.W.3d at 13-14.