In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-22-00429-CV

IN RE JERAMIE WAYNE GAMBLE, INDIVIDUALLY AND AS NEXT FRIEND OF A.G. AND S.G., MINORS, Relator

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Original Proceeding
30th District Court of Wichita County, Texas
Trial Court No. 185,766-A

Before Birdwell, Womack, and Walker, JJ.
Opinion by Justice Birdwell
Justice Womack dissents without opinion.

OPINION

I. INTRODUCTION

In this original proceeding, Relator Jeramie Wayne Gamble, seeks mandamus relief individually and as next friend of his minor daughters, A.G. and S.G., from the trial court's order granting their former stepfather, Real Party in Interest James Couch, leave to designate their mother, Kendra Couch (Kendra), and the Texas Department of Transportation (TxDOT) as third parties responsible for the catastrophic injuries that they suffered in a cross-median, head-on collision on U.S. Highway 287 as passengers in a 2016 Chevrolet Silverado pickup truck leased by Couch's employer, Ecolab, Inc. (Ecolab),[1] and driven by Couch. By granting Couch leave to so designate Kendra and TxDOT, the trial court authorized the submission of their and Couch's respective percentages of responsibility[2] to the jury in the upcoming trial for a

[1]Gamble's first amended petition alleges that the truck was a company vehicle that Ecolab leased for use by its employees.

[2]Section 33.011(4) of the Texas Civil Practice and Remedies Code defines "percentage of responsibility" as

> that percentage, stated in whole numbers, attributed by the trier of fact to each claimant, each defendant, each settling person, or each responsible third party with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.

Tex. Civ. Prac. & Rem. Code Ann. § 33.011(4).

determination of their proportionate responsibility for purposes of adjudicating Couch's joint and several liability, if any, for the damages alleged by Gamble on behalf of himself and his daughters. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003 (submission), 33.013(b) (adjudication of joint and several liability). Gamble asserts that the trial court abused its discretion by authorizing these designations because (1) Couch failed to comply with his disclosure obligations as required by Section 33.004(d) of the Texas Civil Practice and Remedies Code in seeking such leave and (2) Kendra's parental immunity and TxDOT's governmental immunity render them ineligible, as a matter of law, for designation as "responsible third parties" since their legal immunities foreclose adjudication of their responsibility according to an "applicable legal standard" such as negligence.[3] Although we conclude that the trial court correctly held that individuals and entities possessing immunity from liability may be designated as responsible third parties, we grant, in part, the mandamus relief requested because we conclude (1) that, as to Gamble's individual claims, the trial court abused its discretion by concluding that Couch had met his discovery obligations as the necessary predicate to such designations of Kendra and TxDOT

[3]Section 33.011(6) defines a "responsible third party" as

> any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.

Id. § 33.011(6).

pursuant to Section 33.004(d) but (2) that Section 33.004(d) does not apply to A.G.'s and S.G.'s claims because the applicable limitations periods on their causes of action have not yet expired. *See id.* § 33.004(d).

II. BACKGROUND

On a fateful, rainy July 4, 2016, Couch was driving home to Fort Worth from Pampa, Texas, along U.S. Highway 287 with his then-wife, Kendra, and her two minor daughters from her prior marriage to Gamble, A.G., age ten, and S.G., age eight. Couch was operating the Silverado with S.G. seated in the front passenger seat and A.G. and Kendra seated in the back seat behind him and S.G., respectively.

Just outside of Wichita Falls, Couch responded to wet driving conditions by applying the brakes to both disengage the truck's cruise control and to slow its overall speed, but in so doing, he lost control of the truck, which left the southeast-bound lanes of traffic, crossed the grassy highway median, and collided virtually head-on into a 2005 Cadillac Escalade SUV travelling the opposite direction in the northwest-bound lanes, causing both vehicles to catch fire. A.G. and S.G. suffered significant gastrointestinal injuries, spinal-cord injuries, closed-head injuries, and neurological damage. A.G. continues to suffer from paraplegia, and both children will require ongoing medical care and other assistance into the foreseeable future.

On January 13, 2017, a little over six months after the accident, Gamble—both in his individual capacity and as next friend of A.G. and S.G.—filed suit against Couch, seeking over $5 million in medical and other expenses that he has incurred or

will incur caring for his daughters during their minority, as well as non-economic damages recoverable on behalf of his daughters both before and after they reach the age of majority, and economic damages recoverable on their behalf after reaching majority.[4] Along with his original petition, Gamble served Couch with requests for disclosure, which pursuant to Rule 194.2 of the Texas Rules of Civil Procedure required Couch to disclose, inter alia, "[t]he name, address, and telephone number of any potential parties"; "[t]he name, address, and telephone number of any person who may be designated as a responsible third party"; and "the legal theories and . . . the factual bases of [his] claims or defenses[.]" Tex. R. Civ. P. 194.2(b), (c), (*l*) (2004, amended 2021).[5]

In his original responses to Gamble's requests for disclosure, served on March 22, 2017, Couch did not disclose any potential or responsible third parties, stating that he was "unaware of any such potential parties at [that] time" while

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[4]"Although a child may recover damages for pain and suffering . . . , a cause of action to recover medical expenses incurred by a minor child through the date the child attains majority and for the loss of services and earnings of an unemancipated minor belongs to the child's parents." *Sarabia v. McNair*, No. 02-09-00160-CV, 2010 WL 1427019, at *3 (Tex. App.—Fort Worth Apr. 8, 2010, no pet.) (mem. op.) ("Historically, in Texas, the right to recover for medical costs incurred [on] behalf of the minor is a cause of action belonging to the parents, unless such costs are a liability as to the minor's estate." (quoting *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983))).

[5]We cite to the version of Rule 194 in place at the time the lawsuit was filed. Rule 194 was amended in 2021 to implement Section 22.004(h-1) of the Texas Government Code. The goal of the amendments was to require disclosure of basic information automatically without the need for a discovery request and thereby to align Rule 194 more closely with Rule 26(a) of the Federal Rules of Civil Procedure. *See* Tex. R. Civ. P. 194.6 cmt. 2021.

reserving "the right to supplement his response as his investigation and discovery continue[d]." He further did not disclose a defensive theory of third-party responsibility, as required by Rule 194.2(c), by which Gamble could reasonably discern the identity of any potential party or responsible third party:

> Further, the negligence, acts, and conduct of Plaintiff and/or third persons, parties, legal entities[,] or instrumentalities over whom Couch had no control were a proximate cause and/or the sole proximate cause and/or a producing cause and/or the cause in whole or in part of the incident giving rise to this lawsuit.

See In re Dawson, 550 S.W.3d 625, 630 (Tex. 2018) (orig. proceeding) (holding that "boilerplate language about unnamed 'persons or entities'" purportedly causing claimant's injuries and a stated intention to supplement in the future did not satisfy defendant's discovery obligations under Rule 194.2(*l*) and Section 33.004(d)). Couch did, however, identify Kendra as a person with knowledge of relevant facts due to her status as a passenger in the pickup at the time of the collision.

On July 28, 2017, Couch supplemented his disclosure responses to identify "the State of Texas" as a person who may be designated as a responsible third party, but he did not provide an address or phone number as required by Rule 194.2(*l*) or specify which state agency or department he intended to designate. He further did not disclose a defensive theory of responsibility against the State of Texas by which Gamble could reasonably discern which state agency or department was the intended designee; instead, Couch's response remained the identical boilerplate assertion

against "third persons, parties, legal entities[,] or instrumentalities over whom [he] had no control"—the same assertion that he had made in his original disclosure responses.

On June 27, 2018—just one week from the expiration of the two-year statute of limitations on his individual claims[6]—Gamble filed his first amended petition adding Ecolab as a defendant.[7] Along with his first amended petition, Gamble served Ecolab with requests for disclosure.

Served upon Gamble on September 7, 2018, Ecolab's original disclosure responses identified "the State of Texas" and Kendra as potential responsible third parties. Like Couch, however, Ecolab failed to specify which state agency or department it intended to designate and did not provide an address or phone number for "the State of Texas" or Kendra. Nor did Ecolab disclose a defensive theory of third-party responsibility against the State of Texas by which Gamble could discern which state agency or department was the intended designee; instead, Ecolab's response mirrored the boilerplate assertion that Couch had made against "third

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[6]As discussed more fully below, Couch asserts that because A.G. and S.G. are minors, the two-year statute of limitations for the personal injury claims that Gamble asserts on their behalf does not "expire" until their respective twentieth birthdays. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.001(a)(1) (tolling the expiration of limitations for minor claimants).

[7]As noted above, Gamble's first amended petition alleged that the truck that Couch had been driving at the time of the collision was a company vehicle leased by Ecolab. *See supra* footnote 1. With this amended pleading, Gamble asserted a direct cause of action against Ecolab for negligent hiring, supervision, or retention and sought vicarious liability against Ecolab for Couch's individual negligence under the doctrine of respondeat superior.

persons, parties, legal entities[,] or instrumentalities over whom [he] had no control" in both his original and supplemental disclosures. This same boilerplate assertion similarly failed to disclose any defensive theory of third-party responsibility against Kendra; as had Couch, Ecolab merely identified Kendra as a person with knowledge of relevant facts due to her status as a passenger.

On May 30, 2019, Couch served his second supplemental disclosure responses in which he again designated "the State of Texas"—but not Kendra—as a responsible third party. He still did not provide an address or phone number or specify which state agency or department he intended to designate. His boilerplate disclosure of defensive legal theories remained unchanged.

Finally, over four years after the collision, on August 17, 2020, Couch and Ecolab served identical supplemental disclosure responses,[8] disclosing that, in addition to the State of Texas, they might designate Kendra as a responsible third party. While they listed a phone number for Kendra, they did not provide an address, merely stating that "her current address is unknown." Additionally, both Couch's and Ecolab's supplemental responses contained the following identical statement regarding their legal theories and the factual bases for their defenses:

> According to the deposition of [Kendra's mother, the girls' grandmother,] Kathy Ely, Kendra . . . told her that one or both of the minor children, A.G. and S.G., were wearing a lap belt only at the time of the accident and had taken the shoulder belt off. To the extent one or

[8]While this was Couch's third supplemental response, it was only Ecolab's first supplemental response.

> both of the minor children, A.G. and S.G., were not properly restrained at the time of the accident, the negligence of Kendra . . . , who was in charge of the girls at the time of the accident, was a proximate cause and/or a producing cause and/or the cause in whole or in part of the injuries complained of in this lawsuit. Additionally, the State of Texas's negligence in the design and/or maintenance of the roadway where the accident occurred was a proximate cause and/or the sole proximate cause and/or a producing cause and/or the cause in whole or in part of the incident giving rise to this lawsuit.

A year and a half later, on February 25, 2022, Couch and Ecolab designated a number of testifying experts, including three to provide evidence in support of their theories of third-party responsibility against Kendra and the State of Texas. In the report attached to her designations, Dr. Lisa Gwin of Biodynamic Research Corporation (BRC)—an osteopathic physician with expertise in "biomechanics, occupant kinematics, and injury causation" and forensic experience in motor-vehicle accidents—concluded that, although A.G. and S.G. wore seatbelt restraints at the time of the collision, (1) their lap belts were improperly placed across their abdomens, not their pelvises, (2) their shoulder straps were improperly placed behind their backs altogether, and (3) had they both been restrained by properly placed lap belts and shoulder straps, the serious abdominal and spinal injuries that they suffered as a result of the collision would not have occurred.

In the report attached to his designations, David W. Hall of David Hall & Associates—a professional engineer with expertise in "accident reconstruction and traffic engineering"—faulted TxDOT specifically for the collision due to (1) poor roadway construction and maintenance that led to the dangerous accumulation of

rainfall on the southeast-bound lanes of U.S. Highway 287 and (2) its failure to install a median barrier between the southeast-bound and northwest-bound lanes to prevent cross-median collisions. In the report attached to his designations, Robert H. Liebbe III of Liebbe Technical Consulting, LLC—an accident reconstructionist whose extensive roadway and collision analysis, including data from the "black box" of the Silverado, provided the foundation for Hall's opinions—concluded that the accumulation of rainfall on the southeast-bound lanes led to loss of control of the Silverado, its crossing of the median into oncoming traffic in the northwest-bound lanes, and the fateful collision with the Escalade.

On June 6, 2022, Couch and Ecolab filed a joint motion for leave to designate the "State of Texas Department of Transportation" and Kendra as responsible third parties pursuant to Section 33.004 of the Texas Civil Practice and Remedies Code; in so moving, they briefly summarized the opinions of their jointly designated testifying experts in support of leave. Gamble timely filed an objection. On July 12, 2022, following a hearing, the trial court signed an order granting leave and designating Kendra and TxDOT as responsible third parties. On November 1, 2022, Gamble filed a petition seeking mandamus relief from the trial court's order.[9]

[9]On July 20, 2022, Gamble nonsuited Ecolab. Therefore, Ecolab is not a real party in interest to this original proceeding.

III. DISCUSSION

In his petition, Gamble raises three issues. First, he asserts that the trial court violated Section 33.004(d) of the Texas Civil Practice and Remedies Code by granting Couch leave to designate Kendra and TxDOT as responsible third parties despite his failure to disclose them in response to Gamble's requests for disclosure on or before the expiration of limitations on July 4, 2018, and to otherwise comply with his discovery obligations under the Texas Rules of Civil Procedure. Second, Gamble asserts that Kendra's parental immunity and TxDOT's governmental immunity render them, as a matter of law, ineligible for designation as responsible third parties because their immunities foreclose adjudication of their responsibility according to an "applicable legal standard" such as negligence. Finally, Gamble asserts that mandamus relief is available to correct the trial court's abuse of discretion because he lacks an adequate remedy by appeal.

For the reasons set forth below, we overrule Gamble's second issue, but we sustain, in part, his first issue as it pertains to his individual claims, overruling it only with respect to A.G.'s and S.G.'s claims. Because we agree that Gamble lacks an adequate remedy by appeal, we sustain his third issue.

A. Standard of Review

Mandamus relief is an extraordinary remedy. *In re Acad., Ltd.*, 625 S.W.3d 19, 25 (Tex. 2021) (orig. proceeding). The party seeking mandamus relief must show both that the trial court clearly abused its discretion and that the party has no adequate

remedy by appeal. *In re Allstate Indem. Co.*, 622 S.W.3d 870, 875 (Tex. 2021) (orig. proceeding).

A trial court abuses its discretion when its ruling is arbitrary, unreasonable, and without reference to guiding principles. *Id.*; *see Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Although we defer to those of a trial court's factual determinations that have evidentiary support, we review on a de novo basis its interpretation of the law and its application of the law to those factual determinations. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). An error of law or an erroneous application of the law to the facts is always an abuse of discretion. *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 91–92 (Tex. 2019) (orig. proceeding).

An appellate remedy's adequacy has no specific definition; "the term is 'a proxy for the careful balance of jurisprudential considerations' [that implicate both public and private interests,] and its meaning 'depends heavily on the circumstances presented.'" *Allstate Indem. Co.*, 622 S.W.3d at 883 (quoting *In re Prudential Ins. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)); *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (quoting *Prudential*, 148 S.W.3d at 136); *see also In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding) ("Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review."). An appellate

remedy is adequate when any benefits to mandamus review are outweighed by the detriments. *Prudential*, 148 S.W.3d at 136.

But the converse is not necessarily true; even when the benefits of mandamus review outweigh the detriments, we must consider whether the appellate remedy is nonetheless adequate. *Id.* In evaluating the benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). The danger of permanently losing substantial rights occurs when the appellate court would not be able to cure the error, when the party's ability to present a viable claim or defense is vitiated, or when the error cannot be made a part of the appellate record. *ERCOT, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 641 (Tex. 2021) (orig. proceeding) (citing *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding)). We should also consider whether mandamus will allow us "to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments" and "whether mandamus will spare litigants and the public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *Team Rocket*, 256 S.W.3d at 262 (quoting *Prudential*, 148 S.W.3d at 136).

Considering this reasoning in *Dawson*, the supreme court concluded that the right of a claimant "to not have to try her case against an empty chair" in violation of Section 33.004(d) is a right equal in value to the "'significant and substantive right'" of

a defendant "'to allow the fact finder to determine the proportionate responsibility of all responsible parties'" through the designation and submission of responsible third parties. 550 S.W.3d at 630 (quoting *In re Coppola*, 535 S.W.3d 506, 509 (Tex. 2017) (orig. proceeding)). Accordingly, the proper application of Section 33.004(d) is a right subject to vindication by mandamus before a trial on the merits. *Dawson*, 550 S.W.3d at 630–31; *see also In re Gonzales*, 619 S.W.3d 259, 265 (Tex. 2021) (orig. proceeding) ("[W]e held in *Dawson* that an ordinary appeal would be inadequate to protect the rights of a *plaintiff* when the trial court erroneously *grants* a defendant's belated motion for leave to designate a time-barred responsible third party.").

B. Gamble Has Not Waived Mandamus Review by Delay

As a threshold issue, Couch asserts that Gamble waived mandamus review by waiting nearly four months to file for relief from the trial court's order designating Kendra and TxDOT as responsible third parties. Although mandamus is a legal remedy, it is largely controlled by equitable principles. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). "One such principle is that '[e]quity aids the diligent and not those who slumber on their rights.'" *Id.* (quoting *Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941)). Whether a party's delay in asserting its rights precludes mandamus relief is a fact-specific inquiry that depends on the circumstances of each case. *In re Oceanografia, S.A. de C.V.*, 494 S.W.3d 728, 730 (Tex. 2016) (orig. proceeding); *In re E.S.*, No. 07-19-00323-CV, 2019 WL 7342242, at *1 (Tex. App.—Amarillo Dec. 30, 2019, orig. proceeding) (per curiam) (mem. op.); *see also Munson v.*

Terrell, 105 S.W. 1114, 1115 (Tex. 1907) (orig. proceeding) ("Laches is an obstacle to the remedy of mandamus—dependent upon the circumstances of the particular case."); *In re Mabray*, 355 S.W.3d 16, 22–23 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding [mand. denied]) ("Laches is a question of fact that should be determined by considering all of the circumstances in each particular case.").

Because of the fact-specific nature of the inquiry, a nearly four-month delay does not necessarily foreclose the availability of mandamus relief. *See Oceanografia*, 494 S.W.3d at 730–31. While it is true—as Couch points out in his brief—that the supreme court denied mandamus relief in *Rivera* based on the relators' unjustified four-month delay in filing their petition, 858 S.W.2d at 367–68, in other cases, the court has held that delays of four months or longer did not preclude mandamus relief. *See In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675–76 (Tex. 2009) (orig. proceeding) (holding that neither a party's four-month delay in obtaining a hearing on its motion to dismiss based on a contractual forum-selection clause nor the following eight-month delay in obtaining a corrected order denying the motion precluded mandamus review); *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding) (holding nearly six-month delay did not preclude mandamus relief because relator provided a sufficient explanation); *In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517, 524–25 (Tex. 2002) (orig. proceeding) (holding that a defendant's four-year delay in moving for dismissal for forum non conveniens under Section 71.052 while challenging in personam jurisdiction did not preclude mandamus relief,

especially when the delay had not prejudiced the plaintiffs). Further, many of our sister courts have considered mandamus petitions filed after delays longer than four months. *See In re Border Steel, Inc.*, 229 S.W.3d 825, 836 (Tex. App.—El Paso 2007, orig. proceeding [mand. denied]) (holding seven-month delay did not preclude relief); *In re Simon Prop. Grp. (Del.), Inc.*, 985 S.W.2d 212, 216 (Tex. App.—Corpus Christi–Edinburg 1999, orig. proceeding) (holding year-and-a-half delay did not preclude relief); *Sanchez v. Hester*, 911 S.W.2d 173, 177 (Tex. App.—Corpus Christi–Edinburg 1995, orig. proceeding) (holding seven-month delay did not preclude relief).

Moreover, the record does not reflect that Gamble lacked interest—or even diligence—in pursuing the relief he now seeks. *See Int'l Profit Assocs.*, 274 S.W.3d at 676. After the trial court granted Couch's motion, Gamble's trial counsel was forced to rework his entire trial strategy, including engaging in additional, complicated discovery and trial preparation against responsible third parties that had not been directly involved in the case up to that point. In addition, the first appellate lawyer that Gamble retained to prepare and file his mandamus petition had to withdraw because of a conflicting trial schedule, requiring his trial counsel to engage a second appellate lawyer and "bring[] him up to speed" on the case. Thus, Gamble has adequately explained the delay and has shown that he did not "slumber on [his] rights." *Rivera*, 858 S.W.2d at 367. Accordingly, given the circumstances of this case,[10]

[10]We emphasize the fact-specific nature of our ruling and caution that this decision should not be read to suggest that a delay of nearly four months is generally

we hold that Gamble did not forfeit mandamus review by waiting nearly four months to file for relief.

C. Governmental and Parental Immunities Do Not Foreclose Designation

In his second issue,[11] Gamble argues that because Kendra enjoys parental immunity and because TxDOT enjoys governmental immunity, there is no "applicable legal standard" by which either qualifies as a "responsible third party," and thus, both are foreclosed as a matter of law from being so designated; accordingly, Gamble asserts that the trial court abused its discretion by authorizing Couch's designations. We disagree.

1. Immunity Does Not Foreclose Third-Party Responsibility

Gamble roots his argument in the text of two provisions of Chapter 33 of the Texas Civil Practice and Remedies Code. First, he points to the language of Section 33.004(g)(1), which provides that if an objection to a defendant's motion for leave to designate a responsible third party is filed, "the court shall grant leave . . . unless the objecting party establishes[that] the defendant did not plead sufficient facts

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presumed to be reasonable or justifiable. As previously stated, whether a delay precludes mandamus relief depends on the unique circumstances of each case. *See Oceanografia*, 494 S.W.3d at 730; *E.S.*, 2019 WL 7342242, at *1.

[11]Because Gamble's second issue raises the antecedent question of Kendra's and TxDOT's eligibility to be designated as responsible third parties and, thus, if sustained, would be dispositive as to whether the trial court abused its discretion—obviating our need to consider the adequacy of Couch's disclosures—we address this issue first. *See, e.g.*, *Giant Res., LP v. Lonestar Res., Inc.*, No. 02-21-00349-CV, 2022 WL 2840265, at *4 (Tex. App.—Fort Worth July 21, 2022, no pet.).

concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure." Tex. Civ. Prac. & Rem. Code Ann. § 33.004(g)(1). According to Gamble, because Couch has not affirmatively pleaded—and indeed cannot plead—facts establishing an exception to Kendra's parental immunity or TxDOT's governmental immunity, Couch "did not plead sufficient facts concerning [their] alleged responsibility," and the trial court erred by granting his motion for leave. *See id.* Alternatively, Gamble argues that, because Chapter 33 defines "responsible third party" as "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission . . . [or] by other conduct or activity that violates an applicable legal standard," parental and governmental immunities negate the existence of any "applicable legal standard" and thereby render "third party responsibility" legally impossible for those who enjoy their protection. *See id.* § 33.011(6).

Grounded on the false premise that an individual or entity that enjoys immunity from liability thereby owes no legal duty to refrain from wrongfully injuring another, Gamble's textual arguments find no support in the common law understanding of immunity. As our sister court in Dallas has observed,

> application of an immunity from liability and the recognition of a legal duty that is the prerequisite to a civil cause of action are two entirely separate issues. Immunity presupposes a legal duty and corresponding liability when the duty is breached. If a legal duty does not exist, the possible application of an immunity never becomes an issue.

Chenault v. Huie, 989 S.W.2d 474, 476 (Tex. App.—Dallas 1999, no pet.) (citation omitted). Thus, a claimant may "plead sufficient facts" demonstrating third-party responsibility for an injury by describing a breach of a legal duty to the claimant—and thereby the violation of an "applicable legal standard"—even if the claimant cannot recover a judgment from the third party because of its immunity. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.004(g)(1), 33.011(6).

Moreover, consistent with our sister courts, this court has previously interpreted the proportionate responsibility provisions of Chapter 33 to authorize the designation of "persons who are not subject to the court's jurisdiction or who are immune from liability" as responsible third parties.[12] *Preston v. M1 Support Servs., L.P.*, 628 S.W.3d 300, 317 n.11 (Tex. App.—Fort Worth 2020) (mem. op) (quoting *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 58 n.5 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding)), *rev'd on other grounds*, 642 S.W.3d 452 (Tex. 2022); *see Thurston, Owens, & Newman, L.L.C. v. Davis*, No. 12-19-00384-CV, 2021 WL 9440633, at *12 (Tex. App.—Tyler Mar. 18, 2021, pet. denied) (mem. op.) (citing *Unitec Elevator* and holding that statutory "immunity" of subscribing employer from common law liability for employee injuries no longer forecloses designation as responsible third party); *N.H.*

[12] *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 868 n.6 (Tex. 2009) (observing that the 2003 amendments to the proportionate responsibility provisions of Chapter 33 "substantially broadened the meaning of the term 'responsible third party' to eliminate [jurisdictional and liability] restrictions").

Ins. Co. v. Rodriguez, 569 S.W.3d 275, 299 (Tex. App.—El Paso 2019, pets. denied) (same).[13]

Finally, interpreting the limitations restriction imposed by Section 33.004(d) in *In re YRC, Inc.*, the supreme court recently distinguished the statutory abrogation of a common law negligence cause of action against a subscribing employer—and, of necessity, its "applicable legal standard"—from the availability of an immunity defense for the breach of the same standard in other contexts:

> Our holding does not extend to causes of action that have limitations periods applicable to third parties but that might not ultimately succeed for various reasons those parties could choose to raise, *such as immunity*, defenses, or lack of merit. *In such situations, a defendant must comply with Section 33.004(d) by timely designating the third party or disclosing its potential designation.*

646 S.W.3d 805, 809 n.1 (Tex. 2022) (orig. proceeding) (emphases added); *see also In re Mobile Mini, Inc.*, 596 S.W.3d 781, 787 (Tex. 2020) (orig. proceeding) (recognizing that because "'responsibility' is not equated with 'liability'" under Chapter 33, a "defendant

[13]Federal courts have similarly held that immunity—including parental immunity—does not preclude a person from being designated as a responsible third party under Chapter 33. *See Fisher v. Halliburton*, 667 F.3d 602, 622 (5th Cir. 2012) ("Even parties 'who are not subject to the court's jurisdiction or who are immune from liability to the claimant' can be designated responsible third parties under [Chapter 33]." (quoting *Unitec Elevator*, 178 S.W.3d at 58 n.5)); *Rubi v. MTD Prods., Inc.*, No. H-15-1831, 2016 WL 7638150, at *6 (S.D. Tex. Dec. 13, 2016) (mem. & recommendation) ("[Mother]'s claim of parental immunity does not prevent her from being designated as a responsible third party. Chapter 33, which does not impose liability, applies to [mother] even though she may have immunity . . . ."); *Hernandez v. Bumbo (Pty.) Ltd.*, No. 3:12-cv-1213-M, 2014 WL 924238, at *3 (N.D. Tex. Mar. 10, 2014) (mem. op. & order) ("Under Chapter 33 as it now exists, traditional immunity defenses under Texas law, including parental immunity, do not prevent responsible third party designations.").

may designate a responsible third party even though that party possesses a defense to liability, or cannot be formally joined as a defendant, or both"); *Galbraith*, 290 S.W.3d at 868 n.6 ("[T]he jury should allocate responsibility among all persons who are responsible for the claimant's injury, regardless of whether they are subject to the court's jurisdiction or whether there is some other impediment to the imposition of liability on them, such as . . . immunity." (quoting 19 William V. Dorsaneo III, Tex. Litig. Guide § 291.03[2][b][i] (2009))).

Accordingly, pursuant to both *YRC, Inc.* and *Preston*, the availability of immunity defenses to Kendra and TxDOT does not foreclose their designation as responsible third parties as a matter of law.

2. Third-Party Responsibility Standards for Kendra and TxDOT

Nevertheless, the inclusion of Kendra and TxDOT as responsible third parties in a proportionate responsibility submission with Couch requires the existence of an "applicable legal standard" by which they may be determined to be responsible for the damages sought by Gamble; absent applicable legal standards, there is no basis for their submission regardless of their immunity. Remarkably, Couch's motion for leave never expressly identifies any "applicable legal standard" the breach of which renders his detailed factual allegations actionable as a matter of law. Because Couch's factual allegations presume duties the breach of which appear actionable as negligence against both Kendra and TxDOT, we look to Texas common and statutory law to confirm its application under these circumstances.

a. Parental negligence and child passenger injuries

The essence of Couch's theory of third-party responsibility against Kendra is that she failed to properly secure A.G. and S.G. by both the seatbelt and shoulder strap at the time of the collision, thereby resulting in their catastrophic injuries. The "applicable legal standard" he urges, therefore, is one of negligent parental supervision. Recent common law and statutory developments concerning child passenger safety, however, suggest the "applicable legal standard" is one of both parental supervision *and* vehicular negligence, whether parental or otherwise, and thereby contemplate the possibility of concurrent tortfeasors subject to overlapping duties and responsibilities when apportioning responsibility for child passenger injuries attributable to their negligent nonuse of seatbelts.

i. *Negligent parental supervision*

In *Motsenbocker v. Wyatt*, the supreme court observed that "[s]mall children when unattended are apt to get into trouble. They often disobey instructions and find themselves in positions of danger wherein because of their tender years and lack of experience they cannot protect themselves." 369 S.W.2d 319, 321 (Tex. 1963). The court then set forth the "rule applicable to this class of cases" when a defendant asserts a parent's negligent supervision as a bar to recovery of damages for injuries to a child caused by the defendant's vehicular negligence:

> Negligence on the part of the parent must consist, in such matters, of neglect of the duty which every father and mother owe to their child, of exercising over it such protective care as its age, capacity, and the danger

> to which it may be exposed render reasonably necessary; and it is to be borne in mind that this is not the only duty which rests upon heads of families, but is only one among many, and its performance is to be exacted with due regard to their abilities, and to other demands upon their attention. The degree of care to be used must always be measured by the circumstances of the case. Care which would be adequate in some situations would be wholly inadequate in others. It is therefore a question peculiarly fit for the determination of a jury of ordinary men, in cases where there is not an entire abnegation of the duty which rests upon the parent, but an attempt to perform it, whether or not caution displayed was a discharge of the duty growing out of, and demanded by, the circumstances.

Id. at 322–23 (quoting *Hous. City St. Ry. Co. v. Dillon*, 22 S.W. 1066, 1067 (Tex. App.—Galveston 1893, no writ)); *see also Yarborough v. Berner*, 467 S.W.2d 188, 189–90 (Tex. 1971) (holding that whether negligent supervision by the injured four-year-old's parents was a proximate cause of the underlying auto–pedestrian accident was a fact issue for determination by the jury).

Although the *Motsenbocker* standard applied in the context of parental causes of action for vehicular injuries to their children, negligently caused by a third party to the parent–child relationship, the doctrine of parental immunity clearly prohibited injured children themselves from recovering damages for negligent parental supervision. *See Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (reaffirming the application of the doctrine "to alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child"). Thus, considering Couch to be a third party to the parent–child relationship between Kendra and A.G.

and S.G. under these authorities, the applicable legal standard would appear to be one of negligent parental supervision. *See In re G.C.S.*, 657 S.W.3d 114, 121, 129–30 (Tex. App.—El Paso 2022, pet. denied) (considering mother's failure to secure her three- and seven-year-old children by seatbelt while driving under the influence as evidence of negligent supervision supporting termination of her parental rights).

But Texas courts have never considered this standard for child passenger seatbelt injuries because (1) the former Texas Automobile Guest Statute foreclosed any cause of action for damages attributable to the ordinary negligence of a driver by any passenger related within two degrees of consanguinity or affinity riding as a guest, (2) the doctrine of parental immunity otherwise foreclosed damages for child passenger injuries caused by parental vehicular negligence and (3) even after the supreme court withdrew immunity for parental vehicular negligence, Texas common and statutory law prohibited any consideration of the nonuse of seatbelts when adjudicating liability for vehicular injuries. Given the supreme court's recent removal of this last impediment to consideration of seatbelt nonuse in proportionate responsibility determinations, the trial court's granting of leave to designate Kendra as a responsible third party presents an issue of first impression concerning the proper manner to apportion her third-party responsibility under the circumstances.

ii. *Parental vehicular negligence*

For most of the last century, the automobile guest statute barred a nonpaying passenger from recovering damages from a driver for ordinary vehicular negligence.

See Whitworth v. Bynum, 699 S.W.2d 194, 195 (Tex. 1985) (discussing the enactment of former Tex. Rev. Civ. Stat. Ann. art. 6701b in 1931 and its amendment in 1973); *Tisko v. Harrison*, 500 S.W.2d 565, 566–67 (Tex. App.—Dallas 1973, writ ref'd n.r.e.) (holding guest statute precluded parents from recovering medical expenses for injuries suffered by their son while a guest in defendant's vehicle); Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges*: PJC 3.10 (1969 & Supp. 1973) ("'Guest' means one who rides in another's vehicle through voluntary hospitality of the driver without payment or benefit of a tangible nature for such transportation."). Given A.G. and S.G. were related to Couch "within the second degree of . . . affinity" at the time of the collision, as well as their undisputed status as nonpaying guests in the Silverado, neither they nor Gamble could have maintained a cause of action for vehicular negligence under the automobile guest statute. *See Whitworth*, 699 S.W.2d at 195 (quoting "second degree of consanguinity or affinity" requirement in former article 6701b, § 1(a)); *Tisko*, 500 S.W.2d at 566–67; Tex. Gov't Code Ann. §§ 573.023(a) ("A parent and child are related in the first degree[of consanguinity.]"), 573.025(a) ("A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity.").

Not until 1988, in *Jilani v. Jilani*, did the supreme court modify the doctrine of parental immunity to permit children to sue their parents for damages arising from parental vehicular negligence, reasoning that the improper operation of a motor

vehicle did not involve the exercise of the "essentially parental" authority or discretion, such as discipline or supervision, which the doctrine sought to protect. 767 S.W.2d 671, 672–73 (Tex. 1988). But as to whether a parent's vehicular negligence may reduce a defendant's liability for injuries to a child passenger via proportionate responsibility or contribution, the issue appears to depend upon if the vehicular negligence involves parental supervision. In *Shoemake v. Fogel, Ltd.*, a nonvehicular negligence case, the supreme court reaffirmed that negligent supervision remained subject to parental immunity in denying a defendant's attempt to reduce its liability to the decedent child's estate by the percentage of comparative negligence of her mother. 826 S.W.2d 933, 935 (Tex. 1992).

iii. *Seatbelts and securing child passengers*

Over the course of the above-outlined history, no Texas court addressed whether the failure of parents to ensure the proper placement and use of seatbelts on their passenger children constituted the negligent operation of a motor vehicle via *Jilani* or the negligent supervision of child passengers via *Motsenbocker* and *Shoemake*. Initially, the supreme court rejected outright the argument that the failure of any injured driver or passenger to use seatbelts constituted contributory negligence that either barred or reduced their recovery. *See Carnation Co. v. Wong*, 516 S.W.2d 116, 117 (Tex. 1974) ("[P]ersons whose negligence did not contribute to an automobile accident should not have the damages awarded to them reduced or mitigated because

of their failure to wear available seat belts."). As the court had previously reasoned in *Kerby v. Abilene Christian College*,

> [w]e draw a sharp distinction between negligence contributing to the accident and negligence contributing to the damages sustained. Contributory negligence must have the causal connection with the accident that but for the conduct the accident would not have happened. Negligence that merely increases or adds to the extent of the loss or injury occasioned by another's negligence is not such contributory negligence as will defeat recovery. The conduct of driving with an open door is not unlike the conduct of driving without using available seat belts. That conduct has been held not to be actionable negligence. Likewise, driving without use of available seat belts has been held not to be contributory negligence such that would bar recovery.

503 S.W.2d 526, 528 (Tex. 1973) (op. on reh'g); *Sonnier v. Ramsey*, 424 S.W.2d 684, 689 (Tex. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) ("The failure to use a seat belt may contribute to the cause of the injury, but almost never to the cause of the accident. This sounds in damages, not liability.").[14]

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[14]Significantly, the first court to consider the issue held that, even had the jury considered the decedents' failure to use an available seatbelt at the time of the fatal collision, the absence of any expert testimony that they would have survived "had they been using their seat belts" rendered harmless any error in the trial court's refusal to submit the issue. *Tom Brown Drilling Co. v. Nieman*, 418 S.W.2d 337, 340–41 (Tex. App.—Eastland 1967, writ ref'd n.r.e.) (finding no common law or statutory authority imposing a duty to use available seatbelts); *see also United Furniture & Appliance Co. v. Johnson*, 456 S.W.2d 455, 458–59 (Tex. App.—Tyler 1970, writ dism'd) (finding no error in the trial court's refusal to instruct the jury on seatbelt usage and mitigation given the absence of any evidence demonstrating that plaintiff "suffered injury she would not have suffered or that her injuries were more severe than would otherwise have been the case, had she had her seat belt fastened"); *Red Top Taxi Co. v. Snow*, 452 S.W.2d 772, 779 (Tex. App.—Corpus Christi–Edinburg 1970, no writ) (finding no error in trial court's refusal to instruct on seatbelt usage in absence of any medical testimony that plaintiff's failure to fasten her seatbelt proximately caused the injuries she suffered). As will be discussed in more detail below, Couch's designation of Dr.

After more than forty years of both Texas courts' and the Texas legislature's addressing the issue—the latter having enacted an outright prohibition on the admissibility of evidence of seatbelt nonuse in motor-vehicle-accident cases in 1985, *see Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633 (Tex. 1986) (op. on reh'g) (observing that the legislature ratified *Wong* by forbidding admissibility of seatbelt usage in civil cases), only to repeal it in 2003—and after the enactment and amendment of the proportionate responsibility provisions of Chapter 33, the supreme court overruled both *Wong* and *Kerby* in *Nabors Well Servs., Ltd. v. Romero* (*Romero I*), holding "that relevant evidence of use or nonuse of seat belts is admissible for the purpose of apportioning responsibility in civil lawsuits." 456 S.W.3d 553, 555 (Tex. 2015); *see also Nabors Well Servs., Ltd. v. Loera* (*Loera I*), 457 S.W.3d 435, 437 (Tex. 2015) (applying *Romero I*). In so holding, the court observed that Chapter 33 "casts a wide net over conduct that may be considered in [the proportionate responsibility] determination, including negligent acts or omissions as well as any conduct or activity that violates an applicable legal standard." *See Romero I*, 456 S.W.3d at 560.

Gwin to testify not only to the absence of proper seatbelt restraint for both A.G. and S.G. but also to the causal relationship between such failure and their catastrophic abdominal and spinal injuries seeks to meet this longstanding evidentiary standard. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 715–17, 727–28 (Tex. 1998) (holding no abuse of discretion in trial court's exclusion of affidavit testimony of biomechanics, vehicle occupant kinematics, and vehicle occupant restraint systems expert that, absent a defect in the vehicle restraint system, the Gammills' ten-year-old daughter would not have died in the underlying motor-vehicle accident because an "analytical gap" existed without an explanation of how the alleged defect actually caused the fatal injuries).

Accordingly, because the proportionate responsibility provisions of Chapter 33 address not only occurrence-causing responsibility, such as vehicular negligence, but also injury-causing responsibility, such as negligent nonuse of seatbelts, the court concluded that evidence of nonuse of seatbelts is admissible to inform the proportionate responsibility determination:

> We believe most reasonable people considering who caused a plaintiff's injuries in a car accident would not lean on a logical distinction between occurrence-causing and injury-causing conduct. *Rather, most would say a plaintiff who breaks the law or otherwise acts negligently by not using a seat belt is at least partially responsible for the harm that befalls him. This is true even if he did not cause the car accident, provided it can be shown the failure to buckle up exacerbated his injuries.* It is this common-sense approach, and not a philosophical abstraction articulated over forty years ago, that our proportionate-responsibility statute captures. We do not suggest there is no logical difference between occurrence-causing and injury-causing conduct. The sharpest rhetorical argument against admitting seat-belt evidence has been that failure to use a seat belt cannot *cause* an accident, and it is those who cause accidents who should pay. But it is equally true that failure to use a seat belt will sometimes exacerbate a plaintiff's injuries or lead to his death. *Accordingly, the conclusion is unavoidable that failure to use a seat belt is one way in which a plaintiff can "cause*[] *or contribut*[*e*] *to cause in any way" his own "personal injuries" or "death."* Tex. Civ. Prac. & Rem. Code [Ann.] §§ 33.003(a), 33.011(4). *The proportionate-responsibility statute calls for an apportionment of fault for "personal injuries" and "death" rather than for the underlying occurrence that introduced a sequence of events in which the end result is potentially influenced by whether the plaintiff acted unreasonably or even broke the law.*

Id. at 562–63 (emphases added).

Acknowledging the prospective impact of this ruling on trials involving vehicular negligence, the supreme court confirmed that evidence of nonuse of seatbelts remains subject to relevancy and scientific-reliability gatekeeping and

specifically anticipated the submission of parental injury-causing negligence when determining proportionate responsibility for child passenger injuries:

> Today's holding opens the door to a category of evidence that has never been part of our negligence cases, but we need not lay down a treatise on how and when such evidence should be admitted. Seat-belt evidence has been unique only in that it has been categorically prohibited in negligence cases. With that prohibition lifted, our rules of evidence include everything necessary to handle the admissibility of seat-belt evidence. As with any evidence, seat-belt evidence is admissible only if it is relevant. *See* Tex. R. Evid. 401, 402. And relevance is the trial court's province. . . . The defendant can establish the relevance of seat-belt nonuse only with evidence that nonuse caused or contributed to cause the plaintiff's injuries. And the trial court should first consider this evidence, for the purpose of making its relevance determination, outside the presence of the jury. . . . Otherwise, the jury will have already heard evidence of nonuse before such evidence has been deemed relevant. Expert testimony will often be required to establish relevance, but we decline to say it will be required in all cases. And, of course, like any other evidence, even relevant seat-belt evidence is subject to objection and exclusion under Rule 403.
>
> Our holding should likewise not introduce any confusion into how to construct a jury charge when seat-belt evidence or any other pre-occurrence, injury-causing conduct is admitted. *Under section 33.003(a), the fact-finder may consider relevant evidence of a plaintiff's failure to use a seat belt as a "negligent act or omission" or as a violation of "an applicable legal standard" in cases where the plaintiff was personally in violation of an applicable seat-belt law. See* Tex. Civ. Prac. & Rem. Code [Ann.] § 33.003(a). *And in cases in which an unrestrained plaintiff was not personally in violation of a seat-belt law, the fact-finder may consider whether the plaintiff was negligent under the applicable standard of reasonable care. This scenario is likely to arise when children are among the passengers of the plaintiff's vehicle. Most children do not violate seat-belt laws by failing to restrain themselves; rather, it is the driver upon whom the law places the responsibility to properly restrain them. Nonetheless, a minor is still held to the degree of care that would be exercised by an "ordinarily prudent child of* [*the same*] *age, intelligence, experience*[,] *and capacity . . . under the same or similar circumstances." Rudes v. Gottschalk*, . . . 324 S.W.2d 201, 204 ([Tex.] 1959) [(op. on reh'g)]. *The jury may further apportion third-party responsibility to the person upon whom the law places the burden to properly restrain the child.*

Id. at 563–64 (emphasis added).

Given the emphasized language in these paragraphs of *Romero I*, it is clear that the nonuse of seatbelts by those injured or killed while traveling in a passenger vehicle so equipped—whether the driver or operator of the vehicle or merely a passenger—involves an "applicable legal standard" for consideration by a factfinder when making a proportionate responsibility determination.[15] As *Romero I* confirms, Couch, as the driver of the Silverado, bore a statutory responsibility for ensuring that A.G. and S.G., as child passengers under the age of seventeen, were properly secured in both their seatbelts and shoulder straps. *See id.* at 558 ("Today, anyone fifteen years or older in any seat is required to buckle up, and drivers have a responsibility to make sure anyone seventeen years or younger anywhere in the vehicle is properly restrained."); *see also* Tex. Transp. Code Ann. § 545.413(b)(1)–(2) ("A person commits an offense if the person[] (1) operates a passenger vehicle that is equipped with safety belts; and (2) allows a child who is younger than [seventeen] years of age and who is not

[15]We note here that we are called upon to determine whether the trial court misinterpreted or misapplied the law in light of the clear authority of *Romero I* despite the unfortunate fact that neither Couch nor Gamble informed this court, let alone the trial court, of the supreme court's decision. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(4) & cmt., *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) ("A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities."). Indeed, as noted above, Couch never actually referred the trial court to any common law or statutory authority whatsoever in support of a "legal theory" applicable to Kendra as a passenger in the Silverado. Nevertheless, however sympathetic we may be to the trial court's plight in this regard, we must consider all pertinent legal authorities in determining whether a misinterpretation or misapplication of the law occurred.

required to be secured in a child passenger safety seat system . . . to ride in the vehicle without requiring the child to be secured by a safety belt, provided the child is occupying a seat that is equipped with a safety belt."), (h) ("In this section, 'passenger vehicle,' 'safety belt,' and 'secured' have the meanings assigned by Section 545.412.").[16] Kendra, as an adult passenger, bore a statutory responsibility for securing her own person by both seatbelt and shoulder strap. *See id.* § 545.413(a)(1) ("A person commits an offense if[] (1) the person[] (A) is at least [fifteen] years of age; (B) is riding in a passenger vehicle while the vehicle is being operated; (C) is occupying a seat that is equipped with a safety belt; and (D) is not secured by a safety belt[.]"). And, although absolved of any statutory responsibility due to their tender years, A.G. and S.G. may be held to an age-appropriate, "ordinarily prudent child" degree of care for securing their own persons by seatbelt and shoulder strap. *See Romero I*, 456 S.W.3d at 564.

What the *Romero I* court did not state expressly, but strongly suggested, is adult passengers other than the operator of the vehicle, presumably parents, may be apportioned responsibility, even as third parties, for failing to secure child passengers in their safety belts under certain circumstances: "The jury may further apportion

[16]Tex. Transp. Code Ann. § 545.412(f)(3) ("'Safety belt' means a lap belt and any shoulder straps included as original equipment on or added to a vehicle."), (f)(4) ("'Secured,' in connection with use of a safety belt, means using the lap belt and any shoulder straps according to the instructions of[] the manufacturer of [either] the vehicle . . . or . . . the safety belt[.]"); *see also Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 747 & n.2 (Tex. 2006) (observing state law requires child passengers to wear seatbelts and quoting Section 545.413(b)(2)).

third-party responsibility to the person upon whom the law places the burden to properly restrain the child." *See id.* Indeed, the exact argument urged by Couch in favor of Kendra's submission as a responsible third party was made by the defendants in *Romero I* for the same purpose, i.e., to reduce their proportionate responsibility for the injuries of all five of the child passengers:[17] "Finally, a parent riding in the car . . . who did not ensure that his or her child was belted could be apportioned fault for that child's injuries. Although the statute did not impose *criminal* liability on parents, they nonetheless have a common-law duty to use ordinary care to protect their children from injury." *See* Appellant's brief on the merits, *Romero I*, No. 13-0136 (Oct. 21, 2013) (available at http://www.search.txcourts.gov/Case.aspx?cn=13-0136&coa=cossup) (emphasis in original) (last examined July 25, 2023).[18] Observing

[17]*See Nabors Wells Servs., Ltd. v. Romero* (*Romero II*), 508 S.W.3d 512, 520 (Tex. App.—El Paso 2016, pet. denied) (on remand) (discussing the seating arrangements in the vehicle as well as the ages and familial relationships of the child passengers). The child passengers included a nine-year-old daughter seated in the front seat between her father, who was driving the vehicle, and her mother; fifteen-year-old twin daughters seated immediately behind their parents in the middle row of the vehicle; and the driver's adult stepdaughter and her four- and eight-year-old sons, all riding in the third row of the vehicle. *See id.*

[18]We may take judicial notice of the briefing of the parties in *Romero I* as online published records of the supreme court. *See In re State Farm Mut. Auto. Ins. Co.*, 614 S.W.3d 316, 336 n.9 (Tex. App.—Fort Worth 2020, orig. proceeding [mand. denied]); *see also Quinius v. Estrada*, 448 S.W.2d 552, 553–54 (Tex. App.—Austin 1969, writ ref'd n.r.e.) (observing that the issue of whether the failure of a plaintiff to wear a seatbelt is a matter of contributory negligence or damages mitigation was "squarely presented" to the supreme court in a "petition for writ of error by several assignments" in *Sonnier* and concluding the court's refusal of the writ, no reversible error, demonstrated its approval of the damages mitigation approach). *But see Com. Standard Ins. Co. v. Marin*,

that, when faced with a record including parent passengers, the *Romero I* court did not limit potential third-party responsibility to drivers only, we hold that, whether couched in terms of the negligent operation of a motor vehicle via *Jilani* or the negligent supervision of child passengers via *Motsenbocker* and *Shoemake*, ensuring that a child passenger is properly secured in an available safety belt is an "applicable legal standard" by which Kendra's third-party responsibility may be determined in this case.[19]

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488 S.W.2d 861, 864 (Tex. App.—San Antonio 1972, writ ref'd n.r.e.) ("In fact, the notation, 'Refused, No Reversible Error,' does not even mean that the [Texas] Supreme Court is satisfied that the Court of Civil Appeals has reached the correct result. It merely means that the application for writ of error presents no error [that] requires reversal."); Tex. R. Form 4.4.2 & App. E ("The Texas Supreme Court is not satisfied that the opinion of the court of civil appeals in all respects has correctly declared the law but is of the opinion that the application presents no error that is reversible.").

[19]Had Kendra been driving the Silverado instead of Couch, there is no question that the combination of *Jilani* and *Romero I* would treat her alleged failure to secure A.G. and S.G. as vehicular negligence not subject to parental immunity. *See Vasquez*, 189 S.W.3d at 747 (observing that aunt's placement of four-year-old niece "unbuckled in the front seat" of her vehicle while she drove through neighborhood authorized aunt's designation as a "responsible third party" when the underlying collision caused the vehicle's airbag to deploy in a manner that broke the child's neck). And at least one post-*Jilani*, pre-*Romero I* decision appears to conflate a mother's negligence in placing her eighteen-month-old daughter and three-year-old son together in the front passenger seat of her vehicle—arguably an instance of negligent supervision—with her negligent operation of the vehicle. *See Bay, Inc. v. Ramos*, 139 S.W.3d 322, 324, 330–31 & n.5 (Tex. App.—San Antonio 2004, pets. denied) (holding jury's "zero" negligence finding for mother "manifestly unjust" due to her placement of her children in the front passenger seat resulting in daughter's broken neck, severed spinal cord and brain trauma when passenger-side airbag deployed in collision; the jury did not hear evidence of whether children were properly restrained, and the majority's analysis did not take such evidence into consideration); *see also In re M.H.*, No. 06-22-

iv. *Is child seatbelt safety a delegable or exclusive duty?*

Even though parental immunity does not foreclose the designation of Kendra as a responsible third party, a subsidiary question raised by the parties—but left unanswered by *Romero I*—is whether the duty for child seatbelt safety imposed upon Couch by Section 545.413(b)(2) of the Texas Transportation Code was delegable to Kendra or whether the legislature intended to impose a duty exclusive to the operators of passenger vehicles.[20] Tacitly acknowledging this duty, but not his breach thereof, Couch's motion for leave initially argued that Kendra was not wholly but "partially responsible for ensuring that A.G. and S.G. were properly seatbelted at all times" only to finally argue that Kendra assumed full responsibility for securing her daughters during her deposition. Indeed, the entire purpose of designating Kendra as

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00072-CV, 2023 WL 2711127, at *5 (Tex. App.—Texarkana Mar. 30, 2023, pet. denied) (mem. op.) (considering mother's operation of motor vehicle with her eleven-month-old child in front passenger seat, unrestrained, to be endangering conduct supporting a judgment terminating her parental rights). Given the *Romero I* court's reasoning in favor of potential third-party responsibility for child passenger injuries caused by the use or nonuse of seatbelts, it appears the court implicitly extended *Jilani* to damages suffered due to a parent passenger's failure to secure her children.

[20]Rule 52.3(f) of the Texas Rules of Appellate Procedure mandates the consideration of subsidiary issues fairly presented by issues or points raised by a relator's petition or a real party in interest's response. Tex. R. App. P. 52.3(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."); *see Rohrmoos Venture v. UTSA DVA Healthcare, LLP*, 578 S.W.3d 469, 480 (Tex. 2019) ("We have firmly mandated that courts broadly construe issues to encompass the core questions and to reach all issues subsidiary to and fairly included within them."). "This mandate must be applied 'reasonably, yet liberally,' so that the merits of an appeal are addressed whenever 'reasonably possible.'" *Rohrmoos Venture*, 578 S.W.3d at 480 (quoting *Ditta v. Conte*, 298 S.W.3d 187, 190 (Tex. 2009)).

a responsible third party is to limit Couch's liability exposure to his occurrence-causing conduct by delegating solely to Kendra any responsibility he may have for injury-causing conduct.

But Gamble objected to Kendra's designation, in part, because "Couch disregarded his legal duty, as the driver of the truck, to ensure A.G. ([ten] years old) and S.G. ([eight] years old) were safely and properly positioned and properly secured by a seatbelt."[21] In essence, Gamble argues that the statutory duty owed by Couch subordinates any duty that Kendra may have had for the seatbelt safety of her daughters to the point of excluding her from any responsibility for their injuries. Because we agree with Gamble that child seatbelt safety is a nondelegable statutory duty owed by every Texas driver but conclude, as suggested by *Romero I*, that the common law duty of parental supervision owed by Kendra was a concurrent—not delegated—obligation, a jury may apportion responsibility between Couch and

[21]Although Gamble supported his objection with a citation to Section 545.412, which mandates the use of a child passenger safety seat system for each child passenger under the age of eight years, *see* Tex. Transp. Code Ann. § 545.412, the citation nevertheless evoked the statutory duty the operator of a passenger vehicle owes for child seatbelt safety. Gamble cited no authority for the proposition that the operator of a passenger vehicle is responsible for the positioning of child passengers, for example, vis-à-vis in the front or back seat or in the open bed of a pickup. *But cf. Vasquez*, 189 S.W.3d at 747 (observing that aunt's placement of four-year-old niece "unbuckled in the front seat" of her vehicle authorized aunt's designation as a "responsible third party"); *Ramos*, 139 S.W.3d at 324, 330–31 & n.5 (holding jury's "zero" negligence finding for mother "manifestly unjust" due, in part, to her placement of her young children in the front passenger seat); Tex. Transp. Code Ann. § 545.414(a) ("A person commits an offense if the person operates an open-bed pickup truck or an open flatbed truck or draws an open flatbed trailer when a child younger than [eighteen] years of age is occupying the bed of the truck or trailer.").

Kendra for any failure to properly secure A.G. and S.G. in their seatbelts at the time of the collision.

"Nondelegable duties may be imposed by the legislature or, in limited circumstances, by the courts." *Collins v. Vivanco*, 603 S.W.3d 843, 848 (Tex. App.—El Paso 2020, no pet.) (citing *Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 652 (Tex. 2007)). Stated simply, when a duty is imposed by law due to public safety concerns, and the imposition expressly identifies the party to bear the duty so imposed, the party cannot avoid its responsibility by delegating it to another not so expressly identified. *See Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2006); *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992). "If he does assign to another the responsibility for performing such a duty, he 'remains liable for any negligence in the performance of that duty.'" *Collins*, 603 S.W.3d at 848 (quoting *Thomas v. Harris Cnty.*, 30 S.W.3d 51, 57 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (op. on reh'g)). As a result, liability for the breach of a nondelegable duty is vicarious rather than direct. *Id.*; *McAllen Hosps., L.P. v. Gonzalez*, 566 S.W.3d 451, 457 n.3 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.).

As we observed in *Bedford v. Moore*, however, the proportionate responsibility provisions of Chapter 33 do not authorize the apportionment of responsibility between those vicariously responsible for occurrence-causing or injury-causing conduct and those directly responsible for the exact same conduct. *See* 166 S.W.3d 454, 460–62 (Tex. App.—Fort Worth 2005, no pet.); *see also In re Xerox Corp.*, 555

S.W.3d 518, 523 n.22 (Tex. 2018) (orig. proceeding) (recognizing vicarious liability as an exception to the general rule favoring apportionment of responsibility between concurrent tortfeasors); *Rayner v. Claxton*, 659 S.W.3d 223, 262–63 (Tex. App.—El Paso 2022, no pet.) ("In cases where only vicarious liability is alleged, such as against an employer for the actions of its employee, the negligence of the employer should not be submitted to the jury for an apportionment of liability because the employee is deemed 'one and the same' with his employer." (quoting *Bedford*, 166 S.W.3d at 461)); *Pierre v. Swearingen*, 331 S.W.3d 150, 154 (Tex. App.—Dallas 2011, no pet.) ("Determining the applicable percentage of liability does not apply, however, to a defendant whose liability is vicarious."); *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 656–57 (Tex. App.—Dallas 2002, pet. denied) ("In reviewing the application of section 33.003 to responsibility, we observe that, while the statute on its face requires all defendants to be included in the apportionment question, it would not be proper for an employer to be included along with the driver if its only responsibility was that of respondeat superior.").

And as our sister court in Dallas recently explained in addressing the designation and submission of responsible third parties, the proportionate responsibility provisions of Chapter 33 contemplate a comparative apportionment determination among only those directly responsible for the injury made the basis of the claim; those merely derivatively or vicariously responsible are excluded from that determination:

> The Texas legislature clearly intended to permit defendants to join as "responsible third parties" those persons whose liability is direct. [For example, o]n its face, section 33.003(a) requires settling parties to be included in the apportionment question. However, such inclusion is conditional. Section 33.003 provides that the jury is to allocate responsibility only among those persons who engaged in "conduct or activity" that caused or contributed to cause the "harm for which recovery of damages is sought." This Court and many of our sister courts have regularly held that comparative apportionment is not proper if the party's only responsibility was derivative of the liability of another.

Am. Honda Motor Co. v. Milburn, 668 S.W.3d 6, 30 (Tex. App.—Dallas 2021, pet. granted) (mem. op.) (citations omitted) (affirming trial court's refusal to submit derivative responsibility of settling Uber entities for comparative apportionment with manufacturer's defective design of rear-seat safety-belt system, contributory negligence of adult passenger in failing to properly secure herself, and negligence of Uber driver in operating vehicle); *see also Rosell*, 89 S.W.3d at 656–57 (affirming trial court's refusal to submit derivative responsibility of bus company with negligence of bus driver for comparative apportionment).

If the duty owed by Couch is nondelegable, therefore, and if the jury ultimately determines that Kendra was negligent in performing her "assigned" or "assumed" duty to secure her daughters for travel, Couch would nevertheless be vicariously liable for any percentage of responsibility the jury attributes to her negligence. In so doing, however, the jury could consider only Kendra's direct, injury-causing conduct, not Couch's vicarious responsibility therefor, and any percentage of responsibility attributable to her is vicariously imputable to him, thereby defeating the entire

purpose of Kendra's designation. Only in the event the duty imposed by Section 545.413(b)(2) was subject to delegation to Kendra can Couch limit the jury's consideration of his responsibility to his occurrence-causing conduct in driving the Silverado.

"A driver has a general duty to exercise the ordinary care a reasonably prudent person would exercise under the same circumstances to avoid a foreseeable risk of harm to others." *Ciguero v. Lara*, 455 S.W.3d 744, 748 (Tex. App.—El Paso 2015, no pet.). This general duty includes compliance with the enacted "rules of the road" governing driving set forth in subtitle C of the Texas Transportation Code, a violation of which constitutes a misdemeanor offense punishable by fine. *See In re Windstar Trucking, LLC*, 657 S.W.3d 474, 485 (Tex. App.—El Paso 2022, orig. proceeding); *see also* Tex. Transp. Code Ann. §§ 542.301, 542.401. Notably, the duty is of sufficient importance to public safety on Texas roadways that any peace officer may arrest without a warrant any driver observed committing such an offense. *See* Tex. Transp. Code Ann. § 543.001; *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 323–24, 354–55, 121 S. Ct. 1536, 1541, 1557–58 (2001) (upholding against a parent driver's Fourth Amendment 1983 civil rights complaint her warrantless arrest for seatbelt offenses pursuant to predecessor of current Section 545.413, including failing to secure her three- and five-year-old children in the front seat of her truck).

Falling within the ambit of subtitle C, Chapter 545 sets forth rules governing the operation and movement of vehicles. *See Kelly v. Brown*, 260 S.W.3d 212, 218–21

(Tex. App.—Dallas 2008, pet. denied) (holding that rule set forth in Chapter 545 is penal statute defining a reasonably prudent person standard for negligence per se cause of action in accident involving passenger vehicle). And as noted above, Section 545.413(b)(2) provides that a person operating a passenger vehicle commits an offense by allowing a child who is younger than seventeen years of age, but who is not required to be secured in a child-passenger safety-seat system, to ride in the vehicle without requiring the child to be secured by an available safety belt, which includes both a seatbelt and a shoulder strap. Tex. Transp. Code Ann. § 545.413(b)(2). Given that Couch was undisputedly the driver of the Silverado at the time of the collision, the rules of the road imposed upon him a duty to secure his stepdaughters in their safety belts while he operated the vehicle, rendering any failure on his part to do so evidence of vehicular negligence. *See Kelly*, 260 S.W.3d at 218–21. And finding that the legislature enacted Section 545.413(b)(2) to enhance public safety and expressly imposed upon the operators of passenger vehicles a duty of child seatbelt safety, we conclude that this duty was nondelegable at the time of the collision. *See Ramirez*, 196 S.W.3d at 795.[22] Therefore, if the only duty in question is the duty imposed by Section

[22]We observe that previously imposed nondelegable duties similarly sought to protect the traveling public, including the passengers of common carriers. For example, one authorized to operate a motor carrier over the highways of Texas has a nondelegable duty to do so in a reasonably prudent manner and may not avoid liability for injuries to members of the traveling public proximately caused by the negligence of the wrongfully delegated party. *See Berry v. Golden Light Coffee Co.*, 327 S.W.2d 436, 439 (Tex. 1959). Similarly, a common carrier owes its passengers a nondelegable duty of protection from the depredations of strangers or other

545.413(b)(2), Couch is vicariously responsible for any injury-causing responsibility attributable to Kendra, and there is no basis for apportionment between them.

This conclusion does not end our inquiry, however. By objecting to Kendra's designation on the grounds that, by virtue of the duty imposed by Chapter 545, Couch was exclusively responsible for the seatbelt safety of A.G. and S.G. at the time of the collision, Gamble implicitly argued that the legislature had abrogated any "applicable legal standard" that may have otherwise supported Kendra's designation as a responsible third party. We cannot agree.

"Chapter 33 embodies the fundamental tort-law principle that liability generally arises only from one's own injury-causing conduct and, as a result, liability for damages is commensurate with fault." *Xerox Corp.*, 555 S.W.3d at 523; *see also MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 505 (Tex. 2010) ("Chapter 33 expresses the [l]egislature's intent to hold defendants responsible for only their own conduct."). The fact that Couch could not, as a matter of law, delegate his duty as the driver, does not abrogate Kendra's common law duty as a parent to reasonably supervise her children. As the Fifth Circuit observed in an analogous situation in *Thacker v. J.C. Penney Co.*,

> A mother, by nature and law, does have a primary duty to protect her children and that duty does not shift to anyone else. But a storeowner is also under a duty. A storeowner must provide safe premises for invitees; he must inspect his store and exercise due care to protect invitees from

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passengers. *See Bennevendo v. Hous. Transit Co.*, 238 S.W.2d 271, 273 (Tex. App.—Galveston 1951, writ ref'd n.r.e.).

> injury from any dangerous condition in his store. The duties of parent and storeowner are concurrent.

254 F.2d 672, 679 (5th Cir. 1958) (interpreting Texas common law in premises liability case involving the fall of a small child from a store balcony during a shopping trip with his mother). The duties owed by Couch and Kendra were concurrent yet distinct; therefore, any breach of either duty was direct, injury-causing conduct subject to apportionment. Indeed, *Romero I* clearly contemplates concurrent duties and apportionment of direct, injury-causing responsibility for multiple parties in this very context. *See* 456 S.W.3d at 564. As a matter of law generally, therefore, Couch and Kendra may both be submitted in the jury charge for a determination of any failure on their part to properly secure A.G. and S.G. by seatbelt at the time of the collision, with their proportionate responsibility to be determined upon affirmative responsibility findings.[23]

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[23]Resolving the manner and method for apportioning Couch's occurrence-causing responsibility and his and Kendra's injury-causing responsibilities is beyond the scope of this original proceeding. However, as noted by our sister court in El Paso on remand in *Loera II*, the supreme court's clear preference as expressed in *Romero I* is to submit both occurrence-causing and injury-causing conduct together in a single question for each injured claimant:

> The flexibility that approach provides accommodates the multiple permutations that arise in seat belt defense cases. The evidence may show some occupants of a vehicle were buckled in, while others not. Some occupants of a vehicle may have a legal duty to ensure others in the vehicle are belted, while other occupants may not owe that duty to each other. *See* Tex. Transp. Code Ann. § 545.412 . . . (requirement of driver to ensure those seven years or younger be secured in a child passenger safety seat system); Tex. Transp. Code Ann. § 545.413

b. TxDOT's liability for premises or special defects

The essence of Couch's theory of third-party responsibility against TxDOT is that it failed to properly design and maintain that portion of the highway where the collision occurred to (1) prevent the accumulation of water that led to Couch's loss of control of the Silverado and (2) otherwise prevent the Silverado from traversing the median through the placement of a barrier. Thus, the applicable legal standard invoked—implicitly if not expressly by way of Couch's motion for leave—is a theory of liability predicated upon a condition of real property: either a premises defect or a special defect. *See Tex. Dep't of Transp. v. Padron*, 591 S.W.3d 684, 689, 696–705 (Tex. App.—Texarkana 2019, pet. denied) (discussing premises-defect theory of liability against TxDOT for pickup hydroplaning due to rainwater accumulation on "worn and

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> (requirement that operator ensure those under seventeen, but not otherwise required to be in a child passenger safety seat system, also be buckled up). The combination of a negligence/proximate cause question, followed by a percentage of responsibility question for each claimant in the lawsuit can account for all of these variables.

Loera v. Fuentes (*Loera II*), 511 S.W.3d 761, 777 & n.9 (Tex. App.—El Paso 2016, no pet.) (on remand); *see also Loera I*, 457 S.W.3d at 437; *Romero I*, 456 S.W.3d at 563.

But the court made no suggestions as to how a trial court accomplishes a proper submission when there are multiple parties responsible for child seatbelt safety, including potentially the child passengers themselves, and one of those parties is otherwise responsible for the physical operation of the vehicle. Our sole suggestion is that the occurrence-causing and injury-causing theories of liability urged against a driver such as Couch should be submitted separately and distinctly to permit a clean comparison between his occurrence-causing and injury-causing responsibility in comparison with the injury-causing responsibility of a passenger parent such as Kendra. Such a submission would also facilitate both a legal and factual sufficiency review of any apportionment finding on appeal.

slick" state highway); *Tex. Dep't of Transp. v. Fontenot*, 151 S.W.3d 753, 760–61 (Tex. App.—Beaumont 2004, pet. denied) (discussing premises-defect and special-defect theories of liability against TxDOT for vehicle hydroplaning due to rainwater accumulation on interstate highway).

i. *Liability standards for premises and special defects*

As a state agency for which the Texas Tort Claims Act (the Act) waives governmental immunity, *see Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 611 (Tex. 2000), TxDOT is liable for personal injury and wrongful death caused by a condition of real property if it would be liable if it were a private person. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). For a claim arising from a premises defect, TxDOT owes to the claimant only the duty that a private person owes to a licensee on private property. *Id.* § 101.022(a). "The duty owed to a licensee is not to injure the licensee by willful, wanton, or grossly negligent conduct, and to make reasonably safe a dangerous condition of which the premises owner is aware but the licensee is not." *Fontenot*, 151 S.W.3d at 760 (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) (op. on reh'g)). The limitation of duty in Section 101.022(a) does not apply, however, to the duty to warn of special defects such as excavations or obstructions on highways. Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b). "That duty requires an owner to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which the owner is or reasonably should be aware." *Payne*, 838 S.W.2d at 237. Thus, a licensee must prove that TxDOT

actually knew of the dangerous condition, while an invitee need only prove that it knew or reasonably should have known, and a licensee must further prove that he did not know of the dangerous condition, while an invitee need not do so. *See Fontenot*, 151 S.W.3d at 761.

A state highway, such as U.S. Highway 287, is a "premises" subject to the Act. *See Mogayzel v. Tex. Dep't of Transp.*, 66 S.W.3d 459, 464 (Tex. App.—Fort Worth 2001, pet. denied) (citing *Sutton v. State Highway Dep't*, 549 S.W.2d 59, 61 (Tex. App.—Waco 1977, writ ref'd n.r.e., and holding state highway system is "premises" within the meaning of the Act). "Whether a condition is a premise[s] defect or a special defect is a question of duty involving statutory interpretation and thus an issue of law for the court to decide." *Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (Tex. 2010) (quoting *Payne*, 838 S.W.2d at 238). Given that the Act does not define what constitutes a special defect other than by expressly identifying excavations and obstructions as exemplars, application of the rule of *ejusdem generis*[24] limits this theory of liability to "those defects of the same kind or class as the ones expressly mentioned." *Id.* (quoting *Harris Cnty. v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978)).

[24]"It is a prime rule of construction that where in a statute general words follow a designation of particular subjects or classes of persons the meaning of the general words will be restricted by the particular designation in such statute. This is known as the rule of ejusdem generis, and is a rule of almost universal application." *Farmers' & Mechs.' Nat'l Bank v. Hanks*, 137 S.W. 1120, 1123–24 (Tex. 1911).

ii. *Accumulation of rainwater on roadway*

Ordinarily, the accumulation of water on a roadway due to heavy precipitation—even to the point of flooding—is not a special defect; such a condition is reasonably anticipated by Texas motorists due to knowledge of the inclement weather itself. *See id.* at 608; *see also Fontenot*, 151 S.W.3d at 761 ("Water on the road is open and obvious and a condition that an ordinary motorist could have anticipated due to the weather conditions, where the evidence shows it had been raining all day."); *Villegas v. Tex. Dep't of Transp.*, 120 S.W.3d 26, 33 (Tex. App.—San Antonio 2003, pet. denied) ("The water on the road was open and obvious and a condition that an ordinary motorist could have anticipated due to the weather conditions."); *Corbin v. City of Keller*, 1 S.W.3d 743, 747 (Tex. App.—Fort Worth 1999, pet. denied) ("[A] flooded low-water crossing during flash flood conditions is neither unexpected nor unusual [because] [m]otorists can and should anticipate flooding in low lying areas when the weather is conducive to flooding.").

For example, in *Fontenot*, our sister court in Beaumont held that, because the temporary accumulation of four inches of rainwater across an interstate highway did not constitute an obstruction, the condition was not a special defect under the circumstances. 151 S.W.3d at 761–62. Similarly, in *Villegas*, our sister court in San Antonio held that a pool of accumulated rainwater on a state highway was a premises, not a special, defect. 120 S.W.3d at 30, 32–33. Finally, in *Padron*, our sister court in Texarkana analyzed the hydroplaning of a pickup due to the accumulation of

rainwater on a "worn and slick" state highway as a premises, not a special, defect. 591 S.W.3d at 689, 696–705.

Although this extensive personal injury caselaw is suggestive, we need not decide whether the allegation of TxDOT's third-party responsibility made by Couch asserts a premises or special defect; each theory of liability suffices as an "applicable legal standard" justifying TxDOT's designation as a responsible third party.

iii. *Median guardrails and barriers*

Alternatively, it is questionable whether the alleged failure of TxDOT to place a barrier in the highway median to foreclose collisions with oncoming traffic is a viable theory of third-party responsibility. As have the supreme court and the majority of our sister courts of appeals, we have previously held that such a failure on the part of TxDOT represents a discretionary decision that is exempt from liability as either a special or premises defect. *See Mogayzel*, 66 S.W.3d at 464–66; *see also Fraley v. Tex. A & M Univ. Sys.*, 664 S.W.3d 91, 100 (Tex. 2023) (holding absence of guardrail or barrier along cross of T-intersection a discretionary matter exempt from liability, not special defect under the Act); *Christ v. Tex. Dep't of Transp.*, 664 S.W.3d 82, 89 (Tex. 2023) (holding lack of placement of concrete barriers between oncoming lanes of traffic in construction zone was discretionary matter, not special defect); *Tex. Dep't of Transp. v. Perches*, 388 S.W.3d 652, 656 (Tex. 2012) ("Guardrails, by their nature, define the roadway[;] they do not impede it. We therefore hold that [concrete] guardrails placed in accordance to plan cannot constitute a special defect under the Act."); *Tex.*

Dep't of Transp. v. Ramirez, 74 S.W.3d 864, 867 (Tex. 2002) (holding design of interstate highway and lack of concrete barrier in median between northbound and southbound lanes "reflect discretionary decisions for which TxDOT retains immunity"); *Tex. Dep't of Transp. v. Arzate*, 159 S.W.3d 188, 192–93 (Tex. App.—El Paso 2004, no pet.) (holding absence of median barrier a discretionary matter and neither a special nor premises defect); *Shafer v. Tex. Dep't of Transp.*, No. 03-01-00560-CV, 2003 WL 21467077, at *1 & n.1 (Tex. App.—Austin June 26, 2003, no pet.) (mem. op.) ("The placement or lack of a guardrail is not a special defect as contemplated by the Act." (citing *Mogayzel*)); *Burnett v. Tex. Highway Dep't*, 694 S.W.2d 210, 212 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) ("The decision to change the median barrier is a discretionary matter which is exempted from liability under Section 14(7) of the Act."); Tex. Civ. Prac. & Rem. Code Ann. §§ 101.056(2) (excluding from the Act's waiver of immunity "a governmental unit's decision not to perform an act . . . if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit"), 101.060 (retaining immunity for "the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is the result of discretionary action of the governmental unit" unless the dangerous condition is a special defect).

As these authorities demonstrate, TxDOT owes no duty to the traveling public to place median barriers to prevent cross-median collisions with oncoming traffic. Stated differently, TxDOT may exercise its discretion to place guardrails and barriers

but is under no legal obligation to do so. *See Fraley*, 664 S.W.3d at 100 (treating absence of guardrail or barrier along cross of T-intersection as a failure to place a traffic or road sign, signal, or warning device); *Christ*, 664 S.W.3d at 89 (treating lack of placement of concrete barriers between oncoming lanes of traffic in construction zone as a failure to place a traffic or road sign, signal, or warning device). Absent a legal duty, therefore, there is no applicable legal standard for purposes of third-party responsibility.

To the extent the trial court granted Couch's motion for leave based upon a missing median barrier theory of third-party responsibility, it abused its discretion; the only viable theory is the rainwater accumulation theory, but that theory suffices.

c. Conclusion

The trial court did not abuse its discretion by concluding that parental immunity and governmental immunity did not, as a matter of law, foreclose the designation of Kendra and TxDOT as responsible third parties. Kendra owed a concurrent, not a delegated, duty to supervise the seatbelt safety of her daughters while traveling in the Silverado—regardless of the statutory duty owed by Couch as the operator of the vehicle—and negligent parental supervision is the applicable legal standard for her designation. TxDOT owed a duty concerning either a premises defect or a special defect concerning the accumulation of rainwater on the highway at the time of the collision, and there are longstanding legal standards available for determining its third-party responsibility. By way of contrast, TxDOT owed no duty

to initially place a median barrier at the site of the collision, and absent any such duty, there is no applicable legal standard for its designation as a responsible third party on that theory.

Having concluded that the trial court did not abuse its discretion by misinterpreting the law in this regard, we overrule Gamble's second issue and turn to the question presented in his first issue: whether the trial court properly applied the requirements of Section 33.004(d) in granting leave for the designation of Kendra and TxDOT as responsible third parties.

D. Couch Violated the Disclosure Requirements of Section 33.004(d)

In his first issue, Gamble asserts that the trial court violated Section 33.004(d)—and thus abused its discretion—by granting Couch leave to designate Kendra and TxDOT as responsible third parties because (A) Couch failed to disclose his intention to designate either of these parties before limitations expired and (B) Couch's disclosures did not comply with his obligations under the applicable rules of civil procedure. For the reasons set forth below, we sustain Gamble's first issue as it pertains to his individual claims but overrule it with respect to A.G.'s and S.G.'s claims.

1. Statutory and Rules Framework for Designating Responsible Third Parties

Section 33.004 of the Texas Civil Practice and Remedies Code governs the designation of responsible third parties. Tex. Civ. Prac. & Rem. Code Ann. § 33.004. Subsection (a) provides that

> [a] defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

Id. § 33.004(a). Subsection (f) stipulates that a motion for leave to designate a responsible third party shall be granted unless another party files an objection on or before the fifteenth day after the motion was filed. *Id.* § 33.004(f). One basis for such an objection is found in Subsection (d), which provides that

> [a] defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure.

Id. § 33.004(d). Thus, a defendant cannot designate a responsible third party after the applicable statute of limitations has expired unless the defendant has "timely" disclosed the individual or entity as potentially responsible for occurrence-causing or injury-causing conduct. *See id.*; *see* Tex. R. Civ. P. 194.2(*l*) (former version in place at time of petition's filing requiring disclosure of responsible third parties).

The version of Rule 194 in place at the time that Gamble filed his original petition against Couch provided that a party may request disclosure of "the name, address, and telephone number of any person who may be designated as a responsible third party" as well as "the legal theories and . . . factual bases of the responding party's claims or defenses." Tex. R. Civ. P. 194.2(c), (*l*). Under the then-applicable rules, a defendant served with requests for disclosure before its answer was due—such as Couch—was not required to respond until 50 days after the service of the request.[25] Tex. R. Civ. P. 194.3. But the rules required a complete response based upon the information available to the defendant or his attorney.

In *Dawson*, the supreme court emphasized that only a complete response to a Rule 194.2(*l*) request—whether original or supplemental—satisfies the disclosure requirement of Section 33.004(d):

> The rules require parties to timely respond to written discovery with "a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made." [Tex. R. Civ. P.] 193.1. The rules also require a party to supplement a response when it learns the response "was incomplete or incorrect when made" or has become so since it was made. [Tex. R. Civ. P.] 193.5(a) And the rules don't allow a party to drag its feet—the supplemental or amended response must be provided "reasonably promptly after the party discovers the necessity for such a response." [Tex. R. Civ. P.] 193.5(b).

550 S.W.3d at 629–30. Stated differently, to determine whether an original or supplemental response to a Rule 194.2(*l*) request is sufficiently "complete" and

[25]Nothing in Section 33.004(d) requires a defendant to provide disclosures before the deadlines set forth in the Texas Rules of Civil Procedure. *Mobile Mini*, 596 S.W.3d at 786–87.

thereby "timely" in support of designation, the trial court must look to "all information reasonably available" to the responding party *or its attorney* at the time the original or supplemental response was made and, concerning a supplemental response, whether it was provided reasonably promptly upon discovery of the available information. *See id.*

Critically, given that a designation of third-party responsibility ordinarily requires a professional evaluation of whether a third party's conduct violated an applicable legal standard, *see* Tex. Civ. Prac. & Rem. Code Ann. § 33.011(6), a Rule 194.2(*l*) response generally represents a legal conclusion drawn by the attorney for the defendant responding to the request. And by signing the disclosures, the attorney certifies "that to the best of [his] knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." Tex. R. Civ. P. 191.3(b); *see In re Allied Chem. Co.*, 227 S.W.3d 652, 657 (Tex. 2007) (orig. proceeding) ("[A]ttorneys certify this to be true when they sign a discovery response; they can no longer simply choose to delay disclosure until the last minute."). So, for example, a signed response of "None" to a Rule 194.2(*l*) request means the attorney, after reasonable inquiry, is without knowledge, information, or belief to conclude that a third party is responsible for the plaintiff's claim against his client. *See Allied Chem. Co.*, 227 S.W.3d at 657. Again, to determine whether this is a complete or timely response, the trial court must look to all information reasonably available to the attorney at the time of his signed response. *See Dawson*, 550 S.W.3d at 629–30. And a

trial court may consider the attorney's "incomplete responses, failure to supplement before limitations expired, and failure to adequately supplement after limitations had expired" in determining whether his client satisfied the timely disclosure requirement of Section 33.004(d). *See Mobile Mini*, 596 S.W.3d at 785–87 (interpreting *Dawson*).

Finally, although acknowledging an incomplete Rule 194.2(*l*) response may nevertheless provide sufficient information for a plaintiff to identify a responsible third party through independent investigation, the *Dawson* court declined to impose upon the requesting plaintiff such a burden:

> Perhaps the better course would've been for [the plaintiff] to independently investigate the extent of [potential responsible third party] Graciano's involvement before limitations expired. But a plaintiff's determination of "who may be designated as a responsible third party" doesn't require such an independent investigation. The rules require the defendant to disclose that information upon request. [The defendant] argues it accomplished that disclosure by mentioning Graciano's name in one place, including boilerplate language about unnamed "persons or entities" it purported caused [the plaintiff]'s injuries in another, and answering "will supplement" to a direct inquiry into the identity of possible responsible third parties.
>
> We hold these responses did not satisfy [the defendant]'s obligations under Rule 194.2(*l*) and [S]ection 33.004(d). And we further hold that in granting leave for [the defendant] to designate Graciano as a responsible third party after limitations had expired, the trial court abused its discretion.

550 S.W.3d at 630 (citations omitted). To be complete, therefore, a Rule 194.2(*l*) response must identify an individual or entity as potentially responsible for the underlying claim. *See id.*

2. Couch and "His" Attorney Demonstrably Dragged Their Feet

Along with his original petition, Gamble served Couch with requests for disclosure on January 13, 2017, which, pursuant to Rule 194.2, required Couch to disclose, inter alia, "[t]he name, address, and telephone number of any potential parties"; "[t]he name, address, and telephone number of any person who may be designated as a responsible third party"; and "[t]he legal theories and . . . the factual bases of [his] claims or defenses." Tex. R. Civ. P. 194.2(b), (c), (*l*). It is undisputed that Couch did not disclose either Kendra or TxDOT as possible responsible third parties before the expiration of the two-year statute of limitations on July 4, 2018. What the mandamus record reveals, however, is that, even before Gamble filed suit, in November 2016, experts in biomechanics, occupant kinematics, and accident reconstruction (whom he would eventually disclose as testifying experts) were already investigating whether Kendra and TxDOT were responsible third parties. Indeed, the opinions of these experts provided the basis for Couch's motion for leave. Because the record clearly reflects that Couch and his attorney knew of the potential third-party responsibility of Kendra and TxDOT well before the running of limitations but failed to timely comply with his disclosure obligations under Rule 194.2, the trial court abused its discretion by implicitly finding that Couch complied with his disclosure obligations.

a. Kendra

On August 17, 2020—over four years after the collision—Couch served Gamble with his third supplemental disclosure responses, for the first time disclosing that he may designate Kendra as a responsible third party. While Couch listed a phone number for Kendra, he did not provide an address, merely stating that "her current address is unknown."[26] Additionally, Couch disclosed the following legal theory as the basis for Kendra's alleged third-party responsibility:

> According to the deposition of [Kendra's mother, the girls' grandmother,] Kathy Ely, Kendra . . . told her that one or both of the minor children, A.G. and S.G., were wearing a lap belt only at the time of the accident and had taken the shoulder belt off. To the extent one or both of the minor children, A.G. and S.G., were not properly restrained at the time of the accident, the negligence of Kendra . . . , who was in charge of the girls at the time of the accident, was a proximate cause and/or a producing cause and/or the cause in whole or in part of the injuries complained of in this lawsuit.

For this response to have been "timely" for purposes of Section 33.004(d), therefore, neither Couch nor his attorney could have been in possession, after reasonable inquiry, of "available information" that so identified Kendra before the expiration of limitations. Indeed, the same attorney who signed Couch's original (March 22, 2017), first supplemental (July 28, 2017), and second supplemental responses (May 30, 2019) signed Couch's third supplemental response (August 17, 2020), thereby certifying that, based upon reasonable inquiry sometime after May 30, 2019, and before August 17,

[26]Couch argues that Gamble should have been able to obtain Kendra's address from the divorce decree but does not explain why he could not have done the same.

2020, he came into possession of available information that led him to conclude that Kendra was a potential responsible third party. This certification was demonstrably false.

First, even assuming the deposition testimony of Kathy provided the information prompting Kendra's disclosure as a potential responsible third party, that deposition occurred on May 22, 2019, making the information available before, not after, the attorney's certification of Couch's second supplemental response on May 30, 2019. Couch and his attorney waited almost a year-and-a-half to disclose that he may designate Kendra as a responsible third party.

Second, Couch's attorney signed and served Gamble with Ecolab's original disclosure responses on September 7, 2018, disclosing that Ecolab may designate Kendra as a responsible third party and thereby certifying that, based upon reasonable inquiry, he was in possession of available information implicating her potential third-party responsibility fully two years before he so certified her possible designation on behalf of Couch. Because Kendra had testified in her deposition on May 10, 2018, that everyone in the Silverado was wearing their seatbelts at the time of the collision and because her mother's deposition testimony to the contrary was still a year into the future, the attorney's certification of Kendra as a potential responsible third party on behalf of Ecolab begs the question of what unique information was available to him as Ecolab's attorney that he did not possess as Couch's attorney. Ecolab's original disclosure responses did not disclose a theory of third-party responsibility against

Kendra; instead, they mirrored the boilerplate assertion that the attorney had made on behalf of Couch against "third persons, parties, legal entities[,] or instrumentalities over whom [he] had no control" in certifying Couch's original and first supplemental disclosure responses. And since in signing Couch's first supplemental disclosure responses the attorney certified that he was without knowledge, information, or belief, after reasonable inquiry, of any potential third-party responsibility on the part of Kendra, the available information prompting his subsequent certification of Ecolab's original disclosure responses could only have come into his possession between July 28, 2017, and September 7, 2018, and only in the context of his representation of Ecolab, not Couch—an altogether unlikely scenario.

Third, although Couch and his attorney could not certify Kendra as a potential responsible third party until four years after the collision, Couch was undoubtedly a source of available information concerning her possible culpability during that entire timeframe, being the only adult eyewitness to Kendra's alleged negligence in failing to secure her daughters by seatbelt. Indeed, as to S.G., the stepdaughter seated next to him in the front seat of the Silverado, Couch was arguably in a better position than Kendra to know whether she was wearing her seatbelt—and particularly her shoulder strap—at the time of the collision. Couch also appears to be the only source of available information for his eventual assertion that, as between the adults in the Silverado, Kendra was "in charge of the girls" at the time of the collision—an assertion not supported by the referenced deposition testimony of Kathy.

Nevertheless, Couch's original, first supplemental, and second supplemental disclosure responses made no mention of Kendra's potential third-party responsibility. It simply beggars belief that Couch could assert Kendra's potential third-party responsibility solely because of Kathy's deposition testimony four years after the collision. *See In re Dakota Directional Drilling, Inc.*, 549 S.W.3d 288, 292 (Tex. App.—Fort Worth 2018, orig. proceeding) ("Further, as he was the driver of the vehicle they were riding in when the accident occurred, it defies all credulity to suggest that Plaintiffs did not know that Bundick was a potential responsible third party.").

Fourth and finally, in November 2016, fully 20 months before the expiration of limitations, an osteopathic physician with expertise in biomechanics,[27] occupant kinematics,[28] and injury causation whom Couch would eventually disclose as a testifying expert in support of his theory of Kendra's third-party responsibility—Dr. Gwin—had already been retained and was investigating whether S.G. and A.G. were properly secured by their seatbelts and shoulder straps at the time of the accident. *See Romero II*, 508 S.W.3d at 531 ("Biomechanical experts are commonly designated when . . . the defendant attempts to demonstrate a plaintiff's injury was caused by the *failure to use* a seat-belt."). Although Couch did not designate Dr. Gwin until February

[27]"Biomechanics is 'the study of the application or relation of the laws of mechanics to the body.'" *Romero II*, 508 S.W.3d at 530 (quoting 2 J.E. Schmidt, Attorney's Dictionary of Medicine, B–115 (2004)).

[28]*See Yard v. Daimlerchrysler Corp.*, 44 S.W.3d 238, 241 (Tex. App.—Fort Worth 2001, no pet.) (describing "occupant kinematics" as "the movement of bodies in a vehicle").

25, 2022, she conducted an inspection of the Silverado on November 10, 2016, the findings of which formed a material basis of her disclosed opinions.

In the report attached to her designation, Dr. Gwin concluded that, although A.G. and S.G. wore seatbelt restraints at the time of the collision, (1) their lap belts were improperly placed across their abdomens, not their pelvises; (2) their shoulder straps were improperly placed behind their backs altogether; and (3) had they both been restrained by properly placed lap belts and shoulder straps, the serious abdominal and spinal injuries that they suffered as a result of the collision would not have occurred. These opinions formed the basis of Couch's motion for leave to designate Kendra as a responsible third party. In reaching her conclusions, not only did Dr. Gwin consider the deposition testimony of Kendra (May 10, 2018), Kendra's mother (May 22, 2019), S.G. (September 2, 2020), A.G. (September 2, 2020), and Couch (May 14, 2021), all of which (besides Kendra's) occurred well after the expiration of limitations, but she also inspected the Silverado on November 10, 2016, and conducted "exemplar-surrogate demonstrations" shortly before and after the filing of Couch's third supplemental disclosure responses on August 17, 2020.[29]

[29]The purpose of such a study is "to understand and document seatbelt webbing/hardware interactions that would be expected if the belt had been worn during the crash." *Udac v. Takata Corp.*, 214 P.3d 1133, 1140 n.7 (Haw. Ct. App. 2009) (holding findings of exemplar-surrogate study conducted by similarly qualified BRC expert erroneously excluded when offered in support of theory that plaintiff was not wearing his seatbelt at the time of accident).

Based upon her inspection, Dr. Gwin made the following findings and observations:

> On November 10, 2016, I inspected the subject 2016 Chevrolet Silverado. There was frontal crash damage as well as frontal fire damage. Both curtain airbags, both front seat torso bags, and both frontal airbags deployed in the Chevrolet. The right front seat back was reclined at the time of my inspection; the vehicle had been inspected by others prior to my inspection. The right front passenger seat belt webbing was advanced and locked in place due to jamming of the webbing in the aft corner of the D-ring at 46" from the origin. The D-ring was in mid position. There was loading on the right front passenger seat belt webbing approximately 18["] from the origin and roping of the webbing from 13 to 18["].[30]
>
> The aft surface of the driver's seat back was scuffed. There was evidence of contact on the left rear door inner door trim. There was loading on the row 2 left seat belt webbing approximately 12" and from 38 to 46" from the origin and roping of the webbing from 21 to 34".

Dr. Gwin further described how the measurements that she took during her investigation were employed to recreate the positioning of the child passengers for the exemplar-surrogate demonstrations:

> I conducted exemplar-surrogate demonstrations at BRC on August 6 and 31, 2020, using a closely matched exemplar vehicle and human surrogates matched to [S.G.] and [A.G] for standing stature and weight. Prior to the first session, the seats and seatback positions, as well as the D-ring heights were adjusted to closely match the positions found during

[30] "'Loading' is the force exerted by an occupant onto a seatbelt during an accident and is measured by the occupant's body weight times the amount of G forces experienced by the occupant. 'Loading marks' are marks on the webbing of a seatbelt assembly caused during an accident by stress placed on the webbing at contact points where the seatbelt passes through the D-ring and the tongue." *Id.* at 1139 n.6; *see also Romero II*, 508 S.W.3d at 524, 530, 541 (holding trial court improperly excluded opinion of biomechanics expert that child passengers were at greater risk of injury due to their not wearing their seatbelts at the time of the accident predicated in material part upon his interpretation of absence of loading markings on seatbelts).

> my vehicle inspection. For the second session, the seats and seatback positions, as well as the D-ring heights were adjusted to closely match the positions demonstrated in insurance evaluation photographs and found during Mr. Robert Liebbe's vehicle inspection, which both took place prior to my inspection.
>
> The surrogate for [S.G.] was 49.75" tall and weighed 67.6 pounds. She was asked to don a leotard[,] and the lap belt marks from [S.G.]'s CT scan were drawn on the leotard. The surrogate was positioned in the right front passenger seat. Her knees did not reach the front edge of the seat. She was asked to don the lap/shoulder seat belt. The shoulder belt was positioned on her neck. The shoulder belt was then placed behind her back. The latch plated and the D-ring locations matched the seat belt evidence found at my vehicle inspection. The lap belt location overlay the leotard markings as well.
>
> The surrogate for [A.G.] was 58.25" tall and weighed 91.8 pounds. She was asked to don a leotard[,] and the lap belt marks from [A.G.]'s CT scan were drawn on the leotard. The surrogate was positioned in the row 2 left seat. When properly seated and properly belted, the latch plate location did not match the seat belt evidence found at my vehicle inspection. The surrogate was then asked to slouch. The latch plate location again did not match the seat belt evidence found at my vehicle inspection. When the surrogate was asked to slouch and place the shoulder belt behind her back, the latch plate location matched the seat belt evidence found at my vehicle inspection. The lap belt location overlay the leotard markings as well.

To be able to mark the leotards on the surrogates, on May 6, 2020, in consultation with a board-certified radiologist, Dr. Gwin reviewed post-accident imaging studies performed on A.G. and S.G. at Cook Children's Medical Center in Fort Worth. There was no radiological evidence of shoulder seatbelt marks for either girl: (I) "A diagonally oriented lap seat belt mark was visible on the abdomen [of S.G.], higher on the left than the right"; (II) "A lap seat belt mark was visible over

[A.G.'s] pelvis anteriorly, which continued laterally in an upward direction"; (III) "[A.G.'s] left-sided mark was more pronounced than the right."

In addition to the imaging studies, Dr. Gwin also considered the medical records for A.G. and S.G. from Cook Children's. Both girls had abdominal contusions attributed to lap belt injury. Significantly, "[i]t was noted during [A.G.'s] hospitalization that she was restrained with only her lap belt." Because the hospital discharged S.G. and A.G. on July 23 and October 6, 2016, respectively, these records were available before Dr. Gwin conducted her vehicle inspection on November 10, 2016. And according to her report, these hospitalizations were the subject of extensive inquiry during Gamble's deposition on January 11, 2018, approximately six months before the expiration of limitations.

Curiously, although Dr. Gwin's report identified the Texas Peace Officer's Crash Report for the collision as a document that she had reviewed in preparation of her opinions, she made no mention of the responding officer's findings concerning whether A.G. and S.G. were restrained and, if so, the manner of their restraint. At the time of the collision, Section 550.062 of the Texas Transportation Code mandated that a law enforcement officer who investigated a motor-vehicle accident in the regular course of duty prepare and file with TxDOT a written report of the accident if the accident resulted in injury to or the death of a person. Tex. Transp. Code Ann. § 550.062(a), (b). The version of the Texas Peace Officer's Crash Report promulgated by TxDOT and in effect at the time of the collision specifically inquired into the

restraint status of those occupying a vehicle involved in a qualifying accident. *See* Texas Peace Officer's Crash Report (Form CR-3 1/1/2015) (Finding No. 18) (https://www.txdot.gov/data-maps/crash-reports-records/forms-law-enforcement.html) (last visited July 27, 2023). And the following were the "code sheet values" required by TxDOT to be employed by the reporting officer for the restraint used by each occupant:

1 = Shoulder and Lap Belt
2 = Shoulder Belt Only
3 = Lap Belt Only
4 = Child Seat, Facing Forward
5 = Child Seat, Facing Rear
6 = Child Seat, Unknown
7 = Child Booster Seat
96 = None
97 = Not applicable
98 = Other (Explain in Narrative)
99 = Unknown

See Instructions to Police for Reporting Crashes § 3.3.31 (2016 ed.) (disclosing no amendments to Section 3.3.31 from original 2015 adoption) (https://ftp.txdot.gov/pub/txdot-info/trf/crash_notifications/2016/crash-report-100.pdf) (last visited July 27, 2023). When faced with an injured occupant, therefore, the investigating officer must determine whether the injured occupant was properly secured by both the shoulder and the lap belt, if applicable. *See id.*

Yet, Dr. Gwin's only mention of the responding officer's findings in the crash report discusses Couch's on-scene account of how the collision itself occurred:

> According to the police report, Mr. Couch reported that it had begun to heavily rain. He turned off the cruise control and slowed to a speed between 60-65 M.P.H., and as he began to slow, he began to lose control of the rear of his vehicle. The vehicle slid into the median and then onto the northwest lanes of traffic on US 287. The vehicle then struck a 2005 Cadillac Escalade . . . . Both vehicles came to rest at the area of impact, caught fire[,] and burned.

Further, although (1) Couch was clearly the on-scene source for the crash report, (2) S.G. was seated next to him at the time of the collision, and (3) A.G. required assistance from third parties to get out of her seatbelt, Dr. Gwin omitted from her analysis any contemporaneous account of their restraint status, including whether Couch's eyewitness account or subsequent recollection (as provided in his deposition testimony on May 14, 2021, which was fully nine months after his attorney had certified Kendra as a potential responsible third party) supported her opinions concerning the improper restraint of the girls.

Just as curiously, although the second session of her exemplar-surrogate demonstrations employed positioning information obtained by Liebbe during his accident-reconstruction inspection of the Silverado on November 9, 2016, Dr. Gwin makes no mention of the seatbelt data retrieved from the "black box" of the Silverado by Liebbe. According to the expert designation provided by Couch, Liebbe "is an accident reconstructionist who has been consulted in this case and will testify as to the causes of the crash, his reconstruction of the crash, his analysis of the black box download from the vehicle driven by . . . Couch, and his inspection of the vehicles involved in the crash." Liebbe inspected the Silverado on November 9, 2016—the day

before Dr. Gwin's inspection—and downloaded data from the crash data recorder "at 14:27:02" on that date. According to Liebbe's own report, "[t]he download report contained crash related data including, but not limited to, front seatbelt buckle status, vehicle delta-V, vehicle indicated speed, accelerator pedal position % full, service brake application state, engine [revolutions per minute (RPM)], engine throttle % full, cruise control state, and engine torque." *See Rayburn v. State Farm Mut. Auto. Ins. Co.*, 330 So.3d 709, 717 (La. Ct. App. 2021) ("The crash data retrieval (CDR) system provides information as to whether a seatbelt was fastened, the speed of the vehicle, the engine RPMs, whether and to what extent the accelerator pedal was applied, and whether the brakes were applied."); *Brantley v. State*, 606 S.W.3d 328, 332–33 (Tex. App.—Houston [1st Dist.] 2020, no pet.) ("The black box records data such as the date and time of the airbag deployment, whether the driver and front passenger seatbelts were buckled, the speed of the vehicle in miles per hour, the percent of throttle and brake applied, engine [RPM], the degree of steering wheel input to the left and right, and the tire pressure of all four wheels."); *Commonwealth v. Gary*, 91 A.3d 102, 153 (Pa. 2014) (Todd, J., dissenting) ("'Black boxes' also known as 'event data recorders[]' . . . record at all times while a vehicle is being driven and, thus, capture a multitude of facts regarding the vehicle's operation. Such facts, include the speed of the vehicle, its direction of travel, turn signal activation, seat belt usage by all occupants, and the Global Positioning System . . . coordinates of the vehicle at every point in its movements." (citation omitted)), *overruled on other grounds by Commonwealth v.*

Alexander, 243 A.3d 177 (Pa. 2020); *see also Brethauer v. Gen. Motors Corp.*, 211 P.3d 1176, 1178, 1185 n.8 (Ariz. Ct. App. 2009) (observing evidence downloaded from Chevrolet truck's sensing and diagnostic module "recorded that the driver's seatbelt was not buckled when the truck had its greatest change of velocity" during a hydroplaning accident). *See generally* Daniel Harper, *Automobile Event Data Recorders, and the Future of the Fourth Amendment*, 120 Colum. L. Rev. 1255, 1259–61, 1267–68 (June 2020) (discussing the purpose and function of event data recorders and the data mandated by federal regulations issued by the National Highway Traffic Safety Administration and referencing 2009 study surveying Texas police departments concerning the frequency with which such data was downloaded in relation to the severity of the crash). At a minimum, therefore, the black box data retrieved by Liebbe in November 2016, and thereafter provided to Dr. Gwin, would have indicated whether S.G. had been buckled in the front seat next to Couch. *See Brantley*, 606 S.W.3d at 334 ("The data also showed that the driver's seatbelt was buckled, but the passenger's seatbelt was not buckled.").[31]

[31]*Brantley* also observes that eyewitness accounts of those who assist in removing occupants from their seatbelts can corroborate the seatbelt data retrieved from the black box. 606 S.W.3d at 335. ("This data was supported by the testimony of . . . one of the first responders to the scene of appellant's crash[] who testified that appellant was buckled into the driver's seat and that his seat belt had to be cut to remove him from the vehicle."). So, despite the apparent absence of black box seatbelt data for A.G., *Brantley* strongly suggests her need for assistance in getting free of her seatbelt provided to eyewitnesses the status of her seatbelt at the time of the collision, and those observations and recollections were available to Dr. Gwin: "While still in the backseat, [A.G.] could not get her seatbelt off. Some people helped her exit

So, in summary, the information available to Couch and his attorney well before the expiration of limitations included (1) Couch's own eyewitness account of not only whether the girls were properly secured in their lap belts and shoulder straps but also his alleged understanding that Kendra was responsible for her daughters' seatbelt compliance at the time of the collision; (2) the responding officer's restraint findings in the Texas Peace Officer's Crash Report for the collision; (3) the eyewitness accounts of those individuals who had assisted A.G. from exiting the Silverado; (4) the medical records from Cook Children's for both girls demonstrating that they had both sustained lap belt injuries, but also documenting that A.G. had been restrained with her lap belt only and not her shoulder strap; (5) imaging studies from Cook Children's for both girls demonstrating that they had both sustained lap belt injuries but showing no signs of any similar injuries caused by their shoulder straps; (6) the front seat passenger seatbelt data downloaded from the black box of the Silverado; and (7) the measurements and inspection findings of an expert in biomechanics and occupant kinematics that ultimately provided the scientific basis for designating Kendra as a responsible third party. Nevertheless, Couch and his attorney did not disclose Kendra as a potential responsible third party until over four years after the accident, falsely certifying that Kathy's hearsay deposition testimony provided the first inkling of the misuse and nonuse of the girls' lap belts and shoulder

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the truck and carried her to the side of the median where they laid her onto a blanket." Indeed, these may be the source of the notation in A.G.'s medical records that "she was restrained with only her lap belt."

straps, even though the same attorney had sufficient information to so certify Kendra on behalf of Ecolab two years earlier, before Kendra's mother's and the girls' depositions occurred.[32] *See Dawson*, 550 S.W.3d at 629–30 (considering defendant's post-limitations discovery conduct to inform timeliness and completeness of pre-limitations disclosures).

Because Dr. Gwin developed a great deal of this information during the course of her privileged consultation, a question of first impression arises as to whether "a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made," *see* Tex. R. Civ. P. 193.1, as contemplated by *Dawson*, excludes from the trial court's Section 33.004(d) analysis any information obtained through the investigation, observations, and analysis of a consulting expert retained in anticipation or in the course of litigation that would otherwise be subject to the consulting expert privilege. Stated differently, may a party and his attorney employ the consulting expert privilege offensively to withhold disclosure of a potential responsible third party beyond the expiration of limitations? We conclude that Couch's disclosure of Dr. Gwin's mental impressions and opinions in support of his motion for leave retrospectively waived the privileged nature of any information that she had obtained through her pre- and intra-litigation investigation

[32]The availability of this information cannot reasonably be attributed to an inquiry conducted by Couch's attorney *on behalf of Ecolab* between July 28, 2017, and September 7, 2018, i.e., the timeframe between his certification of Couch's first supplemental disclosure responses and Ecolab's original disclosure responses.

of the underlying motor-vehicle accident for purposes of determining whether Couch and his attorney met their disclosure obligations before the expiration of limitations.

Rule 192.3(e) of the Texas Rules of Civil Procedure states categorically that "[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable." Tex. R. Civ. P. 192.3(e). To the extent those mental impressions and opinions—including any material prepared in their forming—were developed in anticipation of litigation or for trial by or for a party or his attorney, they are also generally not discoverable under the work product privilege. *See* Tex. R. Civ. P. 192.5(a)(1), (b)(2); *In re Fairway Methanol LLC*, 515 S.W.3d 480, 491 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) ("Texas appellate courts have found accident investigation reports to be protected work product when it is clear that they were prepared in anticipation of litigation.").[33]

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[33]In *General Motors Corp. v. Gayle*, the supreme court emphasized the importance of the consulting expert privilege in accident reconstruction cases, observing that

> [l]ike the work-product privilege, this consulting-expert privilege grants parties and their attorneys a sphere of protection and privacy in which to develop their case. Parties and counsel may consult with an expert to attempt to recreate an accident and test their litigation theories. If the expert's conclusions support the consulting party's case, that expert may be designated as a witness for trial. If, on the other hand, the expert's conclusions do not support the party's case, the identity of the expert and his or her conclusions need not be revealed to the other side.

951 S.W.2d 469, 474 (Tex. 1997) (orig. proceeding).

A party and his attorney are obligated to disclose only the identity, mental impressions, and opinions of a consulting expert when they "have been reviewed by a testifying expert" or the formal status of the consulting expert changes to that of a testifying expert. *See McIlhany*, 798 S.W.2d at 559 n.7. Upon disclosure as a testifying expert, Rule 192.3(e) mandates the disclosure of the expert's mental impressions and opinions and "the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case . . . *regardless of when and how the factual information was acquired*." Tex. R. Civ. P. 192.3(e)(3) (emphasis added). Accordingly, when Couch disclosed Liebbe and Dr. Gwin as testifying experts and then supported his motion for leave using their mental impressions and opinions, *Dawson* authorized the trial court's consideration of the facts known to them (and by inference to Couch and his attorney)—regardless of when and how they obtained such facts, including by their November 2016 investigations in anticipation of litigation—in determining whether they had failed to comply with their disclosure obligations before the expiration of limitations. *See* 550 S.W.3d at 629–30. Moreover, since the same attorney certified Kendra as a potential

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Nevertheless, in *Tom L. Scott, Inc. v. McIlhany*, the court held that "the protection afforded by the consulting expert privilege is intended to be only 'a shield to prevent a litigant from taking undue advantage of his adversary's industry and effort, not a sword to be used to thwart justice or to defeat the salutary objects' of discovery." 798 S.W.2d 556, 559 (Tex. 1990) (orig. proceeding) (quoting *Williamson v. Superior Ct.*, 582 P.2d 126, 132 (Cal. 1978)). The privilege may not be asserted offensively to suppress evidence or to conceal discreditable facts. *See id.* (citing interpretation of *Williamson* by *Chuidian v. Phillipine Nat'l Bank*, 734 F. Supp. 415, 423 (C.D. Cal. 1990)).

responsible third party for Ecolab's original and Couch's second supplemental disclosure responses and did so while Dr. Gwin's mental impressions and opinions remained subject to the consulting expert privilege, it is difficult to credit the argument that the privilege relieved him of his duty to disclose. Tex. R. Civ. P. 191; *see Allied Chem. Co.*, 227 S.W.3d at 657. Stated differently, when a party or his attorney becomes aware of facts that would reasonably prompt the disclosure of a potential responsible third party, the party's or his attorney's discovery obligation under Section 33.004(d) is to make the disclosure, even if the source of the information remains otherwise privileged from discovery.

Couch and his attorney knew that Dr. Gwin's investigation had revealed material evidence that A.G. and S.G. had not been wearing their lap belts correctly or their shoulder straps at all and that such evidence implicated the adults in the Silverado—Couch as the driver and Kendra as their supervising parent. At a minimum, it is simply not reasonable to believe that Couch "witnessed" his eight-year-old stepdaughter wearing her shoulder strap in the front seat next to him but only came around to disbelieving his own eyes four years later when Dr. Gwin presented her findings to his attorney. *See YRC Inc.*, 646 S.W.3d at 809 n.3 (finding absence of gamesmanship due to obviousness of proposed responsible third party to plaintiff and citing *Dakota Directional Drilling*); *Dakota Directional Drilling*, 549 S.W.3d at 292 (observing that plaintiffs' contention that they did not know the driver of the vehicle in which they were riding was a potential responsible third party "defies all

credulity"). This information was available to Couch and his attorney well before the expiration of limitations, as demonstrated by the same attorney's certification of Ecolab's original disclosure responses. This is the trap they cannot escape. Despite maintaining the exact same consulting privilege on behalf of Ecolab, the attorney possessed sufficient information to certify Kendra as a responsible third party without any additional information than already existed before the expiration of limitations.[34]

Therefore, the record shows that Couch and his attorney clearly dragged their feet and engaged in the very type of gamesmanship the legislature intended to prevent. *See Dawson*, 550 S.W.3d at 629–30. Accordingly, it was an abuse of discretion for the trial court to conclude that Couch's disclosures regarding Kendra's designation as a responsible third party met the timeliness requirement of Section 33.004(d). *See id.*; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 33.004(d).

b. TxDOT

The record reflects that Couch engaged in similar foot-dragging and gamesmanship in his disclosures concerning TxDOT. By November 2016, Liebbe—a mechanical engineer and accident reconstructionist whom Couch would eventually disclose as a testifying expert—had already been retained and had begun investigating both the scene of the accident and the vehicles involved. As noted above, Liebbe's

[34]A reasonable inference may also be drawn that Couch and his attorney were not forthcoming in their disclosure of Kendra because the exact same information implicated Couch, as the driver of the Silverado, in the exact same injury-causing conduct.

extensive roadway and collision analysis provided the foundation upon which Hall—a professional engineer whom Couch ultimately designated as a testifying expert in the areas of accident reconstruction and traffic engineering—based his opinion that TxDOT was responsible for the collision because of its poor construction and maintenance of the highway and its failure to install a median barrier. Liebbe's report states that his first scene inspection in November 2016 included a "preliminary roadway evaluation," which included an analysis of the asphalt and the potential for "excessive water accumulation on the roadway surface." Thus, it is evident that as early as November 2016—twenty months before the expiration of limitations[35] and

[35]Gamble argues that the six-month deadline for giving notice to effectuate a waiver of sovereign immunity under the Act should be treated as the "applicable limitations period" regarding any causes of action against TxDOT for purposes of Section 33.004(d). Tex. Civ. Prac. & Rem. Code Ann. § 33.004(d); *see id.* § 101.101(a). However, this position has no support in either the language of the statute or any caselaw dealing with responsible third parties. The Act requires six months' notice of "a claim against" a governmental unit. *Id.* § 101.101(a). But designating TxDOT as a responsible third party is not the same as filing a claim against it because—unlike a claim—a responsible-third-party designation "does not by itself impose liability." *City of El Paso v. Collins*, 440 S.W.3d 879, 882 (Tex. App.—El Paso 2013, no pet.) (quoting Tex. Civ. Prac. & Rem. Code Ann. § 33.004(i)(1)). Further, the Act's notice provision—which is designed "to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial," *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995), and is a jurisdictional prerequisite to suit, *Timmons v. Univ. Med. Ctr.*, 331 S.W.3d 840, 846 (Tex. App.—Amarillo 2011, no pet.) (citing Tex. Gov't Code Ann. § 311.034)—has a nature distinct from that of a statute of limitations, which is, in essence, "an affirmative defense and, unlike the six-month notice period [in the Act], does not deprive the trial court of jurisdiction," *id.* (citing Tex. R. Civ. P. 94). Thus, we reject Gamble's argument that the Act's six-month notice deadline constitutes the "applicable limitations period" for purposes of Section 33.004(d).

two months before Gamble even filed suit—Couch had contemplated faulty roadway design or maintenance as a potential cause of the accident giving rise to this lawsuit.

However—despite having already retained an expert to perform roadway and collision analysis several months earlier—in his initial disclosure responses served in March 2017, Couch did not disclose TxDOT (or anyone) as a potential responsible third party, nor did he disclose the negligent design or maintenance of the roadway as a potential defensive theory. Couch supplemented his disclosure responses in July 2017, listing "the State of Texas" as a responsible third party, but he did not identify TxDOT as the governmental unit to be held responsible, provide an address or phone number for "the State of Texas," or explain the factual basis or defensive theory for holding "the State of Texas" responsible for any portion of Gamble's and his daughters' claims.

Liebbe conducted a second inspection of the crash site in March 2018—more than three months before the expiration of the two-year statute of limitations. This inspection included taking photographs and video of the roadway after a period of rain. Using these images, Liebbe was able to observe a water runoff path even after the rain had stopped. During this second scene inspection, Liebbe also took a three-dimensional scan of the southeast travel lanes, and using this data, he developed cross-slope profiles and grade profiles of these lanes. Liebbe also used this scene-scan data to develop contours of constant elevation for analyzing roadway surface features.

Thus, it is clear that Couch and his attorneys had gathered substantial information to support their theory that TxDOT was at least partially responsible for the accident well before the two-year limitations period expired. However, despite the additional information gained from Liebbe's second scene inspection in March 2018, Couch did not supplement his disclosures again until May 2019—ten months after limitations had expired.[36] And these second supplemental disclosure responses were just as inadequate as his prior disclosures. Couch still did not identify TxDOT as a responsible third party, again vaguely designating "the State of Texas." As before, Couch did not provide an address or phone number for "the State of Texas" or explain the factual basis or defensive theory for holding "the State of Texas" responsible for any portion of Gamble's and his daughters' claims.

It was not until August 17, 2020—nearly four years after Liebbe had been retained—that Couch disclosed his defensive theory that "the State of Texas's negligence in the design and/or maintenance of the roadway . . . was a proximate cause . . . of the incident giving rise to th[e] lawsuit." Even then, Couch still did not name TxDOT as a responsible third party; he merely listed "the State of Texas" and—despite the requirements of Rule 194.2(*l*)—included no address or phone

[36]Liebbe's and Hall's reports indicate that TxDOT initiated a project to install a cable barrier system along the U.S. Highway 287 median in the area where the crash occurred sometime in 2018 and that the cable barrier was installed before June 2020. In the event that this cable-median-barrier project was initiated prior to July 4, 2018, that alone would demonstrate that Couch and his attorney had sufficient information to specifically identify TxDOT as a responsible third party prior to the expiration of limitations.

number. *See* Tex. R. Civ. P. 194.2(*l*) (requiring disclosure of "the name, address, and telephone number of any person who may be designated as a responsible third party"). Indeed, Couch never specifically named TxDOT as a potential responsible third party until he filed his motion for leave in June 2022—more than five and a half years after retaining Liebbe and nearly six years after the accident.

Therefore, the record clearly shows that Couch and his attorney lay behind the log in disclosing TxDOT as a responsible third party, engaging in the same kind of gamesmanship they had regarding Kendra's designation. *See Dawson*, 550 S.W.3d at 629–30. Accordingly, it was an abuse of discretion for the trial court to conclude that Couch's disclosures regarding TxDOT's designation as a responsible third party met the timeliness requirement of Section 33.004(d). *See id.*; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 33.004(d).

3. Couch Cannot Rely on Ecolab's Disclosures to Cure the Deficiencies in His Own Disclosures

Relying on *Coachmen Industries, Inc. v. Alternative Service Concepts L.L.C.*, No. H-06-0892, 2008 WL 2787310 (S.D. Tex. July 15, 2008) (mem. & order), Couch argues that because Gamble did not sue Ecolab until shortly before limitations ran and therefore conceded on the record that Ecolab's designations were not untimely under Section 33.004(d), *see Mobile Mini*, 596 S.W.3d at 786–87, Gamble's complaint concerning Couch's inadequate and untimely disclosures is moot. However, even setting aside the

fact that *Coachmen*—an unpublished decision from a federal district court—is not binding on this court, it is distinguishable from the present case.

In *Coachmen*, a complex commercial lawsuit involving a number of claims against multiple defendants, defendant ASC designated a number of responsible third parties under Section 33.004. 2008 WL 2787310, at *1. Later, after ASC had settled and was no longer part of the lawsuit, a different defendant filed an untimely motion for leave to designate responsible third parties. *Id.* After the trial court denied his untimely motion, the defendant argued that the responsible third parties previously designated by ASC remained as designated parties and should be available to all defendants for apportionment of liability. *Id.* After examining the text of Section 33.004, the trial court agreed. *See id.* at *1–5. Noting that the statute states that "*the* defendant" seeking to designate responsible third parties bears the initial burden of establishing a factual basis for the named party's responsibility but that "*a* defendant" may respond to a motion to strike a third-party designation, the trial court concluded that "once leave has been granted to designate a responsible third party, that designated party is available for apportionment of fault by any defendant" provided that certain conditions are met. *Id.* at *2–3 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 33.004(g), (*l*) (emphases added)).

Thus, *Coachmen* involved a defendant's seeking to avail himself of another unaffiliated party's previous, unchallenged responsible-third-party designations, a situation that differs significantly from the one presented here. Unlike the defendants

in *Coachman*, Couch and Ecolab were not only affiliated parties but were also represented by the same counsel. Indeed, the motion for leave to designate Kendra and TxDOT as responsible third parties was presented as a joint motion of Couch and Ecolab. The trial court was thus presented with a question wholly distinct from the one that the district court was asked to decide in *Coachmen*. Instead of determining whether a responsible third party previously properly designated by one defendant should be available to be submitted at trial by another defendant, *see id.* at *2, the trial court here had to decide whether Kendra and TxDOT had been properly designated in the first place.

Further, unlike *Coachmen*, in which the propriety of ASC's previous responsible-third-party designations was unquestioned, *see id.* at *1, the propriety of Ecolab's designations was challenged by Gamble and is very much in doubt. Though perhaps not technically untimely under Section 33.004(d), *see Mobile Mini*, 596 S.W.3d at 786–87, Ecolab's disclosure responses reflected the same kind of gamesmanship that Couch's did, *id.* at 785 (recognizing that Section 33.004(d) was designed to prevent "procedural gamesmanship"). As noted above, Ecolab's original disclosure responses served in September 2018 identified "the State of Texas" and Kendra as potential responsible third parties, but—like Couch—Ecolab failed to specify which state agency or department it intended to designate and did not provide an address or phone number for "the State of Texas" or Kendra as required by Rule 194.2(*l*). Even more significantly, despite having engaged Dr. Gwin and Liebbe no later than

November 2016—nearly *two years* before serving its original disclosure responses—Ecolab's disclosures concerning the legal theories and factual bases of its defenses did not mention either Ecolab's contention that Kendra's failure to ensure that A.G. and S.G. were properly seated and belted was a proximate cause of the girls' injuries or its assertion that "the State of Texas['s]" failure to properly design and maintain the roadway was a proximate cause of the collision. Rather, Ecolab's disclosures contained the same boilerplate assertion that Couch had made against "third persons, parties, legal entities[,] or instrumentalities over whom [he] had no control" in both his original and supplemental disclosures. Indeed, Ecolab—like Couch—did not disclose these defensive theories until August 2020—nearly *two years* after serving its original disclosures—and even then failed to provide any contact information for "the State of Texas" or Kendra as required by Rule 194.2(*l*). Thus, the record reflects that Ecolab—like Couch—engaged in "dilatory . . . tactics to game the system" and provided "inadequate" disclosure responses, i.e., the very type of conduct that the supreme court has suggested can cause a party to forfeit the right to designate responsible third parties under Section 33.004(d). *See id.*

Accordingly, even if we were to accept Couch's assertion that under *Coachmen*'s interpretation of Section 33.004, he can "piggyback" on Ecolab's responsible-third-party designations, this would be of no help to him because Ecolab's disclosure responses were just as inadequate as his own. Nothing in Section 33.004 or the jurisprudence interpreting this statute requires us to, in essence, stamp a "King's X"

on Couch's dilatory and inadequate disclosure responses merely because Ecolab was not added as a party to the lawsuit until shortly before the two-year limitations period expired, particularly given that Couch and Ecolab were represented by the same counsel and that Ecolab's disclosures were just as inadequate as Couch's. Thus, we decline to do so.

E. Because the Limitations Period for the Girls' Claims Has Not Expired, Section 33.004(d) Does Not Prohibit Couch's Responsible-Third-Party Designations as to Those Claims

Couch argues that because the limitations period on A.G.'s and S.G.'s claims has not yet run and because Gamble's claims are derivative of his children's, Section 33.004(d) does not bar Couch's responsible-third-party designations. Couch is partially correct.

Section 33.004(d) provides that

> [a] defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure.

Tex. Civ. Prac. & Rem. Code Ann. § 33.004(d). Thus, even if a defendant has failed to satisfy his disclosure obligations, Section 33.004(d) will not prevent him from designating a responsible third party unless the limitations period on the cause of action for which the responsible third party is liable "has expired." *Id.*

Ordinarily, A.G.'s and S.G.'s personal injury claims would be subject to Texas's two-year statute of limitations for negligence claims, meaning that the limitations period would have expired on July 4, 2018. *See id.* § 16.003(a). However, because A.G. and S.G. are minors, they are considered to have a "legal disability," *see id.* § 16.001(a)(1), and as a result, the limitations periods on their claims are tolled until they reach age eighteen, *see Weiner v. Wasson*, 900 S.W.2d 316, 321 (Tex. 1995). Thus, the limitations periods on A.G.'s and S.G.'s claims do not expire until their respective twentieth birthdays. *See id.* Because the limitations periods on A.G.'s and S.G.'s claims have not yet expired, Section 33.004(d) does not prevent Couch from designating Kendra and TxDOT as responsible third parties notwithstanding his inadequate and untimely disclosures.[37] Thus, the trial court did not abuse its discretion by allowing

[37]Texas Rule of Civil Procedure 215.2 allows a trial court to sanction a party for failure to comply with a proper discovery request and lists the sanctions a court may impose. Tex. R. Civ. P. 215.2; *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004). These sanctions include, inter alia, "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence." Tex. R. Civ. P. 215.2(b)(4); *Cire*, 134 S.W.3d at 839; *see also* Tex. R. Civ. P. 193.6(a) (providing that "[a] party who fails to make, amend, or supplement a discovery response, *including a required disclosure*, in a timely manner may not introduce" the untimely disclosed material into evidence unless the trial court finds good cause or absence of unfair surprise or prejudice (emphasis added)). A trial court's sanction must be just, meaning that (1) "a direct relationship must exist between the complained-of conduct and the sanctions imposed" and (2) "the sanctions must not be excessive." *Norwood v. Norwood*, No. 2-07-244-CV, 2008 WL 4926008, at *5 (Tex. App.—Fort Worth Nov. 13, 2008, no pet.) (mem. op.). Thus, even though Section 33.004(d) does not prevent Couch from designating Kendra and TxDOT as responsible third parties with respect to the girls' claims, the trial court nevertheless retains the discretion to prohibit Couch from introducing any evidence

Couch to designate Kendra and TxDOT as responsible third parties with respect to the girls' claims.

However, contrary to Couch's assertion, Gamble's individual claims for medical expenses are his own; they are not derivative of A.G.'s and S.G.'s claims. *See Sax*, 648 S.W.2d at 666; *Sarabia*, 2010 WL 1427019, at *4. Thus, the two-year statute of limitations for Gamble's individual claims was not tolled and has therefore expired. *Cf. Baptist Mem'l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex. 1996) (holding statutory tolling provision for minors under age twelve does not apply to an adult's wrongful-death claim based on the death of a minor under twelve years of age). Accordingly, given Couch's untimely and inadequate disclosures, the trial court abused its discretion by granting Couch leave to designate Kendra and TxDOT as responsible third parties with respect to Gamble's individual claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 33.004(d).

Because Couch failed to comply with his disclosure obligations but the applicable limitations periods on A.G.'s and S.G.'s causes of action have not yet expired, we sustain in part Gamble's first issue as it pertains to his individual claims but overrule it with respect to the girls' claims.

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supporting his responsible-third-party defensive theories as a sanction for untimely and inadequate disclosure responses, subject to review for abuse.

F. Gamble Has No Adequate Remedy by Appeal

Having sustained in part Gamble's first issue, we must address the question presented in his third issue—whether he is entitled to mandamus relief to correct the trial court's abuse of discretion or, stated differently, whether he has an adequate remedy by appeal. *See Allstate Indem. Co.*, 622 S.W.3d at 875. Because, as noted above, the supreme court has held that an ordinary appeal is inadequate to protect a plaintiff's rights when a trial court erroneously grants a defendant's motion for leave to designate a responsible third party, we conclude that Gamble has no adequate remedy by appeal and that he is therefore entitled to mandamus relief. *See Dawson*, 550 S.W.3d at 630–31; *see also Gonzales*, 619 S.W.3d at 265.

Accordingly, we sustain Gamble's third issue.

IV. CONCLUSION

Because the trial court clearly abused its discretion by granting Couch leave to designate Kendra and TxDOT as responsible third parties with respect to Gamble's individual claims and because Gamble has no adequate remedy by appeal, he is entitled to mandamus relief. Accordingly, we conditionally grant a writ of mandamus and direct the trial court to modify its July 12, 2022 order designating Kendra and TxDOT as responsible third parties to provide (1) that Kendra's and TxDOT's responsible-third-party designations apply only to A.G.'s and S.G.'s causes of action and not to Gamble's individual claims and (2) that Kendra and TxDOT will not be submitted to the trier of fact for the determination of their percentage of

responsibility for Gamble's individual claims. *See* Tex. R. App. P. 52.8(c). Our writ will issue only if the trial court fails to comply.[38]

/s/ Wade Birdwell

Wade Birdwell
Justice

Delivered: August 17, 2023

[38]We lift our November 23, 2022 stay of all trial court proceedings.