

bleachers on a sunny concrete slab. By the last drill on the last day of class, Capt. Smith was visibly disoriented, with his internal temperature at 107.9 degrees and his skin hot to the touch. As Capt. Smith lay dying, an instructor left him on the floor for five minutes and even told another student to finish the course by walking around Capt. Smith's body. When help finally arrived, Capt. Smith had no pulse. Of the 22 firefighters who began the class with Capt. Smith, six quit for safety reasons and three were evacuated for medical emergencies. Capt. Smith died.

The defendants in this suit designed, taught, and hosted the class that killed Capt. Smith after years of inflicting similar heat injuries on past students, including those in Capt. Smith's class who were forced to quit or seek medical attention for heat stress within the hours before Capt. Smith collapsed. The Texas Fire Marshal and the federal government investigated Capt. Smith's death and concluded that these defendants chose to ignore routine safety concerns and obvious signs of heat emergencies, costing Capt. Smith his life. Capt. Smith's widow now asks a Jefferson County jury to right that wrong.

DISCOVERY CONTROL PLAN

1. Plaintiffs intend to proceed with Level 3 discovery as provided by Texas Rule of Civil Procedure 190.4.
2. The damages sought are within the jurisdictional limits of the Court. As provided by TEX. R. CIV. P. 47(c), Plaintiffs state that they seek monetary relief over \$1,000,000, with the actual and punitive damages awarded by the jury anticipated to be several multiples higher. For example, Capt. Smith's earnings over the rest of his lifetime would have been substantial, to say nothing of the pain and agony suffered by Capt. Smith as hyperthermia caused his organs to fail

and caused his eventual death the following day. And the mental anguish, loss of consortium, and other harms suffered by his family from this avoidable tragedy are incalculable.

PARTIES

3. Plaintiff Penelope M. Smith (“Mrs. Smith”) is Capt. Smith’s widow. She lives in Harris County with her two children, who were elementary-school-aged when their father died. Mrs. Smith sues on her own behalf, as personal representative of Capt. Smith’s estate, and on behalf of all those entitled to recover under the Texas Wrongful Death and Survival Acts, including Nicholas Smith, Natalie Smith, and Capt. Smith’s mother. Collectively, Mrs. Smith and the other statutory beneficiaries are referred to throughout this petition as the “Smith Family.”

4. Nicholas Smith, a minor, is the son of Capt. and Mrs. Smith.

5. Natalie Smith, a minor, is the daughter of Capt. and Mrs. Smith.

6. Defendant State Firemen’s & Fire Marshals’ Association of Texas (“State Association”) is a Texas nonprofit corporation that may be served with process through its officers or its registered agent, Chris Barron of the State Firemen’s & Fire Marshals’ Association Fire Programs Institute, at 4450 North Frontier Trail, Austin, Texas 78745.

7. Defendant East Texas Firemen’s & Fire Marshals’ Association (“East Texas Association”), is a division of the State Association and (or in the alternative) is a Texas nonprofit association, that may be served with process through its officers, including:

- a. President Phillip Kibodeaux, who lives at 135 Turner Ave., China, Texas 77613;
- b. Vice President Jason January, who lives at 3719 Morgan Lane, Huntsville, Texas 77340; or
- c. Secretary/Treasurer Dennis M. Gifford, who lives at 115 Candlewick Drive, Lumberton, Texas 77657.

8. Defendant Industrial Safety Training Council (“ITSC”) is a Texas nonprofit corporation that may be served with process through its registered agent, John J. Durkay, at 324 North Memorial Freeway, Nederland, Texas 77627.

9. Defendant Dennis M. Gifford is an individual who lives at 115 Candlewick Drive, Lumberton, Texas 77657 and may be served with process wherever he is found.

10. Defendant William N. Rains is an individual who lives at 13 Briarwick Drive, Lumberton, Texas 77657 and may be served with process wherever he is found

11. John Does No. 1 through 10 were the members of the East Texas Association who served as trainers during the September 2012 smoke divers class and who were responsible for creating or monitoring the abhorrent conditions under which Capt. Smith perished. After receiving expedited discovery to identify John Does No. 1 through 10, the Smith Family will amend its petition to identify them by name and to arrange for service of process. Together with lead instructors Dennis Gifford and William Rains, the John Does are referred to throughout this petition as “the instructors.”

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over all claims in this action under the laws and constitution of this state.

13. This Court has personal jurisdiction over all defendants, who reside and engage in business in Texas. All defendants have sufficient minimum contacts with Texas to establish both specific and general jurisdiction.

14. Venue is proper in Jefferson County because a substantial part of the acts and omissions giving rise to this lawsuit occurred here. TEX. CIV. PRAC. & REM. CODE § 15.002.

Specifically, Capt. Smith died in Beaumont as the result of a firefighter training program held at the Beaumont Emergency Services Training (“BEST”) Complex.

FACTUAL BACKGROUND

A. The East Texas Association designs a “smoke divers” training class to be as grueling as possible, the State Association approves the curriculum, and the ITSC allows the East Texas Association to present the classes at ITSC’s training school.

15. In 1996, the East Texas Association developed the “smoke divers” class. At least in theory, the objective of the class is for firefighters to learn how to survive—while wearing full gear—if their oxygen tanks run out of air during a fire. The East Texas Association boasts that its class is an “extremely challenging” and “intensely physical” experience designed to “take the student to his/her limit.” Having completed the course themselves, the instructors approached smoke divers training as a fraternity-style hazing ritual to sort out which firefighters were “tough” enough to display the smoke divers completion badge on their uniforms.

16. Over the years, the East Texas Association changed the smoke divers class to become even more grueling. The original program included four hours of training on Friday, eight hours on Saturday, and eight hours on Sunday, but the East Texas Association compressed the demanding class schedule into 10 hours on Saturday and 10 hours on Sunday. Additionally, the East Texas Association added extra obstacles over the years to the six-story tower at the end of its course. The State Association approved the curriculum.

17. Since at least 1996, the East Texas Association has conducted two annual smoke divers classes at the ITSC’s BEST Complex in Beaumont. For years, participants have complained to the East Texas Association that instructors were inattentive to the risk of heat injuries and needed to include more hydration stations. One previous student even recommended in writing that instructors “back off on the second floor” of the training tower—the very floor

where Capt. Smith perished. Moreover, numerous students in previous classes suffered from heat-related illnesses that required medical intervention, including emergency room treatment.

B. Capt. Smith enrolls in the East Texas Association’s smoke divers class.

18. Capt. Smith dedicated his life to public service, proudly serving for three years in the United States Navy. In 2008, Capt. Smith continued his public service by joining the Atascocita Volunteer Fire Department while also working as a district manager for the Zales Corporation. He was the Honor Graduate for the 2008 Recruit Class. In just four years, Capt. Smith rose from rookie recruit to the respected rank of captain. Additionally, he earned a Certificate of Appreciation for service during Hurricane Ike and was named Firefighter of the Year and Officer of the Year.

19. Ever in search of ways to become an even more skilled firefighter, Capt. Smith completed four advanced training courses. In 2011, he decided to take his fifth such course and chose smoke divers training. To prepare for the class, Capt. Smith began an extensive personal training and fitness program. Each day for nearly a year, he began his morning with cardio workouts at a local gym and also fit in a bike ride whenever possible. He became so fit in preparation for the course that, at age 46, he lost nearly 80 pounds and was planning to complete a triathlon the weekend after smoke divers training.

C. Despite scorching temperatures and past incidents of heat-related sickness, instructors begin the course with their characteristic “boot camp” approach.

20. Class began on a scorching Saturday in mid-September, with the outside heat index reaching 92.2 degrees. Instructors and the ITSC knew that the weather forecast called for scorching conditions. Capt. Smith arrived at 6:30 a.m. for the day’s only air-conditioned activity, a 30-minute slideshow. Apart from a few slides during this half-hour opening speech, course instructors never mentioned safety protocols. Heat stress, heat-related illness, rehab protocol,

hydration, rest breaks, and heat safety rules were never discussed at all. Nor did the “safety” presentation include any instructions about how to notify instructors in the event of a heat emergency. Students did not receive radios to wear inside their outfits, and the instructors did not even discuss hand signals or other inexpensive ways to call for help.

21. Just before class began on the first day, paramedics checked each student’s heart rate, blood pressure, and blood oxygen levels for the first and last time. Capt. Smith tested normal, but several students had abnormal readings even before beginning any physical activity. The paramedics relayed these abnormal readings to the instructors, who were responsible for making any disqualifying medical decisions. But the instructors did not disqualify any of those students from participating. Moreover, paramedics never again tested any of the students to monitor vital signs—not in between training exercises and not even at the beginning of the second day of class.

22. One student arrived late on the first morning of class. Instructors required the entire class to perform push-ups as a “punishment” to the whole class for the late arrival. According to an investigation by the Texas State Fire Marshal, this episode was merely one example of the instructors’ “military boot camp approach.”

23. After finishing their push-ups, students immediately moved outside for four hours of training in their full, 75-pound firefighting gear, which includes a heavy jacket and pants, boots, a helmet, a mask, and an oxygen tank.

24. From the outset of the program, much of the training was completed on a concrete pad in the open sun. Another portion of the morning’s activities involved breathing exercises inside a dark, metal cargo container. Even when one student finished an exercise, instructors would force him to continue walking alongside his classmates who were still completing the exercise instead of resting.

25. After each group of students finished an exercise, instructors directed them to take a 30-minute “break” on metal bleachers located on a concrete pad in the open sun. Students received no Gatorade, Pedialyte, or even cold towels. Throughout the course, these were the only “breaks” that students received. Meanwhile, the instructors themselves sat beneath a shaded awning.

26. Upon ending their first break, students began navigating a series of obstacles on the concrete pad, including crawling through a metal container and then climbing a staircase. According to government investigators, the instructors intentionally placed students under physical and mental stress to increase their breathing and heart rates. Instructors used various methods to increase the students’ stress levels including yelling, loud noises, banging on walls, and other intimidation techniques.

27. By lunchtime on the first day of class, the students’ heavy gear was soaked with sweat, preventing their bodies from properly releasing heat. Even before lunch, one student quit the class for safety reasons and another had to be evacuated by paramedics.

28. Nonetheless, the instructors and the ITSC only ramped up the severity of activity during the worst of the afternoon sun. In one post-lunch exercise, students had to crawl through a 2’x2’x10’ box while wearing their oxygen tanks. Instructors had a thermal imaging camera that showed temperatures inside the box at 120 degrees.

29. During the box drill, one student told an instructor that he felt like vomiting, and the instructor replied “puke and keep going.” The student then passed out inside the box and had to be removed. Paramedics gave him a popsicle, but no one ever checked his core temperature or his blood glucose. While the student ate his popsicle, the instructors cajoled him to complete two more drills, warning that if he accepted intravenous fluid, he would have to visit the hospital and be disqualified from the class.

30. At the end of the first day, another student showed visible signs of dehydration, including cramps, chills, and vomiting. On the first day of training alone, two students in Capt. Smith's class were treated for heat stress, and three more students quit the program because they considered it to be unsafe. This was hardly surprising given that students were forced to wear their full firefighter suits—in the sun—with almost no interruption from 7:30 a.m. to 6:00 p.m.

D. Instructors and the ITSC pay no heed to the first day's medical emergencies and increase the pace on day two of class.

31. When students arrived for the second day of training, their gear was still drenched in sweat from the first day of activities. Moreover, the student who passed out on the first day of class told instructors that he had been vomiting all night. Nonetheless, no one ever checked that student's vital signs before starting the second day of class. In fact—after a 10-hour day of training that instructors described as an “intensely physical” experience designed to “take the student to his/her limit”—no one checked *any* student's vital signs at any time.

32. On day two, training continued for ten more hours. Despite the litany of heat-related risks and illnesses that became obvious on the first day of training, instructors only increased their abusive tactics on the second day, when the outside heat index soared to 91.4 degrees with almost no wind. In between drills, instructors again forced students to “rehabilitate” on unshaded metal benches.

33. Without anyone checking his vital signs, Capt. Smith began the second day of class by climbing through a 40-foot metal pipe while hauling an 180-pound mannequin made of concrete. Given the temperature inside and outside the pipe, their soaked gear, and the cramped conditions inside the pipe, Capt. Smith and his fellow students struggled mightily to finish.

34. Shortly after Capt. Smith emerged from the hot metal pipe, instructors told him to navigate an obstacle course inside a cinder-block building. Obstacles included ramps, stairs, drop-

offs, windows, holes, and other hazards that required students to remove and replace their heavy oxygen tanks. Instructors positioned themselves in the rafters above the students, where they used several techniques to purposely increase the students' stress levels. **As Capt. Smith and his fellow students maneuvered through the building, instructors repeatedly ensnared them with bungee cords, threw firecrackers at them, banged drums, and yelled that the students were "p***ies."**

35. While attempting to navigate the cinder-block building, another student—who spent the previous night vomiting from heat exhaustion—"saw red and feared for his life." After instructors refused to stop snaring his oxygen tank with bungee cords, that student fell unconscious. As soon as he awoke, he had to remove his face mask to continue breathing. As a result, instructors disqualified that student from the class—but forced him to crawl through another obstacle before he was allowed to exit the building.

E. Capt. Smith collapses during the final training exercise.

36. Despite yet another medical emergency, neither the instructors nor the ITSC took any steps to assure that other students were not suffering from the same heat-related injuries. Instead, they pressed students to complete the hardest phase of the class.

37. After struggling through the morning session, Capt. Smith arrived at the six-story training tower that marks the class's final course. The entire tower is filled with obstacles and artificial smoke. Students enter the tower by climbing an outdoor staircase and then maneuvering downward from floor to floor.

38. Capt. Smith entered the tower with two other students. Just two floors into the six-floor drill, one of those students began struggling to keep up and had to quit the class due to physical stress. On that same floor, Capt. Smith encountered problems switching his oxygen tank

as quickly as instructors demanded. Because the metal threading on his oxygen tank was stripped, it took him much longer than normal to swap tanks. According to an eyewitness, instructors refused to believe Capt. Smith when he told them that his air tank was damaged, and they yelled at him for five minutes to raise his stress level before finally allowing him to try another tank.

39. Capt. Smith proceeded through two more floors of the tower with his lone remaining teammate. The next-to-last floor was filled with wood landscaping timbers, tires, pallets, golf balls, metal pipes, and marbles on the floor. A previous student in the class had even written to instructors that they needed to “back off” on that floor of the tower because their tactics on the floor were too intense.

40. While on this floor, Capt. Smith started losing his breath, and one of the instructors told him to turn off the “PASS device,” or warning alarm, on his air tank. The instructors, as firefighters themselves, knew that PASS devices are used in actual fires and in training scenarios to promote firefighter safety. If a firefighter stops moving for more than a few seconds, his PASS device blares a loud distress signal that allows rescuers to find him.

41. With his PASS device disabled at the instructor’s command, Capt. Smith climbed through an obstacle on the second floor. But he then stumbled and, for no apparent reason, reentered the same obstacle that he just completed. An instructor responded by yelling at Capt. Smith for nearly five minutes. Finally, Capt. Smith stopped and kneeled. The instructor told another student to walk around Capt. Smith and finish the course without him.

42. Minutes after Capt. Smith appeared disoriented and stopped responding to instructors, someone called “Mayday” and finally evacuated the now-unconscious Capt. Smith from the tower. Had Capt. Smith’s PASS device been active, instructors would have been forced to call a “Mayday” alert much sooner.

43. Even during the evacuation of Capt. Smith, instructors continued to accelerate the unsafe conditions. The student who had to walk past Capt. Smith's body fell down a stairwell inside the tower. At the bottom of the steps—and during the evacuation of Capt. Smith—two instructors nonetheless forced that student to finish the obstacle course before he was allowed to exit the tower.

44. **When an ambulance arrived, Capt. Smith was not breathing and had no pulse. His internal temperature was 107.9 degrees and his skin was hot to the touch.** Even as Capt. Smith was being rushed to the hospital with no pulse, Gifford and an ITSC employee decided to continue the exercise in the training tower. Yet another student began displaying visible signs of heat stress by talking nonsense, lunging forward, and collapsing into an obstacle. That student too was evacuated and hospitalized. In response, instructors allowed the remaining students to take a short “break” on the sun-soaked metal benches before deciding to press forward with more training after two students were hospitalized for heat stroke.

45. At the hospital, doctors diagnosed Capt. Smith with hyperthermia, heatstroke, severe dehydration, and complications of heatstroke. Capt. Smith remained hospitalized for a day. Physicians then pronounced him brain dead and pulled the plug from his life-support machine. An autopsy revealed that Capt. Smith died from hyperthermia caused by the smoke divers training. Although Capt. Smith was an organ donor, his internal organs were so badly damaged from smoke divers training that they could not be donated.

46. The Texas Fire Marshal and the National Institute for Occupational Safety and Health (“NIOSH”) investigated the circumstances of Capt. Smith's death. Both agencies concluded that he died needlessly from preventable heat injuries that could have been avoided if the instructors, the East Texas Association, and ITSC had taken even minimal precautions to

prevent a repeat of the numerous heat-related emergencies that students had been suffering at smoke divers classes for years before Capt. Smith enrolled.

47. Of the 22 firefighters who began the class with Capt. Smith, six were forced to quit and three were evacuated for medical emergencies. Capt. Smith died. Moreover, NIOSH interviewed 10 surviving students from Capt. Smith's class, and every one of those students reported symptoms of heat illness.

48. In spite of the overwhelming evidence that their intentional disregard for safety had injured virtually every student in the class, the instructors and the East Texas Association showed no remorse. The day after Capt. Smith died, Gifford—an East Texas Association officer—effectively blamed Capt. Smith. “As tragic as this is, it’s really more or less coming down to the strict limitations of the individual,” Gifford told KFDM News. “We are going to take a completely new look and see if there is anything we can do to get our *individuals to be a little more proactive in their own safety.*” But if Gifford and his fellow defendants had been “a little more proactive” in preventing the heat-related injuries they witnessed for years, Capt. Smith would still be alive.

CAUSES OF ACTION

49. For each cause of action below, the Smith Family incorporates as if fully set forth within each cause of action the factual allegations in paragraphs 1–48.

Counts I and II: Negligence and Gross Negligence

50. All defendants owed a legal duty of care to Capt. Smith. Among other reasons, all defendants have a duty to exercise reasonable care to avoid foreseeable risk of injury to others. Moreover, each defendant owed a duty to prevent injuries to others who may be injured by a dangerous condition caused by that defendant or by a peril under that defendant's control.

Likewise, the defendants have a duty to exercise reasonable care in performing services that the defendants should have recognized as necessary for the protection of students.

51. All defendants breached their duty to Capt. Smith through their negligent acts and omissions. Defendants' breaches of duty killed Capt. Smith. His internal temperature soared to 107.9 degrees during the class, he collapsed on site and went into cardiac arrest, and an autopsy showed that hyperthermia was the cause of death. Two government investigations confirmed that defendants' misconduct killed Capt. Smith.

52. Through the actions and inactions described above, all defendants acted intentionally, willfully, and with reckless disregard for the safety of students—not with mere negligence. In other words, their conduct was grossly negligent.

Extreme Degree of Risk

53. When viewed objectively from the standpoint of all defendants, the acts and omissions complained of involved an extreme degree of risk. The probability and magnitude of the potential harm to Capt. Smith and his fellow students was monumental. Specifically, heatstroke and its complications pose life-threatening risks. **According to the ITSC's own safety manual, "[h]eat stress is a true medical emergency and can rapidly progress to heat stroke."** Heat stroke has a mortality rate of up to 80 percent. On sunny summer days with weather as extreme as it was during the smoke divers class, even the protocols of the United States Army and United States Air Force call for shutting down training exercises to avoid the obvious—and likely—risk of heat-induced injury.

54. The extreme risks to Capt. Smith and his fellow students are further evident from course descriptions written by the instructors and the East Texas Association. As defendants themselves acknowledge, the smoke divers class—at least as run by the East Texas Association—

is an “extremely challenging” and “intensely physical” experience designed to “take the student to his/her limit.” Based on “course intensities, extensive physical exertion and exposure to high temperatures,” the instructors and East Texas Association knew that the risk of injury so severe that they hired on-site paramedics.

Conscious Indifference to Extreme Risk

55. As described above and summarized below, each defendant had actual, subjective awareness of the risk involved but nonetheless proceeded with conscious indifference to the rights, safety, and welfare of Capt. Smith and his fellow students.

56. The ITSC clearly had actual subjective awareness of the risks facing Capt. Smith. According to the ITSC’s own “Participant Safety Manual,” “[h]eat stress is one of the greatest concerns for individuals involved in hands-on training activities” at the ITSC’s facility. Moreover, the ITSC’s manual confirms that it knew “heat stress is most prevalent during the warmer months of the year,” i.e., in months like September, when the ITSC allowed the class to be held.

57. The instructors and the East Texas Association had equally clear knowledge of the heat risks associated with smoke divers training. The East Texas Association’s own web site called the course “extremely challenging,” “intensely physical,” and warned that it “will take students to his/her limit.” Moreover, the instructors and the East Texas Association (1) required applicants to submit a health-clearance form, (2) encouraged fire departments not to send beginners to the course, and, at least on paper, (3) required paramedics to be on hand “before, during, and after” each smoke divers exercise. As these facts show, the instructors and the East Texas Association knew that their training program was an inherently dangerous activity.

58. All defendants also had clear, subjective knowledge of the risks involved because numerous students in previous smoke divers classes required medical attention—up to and

including emergency-room treatment—for heat-induced injuries. Additionally, many past students submitted written course evaluations complaining that instructors took insufficient care to prevent dehydration and other heat-related illnesses. Long before Capt. Smith collapsed on the second-to-the-last floor of the training tower, a previous applicant warned instructors in writing that they needed to “back off on the second floor.” According to NIOSH, heat illness is a preventable disease, and the heat incidents at past smoke divers classes “should have served as a warning” to the ITSC, the East Texas Association, and the instructors.

59. The weather forecast for the program also put all defendants on notice of unsafe conditions. The ITSC’s own “action plan” for the smoke divers course shows that the ITSC, the instructors, and the East Texas Association knew that the weather forecast called for 98-degree temperatures (with a 107-degree heat index) on the day Capt. Smith died.

60. By the time Capt. Smith’s temperature soared to 107.9 degrees, all defendants also had subjective knowledge of the heat-related illnesses affecting multiple students in Capt. Smith’s very class. They knew, for example, that one student spent the night vomiting from heat exhaustion, that temperatures inside one of the training facilities had reached 120 degrees, that one student had passed out during training, that two students required medical care, and that several other students quit the class citing heat-related sickness. Several instructors also witnessed Capt. Smith himself struggling to complete various exercises in the hours before his collapse.

61. Despite their subjective knowledge that the smoke divers class presented a substantial risk of heat-related injuries so severe as to require hospitalization, the ITSC, the East Texas Association, and the instructors ignored clear warning signs that students were suffering grave health consequences during training, and wantonly pushed Capt. Smith and his classmates

to continue. Their conscious indifference to the welfare of Capt. Smith and his classmates is amply shown by the non-exclusive list of examples below:

- a. The East Texas Association and the instructors not only failed to guard against the risks of heat stroke, they affirmatively increased students' physical stress and temperature by using "intimidation tactics" such as throwing lit firecrackers at students and repeatedly ensnaring students with bungee cords.
- b. All the defendants forced Capt. Smith and his classmates to "cool down" on metal bleachers on a concrete pad in the open sun.
- c. All defendants failed to follow virtually all of the ITSC's own heat-related safety rules, which the East Texas Association and the instructors received and were required to enforce. For example, ITSC rules require (a) removal of heavy clothing during breaks, (b) "increased cool down periods," in hot weather, (c) evaluation by a qualified medic "at the first signs of heat stress," (d) immediate removal to a shaded cool-down area for any student showing signs of heat stress. None of these protocols was followed or enforced. Defendants required students to don their full turnout gear during breaks, did not increase the breaks to account for the temperature, failed to seek immediate medical evaluation of students showing obvious signs of heat stress, and failed to remove students to shaded cool-down areas after observing signs of heat stress.
- d. When students complained of heat stress, instructors allowed—and even persuaded—them to continue the class, making no modifications to protect other students from the same injuries, and pressuring all students to continue lest they be labeled "p***ies" unfit to wear the smoke divers patch.
- e. The ITSC, the East Texas Association, and the instructors failed to arrange for testing of students' vital signs after the program began. On the day that Capt. Smith collapsed, the defendants failed to monitor vital signs at all.
- f. Neither the ITSC nor the East Texas Association bothered to use a simple thermometer to measure environmental heat. It would have cost less than \$150 to buy one, compared to the \$4,800 in tuition that the East Texas Association earned for every smoke divers class.
- g. Despite years of past heat incidents, all defendants failed to provide an ice-water immersion station at the smoke divers class. This would not have been expensive or complex. Ice water immersion requires only dumping a few bags of ice into a tin livestock tank or a plastic storage bin. The Texas State Fire Marshal concluded that, had defendants spent \$100 or so to provide this low-tech relief from heat stress, **Capt. Smith's "core temperature could have been reduced sooner, improving his prognosis" for staying alive.**

- h. All defendants failed to instruct students about heat-stroke precautions during the “safety” presentation at the beginning of the smoke divers class—or at any other time.
- i. All defendants required students to complete the course wearing drenched gear, which further prevented heat from escaping students’ bodies.
- j. All defendants failed to provide radios, or offer any other procedure (such as simple hand signals) that would allow students—clad in their full gear and masks—to timely notify instructors of overheating.
- k. All defendants refused to fix the unsafe conditions on floor two of the training tower—where Capt. Smith finally collapsed—despite a prior student’s written warning that conditions on that floor were too severe.
- l. All defendants chose to hold smoke divers class on a hot summer day and took no precautions to prevent heat injury despite knowing of weather forecasts calling for 90-to-100-degree temperatures.
- m. The instructors and the East Texas Association, with the State Association’s approval, changed the smoke divers curriculum to provide for two, intense 10-hour days when the original smoke divers program developed in other states spaced the exhaustive training over three days to reduce the risk of injury.
- n. The instructors and the East Texas Association instructed Capt. Smith to continue with the training-tower exercise just minutes after one of his fellow students in that exercise had to quit the class under physical duress.
- o. When Capt. Smith was struggling with a damaged oxygen tank, the instructors yelled at him for nearly five minutes, increasing his stress level just moments before his collapse.
- p. The instructors forced Capt. Smith to turn off his “PASS” warning device, effectively shutting off his last lifeline and preventing him from obtaining timely medical attention.
- q. All defendants failed to ensure that smoke divers participants were cleared by a qualified physician, did nothing to check participants for heatstroke risk factors, allowed courses to be conducted during the middle of the afternoon on blazing summer days, and failed to ensure that smoke divers instructors were qualified on trained in responding to heat-related illness.

62. As a result of all defendants’ grossly negligent acts and omissions, Capt. Smith sustained severe personal injuries, mental anguish, and physical pain prior to his death. As

provided by the Texas Survival Statute, Capt. Smith's estate is entitled to recover for his damages, including but not limited to, damages for mental anguish, physical injuries, pain and suffering, necessary funeral bills, expenses, and exemplary damages. In addition, defendants' misconduct caused the damages described below.

Count III: Wrongful Death

63. As Capt. Smith's widow, Mrs. Smith is a statutory beneficiary entitled to sue under the Texas Wrongful Death Act. Defendants are individuals, corporations, and associations subject to liability under the Act. As described in paragraphs 1-62 above, their wrongful acts, neglect, carelessness, unskillfulness, and default caused Capt. Smith's death. Had Capt. Smith lived, he would have been entitled to sue for his injuries.

64. As a result of Defendants' misconduct and the death of Capt. Smith, the Smith Family has suffered damages in the past and will continue to suffer damages including, but not limited to, loss of future financial contributions; loss of services; loss of consortium and companionship; loss of inheritance; loss of advice, care, and counsel; bereavement; medical, funeral, and burial, expenses; and mental anguish. All members of the Smith Family will continue to suffer from these injuries for the rest of their lives and seek compensation for such damages.

65. The Smith Family is entitled to exemplary damages because Defendants' acts and omissions, when viewed objectively from Defendants at the time of the occurrence, involved an extreme degree of risk, considering the probability and magnitude of potential harm to others, and Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, and welfare of others.

VICARIOUS LIABILITY

66. The East Texas Association is liable in its own right for designing and administering the smoke divers class in the grossly negligent manner described above. Additionally or in the alternative, the East Texas Association is vicariously liable for the grossly negligent actions and omissions of its members (the instructors) who designed and administered the September 2012 smoke divers class.

67. The East Texas Association is an unincorporated division of the State Association, and its self-declared mission is to provide regional support for the State Association. Consequently, the State Association is liable in its own right to the same extent and for the same reasons as the East Texas Association. Additionally or in the alternative, the State Association is vicariously liable for the grossly negligent actions and omissions of (1) its members (the instructors) who designed and administered the September 2012 smoke divers class and (2) the East Texas Association.

68. The ITSC is liable in its own right for the actions and omissions of the ITSC described above. Additionally or in the alternative, the ITSC is vicariously liable for the actions and omissions of its employees, officers, or agents who were responsible for the actions and omissions described above, including the ITSC personnel who approved the September 2012 smoke divers class or who were present during the class.

REQUESTS FOR DISCLOSURE

69. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, the Smith Family requests that all defendants disclose, within 50 days of service of this request, the information or material described in Rule 194.2.

JURY DEMAND

70. The Smith Family demands a trial by jury. The requisite jury fee was paid in connection with the filing of this petition.

MOTION FOR EXPEDITED DISCOVERY

71. The Texas Rules of Civil Procedure provide that “[t]he procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit . . . by court order for good cause.” TEX. R. CIV. P. 191.1. “Good cause” exists to expedite discovery so that the Smith Family can identify and sue the John Does within the limitations period. The Smith Family has timely and diligently attempted to identify the John Does through independent investigation, through review of media coverage, and through extensive consultation with the government agencies that have reviewed Capt. Smith’s death. Despite those efforts, the Smith Family has been unable to identify the John Does, and the only method of timely learning their identity is from the other defendants.

72. As a result, the Smith Family asks that the Court order each defendant to respond without objection to the following five interrogatories by serving answers, through electronic mail, no later than 5:00 p.m. on September 3, 2014:

Interrogatory No. 1

State the name and last-known address of all individuals who served as instructors during the September 2012 “Smoke Divers” class.

Interrogatory No. 2

With respect to the September 2012 administration of the “Smoke Divers” class, describe in general the role and responsibilities of each person identified in response to Interrogatory No. 1.

Interrogatory No. 3

State the name and last-known address of the individuals who served as instructors for the “tower exercise” while Capt. Neal Wade Smith was inside the training tower during the September 2012 “Smoke Divers” class.

Interrogatory No. 4

State the name and last-known address of all ITSC employees, officers, or agents who were present during any portion of the September 2012 “Smoke Divers” class.

Interrogatory No. 5

With respect to the September 2012 administration of the “Smoke Divers” class, describe in general the role and responsibilities of each person identified in response to Interrogatory No. 4.

PRAYER FOR RELIEF

73. For the reasons above, the Smith Family respectfully requests that the Court enter a judgment against all defendants and that the Court order all defendants to pay all actual, consequential, and incidental damages proximately caused by defendants’ actions or inactions; exemplary damages; pre-judgment and post-judgment interest at the maximum rate allowed by law; all court costs incurred in this action and any appeals; and all other relief at law and in equity to which the Smith Family may be entitled.

Respectfully submitted,

**AHMAD, ZAVITSANOS, ANAIPAKOS,
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