SMU | Dedman School of Law

SMU Law Review

Volume 64 | Issue 1 Article 22

January 2011

Personal Tort Law

Meredith J. Duncan

Jacquelyn Craig

Recommended Citation

Meredith J. Duncan & Jacquelyn Craig, *Personal Tort Law*, 64 SMU L. Rev. 451 (2011)
https://scholar.smu.edu/smulr/vol64/iss1/22

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

PERSONAL TORT LAW

*Meredith J. Duncan**
*Jacquelyn Craig***

I. INTRODUCTION 451
II. DUTY OF CARE IN NEGLIGENCE ACTIONS 452
A. DUTY OF PRIVATE BUSINESSES OR PREMISES OWNERS 452
B. DUTY OF THE SOVEREIGN 456
1. Premises Liability and the Recreational Use Statute 457
2. Ordinary Premises Liability 460
C. DUTY TO WARN UNDER THE LEARNED INTERMEDIARY DOCTRINE 462
III. REPOSE STATUTE AS ABSOLUTE BAR IN *ALL* MEDICAL MALPRACTICE ACTIONS 463
IV. WRONGFUL DISCHARGE 465
A. NO LIABILITY OF INDIVIDUAL EMPLOYEES 465
B. AVAILABILITY OF PUNITIVE DAMAGES 466
V. CONCLUSION 468

I. INTRODUCTION

THIS Survey period, the Texas courts were busy shaping and refining personal tort law with the greatest development focusing on the legal contours of the duty of care in negligence actions. This article begins by discussing various cases defining one's duty of care in premises liability actions, including duty of private businesses and premises owners,[1] as well as duty of the sovereign.[2] It next discusses cases considering duty to warn within the context of the learned intermediary doctrine.[3] The article then turns to the Texas courts' consideration of the

* B.A., Northwestern University; J.D., University of Houston Law Center. George Butler Research Professor of Law, University of Houston Law Center. Duncan is a member of the American Law Institute and co-author of TORTS: A CONTEMPORARY APPROACH (West 2010). She thanks the University of Houston Law Center administration for its support on this project.

** B.S., Texas A&M University; J.D. expected May 2011, University of Houston Law Center. Craig thanks Tim Geiger, for his support and patience; her wonderful family, for their endless love and encouragement; and most importantly, Professor Duncan, for fostering an appreciation and love for Tort Law.

1. *See infra* Part II. A.
2. *See infra* Part II. B.
3. *See infra* Part II. C.

statute of repose in the medical malpractice context[4] and concludes with a discussion of cases dealing with the tort of wrongful discharge—a unique tort representing an exception to the employment-at-will doctrine in Texas.[5]

II. DUTY OF CARE IN NEGLIGENCE ACTIONS

A. DUTY OF PRIVATE BUSINESSES OR PREMISES OWNERS

In *Del Lago Partners, Inc. v. Smith*,[6] the Texas Supreme Court examined whether owners and operators of a bar have a duty to protect patrons from imminent assault by a fellow guest.[7] The majority's decision precipitated the filing of three dissenting opinions,[8] as justices sparred over the appropriate standard of care owed to a bar patron injured in a melee among drunken bar patrons.[9]

Late one evening, about an hour before the defendant bar's closing time, tensions escalated between two groups at the Grandstand Bar on defendant Del Lago's resort property.[10] Present was a group of fraternity members celebrating their organization's 40th anniversary as well as a separate wedding party, which arrived at the bar late into the evening.[11] Verbal confrontations between the two parties commenced almost immediately after the wedding party arrived. After at least ninety minutes of heated exchanges between the parties (including posturing, cursing, and name-calling), a physical fight broke out.[12] Bradley Smith, a member of the fraternity, was seriously injured when he attempted to rescue a fellow fraternity brother, who Smith knew suffered from a heart condition.[13] An unidentified person rammed Smith's head into a wall stud, fracturing Smith's skull and causing brain damage.[14] Smith sued the bar pursuant to

4. *See infra* Part III.
5. *See infra* Part IV.
6. 307 S.W.3d 762 (Tex. 2010).
7. *Id.* at 764.
8. *See id.* at 777, 780 (Johnson, J., dissenting) (arguing the majority improperly states the applicable duty owed, ignores the plaintiff's burden to prove the defendant failed to use ordinary care, and overlooks the insufficiency of evidence regarding proximate causation); *id.* at 787, 791 (Wainwright, J., dissenting) (concluding the claim was improperly submitted under a premises liability theory rather than a negligent activity theory); *id.* at 796–97 (Hecht, J., dissenting) (calling the majority's holding a "non-rule," which deviates from Texas law and fails to provide landowners with clear guidelines).
9. *Id.* at 770 (deciding a duty arose to use reasonable care to protect bar patrons from imminent assault during ninety minutes of heated altercations); *id.* at 782 (Johnson, J., dissenting) (stating the landowner does not have a duty to warn an invitee of open and obvious conditions, or of conditions of which the invitee has knowledge); *id.* at 787 (Wainwright, J., dissenting) (concluding the plaintiff failed to establish the existence of an unreasonable risk of serious harm, and thus the defendant bar did not owe him a duty); *id.* at 799 (Hecht, J., dissenting) (asserting the law is settled in Texas that a landowner "must either adequately warn" an invitee of an unreasonably dangerous condition or "make the condition reasonably safe," but there is no requirement to do both).
10. *Id.* at 765.
11. *Id.*
12. *Id.* at 765–66.
13. *Id.* at 766.
14. *Id.*

a premises liability theory.[15] After a lengthy jury trial, the jury apportioned 49% of the fault to Smith and 51% to the defendant bar, imposing liability against the bar.[16]

In Texas, a premises liability action is based in negligence, with the scope of the legal duty owed to a plaintiff defined by the plaintiff's status at the time of the injury.[17] The plaintiff in *Del Lago* was properly characterized as an invitee, and as such the defendant bar owed him the "duty to use ordinary care to reduce or eliminate an unreasonable risk of harm . . . about which the [bar] owner knew" or should have been aware.[18]

The primary issue with which the supreme court grappled was whether a defendant had a duty to warn when the plaintiff himself is aware of a criminal act that may constitute a risk of harm. The majority held that under the circumstances, the bar owner had a duty to take reasonable steps to protect the plaintiff from the imminent threat of battery presented by the bar fight.[19] Expressly limiting its holding to the specific facts of this case,[20] the *Del Lago* majority held the bar owed Smith a duty to use reasonable care to protect him from the imminent assault, despite Smith being aware of the potential risk.[21] The bar owner's "duty arose because the likelihood and magnitude of the risk to patrons reached the level of an unreasonable risk of harm, the risk was apparent to the property owner, and the risk arose in circumstances where the property owner had readily available opportunities to reduce it."[22]

The supreme court's decision is substantial to developing personal injury tort law because ordinarily a landowner has no duty to protect invitees from criminal acts of third parties.[23] Texas courts have previously recognized an exception to this general no-duty rule: "[o]ne who controls . . . premises [has] a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an

15. *Id.* at 767. Smith initially put forward a premises liability theory as well as a negligent activity theory, but the defendant objected to and the trial court denied submission of the negligent activity theory to the jury. *Id.* at 775.

16. *Id.* at 767.

17. *Id.*; *see also* 59 TEX. JUR. 3D *Premises Liability* §§ 15, 17 (2010) (explaining the rule in Texas and most jurisdictions is that the extent of a landowner's liability for an injury resulting from a condition of the premises is generally determined by the injured entrant's status, absent explicit statutory expression to the contrary).

18. *Del Lago*, 307 S.W.3d at 767.

19. *Id.* at 770.

20. *Id.* ("We hold only, on these facts, that during the ninety minutes of recurrent hostilities at the bar, a duty arose on Del Lago's part to use reasonable care to protect the invitees from imminent assaultive conduct.").

21. *Id.* at 772.

22. *Id.* at 770. The majority provides, "When a landowner 'has *actual* or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent' to reduce or eliminate that risk." *Id.* at 769 (quoting Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983)).

23. *Id.* at 767; *see also* 59 TEX. JUR. 3D *Premises Liability* § 71 (2010) (stating an owner of premises generally has no duty to protect against criminal conduct of third parties).

unreasonable and foreseeable risk of harm to the invitee."[24] An owner may have a duty to protect invitees if he has direct knowledge that criminal conduct is imminent or, if he lacks such knowledge, when past criminal conduct renders similar future conduct foreseeable.[25] The supreme court previously held that the occurrence of prior criminal conduct affected what an owner knew or should have known.[26] Here, the supreme court found the *Timberwalk* factors largely inapplicable and instead focused on the defendant's knowledge of immediately preceding conduct and specific circumstances surrounding the injury.[27] Ultimately, the *Del Lago* court recognized a new factor impacting the foreseeability analysis—that a duty may arise where the nature and character of the premises increases the foreseeability of the criminal activity, even though that criminal activity may be known to the plaintiff.[28]

In considering the facts, the *Del Lago* majority concluded that the nature and character of a bar at closing time, with a previous ninety minutes of heated altercations among intoxicated patrons, increased the foreseeability of the bar fight thereby imposing an affirmative duty upon the landowner to guard against the risk of harm.[29] The majority explained that the applicable duty requires a premises owner either to warn invitees of the dangerous condition adequately or to take prudent actions to make the condition reasonably safe.[30] Here, "Del Lago had actual and direct knowledge that a [fight] was imminent" and had the "time and means to defuse the situation."[31] The supreme court took great pains to emphasize that it was not announcing a general rule, but was merely holding that there are some circumstances in which a warning will always be inadequate and an owner must take affirmative steps to make the premises safe. The facts in *Del Lago* presented just such a situation.[32]

Interestingly, the majority opinion considered *Del Lago* to be a case of premises liability *nonfeasance* as contrasted with a negligent-activity case of *malfeasance*.[33] The dissent argued the case should be treated as a neg-

24. Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998) (quoting Lefmark Mgmt. Co. v. Old, 946 S.W.2d 52, 53 (Tex. 1997)).

25. *Del Lago*, 307 S.W.3d at 768; *Timberwalk*, 972 S.W.2d at 756–57 (finding an owner lacking direct knowledge of imminent criminal conduct still has a duty to protect against such conduct if past criminal conduct made future conduct foreseeable).

26. *See Timberwalk*, 972 S.W.2d at 756–59 (analyzing the foreseeability of future injury given past criminal conduct by considering proximity, recency, frequency, similarity, and publicity).

27. *Del Lago*, 307 S.W.3d at 768 (finding these "factors inapplicable to today's case").

28. *Id.* Relying upon the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. f (2010) and recent precedent, the majority explained that there are situations where "criminal misconduct is sufficiently foreseeable as to require a full negligence analysis of the actor's conduct." *Id.* at 769.

29. *Id.* at 768–69.

30. *Id.* at 771.

31. *Id.* at 769.

32. The majority reasons that its holding is sensible because a bar sign stating "drink at your own risk" does not discharge the defendant bar of its duty to take reasonable steps such as calling security or otherwise acting earlier to prevent the fight. *Id.* at 771 n.32.

33. Relying on *Timberwalk* and *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992), the majority explained that a negligent activity theory requires affirmative misconduct, or

ligent activity claim, concluding the proper inquiry should focus on the defendant's affirmative, contemporaneous conduct, that allegedly caused the injury—or *malfeasance*.[34] In contrast, a premises liability case focuses on the landowner's failure to take measures to render the property safe—or *nonfeasance*.[35] The dissent disapproved treating *Del Lago* as one of premises liability, explaining the facts lend themselves to a discussion under a malfeasance theory rather than a nonfeasance theory.[36] The majority concluded the case was properly tried and submitted under a premises liability theory, noting the supreme court has repeatedly considered cases involving inadequate security as fitting neatly under premises liability.[37] Of course, the line between the two theories may at times be unclear as "almost every artificial condition can be [characterized as] created by an activity."[38]

The majority also persuasively explained that despite applying the law as the three dissenting opinions would have it, Texas long ago adopted a comparative fault statute providing apportionment of fault among parties.[39] Because the *Del Lago* jury apportioned fault between Smith and the defendant bar at 49% and 51%, respectively, Smith was not barred from recovery. Apportionment of responsibility only reduced the amount recoverable in judgment by 49%, equal to the percentage of fault attributable to Smith.[40] The majority persuasively characterized the assumption-of-risk portions of the dissents from Justice Johnson and Justice Hecht as thinly veiled attempts to revitalize a form of contributory negligence or assumption of the risk as a complete bar to Smith's ability to recover in this case.[41]

---

malfeasance; whereas a premises liability theory applies when a landowner has failed to take measures to render the premises in a reasonably safe condition, or *nonfeasance*. *See Del Lago*, 307 S.W.3d at 776.

34. *Del Lago*, 307 S.W.3d at 787 (Wainwright, J., dissenting) (arguing that because Smith's complaint was not based on a "condition of the land," the proper inquiry is the "contemporaneous acts and omissions of the Del Lago staff and invitees in the Grandstand Bar," and is properly cast as a negligent activity case instead of a premises liability case).

35. *Id.* at 776 (majority opinion).

36. *Id.* at 788–90 (Wainwright, J., dissenting) (noting that while the supreme court has recognized a duty of premises owners to take reasonable measures to protect others against criminal conduct and has analyzed these cases as premises liability claims, these cases included allegations of defendants' failure to employ adequate security measures, which inherently included a defective physical condition of the premises that allegedly permitted the criminal acts to occur).

37. *See id.* at 776 (majority opinion).

38. *Id.*

39. *Id.* at 772–73; *see also* Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) *overruled on other grounds by* Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. 1978) (abolishing the implied assumption of the risk doctrine as a complete defense to tort liability).

40. *Del Lago*, 307 S.W.3d at 772 (explaining the plaintiff's portion of responsibility for his "own risky conduct is now absorbed into the allocation of damages"); *id.* at 772 n.34 (referencing the legislature's adoption of a comparative negligence scheme as conveying a clear intent to apportion negligence rather than bar recovery).

41. *Id.* at 772–73. The dissenting justices take issue primarily with both (1) the failure of the parties to preserve error properly on the issue of premises liability or negligent activity and (2) the jury's factual findings where it apportioned 49% of the fault to the

The major difference in *Del Lago* distinguishing it from what might otherwise be an ordinary premises liability duty analysis is the supreme court's fact-specific focus on the circumstances and the great deal of weight it ultimately gave to the defendant's immediately preceding conduct and the nature and character of the defendant bar.[42] The supreme court's willingness to analyze whether a duty exists on such a case-by-case basis is rather remarkable, especially where the defendant is a business in a premises liability action. In the past, Texas courts have not seemed so willing to find for plaintiffs against business defendants in premises–liability actions.[43]

B. DUTY OF THE SOVEREIGN

The state is ordinarily insulated from liability under the doctrine of sov-

---

plaintiff and 51% of the fault to the defendant bar. *See id.* at 780, 787. Unfortunately, the dissenting justices' positions lack legal support. Regarding Justice Johnson's dissent, the majority complains: "Justice Johnson's view would effectively revive the doctrine of voluntary assumption of the risk as a complete bar to recovery, but the Texas proportionate responsibility statute makes clear that a plaintiff's negligence bars recovery only 'if his percentage of responsibility is greater than 50 percent.'" *Id.* at 772 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2011)). Regarding Justice Hecht's dissent, the majority complains that while Justice Hecht relies on the Restatement (Second) of Torts § 343A(1), which bars liability when an invitee is aware of the dangerous condition, he ignores two important things: (1) most states *and* the Third Restatement have rejected this outdated section of the Second Restatement and (2) even if the court did consider the Restatement (Second) of Torts § 343A(1), that section also comes with a relevant exception—that even though liability is barred when an invitee is aware of a dangerous condition, it is not similarly barred if "the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* at 773–74.

42. *See id.* at 769.

43. The Amarillo Court of Appeals also had an opportunity to address premises liability issues in *Labaj v. VanHouten*, 322 S.W.3d 416 (Tex. App.—Amarillo 2010, pet. denied). In *Labaj*, a watchdog kept on the lot of a used car and repair shop attacked plaintiff Dee-Ann VanHouten. At the time of the attack, VanHouten was looking at a car in the back lot of a used car garage. The dog, a pit bull recently injured and having just delivered a litter of pups, attacked VanHouten, removing a portion of her leg muscle. VanHouten sued Third Coast Auto Group (TCAG), the landowner that kept the dog on the premises for protection of its establishment. The Amarillo Court of Appeals held VanHouten was an invitee, thus TCAG owed her the duty to exercise ordinary care to keep the premises reasonably safe. *Id.* at 421. Whether a duty arose was determined, in part, by the foreseeability of the risk that a dog bite would occur. *Id.* The court of appeals concluded a dog kept under such conditions would foreseeably become over-protective and dangerous, and the evidence was legally sufficient for a jury to find TCAG breached its duty to VanHouten, ultimately causing her injuries. *Id.* at 422–23. The *Labaj* decision is interesting because the court of appeals clarified a complicated distinction among various articulations of duty owed in dog bite cases involving premises liability. First, Texas law distinguishes between owners of animals with known aggressive tendencies and owners of animals that do not have an aggressive disposition. *Id.* at 420. Strict liability applies to the former; however, owners of the latter may still be held liable if the plaintiff proves the owner's negligent handling caused the injury inflicted by the dog. *Id.* Second, the law distinguishes between the duty owed to invitees versus the duty owed to licensees. *Id.* at 421. Landowners have a duty not to injure licensees willfully, wantonly, or through gross negligence. *Id.* A more burdensome duty is imposed if the injured party is an invitee; the owner must exercise ordinary care to keep the premises reasonably safe. *Id.* These distinctions are reiterations of present law.

ereign immunity,[44] but the Texas Tort Claims Act (TTCA) carves out an exception for personal injuries caused by premises defects.[45] While the TTCA subjects the government to premises liability, the recreational use statute restricts its scope.[46] The recreational use statute essentially provides that the injured person is deemed a trespasser when a defective condition occurring on government-owned property forms the basis of a suit.[47] The courts note the statute itself dictates a higher standard than the true, common law standard of care owed to a trespasser.[48] Consistent with statutory text, Texas courts require the plaintiff to prove the defendant acted with gross negligence, malicious intent, or bad faith.[49] Given the statutory standard of gross negligence, the duty analysis for a premises defect claim involves a common law factor-balancing approach.[50] Because the relevant duty is created by the recreational use statute, courts must remain "mindful of [the statutory] text and purpose" in carrying out a legal duty analysis.[51] This past term, the Texas Supreme Court and the Austin Court of Appeals examined the scope and application of the legal duty owed by the government regarding characteristics of an alleged premises defect.

1. Premises Liability and the Recreational Use Statute

In *City of Waco v. Kirwan*,[52] the mother of a park visitor brought a wrongful death action against the City of Waco based on an alleged premises defect after her son fell off a cliff's edge.[53] The plaintiff's son , Brad

44. *See* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001) (noting sovereign immunity protects the state from suits for damages unless waived); Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405, 408 (Tex. 1997), *superseded by statute*, TEX. GOV'T CODE §§ 2260.001–.018 (West 2011), as recognized in *Gen. Servs. Comm'n*, 39 S.W.3d at 595 (recognizing the state must waive its sovereign immunity to be sued for damages, and the State did not waive its immunity from a suit for breach of contract merely by entering into the contract); Hosner v. DeYoung, 1 Tex. 764, 769 (Tex. 1847) ("A state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent.").

45. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (West 2011) (waiving state immunity where a condition or use of real property causes personal injury or death otherwise actionable under Texas law).

46. *See id.* § 102.022 (stating the governmental duty for a premises defect mirrors the duty a private individual owes to licensees); *id.* § 75.002(f) (limiting the governmental duty owed to persons engaging in recreation on government land to the same duty owed trespassers). In *State v. Shumake*, 199 S.W.3d 279, 281 (Tex. 2006), the supreme court made clear the recreational use statute does not reinstate sovereign immunity, but only restricts state liability by classifying the recreational user of state-owned premises as a trespasser and requiring proof of gross negligence, malicious intent, or bad faith.

47. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(f).

48. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(d), (f); *see* City of Waco v. Kirwan, 298 S.W.3d 618, 623 (Tex. 2009) (noting that while the statute "does not wholly adopt the common-law trespasser standard, it does adopt the common-law gross negligence standard. Thus, we refer to our traditional, common-law duty analysis . . . .").

49. *Kirwan*, 298 S.W.3d at 620; *see, e.g.*, Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 544 (Tex. 1998).

50. *Kirwan*, 298 S.W.3d at 623–24.

51. *Id.* at 624.

52. 298 S.W.3d 618 (Tex. 2009).

53. *Id.* at 620–21.

McGehee, was sitting on the edge of the cliff at a Waco city park watching boat races when the rocks beneath him suddenly crumbled, causing him to fall sixty feet to his death.[54] Coming within the purview of the recreational use statute,[55] this case presented the supreme court with an opportunity to answer a question left open by its decision in *Shumake*[56]—whether the city, as landowner, owes a duty to recreational users to warn or protect against the dangers of naturally occurring conditions.[57]

The supreme court ruled the recreational use statute, in most cases, does not give rise to a general duty to protect or warn others against dangers arising from naturally occurring land conditions.[58] To determine whether a duty exists, the court balances "the risk, foreseeability, and likelihood of injury [. . .] against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."[59] Applying the law to these facts, the supreme court held the City did not owe McGehee a duty to warn him against the dangers of the cliff.[60] The court reasoned that the magnitude of the burden often outweighs the foreseeability of the risk of harm where the condition is a natural one.[61] The risk of harm posed by the cliff in this case was foreseeable to both the City and McGehee. Thus, the city had no duty to warn because the burden of imposing a duty on landowners to protect against dangers a reasonable person would anticipate outweighs the risk of harm.[62]

The *Kirwan* decision leaves room for the future determination of whether a duty to warn arises when a condition is naturally occurring, but not open, obvious, or the kind a reasonable person would expect to encounter on the land.[63] The supreme court noted such a duty may arise if the landowner knows of a hidden and dangerous natural condition in an area frequented by recreational users, the landowner is aware of previous deaths or injuries related to the danger, and the danger is not the type a recreational user would expect to encounter on the property.[64] In such a case, the foreseeability and likelihood of the risk may outweigh the burden of imposing a duty on the landowner.[65] Nonetheless, whether the

54. *Id.* at 620.
55. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(f) (West 2011).
56. State v. Shumake, 199 S.W.3d 279, 279 (Tex. 2006). The condition in *Shumake* was man-made and not naturally occurring like the cliff at issue here. *Id.* at 281. The *Shumake* court held that under the recreational use statute, landowners have "no duty to warn or protect trespassers from obvious defects or conditions." *Id.* at 288.
57. *Kirwan*, 298 S.W.3d at 622.
58. *Id.* at 622–23 (holding landowners generally have no duty to warn or protect against dangers of natural conditions, but exceptions to this rule exist); see *id.* at 623–24 for specific examples of potential exceptions to the no-duty-to-warn rule.
59. *Id.* at 623–24 (quoting Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 544 (Tex. 1998)).
60. *Id.* at 628.
61. *Id.* at 625.
62. *Id.* at 625–26.
63. *Id.* at 626.
64. *Id.*
65. *Id.*

supreme court will recognize such a duty if given the appropriate facts remains to be seen.[66] The supreme court additionally noted that while the statute imposes a duty in circumstances involving artificially created conditions,[67] the facts in *Kirwan* did not require it to define the point at which a natural condition will be sufficiently altered to become "artificial" and thus giving rise to an affirmative duty to warn.[68]

Following the supreme court's *Kirwan* opinion, *Texas State University–San Marcos v. Bonnin*[69] seemed poised to address the boundaries of the artificial-versus-natural distinction *Kirwan* left unanswered.[70] The facts are tragic. Jason Bonnin worked at a Joe's Crab Shack overlooking the San Marcos River on Texas State University–San Marcos grounds.[71] While celebrating a colleague's final day at work, Jason and fellow employees were jumping from the Joe's Crab Shack deck into the river.[72] "After his second jump, Jason was sucked into the undertow and became trapped in the caverns beneath the restaurant, where he drowned."[73] His parents sued the University alleging its repairs to the dam created an "unreasonably dangerous condition," and that the University negligently failed to block access to the caverns.[74]

On remand, the court of appeals discussed the Bonnins' negligence claims and premises defect claims in turn.[75] The court of appeals first dismissed the negligence claims pertaining to the University's repairs to the dam because the Bonnins based their design defect allegations on discretionary acts of the University.[76] Under the TTCA, the discretionary acts exception effectively reinstates sovereign immunity.[77] However, the Bonnins based their premises defects claims on the turbulent undertow itself rather than the waterway repairs, thereby avoiding dismissal under the discretionary acts exception.[78] The court of appeals distinguished the case from *Shumake* because unlike the man-made culvert in *Shumake*, the turbulent undertow was a naturally occurring condition falling squarely within *Kirwan*.[79] The defect claims based on the turbu-

66. *See id.* at 627 ("[W]e do not hold that a party may never be liable for gross negligence related to a natural condition—under some circumstances not present in this case, a landowner may be liable.").

67. *See Shumake*, 199 S.W.3d at 288.

68. *Kirwan*, 298 S.W.3d at 627.

69. Tex. State Univ.-San Marcos v. Bonnin, 314 S.W.3d 912, 912 (Tex. 2010).

70. *Kirwan*, 298 S.W.3d at 627.

71. *Bonnin*, 314 S.W.3d at 912.

72. *Id.*

73. *Id.*

74. *Id.*

75. Tex. State Univ.-San Marcos v. Bonnin, No. 03-07-00593-CV, 2010 WL 4367013, at *2–3 (Tex. App.—Austin Nov. 05, 2010, no pet. h.) (mem. op.).

76. *See id.* at *2.

77. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West 2011); see *Bonnin*, 2010 WL 4367013, at *2.

78. *Bonnin*, 2010 WL 4367013, at *3.

79. *Id.* at *4. The court also presumed *Shumake* did not address the discretionary acts exception of TTCA section 101.056 in connection with the design of the man-made culverts because the parties failed to raise the issue. *Id.*

lent undertow were barred by sovereign immunity because there is no general duty to warn or protect recreational users against naturally occurring conditions.[80] The court of appeals presumably did not undertake the factor analysis laid out in *Kirwan* because the facts surrounding the danger of the undertow did not fit any of *Kirwan*'s suggested exceptions.[81] The court of appeals instead followed *Kirwan*'s overarching holding, namely that there is no duty to warn where the condition is naturally occurring.[82]

What was once a hopeful avenue to injured plaintiffs after *Shumake*[83] and *Kirwan*[84] is now blanketed with reality by *Bonnin*. The facts seemed perfectly aligned to analyze the strength of the connection between the university's repairs to the waterway and the resulting undertow that ultimately caused Jason's death and whether the natural condition—the strength of the undertow—became artificial at some point due to the changes brought on by the repairs.[85] But neither *Kirwan* nor *Shumake* mentioned the statutory question *Bonnin* put into issue—the effect of the discretionary acts exception. The *Bonnin* court extinguished the potential viability of any natural-to-artificial argument. According to the court of appeals, a premises defect claim, because it would be barred by the discretional acts exception, ultimately turns on analyzing the design decision of the waterway repairs.[86]

2. *Ordinary Premises Liability*

Given the flurry of weather events that occurred throughout Texas this past year, *Reyes v. City of Laredo*[87] seemed perfect in its timing. *Reyes* presented a significant decision for local governments and citizens alike, as it clarified the level of actual knowledge required in a premises defect suit brought against a governmental unit.[88] As previously noted, the TTCA limits governmental premises liability by restricting the state's duty to protect only against premises defects of which it has actual knowledge.[89] This limitation does not extend to cases involving special

80. *Id.*

81. *See infra* notes 97–106 and accompanying text.

82. *See Bonnin*, 2010 WL 4367013, at *4.

83. *See supra* note 56 and accompanying text.

84. *See* City of Waco v. Kirwan, 298 S.W.3d 618, 627 (Tex. 2009) (noting the facts of the case did not require the supreme court to define the point when a landowner transforms the "natural" to the "artificial" in a premises defect suit).

85. *See Bonnin*, 314 S.W.3d at 912–13.

86. *Bonnin*, 2010 WL 4367013, at *4 n.5.

87. Reyes v. City of Laredo, No. 09-1007, 2010 WL 4909963 (Tex. Dec. 3, 2010) (per curiam).

88. *Id.* at *3–5.

89. This is the same duty a private landowner owes to a licensee, which is a lesser standard than that owed to invitees. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (West 2011) (stating that except for toll roads the government "owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises" if the suit is a premises defect claim).

defects.[90]

"Maria Reyes sued the City of Laredo for the wrongful death of her fourteen-year-old daughter, who drowned when the van in which she and her family were riding . . . was swept away in flash flood waters."[91] The area was flooded by an overflowing creek and had risen during a rainstorm.[92] Upholding the court of appeals' determination, the supreme court held that the rain-flooded street was not a special defect.[93] Disposing the special defect issue meant the City only had a duty to warn motorists of the flooding if it *actually knew* of the flooding.[94] The supreme court and the lower court differed on this point. The appellate court held the City had actual knowledge of the flooded street.[95] A nearby homeowner who had "a clear view of the accident site" started calling 911 several hours before the incident occurred to inform the City the creek "was rising and that there [would] be a problem with cars getting swept away if something was not done."[96] The homeowner placed four or five calls of the same nature thereafter.

The Texas Supreme Court disagreed with the court of appeals holding the City lacked actual knowledge.[97] The supreme court stated no inference could be made regarding the City's actual knowledge that the area flooded, much less its knowledge when the accident occurred.[98] Mere "[a]wareness of a potential problem is not actual knowledge of an existing danger."[99] Even though the City knew the crossing had previously flooded during heavy rains, actual knowledge requires the City to have knowledge of the dangerous condition at the time of the accident, not mere knowledge of a possibility that a dangerous condition could develop. The supreme court continued, stating that if testimony existed evidencing a 911 call giving the operator "a credible report at about the time of the accident that the crossing had actually flooded and was imperiling

90. *Id.* § 101.022(b). Generally, special defects include "excavations or obstructions on highways, roads, or streets." *Id.* If the defect is considered a special defect, the government's duty becomes that which a private landowner owes to an invitee. Denton County v. Beynon, 283 S.W.3d 329, 331 (Tex. 2009). The government must "use ordinary care to protect an invitee from a dangerous condition of which the [government] is or reasonably should be aware." *Id.*

91. *Reyes*, 2010 WL 4909963, at *1.

92. *Id.*

93. *Id.* at *1, *3.

94. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a); State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992) ("A licensee must prove that the premises owner actually knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known.").

95. *Reyes*, 2010 WL 4909963, at *1. "The court of appeals concluded that 'Sanchez's statements, and the reasonable inferences from those statements, were sufficient to raise a fact issue on whether the City had actual knowledge of the dangerous condition at the time of the accident.'" *Id.* at *4.

96. *Id.*

97. *Id.* at *5.

98. *Id.* at *4 ("[T]he most one can reasonably infer about what the City knew is that at 12:30 a.m., Chacon Creek was rising, that 'there was going to be a problem' at some point, and that the danger persisted throughout the night.").

99. *Id.*

motorists," the City would then possess the requisite actual knowledge of a dangerous condition.[100]

Consistent with the Texas Supreme Court's analysis in *Kirwan* and the general notion of restricting the government's liability exposure as seen in *Bonnin*, the supreme court again declined to recognize an existing duty in *Reyes*. However, after the facts posited by *Reyes*, actual knowledge invokes a high burden for plaintiffs to satisfy. Reyes leaves little room, if any, to infer a governmental unit's knowledge, even if the evidence suggests it would be reasonable to do so. In defining the actual knowledge requirement, the *Reyes* decision seems to encourage willful blindness by the state.

C. Duty to Warn Under the Learned Intermediary Doctrine

In *Centocor, Inc. v. Hamilton*,[101] the Corpus Christi Court of Appeals addressed whether Texas recognizes an exception to the learned intermediary doctrine when a drug manufacturer fails to warn a patient of adverse effects caused by the drug and directly advertises the drug to its consumers.[102] In *Centocor*, the plaintiff sued the manufacturer of the drug Remicade after developing "a drug-induced lupus-like syndrome."[103] The drug manufacturer defended against the claim of fraud by arguing, *inter alia*, that the learned intermediary doctrine precluded imposition of liability.[104]

The *Centocor* court chose to "recognize an exception to the learned intermediary doctrine when a drug manufacturer directly advertises [false statements] to its consumers."[105] The learned intermediary doctrine ordinarily relieves a drug manufacturer from liability if it adequately warns the physician, but the court of appeals carved out an exception when the purpose of the doctrine is undermined.[106] According to the court of appeals, the doctrine was formed during an era when drug manufacturers did not normally advertise their products directly to consumers and patients relied on information provided to them by their doctors.[107] Adequate warnings to the physician cut off the manufacturer's liability because the doctrine served to adequately warn the patient as well.[108]

---

100. *Id.*

101. Centocor, Inc. v. Hamilton, 310 S.W.3d 476 (Tex. App.—Corpus Christi 2010, no pet. h.).

102. *Id.* at 480.

103. *Id.*

104. *Id.* at 480–81. The learned intermediary doctrine allows a manufacturer of a product to rely upon an intermediary, such as a physician, to pass along warnings to the product's ultimate consumer, the patient, thereby avoiding imposition of liability for a failure to warn the patient. *See, e.g.*, Ackermann v. Wyeth Pharm., 526 F.3d 203, 207 (5th Cir. 2008); Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591–92 (Tex. 1986); Coleman v. Cintas Sales Corp., 40 S.W.3d 544, 551 (Tex. App.—San Antonio 2001, pet. denied).

105. *Centocor*, 310 S.W.3d at 481.

106. *Id.* at 507–08.

107. *Id.* at 506–07.

108. *Id.* at 480 (opining that warning the physician was sufficient because pharmaceutical manufacturers did not directly advertise their products to patients).

However, when the manufacturer directly advertises to the patient in a misleading fashion, the underlying assumptions of the doctrine no longer apply.[109] The manufacturer cannot then rely on its warnings to the physician to satisfy its duty to warn the ultimate consumer.[110]

The *Centocor* opinion is an important event in Texas law because it essentially expounds upon previous law to accommodate industry changes regarding pharmaceutical advertising.[111] In the words of the court of appeals: "Our medical-legal jurisprudence is based on images of health care that no longer exist."[112] Pursuant to *Centocor*, patients may have a cause of action against the drug manufacturer if the direct advertising was misleading even though the drug manufacturer believed it discharged its duty via the learned intermediary doctrine by adequately warning physicians of the dangers and adverse consequences of a particular drug.[113]

III. REPOSE STATUTE AS ABSOLUTE BAR IN *ALL* MEDICAL MALPRACTICE ACTIONS

The Open Courts provision of the Texas Constitution provides that "all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[114] The statute of repose found in section 74.251 of the TTCA bars all healthcare liability claims brought ten years after the date on which the conduct giving rise to the claim occurs.[115] In the following two "surgical sponge" cases, the Texas Supreme Court discusses the time limits placed on medical malpractice suits.

In *Walters v. Cleveland Regional Medical Center*,[116] Tangie Walters received a tubal ligation following the birth of her child.[117] Not long after the surgery, she complained of abdominal cramping, which continued to bother her thereafter.[118] A nurse initially told Tangie the pain was an

109. *Id.* at 507–08 (reasoning the doctrine is undermined because patients ask for drugs by name after seeing advertisements, and the role physicians play in the patient-physician relationship is significantly diminished due to direct marketing).

110. *Id.* at 508.

111. *See id.* at 503–05 (noting various courts have carved out an exception to the learned intermediary doctrine where the doctor's role in the decision-making process and drug selection has diminished, and it is less likely warnings will be adequately conveyed to the patient). For examples of cases recognizing an exception to the learned intermediary doctrine for claims involving oral contraceptives, *see* Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867 (E.D. Mich. 1985), and MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65 (Mass. 1985).

112. *Centocor*, 310 S.W.3d at 480 (quoting Perez v. Wyeth Labs., 734 A.2d 1245, 1246–47 (N.J. 1999)).

113. *Id.* at 499 (recognizing an exception to the learned intermediary doctrine when drug manufacturers directly advertise to consumers in a manner which "fraudulently touts the drug's efficacy while failing to warn of the risks").

114. TEX. CONST. art. I, § 13.

115. TEX. CIV. PRAC. & REM. CODE ANN. § 74.251(b) (West 2011).

116. Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292 (Tex. 2010).

117. *Id.* at 294.

118. *Id.*

after-effect of childbirth; her doctor later attributed the pain to nursing.[119] The health problems, doctor visits, and wrong diagnoses resulting after were daunting. Among other ailments, Tangie experienced fatigue, insomnia, infections, uterine problems, bladder problems, chronic pain, and cysts.[120] Nine-and-a-half years after Tangie's surgery, a surgeon discovered a sponge had been left inside her abdomen.[121] Within two months of its discovery, Tangie sued the Cleveland Regional Medical Center, the doctor who operated on her, and the doctor's assistant.[122]

In considering her case, the supreme court reaffirmed its holding in *Neagle v. Nelson*[123] rendered twenty-five years earlier if a patient brings a foreign-object suit after the two-year statute of limitations expires but within a reasonable period of time, the patient may use the Open Courts provision to overcome the statutory limitations period.[124] "Sponge cases" warrant providing patients with a longer period of time to bring suit because the injury is difficult to discover, and the wrongdoing and identity of the one who committed the wrong are typically undisputed.[125] *Walters* articulates an additional reason for the supreme court's long-time holding that foreign-object claims can survive the two-year statute of limitations ordinarily applicable to medical malpractice actions through the Open Courts provision. To hold otherwise would render the repose statute superfluous: if the two-year statute of limitations acted as an absolute bar, the legislature's ten-year statute of repose would be unnecessary and meaningless.[126]

While *Walters* held the statute of repose was an absolute bar to all medical malpractice claims, even those brought by foreign-objects claimants, *Methodist Healthcare System of San Antonio, Ltd. v. Rankin*[127] called into question the constitutionality of the statute itself. *Rankin* presented a face-off between the ten-year statute of repose and the Open Courts provision of the Texas Constitution.[128]

In November 1995, Emmalene Rankin underwent a hysterectomy.[129] Nearly eleven years later, she was told that a surgical sponge had been left in her abdomen during the surgery.[130] She filed suit soon after against the hospital where the procedure was performed and the two phy-

119. *Id.*
120. *Id.*
121. *Id.* at 295.
122. *Id.*
123. Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985).
124. *Walters*, 307 S.W.3d at 294; *see also* TEX. CONST. art. I, § 13; *Neagle*, 685 S.W.2d at 12; Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 290 (Tex. 2010).
125. *Walters*, 307 S.W.3d at 294.
126. *Id.* at 298.
127. 307 S.W.3d 283 (Tex. 2010).
128. *Id.* at 284.
129. *Id.* at 285.
130. *Id.*

sicians who participated in the procedure.[131] The defendants argued Rankin's claims were barred by the ten-year statute of repose.[132] Before the supreme court for the first time was the issue of whether the Open Courts provision trumped the statute of repose.[133]

The supreme court upheld the statute's constitutionality and held that all healthcare liability claims are subject to the absolute time bar set by the legislature in the statute—a limit of ten years.[134] The supreme court stated the statute was not an unreasonable, and therefore not an unconstitutional, exercise of legislative power simply because Rankin was deprived of her right to sue before she had an opportunity to discover the sponge.[135] The court explained that focusing on the individual loss of Rankin's right to redress her wrongs "ignores the broader societal concerns that spurred the Legislature to act."[136] The supreme court upheld the repose statute as a reasonable policy decision by the Legislature to increase affordability of and accessibility to healthcare.[137]

IV. WRONGFUL DISCHARGE

A. No Liability of Individual Employees

In *Physio GP, Inc. v. Naifeh*,[138] the plaintiff Naifeh was an employee of Physio, an occupational and physical therapy clinic owned by the Saadats.[139] While Naifeh was employed at Physio, Tanja Saadat allegedly "consistently falsif[ied] Naifeh's patient treatment documents to include additional services that were not performed [in order to receive] higher payments from insurers."[140] Wanting no part in this misconduct, "Naifeh repeatedly refused to sign these altered treatment documents and was eventually fired" as a result.[141] Naifeh then brought a wrongful termination action against the Saadats, claiming they terminated her for refusing to perform an unlawful act.[142]

Because Texas is an employment-at-will jurisdiction, any party to an employment contract can terminate the contract absent an agreement to the contrary between the parties.[143] Despite this doctrine, Texas allows a

131. *Id.* The 1995 hysterectomy was performed at Southwest Texas Methodist Hospital. *Id.*
132. *Id.*
133. *Id.* at 284.
134. *Id.* at 284–85.
135. *Id.* at 284–85, 287 (noting review of a statute's constitutionality creates a presumption that the Legislature did not act unreasonably or arbitrarily).
136. *Id.* at 287.
137. *Id.* at 287–88 (noting "a spike in healthcare-liability claims [launched] an insurance crisis" because indeterminate periods of potential liability increase the insurance "rates that insurers must charge").
138. Physio GP, Inc. v. Naifeh, 306 S.W.3d 886 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.).
139. *Id.* at 887.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*; *see also* Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993).

former employee to sue the employer in tort for wrongful termination if the employee can establish that he or she was fired for refusing to perform an illegal act.[144] This exception to the employment-at-will doctrine is generally referred to in Texas as the *Sabine Pilot* doctrine.[145] The *Physio* case presents an issue of first impression, namely whether individual employees working for an employer can be held *personally* liable in tort for committing a wrongful discharge violation.[146]

The imposition of individual liability is controversial, as illustrated by the jurisdictional split presently existing throughout the states.[147] Some states permit individual liability for wrongful discharge for one's failure to perform a criminal act, reasoning that individuals should be responsible for their own torts even if they are acting as agents on behalf of their employers at the time of their wrongful conduct.[148] These jurisdictions take the position that individual tort liability provides a much needed deterrent against such wrongful conduct.[149] The Houston Fourteenth Court of Appeals rejected this reasoning, siding with jurisdictions refusing to impose individual liability on anyone besides the employer even *if* the employee who wrongfully fired the individual is a supervisor or owner of the business.[150] The dissent concluded the majority's reasoning was flawed, persuaded by contrary rationale.[151] Unlike the majority, the dissent was not persuaded that only the employer Physio had power to terminate Naifeh's employment. According to the dissent, the majority's reasoning rested on a legal fiction because "no one disputes the effectiveness of [the defendant's] termination" of the plaintiff's employment.[152] Restricting the source of duty in a wrongful discharge tort solely to the employer-employee relationship has significant implications, as it in effect undermines the *Sabine Pilot* doctrine, which serves a public interest by discouraging criminal acts.[153]

B. Availability of Punitive Damages

An additional case that addressed a different issue arising from the

144. *Physio*, 306 S.W.3d at 887–88; Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).

145. *See e.g.*, *Physio*, 306 S.W.3d at 887–88 (referring to the *Sabine Pilot* doctrine).

146. *See id.* at 888.

147. For examples of cases holding individuals personally liable for their own torts, even when they are acting as the employer's agents, see Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 775–77 (Iowa 2009), Ballinger v. Delaware River Port Authority, 800 A.2d 97, 110–11 (N.J. 2002), and Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 698–99 (W. Va. 1982). For examples of cases holding individual liability is not permitted for a wrongful discharge action, see Miklosy v. Regents of Univ. of Cal., 188 P.3d 629, 644–45 (Cal. 2008) and Schram v. Albertson's, Inc. 934 P.2d 483, 490–91 (Or. Ct. App. 1997).

148. *Physio*, 306 S.W.3d at 888; *see also supra* note 145.

149. *Physio*, 306 S.W.3d at 888; *see also supra* note 145.

150. *Physio*, 306 S.W.3d at 888.

151. *Id.* at 890 (Harvey, J., dissenting).

152. *Id.* ("In the real world, no one disputes the fact that Naifeh was fired by Tanja Saadat.").

153. *Id.* at 890–91 (noting the wrongful discharge committed in this case is "the very behavior *Sabine Pilot* was [intended] to prevent").

Sabine Pilot context was *Safeshred, Inc. v. Martinez*.[154] *Safeshred* addressed for the first time whether punitive damages are available in a *Sabine Pilot* cause of action. Answering in the affirmative, the Austin Court of Appeals held that punitive damages are indeed available to plaintiffs wrongfully discharged for refusing to engage in illegal conduct.[155]

In *Safeshred*, Martinez was fired because he refused to drive a truck failing to meet regulatory safety requirements.[156] While the supreme court's *Sabine Pilot* decision failed to expressly address which damages would be available to wrongfully discharged plaintiffs, Justice Kilgarlin's concurrence in *Sabine Pilot* suggested punitive damages were available in such an action.[157] In *Safeshred*, the court of appeals adopted Justice Kilgarlin's view, stating recoverable damages include loss of wages, employment retirement benefits, and punitive damages.[158] The court of appeals further reasoned that punitive damages are not only appropriate in a wrongful discharge action, but are also proper and necessary to deter criminal conduct "by prohibiting employers from firing employees for refus[ing] to commit illegal acts."[159]

The *Safeshred* court's rationale seems somewhat inconsistent with the *Physio* decision, which refused to recognize individual liability based on public policy interests in deterring criminal conduct.[160] The dissent in *Safeshred* disagreed with the majority's decision making punitive damages available.[161] The dissent argued that a decision regarding the appropriateness of punitive damages is more properly left to the legislature, which can more satisfactorily balance and consider important public policy concerns.[162]

---

154. Safeshred, Inc. v. Martinez, 310 S.W.3d 649 (Tex. App.—Austin 2010, pet. granted).

155. *Id.* at 661. The Texas Supreme Court recently clarified the standards for reviewing punitive damage awards, which accounts for the increasingly strict due process scrutiny imposed by the United States Supreme Court. *See* Bennett v. Reynolds, 315 S.W.3d 867, 873–83 (Tex. 2010); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–86 (1996) (providing a three-part framework as the standards courts should use to identify unconstitutionally excessive awards, which include the degree of reprehensibility of the conduct, the disparity between actual or potential harm suffered and punitive damages awarded, and the difference between a jury's award and civil penalties authorized in comparable cases). In *Bennett*, the jury awarded $1.25 million in exemplary damages against Bennett for conversion of his neighbor's cattle. 315 S.W.3d at 869. The Texas Supreme Court upheld the award of exemplary damages, but found the amount unconstitutionally excessive and remanded the case back to the appellate court for remittitur consistent with an appropriate ratio analysis. *Id.* at 885.

156. *Safeshred*, 310 S.W.3d at 654–57.

157. *Id.* at 659 (citing Sabine Pilot Serv., 687 S.W.2d at 736 (Kilgarlin, J., concurring)).

158. *Id.* at 659–61.

159. *Id.* at 660.

160. *See supra* notes 136–151 and accompanying text.

161. *Safeshred*, 310 S.W.3d at 669 (Puryear, J., concurring and dissenting).

162. *Id.* A remaining question left unanswered by *Safeshred* is whether mental anguish damages are available to *Sabine Pilot* plaintiffs. The majority in *Safeshred* declined to answer because it disposed the issue, finding Martinez failed to present sufficient evidence to support an award of damages for mental anguish even if such damages were available.

V. CONCLUSION

The recent opinions of the supreme court this past term bring to the forefront the importance of defining the scope and application of legal duties recognized in Texas tort law. *Del Lago Partners, Inc.* presented an unexpected shift in the usual premises liability outcome. The supreme court's willingness to undertake a fact-specific analysis and impose a duty upon the business owner was remarkable, as was the supreme court's promulgation of a new factor impacting the foreseeability analysis—the nature and character of the premises.

The supreme court also examined the contours of the duty owed under the recreational use statute in *Kirwan*, making clear there is no general duty to warn or protect recreational users against the dangers of naturally occurring land conditions. *Bonnin* additionally emphasized the inability of plaintiffs to sue the government for premises defects where the basis of the claim involves discretionary acts. When the discretionary acts exception applies, sovereign immunity is not waived. *Reyes* reiterated that where a governmental unit is not covered by the recreational use statute, the government only has a duty to warn of premises defects if it has actual knowledge of an existing danger. After *Reyes*, the actual knowledge threshold can rarely (if ever) be inferred, making it a difficult standard for plaintiffs to satisfy. *Centocor* exemplifies the changing pharmaceutical industry and voids the effect of the learned intermediary doctrine by holding manufacturers who advertise directly to their consumers accountable. Finally, two cases from the courts of appeals considered whom plaintiffs may sue in tort for wrongful discharge violations and what damages are available. The Houston Fourteenth Court of Appeals expressly stated individual liability for a wrongful discharge may not be imposed on anyone other than the employer. However, exemplary damages remain available in a *Sabine Pilot* action, at least by the recent ruling of the Austin Court of Appeals.

See id. at 667 n.28. The majority made clear its finding does not affect or decide whether these damages are available. *Id.*