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Personal Torts

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PERSONAL TORTS

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I. NEGLIGENCE

A. DUTY AND BREACH

DURING this Survey period, Texas courts have addressed the concept of duty, reiterating the well-established elements. In *Doe v. Franklin*,[1] the El Paso Court of Appeals discussed duty in the context of preventing another party's criminal conduct. The court recognized that a person does not have a duty to prevent another's criminal acts unless "a special relationship [exists] between the tortfeasor and the criminal actor," such as the parent-child relationship or the employer-employee relationship.[2] In discussing the duty owed, the court reasoned that "a person has a duty to not place another in harm's way of foreseeable criminal activity."[3] The court considered the traditional factors in determining whether a duty existed: "risk, foreseeability, likelihood of injury weighed against the social utility of the actor's conduct, magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."[4]

In *Doe*, the defendant was providing child care for the plaintiffs. Unfortunately, the care giver was married to a pedophile, and the court held that "[i]t is foreseeable that a child will be victimized if left alone or brought into close proximity with a pedophile."[5] The court points out that where the defendant "knew or should have known of her husband's proclivities" to molest their grandchild, the defendant's duty was to "have taken steps to ensure that her granddaughter would not be placed in harm's way or to otherwise ensure that her husband would not be in a position to act on his temptations."[6] Noting that "care giving is more a social necessity than a social utility," the court relied upon *Cain v. Cain*[7] in holding that "a duty exists to not place a child in a situation in which the risk of sexual abuse is heightened and in which the risk is foreseeable."[8]

A police officer claimed a protestor owed him a duty in *Juhl v. Airington*.[9] A group of demonstrators attempted to block access to an abortion clinic. Police officers at the scene ordered the demonstrators to leave the premises; those who did not leave were forcibly removed by the police. In attempting to remove one demonstrator, an officer injured his back. The officer filed suit against the protester he forcibly removed, the protest organizer, and other protesters who were present when he injured

1. 930 S.W.2d 921 (Tex. App.—El Paso 1996, no writ).
2. *Id.* at 927.
3. *Id.*
4. *Id.* (quoting Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).
5. *Id.* at 928.
6. *Id.*
7. 870 S.W.2d 676 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
8. *Doe*, 930 S.W.2d at 928-29.
9. 936 S.W.2d 640 (Tex. 1996).

his back. The allegations of negligence included a foreseeable confrontation with the police, creating a situation that they knew or should have known would risk injury to others, and failing to obey the lawful orders of the police.

The trial court granted the demonstrators summary judgment on the ground that they owed no duty to prevent a fellow protester from injuring the officer. The El Paso Court of Appeals reversed, holding that if the protest group was an unincorporated association, the individual members could be liable for the actions of the others acting in concert.[10] The Texas Supreme Court reversed and rendered judgment against the plaintiff. The court noted that each demonstrator was left to his own discretion regarding whether to obey an officer's order.[11] Also, basing an individual's liability on one group association member's tortious act "would pose serious threats to the right of free association."[12] The court further articulated that "liability of members of a group should be analyzed in terms of the specific actions undertaken, authorized or ratified by those members," regardless of incorporation status.[13] Moreover, the court noted that the question remains open whether "concert of action" liability as defined in the Restatement (Second) of Torts section 876 is recognized in Texas.[14]

The duty owed by a boy scout troop was analyzed in *Golden Spread Council, Inc. v. Akins*.[15] In the summer of 1987, C.C. was molested four times by Melvin Estes. A year later, a friend invited C.C. to join Boy Scout Troop 22. Unbeknownst to C.C., Estes was the assistant scoutmaster for the troop. Despite Estes's involvement with the troop, C.C. joined the unit. Estes did not molest C.C. while the two were associated with Troop 22. During a camping trip with the unit, C.C. confided in several of the members that Estes had molested him previously. Other scouts said that Estes had tried similar acts with them. One of the scouts who overheard this discussion was the son of the head scoutmaster. The son notified his father, and the father reported the matter to a Golden Spread Council employee, Herbert. The scoutmaster did not specify that the matter concerned sexual molestation.

Herbert made a report to the scout executive for Golden Spread. After being instructed to investigate the matter further, Herbert reported to the executive that the son would not disclose the names of the boys, the son was a known liar, and that Estes and the head scoutmaster were involved in a family feud. Golden Spread did not relay this information to the local police or Boy Scouts of America, and it did not undertake further investigation. A short time later, a church group decided to start its own troop. Herbert and the district scout committee had the responsibil-

10. *Id.* at 642.
11. *Id.* at 645.
12. *Id.* at 642.
13. *Id.* at 643.
14. *Id.*
15. 926 S.W.2d 287 (Tex. 1996).

ity of putting the church in touch with potential scoutmasters. Herbert and the committee introduced Estes to the church, which chose him as the scoutmaster.

Upon assignment to the new troop, Estes persuaded C.C. to leave Troop 22 and to join his troop. Estes resumed his advances toward C.C. and attempted to molest him on at least two occasions. In January of 1989, Estes was arrested for child molestation, and was subsequently convicted and imprisoned. Akins, C.C.'s mother, sued Boy Scouts of America and Golden Spread for negligent failure to properly screen and supervise Estes and for failure to remove Estes from his position as scoutmaster. The trial judge granted summary judgment for both the Boy Scouts and Golden Spread, which the appellate court reversed. The Texas Supreme Court concluded that the Boy Scouts did not owe a duty to C.C., yet Golden Spread did.[16] The court balanced the traditional factors listed above to determine that the imposition of a duty on Golden Spread was warranted.[17] The court held that a fact finder could determine that Herbert and Golden Spread should have foreseen that the recommendation of Estes would endanger scouts.[18] The court also weighed the social value of scouting and concluded that Golden Spread still owed a duty to report its knowledge regarding Estes.[19]

In *Sipes v. City of Longview*,[20] the Texarkana Court of Appeals held that "the City of Longview owed no duty to [the motoring public] to eliminate or warn of tall median grass at the location of the [automobile] accident" without a showing of ownership, dominion, or control over the median.[21] The court of appeals recognized that the Texas Department of Transportation chooses to retain control by contracting with a mowing company; thus, the City of Longview had no control of the median and no duty to warn or eliminate the danger.[22]

In *Graham v. Freese & Nichols, Inc.*,[23] the Eastland Court of Appeals held that an engineering firm did not owe a duty to a general contractor's employee who was injured at a dam construction site because it had no control over the premises or the safety precautions.[24] The engineer's duties did not include control over the premises based on the provisions in his contract.[25] The court reasoned that, absent control, there can be no duty.[26]

According to *Old v. Lefmark Management Co.*,[27] a property owner has

16. *Id.* at 289.
17. *Id.* at 290.
18. *Id.*
19. *Id.*
20. 925 S.W.2d 764 (Tex. App.—Texarkana 1996, writ denied).
21. *Id.*
22. *Id.*
23. 927 S.W.2d 294 (Tex. App.—Eastland 1996, writ requested).
24. *Id.* at 295.
25. *Id.*
26. *See id.*
27. 908 S.W.2d 16 (Tex. App.—Houston [1st Dist.] 1995, writ granted).

a duty to convey knowledge of prior criminal conduct to a subsequent purchaser. Phillip Old went to purchase donuts at Shipley's Donuts, located in the Fairbanks Shopping Center. During an armed robbery which was in progress, Mr. Old was shot and killed. Mr. Old's widow sued Lefmark, the former manager of the shopping center, alleging that it created dangerous conditions on the premises by allowing foreseeable criminal conduct and that it owed a duty to notify the new manager of the history of the criminal activity in the area. The trial court granted Lefmark's motion for summary judgment. The court of appeals reversed, holding that Lefmark owed "a duty to disclose to its successors any knowledge of dangerous conditions affecting the shopping center."[28]

B. CAUSATION

In *Gillespie v. Century Products Co.*,[29] the San Antonio Court of Appeals rejected the usual presumption that an adequate warning label on an infant car seat would have been followed by the user of the product.[30] The court found, under the circumstances of this case, that the adequacy of the warning was irrelevant because nothing the manufacturer did or failed to do could have prevented the death of the five-month-old child in the automobile accident.[31] Discussing the two elements of causation (cause-in-fact and foreseeability), the court found that the lack of an adequate warning was not the cause-in-fact of the child's death and, thus, the first crucial element of causation was lacking.[32]

The proper use of a sole proximate cause instruction was defined in *Bel-Ton Electric Service, Inc. v. Pickle*.[33] Bel-Ton was hired by LTV Aerospace to renovate one of its hanger buildings. The renovation required Bel-Ton to move at least one of two sets of switches which controlled the hanger doors. Bel-Ton moved only one set of switches. Some time later, an employee deliberately jammed one set of switches, which resulted in the doors closing automatically unless a switch was manually held open. An LTV employee was found crushed to death by the hangar doors. His widow sued for wrongful death, alleging that Bel-Ton's failure to remove the set of switches was negligent. Bel-Ton requested a sole proximate cause instruction based on the evidence that an LTV employee jammed the switches after Bel-Ton had completed its work. The trial court refused the instruction, and the jury found Bel-Ton liable. The court of appeals affirmed.

The Texas Supreme Court reversed and remanded for a new trial. It held that Bel-Ton had presented evidence which, if believed by the jury, would support the conclusion that the LTV employee was the sole proxi-

28. *Id.* at 20-21.
29. 936 S.W.2d 50 (Tex. App.—San Antonio 1996, no writ).
30. *Id.* at 52.
31. *Id.* at 52-53.
32. *Id.* at 53.
33. 915 S.W.2d 480 (Tex. 1996).

mate cause of the other employee's death.[34] Based on that evidence, Bel-Ton was entitled to the sole proximate cause instruction (i.e., that the *only* cause of the employee's death was the act of jamming the switch, and, therefore, Bel-Ton's actions were not the proximate cause of the death).[35]

C. Statute of Limitations

The Texas Supreme Court first visited the issue of repressed memories in the context of the statute of limitations in *S.V. v. R.V.*[36] R.V., age 20, sued her father for allegedly sexually abusing her over a 15-year period. She filed suit more than two years after the date of the last alleged occurrence, claiming that she had repressed the memories of the abuse and did not recover the memories until undergoing counseling. Experts at trial testified that R.V.'s symptoms were consistent with childhood sexual abuse syndrome. The trial court granted a directed verdict for her father. The court of appeals reversed and remanded, holding that the discovery rule should apply and that R.V. should have two years from the date she remembered the events to file suit.[37]

The Texas Supreme Court reversed. It restated the general principle: "accrual of a cause of action is deferred in cases of fraud or in which the wrongdoing is fraudulently concealed."[38] The remaining way to toll limitations (in the absence of some disability) is the discovery rule which requires two elements for repressed memories: (1) the wrongful act and injury must be inherently undiscoverable at the time they occurred, and (2) the wrongful act and injury must now be objectively verifiable.[39] The court assumed, without deciding, that the act and injury were inherently undiscoverable in this case.[40] However, the court held that recovered memories do not satisfy the objectively verifiable element.[41] Accordingly, the statute of limitations was not tolled and had expired before suit was filed.

The statute of limitations was satisfied where a related entity defendant was given notice within the proper time period in *Thompson v. Community Health Investment Corp.*[42] Youlanda Thompson died on September 21, 1990, at Colonial Hospital in Terrell, Texas. Prior to the filing of a lawsuit, the owner of Colonial Hospital transferred it to a subsidiary corporation, which sold the hospital to an unrelated corporation. Colonial Hospital received notice under the Texas Revised Civil Statutes, article 4590i, section 4.01 within two years of Thompson's death and forwarded

34. *Id.*
35. *Id.*
36. 933 S.W.2d 1 (Tex. 1995).
37. *Id.* at 3.
38. *Id.* at 4, 6.
39. *Id.*
40. *Id.* at 8.
41. *Id.* at 15, 20.
42. 923 S.W.2d 569 (Tex. 1996).

it to the subsidiary; the subsidiary did not receive the notice until more than two years after the death of Thompson. The trial court granted summary judgment for the subsidiary based on the statute of limitations, which the appellate court affirmed. The Texas Supreme Court reversed, holding that pre-suit notice to a related hospital entity tolls the statute of limitations with respect to a subsequent owner of the hospital under section 4.01 of the Medical Liability and Insurance Improvement Act.[43]

In *Brown v. Shwarts*,[44] the Waco Court of Appeals strictly applied Texas Revised Civil Statute, article 4590i, section 10.01 "notwithstanding any other law" to calculate the limitation period for wrongful death actions based on medical malpractice, despite realizing possible inequity.[45] Section 10.01 dictates that an action for medical malpractice must be brought within two years of first of three possible accrual dates: "(1) the date the breach or tort occurred; (2) the date the [health care] treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed."[46] A plaintiff cannot choose the date to start the running of the limitation period on his action, but must bring the suit within two years of the first of these three occurrences.[47] Improper treatment prior to a child's birth starts the limitation clock, not the actual birth or later death of the child.[48]

A mother's statute of limitations accrued at the birth of her child in *Baptist Memorial Hospital System v. Arredondo*.[49] A mother brought a wrongful death action against a hospital and physician for causing injury to her son during delivery. The doctor delivered her son on July 17, the newborn died on July 19, 1991, and she commenced suit on July 19, 1993. The Texas Supreme Court held that the mother's statute of limitations ran from the date of delivery under the Medical Liability and Insurance Improvement Act.[50] The court further held that the child's tolling provision of section 10.01 did not apply because the "provision tolls a claim's accrual only when it is filed by a minor or on a minor's behalf."[51]

The court in *Jennings v. Burgess*[52] started the statute of limitations on the date of a negligent medical referral, not the date the second doctor actually saw the patient.[53] On March 3, 1989, Jennings diagnosed Burgess as having cancer on her nose. Although Burgess requested a referral to a specialist, Jennings referred Burgess for treatment to Manning, a general practice physician. Later, Manning referred Burgess to a specialist, who

43. *Id.* at 572.
44. 929 S.W.2d 609 (Tex. App.— Waco 1996, writ granted).
45. *Id.* at 612-13.
46. *Id.* (quoting Chambers v. Conaway, 883 S.W.2d 156, 158 (Tex. 1993)).
47. *See id.*
48. *See id.* at 613. This holding is contrary to the legislative history of the Act and the intent of the legislature.
49. 922 S.W.2d 120 (Tex. 1996).
50. *Id.* at 121.
51. *Id.* This is another restructure interpretation of article 4590i by the current court.
52. 917 S.W.2d 790 (Tex. 1996).
53. *Id.* at 794.

discovered the cancer had invaded her nose. Burgess sued Jennings for the initial negligent referral to a general practitioner. The Texas Supreme Court held that the claim was barred because the two year statute of limitations, as governed by article 4590i, section 10.01 of the Texas Revised Civil Statutes, ran from the date of the referral when Burgess was referred to a general practitioner instead of a specialist as she requested, rather than when Burgess discovered the cancer had invaded her nose.[54]

D. Vicarious Liability

In *NationsBank, N.A. v. Dilling*,[55] the Texas Supreme Court held that vicarious liability is inapplicable to an employer in the absence of an employee's actual or apparent authority.[56] A bank teller was involved in an investment scheme that was used to defraud Dilling. Because that involvement was not within the course and scope of her employment as a teller, NationsBank could not be held vicariously liable to Dilling.[57]

E. Negligent Hiring

In *Golden Spread Council, Inc. v. Akins*,[58] the parents of a molested boy accused the Boy Scouts of America and the local council of negligently hiring an abusive scoutmaster. Under the facts of the case,[59] such an action must fail since neither entity hired the scoutmaster; instead, they simply recommended him for hire.[60]

In *NationsBank, N.A. v. Dilling*,[61] the defrauded investor also claimed NationsBank negligently hired the teller. The Texas Supreme Court defined the foreseeable injury of that alleged negligence as improper work as a teller, not involvement in the investment scheme.[62] Since the fraudulent scheme against Dilling was not foreseeable to NationsBank, a negligent hire cause of action failed.[63]

F. Criminal Acts of Third Parties

Walker v. Harris[64] turned on the issue of foreseeability of criminal conduct. Harris was stabbed to death at a four-plex in Brookshire. His survivors sued Walker, the owner of the four-plex, for negligent failure to warn the public of criminal activity in the area and for negligent failure to provide adequate security. The Texas Supreme Court, in affirming the trial court's granting of summary judgment for Walker, held that, as a

54. *Id.*
55. 922 S.W.2d 950 (Tex. 1996).
56. *Id.* at 952.
57. *See id.* at 953.
58. 926 S.W.2d 287 (Tex. 1996).
59. *See supra* text accompanying notes 15-16.
60. *Akins*, 926 S.W.2d at 290.
61. 922 S.W.2d 950 (Tex. 1996).
62. *Id.* at 953-54.
63. *Id.*
64. 924 S.W.2d 375 (Tex. 1996).

matter of law, the stabbing was not foreseeable where: (1) the city Police Chief testified that the apartment is located in an area of low to moderate crime, (2) the record indicated that the police had never been called to the property to investigate a violent crime, and (3) the property had ever been burglarized.[65]

In *Doe v. Franklin*,[66] a grandmother owed a duty not to leave her grandchild alone with her grandfather because he had a known proclivity to molest children.[67] Because of the known danger of criminal conduct, the risk was foreseeable and the danger preventable.[68]

According to *Old v. Lefmark Management Co.*,[69] a property owner has a duty to convey knowledge of prior criminal conduct to a subsequent purchaser.[70] Under the facts of the case,[71] the court held that Lefmark owed "a duty to disclose to its successors any [knowledge] of dangerous conditions affecting the shopping center."[72]

G. Professional Negligence

1. Medical Malpractice

In three related cases, the Texas Supreme Court recently prevented discovery of a hospital's records relating to its initial granting of staff privileges to a doctor in a medical malpractice suit against the doctor and the hospital.[73] Plaintiffs in *Brownwood* brought a wrongful death and survival action alleging that the doctor was negligent in his diagnosis and treatment of the decedent and that the hospital was negligent in extending staff privileges to the doctor. Plaintiffs requested copies of the following documents: (1) the doctor's application for staff privileges, (2) the hospital's bylaws, and (3) the minutes of the board of trustees and/or of the credentialing committee approving the doctor's application for hospital privileges. Defendants objected to the production of these documents as privileged from discovery under section 5.06 of the Medical Practice Act and section 161.032 of the Health & Safety Code. After an *in camera* inspection, the trial court held that the documents were privileged and denied discovery, making the proof for a negligent credentialing case inaccessible.[74] The Texas Supreme Court held that the doctor's application for staff privileges and the minutes of the trustees or credentialing committee's meetings were privileged, but the hospital's by-laws,

65. *Id.* at 377-78.
66. 930 S.W.2d 921 (Tex. App.—El Paso 1996, no writ).
67. *Id.* at 928-29.
68. *Id. See supra* section I(A).
69. 908 S.W.2d 16 (Tex. App.—Houston [1st Dist.] 1995, writ granted).
70. *Id.* at 20-21.
71. *See supra* text accompanying notes 27-28.
72. *Old*, 908 S.W.2d at 20-21.
73. Brownwood Regional Hosp. v. Eleventh Court of Appeals, 927 S.W.2d 24 (Tex. 1996); Memorial Hosp.—The Woodlands v. McCown, 927 S.W.2d 1 (Tex. 1996); Irving Healthcare Sys. v. Brooks, 927 S.W.2d 12 (Tex. 1996).
74. *Brownwood*, 927 S.W.2d at 26.

rules, and regulations concerning medical staff were not privileged.[75]

The extent of a hospital's obligations to warn third parties was discussed in *Garcia v. Santa Rosa Health Care Corp.*[76] The court of appeals held that health care professionals who discovered AIDS in a hemophiliac patient, which they believed was likely caused by services administered by the health care workers themselves, were under a duty to warn readily identifiable third parties who were potentially endangered so long as the warning does not violate the hospital-patient relationship.[77] The court reasoned that this case fell in line with two other cases finding a duty in similar situations.[78]

2. *Legal Malpractice*

The scope of an attorney's duties was defined in *Barcelo v. Elliott.*[79] Elliott drafted a will with a specific trust provision that distributed income to Barcelo during her life. On Barcello's death, the trust would terminate and the trustee would distribute a specific amount to her children and siblings, with the remainder distributed to her grandchildren. After Barcelo's death, two of her children contested the validity of the trust and the probate court declared the trust invalid and unenforceable. The intended remainder beneficiaries settled with the decedent's children and sued Elliot and his firm for malpractice. In upholding summary judgment for the attorneys, the Texas Supreme Court reaffirmed that privity is necessary to assert a legal malpractice claim: "an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."[80] The court also rejected plaintiffs' contention that recovery was permissible under a third party beneficiary contract theory.[81]

II. PERSONAL TORTS

A. Defamation and False Light Invasion of Privacy

In *Duran v. Furr's Supermarkets, Inc.*,[82] the El Paso Court of Appeals held that a security guard who threatened to arrest a woman may have defamed her because the threats may have falsely imputed criminal conduct to the woman.[83] In reversing a summary judgment, the court of ap-

75. *Id.* at 27.
76. 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996, writ requested).
77. *Id.* at 377.
78. *Id.* (citing Gooden v. Tips, 651 S.W.2d 364, 369 (Tex. App.—Tyler 1983, no writ) (recognizing physician's duty to the motoring public to warn his patient of the side effects of a drug prescribed for her); and Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (holding that when a therapist reasonably believes that his patient poses a serious danger of violence to a specific, readily indentifiable person, the therapist bears the duty to exercise reasonable care to protect that person)).
79. 923 S.W.2d 575 (Tex. 1996).
80. *Id.* at 578-79.
81. *Id.*
82. 921 S.W.2d 778 (Tex. App.—El Paso 1996, writ denied).
83. *Id.* at 793.

peals described the question as "whether [the guard's] statements falsely imputed criminal conduct to her."[84] According to Duran, a security guard verbally abused her when the guard requested that she move her car. When asked for his name, the security guard threatened to arrest her. That threat of an arrest formed the basis of Duran's suit for defamation because the statements implied the commission of a crime and subjected her to public ridicule.[85]

B. Intentional Infliction of Emotional Distress

In a decision that focused on the freedom of religion, the Texas Supreme Court evaluated a claim for intentional infliction of emotional distress in *Tilton v. Marshall*.[86] The court rejected plaintiffs' efforts to sue Robert Tilton for intentional infliction of emotional distress for making insincere religious representations and for breaching promises to read, touch, and pray over tithes and prayer requests. The court concluded that a determination of intentional infliction of emotional distress would necessarily infringe on Tilton's constitutional rights because no conscientious fact finder could determine whether Tilton's conduct was outrageous without first evaluating the truth or veracity of the religious beliefs espoused by Tilton.[87]

C. Wrongful Death

The court in *Zezulka v. Thapar*[88] dealt with a physician's duty to warn. A psychiatrist began treating a Vietnam veteran after the veteran slapped his stepfather at a family gathering. The psychiatrist determined that the veteran suffered from post-traumatic stress disorder and that he was paranoid and delusional, specifically concerning his step-father and certain racial groups. The veteran later killed his step-father, and the veteran's mother filed a wrongful death suit against the psychiatrist. She contended that the psychiatrist was negligent in not warning her family that her son contemplated killing his step-father. The trial court granted the psychiatrist's motion for summary judgment on the ground that the psychiatrist did not have a doctor-patient relationship with the plaintiff or the step-father and therefore did not have a duty to warn them.[89] The court of appeals reversed and remanded, concluding that "[t]he existence of a doctor-patient relationship is not presently a prerequisite for a wrongful death action" and that a psychiatrist has a duty to warn a known

84. *Id.*
85. *Id.*
86. 925 S.W.2d 672 (Tex. 1996).
87. *Id.* at 681.
88. No. 01-94-01195-CV, 1996 WL 37994 (Tex. App.—Houston [1st Dist.], Jan. 29, 1996, no writ) (not released for publication).
89. *Id.* at *5.

person of specific threats made by the psychiatrist's patient.[90]

D. Premises Liability

The absence of knowledge of a premises defect supported a summary judgment in *Motel 6 v. Lopez*.[91] Lopez alleged that she suffered injuries when she fell in the shower in her room at a Motel 6 in El Paso. Lopez sued Motel 6 and two manufacturers of the shower for negligence. Motel 6 moved for summary judgment on the premises liability claim, alleging no actual or constructive knowledge of any defect with the shower. Attached to the motion was an affidavit from the motel manager who stated that she was unaware of prior similar occurrences, that she had not received any complaints concerning the safety of a shower stall, and that the stall had been cleaned before Lopez entered it. The trial court granted summary judgment for Motel 6 without stating the grounds for its ruling. The Texas Supreme Court affirmed the summary judgment, noting that the premises liability claim failed because Motel 6 did not have either constructive or actual knowledge that an unreasonably dangerous condition existed.[92]

The court in *Johnson County Sheriff's Posse, Inc. v. Endsley*[93] rejected a premises liability claim against a rodeo arena. A spectator at a barrel race suffered a serious eye injury when he was struck by an unknown object, apparently thrown by a horse in the barrel race. Endsley sued the facility lessor for negligence under premises liability. Based on the facts of the case, the Texas Supreme Court concluded that dirt containing small rocks is not an unreasonably dangerous condition for which a landlord may be held liable.[94]

E. Product Liability

In *Firestone Steel Products Co. v. Barajas*,[95] Firestone designed and patented a wheel rim that enabled installation of a tubeless tire on the wheel rim for trucks. The wheel rim was only designed for dual wheels. Firestone permitted use of the design by its competitors without charging a patent license fee. Subsequently, another company modified the design for use with single wheels. Firestone neither participated in the modification nor collected a royalty from the single wheel design. While attempting to fix a flat tire, Barajas tried to place a 16 inch tire on a 16 1/2 inch wheel rim made by the modifier company. The tire exploded and fatally injured Barajas.

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90. *Id.*; *see also* Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996, writ requested) (for the same proposition regarding an AIDS patient, see discussion in section I.G(1) above).

91. 929 S.W.2d 1, 4 (Tex. 1996).

92. *Id.*

93. 926 S.W.2d 284, 287 (Tex. 1996).

94. *Id.*

95. 927 S.W.2d 608 (Tex. 1996).

The decedent's parents sued Firestone for negligence and strict products liability. Firestone moved for summary judgment on the ground that it did not design, manufacture, or sell the wheel in question, and therefore, it could not be liable based upon its original patent. The Texas Supreme Court upheld a summary judgment, holding that "[i]f the original designer of a system or prototype gives the design to another party, this action alone is not enough to impose liability under a strict products liability theory."[96] The court reaffirmed the position that strict products liability requires proof that a defendant supplied the product that caused the injury, stating that "[i]t is not enough that the seller merely introduced products of similar design and manufacture into the stream of commerce."[97]

Explaining a failure to warn defect was the crux of *Clark Equipment Co. v. Pitner*.[98] As the plaintiff drove a forklift down a ramp, tilting the forks of the forklift to keep the load level, the engine died. The forklift continued traveling down the ramp, and the plaintiff had little control over the steering and brakes. The plaintiff was injured while attempting to jump off the forklift. The jury found a marketing defect based on a failure to warn.

The court of appeals affirmed and held that a marketing defect exists "when a defendant knows or should know of a potential risk of harm presented by the product but markets it without adequately warning of the danger or providing instructions for safe use."[99] An engineer for the defendant, who had worked on the design of the brakes and the steering for the type of forklift involved in the accident, testified that forklifts are sometimes driven on slopes, that braking and steering becomes more difficult when the engine is not running, and that tilting the forks may cause the engine to die. This evidence was legally and factually sufficient to show the defendant's knowledge of the marketing defect.[100]

The Statute of Repose was rejected as a defense in *Astec Industries, Inc. v. Suarez*.[101] The estates of several workers at an asphalt plant sued the manufacturer of a hopper which had been installed as a part of a material handling system. In affirming the judgment against the defendant, the appellate court rejected defendant's assertion that the Texas Civil Practices and Remedies Code section 16.009 precluded the suit because the ten year Statute of Repose for real estate improvements had run.[102] The court relied on *Sonnier v. Chisholm-Ryder Co.*[103] which held that the statute protects only those who add personalty to real property.[104] Be-

96. *Id.* at 613.
97. *Id.* at 614.
98. 923 S.W.2d 117 (Tex. App.—Houston [14th Dist.] 1996, writ denied).
99. *Id.* at 126.
100. *Id.* at 127.
101. 921 S.W.2d 794, 797 (Tex. App.—Fort Worth 1996, no writ).
102. *Id.*
103. 909 S.W.2d 475, 482 (Tex. 1995).
104. *Id.*

cause the manufacturer did not proffer evidence that it had installed the machinery, rather than just manufactured it, the Fort Worth Court of Appeals concluded that the Statute of Repose was inapplicable.[105]

In *Augustine v. Bell Helicopter Textron, Inc.*,[106] the widows of two servicemen killed in a helicopter crash sued the manufacturer for defective design of the drive shaft. Bell claimed the "government contractor defense," which precludes recovery under state law for military design defects where "the United States approved reasonably precise specifications, the equipment conformed to those specifications, and the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[107] The appellate court reversed a summary judgment for Bell because the government did not exercise discretion regarding the design of the drive shaft.[108]

F. GOVERNMENTAL/OFFICIAL IMMUNITY

Cortez v. Weatherford Independent School District[109] involved a wrongful death action where a six-year-old child exiting a school bus was struck and killed by a motorcycle. The Fort Worth Court of Appeals held that the bus driver's act of unloading students was a discretionary function according to the "Course Guide for School Bus Driver Training in Texas," and thus, he was entitled to official immunity.[110] Also, the court held that the school district was immune from liability.[111] Furthermore, the school district's decision not to equip the bus with a stop arm was an exercise of its discretionary powers and not subject to the Texas Tort Claims Act's limited waiver of immunity.[112]

In *City of Orange v. Jackson*,[113] the Beaumont Court of Appeals held that the city's sovereign immunity was not waived under the Texas Tort Claims Act where an arrestee dies from her physical condition or from the lack of medical attention.[114] The court concluded that transporting the arrestee by a police vehicle was not a misuse of tangible personal property sufficient to pierce governmental immunity.[115]

On the other hand, in *Woods v. Moody*,[116] the Houston Court of Appeals refused to apply official immunity where an officer driving a motor vehicle while on official, non-emergency business struck plaintiff's vehicle

105. *Astec*, 921 S.W.2d at 797.
106. 922 S.W.2d 287 (Tex. App.—Fort Worth 1996, writ denied).
107. *Id.* at 290.
108. *Id.* at 291.
109. 925 S.W.2d 144 (Tex. App.—Fort Worth 1996, no writ).
110. *Id.* at 149.
111. *Id.*
112. *Id.* at 150.
113. 927 S.W.2d 784 (Tex. App.—Beaumont 1996, no writ).
114. *Id.* at 786.
115. *Id.* at 786-87.
116. 933 S.W.2d 306 (Tex. App.—Houston [14th Dist.] 1996, no writ).

from behind.[117] The appellate court held that the officer was performing a ministerial act, not a discretionary act "such as engaging in a high speed chase."[118] Accordingly, the officer could be held liable for the resulting damages.

In *Drogin v. Campbell*,[119] the San Antonio Court of Appeals held that if a state hospital employee exercised medical and not governmental discretion, the employee was not immune from tort liability.[120] However, official immunity may still be available if the employee's discretion was colored by governmental factors and concerns.[121]

The scope of discretion was discussed further in *Dickerson v. Davis*.[122] Dickerson invited Davis to sit with him on his lifeguard stand while Dickerson was monitoring a public swimming pool. While seated on the stand, Dickerson "nudged" Davis with his feet and she fell into the pool below. Davis filed suit against Dickerson and the City of Amarillo alleging negligence.

In denying Dickerson immunity, the appellate court explained that official immunity shields a government employee from suits arising from the performance of his "(1) discretionary duties in (2) good faith as long as [he is] (3) acting within the scope of [his] authority."[123] In determining whether an action was a discretionary duty, the court of appeals looked to the act of the employee at the time the incident occurred rather than the employee's general job description.[124] The appellate court noted that although a lifeguard has discretionary duties concerning the rendition of assistance to pool patrons, not all actions performed by a lifeguard are discretionary duties.[125] Because Dickerson did not establish that the incident occurred during the furtherance of a discretionary duty, summary judgment was properly denied.[126]

Procedural defects precluded official immunity in *Texas Youth Commission v. Givens*.[127] Cooper brutally raped Givens on April 19, 1990. At the time of the attack, Cooper was a youth under the care and control of the Texas Youth Commission, which had been holding him at a maximum security facility. On April 19, 1990, Cooper escaped from a minimum security ranch used by the Texas Youth Commission for supervised recreational outings. As a result of the incident, Givens brought various causes of action against the Commission. The district court granted in part, and denied in part, the Commission's motion for summary judgment based on official immunity. The appellate court affirmed because the

117. *Id.* at 308.
118. *Id.*
119. 928 S.W.2d 205 (Tex. App.—San Antonio 1996, no writ).
120. *Id.* at 206.
121. *Id.* at 206-07.
122. 925 S.W.2d 123 (Tex. App.—Amarillo 1996, writ dism'd w.o.j.).
123. *Id.* at 125.
124. *Id.*
125. *Id.* at 126.
126. *Id.*
127. 925 S.W.2d 760 (Tex. App.—Austin 1996, no writ).

government failed to specially except to the vague petition's failure to identify specific employees.[128]

G. Texas Tort Claims Act

1. *Premise or Special Defect*

A poorly maintained stairwell constituted a special defect in *Roberts v. City of Grapevine*.[129] Roberts lost her balance while walking down steps that descended from an elevated sidewalk. The fall resulted in a sprain to Roberts' right ankle and a fracture to her left ankle which required the insertion of metal screws. Although Roberts knew that the sidewalk was shaped differently than in other parts of town, Roberts stated that she lost her balance as she descended the first step because the unusual height of the first step startled her. Roberts brought a suit for damages under the Texas Tort Claims Act. The trial court granted the City a summary judgment, holding that the defect in the step was a premise defect, and, therefore, the City owed Roberts the lesser duty owed to a licensee.[130]

The court of appeals reversed, holding that the defective condition in the steps was a special defect.[131] The court stated that "the primary issue at hand is whether the defective condition in this case constituted a condition that presented an unexpected or unusual danger to the ordinary users of the sidewalk and was, therefore, a special defect within the [Texas Tort Claims Act]."[132] In its evaluation of the defect character, the court relied upon the City's designation of the crosswalk for public use and the size of the defect.[133] Because the City mandated pedestrian traffic through an area with dilapidated steps, the City owed Roberts the higher duty owed to an invitee to inspect and make repairs.[134]

2. *Condition or Use of Property*

In *Kerrville State Hospital v. Clark*,[135] the Texas Supreme Court addressed the issue of whether a state hospital's administration of an oral drug, "rather than an injectionable drug, constitute[d] use or misuse of tangible personal property under the terms of the Texas Tort Claims Act."[136] The court reasoned that the hospital's failure to administer the injectionable drug constituted a non-use of tangible personal property and, therefore, did not fall within the waiver provisions of the Act.[137] In this case, the parents of a woman who had been murdered by her estranged husband sued a state mental hospital for wrongful death. The

128. *Id.* at 763.
129. 923 S.W.2d 169, 173 (Tex. App.—Fort Worth 1996, writ requested).
130. *Id.* at 171.
131. *Id.* at 173.
132. *Id.* at 172.
133. *Id.*
134. *Id.* at 173.
135. 923 S.W.2d 582 (Tex. 1996).
136. *Id.* at 584.
137. *Id.*

husband, who was an outpatient at the hospital, was known to refuse his medication and to become violent when not medicated. The parents alleged that because of these known conditions, the hospital should have used an injectionable drug instead of the oral drug that it had prescribed. The Texas Supreme Court refused to waive the hospital's immunity.[138]

H. DAMAGES

In *Crawford v. Kirk*,[139] the court of appeals recognized a wrongful pregnancy cause of action relating to the birth of a normal, healthy child after a failed sterilization procedure.[140] The parents' damages, however, were limited to the actual medical expenses incurred as a result of the failed procedure, not the costs of raising the child.[141]

1. Mental Anguish

In *Drury v. Baptist Memorial Hospital System*,[142] the San Antonio Court of Appeals held that "fear of contracting HIV and AIDS, such as will support an award for mental anguish, should be reasonably based upon circumstances showing actual exposure to the disease causing agent."[143] However, fear of contracting the disease without actual exposure is, "as a matter of law, unreasonable" and will not support an award of damages for mental anguish.[144]

An unrelated bystander could not recover mental anguish damages in *Motor Express, Inc. v. Rodriguez*.[145] Two tractor-trailer rigs were parked on the shoulder of the highway in front of Motor Express's premises. While two men examined the rigs, a speeding car hit and killed one of the men. The other man was not injured. The survivor, Rodriguez, sued Motor Express for the emotional distress he suffered as a result of watching the other man's death and from his own life-threatening experience.

The Texas Supreme Court affirmed a summary judgment for the defendant. The court explained that "[t]here are few situations where a [plaintiff] who is not physically injured by [a defendant] may recover mental anguish."[146] Because Rodriguez was not related to the deceased and did not suffer a physical injury, and because Motor Express did not owe a specific duty to Rodriguez under the circumstances, Rodriguez could not recover mental anguish damages.[147]

Evidence necessary to support an award of mental anguish was lacking

138. *Id.*
139. 929 S.W.2d 633 (Tex. App.—Texarkana 1996, writ requested).
140. *Id.* at 637.
141. *Id.*
142. 933 S.W.2d 668 (Tex. App.—San Antonio 1996, writ denied).
143. *Id.* at 674.
144. *Id.* at 675.
145. 925 S.W.2d 638 (Tex. 1996).
146. *Id.* at 639-40.
147. *Id.*

in *Saenz v. Fidelity & Guaranty Insurance Underwriters*.[148] A jury found that Saenz suffered damages of $250,000 for past and future mental anguish. The appellate court reasoned that "[t]ranslating mental anguish into dollars is necessarily an arbitrary process for which the jury is given no guidelines."[149] The Texas Supreme Court, however, reversed because there was insufficient evidence to support the damages.[150] The court admonished the appellate courts to conduct a meaningful evidentiary review to determine whether the evidence accorded with the fact-finder's award of damages.[151]

2. *Exemplary Damages*

In some situations, punitive damages cannot be recovered in maritime actions, according to *Maritime Overseas Corp. v. Waiters*.[152] Waiters, a steward's assistant, injured his back when he fell down some stairs on board the ship Overseas Marilyn. Maritime Overseas paid maintenance and cure benefits to Waiters from April 1989 to late June 1989, but did not pay maintenance and cure benefits from late June 1989 to August 1989. Waiters later twice requested maintenance and cure benefits for reinjuries to his back, which Maritime Overseas paid once. Waiters then sued under the Jones Act for negligence and under general maritime law for unseaworthiness and maintenance and cure benefits. The jury found that Maritime's failure to pay maintenance and cure benefits was willful, arbitrary, and capricious, and it awarded punitive damages. The Texas Supreme Court reversed and followed *Guevara v. Maritime Overseas Corp.*[153] in holding that nonpecuniary damages, including punitive damages, are not recoverable for maintenance and cure actions under general maritime law.[154]

In *White v. Sullins*,[155] the Beaumont Court of Appeals held that inability to pay punitive damage awards will not work to judicially reduce the award.[156] While standing by his car, a police officer (Sullins) was struck by an intoxicated hit and run driver (White). A jury found White grossly negligent and awarded actual and exemplary damages to Sullins. On appeal, White complained that the evidence was insufficient to sustain the jury award of five million dollars as punitive damages because he was a laborer and would never be able to pay the judgment. In rejecting White's contention, the appellate court explained that a defendant's net worth is relevant in determining the amount of punitive damages that will effectively punish the defendant, but "penury does not diminish the of-

148. 925 S.W.2d 607 (Tex. 1996).
149. *Id.* at 614 (citation omitted).
150. *Id.*
151. *Id.*
152. 917 S.W.2d 17 (Tex. 1996).
153. 59 F.3d 1496 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 706 (1996).
154. *Waiters*, 917 S.W.2d at 19.
155. 917 S.W.2d 158 (Tex. App.—Beaumont 1996, writ denied).
156. *Id.* at 163.

fense."[157] Accordingly, a defendant's inability to pay the judgment will not reduce the amount of the judgment.[158]

I. INSURANCE

In *Howard v. INA County Mutual Insurance Co.*,[159] the Dallas Court of Appeals held that, absent a written rejection, uninsured/underinsured motorists coverage under article 5.06-1(1) of the Texas Insurance Code exists by operation of law, regardless of the parties' intent or the absence of premium payments.[160] The court further held that the parties may not reform the insurance contract to reject the uninsured/underinsured motorists coverage retroactively to extinguish claims that have arisen during that policy period.[161]

In *Valentine v. Safeco Lloyds Insurance Co.*,[162] the Houston Court of Appeals held that an employee acting within the scope of her employment, and injured due to her employer's negligence, may not collect from her underinsured motorist coverage since she recovered workers' compensation benefits.[163]

J. WORKERS' COMPENSATION

A carrier cannot be forced to pay the attorney's fees of a claimant under the facts of *Travelers Indemnity Co. v. Mayfield*.[164] Travelers brought an action for judicial review of a determination by the Workers' Compensation Commission granting Mayfield benefits. The district court granted a request by Mayfield for the appointment of an attorney to represent her and ordered Travelers to pay the attorney's reasonable fees. Mayfield asserted that such appointment was proper under Texas Labor Code section 408.147(c). The Texas Supreme Court reversed because the Workers' Compensation Act does not require the carrier to pay attorney's fees for the claimant.[165]

The acceptance of compensation benefits precluded a later suit against an employer in *Medina v. Herrera*.[166] Medina alleged that he injured his back when Herrera, his supervisor, assaulted him. Medina filed a workers' compensation claim, which the employer's carrier paid. Two years later, Medina sued Herrera and his employer for damages arising from the intentional tort. The Texas Supreme Court held that the suit against the employer and the receipt of compensation benefits were mutually ex-

157. *Id.*
158. *Id.*
159. 933 S.W.2d 212 (Tex. App.—Dallas 1996, no writ).
160. *Id.* at 218.
161. *Id.* at 220.
162. 928 S.W.2d 639 (Tex. App.—Houston [1st Dist.] 1996, no writ).
163. *Id.* at 644.
164. 923 S.W.2d 590, 593 (Tex. 1996).
165. *Id.*
166. 927 S.W.2d 597 (Tex. 1996).

clusive remedies.[167] Accordingly, the court held that the suit against the employer was barred.[168] Nevertheless, the court permitted the claim against Herrera to continue.[169]

In *Sims v. Western Waste Industries*,[170] Sims brought a suit against a truck manufacturer and the parent corporation of his employer for an on the job injury he sustained to his leg. The trial court granted the parent corporation's summary judgment because, as the parent corporation, it was entitled to assert the same immunity as the employer under an "alter ego" theory of the compensation bar.[171] The court of appeals reversed the summary judgment, holding that the alter ego theory is designed to impose liability on a parent corporation and that it is not a means of escaping liability.[172] The legislature never intended to permit a parent corporation, "who deliberately chose to establish the subsidiary corporation," to assert the immunity of the Texas Workers' Compensation Act.[173]

K. Federal Regulation Preemption of Tort Claims

Continental Airlines, Inc. v. Kiefer,[174] consolidated with *American Airlines, Inc. v. Shupe*, presents the question of whether the federal airline regulations preempt Texas tort law. Norma Kiefer was injured when a flight attendant dropped a bag from an overhead storage bin on her head. Kiefer sought damages for her injuries, and her husband sought damages for loss of society. The trial court granted summary judgement to Continental on the ground that the Kiefer's common law claims were preempted by federal law.[175] The court of appeals reversed and remanded for trial, holding that the statute in question, the Airline Deregulation Act,[176] did not expressly preempt the claims.[177]

Douglas Shupe sued American Airlines and Metro Airlines for injuries allegedly incurred when the airlines failed to provide "meet and assist" services for a passenger needing assistance at DFW Airport. The district court granted summary judgment in favor of the airlines. The court of appeals determined that the Airline Deregulation Act, as interpreted by the United States Supreme Court in *American Airlines v. Wolens*,[178] preempted the state DTPA claims, but not the negligence or breach of con-

167. *Id.* at 602.
168. *Id.*
169. *Id.*
170. 918 S.W.2d 682 (Tex. App.—Beaumont 1996, writ denied).
171. *Id.* at 683.
172. *Id.* at 686.
173. *Id.*
174. 920 S.W.2d 274 (Tex. 1996).
175. *Id.* at 275.
176. 49 U.S.C. app. § 1305(a)(1) (current version at 49 U.S.C. § 41713(b)(1) (1994)) (provides that no state can enact a law relating to rates, routes, or service of any air carrier).
177. Kiefer v. Continental Airlines, Inc., 882 S.W.2d 496, 505 (Tex. App.—Houston [1st Dist.] 1994), *aff'd*, 920 S.W.2d 274 (Tex. 1996).
178. 513 U.S. 219 (1995).

tract claims.[179]

The Texas Supreme Court held that the federal regulations did not preempt common law personal injury negligence claims nor breach of contract claims.[180] However, the court held that DTPA claims are preempted by the federal regulations.[181] The court reasoned that common law negligence claims and breach of contract claims do not impair federal regulation.[182] It noted that punitive damages or mental anguish damages might impair deregulation; however, those issues were not before the court.[183]

L. OTHER

Consent judgments and subsequent assignment of claims against an insurance company were rejected in *State Farm Fire & Casualty Co. v. Gandy*.[184] Gandy sued her step-father, Pearce, for sexually abusing her as a child. State Farm, the Pearce's homeowner's insurer, agreed to pay the attorney whom Pearce had chosen to defend him, but reserved its right to deny coverage. During the pendency of the case, Pearce pleaded no contest to criminal charges brought by Gandy. Without notifying State Farm, Pearce settled with Gandy for over six million dollars and assigned to Gandy any claims that Pearce might have against his insurer. Gandy agreed never to attempt to collect the judgment against Pearce. Gandy then sued State Farm as Pearce's assignee to collect the agreed judgment and to recover damages for State Farm's alleged failure to properly defend Pearce. The trial court granted summary judgment for State Farm on the policy suit, and the Texas Supreme Court affirmed the judgment against Gandy. The court held that the assignment by Pearce of his claims violated public policy because it tended to increase and distort litigation.[185]

179. Shupe v. American Airlines, Inc., 893 S.W.2d 305, 308 (Tex. App.—Fort Worth 1995), *aff'd sub nom.* Continental Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996).
180. *Continental*, 920 S.W.2d at 284.
181. *Id.* at 278.
182. *Id.* at 282-83.
183. *Id.*
184. 925 S.W.2d 696 (Tex. 1996).
185. *Id.* at 715.