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# Personal Torts

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# PERSONAL TORTS

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# I. NEGLIGENCE

## A. DUTY AND BREACH

TEXAS courts had the opportunity to revisit the concepts of duty and breach in the context of multiple causes of action, the competitive sports doctrine and through independent contractors throughout this Survey period.

The Corpus Christi Court of Appeals distinguished between a breach of contract action and one in tort in *Parks v. DeWitt County Electric Co-op., Inc.*[1] The Parks sued DeWitt's County Electrical Co-op for damages resulting from the destruction of several trees on the Parks' property. The Parks accused the Co-op of breach of contract, DTPA violations, and negligence. The court recognized that the contract between the parties gave rise to both a breach of contract cause of action and a separate tort claim. The duty not to destroy the Parks' trees arose independently of the contract, and the damages were not exclusively limited to the subject matter of the contract. Accordingly, the plaintiffs could simultaneously pursue both causes of action under the separate duties owed by the defendants.[2]

In *Moore v. Phi Delta Theta Co.*,[3] as a pledge to the defendant fraternity, the plaintiff voluntarily participated in a paintball "war" game. During the game, the plaintiff's eye goggles slipped off, and he was hit in the eye with a paintball, blinding that eye. The plaintiff then sued the fraternity that sponsored the event. The fraternity used the theory of "competitive contact sports doctrine," as its defense, arguing that its duty was merely to avoid intentional or reckless injury to the participants in the game. The appellate court disagreed, noting that the fraternity was not a participant in the game and, thus, was not entitled to this modified duty; instead, non-participating entities (such as sponsors) are to be tried on concepts of ordinary negligence.[4]

In *McCarty v. Barwood Homes Association*,[5] a painting contractor employed plaintiff to refurbish a tennis court and nearby light poles. While on a scaffolding, plaintiff came into contact with a power line and received severe electrical burns. In the suit against the premises owner and the power company, plaintiff alleged violations of the Health and Safety Code, which required property owners to notify power companies of work to be accomplished near power lines.[6] Reciting the duties owed an invitee by a landowner, the appellate court rejected arguments that the power line was a premises defect; instead, the Houston Court of Appeals

1. 962 S.W.2d 707 (Tex. App.—Corpus Christi 1998, pet. granted).
2. *See id.* at 712.
3. 976 S.W.2d 738 (Tex. App.—Houston [1st Dist.] 1998, pet. granted).
4. *See id.* at 742.
5. 981 S.W.2d 325 (Tex. App.—Houston [14th Dist.] 1998, pet. filed).
6. *See id.* at 330-31 (citing TEX. HEALTH & SAFETY CODE ANN. § 752.003 *et seq.* (Vernon 1992)).

held the plaintiff's injuries were the result of the activities of the painting contractor, over whom the property owner had no control.[7] However, the court did extend the Health & Safety Code duties to the owner, finding that the "person responsible for the work" and controlling the details of the work did owe a duty to notify the power company of the proximity of that work to the power line.[8]

## B. CAUSATION

Interesting theories of *res ipsa loquitor*, foreseeability, and sequential acts of negligence required Texas courts to consider the concept of causation. In one case, the plaintiff company purchased pipe from a nearby supply company. When the pipe was discovered to be defective, the plaintiff sued the supply company and several others involved in the chain of distribution for the sale of the pipe.[9] Using the theory of *res ipsa loquitor*, the plaintiff argued that one or all of the defendants were negligent in their inspection, storage, and delivery of the pipe. Since any one of the defendants' negligence might have been the sole cause of the injuries, the appellate court affirmed a summary judgment against the *res ipsa loquitor* theory. *Res ipsa loquitor* is appropriate, according to the Houston Court of Appeals, only if the multiple defendants have simultaneous joint control over the instrument. In this case, the several changes of possession precluded such joint control and, thereby, precluded a multi-party *res ipsa loquitor* theory.

In *Rodriguez v. Moerbe*,[10] someone broke into defendant's automobile. As the defendant pulled along side a second vehicle filled with potential suspects for the break-in, the second vehicle sped through a stop sign and ran into the plaintiff's vehicle. The plaintiff sued the defendant arguing that his negligence, in chasing the second vehicle, was the cause of the accident. Recognizing that the "pursuit" by the defendant might give rise to a foreseeable "flight", the San Antonio court held a duty was owed by the defendant to the plaintiff. Further, the actions of the defendant could be a direct and proximate cause of the accident, foreseeably causing the "flight" of the second vehicle. The defendant's claim that the second vehicle running the stop sign was a new and independent cause of the accident was a fact question, best left to a jury, and precluding a summary judgment.

In *Hall v. Huff*[11] the plaintiff filed a medical negligence suit against a physician and a subsequent treating hospital. The physician had misdiagnosed signs of renal failure, necessitating the transfer of the plaintiff to a subsequent hospital; that hospital, in turn, failed to diagnose a cardiac

7. *See id.* at 349.
8. *See id.* at 352.
9. *See* Esco Oil & Gas, Inc. v. Sooner Pipe & Supply Corp., 962 S.W.2d 193 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).
10. 963 S.W.2d 808 (Tex. App.—San Antonio 1998, pet. denied).
11. 957 S.W.2d 90 (Tex. App.—Texarkana 1997, writ denied).

tamponade. In a vague motion for summary judgment, the physician argued that the sole cause of the plaintiff's subsequent death was the treatment rendered by the hospital after the physician's treatment had ended. Recognizing that survival causes of action still existed against the physician for the period of time prior to the plaintiff's death, and recognizing that the apparent sole cause argument of the physician was not proven as a matter of law, the appellate court reversed a summary judgment to allow a jury to resolve the fact questions.[12]

### C. Foreseeability of Third-Party Causation

In more refined causation arguments, the Houston First District Court of Appeals, twice addressed a third party's involvement in wrongful death cases. In *Wilson v. Brister*,[13] the plaintiff brought a negligence suit against a psychiatrist, claiming that the psychiatrist improperly treated the depression of his daughter who committed suicide only days after the counseling. The defendant was granted a summary judgment, having argued that a third party providing the gun and bullets to the daughter was an unforeseeable, intervening criminal act that defeated any causation on the psychiatrist's part. Reversing, the Houston Court of Appeals noted that the exact manner of the daughter's suicide (borrowing a gun) need not be foreseeable in a negligence action against the psychiatrist for failure to prevent any suicide through counseling.

In *Carreiro v. Wiley*,[14] the plaintiff's daughter was murdered while visiting a friend's house. The defendants were the parents of the friend, who had left the seven- and ten-year-old girls home alone, and unsupervised. Granting a summary judgment, the trial court held that the criminal conduct of the murderer was the superseding and sole cause of the girl's death. The Court of Appeals reversed, finding that the criminal conduct was the foreseeable result of the negligence of the parents in leaving the young girls home alone.[15]

### D. Professional Negligence

#### *1. Medical Malpractice*

With no substantive changes to Article 4590i during the Survey period, Texas courts found more procedural issues to address during 1998 in the medical malpractice arena. In *Andrade Garcia v. Columbia Medical Center*,[16] the plaintiff underwent prostate surgery and was improperly intubated prior to the surgery, which resulted in his suffocation, cardiac

12. For further discussion on causation, *see* Mikolajczyk v. Salazar, 966 S.W.2d 711 (Tex. App.—San Antonio 1998, no pet. h.) and Schorlemer v. Reyes, 974 S.W.2d 141 (Tex. App.—San Antonio 1998, pet. denied).

13. 982 S.W.2d 42 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

14. 976 S.W.2d 829 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

15. For further discussion on the foreseeability of third-party causation, *see* Prather v. Brandt, 981 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

16. 996 F. Supp. 605 (E.D. Tex. 1998).

arrest, and ultimate death. During the course of discovery in this federal lawsuit, plaintiffs uncovered evidence that the hospital knew within hours of the surgery that the plaintiff was brain dead since the hospital had taken a clandestine EEG; however, the hospital failed to reveal this information or the results of the test to the plaintiff's family. Seeking permission to add causes of action for fraud, intentional infliction of emotional distress, conspiracy, and other theories of liability, the federal district court granted permission for the plaintiffs to amend their complaint. The defendants unsuccessfully argued that all of the various causes of action were subsumed by Article 4590i into simple negligence actions. The court, recognizing that concealing the information known about the plaintiff's brain death did not relate to a "health care" claim, allowed plaintiff's fraud, conspiracy, intentional infliction of emotional distress, and punitive damages theories to be amended into the complaint as separate causes of action.[17]

In *Mikolajczyk v. Salazar*,[18] a medical negligence suit, the plaintiffs claimed that the defendant doctor breached the applicable standard of care by prescribing hormones without first ruling out the potential for the plaintiff's pregnancy, which later proved positive. The defendant moved for summary judgment, supported by his own affidavit, arguing a lack of evidence to link the hormones taken by the plaintiff to the testicular cancer diagnosed in her son after birth. The defendant's affidavit failed to establish his expertise in the field of obstetrics, and instead admitted that his field of practice was in the termination of pregnancies. More importantly, the sole basis for the motion was a lack of evidence to establish the causative link between the prescribed hormones and the baby's cancer; since the burden of disproving that element of the plaintiff's cause of action was not established from the affidavits, the summary judgment was reversed.

In *Boren v. Bullen*,[19] the plaintiff sued his doctor for medical negligence. The doctor filed a motion for summary judgment, denying any violation of the applicable standard of care. As a specialist in infectious diseases, the defendant's doctor appended his own affidavit to support his motion. In response, the plaintiffs filed affidavits from three separate experts—none of whom had practiced medicine for infectious diseases, nor professed any knowledge of the applicable standard of care for an infectious disease physician. The Corpus Christi Court of Appeals affirmed the summary judgment for lack of appropriate expert evidence regarding violations of the defendant doctor's standard of care.

In *Jones v. Miller*,[20] the plaintiff was suffering from foot pain, and saw Dr. Miller for treatment. Dr. Miller performed surgery to remove a bunion from Jones' foot. After a follow up appointment, Dr. Miller declared

17. *See id.* at 616.
18. 966 S.W.2d 711 (Tex. App.—San Antonio 1998, no pet. h.).
19. 972 S.W.2d 863 (Tex. App.—Corpus Christi 1998, no pet. h.).
20. 966 S.W.2d 851 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).

Jones' foot healed and instructed her to begin walking on it. After repeated pain drove Jones to seek a second opinion, she discovered her foot had not properly healed, resulting in this misdiagnosis lawsuit against Dr. Miller. In an affidavit supporting his motion for summary judgment, Dr. Miller was quite specific in describing the applicable standard of care and how he satisfied that standard in many areas of his treatment for Jones; however, Dr. Miller did not specifically describe the standard of care in post-operative follow-up nor how he claimed to have satisfied that standard. Consequently, Dr. Miller's summary judgment was reversed for lack of an adequate and specific description of the applicable standard of care and satisfaction of same for the relevant time period.

In *Schorelemer v. Reyes*,[21] the plaintiff, a patient of the defendant-physician, brought a medical malpractice action against the physician for improper diagnosis, negligently removing an ovary, fallopian tube, and her appendix, and leaving a sponge in her abdomen. The San Antonio Court of Appeals, in affirming the trial court, held that the plaintiff was entitled to a *res ipsa loquitur* instruction and the evidence supported a finding of negligence on the defendant's part. *Res ipsa loquitur* applies only when: (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant.[22] Although *res ipsa* is generally inapplicable to medical malpractice cases, *res ipsa* is applicable where the "nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, requiring no expert testimony."[23] The evidence regarding the defendant's failure to remove the sponge satisfied the above standards and the court held that the evidence was both legally and factually sufficient to support the verdict under the negligence theory for failure to remove the sponge.

### 2. *Legal Malpractice*

Traditional concepts of legal malpractice were addressed during the survey period with some sobering explanations of the duties owed to those outside the traditional attorney-client relationship. In *First National Bank of Durant v. Douglass*,[24] a borrower hired the defendant-attorney to obtain a title opinion. The lender, relying upon the same opinion, extended the loan to the borrower. After the borrower later defaulted, the lender sued the borrower and the defendant attorney. Reversing a summary judgment granted to the defendant attorney, the Fifth Circuit held that the actions of the defendant attorney could be pursued under a negligent misrepresentation theory. Although the lender was not privy to the attorney-client relationship, the defendant attorney did owe

21. 974 S.W.2d 141 (Tex. App.—San Antonio 1998, pet. denied).
22. *See id.* at 145.
23. *Id.* at 145 (citing Haddock v. Arnspiger, 793 S.W.2d 948, 951 (Tex. 1990)).
24. 142 F.3d 802 (5th Cir. 1998).

"an independent duty based on the attorney's manifest awareness of plaintiff's reliance on the representation and intention that the plaintiff so rely."[25] The factors enumerated in the Restatement (Second) of Torts §552, as adopted by the Texas Supreme Court in *Federal Land Bank Association of Tyler v. Sloane*,[26] supported such an action for negligent misrepresentation even without an attorney-client relationship.

In *Goggin v. Grimes*,[27] the plaintiff retained the attorney Grimes to represent her in a divorce case. Grimes later withdrew from representation but intervened in the divorce action seeking attorney's fees. The final judgment in the divorce action awarded Grimes the fees, and no appeal was taken from that judgment by the plaintiff. This separate suit was instituted one-year later, directly against Grimes for legal malpractice. Grimes argued that the malpractice claim was a compulsory counterclaim to the fee dispute and, since no appeal was taken from the divorce judgment, that final judgment awarding attorney's fees was *res judicata* to this later malpractice claim. Affirming the summary judgment for Grimes, the Houston Court of Appeals recognized that the legal malpractice claims all arose from the same transaction as described by Rule 97(a) of the Texas Rules of Civil Procedure, which had been litigated to a final resolution and barred this second suit.[28]

In *Smith v. Flinn*,[29] the plaintiff retained Flinn to investigate potential breaches of a home repair contract. Although the true nature and extent of the attorney-client relationship was in dispute, no suit was filed within the four-year statute of limitations against the contractor for the potential breach. Nearly three-years after the statute had passed, the plaintiff filed suit against Flinn alleging malpractice for allowing the statute of limitations to expire. Noting that the legal malpractice statute of limitations is only two-years, the court of appeals affirmed a summary judgment for Flinn. Plaintiff's attempts to invoke the discovery rule were unpersuasive, as the plaintiff could provide no explanation for why she had undertaken no inquiry or investigation into the status of her potential claim for seven years.

In *Baker v. Mallios*,[30] the Dallas Court of Appeals held that public policy concerns did not preclude the plaintiff in a legal malpractice action from assigning a portion of his recovery to a third party. In this case, the third party financed the plaintiff's legal malpractice action in exchange for the assignment. The general rule in Texas is that causes of action are assignable.[31] An exception to the general rule is that legal malpractice claims are not assignable. The public policy concerns of role reversal, availability of legal services, collusion, zealous advocacy, and marketplace

25. *Id.* at 809.
26. 825 S.W.2d 439, 442 (Tex. 1991),
27. 969 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).
28. *See id.* at 137.
29. 968 S.W.2d 12 (Tex. App.—Corpus Christi 1998, no pet. h.).
30. 971 S.W.2d 581 (Tex. App. - Dallas 1998, pet. granted).
31. *See* TEX. PROP. CODE ANN. §12.014 (Vernon 1984).

did not "support a prohibition against a *plaintiff* assigning to a third party a portion of any proceeds he recovers in his legal malpractice claim against his own attorney."[32]

In *City of Garland v. Booth*,[33] the defendants were attorneys at a law firm that had previously represented the City of Garland. The defendants were approached regarding the possibility of representing some neighboring cities against Garland regarding waste water disputes. After confirming that none of the current attorneys in the firm had ever represented Garland and that none had ever received confidential information regarding Garland, the defendant attorneys agreed to represent the neighboring cities. In that lawsuit, Garland moved to disqualify the defendant attorneys, based on their firm's prior representation of Garland. After a ten-day evidentiary hearing, the motion was granted. Shortly thereafter, the case settled including the assignment to Garland of any legal malpractice claims against the defendant attorneys. In this subsequent action by Garland for legal malpractice, the defendant attorneys moved for summary judgment on the basis that the assignment of a legal malpractice claim violates public policy. Reciting the body of law to that effect, and the rationale prohibiting such assignments, the Dallas Court of Appeals affirmed the summary judgment.

### 3. *Counseling Malpractice*

In *Sanders v. Casa View Baptist Church*,[34] the plaintiffs filed a civil rights and a negligence suit against their employer, Casa View Baptist Church, and against their minister. All causes of action arose out of the minister's marital counseling of the plaintiffs. In appealing the jury's $85,000 verdict, the defendants argued that the First Amendment to the United States Constitution barred any suit arising out of the religious pastoral services provided by the minister to the plaintiffs. The court, however, held that although the minister occasionally referenced scripture in his counseling sessions, the underlying purpose of the counseling was secular in nature and not religious; thus, the protections of the First Amendment were unavailable. Citing the holding of the district court, the Fifth Circuit ruled that defendant's arguments "reflected the obvious truth that the activities complained of by the plaintiffs were not part of his religious beliefs and practices and he is not so brazen as to now contend otherwise."[35] Accordingly, the jury's verdict against the minister and the other defendants was affirmed.

### 4. *Medical Malpractice/Statute of Limitations*

The statute of limitations in medical negligence cases surfaced often in

32. *Baker*, 971 S.W.2d at 587 (emphasis added).
33. 971 S.W.2d 631 (Tex. App.—Dallas 1998, pet. denied).
34. 134 F.3d 331 (5th Cir. 1998), *cert. denied sub nom*, Baucum v. Sanders, 119 S. Ct. 161 (1998).
35. *Id.* at 338.

the appellate courts. In *Martin v. Catterson*,[36] two different dermatologists treated the plaintiff for a scalp condition and diagnosed a benign skin condition. Later, a third dermatologist found the condition to be cancerous. Suit was filed against the first two pursuant to the discovery rule provided by the Open Court's provision of the Texas Constitution. During the pendency of the suit, the plaintiff died. His survivors amended the petition to include the new wrongful death and survivorship actions against the same defendants. Moving for summary judgment, the defendants argued that the wrongful death and survival actions were barred by the two-year statute of limitations, having been "filed" more than two-years after the date of last treatment. The court held that

> [s]uch a result would reward negligent doctors for the death of their patients. For no good reason, such a rule would make it cheaper in some cases (like this one) to kill a patient than to maim him. Further, it would encourage the defendants to prolong litigation in the hope that a plaintiff's claim would die with him.[37]

For the foregoing reasons, the summary judgment in favor of the defendants was reversed, allowing the amendment.

In *Ratliff v. Earle*,[38] after more than two years of treatment, including two major surgeries, the plaintiff discontinued care and treatment by the defendant doctor. Shortly after her second surgery by the defendant doctor implanting certain medical devices in the plaintiff's spine, the plaintiff saw a television program describing the inappropriateness of the devices for that use. Within three-months, the plaintiff filed suit against the defendant doctor. The defendant filed a motion for summary judgment on the basis of the two-year statute of limitations. Arguing that the only readily ascertainable date of treatment from the defendant was the last day the plaintiff was seen, the plaintiff invoked the continuing course of treatment doctrine,[39] as the accrual date for the statute of limitations. The court of appeals recognized that the continuing course of treatment issue, revolving around when the treatment for the particular injury accrued, is necessarily a fact specific question depending upon the events of each particular case. Because several items of evidence contained in the record could well support the jury finding a continuing course of treatment by the defendant doctor, the summary judgment was reversed, allowing the amendment of the petition.

In *Hyson v. Chilkewitz*,[40] the plaintiff filed this medical negligence lawsuit against several different entities involved with his surgery. The plaintiff argued his electrical burns were the result of medical malfeasance. More than two-years and seventy-five days after the injury, plaintiff amended his petition to join an additional medical association. To avoid the defendant's motion for summary judgment, the plaintiff argued that

36. 981 S.W.2d 222 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.).
37. *Id.* at 225-26.
38. 961 S.W.2d 591 (Tex. App.—San Antonio 1997, pet. granted).
39. TEX. REV. CIV. STAT. ANN. art 4590i § 10.01 (Vernon Supp. 1999).
40. 971 S.W.2d 563 (Tex. App.—Dallas 1998, pet. granted).

the association was already a party through its sole shareholder, and that the legal theories of misnomer and misidentification should therefore toll the applicable statute of limitations. Strictly interpreting the continuing course of treatment doctrine, the Dallas Court of Appeals held that the two-year limitations (or, more appropriately, one-day short of two-years) applied to the plaintiff's amendment "notwithstanding any other law."[41] Therefore, the legal theories of misnomer and misidentification, interpreted as "other laws," could not be used to extend the statute of limitations.

In *Slater v. National Medical Enterprises, Inc.*,[42] the plaintiff sued a psychiatrist and several psychiatric facilities alleging fraudulent schemes to provide plaintiff with unwanted and unneeded medical treatment to confine her in the facilities, and also that the psychiatrist had committed malpractice in her psychiatric care. The suit was filed nearly six years after the plaintiff's last admission and treatment by the doctor had ended. Arguing the statute of limitations should be tolled by the Open Court's provision of the Texas Constitution, or tolled through the fraudulent concealment by the defendants, plaintiff sought a reversal of the summary judgment granted in favor of the defendants. The Fort Worth Court of Appeals affirmed, recognizing that the medical negligence allegations accrued on the date of last treatment and that the plaintiff had provided no facts to indicate that her injuries were unknown or unknowable. Further, the fraud cause of action expired four years from the last treatment, and again no facts would support the plaintiff's discovery rule tolling of the statute of limitations.

In *Jones v. Miller*,[43] the plaintiff sued the defendant psychiatrist, alleging failure to diagnose the cause of her multiple personality disorder. Appealing the trial court's granting of summary judgment based on the two year statute of limitations, the plaintiff argued that the trial court should have tolled her statute because she was of "unsound mind" pursuant to section 16.001 of the Texas Civil Practice & Remedies Code. Reviewing the summary judgment evidence on file at the time of the hearing, including the affidavit of the plaintiff's husband, the court affirmed the summary judgment for lack of competent evidence to establish the plaintiff's unsound mind.

In *Savage v. Psychiatric Institute of Bedford*,[44] Savage was suffering from depression and anxiety from family and relationship difficulties when she was a teenager. She was encouraged by family to be evaluated at the defendant's facility. That evaluation resulted in the recommendation that Savage voluntarily commit herself to the facility, which she did. She was discharged about six weeks later, and turned eighteen more than two years after the discharge. On the eve of her 21st birthday, more than

41. *Id.* at 566.
42. 962 S.W.2d 228 (Tex. App.—Fort Worth 1998, pet. denied).
43. 964 S.W.2d 159 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).
44. 965 S.W.2d 745 (Tex. App.—Fort Worth 1998, pet. denied).

five years after her discharge, Savage filed suit against the facility for fraudulently inducing her to admit herself and claiming that she was treated poorly while a resident, and medical negligence. Affirming the defendant's summary judgment, the court held that her medical negligence actions accrued on her 18th birthday, and the statute of limitations therefore expired on her 20th birthday; further, the "fraud" cause of action was subsumed by the continuing course of treatment doctrine, and thus her statute of limitations was merely two years, which expired on her 20th birthday.

## II. ADDITIONAL TORTS

### A. DEFAMATION

Issues of malice and various qualified immunities became crucial in several defamation suits published last year. In a defamation suit arising out of the 1993 Bureau of Alcohol, Tobacco, and Firearms (ATF) raid on the Branch Davidian compound, the Supreme Court of Texas decided whether a media plaintiff, one of only a few journalists to report live from the compound, whose reports were rebroadcast worldwide, and who willingly gave numerous interviews about his role in the failed raid, was a public figure.[45] The plaintiff sued WFAA-TV in Dallas alleging that its news reports concerning his role in the failed raid damaged his reputation in the community. The Texas Supreme Court specifically held that the plaintiff became a limited-purpose public figure after thrusting himself to the forefront of the controversy surrounding the failed raid. Public figures must prove that the defendant acted with actual malice during the alleged defamation.[46] "Actual malice" requires a showing that the defendant "entertained serious doubts as to the truth of his publication" and published the statement "with the knowledge that it was false or with reckless disregard of whether it was false or not."[47] Based on the affidavit of a WFAA reporter, the court held that WFAA established as a matter of law that it did not act with actual malice in reporting the ATF's investigation into why the raid failed.

The plaintiff, in *Yeager v. TRW Inc.*,[48] brought a lawsuit against a credit reporting agency alleging, inter alia, defamation after the defendant published four inaccurate credit reports to lenders with whom the plaintiff had applied for credit. The district court held that qualified immunity protected the credit reporting agency based on the plaintiff's consent to publication of the information; because the agency did not act with malice in publishing three reports before the agency had notice of the reports' inaccuracy; therefore, it could not have defamed the plaintiff. The district court further held that summary judgment was inappropriate regarding the fourth publication. A fact issue existed as to whether the

45. WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998).
46. *See id.* at 573.
47. *Id.* at 584.
48. 984 F. Supp. 517 (E.D. Tex. 1997).

agency acted with reckless disregard with respect to the fourth report, which was published after the agency had notice of the report's false information. ("Reckless disregard" is a high degree of awareness of probable falsity.) If the plaintiff can show that the defendant acted with reckless disregard, plaintiff will overcome defendant's qualified immunity.

An assistant superintendent for business services for the Tyler Independent School District filed suit for defamation and intentional infliction of emotional distress against a television station and other parties connected to the defendant. In *Beck v. Lone Star Broadcasting Co.*,[49] the Tyler Court of Appeals held that the assistant superintendent was a public official for defamation purposes, which requires a showing of "actual malice." The reporter's use of the words "bid-rigging" and "racketeering" were sufficiently close to the allegations made by a school board member against the assistant superintendent to negate any suggestion of reckless disregard for the truth. Plaintiff's allegations of the television station's failure to investigate, insufficient proofreading, or negligent training did not establish actual malice required for a defamation claim brought by a public official.

In *Swate v. Schiffers*,[50] a physician brought a libel per se action against a newspaper, publisher, and reporter for a published article that allegedly contained false statements. The crux of the article reported that the physician had failed to practice medicine in an acceptable manner, that the physician was on probationary status, that the hospital had terminated the physician's employment, and that the physician was suing the hospital. According to the evidence, the article was substantially true. Moreover, the court held that the article was a privileged publication because the physician was a limited-purpose public figure and the article was a reasonable and fair comment on a judicial proceeding, and matters of public concern. The physician in this case failed to establish that the article was published with malice, as required for a public figure.

In *Attaya v. Shoukfeh*,[51] a physician sued another physician for, inter alia, furnishing information against the plaintiff to the State Board of Medical Examiners in bad faith, defamation, intentional infliction of emotional distress, and malicious prosecution. The Amarillo Court of Appeals held that the qualified immunity provisions of the Medical Practice Act did not afford the plaintiff a private cause of action against another physician for allegedly supplying information to the State Board of Medical Examiners in bad faith or with malice. Moreover, the qualified immunity provisions did not supersede the common law absolute immunity doctrine protecting a physician's statements provided to the Board

49. 970 S.W.2d 610 (Tex. App.—Tyler 1998, writ denied),
50. 975 S.W.2d 70 (Tex. App. - San Antonio 1998, writ denied),
51. 962 S.W.2d 237 (Tex. App.—Amarillo 1998, writ denied),

from becoming the basis for any civil liability.[52]

### B. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress claims were addressed often, and typically as collateral claims to another cause of action such as defamation or sexual harassment. In *Tompkins v. Cyr*,[53] a physician and his spouse brought a tort action against anti-abortion activists and organizations who had conducted a long-term campaign of picketing and other conduct directed at plaintiffs' home, church, and workplace. The case was originally filed in state court and was removed to federal court after the plaintiffs amended their pleadings to include a RICO claim. The plaintiffs alleged causes of action for intentional infliction of emotional distress, invasion of privacy, and civil conspiracy. The district court held that imposing tort liability for focused picketing and threatening conduct did not violate the First Amendment to the United States Constitution. Additionally, as to most defendants, the evidence supported verdicts on theories of intentional infliction of emotional distress, invasion of privacy, and civil conspiracy. The district court further stated that, in a manner consistent with the First Amendment, focused residential picketing may be banned entirely and need not be tolerated in a civilized society.[54] Because of the dangers posed to society by focused residential picketing, the district court found that any actions of focused residential picketing constituted sufficiently extreme and outrageous conduct to support claims of intentional infliction of emotional distress.

The district court, in *Scribner v. Waffle House, Inc.*,[55] held that the sexually harassing conduct in this case supported a finding of intentional infliction of emotional distress. The plaintiff brought this action against her former employer, alleging Title VII and state sexual harassment violations, in addition to a state law claim for intentional infliction of emotional distress. Texas courts have found extreme and outrageous conduct even where the harassment did not reach the atrocious levels of this case. The district court further concluded that plaintiff's harassers caused her severe emotional distress after considering the intensity and duration of the distress. The extreme and outrageous character of the defendant's conduct is, in itself, important evidence that distress existed, but the plaintiff need not prove the distress had physical manifestations.

Parents of elementary school students, as next friends, alleged federal statutory and constitutional causes of action, in addition to a Texas state

52. For further discussion on defamation, see *Beck v. Lone Star Broadcasting Co.*, 970 S.W.2d 610 (Tex. App.—Tyler 1998, writ denied) and *Rodriguez v. Sarabyn*, 129 F.3d 760 (5th Cir. 1997).

53. 995 F. Supp. 664 (N.D. Tex. 1998).

54. The court distinguished however, between "focused" picketing and other types of residential picketing. The court held that while the protesters had the right to march up and down the street, they did not have right to remain directly in front of the physician's house. *See id.* at 678-79.

55. 14 F. Supp.2d 873 (N.D. Tex. 1998)

law claim for intentional infliction of emotional distress against the Beaumont Independent School District, principal and teacher in *Doe v. Beaumont Independent School District*.[56] The causes of action arose out of the alleged sexual abuse of the students by a teacher. The district court stated that the test is whether the conduct towards another person is so extreme and egregious as to be beyond the bounds of decent society. Under this standard, a genuine issue of material fact existed as to whether the conduct of the abusive teacher was sufficiently extreme and outrageous. The district court further held that, as a matter of law, the principal's failure to report the alleged abuse did not constitute extreme and outrageous conduct. The standard of extreme and outrageous conduct is higher than deliberate indifference.

In *Hart v. O'Brien*,[57] an arrestee sued an assistant county attorney, various state narcotics officers, and sheriff's deputies, alleging that her arrest and search violated her constitutional rights, and violated state laws against, inter alia, intentional infliction of emotional distress and malicious prosecution. With respect to the intentional infliction of emotional distress claim, the Fifth Circuit held that plaintiff's allegations do not state a claim because the arrest warrant commanded the officers to arrest her. It continued, stating conduct that is required or authorized by law cannot be extreme or outrageous. Furthermore, the plaintiff could not recover for intentional infliction of emotional distress based on a federal hold because the hold lasted only one day. As a matter of law, any alleged distress was not sufficiently severe. In addition, the claim for intentional infliction of emotional distress was insufficient based on an arrest without probable cause because there was no evidence that the officers did not reasonably believe they had probable cause to seek a warrant. The record contained no evidence that the officers executed the warrant unreasonably.

In *Beck v. Lone Star Broadcasting Co.*,[58] an assistant superintendent for business services for the Tyler Independent School District filed suit for defamation and intentional infliction of emotional distress against a television station and other parties connected to the defendant. A claim for the intentional infliction of emotional distress requires the plaintiff to prove that the defendant: (1) acted intentionally or recklessly; (2) in an extreme and outrageous manner; (3) that caused plaintiff to suffer emotional distress; (4) that was severe.[59] The Tyler Court of Appeals in this case held that the reporters' references to alleged racketeering and bid-rigging did not constitute sufficiently extreme and outrageous conduct to sustain a claim of intentional infliction of emotional distress.

In *Brandes v. Rice Trust, Inc.*,[60] a testator's sister and her children

56. 8 F. Supp.2d 596, 615 (E.D. Tex. 1998).
57. 127 F.3d 424 (5th Cir. 1997).
58. 970 S.W.2d 610 (Tex. App.—Tyler 1998, pet. denied).
59. *See id.* at 619.
60. 966 S.W.2d 144 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

brought an action against Rice University alleging, in part, intentional infliction of emotional distress based on a deathbed gift by the testator to Rice University. The Houston Court of Appeals held that summary judgment in favor of Rice University was proper because the University, through its agents, was exercising its legal right to accept a gift from the testator to the University. In Texas, there is no liability for intentional infliction of emotional distress where an actor solely exercises his legal rights.[61]

In *Dancy v. Fina Oil & Chemical Co.*,[62] after the defendant published a list of employees with excessive absences, the employees brought a lawsuit against their employer alleging intentional infliction of emotional distress and invasion of privacy. The district court held that the publication of the list was not actionable as intentional infliction of emotional distress.[63] The court stated that the cause of action does not protect against mere insults, indignities, and threats and the cause of action will not lie for "mere employment disputes."[64] The district court believed that the list was a reasonable manner in which to inform department managers regarding employees that needed to be counseled for attendance improvement. The district court concluded that the publication of the list did not rise to the level of outrageous or intolerable conduct required to prevail on a claim for intentional infliction of emotional distress.[65]

### C. Premises Liability

Several interesting approaches to traditional premises liability cases were published in 1998, reflecting creativity that met with varying degrees of success. In *Collard v. Interstate Northborough Partners*,[66] the plaintiffs filed suit against a maintenance company for a slip and fall in the restroom of a building maintained by the defendant company. Appealing the defendant's summary judgment, the plaintiffs argued that the condition of the floor was created by the defendant and was not the result of a foreign substance that was or should have been discovered by the defendant.[67] Since the condition of the surface of the floor was created by the defendant, there was at least some evidence that the defendant knew or should have known of the dangerous condition, warranting reversal of the summary judgment to allow a jury's determination of the *Kroger* elements.[68]

In *CMH Homes, Inc. v. Daenen*,[69] the plaintiff was making a delivery to a storage trailer on the defendant's property when the steps to the trailer collapsed, resulting in back injuries to the plaintiff. In this prem-

61. *See id.* at 147.
62. 3 F. Supp.2d 737 (E.D. Tex. 1997).
63. *See id.* at 740.
64. *Id.* at 739
65. *See id.* at 739.
66. 961 S.W.2d 701 (Tex. App.—Tyler 1998, no pet. h.).
67. *See id.* at 704.
68. *See* Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992).
69. 971 S.W.2d 184 (Tex. App.—Beaumont 1998, pet. filed),

ises liability case, the land owner argued that it had no actual or constructive knowledge of the condition of the steps in the time period immediately preceding the accident. Recognizing that the defendant placed the steps in use for invitees, maintained the steps, replaced the steps on a regular basis, and knew the steps had to be used to access the trailer, the Beaumont Court of Appeals affirmed judgment for the plaintiff.[70] The dangerous condition of the premises did not result from an unnoticed foreign substance, but instead from an absolutely predictable result of wear and tear on the stairs. As such, the plaintiffs did not have to show actual or constructive knowledge on the part of the defendant in the moments prior to the accident. The plaintiffs merely had to show the foreseeable results of the deteriorating condition and the lack of appropriate remedial measures to identify the danger.[71]

In *Hirabayashi v. North Main Bar-B-Que, Inc.*,[72] after finishing lunch, the plaintiff departed the premises of the defendant's restaurant and walked across the street toward a vacant lot neither owned nor operated by the defendant. A car struck the plaintiff while he was crossing the street. In this premises liability case, plaintiff argued that the restaurant owed an "assumed duty" to its invitees to provide safe access to and from the lot.[73] The court affirmed the summary judgment for the defendant because of the lack of evidence that any recognized "assumed duties" applied to this defendant, such as the duty not to create a dangerous condition off-premises or the duty not to obscure off-premises dangers.[74]

### D. Products Liability

In *Hyundai Motor Co. v. Alvarado*,[75] the plaintiff brought a products liability and negligence action against Hyundai Motor Company on grounds that the defendant's two-point passive seat belt system, which did not include a lap belt, was defective in that it failed to restrain the passenger. The Supreme Court of Texas held that the common law claims of products liability and negligence were neither expressly nor impliedly preempted by the National Traffic and Motor Vehicle Safety Act (Safety Act)[76] and its implementing standards. In light of the language used in the Safety Act's express preemption clause, the savings clause, and the Safety Act's legislative history, the court did not find "an unambiguous congressional mandate" congressional intent to preempt the plaintiff's claims.[77] In addition, the court held that the Safety Act does not preempt the entire field of vehicle safety because Congress has not pervasively

70. *See id.* at 190.
71. *See CMH Homes, Inc.*, 971 S.W.2d at 189.
72. 977 S.W.2d 704 (Tex. App.—Fort Worth 1998, pet. denied).
73. *See id.* at 706.
74. *See id.* at 707.
75. 974 S.W.2d 1 (Tex. 1998).
76. *See id.* at 12-13.
77. *See id.* at 13.

regulated vehicle safety.[78] Moreover, imposing tort liability on manufacturers is not inconsistent with Congress' desire to encourage innovation and competition in vehicle safety.[79]

In *Fuller-Austin Insulation Co. v. Bilder*,[80] plaintiff brought suit against an asbestos manufacturer for injuries she suffered from childhood exposure to asbestos on the work clothing of her stepfather. In this appeal of the trial court's judgment in favor of the plaintiff, the asbestos manufacturer argued it owed no duty to the plaintiff, as plaintiff's exposure to the asbestos was unforeseeable. On both the product liability theory alleging market defect, and the negligence action, the Beaumont Court of Appeals affirmed the judgment for the plaintiff. "Recovery under the strict liability doctrine is not limited to users and consumers."[81] Likewise, the duty of ordinary care would extend to those plaintiffs foreseeably exposed to the asbestos dust on the work clothing of employees.[82]

In *General Motors Corp. v. Castaneda*,[83] a motorist who was injured in an automobile collision sued the other driver, alleging negligence, and the automobile manufacturer, alleging that her vehicle was not crashworthy. The San Antonio Court of Appeals held that legally sufficient evidence supported the jury's finding that the defective design of the vehicle's door latch rendered the vehicle uncrashworthy and caused or enhanced the plaintiff's injuries.[84] In crashworthiness cases, the "jury apportions responsibility between all whose action or products combine to cause the entirety of the plaintiff's injuries and the defect need only be a producing cause of the injury."[85] However, this case was remanded because the court held that the mere fact that one of the defendant's automobile dealerships was located in the forum county did not establish that the dealership was an agent or representative of the manufacturer for venue purposes.[86] The court concluded that there was no evidence to support the trial court's conclusion that the dealership in the forum county was the agent or representative for General Motors.[87]

### E. Malicious Prosecution

Like defamation, perceived victims turned to actions for malicious prosecution to remedy their injuries. In *Alvarez v. Anesthesiology Associates*,[88] a mother of an infant child and her parents brought an action against a hospital and its physicians for, inter alia, malicious prosecution and intentional infliction of emotional distress. The plaintiffs claimed

78. *See id.* at 9.
79. *See id.* at 11.
80. 960 S.W.2d 914 (Tex. App.—Beaumont 1998, pet. granted and case abated).
81. *Id.* at 918.
82. *See id.*
83. 980 S.W.2d 777 (Tex. App.—San Antonio 1998, pet. filed).
84. *See id.* at 781.
85. *Id.* at 780-81.
86. *See id.* at 783.
87. *See id.* at 786.
88. 967 S.W.2d 871 (Tex. App.—Corpus Christi 1998, no pet. h.).

that the physicians had made a report to Child Protective Services to cover up their own negligence in treating the child. With respect to the malicious prosecution claim, the Corpus Christi Court of Appeals held that a genuine issue of material fact existed as to whether one doctor acted in good faith when he made a report of child abuse against the mother.[89] All the defendants in this case claimed immunity from malicious prosecution under the mandatory child abuse reporting provisions of the Texas Family Code. Bad faith and malice are elements of a malicious prosecution claim that are not properly disposed of by summary judgment because they entail the evaluation of intent.[90] The initial presumption in malicious prosecution claims is that the defendant acted in good faith and had probable cause to initiate or procure the prosecution. The plaintiff successfully rebuts the presumption if the plaintiff produces evidence that the motives, grounds, beliefs, and other actions of the defendant did not constitute probable cause.[91]

In *Hart v. O'Brien*,[92] an arrestee sued various assistant county attorneys, state narcotics officers, and sheriff's deputies alleging that the arrest and search violated her constitutional rights, and violated state laws against malicious prosecution, and intentional infliction of emotional distress. With respect to the malicious prosecution claim, the Fifth Circuit held that the inclusion of inaccurate statements in a warrant for probable cause and the failure to produce exculpatory evidence do not state a claim for malicious prosecution under Texas law.[93] The officers did not intentionally or recklessly include inaccurate statements, and therefore, as a matter of law plaintiff could not show the malice required against a public officer.

### F. Intentional Torts and Discrimination

In *LC v. AD*,[94] the adult plaintiff filed this action against her father for sexual abuse when the plaintiff was a child. The trial court granted summary judgment for the father on the statute of limitations—the suit was filed more than two years after LC's 18th birthday. LC's response alleged that she first discovered (recalled) the abuse after the statute of limitations expired, and that she should have a two year period from that discovery to institute suit. In reviewing the evidence, the Dallas Court of Appeals found that LC had sufficient information from several different psychologists and counselors to put her on reasonable notice of the childhood abuse more than two years prior to her filing the petition, and the court therefore affirmed the defendant's summary judgment.[95]

89. *See id.* at 879.
90. *See id.* at 876.
91. *See id.* at 877.
92. 127 F.3d 424 (5th Cir. 1997, pet. denied).
93. *See id.* at 451.
94. 971 S.W.2d 512 (Tex. App.—Dallas 1997, pet. denied).
95. *See id.* at 516.

## III. DEFENSES

### A. GOVERNMENTAL AND OFFICIAL IMMUNITY

Government officials were often the subject of appellate court opinions during the survey period. In *Harris County v. Garza*,[96] the plaintiffs brought action against Harris County to recover damages arising from an automobile accident involving a deputy constable who was responding to an emergency call. The jury found both the constable and the plaintiff negligent. Government employees are entitled to official immunity from suit arising from the performance of their: (1) discretionary duties in; (2) good faith as long as they are; (3) acting within the scope of their authority.[97] The Houston Court of Appeals held that the trial court's finding that the deputy acted in good faith, which supported the deputy's claim of official immunity, rendered immaterial the trial court's finding that the deputy acted negligently.[98] Moreover, the court held that the deputy's act of driving at a high rate of speed to the scene of a reported emergency was a discretionary act.[99] The county could not be held liable for the deputy's negligent acts because the deputy satisfied the elements to qualify for official immunity.

In *City of San Antonio v. Garcia*,[100] a motorist brought an action under the Texas Tort Claims Act alleging that the City of San Antonio and a police officer were liable for injuries that the plaintiff suffered during an arrest following a traffic stop. The San Antonio Court of Appeals held that a genuine issue of material fact existed as to whether the police officer acted in good faith when he arrested the plaintiff following a traffic violation. The test for good faith is whether a reasonably prudent officer under the same or similar circumstances would have acted in the same or similar manner.[101] Whether the plaintiff exhibited hostile behavior when approached by the police officer was a material fact issue that precluded summary judgment based on good faith.

In *Heikkila v. Harris County*,[102] the parents of a minor who died in a fire appealed the grant of summary judgment in favor of Harris County (County), in an action alleging that the county negligently released the minor's remains to an unrelated family. The plaintiffs claimed severe mental anguish damages because the negligent release of their son's body prevented them from burying their son in an appropriate manner. The Tyler Court of Appeals affirmed the trial court's granting of the County's motion for summary judgment on the basis that the County retained sovereign immunity because the medical examiner who misidentified the

96. 971 S.W.2d 733 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).
97. *See id.* at 736.
98. *See id.*
99. *See id.*
100. 974 S.W.2d 756 (Tex. App.—San Antonio 1998, no pet. h.).
101. *See id.* at 758.
102. 973 S.W.2d 333 (Tex. App.—Tyler 1998, pet. denied).

body was entitled to official immunity.[103] According to the court, the summary judgment evidence on the record supported the finding that the medical examiner's official immunity was established as a matter of law, which shielded the County from any liability based on the medical examiner's negligence.[104]

In *Siders v. State*,[105] the victims in an automobile accident at the location of an old stop sign near an improved highway filed an action against the State and state engineers under the Texas Tort Claims Act for negligently failing to remove the stop sign following the road improvements. The plaintiffs appealed the trial court's granting of summary judgment in favor of the defendants based on sovereign and official immunity. The Dallas Court of Appeals held that the State's failure to remove the old sign could not constitute negligent construction or maintenance of the highway.[106] Moreover, the court held that the state engineers who designed the project without removal of the old sign acted in good faith in performing a discretionary function within the scope of their authority, providing the engineers with official immunity.[107] In addition, the failure of the State to include removal of the old sign in the plans and specifications for the construction project did not render the documents to be "tangible property" under the Texas Tort Claims Act, which waives sovereign immunity for injury caused by the use of "tangible property."[108]

In *Foster v. Estrada*,[109] the parents of a minor brought an action, individually and as next friend, against the school principal and coach for injuries the child sustained on school property. The San Antonio Court of Appeals held that a genuine issue of material fact existed as to whether the principal and coach were performing a discretionary or ministerial duty. The Education Code provides an affirmative defense for school district professional employees if the following requirements are satisfied: (1) they were professional employees of the applicable school district at the relevant time; (2) their actions, if any, were incident to or within the scope of their duties at the relevant time; (3) their duties involve the exercise of judgment or discretion; and (4) they did not use excessive force in the discipline of the student.[110]

In *Lyons v. Lindsey Morden Claims Management, Inc.*,[111] the plaintiff was injured on the job while employed by El Paso Community College. The plaintiff settled her workers' compensation claim against the self-insured college, which hired the defendant, an independent claims adjusting firm, to provide adjusting services for the plaintiff. After the defendant

103. *See id.* at 337.
104. *See id.*
105. 970 S.W.2d 189 (Tex. App.—Dallas 1998, pet. denied).
106. *See id.* at 192.
107. *See id.* at 193-94.
108. *See id.* at 194.
109. 974 S.W.2d 751 (Tex. App.—San Antonio 1998, pet. filed).
110. *See id.* at 753 (citing TEX. EDUC. CODE ANN. § 22.051 (Vernon 1996)).
111. 985 S.W.2d 86 (Tex. App.—El Paso 1998, no pet. h.).

denied plaintiff's claims for medical care, she filed this suit against the college and the claims adjusting firm alleging insurance code and DTPA violations, breach of the duty of good faith and fair dealing, and conspiracy. The El Paso Court of Appeals reversed the trial court's grant of summary judgment and held that the defendant, as a matter of law, did not establish an agency relationship between the adjusting firm and the college to share the college's governmental immunity from liability.[112] Lindsey Morden failed to establish the details of its professional relationship with the college, and the extent of its right to control the adjusting firm's actions specifically regarding the plaintiff's claim, rather than relying solely upon its own employee's testimony. Lindsey Morden's evidence contained no contract of employment, no description of control by the college of the firm's work, no explanation of the manner in which Lindsey Morden was paid, nor any other facts supporting an agency relationship.[113]

### B. Texas Tort Claims Act

As with official immunity, the Texas Tort Claims Act (TTCA)[114] was evaluated many times during the Survey period concerning the use of tangible personal property. In *Lamar University v. Doe*,[115] the parents of minor children sued Lamar University under the TTCA alleging that the University was liable for the sexual misconduct of one of its students who lived in a university dormitory and sexually assaulted and molested the minors in the room. The court of appeals dismissed the action and held that the parents failed to allege that the injuries suffered by the children arose from the use of "tangible personal property" within the meaning of section 101.021 of the TTCA.[116] The plaintiffs did not establish that an employee of the University negligently used personal property that proximately caused the plaintiffs' injuries. The occupant of the dormitory room, rather than the dormitory room itself, caused the injuries to the minor children.

In *Dallas County Mental Health & Mental Retardation v. Bossley*,[117] the estate and parents of a patient brought a wrongful death action against the facility, its workers, and physicians after the patient escaped from the facility and threw himself in front of a truck. The plaintiffs alleged that the defendants were negligent in failing to prevent the patient from escaping and committing suicide. The Texas Supreme Court held that the unlocked doors of the facility through which the patient escaped were not the proximate cause of the patient's death, and therefore, the facility's immunity as a governmental unit was not waived under section

112. *See id.* at 90-91.
113. *See id.* at 90.
114. Tex. Civ. Prac. & Rem. Code § 101 (Vernon 1997 & Supp. 1999).
115. 971 S.W.2d 191 (Tex. App.—Beaumont 1998, no pet. h.).
116. Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 1997 & Supp. 1998).
117. 968 S.W.2d 339 (Tex. 1998).

101.021(2) of the TTCA.[118] The court stated that property does not cause injury if it does no more than furnish the condition that makes the injury possible.[119] In this case, the court concluded that the unlocked doors permitted the patient's escape, but did not cause his death.

In *Smith v. City of Houston*,[120] the plaintiff, an automobile passenger, sued the City of Houston and a city employee for injuries she sustained in a collision with a vehicle driven by the city employee. The trial court granted summary judgment for the defendants based on the plaintiff's failure to give formal notice of her claim under the TTCA and the Charter of the City of Houston.[121] The court of appeals held that the notice provisions of section 101.101(a) of the TTCA and city charter did not apply to the claims against the city employee.[122] These notice provisions only apply to governmental units and the definition of "governmental unit" in section 101.001(2) of the TTCA does not include an employee.[123] In addition, the court held that the City's deemed admission that the City and employee received actual notice of the plaintiff's claim within the applicable time period required by the TTCA resulted in a waiver of the formal notice provisions.[124]

In *Raymond v. Hanson*,[125] an automobile passenger injured in a collision with a tractor-trailer driven by a county employee brought an action against Dallas County and the employee under the TTCA. The plaintiff appealed the trial court's granting of defendants' summary judgment due to the plaintiff's failure to comply with the presentment requirement in section 81.041(a) of the Local Government Code.[126] The court of appeals held that the six-month notice requirement in section 101.101 of the TTCA was the exclusive notice requirement for suits brought under the TTCA, and local government requirements altering this section were unenforceable.[127] The trial court erred in granting summary judgment in the defendants' favor because the plaintiff was not required to comply with section 81.041(a) of the Local Government Code before suing the County under the TTCA.

In *Salvatierra v. VIA Metropolitan Transit Authority*,[128] the parents of a minor child sued the San Antonio Transit Authority for injuries sustained by the child when he was struck by one of defendant's buses. The trial court granted summary judgment in the plaintiffs' favor but limited damages to $100,000 based upon sovereign immunity under section

118. *See id.* at 343 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1997)).
119. *See id.*
120. 960 S.W. 2d 326 (Tex. App.—Houston [14th Dist.] 1997, no pet.).
121. *See id.* at 328.
122. *See id.*
123. TEX. CIV. PRAC. & REM. CODE § 101.001(3) (Vernon Supp. 1999).
124. *See Smith*, 960 S.W.2d at 328.
125. 970 S.W.2d 175 (Tex. App.—Dallas 1998, no pet. h.)
126. TEX. LOCAL GOV'T CODE ANN. § 81.041(a) (Vernon 1988).
127. *See Raymond*, 970 S.W.2d at 178.
128. 974 S.W. 2d 179, 183 (Tex. App.—San Antonio 1998, pet. denied).

101.023(b) of the TTCA. The plaintiffs appealed the imposition of the cap. The court of appeals held that the damages cap did not violate the open courts provision in Article I, Section 13 of the Texas Constitution.[129] The defendant is a public entity created in accordance with a statute that provides a limited waiver of liability pursuant to the TTCA. The court found nothing arbitrary about the limitations on waiver of immunity in connection with the creation of mass transit authorities. The court of appeals finally held that the damages cap did not violate the equal protection clause because all citizens who sustain an injury are limited to the same damages cap regardless of the extent of their injuries.[130]

In *Hill v. City of Houston*[131] the survivors of children who died in a house fire brought an action against the City of Houston under section 1983, alleging violations of due process and equal protection under the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as well as pendent state claims under the Texas Tort Claims Act.[132] The United States District Court considered the defendant's motion to dismiss. The district court held that the plaintiffs' allegations that the City neglected to repair defective fire equipment, causing a delay in efforts to rescue the children that resulted in their death, were sufficient to state a section 1983 claim for violation of substantive due process.[133] In addition, the district court held that the plaintiffs' allegations that the City failed to maintain and repair vehicles at a fire station located in a predominantly black neighborhood, for the benefit of more affluent white neighborhoods served by other fire stations, were sufficient to state an equal protection violation claim under section 1983.[134] Regarding the state law claims brought under the TTCA, the district court held that the City's sovereign immunity was waived under section 101.021 of the TTCA based on the defective condition or use of personal property.[135] The plaintiffs' allegations were sufficient to state a claim under the TTCA because the plaintiffs alleged that the defendant failed to properly implement its own policy regarding the repair of fire equipment and negligently implemented its policy on responding to fire emergency calls.

### C. Federal Tort Claims Act / Preemption

As with its state counterpart, the Federal Tort Claims Act (FTCA) was used often as a defensive tool in 1998, although not always successful. The plaintiff in *Linkous v. U.S.*[136] was a mother who sued the United States and a physician under the FTCA, individually and on behalf of her minor children, for injuries sustained during medical treatment at an

129. *See id.* at 184.
130. *See id.*
131. 991 F. Supp. 847 (S.D. Tex. 1998).
132. *See id.* at 849-52.
133. *See id.* at 850.
134. *See id.* at 851.
135. *See id.* at 852.
136. 142 F.3d 271 (5th Cir. 1998)

army hospital. The Fifth Circuit Court of Appeals held that the physician, who had contracted with the army hospital to provide ob/gyn services to beneficiaries of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), was an independent contractor rather than a federal employee. As such, the physician was not entitled to official immunity.[137] In addition, the court held that the Government was not equitably stopped from denying the physician's status as a government employee for FTCA purposes.[138] The plaintiff failed to show the required elements of affirmative misconduct by the Government and detrimental reliance to establish equitable estoppel, allowing the Government to maintain its official immunity.[139]

In *Starnes v. U.S.*,[140] the parents of a deceased child brought an action under the FTCA against the United States Government alleging professional negligence on the part of a physician who was on active duty in the United States Army and worked in a private hospital pursuant to a Military Training Agreement.[141] The Fifth Circuit Court of Appeals reversed the district court's finding that the physician was a borrowed servant of the private hospital. The Court of Appeals concluded that the borrowed servant defense did not apply to absolve the Government of liability for the physician's alleged negligence.[142] The fact that the physician was a resident, as opposed to an attending physician, did not change the result because of the expansive duties residents possess at hospitals.

In *Rodriguez v. Sarabyn*,[143] the defendants, two Bureau of ATF agents and a psychologist who worked for the ATF, brought this interlocutory appeal in an action initiated by an ATF agent to determine whether the individual defendants were acting within the scope of their employment when they made the allegedly defamatory statements. The defendant allegedly made the tortious statements to the media and in subsequent investigations into the raid on the Branch Davidian Complex. The Fifth Circuit Court of Appeals held that the psychologist was an independent contractor, rather than a federal employee, and therefore, the FTCA did not shield the psychologist from individual liability.[144] However, the court held that the FTCA shielded the ATF agents from personal liability for statements made while the ATF employed each agent.[145] The Fifth Circuit Court of Appeals applied Texas respondeat superior liability law, which requires that the defamatory statements must be: (1) referable to a duty owed by the employee to the employer; and (2) made while the employee was in the process of discharging that duty.[146]

137. *See id.* at 277.
138. *See id.* at 277-78.
139. *See id.* at 278.
140. 139 F. 3d 540 (5th Cir. 1998).
141. *See id.* at 541.
142. *See id.* at 543.
143. 129 F.3d 760 (5th Cir. 1997).
144. *See id.* at 765.
145. *See id.* at 766.
146. *See id.* at 767 (citing Texam Oil Corp. v. Poynor, 436 S.W. 2d 129, 130 (Tex. 1968)).

The allegedly defamatory statements made by ATF agents to the media and investigators about the plaintiff were made within the scope of their employment, even if made to deflect scrutiny from themselves.[147]

In *Cazales v. Lecon, Inc.*,[148] the family of a landscaping subcontractor's employee brought a wrongful death and survival action in state court against the general contractor of the United States Veterans Affairs Department's cemetery expansion project after the employee was electrocuted while excavating. The general contractor brought this third party claim against the United States in federal court. The district court addressed the United States Dept. of Veterans Affairs' (VA's) motions to dismiss for lack of subject matter jurisdiction and for failing to state a claim upon which relief can be granted, or in the alternative for summary judgment. The district court granted the United States' motion for summary judgment.[149] The court specifically held that the VA's decision to delegate responsibility for worker safety to the general contractor of a cemetery expansion construction project fell within the discretionary function exception to the FTCA.[150] Moreover, the court held that the VA's decision to limit its contractually required safety inspections of the construction project to weekly spot checks, and not to inspect areas in which it would not expect to find VA employees, visitors, or patients, fell within the discretionary function exception to the FTCA.[151] Without the FTCA elements to pierce governmental immunity, the third party claim failed.

### D. Statute of Limitations

In a combined opinion, the Supreme Court of Texas decided two cases regarding the statute of limitations in latent occupational disease cases. In the first case, *Childs v. Haussecker*,[152] the plaintiff brought a legal malpractice action against his attorney arising out of allegedly erroneous advice that the plaintiff's workers' compensation claim was time barred. In the second case, *Humble Sand & Gravel, Inc. v. Martinez*,[153] a sandblaster brought products liability claims against the manufacturers and suppliers of sandblasting equipment. The Texas Supreme Court held that a cause of action for latent occupational disease cases does not accrue until the plaintiff is on notice of the injury and knows or should have known that the injury is likely work-related.[154] In addition, the Court held that issues of fact existed as to when the client and sandblaster should have connected the symptoms of silicosis with their respective oc-

147. *See id.* at 772.
148. 994 F. Supp. 765 (S.D. Tex. 1997).
149. *See id.* at 776.
150. *See id.* at 774.
151. *See id.* at 776.
152. 974 S.W.2d 31 (Tex. 1998).
153. 980 S.W.2d 828 (Tex. App.—San Antonio 1998, pet. filed).
154. *See Childs*, 974 S.W.2d at 40.

cupational exposure to silica dust.[155]

In *DeLoitte & Touche v. Weller*,[156] a class of investors in a limited partnership sued DeLoitte & Touche for accounting malpractice after the IRS audited and assessed penalties against the partnership. DeLoitte & Touche appealed the trial court's judgment, arguing that the statute of limitations barred the suit. The court of appeals concluded that the accrual of the statute of limitations in professional negligence cases begins when the professional advice is followed.[157] In the event the injury is not yet identifiable, for example, the advice has not yet been recognized as inappropriate, the victim may invoke the discovery rule to toll the accrual date to the time when the injury was or should have been discovered.[158] In this case, several of the limited partners had sufficient information to have recognized the injury more than two years prior to the date the action was filed, and thus the statute of limitations had expired against the partnership.[159]

## IV. IMPORTANT ISSUES

### A. DAMAGES

In *Mobil Oil Corp. v. Ellender*,[160] the surviving family members and the administrator of the estate of a contractor who died of leukemia filed a lawsuit against Mobil Oil, alleging that the decedent's exposure to benzene at the defendant's facility caused the decedent's death. The Supreme Court of Texas held that there was legally sufficient evidence of gross negligence on the defendant's part.[161] The court found that there was evidence that Mobil's own actions and omissions involved an extreme degree of risk to contract workers like the decedent. The evidence showed that Mobil vice principals' had knowledge that by not providing protective gear, not monitoring, and not warning workers about benzene exposure was an extreme risk to contract workers, like the decedent, who regularly had contact with benzene while employed by Mobil.[162] The court further held that the Beaumont Court of Appeals should not have recalculated the cap on punitive damages when that issue was not appealed.[163] Moreover, the defendant met its burden of proving the amount of family members' settlement with other defendants as a basis for credit. Finally, the court held that the family members had the burden to show what portion of the settlement was non-creditable punitive damages.[164] A corporation can be held liable in punitive damages for gross

155. *See id.* at 47.
156. 976 S.W.2d 212 (Tex. App.—Amarillo 1998, pet. denied).
157. *See id.* at 216 (citing Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1997)).
158. *See id.*
159. *See id.* at 219.
160. 968 S.W.2d 917 (Tex. 1998).
161. *See id.* at 924.
162. *See id.*
163. *See id.* at 926.
164. *See id.* at 928.

negligence if the corporation itself commits gross negligence or grossly negligent acts or omissions can be attributed to the corporation.[165]

In *Owens-Corning Fiberglas Corp. v. Malone*,[166] the plaintiffs brought several different product liability suits against Owens-Corning, which were consolidated for trial. In this appeal of the judgments in favor of the plaintiffs, the Texas Supreme Court addressed what evidence, beyond the defendant's net worth, is admissible in the jury's consideration of punitive damages. The court concluded that:

> Texas law should allow defendants to introduce some evidence to mitigate punitive damages. Accordingly, we hold that evidence about the profitability of a defendant's misconduct and about any settlement amounts for punitive damages or prior punitive damages awards that the defendant has actually paid for the same course of conduct is admissible when the defendant offers it in mitigation of punitive damages.[167]

The Texas Supreme Court, however, went on to hold that the number of pending claims, the actual damage awards, anticipated claims and awards, insurance coverage, and unpaid awards were neither relevant nor admissible as an effort to mitigate punitive damages.[168] Furthermore, arguments by the defendant that repetitive punitive damage verdicts violated the defendant's due process rights were unpersuasive: "We therefore conclude, as have other courts when considering OCF's same arguments under similar facts, that 'the evidence produced by OCF falls short of demonstrating a due process violation.'"[169]

## B. Insurance Issues

In *State Farm Lloyds v. Performance Improvement Corp.*,[170] State Farm filed declaratory judgment action concerning liability insurance coverage for a lawsuit for an alleged child molestation. The mother of the child sued the insured, Performance Improvements Corporation (PIC), alleging that the child had been molested by a maintenance employee who had been screened and tested by PIC on behalf of the apartment complex where the child lived.[171] The San Antonio Court of Appeals held that the insured's act of screening employment applicants was a "professional service" within the meaning of the exclusion of the coverage for injury or damage due to the rendering or failure to render any professional service.[172] The facts established as a matter of law that the liability of PIC in the underlying lawsuit was based solely upon its management consulting, a professional service, rather than on the sale of a

165. *See id.*
166. 972 S.W.2d 35 (Tex. 1998).
167. *Id.* at 40.
168. *See id.* at 41.
169. *Id.* at 53.
170. 974 S.W.2d 135 (Tex. App.—San Antonio 1998, pet. denied).
171. *See id.* at 136.
172. *See id.* at 138.

product.[173]

### C. Vicarious Liability

In *Rosenthal v. Grocers Supply Co., Inc.*,[174] Grocers Supply hired a contractor to clear some land of trees and brush. Grocers then showed the contractor the land that it wish the contractor to clear. The plaintiff confronted the subcontractor while the subcontractor was clearing the trees and claimed that the subcontractor was mistakenly clearing the plaintiff's land. During that confrontation, the subcontractor injured the plaintiff. In this suit against Grocers, plaintiff argues that Grocers can be held vicariously liable for the actions of their independent contractor. The court reversed the trial court's summary judgment holding that since Grocers controlled a vital "detail" performance by the independent contractor (identifying the land to clear), there is a "fact issue on liability, both as to Grocer's responsibility for the contractor's acts and also as to Grocer's responsibility for its own error."[175]

### D. Class Actions

In *Southwestern Refining Co., Inc. v. Bernal*,[176] the defendant filed an interlocutory appeal challenging the class certification and trial plan ordered by the trial court in an action alleging personal injuries resulting from a tank explosion at a refinery. The court of appeals affirmed the class certification and modified the certification order to postpone an assessment of punitive damages until after the actual damages of the class representatives have been determined. In evaluating the class certification order under an abuse of discretion standard, the court of appeals focused on the gains in judicial efficiency provided by class certification in this case. Treating the 904 plaintiffs as a class, rather than as a large group of joined plaintiffs, provided substantial benefits in economy and trial management. Moreover, enormous gains in judicial efficiency would also be realized by allowing a single trial to resolve liability issues for the entire class. The court of appeals held that the trial court did not abuse its discretion in separating the determination of whether the defendants were negligent from whether the plaintiffs suffered damages caused by that negligence.[177]

### E. Spoliation of Evidence

Reversing a well-reasoned opinion, the Texas Supreme Court departed from the majority of states in a negligent record-keeping case. In *Trevino v. Ortega*,[178] a parent of a girl injured at birth sued the physician for

173. *See id.*
174. 981 S.W.2d 220 (Tex. App.—Houston [1st Dist.] 1998, no pet.)
175. *Id.* at 222.
176. 960 S.W.2d 293 (Tex. App.—Corpus Christi 1997, pet. granted).
177. *See id.* at 298.
178. 969 S.W.2d 950 (Tex. 1998).

intentional spoliation of evidence, which allegedly prejudiced the parent's opportunity to obtain damages in a medical malpractice action. The Supreme Court of Texas held that Texas does not recognize an independent tort cause of action for the spoliation of evidence.[179] The court stated that spoliation of evidence does not give rise to independent damages and declined to create a new cause of action.[180] Moreover, the spoliation of evidence is better remedied within the lawsuit affected by the spoliation, rather than by providing a party with an independent cause of action to remedy evidence destruction.

179. *See id.* at 951.
180. *See id.*