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Personal Torts

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PERSONAL TORTS

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THE Texas Supreme Court again addressed many basic issues of tort law during this Survey period, including whether a "publication as whole" can be defamatory, what is "extreme and outrageous" conduct by a business manager, and several important limitations issues. The boundaries of the Medical Liability and Insurance Improvement Act ("MLIIA") and governmental immunity were frequently litigated, and several cases addressed whether selective disclosure of information can give rise to liability under torts such as malicious prosecution.

I. NEGLIGENCE

A. GENERAL ISSUES

In the case of *Lions Eye Bank of Texas v. Perry*, the court addressed a claim for negligence and gross negligence arising from the donation of a dead body's eyes to an eye bank without the consent of the family.[1] The court recognized that there is no general legal duty to avoid the negligent infliction of mental anguish.[2] It then found no "special relationship" between the deceased's relatives and the eye bank that would allow recovery for mental anguish damages, noting that such cases have three common elements: (1) a contractual relationship between the parties; (2) a particular susceptibility to emotional distress on the part of the plaintiff; and (3) the defendant's knowledge of the plaintiff's particular susceptibility to the emotional distress based on the circumstances.[3] Without a contractual relationship, the plaintiffs could not establish a mental anguish claim. Additionally, they could not recover as bystanders because they did not witness the actual eye removal.[4] A dissent argued that Texas courts have consistently allowed recovery of mental anguish damages for the negligent handling of a dead body.[5]

The case of *Montes v. Pendergrass* arose from a collision when a car attempted to pass a tractor-trailer rig.[6] A threshold issue was whether

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1. 56 S.W.3d 872 (Tex. App.—Houston [14th Dist.] 2001, pet. filed).
2. *Id.* at 875 (citing Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993)).
3. *Id.* at 877 (citing Johnson v. Standard Fruit & Vegetable Co., 984 S.W.2d 633, 638 (Tex. App.—Houston [1st Dist.] 1997), *rev'd on other grounds*, 985 S.W.2d 62 (Tex. 1998)).
4. *Id.* at 878.
5. *Id.* at 879 (Seymore, J., dissenting).
6. 61 S.W.3d 505 (Tex. App.—San Antonio 2001, no pet.).

"sole proximate cause" was an affirmative defense. The court noted that this doctrine is limited to circumstances in which the evidence shows a third person's conduct, not the conduct of any of the parties to the lawsuit, is the sole proximate cause of the occurrence.[7] Therefore, a claim of sole proximate cause is a challenge to the causation element of the plaintiff's claim, not an affirmative defense. The case went on to find fact issues about whether the plaintiff had kept a proper lookout and whether the failure to keep a proper lookout was the proximate cause of an accident.[8]

The case of *Trans America Holding v. Market-Antiques & Home Furnishings* addressed whether a *res ipsa loquitur* instruction was required in a negligence case.[9] The parties did not dispute that the instrumentality causing the fire at issue was under the defendant's sole management and control. The issue was whether the fire was the sort of accident that occurs only with negligence. The focus in that type of inquiry is on the nature of the injury rather than the conduct of the defendant.[10] While the evidence showed that negligence may have occurred, the court did not find that it established the character of the fire to be such that it would occur only with negligence, and, therefore, held that it was not an abuse of discretion to decline giving the instruction.[11] The court noted that a "circumstantial evidence" instruction may often suffice in place of a *res ipsa loquitur* instruction.[12]

B. Medical Malpractice

In a nursing home negligence case, the court of appeals in *Pack v. Crossroads, Inc.* held that the Medical Liability and Insurance Improvement Act (MLIIA)[13] does not authorize negligence *per se* claims based on a breach of the MLIIA.[14] Because expert testimony is required to prove a cause of action under the MLIIA, it would not be appropriate to allow an inference of negligence without such testimony.[15]

In *Cobb v. Dallas Fort Worth Medical Center - Grand Prairie*, a plaintiff sought to hold a hospital strictly liable for providing an allegedly defective set of surgical screws for an operation.[16] Because the hospital was not in the business of selling this equipment to the public, or otherwise

7. *Id.* at 508 (citing Am. Jet, Inc. v. Leyendecker, 683 S.W.2d 121, 126 (Tex. App.—San Antonio 1984, no writ)).

8. *Id.* at 510-11; *see also* Buls v. Fuselier, 55 S.W.3d 204 (Tex. App.—Texarkana 2001, no pet.) (discussing treatment of inferential rebuttal issues such as sole proximate cause and new and independent cause).

9. 39 S.W.3d 640 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

10. *Id.* at 649.

11. *Id.* at 649-50.

12. *Id.* at 650 (quoting Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974)).

13. Tex. Rev. Civ. Stat. Ann. art. 4590i, § 1.01 *et seq.* (Vernon 2002 Cumulative Annual Pocket Part).

14. 53 S.W.3d 492 (Tex. App.—Fort Worth 2001, pet. filed).

15. *Id.* at 509.

16. 48 S.W.3d 820, 826 (Tex. App.—Waco 2001, no pet.).

providing it outside of its primary purpose of providing medical facilities, the court held that the claims were inseparable from the services rendered by the hospital, requiring judgment for the defendant as a matter of law.[17]

In the case of *Bush v. Green Oaks Operator, Inc.*, the trial court dismissed the plaintiff's case because she failed to file an expert report within 180 days after filing suit as required by the MLIIA. The plaintiff contended that her lawsuit was not a healthcare liability claim but was based on common law negligence and premises liability, as it arose from an attack upon her by a fellow patient.[18] The court of appeals concluded that the claim did not arise under the Act, as she was not contending that the hospital breached a standard of care owed to her as a patient but rather that she was harmed by the unsafe condition created at the hospital.[19] A dissent argued that this was simply an attempt to recast a claim for inappropriate medical treatment of the dangerous inmate as a common law claim.[20]

The plaintiff in *Ponce v. El Paso Healthcare System, Ltd.* argued that her claim was not subject to the MLIIA because the Act's definition of a "healthcare provider" does not include physical or occupational therapists within its scope.[21] Acknowledging that the plaintiff was correct about the list of professionals in the statute, the court nevertheless affirmed the trial court's summary judgment, noting that a claim against an "employee" or "agent" of a healthcare provider was expressly allowed by the statute.[22] The court went on to find that the cause of action was a "healthcare liability claim" within the meaning of the statute because it was based upon an alleged departure from accepted standards of medical care. It involved "healthcare" because the physical therapy at issue was prescribed by her physician following surgery and was conducted according to that prescribed treatment.[23]

What constitutes a healthcare liability claim was also addressed in *Gomez v. Matey*.[24] The plaintiff claimed that her doctor recommended and performed a hysterectomy that he knew she did not need.[25] After the plaintiff failed to file an expert report within 180 days of filing suit, the trial court dismissed her suit.[26] To determine whether a claim is based on a breach of the accepted standard of care and thus falls within the MLIIA, a court must determine whether the plaintiff must prove a

17. *Id.* at 827.
18. 39 S.W.3d 669, 671 (Tex. App.—Dallas 2001, no pet.).
19. *Id.* at 672-73.
20. *Id.* at 673 (Dodson, J., dissenting).
21. 55 S.W.3d 34 (Tex. App.—El Paso 2001, pet. denied).
22. *Id.* at 37 (citing Henry v. Premier Healthstaff, 22 S.W.3d 124, 127 (Tex. App.—Fort Worth 2000, no pet.)).
23. *Id.* at 39 (citing TEX. REV. CIV. STAT. ANN. art. 4590i, §1.03(a)(2) & (4)).
24. 55 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.).
25. *Id.* at 733-34.
26. *Id.* at 734 (citing TEX. REV. STAT. ANN. art. 4590(i), § 13.01(e)).

breach of the accepted standard of care.[27] The court found that, regardless of the plaintiff's artful pleading, to prove misdiagnosis—even purposeful misdiagnosis—plaintiff must rely on medical expertise to prove a deviation from the accepted standard of medical care.[28]

The plaintiff in *Martinez v. Battelle Memorial Institute* argued that she could state a claim for "ordinary negligence" and thereby avoid the provisions of the MLIIA.[29] Defendants argued that all of plaintiff's negligence claims required proof of the standard of care for diagnosis and care by an appropriate medical expert, thus bringing them within the statute.[30] Plaintiff relied upon the case of *Rogers v. Crossroads Nursing Service*,[31] which involved a claim arising from the negligent placement of a heavy supply bag that fell on the plaintiff. The court agreed with defendant's characterization of the claims, finding that the standard of care could not be measured by the common knowledge of a lay juror, even though they nominally dealt with such matters as failure to properly enforce certain internal guidelines.[32]

In *Neal-Moreno v. Kittrell*, the San Antonio Court of Appeals held that when a doctor has a continuing duty to care for a patient, the patient's malpractice cause of action accrues on the date of the patient's last examination.[33] In *Kittrell*, a doctor failed to diagnose cervical cancer after the patient received an abnormal pap smear following the birth of her child. The court rejected the doctor's argument that the cause of action accrued when the doctor first performed the pap smear. Rather, the court held that because the doctor continued to see the patient, the cause of action did not accrue until the patient's last visit, at which time the doctor did not follow up on the abnormal pap smear and did not discover the patient's cervical cancer.[34]

In another case involving the expert reports required by the MLIIA, the trial court's grant of summary judgment for defendants was affirmed after the court found that the plaintiff's expert affidavit was not made in good faith.[35] The statute requires the report to include the expert's opinions about the applicable standard of care, how the care failed to meet that standard, and causation.[36] The court found that the plaintiff's expert report failed to represent a good faith effort because the expert's affidavit failed to identify the appropriate standard of care, failed to inform of the manner in which the doctor had failed to meet the standard of care, and offered no insight into the causal relationship between the breach and the

27. *See id.*
28. *Id.* at 735.
29. 41 S.W.3d 685 (Tex. App.—Amarillo 2001, no pet.).
30. *Id.* at 691.
31. 13 S.W.3d 417, 418 (Tex. App.—Corpus Christi 1999, no pet.).
32. *Martinez*, 41 S.W.3d at 692.
33. 52 S.W.3d 782 (Tex. App.—San Antonio 2001, pet. abated).
34. *Id.* at 785.
35. Hightower v. Saxton, 54 S.W.3d 380 (Tex. App.—Waco 2001, no pet.) (citing TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 13.01(d), (e), (l)).
36. *Id.* at 384.

injury. Citing the Texas Supreme Court in *American Transitional Care Centers v. Palacious*, the court noted that "[a] report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill" the statute.[37]

The existence of a physician-patient relationship between a neurologist and an emergency room patient was addressed in *Lection v. Dyll*.[38] The plaintiff was taken to an emergency room with symptoms of slurred speech and dizziness. The physician on duty examined the plaintiff and paged the neurologist on call, who then telephoned the physician on duty. The timing of that call and the plaintiff's discharge from the emergency room was disputed.[39] Soon after discharge, the plaintiff suffered a disabling stroke. The neurologist contended that he had no physician-patient relationship with the plaintiff and that the phone call between the two doctors did not create a duty. The court noted that a physician-patient relationship requires neither the formalities of a contract nor that the physician deal directly with the patient. Additionally, an on-call physician to an emergency room can assume a duty to the patient if he takes some affirmative action to treat the patient.[40] The court ultimately found that, given the dispute about when the plaintiff left the hospital, there was a fact issue as to whether the plaintiff was an emergency patient when the phone call occurred, making summary judgment improper.[41] The court also found a fact issue as to whether the defendant took affirmative acts of treatment.[42]

In the case of *Simmons v. Healthcare Centers of Texas*, the court held that the 75-day tolling provision available under the MLIIA to a plaintiff who files the appropriate notice before the end of the 2-year limitation period is still available in full.[43] Thus, when notice is provided under section 4.01(a) of the Act,[44] the claimant has two years and seventy-five days in which to file a claim.[45]

In *Roberts v. Williamson*, the Texarkana Court of Appeals addressed the sufficiency of evidence in a jury award of $600,000 for medical expenses that the plaintiff would incur after the age of eighteen.[46] In that case, parents sued two physicians who treated their newborn child who suffered brain injuries from oxygen deprivation. During trial, there was evidence about the medical expenses incurred to treat the child and her

37. *Id.* (citing Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873 (Tex. 2001)).

38. 65 S.W.3d 696 (Tex. App.—Dallas 2001, pet. denied).

39. *Id.* at 700.

40. *Id.* at 705.

41. *Id.* at 707.

42. *Id.*

43. 55 S.W.3d 674, 680 (Tex. App.—Texarkana 2001, no pet.).

44. TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01.

45. *Simmons*, 55 S.W.3d at 677 (citing DeCheca v. Diagnostic Ctr. Hosp. Inc., 852 S.W.2d 935, 937 (Tex. 1993)).

46. 52 S.W.3d 343, 349 (Tex. App.—Texarkana 2001, pet. filed).

anticipated medical expenses until she turned eighteen.[47] No evidence was presented concerning what the likely future medical expenses would be after the child turned eighteen. The jury awarded $600,000 for medical expenses incurred and likely to be incurred until the child turned eighteen and an additional $600,000 in medical expenses likely to be incurred after the child turned eighteen. The court found that the jury is allowed to consider pre-age-eighteen costs when determining future damages; and, because the jury heard evidence concerning the patient's then present physical state, her past medical care and expenses, and the nature and course of her injuries, the evidence was legally sufficient to sustain the jury's award of $600,000 in medical expenses after the child reached the age of eighteen.[48]

C. LEGAL MALPRACTICE

In *Apex Towing Co. v. Tolin*, the Texas Supreme Court reaffirmed that "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded."[49] Apex Towing hired Tolin and his law firm to defend them against a maritime personal injury suit in a Texas court. The defendants allegedly failed to file a timely maritime-limitation of liability pleading, which left Apex exposed to a judgment in excess of the value of the vessel and its freight at issue in the underlying lawsuit. Apex hired other counsel to appeal the judgment and ultimately settled the case. The court of appeals dismissed the appeal on May 19, 1995.[50]

Apex filed malpractice claims on February 19, 1997. The defendants moved for summary judgment on the grounds that the two-year statute of limitation began to run no later than January 27, 1995, when the parties settled the underlying personal injury case.[51] The trial court granted summary judgment, and the court of appeals affirmed. Recognizing that several Texas courts have held that *Murphy v. Campbell*[52] limited application of the tolling rule recognized in *Hughes v. Mahaney & Higgins*[53] to situations in which a party is forced to obtain new counsel, the Texas Supreme Court granted Apex's petition for review.

The law firm defendants argued that *Murphy* modified the *Hughes* rule so that the statute of limitations runs no later than when a party hires new counsel to handle the underlying litigation.[54] The defendants relied on a section in *Murphy* in which the majority opinion responded to a dissent,

47. *Id.* at 350.
48. *Id.*
49. 41 S.W.3d 118, 119 (Tex. 2001).
50. *Id.*
51. *Id.*
52. 964 S.W.2d 265 (Tex. 1997).
53. 821 S.W.2d 154 (Tex. 1991).
54. *Apex Towing*, 41 S.W.3d at 120.

stating: "[*Hughes*] is expressly limited to claims against a lawyer arising out of litigation where the party must not only assert inconsistent positions but must also obtain new counsel."[55]

The supreme court reasoned that *Hughes* set forth two policies as the basis for tolling limitations until all appeals on the underlying claim are exhausted. First, the court was concerned with forcing a client to adopt inconsistent litigation postures in the underlying case and the malpractice case.[56] Second, limitations should be tolled because the viability of the malpractice action depends on the outcome of the underlying litigation.[57] The court rejected the "continued representation" requirement that some Texas courts have applied based on *Hughes*, stating that hiring a new attorney would not necessarily solve the problem of having to adopt inconsistent positions.[58] Thus, when a lawyer commits malpractice in litigation, the statute of limitations is tolled until the underlying case is finally concluded. The court also held that the settlement of the underlying case does not eliminate any claim for damages sought in a malpractice action.[59]

Decided the same day as *Apex Towing*, the supreme court held in *Underkofler v. Vanasek* that the *Hughes* rule does not toll the statute of limitations for Deceptive Trade Practices Act claims.[60] Because the Legislature adopted a specific statute of limitations for DTPA claims, which includes only two exceptions to the general rule, the court declined to apply *Hughes* to DTPA claims about legal malpractice. The court thus overruled *Aduddell v. Parkhill*, issued the same day as *Hughes*, which had applied a tolling rule to DTPA claims.[61]

In *Brents v. Haynes & Boone, L.L.P.*, the Dallas Court of Appeals applied *Apex Towing* and *Underkofler*.[62] Haynes and Boone represented the plaintiffs in a real estate action that the United States Department of Housing and Urban Development later challenged as discriminatory. The unusual situation existed in which the underlying claim was final but later litigation that resulted from the alleged malpractice was not final until years after that date.[63] This issue was not addressed by *Apex Towing* or *Underkofler*. The Dallas Court of Appeals strictly followed the Texas Supreme Court's direction that a bright-line limitations rule should apply in legal malpractice cases and declined to broaden "litigation" to include an administrative investigation that might later result in a lawsuit.[64]

Two Texas courts held that a plaintiff is not permitted to fracture legal

55. *Id.* (quoting *Murphy*, 964 S.W.2d at 273).
56. *Hughes*, 821 S.W.2d at 156.
57. *Id.* at 157.
58. *Apex Towing*, 41 S.W.3d at 121.
59. *Id.*
60. Underkofler v. Vanasek, 53 S.W.3d 343 (Tex. 2001).
61. 821 S.W.2d 158 (Tex. 1991).
62. 53 S.W.3d 911 (Tex. App.—Dallas 2001, pet. filed).
63. *See id.* at 916.
64. *Id.*

malpractice claims into additional causes of action.[65] In each case, a plaintiff was not permitted to assert additional causes of actions, such as breach of contract and breach of fiduciary duty, where the plaintiff's malpractice claim was either denied on summary judgment or otherwise dismissed.

Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc. held that an attorney in a legal malpractice action is not limited to the same affirmative defenses raised by the defendant in the underlying suit.[66] The attorney defendants argued that the statute of frauds would have barred the former client's recovery and, therefore, the plaintiff could not prove that he would have prevailed on the underlying cause of action but for the attorneys' negligence.[67] The plaintiff countered that the defendants in the underlying lawsuit did not allege statute of frauds as an affirmative defense and that the law firm defendants in the malpractice action waived the statute of frauds by failing to plead the affirmative defense in the legal malpractice action.[68] The court rejected the plaintiff's waiver theory, holding that an attorney in a legal malpractice suit is not limited to the same affirmative defenses raised by the defendant in the underlying suit and that an attorney in a legal malpractice suit is not required to raise the statute of frauds as an affirmative defense to claims sounding in negligence and gross negligence because it is merely raised to negate causation.[69]

D. Negligent Hiring, Training, Supervising

The question in *Wise v. Complete Staffing Services* was whether a staffing agency had a duty to conduct a criminal history check on a temporary employee that went beyond the records of Harris County, the residence of the employee for the past four years, when the employee otherwise had a good work record.[70] The court found no duty to conduct this additional check, noting that "the social implications of requiring an unlimited background check of all employees, and then imposing liability if an employee is harmed by the criminal actions of a co-worker, are beyond what we believe would be appropriate."[71] The court stressed that the assault giving rise to the suit did not result from any incompetence or unfitness for the job, but by the intervening criminal act of an employee. Thus, the employer, and by extension the staffing agency supplying temporary employees, had no duty to check the criminal histories of its employees unless directly related to the duties of the job at hand.[72]

65. *See* Goffney v. Rabson, 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Cuyler v. Minns, 60 S.W.3d 209 (Tex. App.—Houston [14th Dist.] 2001, pet. filed).
66. 48 S.W.3d 865, 876 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).
67. *Id.* at 874-75.
68. *Id.* at 875-76.
69. *Id.* at 876.
70. 56 S.W.3d 900 (Tex. App.—Texarkana 2001, no pet.).
71. *Id.* at 905.
72. *Id.* at 903 (citing Guidry v. Nat'l Freight, Inc., 944 S.W.2d 807, 811 (Tex. App.—Austin 1997, no writ)).

The court held in *Duge v. Union Pacific Railroad* that an employer did not have a duty to exercise control over a fatigued employee who was involved in an accident on the way home from work.[73] The court distinguished *Otis Engineering v. Clark*, in which an employer was held liable for an accident caused by a visibly intoxicated employee driving home from work,[74] on the basis that the defendant in the present case had no comparable knowledge of the employee's condition.[75]

In *Larkin v. Johnson*, the court of appeals held that an off-duty police officer was not acting within the course and scope of his employment when he followed a customer outside and arrested him for stealing.[76] Additionally, because the acts of making an arrest and turning the case over to the district attorney's office were within the scope of a deputy sheriff's authority, the officer was entitled to official immunity.[77]

Two opinions during the Survey period analyzed hiring decisions by law enforcement officials. Both cases found those decisions protected by immunity doctrines.[78]

In the case of *Ana, Inc., v. Lowry*, a convenience store customer was attacked by a store employee after complaining about the store's high prices.[79] The issue was whether the company who owned the store was responsible for the acts of the employee. The court relied upon *Texas & Pacific Railway v. Hagenloh*, in which the Texas Supreme Court described the limits of an employer's responsibility for an employee's assault on a third party.[80] Observing that "[i]t is not ordinarily within the scope of a servant's authority to commit an assault on a third person," the Court went on to say that there could be liability if "the employee's duty is to guard the employer's property."[81] Because no evidence showed the employee's responsibilities other than the plaintiff's own observation that the employee was the only person in the store, the court found no evidence that the employee was within the course and scope of his authority at the time of the incident.[82]

73. 71 S.W.3d 358 (Tex. App.—Corpus Christi 2001, pet. denied).
74. 668 S.W.2d 307, 311 (Tex. 1983).
75. *Duge*, 71 S.W.3d at 362.
76. 44 S.W.3d 188, 189-90 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).
77. *Id.* at 189, 190 n.1 ("If Clark Kent is outraged about wrongdoing he discovers while on assignment, his anger is not kryptonite. He is nonetheless Superman as he sallies forth to fight for truth, justice, and the American Way.").
78. *See* Dovalina v. Nuno, 48 S.W.3d 279 (Tex. App.—San Antonio 2001, no pet.); Wood County v. Rivers, 51 S.W.3d 626 (Tex. App.—Tyler 2000, pet. denied).
79. 31 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2000, no pet.).
80. *See id.* at 769 (citing Tex. & Pac. Ry. v. Hagenloh, 247 S.W.2d 236 (Tex. 1952)).
81. *Id.* (quoting *Hagenloh*, 247 S.W.2d at 239, 241).
82. *Id.* at 771. Because of the same lack of evidence about responsibilities, the court also held that the employee was not a "vice principal" of the defendant.

II. ADDITIONAL TORTS

A. DEFAMATION

In *Turner v. KTRK Television,* the Texas Supreme Court ruled that a defamation claim could be based on a publication as a whole rather than specific statements.[83] In *Turner*, a candidate for mayor of Houston sued a television reporter and a television company after the broadcast of a story questioning the role the candidate played in an attempted multi-million dollar life insurance scam. Although the candidate was ahead in the polls before the broadcast, he ultimately lost the mayoral race. The candidate's connection with the alleged insurance scam included the preparation and probate of the will of a man who ultimately faked his death and collected benefits.[84] The broadcast contained statements that were literally or substantially true, but were juxtaposed in such a way as to create a misleading impression. Specifically, the broadcast informed listeners that the candidate was denied payment for his services by the executor of the estate, but did not say that the payment request was denied because it was untimely.[85]

Although the supreme court ultimately found that the plaintiff could not support a cause of action due to a lack of showing of sufficient evidence of actual malice, the court's analysis of whether a public figure could bring a defamation claim based on a broadcast as a whole is significant. The supreme court disapproved of other cases to the extent that they have held that a plaintiff cannot bring a claim for defamation based on a publication as a whole.[86] The court also distinguished two of its previous cases. In the first, *Randall's Food Markets v. Johnson*, the court held that a defendant cannot be held liable for presenting a true account of events, regardless of what someone might conclude from the account.[87] *Randall's* did not involve, however, the omission of material facts or the misleading juxtaposition of true facts.[88] The court also noted that in *Cain v. Hearst Corp.* it had rejected the "false light" tort because it "largely duplicated defamation without the more established tort's procedural and substantive safeguards."[89]

Business disparagement claims were brought against a magazine author and the author's source for his article in *Granada Biosciences, Inc. v. Forbes, Inc.*[90] The court of appeals held that, as with a defamation claim,

83. 38 S.W.3d 103 (Tex. 2000).
84. *Id.* at 109-10.
85. *Id.* at 111-13.
86. *See, e.g.*, Am. Broad. Cos. v. Gill, 6 S.W.3d 19, 43 (Tex. App.—San Antonio 1999, pet. denied); Evans v. Dolcefino, 986 S.W.2d 69, 78 (Tex. App.—Houston [1st Dist.] 1999, no pet.); KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779, 789 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Hardwick v. Houston Lighting & Power Co., 943 S.W.2d 183, 185 (Tex. App.—Houston [1st Dist.] 1997, no writ).
87. 891 S.W.2d 640 (Tex. 1995).
88. *See Turner,* 38 S.W.3d at 115.
89. 878 S.W.2d 577 (Tex. 1994).
90. 49 S.W.3d 610 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.).

a public figure plaintiff in a business disparagement action must prove actual malice. The court rejected the plaintiff's position that because defamation and business disparagement were designed to protect different interests, a public figure plaintiff bringing a business disparagement action should not be required to meet the same elements as a public figure plaintiff bringing a defamation action. Instead, the court found that the same constitutional protections set forth in *New York Times v. Sullivan*[91] and its progeny applied. The court further noted that the differences between defamation and business disparagement typically result in more stringent requirements on plaintiffs who allege business disparagement claims.[92]

The Fort Worth Court of Appeals found in *Minyard Food Stores, Inc. v. Goodman* that sometimes a kiss is not just a kiss and upheld the jury's verdict for the plaintiff in a slander action.[93] The plaintiff resigned from Minyard Food Stores after the store manager told two other workers that he had kissed, hugged, and given the married plaintiff back massages. Although the plaintiff admitted receiving two back massages and a friendly hug, she emphatically denied ever kissing the manager.[94] After both the manager and the employee were transferred to different locations, rumors spread that the transfer was due to an affair between the two employees, and the plaintiff quit her job. Minyard argued that the manager's statements were substantially true and therefore not defamatory because the plaintiff acknowledged hugging and receiving a massage from him. Minyard argued that "adding a kiss to this mix simply does not alter the nature of the relationship."[95] The court upheld the jury's verdict finding that the jury, notwithstanding the plaintiff's admissions, could have reasonably concluded that the manager's statements that he kissed the plaintiff and engaged in "heavy petting" and a "make out session" were false.[96]

In *Bell v. Lee*, the San Antonio Court of Appeals affirmed a summary judgment for a defendant in a defamation suit brought after an attorney made allegedly defamatory comments in a letter written in contemplation of litigation.[97] In *Bell*, a police officer investigated a financial "scheme" involving a local church. The officer received a letter from the church's lawyer claiming that the officer's inquiries had damaged the church's relationship with the bank as well as its reputation. The letter threatened a

91. 376 U.S. 254 (1965).

92. *Granada*, 49 S.W.3d at 618 (citing Hurlbut v. Gulf Atlantic Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987)).

93. 50 S.W.3d 131 (Tex. App.—Fort Worth 2001, pet. granted).

94. *Id.* at 138.

95. *Id.*

96. *Id.* The court also held that the manager was acting in the course and scope of his employment even though his statements were not true because they were made in response to the company's investigation of another employee's complaint. Further, the employer was not able to defeat the claim based on the qualified privilege because the jury found that the statements were made with actual malice.

97. 49 S.W.3d 8 (Tex. App.—San Antonio 2001, no pet.).

slander lawsuit and demanded an apology from the police officer. Copies of the letter were sent to the professional standards section of the San Antonio Police Department and the San Antonio City Attorney.[98] The officer sued the church and its lawyers for slander, and the defendants sought summary judgment asserting that their statements were absolutely privileged because they were made by an attorney in contemplation of litigation. The court rejected the plaintiff's argument that the privilege did not further representation and instead held that the privilege attaches if the statement has some relationship to a contemplated proceeding, regardless of whether it in fact furthers the representation.[99]

Finally, in *Wheeler v. Methodist Hospital*, the First Court of Appeals held that each publication of reports by the National Practitioner Data Bank ("NPDB") was a discreet actionable event for purposes of determining whether a defamation claim is barred by limitations.[100] The NPDB reported on March 17, 1995, that a doctor was suspended for failure to adhere to a practice improvement plan. The doctor did not bring suit until November 13, 1996, alleging defamation and business disparagement. Although the court found that the doctor knew or should have known about the NPDB report by the date of the letters, citing evidence that the doctor received at least three letters that should have put him on notice of the NPDB's report, it held that the doctor's claims were not barred by limitations due to subsequent publications. Specifically, the NPDB republished the report on November 14, 1995 and August 6, 1996—both dates within one year of the date the lawsuit was filed. Therefore, the doctor's claims resulting from those two publications were not barred by the statute.

B. Intentional Infliction of Emotional Distress

The Texas Supreme Court held in *Bradford v. Vento* that, as a matter of law, it is not "extreme and outrageous" for a business manager to complain to police about a suspected trespasser.[101] The court observed that preventing disturbances on mall property is "a managerial function that is necessary to the ordinary operation of a business organization."[102] The court noted that, even though the manager could have given the police more information than he did, his failure to do so was within a permissible exercise of his rights as a mall manager.[103]

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98. *Id.* at 10.

99. *Id.* at 11.

100. No. 01-98-00922-CV, 2000 WL 1877658 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

101. 48 S.W.3d 749 (Tex. 2001).

102. *Id.* at 759 (quoting Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995)).

103. *Id.* (citing Wornick Co. v. Casas, 856 S.W.2d 732, 735 (Tex. 1993) (holding that it is not extreme and outrageous for an employer to have a terminated employee escorted from the premises by a security guard)).

The case of *Gaspard v. Beadle* involved an attorney who began a sexual relationship with his client during his representation of her in a divorce.[104] The attorney ended the relationship and then sent her an invoice for legal work. The plaintiff suffered emotional distress and bewilderment for receiving a bill for services that she thought the attorney would do for free.[105] While the court observed that "[t]he timing of his bill and the manner in which [the attorney] performed the legal work was not prudent," it is still the case that "[i]nsensitive or rude behavior does not amount to outrageous behavior."[106] Thus, the element of outrageous conduct was not satisfied.

In *Rescar, Inc. v. Ward*, the court held that, just because a plaintiff has won a *Sabine Pilot* claim based on his discharge for refusing to perform an illegal act, the conduct of that employer is not automatically "extreme and outrageous."[107] The court went on to hold that a threat to "blackball" the plaintiff in the trucking industry did not rise to the level of being "utterly intolerable in a civilized community" so as to give rise to liability under this tort.[108] Additionally, the court concluded that, even though the plaintiff had worried about his finances and suffered a "mild to medium" form of depression for a year, after which he fully recovered on his own, these facts were insufficient to prove "severe" distress so as to give rise to tort liability.[109]

When the jury heard testimony that a husband threw things at his wife, broke things in her presence, spit on the wife, argued at length with her, locked her out of the house, and poured various substances on her, the jury could conclude that his conduct was sufficiently outrageous to support tort liability.[110] In stating the applicable standards, the court of appeals noted that intentional infliction of emotional distress does not necessarily require evidence of the physical aspects of assault or battery, but also acknowledged that the fact that conduct is intentional, malicious, or even criminal does not, standing alone, make it extreme and outrageous for purposes of this tort.[111] A court must consider the context of the conduct at issue and the relationship between the parties, and when repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous.[112]

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104. 36 S.W.3d 229 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).
105. *Id.* at 237.
106. *Id.* at 238.
107. 60 S.W.3d 169, 180 (Tex. App.—Houston [1st Dist.] 2001, pet. filed) (citing Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734-35 (Tex. 1985)).
108. *Id.* at 181.
109. *Id.* at 181.
110. Toles v. Toles, 45 S.W.3d 252, 262 (Tex. App.—Dallas 2001, pet. denied).
111. *Id.* at 262.
112. *See id.* (citing GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 615-16 (Tex. 1999)). The court also held that, despite the defendant's claims that he did not intend harm, the circumstances of his violent actions toward his wife could allow a jury to conclude that, notwithstanding his disclaimers, his actions were done with knowledge of a high degree of risk of harm to his wife. *Id.* at 260.

Evidence that an insurance company "pursued a damaging course of action against [a terminated agent] even after [he] was fired, by involving several federal agencies with punitive power such as the IRS" and trying to have the agent's insurance license revoked, when this activity was "apparently unnecessary and largely unexplained," was legally sufficient to support a determination that the insurance company's conduct was "outrageous."[113]

In the case of *Henderson v. Wellman*, the court held that the filing of sexual harassment charges by a part-time office worker against her supervisor, even though there was a factual dispute as to whether some of her allegations were true, did not rise to the level of extreme and outrageous conduct necessary for a claim of intentional infliction of emotional distress.[114] The court reasserted that wrongful termination, standing alone, is not evidence of extreme and outrageous conduct[115] and that a claim for intentional infliction of emotional distress does not lie for ordinary employment disputes.[116]

The conclusory statement in an affidavit that the plaintiff's emotional distress "rated a 10 on a 1-10 scale" after a billing dispute with a utility company did not raise a fact issue on the element of "severe" emotional distress. The court noted that argument and evidence about whether the conduct of the defendants was outrageous was not pertinent to whether the plaintiff suffered severe distress.[117]

On the other hand, sufficient evidence was offered to create a fact issue on whether emotional distress was severe when a hospital failed to provide pathology slides needed for a second opinion, for an extended period of time, during which it knew that the patient was upset to the point of needing antidepressants.[118] The court also noted that the hospital's knowledge about the plaintiff's distress was significant in finding that the conduct was outrageous.[119]

C. Premises Liability

The Waco Court of Appeals held in *Torres v. City of Bellmeade* that competitive team sports, such as softball, are not the type of activity contemplated by the legislature in enacting the Recreational-Use Statute, which provides that a landowner who allows or invites another to enter his property for recreational purposes does not owe the other a greater

113. Tex. Farm Bureau Ins. Co. v. Sears, 54 S.W.3d 361, 375 (Tex. App.—Waco 2001, pet. granted) (citing *GTE Southwest*, 998 S.W.2d at 612).

114. 43 S.W.3d 591, 597 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

115. *Id.* at 596 (citing Southwestern Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998)).

116. *Id.* (citing *GTE Southwest*, 998 S.W.2d at 612-13).

117. Bailey v. Gulf States Utils. Co., 27 S.W.3d 713, 717 (Tex. App.—Beaumont 2000, pet. ref'd).

118. Elliott v. Methodist Hosp., 54 S.W.3d 789, 797 (Tex. App.—Houston [1st Dist.] 2001, pet. filed).

119. *Id.* at 797.

degree of care than that owed to a trespasser.[120] The plaintiff was injured while sitting on a swing after her softball team was eliminated from a tournament at the city's softball complex. The court rejected the defendant's assertion that a competitive sport is one of the recreational activities contemplated under the statute. It cited a South Dakota Supreme Court case about a similar statute, which specifically referenced winter sports but not summer sports.[121] That court held that the inclusion of "winter sports" seemed to imply the consideration and rejection of summer sports, such as softball.[122] The Waco Court of Appeals agreed with this reasoning, holding that the Texas Legislature could have included "competitive team sports" in the definition of "recreation" had it intended to include them, and reversed the trial court's grant of summary judgment for the defendant.[123]

A no-evidence summary judgment in favor of the defendant was affirmed in *Lavy v. Pitts*.[124] Pitts owned a working interest in oil leases for which joint venture agreements gave him full power to direct the business, as well the right to delegate all or any part of that power to another entity, Dallas Production, Inc. ("DPI"). Pitts delegated all of its power to DPI, and an employee of DPI was injured while working on the property. The plaintiff alleged that since Pitts kept the right to control production on the property, Pitt owed him, as an invitee, a duty of reasonable care to either remedy or warn of dangerous conditions. The Eastland Court of Appeals found no evidence of a nexus between any control retained by the defendant and a duty of care owed to the plaintiff. Although Pitts retained the power to remove DPI if operations were not performed in a good and workmanlike manner, the court noted that a good and workmanlike manner does not necessarily implicate safety concerns.[125] Interestingly, because the plaintiff failed to plead alter ego or any other theory that would have allowed the plaintiff to pierce the corporate veil, it was irrelevant that the defendant served on the board of DPI and owned a controlling interest in the company.

In *Texas Department of Parks and Wildlife v. Miranda*, a trial court's order denying the Department's plea to the jurisdiction was affirmed where the plaintiffs alleged in their petition that the department was

120. Torres v. City of Bellmead, 40 S.W.3d 662, 665 (Tex. App.—Waco 2001, pet. granted).

121. Johnson v. Rapid City Softball Ass'n, 514 N.W.2d 693, 695-696 (S.D. 1994).

122. *Id.* at 696.

123. The court recognized two subsequent amendments to the statute that bolster the exclusion of competitive sports from the statute. The first amendment included a general catch-all phrase referring to "any other activity associated with enjoying nature or the outdoors." TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3) (Vernon 1996). Under the canon of construction *ejusdem generis*, a general phrase is limited to the same types of things listed more specifically. The court also considered an amendment that added "hockey, in-line hockey, skating and skateboarding if conducted in indoor municipal facilities." The court found that the specific inclusion of hockey and in-line hockey implied the consideration and rejection by the legislature of other competitive team sports. *Id.* § 75.002(e).

124. 29 S.W.3d 353 (Tex. App.—Eastland 2000, pet. ref'd).

125. *Id.* at 358-59. The statutory scheme at issue in this case has since been amended.

aware of the dangers of falling tree branches, failed to remedy them, and deliberately failed to warn the plaintiffs of the dangerous condition.[126] Absent an allegation that the plaintiffs' allegations were pled merely as a sham to wrongfully obtain jurisdiction, the court was not permitted to consider the substance of the plaintiffs' claims but could only determine whether the pleading stated a premises defect claim based on gross negligence. In this case, the Recreational-Use Statute could only bar a finding of jurisdiction if the plaintiff failed to properly plead in its petition a sufficient statement claiming that the department injured the plaintiff willfully, wantonly, or through gross negligence.[127]

In *American Industries Life Insurance Co. v. Ruvalcaba*, an $8 million judgment in favor of the plaintiffs was reversed.[128] In that case, the two-year-old son of an employee of a private security company fell from a staircase and suffered a traumatic brain injury resulting in permanent damage. The child and his mother were visiting the employee father for lunch. The Ruvalcabas sued the owner of the building, alleging that the child was an invitee at the time of the accident and that the open staircase from which the child fell constituted an unreasonably unsafe condition.[129] After a bench trial, the trial court found that the defendants were liable as owners of the premises and were negligent. The court of appeals found no evidence that the child was a business invitee.[130] Specifically, the court found no evidence that the child was invited on the premises by the defendants or of any mutual benefit from that visit. The court also considered whether the child was an invitee under section 360 of the *Restatement (Second) of Torts*, adopted by the supreme court in *Parker v. Highland Park, Inc.*,[131] and determined that *Parker* was limited to situations involving an apartment complex or a store offering goods for sale to the public. Finally, the court rejected any theory that the child was an invitee merely because he was a child of the tenants, or because he was a visitor to a public building.[132]

A plaintiff's jury verdict was reversed by the San Antonio Court of Appeals in *Wal-Mart Stores, Inc. v. Rosa*, holding that there was no evidence from which it could be inferred that Wal-Mart had actual knowledge or constructive notice of the premises defect, a piece of banana, for so long that the banana should have been removed.[133] Circumstantial evidence must establish "that it is more likely than not that the dangerous condition existed long enough to give the proprietor a reasonable opportunity to discover the condition."[134] There was testimony from the plain-

126. 55 S.W.3d 648, 651-52 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.).
127. *Id.* at 651 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(c)).
128. 64 S.W.3d 126 (Tex. App.—Houston [14th Dist.] 2001, no pet.).
129. *Id.* at 131.
130. *Id.* at 141.
131. 565 S.W.2d 512, 514 (Tex. 1978).
132. *Am. Indus.*, 64 S.W.3d 126 at 135-40.
133. 52 S.W.3d 842, 844 (Tex. App.—San Antonio 2001, pet. ref'd).
134. *Id.* at 843 (quoting Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934, 936 (Tex. 1998)).

tiff's daughter-in-law that the banana was brown and typically it takes 45 minutes for a banana to turn brown and from the plaintiff herself that the banana "looked to her to have been there awhile," as well as a description of the number and proximity of Wal-Mart employees at the scene and of a three-inch wide-angled mirror on the wall. The court held this evidence was not sufficient to show that it was more likely than not that the banana had been on the floor for a long time. Rather, the circumstantial evidence merely supported the possibility that the dangerous condition existed long enough for Wal-Mart to have discovered it.[135] In a dissent, Chief Justice Hardberger questioned the role of jurors and judges, noting that if circumstantial evidence supports more than one reasonable inference, it is for the jury to decide which is more reasonable.[136] Of particular interest to Justice Hardberger was that the jury ruled in favor of the plaintiff after hearing testimony from two Wal-Mart employees that the customer in line in front of the plaintiff was holding a baby who was eating a banana, which was the unrefuted source of the dangerous condition.

D. Products Liability

In *Meritor Automotive, Inc. v. Ruan Leasing Co.*, the Texas Supreme Court interpreted a section of the Texas Products Liability Act which requires the manufacturer of an allegedly defective product to indemnify the seller for any loss arising from a products liability action, except when the seller independently causes the loss.[137] The question was whether the seller's cost to defend an unsuccessful negligence claim, asserted in addition to a products liability claim, was part of the "loss arising out of a products liability action" falling within the manufacturer's duty to indemnify under the statute.[138] The supreme court concluded that it was. The court agreed that the word "action" in the statute includes all direct allegations against the seller that relate to the plaintiff's injury, noting that if it did not, there would be no need for the statute to limit liability for certain negligence claims arising from the seller's negligence.[139] The court further observed that the legislative history of the statute generally confirmed its reading, as the Senate Bill Analysis explained that the Act's purpose was to "expand the indemnity rights sellers now have."[140]

This statute was also at issue in *Oasis Oil, Inc. v. Koch Refining Co.*, which involved a seller's right to indemnity after the seller settled a products liability action involving damage caused by chemicals sold and pur-

135. *Id.* at 844.

136. *Id.* at 847.

137. 44. S.W.3d 86 (Tex. 2001) (analyzing Tex. Civ. Prac. & Rem Code § 82.002(a) (Vernon 2001)).

138. *Meritor*, 44 S.W.3d at 87.

139. *Id.* at 90 (citing Tex. Civ. Prac. & Rem. Code § 82.002(a) (Vernon 2001)).

140. *Id.* at 91 (quoting Senate Comm. on Economic Development, Bill Analysis, Tex. S.B. 4, 73rd Leg., R.S. at 2 (1993)).

chased originally from the manufacturer.[141] In reversing a "no evidence" summary judgment, the court reminded that a seller's indemnity claim does not require proof of the usual tort concepts of causation, chain of custody, or product defect.[142] A claimant need only prove that it is a statutory seller which suffered a qualifying loss in a products liability action as defined by the statute, and that the defendant qualify as a statutory manufacturer.[143]

In the case of *Humble Sand & Gravel, Inc. v. Gomez*, the court of appeals analyzed what warnings are required about the use of silica flint to a user generally knowledgeable about the risks of breathing silica dust.[144] After analyzing prior Texas precedent as well as the treatment of these issues by the *Restatement (Second) of Torts*, the court concluded that the trial court has the responsibility to determine the validity of the sophisticated user defense via the "reasonableness" test as set out in section 388 of the *Restatement*.[145] After finding a duty to warn, the trial court correctly asked the jury whether the warning was adequate under the circumstances, and did not err in denying a requested jury question about the sophisticated user defense.[146] A dissent argued that, under the facts of this case, the sophisticated user defense was an absolute bar to recovery.[147]

The case of *Otis Spunkmeyer, Inc. v. Blakely* addressed the submission of a causation question to the jury in a products liability action about a hard object in a cookie.[148] The court began by critiquing a confusing jury instruction about what the "occurrence in question" was, noting several "nonsensical" findings that the jury could have made based on the instruction given. The court held the necessary findings could be implied from the charge submitted, but noted that the case "illustrates the advisability of clearly defining any use of the word 'occurrence' in the charge, and reviewing the pleadings, proof, and the remainder of the charge to insure the rest of the jury questions make sense in light of that definition."[149]

The court went on to find a fatal conflict between the jury's answers to two questions. In response to question number one, the jury answered "no" to whether a manufacturing defect in the cookie was a producing

141. 60 S.W.3d 248 (Tex. App.—Corpus Christi 2001, no pet.) (analyzing TEX. CIV. PRAC. & REM. CODE ANN. §§ 82.001-.006) (Vernon 2001).

142. *Id.* at 255.

143. *Id.* (citing *Meritor*, 44 S.W.3d at 91).

144. 48 S.W.3d 487, 493 (Tex. App.—Texarkana 2001, no pet.).

145. RESTATEMENT (SECOND) OF TORTS § 388 & cmt. n (1965). Under the reasonableness test, "the magnitude of the risk involved must be compared with the burden which would be imposed by requiring them . . . and the magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result." *Id.* cmt. n.

146. *Humble Sand*, 48 S.W.3d at 502.

147. *Id.* at 508 (Cornelius, C.J., dissenting).

148. 30 S.W.3d 678 (Tex. App.—Dallas 2000, no pet.).

149. *Id.* at 686 (quoting STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES, P.J.C. § 71.1 (1998)).

cause of the occurrence, while in response to question number three, the jury answered "yes" to whether the cookie dough supplied by the defendant was unfit for ordinary purposes because of a defect and, if so, whether the unfit condition was a proximate cause of the occurrence.[150] Analyzing the pleadings, evidence, and nature of the plaintiff's injuries, the court concluded that the jury was asked functionally identical questions even though two distinct causes of action were involved, and thus found the "yes" and "no" answers were in fatal conflict.[151]

The case of *Coleman v. Cintas Sales Corp.* arose from burns suffered by a country club employee when fire flared at an employee barbeque as he was cooking.[152] The employee sued the clothing manufacturer who leased his uniform to the country club. The particular uniform he was wearing was designed for employees who would not be exposed to a risk of flammability in the workplace, and the plaintiff did not ordinarily work in any task that would require him to weld, burn trash, or use tools that required an open flame. The court held that a seller is not required to provide flame-retardant uniforms when there is no foreseeable risk of exposure to fire associated with the product's clearly intended use; therefore, summary judgment was appropriate on the plaintiff's claim for design defect.[153] However, as to the duty to warn claims, the court held it was potentially foreseeable that the fabric might be used near flame, and found a fact issue as to whether the plaintiff would have used additional caution had he been properly warned that the fabric might worsen any burn injury.[154] Accordingly, the plaintiff was allowed to proceed with his claim for marketing defect.[155]

In the course of finding fact issues on other theories of liability, the court in *Allen v. W.A. Virnau & Sons, Inc.* held that a tractor dealership had no duty to warn an experienced, safety-conscious tractor user of the "open and obvious" risk of falling off or being thrown from a tractor, particularly a tractor doing "bush hog" work.[156]

In *Roland v. DaimlerChrysler Corporation*, the court of appeals affirmed a summary judgment that a pickup truck manufacturer has no duty to warn of the dangers of riding in an open pickup bed.[157] The court observed: "We firmly believe that people have a sufficient intuitive grasp of the basic laws of physics to ensure that if one is in an open and unpro-

150. *Id.* at 689.

151. *Id.* at 691.

152. 40 S.W.3d 544, 547 (Tex. App.—San Antonio 2001, pet. denied).

153. *Id.* at 549.

154. *Id.* at 550-51. Other summary judgment theories, as well as affirmative defenses, were apparently raised for the first time on appeal and thus not considered by the court of appeals, including the affirmative defenses of "common knowledge" and "learned intermediary." *Id.*

155. *Id.* at 551-52.

156. 28 S.W.3d 226, 234-35 (Tex. App.—Beaumont 2000, pet. denied) (citing Caterpillar, Inc. v. Schears, 911 S.W.2d 379, 382-86 (Tex. 1995), and Sauder Custom Fabrication, Inc. v. Boyd, 967 S.W.2d 349 (Tex. 1998)).

157. 33 S.W.3d 468 (Tex. App.—Austin 2000, pet. denied).

tected area of a truck, the consequences of a sudden start, stop, or turn are understood and appreciated as a matter of common knowledge."[158]

E. Liquor Liability

The case of *Bruce v. K.K.B., Inc.* involved a summary judgment in a dram shop liability case.[159] The trial court found no evidence that it was apparent to the defendant restaurant that the plaintiff was obviously intoxicated to the extent she presented a clear danger to herself and others.[160] A bartender and waiter testified that the plaintiff ordered a bottle of wine in the afternoon, did not appear intoxicated, behaved normally, and had a quiet dinner.[161] The plaintiff then lost control of her car roughly an hour later and was killed in a collision. The court reversed the summary judgment, citing expert testimony about the likely symptoms of intoxication that would have been visible in the restaurant given her high blood alcohol content at the time of the accident.[162]

The same issue arose in *Cianci v. M. Till, Inc.*, in which the court held that testimony from a reliable expert about the visible effects of a likely intoxication level was enough to avoid summary judgment, even though witnesses said that the plaintiff did not appear visibly intoxicated.[163] *Cianci* also involved the "safe harbor" provision of the Dram Shop Act, under which actions of an employee that violate the Act are not attributable to the employer if the employer has given certain training to the employee.[164] The court found that a former server's testimony that her manager told her to keep serving alcohol to obviously intoxicated people until "he made his decision on whether they needed to be served or not" raised a fact issue as to whether the defendant encouraged its employees to serve intoxicated people and thus lost the protection of the "safe harbor."[165] The court also found that no collateral estoppel bar to the suit arose from an administrative proceeding before the TABC involving the defendant company, because the plaintiff was not a party to that proceeding.[166]

F. Malicious Prosecution

The case of *First Valley Bank v. Martin* arose from a bank's efforts to foreclose on seventy-five head of cattle pledged as security for a loan.[167]

158. *Id.* at 470.
159. 52 S.W.3d 250 (Tex. App.—Corpus Christi 2001, pet. denied).
160. *See* Tex. Alco. Bev. Code Ann. §§ 2.02 (b)(1), (2) (Vernon 2001).
161. *Bruce*, 52 S.W.3d at 255.
162. *Id.* at 256. *Bruce* distinguished *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 90-92 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), in which the court held that mere involvement in an accident after leaving a bar does not raise a fact issue about the individual's intoxication.
163. 34 S.W.3d 327, 331-32 (Tex. App.—Eastland 2000, no pet.).
164. Tex. Alco. Bev. Code Ann § 106.14(a) (Vernon 2001).
165. *Cianci*, 34 S.W.3d at 330.
166. *Id.* at 330-31.
167. 55 S.W.3d 172 (Tex. App.—Corpus Christi 2001, pet. filed).

After the loan went into default, the bank found and sold twenty of the cattle. Shortly thereafter, the bank loan officer told the local sheriff that the bank had been unable to find any of the cattle, and upon the basis of this information, a criminal prosecution was initiated for the offense of hindering a secured creditor.[168] The court first held that, even though the district attorney made the decision to prosecute, there can be tort liability if "a person provides information which he knows is false to another to cause a criminal prosecution."[169] The court then looked at the jury instructions, which let the jury find liability for "procurement" of a prosecution if the defendants "failed to fully and fairly disclose all material information" to the authorities.[170] The court observed that in *Browning Ferris Industries v. Lieck*, the supreme court focused simply on whether a defendant made knowingly false statements to investigators.[171] The court went on to review section 653 of the *Restatement (Second) of Torts*, cited in *Lieck*, which also notes that "conduct" can give rise to liability.[172] The court further noted that partial disclosure can give rise to civil liability in several other situations in tort law, such as fraud, and approved the instruction.[173]

The case of *McCall v. Tana Oil & Gas Corp.* involved several tort claims about judicial process arising from a contract dispute.[174] The first was for abuse of process, in which the plaintiffs claimed that defendants brought a groundless suit after making threats that "something would happen" unless another pending lawsuit was dismissed.[175] The court affirmed summary judgment, noting that the citation obtained by defendants "was procured by appellees and used for its intended purpose of summoning the [parties] to appear and answer appellees' claims in that suit."[176] The plaintiffs also sued for malicious prosecution. The lawsuit complained of was terminated voluntarily. Acknowledging authority that a non-suit is not a "termination in favor of the plaintiffs" required by the tort of malicious prosecution,[177] the court also observed that, depending upon the circumstances, the voluntary non-suit could be construed as a favorable termination.[178] However, to prove malicious prosecution, "[t]here must be some physical interference with a party's person or

168. TEX. PENAL CODE ANN. § 32.33 (Vernon 2001).

169. *Martin*, 55 S.W.3d at 181 (quoting Browning Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 293 (Tex. 1994)).

170. *Id.* at 185-86.

171. *Id.* (citing *Lieck*, 881 S.W.2d at 294).

172. *Lieck*, 881 S.W.2d at 294 (citing RESTATEMENT (SECOND) OF TORTS § 653 cmt. g (1977)).

173. *Martin*, 55 S.W.3d at 187.

174. No. 03-00-00347-CV, 2001 WL 838392 (Tex. App.—Austin July 26, 2001, pet. filed).

175. *Id.* at *7.

176. *Id.* at *8.

177. *Id.* at *9 (citing Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 208 (Tex. 1996)).

178. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 674(b) cmt. j (1977), and distinguishing K.T. Bolt Mfg. Co. v. Tex. Elec. Coops., Inc., 837 S.W.2d 273, 275 (Tex. App.—Beaumont 1992, writ denied)).

property in the form of an arrest, attachment, injunction, or sequestration," and the plaintiffs made no such claim other than a general allegation that the lawsuit complicated the ongoing prosecution of another case.[179]

The case of *King v. Graham* involved a dispute among tour guides who conducted deer hunts in the Texas Hill Country.[180] An indictment was issued after a complaint to the sheriff that money had not been paid. The indictment was later withdrawn because the contract had not been breached, and it indicated that the parties had sued for malicious prosecution. The major issues were whether the defendants had "procured" a criminal prosecution, whether there was probable cause for such a prosecution, and whether they had acted with malice. The court of appeals found conflicting testimony about whether the statements to the sheriff were false, and further noted that the failure to fully and fairly disclose other material information to the sheriff was an alternative basis the jury could rely upon to find procurement.[181] The court found no error arising from not putting the word "material" in the instruction about passing false or misleading information to the authorities.[182] As for probable cause, the court noted an initial presumption of good faith, which can be rebutted if the plaintiff produces evidence about the motives, grounds, beliefs, and other evidence upon which the defendant acted.[183] Again, the court noted conflicting testimony, and observed from the timing of events that "[i]n all likelihood, the jury felt that [plaintiff] acted too hastily in reporting his suspicions" to the sheriff, and could thus find that the defendants were using the criminal justice system because they had no civil recourse under their contract.[184] Citing the same evidence about the apparent haste with which prosecution was sought, the court found sufficient evidence of malice as well. The court affirmed the damage award and also affirmed the award against the defendants individually, even though they performed acts as agents of a corporation.[185]

In *Rodriguez v. Wal-Mart Stores, Inc.*, the court observed that, while no liability for false imprisonment can be imposed on a party who merely reports facts to the authorities, a lack of full disclosure or misrepresentation of facts to authorities may result in liability under this tort.[186] The evidence showed that Wal-Mart reported a "hot" check, but did not dis-

179. *McCall*, 2001 WL 838392, at *9-10 (quoting *Tex. Beef Cattle*, 921 S.W.2d at 208-09 (citations omitted)).

180. 47 S.W.3d 595, 603-04 (Tex. App.—San Antonio 2001, no pet.).

181. *Id.* at 605-06 (citing Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 519 (Tex. 1997)).

182. *Id.* at 606 (citing *Lieck*, 881 S.W.2d at 293).

183. *Id.* at 607 (citing *Richey*, 952 S.W.2d at 517-18).

184. *Id.* at 607-08.

185. *King*, 47 S.W.3d at 610-11. A dissent argued that no evidence showed that the information given to the sheriff was material to the decision to prosecute, citing the testimony of the officials who made the decision. *Id.* at 612, 613 (citing *Lieck*, 881 S.W.2d at 291).

186. 52 S.W.3d 814, 819 (Tex. App.—San Antonio 2001, pet. granted) (citing Bossin v. Towber, 894 S.W.2d 25, 29 (Tex. App.—Houston [14th Dist.] 1994, writ denied), and

close that its check identification system could provide an erroneous driver's license number under certain circumstances. This created a fact issue as to whether Wal-Mart misled the district attorney's office into believing that the driver's license listed on the complaint form identified the individual who committed the offense.[187] The court, however, affirmed summary judgment for Wal-Mart on the "procurement" element of malicious prosecution, finding no evidence that Wal-Mart knew the information it provided was in fact false.[188] It also held that the torts of negligence and gross negligence cannot exist in this context independent from the malicious prosecution claim, or they would "in substance convert the tort of malicious prosecution to one of negligent prosecution."[189]

G. WRONGFUL DEATH

The case of *Sanchez v. Brownsville Sports Center, Inc.* was a products liability case against Honda Motor Company.[190] The plaintiffs sued on behalf of their ten-year old son who was killed in an ATV accident in Mexico. The jury found Honda and each of the boy's parents to be 33 1/3% responsible for the accident. The court affirmed the sufficiency of the evidence to find the parents' negligence, noting the lack of supervision at the time of the accident, the fact that the boy was not wearing a helmet, the parents' lack of knowledge about proper air pressure for the ATV's tires, and the failure of the boy to observe Mexican safety laws when the accident occurred.

The trial court entered a take nothing judgment, apparently combining the percentages assessed against the parents, and then determining that because their collective responsibility was more than 60%, they were not entitled to recovery.[191] The court of appeals reversed, holding it was improper to combine the percentages of separate claimants. The court allowed each plaintiff to recover one-half of the $1,000,000 awarded by the jury, since the percentage of responsibility of each plaintiff (33 1/3%) equaled Honda's.[192] The court of appeals affirmed the trial court's directed verdict on the survival claims of the boy, citing an expert witness' testimony that the boy had blacked out immediately upon the collision, and discounting the testimony of an eyewitness that she looked away at

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Leon's Shoe Stores, Inc. v. Hornsby, 306 S.W.2d 402, 410 (Tex. Civ. App.—Waco 1957 no writ)).

187. *Id.* at 819-20.

188. *Id.* at 821.

189. *Id.* (quoting Smith v. Sneed, 938 S.W.2d 181, 185 (Tex. App.—Austin 1997, no writ)). A dissent argued that the responsibility for determining whether charges should be brought rested with prosecutors and the police, not Wal-Mart, and distinguished the *Hornsby* case cited by the majority because it arose in a small store where the plaintiff was known and where a store employee had personal knowledge about the plaintiff's finances. The dissent expressed misgivings about applying the standard from that case to the computerized system used by Wal-Mart. *Id.* at 824, 825 (Rickhoff, J., concurring and dissenting).

190. 51 S.W.3d 643 (Tex. App.—Corpus Christi 2001, no pet.).

191. *See* TEX. CIV. PRAC. & CODE ANN. § 33.001 (Vernon 1997).

192. *Sanchez*, 51 S.W.3d at 657.

the time of the accident as not probative of what the boy himself felt.[193]

III. DEFENSES

A. PREEMPTION

In the case of *Great Dane Trailers, Inc. v. Estate of Wells*, the Texas Supreme Court addressed whether state law tort claims arising from a collision with a tractor-trailer rig are preempted because they conflict with federal law.[194] The court affirmed the court of appeals' holding that the claims were not expressly or impliedly preempted by either the National Traffic and Motor Vehicle Safety Act or Federal Motor Vehicle Safety Standard 108. The plaintiff's theory was that the trailer was not visible at night. The defendant manufacturer contended that this claim conflicted with the "conspicuity" regulations enacted by the Secretary of Transportation. The trailer was manufactured in 1986; the court observed that the Standard 108, enacted that year, set only minimum standards and was only the first of a series of rules fully implementing these requirements.[195] The court also rejected an argument that a heightened standard in 1986 would have impeded the Secretary's investigation of potential regulations, concluding that such a holding would create implied preemption anytime the Secretary studied the effectiveness of its regulations.[196] The court also noted that the plaintiff's claims simply stated that the manufacturer should have *supplemented* the truck's reflector system rather than *replacing* it with a different system entirely.[197] The preemption analysis concluded by citing the "savings clause" in the statute.[198] Throughout, the court placed great emphasis on the analysis used by the United States Supreme Court in a recent opinion dealing with preemption of tort claims about passive restraints, even though that case ultimately found conflict preemption.[199] The court also noted that its conclusion was not inconsistent with the goal of uniformity in national transportation regulations, and observed that the weight of authority from other jurisdictions was consistent with the result.[200]

Similarly, plaintiffs' tort claims based upon the labeling of certain herbicides were held by the Eastland Court of Appeals to not be preempted by the Federal Insecticide, Fungicide, & Rodenticide Act.[201] The claims dealt with the efficacy of the products, not the risks to humans and the environment imposed by the use of the product, and thereby avoided the

193. *Id.* at 666-67.
194. 52 S.W.3d 737 (Tex. 2001).
195. *Id.* at 743-44.
196. *Id.* at 744-45.
197. *Id.* at 746
198. *Great Dane Trailers*, 52 S.W.3d at 746 (2001) (quoting 15 U.S.C. § 1397(k) ("[C]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.")).
199. *Id.* at 741 (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000)).
200. *Id.* at 747, 748.
201. 7 U.S.C. § 136 *et seq.*

scope of the preemption provision in that federal statute.[202] The Texas Supreme Court has granted a petition for review in this case.

B. Statute of Limitations

In the case of *Pustejovsky v. Rapid-American Corp.*, the Texas Supreme Court held that the "single action rule" and the statute of limitations did not bar a plaintiff, who settled an asbestosis suit with one defendant in 1982, from bringing suit against different defendants twelve years later for asbestos-related cancer.[203] The court acknowledged the general rule that a cause of action accrues upon injury even if the fact of injury is not yet known, and further acknowledged that in a typical case involving progressive injuries, the single action rule may occasionally result in uncompensated damages in order to vindicate other competing interests. However, in an asbestos case where multiple latent injuries may manifest years or even decades apart, the single action rule produces "much more erratic results" than in the typical case.[204] Citing general case law about the discovery rule, and noting the requirement that a plaintiff may recover damages for a future disease only if he shows a reasonable medical probability that a disease will appear, the supreme court held that the unfairness of not allowing a deserving plaintiff to recover outweighed the defendant's interest in repose, particularly since the progression of the disease provided a check on "stale and fraudulent claims."[205]

After a review of "several different formulations" of the elements of fraudulent concealment in Texas, the Northern District of Texas concluded in *Prieto v. John Hancock Mutual Life* that the most appropriate statement was as follows: "First, actual knowledge by the defendant that a wrong has occurred, and second, a fixed purpose to conceal the facts necessary for the plaintiff to know that it has cause of action."[206] The tolling effect lasts "until the fraud is discovered or could have been discovered with reasonable diligence."[207] The court found a fact issue on the applicability of this doctrine, even though the court also concluded that the plaintiff's claim was not "objectively verifiable" so as to fall within the tolling doctrine of the discovery rule.[208]

A prison inmate must prove he exhausted all administrative remedies within the penal grievance system before initiating a lawsuit, and must then file suit within thirty-one days after receiving a written decision from

202. Geye v. Am. Cyanamid Co., 32 S.W.3d 916, 921 (Tex. App.—Eastland 2000, pet. granted).

203. 35 S.W.3d 643 (Tex. 2000).

204. *Id.* at 652.

205. *Id.* at 652-53.

206. 132 F. Supp. 2d 506, 516 (N.D. Tex. 2001) (quoting Santanna Natural Gas Corp. v. Hamon Operating Co., 954 S.W.2d 885, 890 (Tex. App.—Austin 1997, pet. denied)).

207. *Id.* at 513 (quoting Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 531 (Tex. 1997)).

208. *Id.* at 514-15 (characterizing plaintiffs' allegations as "little more than 'a swearing match between parties over facts and between experts over opinions'") (quoting *In re* Coastal Plains, Inc., 179 F.3d 197, 215 (5th Cir. 1999)).

the grievance system.[209] This provision controls over the general two-year limitations period for personal injury.[210]

IV. OTHER ISSUES

A. INSURANCE

A home builder's failure to prepare the soil properly for a foundation was not an "accident" and thus not an "occurrence" under the builder's commercial general liability policy.[211] The court relied upon the definition of "accident" used in a recent Texas Supreme Court opinion construing that term in an automobile liability policy, which held that "an injury is accidental if 'from the viewpoint of the insured, [it is] not the natural and probable consequence of the action or occurrence which produced the injury; or in other words, if the injury could not reasonably be anticipated by [the] insured, or would not ordinarily follow from the action or occurrence which caused the injury.'"[212] The breach complained of was intentional and thus did not fall within this definition.[213]

The issue in *Carlton v. Trinity Universal Insurance* was whether "inherent diminished value" was a covered loss under the Texas standard auto policy.[214] The plaintiff's car was stolen and the thieves put more than 3,500 miles on the vehicle while it was in their possession. The insurance carrier made repairs to the vehicle, which were not alleged to be improper, inadequate, or incomplete, but the plaintiff alleged that the value of the automobile was diminished to be at least $2,000 less than the "blue book" trade-in value as a result of the theft. The court declined to defer to a recent opinion of the Texas Department of Insurance, noting that the policy language at issue was not ambiguous.[215] The court went on to conclude that where an insurer has fully, completely, and adequately "repaired or replaced the property with other of like kind and quality" as required by the standard policy, then any reduction in market value of the vehicle due to factors that are not subject to repair or replacement are not compensable. The court noted that while the insured may well suffer this type of damage as a result of direct or accidental loss, the plain language of the standard policy clearly and unambiguously limits the insurer's liability to the "amount necessary to repair or replace the property

209. Wallace v. Tex. Dep't of Criminal Justice, 36 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (citing TEX. CIV. PRAC. & REM. CODE ANN. §14.005(b) (Vernon 2001)).

210. *Id.* at 610-11.

211. Hartrick v. Great Am. Lloyds Ins. Co., 62 S.W.3d 270, 278 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 275.

212. *Id.* at 276 (quoting Mid-Century Ins. Co. v. Lindsey, 997 S.W.2d 153, 155 (Tex. 1999)).

213. *Hartrick*, 62 S.W.3d at 277.

214. 32 S.W.3d 454, 459 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

215. *Id.* at 459-60.

with other of like kind and quality."[216]

A claim for negligent misrepresentation was not subject to the discovery rule, and was thus barred by the applicable statute of limitations, when all that the insured needed to do to discover its alleged injury was conduct a routine check regarding the insurance certificate with its carrier and inquire whether insurance coverage was in effect.[217] The court relied upon the general limitations principles stated in the recent Texas Supreme Court opinion of *HECI Exploration Co. v. Neel.*[218]

In *Lias v. State Farm Mutual Automobile Insurance Co.*, the Dallas Court of Appeals reminded that, while some cases hold that if there is no insurance coverage, there can be no bad faith on the part of the insurer for failure to pay a claim, a separate contract claim is not an absolute prerequisite to a bad faith claim because the plaintiff can establish coverage in the tort action.[219] The court went on to affirm the trial court's summary judgment based on the lack of any evidence that the insurer failed to attempt a prompt, fair settlement when the insurer's liability had become reasonably clear.[220]

Tort claims against an insurer under the DTPA were not allowed in *Southstar Corp. v. St. Paul Surplus Lines* when they were premised on a breach of the insurer's duty to defend.[221] The court cited the analysis of the issue by the San Antonio Court of Appeals, which recognized the general principle that, for a tort duty to arise from a contractual duty, the liability must arise "independent of the fact that a contract exists between the parties" and that "when the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract."[222]

The case of *State Farm Lloyds v. Borum* was an action against an insured and his step-daughter for declaratory judgment that the homeowner's policies provided no coverage for sexual molestation by the insured.[223] The main dispute was whether so-called "boundary violations"—indecent exposure without physical contact—triggered the "inferred intent" rule, which says that intent to injure will be inferred as a matter of law in cases involving sexual abuse of a minor, thus bringing such cases outside the general rule that a person's intent to injure is a question of fact.[224] The court of appeals found that intent could be in-

216. *Id.* at 465.

217. Sabine Towing & Transp. Co. v. Holliday Ins. Agency, Inc., 54 S.W.3d 57, 62-63 (Tex. App.—Texarkana 2001, pet. denied).

218. 982 S.W.2d 881 (Tex. 1998).

219. 45 S.W.3d 330, 334-35 (Tex. App.—Dallas 2001, no pet.) (citing Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 213-14 (Tex. 1988)).

220. *Id.* at 335.

221. 42 S.W.3d 187, 194 (Tex. App.—Corpus Christi 2001, no pet.).

222. United Servs. Auto. Ass'n v. Pennington, 810 S.W.2d 777, 783 (Tex. App.—San Antonio 1991, writ denied) (quoting Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991)).

223. 53 S.W.3d 877 (Tex. App.—Dallas 2001, pet. denied).

224. *Id.* at 888, 891.

ferred in this case because of the repeated number of incidents and the fact that they ultimately resulted in forced sexual contact with a minor, which meant they were not separate and independent from the actual physical contact.[225] Accordingly, State Farm had no duty to defend, and thus no duty to indemnify.[226]

B. Vicarious Liability

In reviewing a "no evidence" summary judgment, the court in *Brown v. Big D Transportation, Inc.* recognized the "branded vehicle doctrine" which provided that "when a vehicle displays the markings of an individual or a corporation, one may conclude that the named party is the owner of the vehicle and the driver is the agent for the named party."[227] The rebuttable presumption created by this doctrine had not been rebutted in the record before the court, making summary judgment inappropriate.[228]

As an alternative basis for affirming a take-nothing judgment in a premises defect case arising from a construction accident, the court in *Saenz v. David & David Construction Co.* held that a proposed jury question that does not touch on the issue of "control" when a subcontractor is involved is improper because it is insufficient to allow a valid finding against the general contractor.[229]

C. Workers' Compensation

The Texas Supreme Court held in *Lawrence v. CDB Services* that an employer could ask its employees to voluntarily elect to participate in employer benefit plans that provide injured employees specified benefits in lieu of common-law remedies.[230] The court also held the form of waiver used in this case met the fair-notice and express-negligence tests for a valid waiver. The court found no statutory bar to such waivers and observed that the policy arguments raised by various *amici* were better addressed by the Legislature.[231]

A "jack-of-all-trades" injured during the course of salvage and cleaning work at a trailer home was injured within the course and scope of his employment and was thus limited to a remedy under the workers' compensation statute.[232] His job title of "machinist" was not dispositive, when considered in the context of all other relevant facts about his work duties.[233]

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225. *Id.* at 891-92.
226. *Id.* at 892.
227. 45 S.W.3d 703, 705 (Tex. App.—Eastland 2001, no pet. h.) (citing Rodriguez v. United Van Lines, Inc., 21 S.W.3d 382, 383 (Tex. App.—San Antonio 2000, pet. denied)).
228. *Id.* at 706.
229. 52 S.W.3d 807, 812-14 (Tex. App.—San Antonio 2001, pet. denied).
230. 44 S.W.3d 544, 554 (Tex. 2001).
231. *Id.* at 553.
232. Burkett v. Welborn, 42 S.W.3d 282 (Tex. App.—Texarkana 2001, no pet.).
233. *Id.* at 288.

In *CIGNA Insurance Co. of Texas v. Killion*, the court of appeals held that a trial court erred by not dismissing or abating a bad faith claim against an insurer, when the insured had not yet exhausted his remedies before the Texas Workers' Compensation Commission.[234] The trial court had jurisdiction to grant the plaintiff relief to the extent it was not dependent upon adjudication of a matter within the TWCC's exclusive jurisdiction, but the court could not directly or indirectly adjudicate an issue within the agency's exclusive jurisdiction. In this case, the issue of the plaintiff's entitlement to back surgery was within the agency's exclusive jurisdiction, the agency had yet to address it, and a "large segment" of the plaintiff's recovery at trial was based upon a favorable ruling as to whether he was entitled to back surgery.[235]

In the case of *Stephens v. Dallas Area Rapid Transit*, the trial court entered summary judgment on a wrongful discharge claim based upon the Texas Labor Code.[236] DART argued that the wrongful discharge claim was barred because the plaintiff elected to pursue his claim through DART's internal grievance and appeal process.[237] The court of appeals concluded that the subject matter of the grievance, which dealt with lost work time, did not address whether DART's reasons for termination were simply a pretext for discrimination, and thus concluded that the suit was not barred by the doctrine of election of remedies.[238] The court also found no *res judicata* bar because DART was not "a court of competent jurisdiction," separate facts were involved, and the DART personnel manual only stated that the administrative decision was "final and binding," but did not say it was an employee's exclusive remedy.[239]

In the case of *Davis v. Medical Evaluation Specialists*, the plaintiff sued a testing company and two physicians, claiming that the medical examinations they performed pursuant to the Texas Workers' Compensation Act were unfairly biased.[240] The defendants obtained summary judgment on the basis of immunity. The court concluded that the company was not entitled to immunity because the company did not itself conduct medical examinations, and because the act of promoting its physicians to insurance companies is routine commercial activity.[241] The court held that a doctor working for a Texas Workers' Compensation Commission lab is not entitled to absolute derived judicial immunity because that would give him more immunity than the commissioners who appointed him.[242] The court went on to find a fact issue as to whether the physicians had

234. 50 S.W. 3d 17 (Tex. App.—Amarillo 2001, no pet.).
235. *Id.* at 22.
236. 50 S.W.3d 621 (Tex. App.—Dallas 2001, pet. denied) (citing TEX. LAB. CODE ANN. § 451.001 (Vernon 2001)).
237. *Id.* at 628.
238. *Id.* at 629 (distinguishing City of Odessa v. Barton, 967 S.W. 2d 834, 835 (Tex. 1998)).
239. *Id.* at 630-31.
240. 31 S.W.3d 788 (Tex. App.—Houston [1st. Dist.] 2000, pet. denied).
241. *Id.* at 792.
242. *Id.* (citing TEX. LAB. CODE ANN. § 402.010).

acted with the good faith required by the defense of qualified immunity.[243]

D. Spoliation

The issue of spoliation of evidence was addressed in *Wal-Mart Stores, Inc. v. Johnson*.[244] The plaintiff was injured when a papier maché reindeer fell on his arm. The actual reindeer was not produced by Wal-Mart in discovery. The trial court instructed the jury on spoliation. The court affirmed the instruction, stating that "Wal-Mart reduced the lawsuit to a swearing match by gathering evidence [the reindeer] and then letting it disappear."[245] A dissent argued that a retail store ordinarily sells its merchandise and would reverse "[b]ecause I do not believe selling merchandise constitutes an obstruction of justice."[246] The Texas Supreme Court has decided to review this case.

E. Class Actions

An illustration of the effect the Texas Supreme Court's ruling in *Southwestern Refining v. Bernal*[247] has had on mass-tort personal injury class action cases is provided by the Fort Worth Court of Appeals' decertification in *Becton, Dickinson & Co. v. Usry*.[248] In *Usry*, medical care providers brought a class action against a needle manufacturer. The trial court was ordered to adopt a trial plan consistent with *Bernal* after that case was issued by the Texas Supreme Court last summer. The plan at issue ordered that common issues regarding defect, causation, and damages would be decided by a single jury in a single trial. The class was certified under Rule 42(b), which requires that questions of law or fact common to the members of the class predominate over any individual questions.[249]

Acknowledging that suits involving "allegedly defective medical devices may be among the weakest candidates for certification when the predominant test is rigorously applied in the manner required under *Bernal*," the Fort Worth Court of Appeals decertified the class. Specifically, the court found that individual questions concerning causation and comparative responsibility predominated over any common issues; for example, the class members' injuries occurred in a variety of unique circumstances involving the fault of the healthcare workers, their employers, and also third parties.[250] The court of appeals rejected the trial court's plan for resolving the individual comparative fault issues, which allowed putative class members to file no-evidence motions for summary judgment on the defendants' comparative fault defense using completed claim

243. *Id.* at 795.
244. 39 S.W.3d 729 (Tex. App.—Beaumont 2001, pet. granted).
245. *Id.* at 731-32.
246. *Id.* at 732 (Gaultney, J., dissenting).
247. 22 S.W.3d 425 (Tex. 2000).
248. 57 S.W.3d 488 (Tex. App.—Fort Worth 2001, no pet.).
249. *Id.* at 493 (citing Tex. R. Civ. P. 42(b)(4)).
250. *Id.* at 494.

forms.[251] Significant to the court's rejection of this plan, the claim forms would be the only means of discovery permitted under the plan unless the trial court granted a specific request for additional discovery. Recognizing, as did *Bernal*, that "class actions do not exist in some sort of alternative universe outside our normal jurisprudence," the court rejected the plan largely because the right to full and fair discovery would be unfairly restricted.[252]

F. GOVERNMENTAL IMMUNITY

Continuing the difficult task of trying to draw boundaries between "use" and "non-use," the Texas Supreme Court considered several immunity issues during this Survey period. In *Texas Department of Public Safety v. Petta*, the supreme court found that sovereign immunity barred claims against the Texas Department of Public Safety because the conduct complained of was intentional, and immunity is not waived for negligence involving the use, misuse, or non-use of information in instruction manuals.[253] The plaintiff alleged various intentional torts after she was found guilty of fleeing or attempting to elude a police officer.[254] The supreme court, noting that the Texas Tort Claims Act specifically excludes waiver of sovereign immunity for claims arising out of assault, battery, or other intentional torts, held that the conduct the plaintiff complained about was clearly intentional and fell within the Act's exclusion.[255] The court also rejected the plaintiff's claim that the Department's negligence in failing to furnish proper training and instruction manuals waived sovereign immunity because, as the court has determined before, information is not tangible personal property, and the plaintiff thus did not allege an injury resulting from the "condition or use of tangible personal [or real] property."[256]

The supreme court also found that sovereign immunity had not been waived in *Texas National Resource Conservation Commission v. White*.[257] In this case, the court found that a stationary electric motor-driven pump is considered motor-driven equipment under section 101.021 of the Texas Tort Claims Act, but that the pump's operation or use did not cause the plaintiff's property damage.[258] After gas fumes migrated onto the plaintiff's property, the Texas Natural Resource Conservation Commission ("TNRCC") installed a motor-driven pump to dissipate the fumes. A fire

251. *Id.* at 497.
252. *Id.* at 497-98.
253. 44 S.W.3d 575, 580-81 (Tex. 2001).
254. *Id.* at 576-77.
255. *Id.* at 580 (citing TEX. CIV. PRAC. & REM. CODE § 101.057).
256. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 101.021(2)).
257. 46 S.W.3d 864 (Tex. 2001).
258. *Id.* at 869 (quoting TEX. CIV. PRAC. & REM. CODE § 101.021(1)(A)). Section 101.021(1)(A) provides, *inter alia*, that sovereign immunity is waived if property damage is caused by the wrongful act or negligence of an employee acting within the scope of his employment if the property damage arises from the operation or use of motor-driven equipment.

then started, and the plaintiff claimed that section 101.021(1)(A) applied because her property damage was proximately caused by the TNRCC's use of motor-driven equipment. Disapproving of *Schaefer v. City of San Antonio*,[259] the court held that stationary electric motor-driven equipment is within the scope of section 101.021's definition of motor-driven equipment.[260] However, because the fire was not caused by the use of the pump, but rather arguably by the non-use of the pump, sovereign immunity was not waived.[261]

In another non-use case, the supreme court found that sovereign immunity was not waived after doctors failed to diagnose an inmate's meningitis.[262] Despite the plaintiff's contention that the doctors misused pain-reducing drugs, the court found that a failure to diagnose was the cause of the injury, not a use of property. In a concurrence, Justice Hecht noted that the court has attempted to determine the meaning of the word "use" in the Texas Tort Claims Act in sixteen cases, approximately one every other year since the Act has been passed, and has produced irreconcilable decisions.[263] In the end, Justice Hecht stated that because the common-law rule of immunity in Texas was the judiciary's to recognize, it is also the judiciary's to disregard.[264] Ultimately, he suggests that an abolition of immunity is more likely to prompt clarity from the Legislature.[265]

The distinction between use and non-use has also been addressed by courts of appeals this Survey period. Specifically, in *Gainesville Memorial Hospital v. Tomlinson*, the Fort Worth Court of Appeals held that a nurse's failure to use the intercom to call for assistance in helping a patient to get out of bed amounted to the non-use of property, which has been rejected as a waiver of immunity.[266] Also, in *Baston v. City of Port Isabel*, the court held that an EKG readout was not "information," but was defined as tangible personal property by an earlier holding of the Texas Supreme Court.[267]

In *City of San Antonio v. Hernandez*, the San Antonio Court of Appeals found that immunity was not waived despite allegations that a police officer misused the police radio to call for backup with a heightened emergency code.[268] In *Hernandez*, police officers confronted a suspect who drew a pistol and fired. After the emergency radio was used to call

259. 838 S.W.2d 688 (Tex. App.— San Antonio 1992, no writ).
260. *White*, 46 S.W.3d at 869.
261. *Id.* at 869.
262. Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 588 (Tex. 2001).
263. *Id.* at 590-91.
264. *Id.* at 592.
265. *Id.* at 593.
266. 48 S.W.3d 511, 514 (Tex. App.— Fort Worth 2001, pet. denied).
267. 49 S.W.3d 425, 428 (Tex. App.—Corpus Christi 2001, pet. denied) (citing UTMB v. York, 871 S.W.2d 175 (Tex. 1994), and Salcedo v. El Paso Hosp. Dist., 659 S.W. 30, 33 (Tex. 1983)).
268. City of San Antonio v. Hernandez, 53 S.W.3d 404 (Tex. App.—San Antonio 2001, pet. denied).

for backup help under a heightened emergency code, the suspect pointed his gun again, and three of the four officers shot the suspect.[269] The suit alleged that, had the officer not called for a heightened emergency code, the situation would not have escalated.[270] Following a long line of cases, the court found that property does not cause injury if it does no more than furnish the condition that makes the injury possible, and therefore, immunity was not waived.[271]

The same court also held that allegations that an ambulance driver failed to drive a vehicle "directly and expeditiously," and allegations that the driver failed to contact an operator by phone as instructed to do in a guidebook, stated claims arising from "non-use" of property and motor vehicles, which are not actionable.[272]

The Harris County Jail uses the services of certain physicians who serve as independent contractors, and who are employed by the University of Health Science Center at Houston. This relationship is confirmed in a written agreement between the County and the hospital. Even though the County required UT's personnel to comply with the county's security policies and guidelines, Harris County had no right to control the details of the physicians' work, and had thus not waived its sovereign immunity under the Texas Tort Claims Act as to the work of these physicians.[273] A dissent argued that the County had a non-delegable duty to provide medical care for its inmates, thereby making it liable for negligence of physicians who treat inmates.[274]

Addressing a matter of first impression, the Fort Worth Court of Appeals held in *State v. Kreider* that minors are not exempt from the six-month presuit notice requirement of section 101.101 of the Texas Tort Claims Act.[275] An individual and his two minor daughters were injured in an accident allegedly caused by a special defect in the road surface. Although the accident occurred on March 14, 1998, the lawsuit was not filed until December 28, 1999. The court found that it lacked subject matter jurisdiction because the plaintiffs had failed to fully comply with the provisions of the Act. Significant to the court's holding that minors must comply with the presuit notice requirement was its finding that the statute is clear and unambiguous. The Legislature could have expressly provided for an exception and did not. Also, the purpose of the presuit notice of claim is to insure prompt reporting of claims so the state may investigate while facts are fresh, and Texas courts have consistently refused to extend the notice period for plaintiffs with disability and mental

269. *Id.* at 406.
270. *Id.* at 409.
271. *Id.*
272. Martinez v. VIA Metro. Transit. Auth., 38 S.W.3d 173, 176-77 (Tex. App.—San Antonio 2000, no pet.).
273. Thomas v. Harris County, 30 S.W.3d 51, 54 (Tex. App.—Houston [1st Dist] 2000, no pet.) (citing TEX. CIV. PRAC. & REM. CODE §101.001(1)).
274. *Id.* at 56 (O'Connor, J., dissenting).
275. 44 S.W.3d 258, 264 (Tex. App.—Fort Worth 2001, pet. denied) (citing TEX. CIV. PRAC. & REM. CODE § 101.101).

incompetency.[276]

Following a long line of cases holding that design decisions are discretionary and therefore do not waive immunity under the Texas Tort Claims Act, the court of appeals affirmed summary judgment in favor of the defendant in *Ramos v. Texas Department of Public Safety*.[277] Two children were killed by a test taker's car when it lurched forward while parking. The plaintiffs alleged various premises defects, including a failure to have warning signs or have a designated safe waiting area for children. The court found that these were discretionary design decisions which did not waive sovereign immunity.[278]

The case of *City of Fort Worth v. Robels* arose when a child was killed at an intersection controlled by two-way stop signs.[279] Immunity is waived as to "the absence, condition, or malfunction of a traffic or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice."[280] The court concluded that this waiver only applies to traffic control signs and signals that were installed, but for some reason are no longer in place.[281] Immunity was maintained in this case because the decision to place a traffic signal in the first instance is discretionary.[282] The court went on to hold that, once the municipality decides to install a particular traffic signal, that decision must be implemented in a reasonable time. Because no evidence showed that the City had decided to install a light at the time of the accident, the City was immune from suit.[283]

In the case of *Clark v. University of Houston*, the court held that a police officer's pursuit of a suspect is a discretionary act and thus the police officer was entitled to official immunity as a defense.[284] It is well settled that an action that involves personal deliberation, decision, and judgment is discretionary; by contrast, actions that require obedience to orders or the performance of a duty to which the actor has no choice are ministerial.[285] The plaintiff argued that, because the police officer was ordered by his superior to chase the suspect's vehicle, the action was ministerial. The court of appeals rejected this theory, noting that *Clark* is controlled by *City of Lancaster v. Chambers*, which directs that "beyond the initial decision to engage in the chase, a high-speed pursuit involves

276. *See id.* at 264-65.

277. 35 S.W.3d 723 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

278. *Id.* at 733.

279. 51 S.W.3d 436 (Tex. App.—Fort Worth 2001, pet. denied).

280. TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (A)(2).

281. *Robels*, 51 S.W.3d at 442 (citing City of San Antonio v. Schneider, 787 S.W.2d 459, 460 (Tex. App.—San Antonio, 1990, writ denied)).

282. *Id.* at 440 (quoting TEX. CIV. PRAC. & REM. CODE § 101.056).

283. *Id.* at 443 (citing and overruling in part Miller v. City of Fort Worth, 893 S.W.2d 27 (Tex. App.—Fort Worth 1994, writ dism'd by agr.)).

284. 60 S.W.3d 206 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

285. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994).

the officer's discretion on a number of levels."[286]

What constitutes a special defect was addressed in *Texas Dept. of Transportation v. Velasco*.[287] The San Antonio Court of Appeals reversed the trial court's denial of the Department of Transportation's plea to the jurisdiction in this personal injury lawsuit, holding that a stopped vehicle is neither a premises defect nor a special defect and, consequently, sovereign immunity is not waived.[288]

An extremely detailed policy implemented by a school to address the handling of a disturbed and violent child "defined the duties [of school employees] with such precision as to leave nothing to the exercise of [their] judgment or discretion."[289] Accordingly, the failure of school district employees to lock a door, escort children, and report to the office if children were late, created fact issues that the employees did not carry out their ministerial duties, and could allow recovery despite the immunity they might otherwise enjoy.[290]

The Austin Court of Appeals concluded that, under the "plain and ordinary meaning" of certain provisions of the Texas Health and Safety Code,[291] a person harmed by a violation of the "patient's bill of rights" while under the care of a mental health facility may sue the facility for damages and other relief.[292] More specifically, the Texas Board of Mental Health and Mental Retardation is required by statute to adopt a "patient's bill of rights" governing in-patient mental health facilities for the purpose of protecting their patients' health, safety, and rights.[293] A violation of this bill of rights falls within the statutory waiver of immunity from liability and suit.[294] The Waco court reached the same result in *Wichita Falls State Hospital v. Taylor*,[295] as has the Beaumont court.[296] The Austin court acknowledged that the Fort Worth Court of Appeals, in direct conflict with this holding, has recently held that the Code does not waive sovereign immunity for violation of the patient's bill of rights.[297] The difference turns on the court's reading of two Texas Supreme Court opinions dealing with sovereign immunity issues under the Anti-Retaliation Act[298] and the Workers' Compensation Act,[299] as well as the perti-

286. *Clark*, 60 S.W.3d at 209 (quoting *Chambers*, 883 S.W.2d at 655). Chambers involved a high-speed chase of a motorcyclist and his passenger by numerous police vehicles, which ultimately ended in the death of the motorcycle driver and injuries to the passenger.

287. 40 S.W.3d 702 (Tex. App.—San Antonio 2001, no pet.).

288. *Id.* at 704-05.

289. Myers v. Doe, 52 S.W.3d 391, 396 (Tex. App.—Fort Worth 2001, pet. filed).

290. *Id.* at 396-97.

291. TEX. HEALTH & SAFETY CODE ANN. §§ 321.003(a) & (b) (Vernon 2001).

292. Cent. County Ctr. for Mental Health & Mental Retardation Servs. v. Rodriguez, 45 S.W.3d 707, 711 (Tex. App.—Austin 2001, pet. filed).

293. 25 TEX. ADMIN. CODE §§ 404.151-.167 (Vernon 2001).

294. *Rodriguez*, 45 S.W.3d at 711.

295. 48 S.W.3d 782, 785 (Tex. App.—Waco 2001, pet. granted).

296. Spindletop MHMR v. Doe, 54 S.W.3d 893 (Tex. App.—Beaumont 2001, no pet.).

297. Tex. Dep't of Mental Health & Mental Retardation v. Lee, 38 S.W.3d 862, 870 (Tex. App.—Fort Worth 2001, pet. filed).

298. City of LaPorte v. Barfield, 898 S.W.2d 288, 292-96 (Tex. 1995).

299. Duhart v. State, 610 S.W.2d 740, 741-43 (Tex. 1980).

nent legislative history.[300] This split among courts of appeals someday may draw attention from the supreme court.

G. DAMAGES

The case of *Columbia Hospital v. Moore* addressed two complex damages issues: (1) whether pre-judgment interest assessed under Subchapter P of the MLIIA is excluded from the damages cap in the Act, and (2) whether the damages cap applicable to a single defendant who is jointly and severally liable may be multiplied by the number of culpable defendants.[301] The interest issue turned on the language of Subchapter P, which provides that, notwithstanding the general pre-judgment interest statute, pre-judgment interest in a healthcare liability claim shall be awarded in accordance with the Act.[302] The Act goes on to require that, if a healthcare liability claim is not settled within a specified period, the judgment must include pre-judgment interest on past damages found by the trier of fact.[303] The question is whether Subchapter P, enacted in 1995, was intended to exclude pre-judgment interest from the damages cap in Subchapter K of the MLIIA.[304] Observing that both subchapters use mandatory language, but that neither contains language of limitation, the court concluded that Subchapter P controls as the later-enacted statute.[305] Despite a number of policy arguments stated in the supreme court's opinion in *Horizon/CMS Healthcare v. Auld*,[306] in the final analysis the court of appeals concluded that *Auld* was expressly limited to the former statute and that, as the later-enacted statute employs mandatory language, the legislature's intent in Subchapter P was to exclude interest from the cap.[307]

As for the application of the damage cap to a jointly and severally liable defendant, the court held that the cap may not be multiplied by the number of culpable defendants. It reasoned that the predictability of damages that the MLIIA was intended to provide would be eroded if a defendant's joint and several liability was allowed to multiply its cap.[308] A dissent argued that the pre-judgment interest should be subject to the cap, arguing that the statutory scheme analyzed in *Auld* is a useful analogy, and that the legislative history of Subchapter P suggests that its pur-

300. *See Rodriguez*, 45 S.W.3d at 712-13.
301. 43 S.W.3d 553, 554 (Tex. App.—Houston [1st Dist.] 2001, pet. granted).
302. TEX. FIN. CODE ANN. § 304.101-.108 ("subchapter P").
303. *See* Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887 (Tex. 2000).
304. Subchapter K provides that in an action on a healthcare liability claim, the limit of civil liability for damages of a physician or healthcare provider shall be $500,000. TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02(a)).
305. *Moore*, 43 S.W.3d at 559 (citing TEX. GOV. CODE ANN. § 311.025(a)).
306. 34 S.W.3d 887 (Tex. 2000).
307. *Moore*, 43 S.W.3d at 562.
308. *Id.* at 566 (distinguishing Baptist Hosp. of Southeast Tex., Inc. v. Baber, 672 S.W.2d 296, 297 (Tex. App.—Beaumont 1984, writ ref'd n.r.e., 714 S.W.2d 310 (Tex. 1986) (per curiam); Rose v. Doctors Hosp., 735 S.W.2d 244, 245 (Tex. App.—Dallas 1987), *rev'd in part and aff'd in part*, 801 S.W.2d 841 (Tex. 1990); and Wynn v. Cohan, 864 S.W.2d 205, 206-07 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).

pose was to bar pre-judgment interest on future damages rather than create another exception to Subchapter K's damages cap.[309]

The court concluded in *Harris County v. Smith* that it was error to include loss of earning capacity as an element in the damages question for a plaintiff in a negligence case, where no credible evidence showed what his income would have been without the accident.[310] The question was then whether this error required reversal under *Crown Life Insurance v. Casteel* on the grounds that the court could not determine whether the jury awarded damages for elements without evidentiary support in answering this question.[311] The court made a traditional harm analysis, noting that the issues involved a finding of damage as opposed to *Casteel*, which addressed only erroneously submitted liability questions. Under this analysis, the court should consider the error not in isolation, but as part of the entire charge, and should not vacate an entire award if the jury could have awarded all damages for a single element.[312] The court held that the charge permitted a "zero" award for certain elements, noting the phrase "if any" in the prefatory language for each damage question, coupled with the instruction to consider each element of damages separately.[313] The court then concluded that there was sufficient evidence to support a $90,000 award for other elements of damages.[314]

The case of *Schindler Elevator Corporation v. Anderson* provides a well-detailed summary of sufficient evidence to support a substantial damage award for future medical expenses, future pain and mental anguish, and physical impairment and disfigurement.[315] Each element was supported by detailed testimony from the plaintiff, whose foot was badly injured in an escalator accident, from his family, and from qualified experts, including a treating orthopedic surgeon, another orthopedic surgeon, and a child psychologist. This testimony provided an adequate foundation for the jury to exercise its "wide discretion in resolving matters of pain and suffering, disfigurement, impairments and setting the amounts attributable thereto."[316]

309. *Id.* at 566 (Taft, J., dissenting in part).
310. 66 S.W.3d 326, 330 (Tex. App.—Houston [1st Dist.] 2001, pet. filed) (citing Bonney v. San Antonio Transit Co., 325 S.W.2d 117, 121 (1959)).
311. 22 S.W.3d 378, 389 (Tex. 2000).
312. *Smith*, 66 S.W.3d at 335 (citing William V. Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 634-36 (1992)).
313. *Id.* at 336.
314. *Id.*
315. No. 14-98-01286-CV, 2001 WL 931177 (Tex. App.—Houston [14th Dist.] 2001, no pet.).
316. *Id.* at *18.