PERSONAL TORTS

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I. NEGLIGENCE

A. Duty and Breach

As has been true for the past fifteen years, Texas courts tinkered with general negligence concepts during the Annual Survey period, refining selected areas with no global changes.

The Nicholsons rented a trailer park space from the Smiths.1 While

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setting up his trailer, Nicholson was stung more than 1,000 times by fire ants. In reviewing the summary judgment in favor of the defendants, the San Antonio Court of Appeals held that fire ants are animals ferare naturae and the landowner owes no duty to warn the invitee unless the landowner has converted the animals to his own use or introduced them to his land. The court noted the defense of animals ferare naturae is typically used in strict liability cases, and the application in negligence actions has been inconsistent. Nonetheless, for lack of a clear-cut precedent of a duty on the part of the defendants, the court refused to create one here for fire ants.

Two families brought suit on behalf of their sons against the Amelia Little League for injuries their sons incurred in a fight after a baseball game had ended.\(^2\) The Beaumont court affirmed the summary judgment for the defendants, recognizing that the assaulting players were not in any special relationship with the League for the after-game fight. For lack of any such relationship, the League was under no duty to control the behavior of the assaulting players.

Thapar was a psychiatrist treating a patient with a history of paranoia and delusions.\(^3\) For three years, Thapar treated the patient with psychotherapy and medication. On several occasions, the patient was hospitalized. During one such hospitalization, the patient threatened to kill Zezulka. Less than a month after his discharge, the patient did, in fact, kill Zezulka. In this suit, the survivors of Zezulka accused Thapar of negligence in the treatment of the patient and failure to warn Zezulka of the death threats. In reviewing the summary judgment in favor of Thapar, the Texas Supreme Court focused on two duty issues: does the doctor have a duty to the victim not to negligently treat his patient, and does the doctor have a duty to warn the victim of the patient’s threats.\(^4\) The Texas Supreme Court answered the former question no: the medical doctor owes no duty to anyone other than his or her patient, regarding negligent treatment of that patient. The Texas Supreme Court also answered the latter question no: confidentiality rules prevent the medical doctor from disclosing information gathered during the course of his or her treatment of a patient to a third party. Further, although exceptions to confidentiality allow the doctor to report such threats to a law enforcement officer, they do not require such disclosure. Thus, there is no independent duty on the part of the medical doctor.

B. Causation

Weathersby’s employer sent her to the defendants’ medical association

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2. See Primrose v. Amelia Little League, 990 S.W.2d 819 (Tex. App.—Beaumont 1999, no pet.).
4. See id. at 637-38 (citing Bird v. W.C.W., 868 S.W.2d 767 (Tex. 1994)).
for a physical exam after she had been hired. The doctor who performed the exam included a test requiring Weathersby to pull up on a bar. Weathersby injured her back during the test and sued the doctor for her injuries. The defendants moved for summary judgment, arguing that the exam had been successfully completed hundreds of times without injury and that the x-rays and studies of Weathersby after the test did not reflect any immediate injury. For lack of an appropriate response and evidence to the contrary, the court affirmed the summary judgment for lack of causation evidence.

Prather was shot three times by an individual standing in the back of Brandt's vehicle. In this suit, Prather claimed Brandt was strictly liable and had negligently entrusted and negligently supervised his son who was driving the vehicle. The trial court directed a verdict for Brandt, and the jury returned a verdict in favor of Brandt's son. On appeal, the court affirmed the judgment in favor of all of the defendants. Texas does not recognize strict liability for ultrahazardous activities, and the evidence at trial reflected that neither of the Brandts could have foreseen the criminal conduct of the shooter in the back of the pickup truck. Accordingly, the negligence actions failed for lack of any causation by the Brandts.

Owners of land brought a suit against prior owners for exposures and injuries resulting from toxic chemicals on the land. The prior owners moved for summary judgment, arguing there was no evidence of the exposure and no evidence of any injury directly caused by such exposure. The plaintiffs' response contained generic affidavits from two medical doctors, which failed to point out any particularized ailment for the plaintiffs and failed to make a causal connection to the toxic exposure. For lack of causation evidence, the United States District Court granted the defendants' motion for summary judgment.

C. FORESEEABILITY OF THIRD PARTY CAUSATION

Michael and Charlotte were married and had a son, M.F.I. After a divorce, Michael married Linda and they had two daughters. Michael retained visitation rights for M.F.I., which allowed him to see his son every other weekend and six weeks during the summer. When he was twelve-years old, M.F.I. was investigated by Child Protective Services ("CPS") for sexually assaulting his minor niece, and CPS notified Charlotte of the investigation. The following summer, M.F.I. went to stay with Michael and Linda and their two minor daughters (M.F.I.'s half sisters). Both girls reported being assaulted by M.F.I. Michael and Linda sued

5. See Weathersby v. MacGregor Med. Ass'n, 983 S.W.2d 82 (Tex. App.—Houston [14th Dist.] 1998, no pet.).
8. See Isbell v. Ryan, 983 S.W.2d 335 (Tex. App.—Houston [14th Dist.] 1998, no pet.).
Charlotte for negligence in failing to warn them about M.F.I.'s prior investigation for sexual assault. Reversing a summary judgment granted in favor of the defendant Charlotte, the court recognized that Charlotte did owe a duty to warn of M.F.I.'s foreseeable criminal conduct.

In a suit arising out of the brutal gang rape and murder of two teenage girls by underage gang members who had been sold alcohol, the Texas Supreme Court rendered a take-nothing judgment in favor of the defendants.9 In the action against the store that sold the alcohol, the trial court granted summary judgment, finding that the sale of alcohol did not proximately cause the girls' deaths. The Court of Appeals had reversed that summary judgment, but the Texas Supreme Court rendered judgment in favor of the defendants. The Court found that the burden of proving intervening criminal conduct rests with the defendants. Once such evidence has been presented, the burden then shifts to the plaintiff to show the criminal conduct was foreseeable by the defendants. This burden shifting only occurs when the criminal conduct is a superseding cause—one not ordinarily foreseeable. In this case, while it would have been foreseeable that minors would drive a vehicle while intoxicated and kill someone (leaving the burden with the defendant to avoid responsibility for the foreseeable criminal conduct), it was not foreseeable that intoxicated minors would intentionally rape and murder the two girls (which shifted the burden back to plaintiffs to show this defendant could have foreseen this conduct).

D. Professional Negligence

1. Medical Malpractice

Neal-Moreno (Moreno) sought care from Kittrell in early 1995, and a Pap smear was performed on May 1, 1995.10 Although the results were abnormal, this fact was not reported to Moreno. Moreno subsequently became pregnant, and during the pregnancy Kittrell continued to provide medical care. After the child was born, Moreno returned to Kittrell complaining of bleeding. Thereafter, Moreno was diagnosed with cervical cancer on July 30, 1996. Moreno filed suit against Kittrell on August 5, 1997, alleging a failure to diagnose the cancer. Kittrell defended by asserting the statute of limitations. Moreno responded with the open court's provision of the Texas Constitution (Article I, section 13, of the Texas Constitution) claiming that she was not informed of the initial diagnosis of abnormal cells on May 1, 1995, and thus she first “discovered” the improper course of treatment in July of 1996 with the diagnosis of cervical cancer. The court held that Moreno had in fact discovered the negligence within two years of her initial treatment and more than 10 months before the statute expired from the initial misdiagnosis. Thus, the

court held that Moreno had sufficient time after her discovery of the negligence to have filed suit. Accordingly, the summary judgment granted to Kittrell was affirmed on the basis of the statute of limitations.

DeRuy was referred to Garza, a gastroenterologist, in October of 1990 for abdominal pain.\textsuperscript{11} After testing was performed, Garza diagnosed DeRuy with biliary cancer. DeRuy underwent treatment for the cancer. In 1994, DeRuy went to the emergency room complaining of abdominal pain. A different physician performed surgery, and DeRuy was diagnosed with gallbladder disease. She was told that she had never had biliary cancer. Suit was filed against Garza on June 7, 1995. The trial court granted summary judgment for Garza on the basis of the statute of limitations. Since DeRuy did not learn of the misdiagnosis until more than two years after the event had occurred, however, the open court's provision of the Texas Constitution allowed DeRuy a reasonable time within which to bring suit after her discovery of the misdiagnosis. The summary judgment was reversed, and the case was remanded for the jury's factual resolution of whether DeRuy's 10-month delay in filing suit after she had discovered the misdiagnosis was a reasonable period of time to investigate and file suit.

Fowler provided silicone injections and cheek implants for Wright on several occasions in 1989 and 1990.\textsuperscript{12} In late 1990, Wright obtained copies of his medical records "because [he] knew [he would] never return to see [Fowler] again."\textsuperscript{13} In 1993 or 1994, Wright saw an allergist because of general tiredness and malaise. In April of 1994, Wright saw another plastic surgeon who removed the implants. In October of 1994, Wright sued Fowler for product liability (based on the silicone implants) and negligence. Fowler moved for summary judgment on the basis that the statute of limitations had expired from the initial implant. Wright invoked the open court's doctrine, claiming that he first discovered the nature of his injuries when the implants were removed (or at the earliest when the implants began causing him pain shortly before their removal). Finding that Wright experienced problems immediately after the initial surgery for the implants and that he had obtained his records soon thereafter, the court affirmed the summary judgment. Thus, the court held, Wright "discovered" his injury well within the statute of limitations.

The LeNotres sued Cohen, alleging the pediatrician failed to diagnose their son's appendicitis.\textsuperscript{14} Cohen moved for summary judgment, claiming there was no negligence on his part. He supported the motion with his own affidavit. The Houston Court of Appeals noted that the required elements for a defendant doctor's affidavit to support a summary judgment include: (1) the listing of the physician's qualifications; (2) the de-

\textsuperscript{11} See DeRuy v. Garza, 995 S.W.2d 748 (Tex. App.—San Antonio 1999, no pet. h.).
\textsuperscript{12} See Wright v. Fowler, 991 S.W.2d 343 (Tex. App.—Fort Worth 1999, no pet.).
\textsuperscript{13} Id. at 346.
\textsuperscript{14} See LeNotre v. Cohen, 979 S.W.2d 723 (Tex App.—Houston [14th Dist.] 1998, pet. denied).
tails of the entire course of treatment by the physician; (3) a specific
denial of each of the allegations of negligence contained in the plaintiff’s
pleadings; (4) an assertion that the physician met the standard of care on
each of the elements claimed; (5) a claim that his or her opinion is based
on a reasonable degree of medical probability; and (6) a statement that
no act or omission by the physician caused or contributed to any injury to
the patient. Cohen’s affidavit did not contain specific denials of each alle-
gation and did not specify how he met the standard of care in each of
those instances. Accordingly, his affidavit was insufficient to support his
motion for summary judgment, and the appellate court reversed the grant
of summary judgment.

2. **Legal Malpractice**

In September of 1992, Norman was injured by an electrical
shock. He hired Marsh to represent him. In the suit, Marsh failed to respond to
requests for admissions, and the trial court granted summary judgment
against Norman. Marsh sought a rehearing and a new trial, both of which
were denied. Norman then hired new counsel in 1994 to pursue the ap-
peal, which was unsuccessful by denial of writ to the Supreme Court of
Texas on March 21, 1996. In February 1997, Norman’s third set of attor-
neys filed a claim for legal malpractice against Marsh. Marsh was granted
summary judgment and this appeal was taken. The court struggled with
the dichotomy created by the Texas Supreme Court in the recent cases of
Hughes v. Mahaney and Murphy v. Campbell. In a literal but dis-
turbing interpretation of Murphy, this court held that the statute of limita-
tions on the malpractice claims accrued when the plaintiff hired new
counsel—even if the underlying case was still pending review by the ap-
pellate courts. Thus, the statute of limitations began to accrue in 1994
even though the Texas Supreme Court did not refuse the writ of error
until nearly two years later. The court recognized the preposterous need
of the plaintiff to take two inconsistent positions (pursuing the error,
claiming it is not error at all, while also suing the attorney for creating the
fatal error in the first place). Arguing they were bound by precedent, the
Corpus Christi court recognized this impossible position, but suggested
that the second suit for malpractice be filed in a timely fashion and
abated, while awaiting the outcome of the underlying action.

Mr. Arlitt retained an attorney to draft a will in 1983. He hired a sec-
ond attorney to draft a codicil in 1985. Arlitt died in 1987, and the heirs
who were largely disinherited by the codicil contested the will. The same
heirs also sued the attorneys for legal malpractice and misrepresentation.
In reviewing a summary judgment in favor of the defendant attorneys,

15. See Norman v. Yzaguirre & Chapa, 988 S.W.2d 460 (Tex. App.—Corpus Christi
1999, no pet.).
17. 964 S.W.2d 265 (Tex. 1997).
18. See Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex. App.—San Antonio 1999,
pet. denied).
the San Antonio court affirmed the summary judgment, recognizing that the actions brought by the children against the attorneys lacked privity to the attorneys. However, the court reversed the summary judgment for those claims involving the wife. Because she and her deceased husband were acting jointly for the benefit of their children in the drafting of both the will and the codicil, the wife was in privity with the lawyers. To the extent Barcelo v. Elliott requires privity in legal malpractice claims, the San Antonio court distinguished this claim because it involved a situation of joint representation of both husband and wife, necessarily creating that privity.

In 1990, Swift retained Seidler to handle a bankruptcy claim. In 1991, the bankruptcy court denied an exemption to Swift for his retirement savings. Complaining of his representation, Swift replaced Seidler with a new attorney in 1992. In April 1992, Swift joined the bankruptcy trustee in a malpractice claim against Seidler. That claim was raised under the ancillary jurisdiction of the bankruptcy court proceeding. Swift later dismissed his bankruptcy claim, which included the malpractice claim in January 1993. On October 8, 1993, the Fifth Circuit Court of Appeals affirmed the bankruptcy court’s final judgment. On October 6, 1995, Swift instituted this negligence action against Seidler in state court. Affirming the summary judgment granted on the basis of the statute of limitations, the San Antonio court held that Swift’s institution of a malpractice claim within the bankruptcy proceedings in early 1992 started the statute of limitations. Although the Fifth Circuit did not finally affirm the bankruptcy court’s final discharge until October 8, 1993, the facts giving rise to Swift’s claims were known and pursued by new counsel in early 1992, more than two years before this state court action was filed.

3. **Other Professional Malpractice**

Laura Schubart and her parents sued the Pleasant Glade Assembly of God, alleging that a youth minister at a church function attempted to cast out Laura’s demons, causing her physical and mental injuries. In its defense, the church argued that it could not be held liable for professional negligence because the action was inextricably intertwined with its exercise of religion. The church argued that the First Amendment to the United States Constitution and its counterpart in the Texas Constitution barred this action. The Fort Worth court recognized that not all religious activities are protected from negligence actions. However, the events involving Schubert would require an “impermissible inquiry into whether [the church] deviated from the standard of care of an ordinary Assembly of God practitioner.” Thus, the Shubert’s claims were barred by the

19. 923 S.W.2d 575 (Tex. 1996).
22. Id. at 89.
First Amendment.

With the new trend of colossal nursing home verdicts, the Horizon/CMS Health Care Corp. v. Auld case addresses several important issues.\(^{23}\) The suit was initially brought by Martha Hary and was represented after Ms. Hary's death by her administratrix Auld. The suit accused the defendants of negligence and gross negligence that resulted in horrendous injuries and damages to Hary. The jury awarded Hary nearly $2.4 million in actual damages and $90 million in punitive damages. The judgment signed by the trial court reduced the actual damages to the wrongful death cap contained within article 4590i of the Medical Liability and Insurance Improvement Act.\(^{24}\) When adjusted to the Consumer Price Index and adding pre-judgment interest this totaled approximately $1.5 million. The court also reduced the punitive damage award to four times the actual damages, based on the provisions of section 41.008 of the Texas Civil Practice and Remedies Code (which totaled approximately $6 million).\(^{25}\) On appeal, the defendants argued that the damage caps within article 4590i also capped punitive damages at the same amounts. Based both on legislative history and on the intent of article 4590i, the court rejected this argument. The court also rejected plaintiff's argument that section 41.008 did not apply, and it affirmed the trial court's revised judgment at four times the actual damages. On an evidentiary matter, the court also rejected the defendant's arguments that the admission of state investigations into the conditions at the defendants' facility injected error in this case, recognizing that such reports were admissible to show the defendants had notice of the poor conditions.

II. ADDITIONAL TORTS

A. Defamation

Taylor sued Knox and his company for defamation and tortious interference with a contract after Knox sent a package of materials (including a memorandum critical of Taylor's abilities to run a business) to various companies engaged in business with Taylor.\(^{26}\) Recognizing that the package and memo were critical of his business abilities, the 14th Court of Appeals held there was sufficient evidence to support the libel per se allegations made by Taylor. Additionally, the fact that the package was sent to a business interest common to both Taylor and Knox did not cloak Knox's activities with the qualified privilege of a shared business interest. The memorandum and package were not in support of any legitimate business interest on the part of Knox. They were instead calculated to cause harm to Taylor. The jury's verdict in excess of $3 million was therefore affirmed.

\(^{23}\) 985 S.W.2d 216 (Tex. App.—Fort Worth 1999, pet. granted).
\(^{26}\) See Knox v. Taylor, 992 S.W.2d 40 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
Harrison was a court-appointed psychologist in a family law case in Harris County. After a movie was created by several of the defendants and broadcast by HBO criticizing Harrison’s actions, this defamation suit followed. The defendants appealed the denial of their motion for summary judgment, arguing that Harrison was a public official and thus was required to show actual malice on the part of the defendants to succeed in a defamation action. Recognizing the breadth of power Harrison received through his court appointment and comparing it to other public officials in the family law arena such as CPS workers and to the actual role of the judge, the Houston Court held that Harrison was a public official. The fact that Harrison did not receive a paycheck from a governmental entity and was not in a permanent position of employment with a governmental entity was insufficient to defeat the defendants’ arguments. Because of his role as a public official, Harrison was required to show malice on the part of the defendants. As there was no evidence of malice, the court rendered judgment in favor of the defendants.

The Gills sued ABC for defamation based on a Day One broadcast involving the Gills’ failed savings and loan association in San Antonio. ABC moved for summary judgment, which was denied. An interlocutory appeal of that denial was granted, based on the jurisdiction given to the court of appeals through section 51.014 of the Texas Civil Practice and Remedies Code. Cases involving defamation actions against the media and involving First Amendment rights can be granted review of the denial of a summary judgment through interlocutory means. The San Antonio court held that the Gills were public figures and thus ABC could only be found liable after a showing of actual malice. In a detailed review of each of the allegedly defamatory statements throughout the entire broadcast, the court held there was no evidence of actual malice on the part of ABC. Thus, the San Antonio court reversed the denial of summary judgment and rendered judgment in favor of ABC.

B. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

The Driscols admittedly owed a debt to the defendant. However, the collection efforts by the defendant were so “horrible,” “nasty,” and “disrespectful” that the Driscols filed this suit for intentional infliction of emotional distress and unreasonable debt collection. Noting the odd hours of the collection phone calls, that the calls were made both at work and at home, the language and profanity used, and the overall demeanor of the calls, the El Paso Court of Appeals affirmed the trial court’s judg-

27. See HBO v. Harrison, 983 S.W.2d 31 (Tex. App. — Houston [14th Dist.] 1998, no pet.).
31. Id. at 78.
ment in favor of the plaintiffs. The court revised the dollar value of the judgment, finding that the recoveries on both unreasonable debt collection and intentional infliction were necessarily double recoveries and violated the one satisfaction rule.

Three employees of GTE Southwest brought this intentional infliction of emotional distress claim, alleging that their supervisor’s conduct was utterly intolerable during the course of their employment. The trial court’s judgment in favor of the employees was affirmed by the court of appeals and further affirmed by the Texas Supreme Court. Upholding the judgment, the Texas Supreme Court recited several incidents involving the supervisor’s conduct, including the fact that four prior employees had filed formal grievances, and that GTE took no official action in response to those grievances or to prior grievances by the three employees involved in this suit. The activities causing the grievances included vulgar profanity, humiliation, screaming, yelling, lunging at employees, and intentionally embarrassing employees. Recognizing that intentional infliction of emotional distress actions do not normally lie for ordinary workplace disputes, the Texas Supreme Court described this conduct by the supervisor as well beyond that of a mere dispute.

Dalrymple sued three individuals in the University of Texas system for intentional infliction of emotional distress and other claims after his employment was terminated. The particular incidents forming the basis of Dalrymple’s complaint revolved around negative reviews for a promotion. Dalrymple argued that these negative reviews were motivated by retaliation (he had previously recommended that one of the three individuals not receive a pay raise). Dalrymple’s claim against the individuals were dismissed at the trial level by summary judgment. The Texas Supreme Court held, as a matter of law, that the actions of these three individuals did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Although the actions leading up to the discharge were both unpleasant and perhaps retaliatory, they were not atrocious and “utterly intolerable in a civilized community.”

C. PREMISES LIABILITY

Davis, who was a state employee, attended a state park on holiday with his family. He sat on a bench outside his cabin and the bench broke, injuring Davis. In this premises liability action, the state attempted to persuade the court that the Tort Claims Act was not applicable because the bench was built before 1970, and the pre-January 1, 1970 exemption

32. See GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605 (Tex. 1999).
33. See Brewerton v. Dalrymple, 997 S.W.2d 212 (Tex. 1999).
34. Id. at 216.
35. See Texas Parks and Wildlife Dep’t v. Davis, 988 S.W.2d 370 (Tex. App.—Austin 1999, no pet. h.).
applied, preventing any action against the state.\textsuperscript{36} But the bench was reevaluated in 1991 and was marked as needing maintenance. Therefore, the subsequent activity by the state is subject to the tort liability section of the Act due to its failure to eliminate the dangerous condition. The jury held the state liable for its employees’ negligence in not fixing the broken bench, and that portion of the judgment was affirmed.

\section*{D. Products Liability}

In 1992 Pauline White brought a products liability action against Westinghouse and twenty-one other suppliers and manufacturers of asbestos and products using asbestos.\textsuperscript{37} White claimed the asbestos caused the cancerous death of her husband Charles White, and the defendants were jointly and severally liable for negligence, gross negligence, and strict liability. Allegedly, Mr. White was exposed to asbestos while employed by the City of Austin on and around Westinghouse’s industrial turbines. Westinghouse used the ten-year statute of repose, found in section 16.009 of the Texas Civil Practice and Remedy Code,\textsuperscript{38} to argue for partial summary judgment, which was granted in 1994 although not signed by the trial judge until 1998.\textsuperscript{39} On appeal White argued the asbestos products were not fixed to real property, and thus the statute of repose did not apply.\textsuperscript{40} The record contained some evidence that Mr. White’s alleged exposure occurred when the asbestos was yet a chattel or contained within a chattel and thus before section 16.009 had been activated.\textsuperscript{41} Therefore, the court of appeals reversed the summary judgment motion and remanded the cause to the trial court for resolution of the fact issue.\textsuperscript{42}

\section*{E. Malicious Prosecution}

Two seventeen-year-old girls were arrested for allegedly shoplifting.\textsuperscript{43} They were asked to sign a document that J.C. Penney claimed would let them go home without admitting guilt. The document was actually a confession. It also included an agreement that the girls would not sue in a civil action. J.C. Penney later filed criminal charges but failed to show up in court on the trial date of either girl. The criminal cases were dismissed. One of the girls filed this suit for false arrest and malicious prosecution, and she received a jury verdict of $75,000. J.C. Penney appealed, claiming there was no evidence of malice and no evidence of a lack of probable

\footnotesize
\begin{itemize}
\item \textsuperscript{37} See White v. CBS Corp., 996 S.W.2d 920 (Tex. App.—Austin 1999, pet. denied).
\item \textsuperscript{39} See White, 996 S.W.2d at 923.
\item \textsuperscript{40} See id. at 924.
\item \textsuperscript{41} See id. at 925.
\item \textsuperscript{42} See id.
\item \textsuperscript{43} See J.C. Penney Co., Inc. v. Ruth, 982 S.W.2d 586 (Tex. App—Texarkana 1998, no pet.).
\end{itemize}
cause. J.C. Penney’s burden was to establish the evidence could only be interpreted to provide probable cause for its conduct. In light of the evidence to the contrary, the jury’s verdict was affirmed. The evidence of malice came from both the misrepresentation of the “confession” and the failure to show up at the criminal trials.

F. Other Intentional Torts

Garcia was injured while on the job. He received worker’s compensation benefits and returned to work on a light duty job. Within months of his return, Garcia was terminated, purportedly because the budget of the employer was low—although another employee was hired to fill Garcia’s job soon after his termination. In this wrongful termination suit for violations of section 451.001 of the Texas Labor Code, the jury found that Garcia was terminated because he had filed a worker’s compensation claim. In reviewing the causal connection between the worker’s compensation claim and his later termination, the El Paso court reiterated the standard established by the Texas Supreme Court that, but for the victim’s filing of the worker’s compensation claim, the employer would not have terminated him. Finding evidence in the record to support the jury’s conclusion that Garcia was fired because of his worker’s compensation claim, the El Paso court affirmed the trial court’s judgment.

Plaintiffs were all employees of the Houston Police Department who complained that they had suffered from a hostile work environmental, intentional infliction of emotional distress, and constructive discharge. The case revolved around the supervisors of each of the employees, who allegedly engaged in a campaign of retaliation against each of the employees. The defendants were denied summary judgment and this appeal followed. To succeed on a retaliation claim, specifically for violation of an employee’s First Amendment right to free speech, the employee must show that the speech involved was a matter of public concern. Additionally, the employee must establish that he or she suffered from an adverse employment action that was caused by the exercise of free speech. Recognizing fact issues for each of the various employees on these elements, the Fifth Circuit remanded most of the retaliation claims to the court for trial. Likewise, fact issues remained to be resolved by the jury on the intentional infliction of emotional distress claim.

In a case (or cases, more appropriately) of great notoriety in the Dallas area, the United States District Court in the Dallas Division of the Northern District of Texas had the opportunity to review several First Amendment and intentional tort issues. Harman purchased a police scanner in

47. See Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998).
1994 and discovered soon thereafter that he could also monitor the cordless telephone conversations of his neighbor, Dallas Independent School District trustee Dan Peavy. After contacting the Dallas County District Attorney's Office, Harman was assured that listening to the phone calls and taping those phone calls were both legal. Several of the tapes Harman made included conversations Peavy allegedly had that involved kickback schemes with insurance policies issued to the Dallas Independent School District. Harman conveyed this information to the various local policing authorities, and when the reaction was less than he expected, he contacted a local news station and made the tapes available. In the interim, changes made in the federal wiretap laws in late 1994 made Harman's interception of the telephone calls illegal. Harman later pled guilty to a subsequent violation after he had been made aware of the changes. Peavy instituted thirteen different civil lawsuits against Harman and the various news agencies all related to the same series of events, including this case. Finding that the neighbors and the media defendants violated the federal wiretap laws, the United States District Court nonetheless granted summary judgment to the media defendants on the basis of their First Amendment right to publicize lawfully obtained information. The court recognized that the information initially obtained was done so legally. However, Harman was not entitled to summary judgment on the basis of the First Amendment, particularly in light of his pleading guilty to violations of the federal wiretap laws. Thus the damages incurred by Peavy were left to be tried to the jury.

Corbett Allen was the chief financial officer for Powell Industries. The chief executive officer, Powell himself, fired Allen. Allen brought this action for tortious interference with a contract and wrongful termination against both Powell and Powell Industries. The trial court granted summary judgment to the defendants. The summary judgment was reversed and remanded by the Amarillo Court of Appeals. In its per curiam opinion, the Texas Supreme Court recognized that the CEO fired the CFO based on the authority given to the CEO by the company's board of directors. Accordingly, the CEO could not have interfered with the CFO's contract since one of the parties to the contract (the corporation, as represented by the board of directors) wanted to terminate the contract. Thus, the tortious interference claim failed as a matter of law. The wrongful termination claim, however, was remanded to the trial court for a trial on the merits.

III. DEFENSES

A. GOVERNMENTAL AND OFFICIAL IMMUNITY

Several employees of the Department of Transportation were painting stripes, and two flagmen were guarding an intersection. A cab driver

50. See McClure v. Reed, 997 S.W.2d 753 (Tex. App.—Tyler 1999, no pet. h.).
drove through the intersection and smashed into another car. Those two cars then hit Reed, who was driving a van. Reed filed suit. The state moved for official and governmental immunity through summary judgment. Official immunity is an affirmative defense, therefore the burden lies with the state.\textsuperscript{51} Government employees are entitled to official immunity if they are acting within the scope of their authority and in good faith.\textsuperscript{52} Further, employees’ actions cannot form the basis of a tort action if they are discretionary; the government is immune if someone is injured because of bad policy decisions.\textsuperscript{53} However, if the action involves ministerial tasks or implementation of a policy decision, immunity does not apply. Texas has had flagmen for a number of years, and construction and maintenance activities are ministerial. Therefore, the state employees are not eligible for immunity.\textsuperscript{54}

Ronald Leghart was killed in a police shooting, and his heirs brought a §1983 action against the officer and several others.\textsuperscript{55} The court evaluated whether a police officer should receive qualified immunity under § 1983 or official immunity under Texas law, using a two-step process to evaluate the qualified immunity issue. The first issue is whether the plaintiff alleged a constitutional rights violation.\textsuperscript{56} Here, the plaintiffs asserted a violation of Leghart’s Fourth Amendment right to freedom from unlawful seizure. They claimed that the officer shot him while he allegedly attempted to escape, but that he presented no apparent threat.\textsuperscript{57} The second issue is whether the police officer’s actions were reasonable under existing law.\textsuperscript{58} According to the officer, his force was reasonable because he feared for his life at the time of the shooting.\textsuperscript{59} Because the reasonableness of the officer’s fear presented a question of fact, the court denied the defendant’s motions to dismiss and for summary judgment based on qualified immunity. Official immunity was also asserted as an affirmative defense, and the issue of the officer’s good faith in his actions also needed a factual resolution by the jury.

Four former police officers brought suit against the City of Hidalgo and its chief of police for wrongful termination.\textsuperscript{60} All four officers’ complaints included the following: public harassment, intimidation, unprofessional conduct, and false accusations.\textsuperscript{61} After review, the court concluded that even though the chief did all the hiring, firing, and terminating, he had acted in good faith, and, thus, he was entitled to official immunity.\textsuperscript{62}

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\item \textsuperscript{51} See id. at 756.
\item \textsuperscript{52} See id.
\item \textsuperscript{53} See id.
\item \textsuperscript{54} See id. at 756-57.
\item \textsuperscript{55} See Leghart v. Hauk, 25 F. Supp. 2d 748 (W.D. Tex. 1998).
\item \textsuperscript{56} See id. at 752.
\item \textsuperscript{57} See id.
\item \textsuperscript{58} See id.
\item \textsuperscript{59} See id.
\item \textsuperscript{60} See City of Hildalgo v. Prado, 996 S.W.2d 364 (Tex. App.—Corpus Christi 1999, no pet. h.).
\item \textsuperscript{61} See id. at 366-67.
\item \textsuperscript{62} See id. at 372.
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The court also ruled that since the chief was granted official immunity, the City was entitled to summary judgment since it could only be vicariously responsible.63

In this negligence and declaratory judgment action, Doe accused the Texas Department of Health ("TDH") of disclosing to a non-employee nursing student that Doe had tested positive for the HIV virus.64 The TDH claimed protection under governmental immunity. It argued that Doe's suit should fail because governmental immunity is only waived under certain claims, and none of Doe's claims involved operating a motor vehicle, defects of premises, or condition or use of tangible property.65 The Court rejected this argument because Doe chose to bring her cause of action under Chapter 81 of the Health and Safety Code, rather than the Texas Tort Claims Act ("TTCA"). In the alternative, TDH argued that the Health and Safety Code does not waive immunity for state agencies.66 The court recognized the legislature's waiver of governmental immunity claims under § 81.103 of the Texas Health and Safety Code Annotated which "prohibits any person, firm, [or] corporation" from disclosing the results of an HIV test.67 Accordingly, the Austin Court of Appeals affirmed the trial court's refusal to dismiss the claims.

B. TEXAS TORT CLAIMS ACT

Petta was pulled over by a police officer for speeding.68 After abusive language by the officer, Petta sped away and was chased down and arrested. Petta sued the Department of Public Safety ("DPS") and the officer on claims of assault, battery, and negligence. Under the TTCA, the DPS cannot be sued if its employee commits an intentional tort.69 However, the DPS can be negligent for failing to train properly and implement policies for its employees.70 The TTCA provides that the government loses its immunity when an employee commits a wrongful or negligent act (1) arising out of the operation or use of a motor vehicle, or (2) caused by the use of tangible personal property.71 Because Petta claimed her injuries occurred from the negligent use of the officer's car, which he used to block her car and to chase her at high speeds, and his tangible personal property (a nightstick, handgun, and shotgun), the action satisfied the necessary elements to proceed under the Tort Claims Act. The summary judgment of the DPS was reversed for the negligence claims.

63. See id. at 373.
64. See Texas Dep't of Health v. Doe, 994 S.W.2d 890 (Tex. App.—Austin 1999, pet. denied).
65. See id. at 893.
66. See id.
67. See id. at 894.
69. See id. at 205.
70. See id. at 206.
71. See id. at 205.
A mother and her two children were involved in an automobile accident in which the son was badly injured. They were hit by a service vehicle operated by a city employee. Under the TTCA, the mother and daughter wanted to recover damages for mental anguish under a bystander theory of recovery. Because the court determined that the plaintiffs qualified as bystanders, they were allowed to pursue this claim against the city. The city argued that the mother’s and daughter’s injuries were dependent upon the son’s successful claim for his injuries under the TTCA. The court agreed, except to the extent that they suffered actual damages themselves, such as shock or mental anguish, from witnessing the accident. Moreover, because their injuries were separate and independent from the son, they were not limited by the son’s cap of $250,000. Each plaintiff was entitled to a separate recovery, up to the statutory limit of $250,000.

Francisca Bernal sued the City of El Paso when she tripped and fell on a city sidewalk. She claimed a worn spot on the sidewalk constituted a special defect under the TTCA. If the city had been unaware of the sidewalk’s condition and the worn spot did not qualify as a special defect, the city would not be liable. After reviewing the evidence, the trial court concluded that the worn spot, which was three inches at its lowest points, did not constitute a special defect and granted summary judgment. The court of appeals reviewed the evidence and concluded that the unexpected three-inch drop-off in the sidewalk might constitute a special defect, and thus reversed the trial court, remanding for trial. The Supreme Court reviewed the evidence and in a per curiam opinion concluded that “as a matter of law, the sidewalk’s condition was not a special defect.”

A child was killed by her father, but before her death the Texas Department of Protective and Regulatory Services (“TDPRS”) had questioned the parents based on complaints from family members. At that time, the TDPRS did not have enough conclusive evidence to determine whether abuse had occurred. After the child’s death, the family filed suit under the TTCA claiming that the government was liable for the death. The appellees claimed the forms and questionnaires from TDPRS were tangible property and led to the death of the child. The court cited a Texas Supreme Court decision that states such papers are tangible but

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73. See id. at 479.
74. See id. at 480.
76. See id. at 611.
77. See id.
78. See id.
79. Id. at 611.
80. See Bush v. Texas Dep’t of Protective and Reg. Services, 983 S.W.2d 366 (Tex. App.—Fort Worth 1998, pet. denied).
81. See University of Texas Med. Branch v. York, 871 S.W.2d 175, 178 (Tex.1994).
the information in them is intangible. Therefore, the government is not subject to the waiver of immunity. Furthermore, the court pointed out that the questionnaires were too far removed to have been the proximate cause of the injuries and death. The Court of Appeals affirmed the lower court’s summary judgment in favor of the TDPRS.

C. Federal Tort Claims Act/Preemption

The appellant, a Naval recruit, consented to sexual encounters with an officer and contracted genital herpes. The recruit sued the Navy, as the employer of the officer, claiming the Navy was responsible for the officer’s action under a negligence theory. The district court dismissed the appellant’s claim pursuant to Federal Rules of Civil Procedure 12(b)(6). Under the Federal Tort Claims Act (“FTCA”), the appellant tried to recover damages as a result of her relationship with the officer. The government claimed it had immunity because the transmission of the disease constituted a battery and therefore fell within the intentional tort exception of the FTCA. The court noted that the limited waiver of sovereign immunity, under the FTCA, should be strictly construed in favor of the government. Furthermore, since the conduct between the parties was consensual, the government had no duty under state law to intervene.

The Federal Bureau of Investigation (FBI) sent an agent into a business setting to gather information about fraudulent business activities. Brown’s claim accused the FBI of threatening him to remain silent and ordering him to become an informant. Brown pursued his claims under the FTCA for abuse of process, malicious prosecution, assault, intentional infliction of emotional distress, false imprisonment, and invasion of privacy. The trial court dismissed all FTCA claims on limitations grounds. Under the FTCA, there is a two-year statute of limitations. All events in this case occurred in August and September of 1993, and the lawsuit was filed in February of 1996. The Court of Appeals affirmed the lower court’s decision that the FTCA claims were time barred.

D. Statute of Limitations

Janis Honea was a passenger in a vehicle struck by a Morgan Drive Away, Inc. truck on October 3, 1995. In her suit, filed October 20, 1997, Honea claimed that she was not initially injured in the accident and did not discover her injuries until December 1, 1995. In response to the defendant’s motion for summary judgment on the basis of the statute of

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82. See Bush, 983 S.W.2d at 368.
83. See id. at 369.
84. See Leleux v. United States, 178 F.3d 750 (5th Cir. 1999).
85. See id. at 753.
86. See id. at 754.
87. See id. at 753.
88. See id. at 590.
89. See Brown v. NationsBank Corp., 188 F.3d 579 (5th Cir. 1999).
90. See id. at 590.
limitations Honea argued the discovery rule. She claimed that she filed suit within two years of discovery of her injuries. The trial court granted the motion for summary judgment, and the appellate court affirmed ruling that the nature of Honea's injuries were not "inherently undiscoverable" as required to invoke the discovery rule.\textsuperscript{91}

\section*{IV. IMPORTANT ISSUES}

\subsection*{A. DAMAGES}

The plaintiffs filed suit against Wal-Mart when the wife was injured by a falling basketball goal that struck her in the head, neck, and shoulder area.\textsuperscript{92} Appealing a judgment for the plaintiffs, the defendants raised three issues of error, all related to the damages. First, the defendants claimed there was either no evidence or insufficient evidence to justify a loss of earning capacity. Second, they claimed the trial court incorrectly submitted the element of loss of earning capacity to the jury. Last, they claimed the past and future loss of consortium and household services awarded by the jury for the husband were excessive. The Beaumont Court of Appeals rejected all three arguments. The jury was not asked to separate the damages for each element, but to give a total as to all elements of damage. The elements included earning capacity as well as physical pain, mental anguish, physical impairments and medical care.\textsuperscript{93} After thorough investigation of the record, the court decided it was not appropriate for an evidentiary review of a single element if the damages in the verdict were not separated from the beginning. Because the jury was not asked to separate the amounts between loss of consortium and household services, the jury could have awarded half for the future as they did for past. The court found the evidence was not so insufficient that the jury's verdict was clearly wrong or manifestly unjust.\textsuperscript{94}

\subsection*{B. INSURANCE ISSUES}

Criep was a treating physician for an individual receiving worker's compensation benefits. The employee's worker's compensation carrier filed suit against Criep, alleging that his medical care of the injured individual was negligent and was the proximate cause of the injuries. In this action, Criep sued the insurance company directly, claiming that the state court action against him was merely a ploy to induce him to testify on the carrier's behalf in a separate lawsuit.\textsuperscript{95} After reviewing the investigation performed by the insurance company prior to filing the suit, the court found there was essentially no investigation into the underlying facts to

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  \item \textsuperscript{91} See Honea v. Morgan Drive Away, Inc., 997 S.W.2d 705 (Tex. App.—Eastland 1999, no pet. h.).
  \item \textsuperscript{92} See Wal-Mart Stores, Inc v. Ard, 991 S.W.2d 518 (Tex. App.— Beaumont 1999, pet. denied).
  \item \textsuperscript{93} See id. at 520.
  \item \textsuperscript{94} See id. at 526-27.
  \item \textsuperscript{95} See Criep v. Sentry Ins., 49 F. Supp. 2d 954 (S.D. Tex. 1999).
\end{itemize}
support the suit against Criep. Accordingly, the United States District Court found that the insurance company's actions were an abuse of process and ultimately constituted intentional infliction of emotional distress against Criep.

In 1993, Costas Verinakis applied for a life insurance policy. As part of the application, Verinakis was required to undergo an examination and blood test. The defendant drew the blood, had it analyzed, and reported that Verinakis was positive for HIV. The insurance company thereafter refused Verinakis' application. Verinakis was then contacted by the City of Houston investigating the report that he tested positive for HIV. Several follow-up tests reflected that Verinakis was, in fact, negative for HIV. Verinakis sued the testing companies for negligence, defamation, etc. The trial court granted the defendant's motion for summary judgment on all the claims. The Houston Court of Appeals found that Verinakis met none of the exceptions which would allow him to recover mental anguish without a showing of physical injuries. Verinakis also suffered no personal physical injuries such that his general negligence claim could support a recovery of mental anguish damages. For lack of a pleading of a special relationship between Verinakis and the testing companies, the general negligence action could not support a recovery for mental anguish. Likewise, Verinakis was not actually exposed to a dangerous substance to support a "fear of cancer" action pursuant to the *Fibreboard Corp. v. Pool* line of cases.

Plaintiffs had health insurance coverage with an ERISA-sponsored plan. This suit was instituted against the plan by a plan member who argued that he suffered harm from the plan's failure to disclose the compensation relationship between the plan and the physicians who contracted with it. Ehlmann sought redress for violations of ERISA's disclosure obligation, noting that neither the plan nor the contracted physicians ever disclosed the financial incentives given to the physicians at the expense of the patients. The United States District Court found that the general disclosure language contained within ERISA does not obligate the plan to release the contractual agreement relationship regarding the physicians' compensation. Accordingly, the plaintiffs could not state a claim under ERISA that would entitle them to relief against the Plan.

C. Vicarious Liability

Lynda LaBono sued Fontenot and two corporations owned by Fontenot for slander and slander per se after Fontenot (and another employee) made comments to employees and customers of both corporations that

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97. *813 S.W.2d 658, 675 (Tex. App.—Texarkana 1991, writ denied)*.
LaBono had been a prostitute in her former employment. \(^9\) Defendants appealed this judgment entered after a jury verdict in favor of LaBono. The defendants argued that an employer is only responsible for its employee's slanderous statements if the employee had been recklessly hired, and there was no such evidence in this case. The Corpus Christi court found, however, that evidence existed to support the employee's status as a vice-principal—he had authority to write checks and to hire/fire employees of both corporations. Additionally, the statements were made at a company picnic and during ordinary business hours in front of other customers. Therefore, the jury's decision was supported by evidence that the statements were made during that employee's exercise of his managerial duty. Accordingly, the corporations could be held responsible for the vice-principal's slander even though such comments ordinarily would not be within the course and scope of his employment.

Fields owned and operated a timber truck. While driving that truck, he ran into an overpass. \(^10\) A log from the truck struck and killed Malone, whose survivors sued Fields and the timber company for whom Fields sold the timber. Fields and the timber company had a contractual agreement regarding payment for the timber from the mill that purchased the timber. The plaintiffs argued that the contractual agreement established either a principal/agent arrangement or a joint venture agreement between Fields and the timber company such that Fields' negligence could be imputed to the timber company. The court rejected both of these arguments, finding that Fields did his work independent of the timber company; that he decided when, where, what, and how to cut and deliver the timber; and that the timber company exercised no control over the details of his work. The plaintiffs' theory of negligent hiring on the part of the timber company also failed. The previous conduct of Fields, including drunken driving convictions, were not causally related to the negligence on the day of Malone's accident. Thus, the timber company could not have foreseen the event causing Malone's death. The summary judgment was therefore affirmed for the timber company.

D. Admimalty and Maritime

The Youngs were passengers in a vehicle struck by West, after West had been gambling and drinking on a riverboat casino owned by Players Casino. \(^10\) The Youngs brought this Dram Shop action against Players Casino, which moved for summary judgment arguing that Louisiana law governed the action and prohibits lawsuits against the sellers of alcohol for actions caused by those who consume the alcohol. Because the tort (serving alcohol to an intoxicated person) occurred on navigable water-

\(^9\) See Fontenot Petro-Chem & Marine Servs., Inc. v. LaBono, 993 S.W.2d 455 (Tex. App.—Corpus Christi 1999, pet. denied).

\(^10\) See Malone v. Ellis Timber, Inc., 990 S.W.2d 933 (Tex. App.—Beaumont 1999, no pet.).
ways, the United States District Court had admiralty jurisdiction over the case. Within admiralty and maritime law, the common law allows the federal court to fashion an appropriate rule to govern the case, in the absence of substantive rules of precedent. Noting prior instances where federal courts held maritime law to include Dram Shop liability, including a case in the Galveston Division of the Southern District of Texas, the court rejected the defendant’s argument that Louisiana substantive law should govern the action. Accordingly, the defendant’s motion for summary judgment was denied, and the Dram Shop action was to proceed to a jury trial.

The plaintiffs brought this wrongful death action as a result of a fatal helicopter crash at an oil rig on the Continental Shelf thirty-seven miles from Galveston, Texas. The action was pursued by the plaintiffs under the Outer Continental Shelf Lands Act (“OCSLA”). The defendants moved for summary judgment, arguing that the Death on the High Seas Act (“DOHSA”) applied to this case. The defendants said that DOHSA barred recovery for non-pecuniary losses and punitive damages. Recognizing prior Fifth Circuit opinions which apply federal maritime law over OCSLA, the court rejected the plaintiff’s argument to apply OCSLA. Because DOHSA (as federal maritime law) could apply to the facts of this helicopter crash, it would take precedence over OCSLA. Accordingly, the court was bound to apply the limitations of recovery contained with DOHSA, including no recovery for punitive damages or non-pecuniary damages.

Linda Jacobs, individually and as administratrix of her husband’s estate, sued the defendants after her husband died on board the defendants’ ship. After a bench trial, Jacobs was awarded damages for the wrongful death of her husband and for the survival damages of pain and suffering by her husband before he expired. Defendants appealed the survival damages awarded to the estate, arguing that the DOHSA precluded recovery of such damages. The Fifth Circuit agreed that the DOHSA was the exclusive remedy for Jacobs as he died on board a ship in international waters. Accordingly, general maritime law would not apply to this action, nor would the Texas survival statutes embodied in section 71.021 of the Civil Practice and Remedies Code. The limitations of recoveries under DOHSA precluded survival damages to the estates, and the Fifth Circuit revised the judgment accordingly.

E. AIRLINE LAWSUITS

Robert Lewis was a passenger on a Continental Airline flight from Missouri to Georgia that included a transfer at Houston Intercontinental. Lewis proceeded to the appropriate gate and was told by a gate agent to

105. See Jacobs v. Northern King Shipping Co., Ltd., 180 F.3d 713 (5th Cir. 1999).
wait approximately thirty minutes to board his airplane. Sometime later, when the gate agent moved to another gate, Lewis was informed that his flight had departed without him. After a lengthy delay and an overnight stay, Lewis tried to reschedule a new flight. In frustration, Lewis commented to a new gate agent that his luggage on the earlier flight could have contained a bomb. Security was called and Lewis was detained at the airport for an investigation. He was ultimately jailed in Harris County for twelve to fourteen hours. This suit against Continental and the Houston Police Department ensued. Continental moved through a 12(b)(6) motion to dismiss the case, based on the Airline Deregulation Act ("ADA"). The defendants argued that the ADA preempted any state law claims against the airlines. The court rejected that argument, noting that the preemption applies only to price, route, and services of an airline, but does not preempt the intentional infliction of emotional distress and assault claims asserted by Lewis. The test applied by the court required Lewis to show one of the following in order to avoid the limitations of the ADA: (1) the conduct was not part of an airline service; (2) the conduct was peripherally or remotely related to an airline service; or (3) the conduct by the airline was unreasonable or outrageous. In this case, Lewis established all three and, thus, was not limited by the Airline Deregulation Act.