2005

Personal Torts

Michael W. Shore

Judy Shore

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol58/iss3/23

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

Michael W. Shore*
Judy Shore**

I. INTRODUCTION

TORTS is "a body of law which is directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests . . . ." The law of torts is "concerned with the allocation of losses arising out of . . . the various and ever-increasing clashes of the activities of persons living in common society. . . ." And the purpose of tort law "is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another."3

In applying these principals, courts have developed a framework for ascribing liability, where the central idea is that liability is "based upon conduct that is socially unreasonable."4 The first step in the analysis inquires whether the defendant owes a duty to the plaintiff. If a duty exists, the second step in the analysis addresses breach of that duty. Did the defendant act in a socially unreasonable manner that breached a duty? The third step in the analysis considers causation. Did the defendant's actions result in the plaintiff's injuries? And the final step addresses damages that the defendant might owe for the plaintiff's injuries.

In earlier times, the jury was the entity that determined what socially reasonable or unreasonable conduct was, viewing the actors' conduct objectively in light of the circumstances. For several years, special interest groups, who do not trust or appreciate juries, have successfully lobbied the Texas Legislature to define in the abstract what is reasonable or unreasonable. To the extent the Texas Legislature has been unwilling to undermine the jury, politically motivated courts have taken up the task by casting aside decades, even centuries of common law precedent to

---

* B.A., B.B.A., Southern Methodist University; J.D., cum laude, Dedman School of Law, Southern Methodist University. Michael Shore is the founding partner of Shore Chan LLP, in Dallas, Texas. Significant work on this paper was contributed by Amy E. Blackwelder, Jerry Hrycyszyn, and Raj K. Krishnan, but the opinions expressed are the responsibility of its primary authors.

** B.A. Emory University; J.D., cum laude, Dedman School of Law, Southern Methodist University.

2. Id. at 6 (citing Wright, Intro. to the Law of Torts, 8 CAMBRIDGE L.J. 238 (1944)).
3. Id.
4. Id.
“limit” the role of lay jurors in deciding societal norms. The result is more economic certainty in the macro sense, but at a high cost. Juries are less respected, making jury duty much less meaningful. Since statutes are not enacted or debated with individual cases or circumstances in mind, justice becomes a “one size fits all” system that often fits no one. In a country where individuality and personal liberty are still popular notions, codifying tort compensation is an area where economic “conservatives” use socialistic state control to their advantage.

II. DUTY

Several cases during the survey period examined the existence of legal duties and common law causes of action.

A. THE DUTY TO WARN—HUMBLE SAND & GRAVEL, INC. v. GOMEZ, 146 S.W.3d 170 (TEX. 2004)

In Gomez, the Texas Supreme Court ignored the basic premise that a manufacturer has a duty to warn users of its products’ dangerous characteristics and instead established a complicated and vague set of duty factors that mix issues of duty and causation. The Texas Supreme Court questioned whether a manufacturer had a duty to place warnings on its product, even though the defendant’s product was extremely hazardous, the defendant knew about these hazards, the burden of including a warning was inconsequential, the injured plaintiff would have read and heeded an adequate warning, and but for the product, the plaintiff would not have acquired an incurable and potentially fatal disease.

Raymond Gomez contracted silicosis while working around abrasive blasting for about six and one-half years. Gomez filed suit against more than twenty defendants, all of whom settled except Humble Sand & Gravel Co., one of the suppliers of flint used in abrasive blasting. In a jury trial, Gomez obtained a judgment against Humble for about $2 million. Humble appealed, arguing that it had no duty to warn of the dangers of silicosis because: (1) the dangers were well known in the abrasive blasting industry; (2) Humble sold only to industrial customers; and (3) Humble was entitled to rely on its industrial customers to provide their own employees, like Gomez, with necessary warnings. The court of appeals rejected Humble’s arguments and affirmed the jury’s verdict.

Gomez was exposed to fine particles of silica in his abrasive blasting work. Inhaling fine particles of free silica, over even months, causes silicosis, “an incurable disease involving afibrosis scarring of the lungs” that can eventually result in death. The health risks associated with inhaling silica dust had been known in the industry and medical community for a long time.

6. Id. at 173, 180.
7. Id. at 174.
Abrasive blasting with flint can be performed relatively safely if workers wear suitable protective equipment. U.S. Occupational Health and Safety Administration (OSHA) regulations require employers to supply respirators or air-fed hoods to protect workers that conduct abrasive blasting. Accordingly, companies conducting abrasive blasting operations, including Gomez's employers, were at least somewhat aware of these health hazards. However, employees conducting the abrasive blasting, including Gomez, were not aware of the risks. Further, the employers' knowledge of the risks did not translate into safe work practices.\(^8\)

Humble sold flint in bulk and in one-hundred-pound bags only to industrial customers, including Gomez's employer. Humble knew of the health hazards associated with breathing silica dust, but included only a fairly benign warning on its bags. The understated warning did not identify death as a possible outcome of improper use and did not identify proper protective equipment necessary for safe use.\(^9\)

Gomez read the inadequate warnings on the Humble bags and did not have an appreciation for the real risk associated with breathing the dust created by abrasive blasting operations—that he could die. Although he wore proper protective equipment in the limited area his air-fed hood reached, he often worked at jobs that created dust (like cleaning) and he entered and left dusty areas without any protective equipment.\(^10\)

The existence of a legal duty and the elements of any duty are questions of law.\(^11\) The jury considered Humble's conduct under two separate legal theories, products liability and negligence, but the Texas Supreme Court did not consider the differences between the two and assumed the duty to warn was the same under both theories.\(^12\) The Texas Supreme Court held that several factors should be considered and balanced in determining whether a duty exists, including social, economic, and political questions, . . . the risk, foreseeability, and likelihood of injury, the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury against the consequences of placing the burden on the defendant . . . [and] whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm.\(^13\)

The plaintiff, as a general rule, "must establish the existence of a duty."\(^14\) In Gomez, however, the Texas Supreme Court held that the defendant Humble had the burden of showing it had no duty to warn.\(^15\) The

\(^{8}\) *Id.* at 174-95.
\(^{9}\) *Id.* at 176.
\(^{10}\) *Id.* at 178-79.
\(^{11}\) *Id.* at 181.
\(^{12}\) *Id.*
\(^{13}\) *Id.* at 182 (citing Graff v. Beard, 858 S.W.2d 918, 920 (Tex. 1993); Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983); Praesel v. Johnson, 967 S.W.2d 391, 397-98 (Tex. 1998)).
\(^{14}\) *Id.* at 182-83 (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989)).
\(^{15}\) *Id.* at 195.
Texas Supreme Court noted that, "in most circumstances, a supplier's duty to warn is simply assumed."\(^\text{16}\) And "circumstances, in which that assumption is not warranted, . . . are more the exception than the rule."\(^\text{17}\) The Texas Supreme Court also stated suppliers, like Humble, are more likely to have access to the "evidence regarding the efficacy or inefficacy" of their warnings.\(^\text{18}\) Further, the court noted that "other cases tend to treat the intermediary issue generally as defensive," and therefore, the burden of proving no duty to warn should properly be on the defendant Humble.\(^\text{19}\)

The Texas Supreme Court stated that a "supplier has no duty to warn of risks involved in a product's use that are commonly known to foreseeable users, even if some users are not aware of them."\(^\text{20}\) The Texas Supreme Court defined "commonly" as "beyond dispute" and stated that it does not require that something is universally known.\(^\text{21}\) Because the Texas Supreme Court concluded that the dangers of inhaling silica dust were well known among flint suppliers and abrasive blasting operators, the Texas Supreme Court concluded that Humble had no duty to warn its customers, the abrasive blasting operators.\(^\text{22}\)

However, as the dissent points out, the abrasive blasting operators' knowledge of these hazards is not as clear as the majority opinion implies.\(^\text{23}\) The abrasive blasting operators knew there was some risk because OSHA required protective equipment and these abrasive blasting operators provided that protective equipment.\(^\text{24}\) However, the provided safety equipment and the enforcement of safe work practices were so inadequate that the dissent makes a compelling argument that the operators did not truly appreciate the risk, both in terms of the minimal amounts of exposure that can lead to disease and the minimal amounts of exposure that could lead to fatalities.\(^\text{25}\) Either the blasting industry did

\(^{16}\) Id.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) Id. at 183 (emphasis added).

\(^{21}\) Id. (citing Am. Tomacco v. Grinnell, 951 S.W.2d 420, 427 (Tex. 1997) (quoting Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991)). As contrasting examples of what is "commonly" known, the court cited to cases which analyzed dangers of alcohol and tobacco use. In Seagram, the Court concluded that the "dangers of alcoholism from prolonged and excessive consumption of alcoholic beverages was common knowledge among the public, even though the plaintiffs in that case asserted that they were themselves personally unaware of this danger." Id. (citing Seagram, 814 S.W.2d at 388). But in Grinnell, the Court concluded that "while the general health risks of smoking were common knowledge, the specific risk of addiction continued to be disputed by the tobacco industry itself and thus could not be said to be common knowledge among smokers." Id. (citing Grinnell, 951 S.W.2d at 427).

\(^{22}\) Id. at 184-85.

\(^{23}\) Id. at 199-201.

\(^{24}\) Id. at 175.

\(^{25}\) Id. at 199-201. For example, the vice president and head of safety at one of the companies where Gomez worked stated that he himself walked through the blasting areas where dangerous dust was present with no protective equipment and he stated that he thought it was just "nuisance dust." Id. at 201. Further, studies done by the National
not know about the danger and real risk or it knew about the risk and intentionally ignored it and put its employees at grave risk of death. The Texas Supreme Court appeared to opt for the latter, but without really acknowledging the implication of its judgment; the implication being that the companies acted in at least a grossly negligent manner, but probably even intentionally inflicted fatal diseases on their employees.

The Texas Supreme Court began its duty analysis with a review of two cases finding that manufacturers had no duty to warn end users where the manufacturer only sold to an intermediary.26 In Alm v. Aluminum Co. of America, the Texas Supreme Court held that “a manufacturer or supplier may, in certain situations, depend on an intermediary to communicate a warning to the ultimate user of a product.”27 In Alm, an aluminum cap had popped off a soda bottle and struck [the plaintiff] in the eye. Alcoa manufactured the machine that fastened the cap to the bottle top, and [the plaintiff] claimed Alcoa should have warned him of the risk that a cap could pop off. But the machine Alcoa manufactured was owned and operated by an independent bottler and Alcoa did not control the bottling process . . . and had no practical way of reaching consumers with any warning.28 In that situation, the Texas Supreme Court concluded “Alcoa should be able to satisfy its duty to warn consumers by proving that its intermediary [the bottler] was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning.”29 The Texas Supreme Court also “noted that other courts had held that a pharmaceutical manufacturer is not required to warn patients of the dangers of a prescription drug as long as physicians who prescribe the drug, ‘learned intermediaries,’ have been adequately warned.”30 The Texas Supreme Court stated that “in both situations . . . it would be reasonable for the supplier to rely on the intermediary to warn the ultimate consumer.”31 But the Texas Supreme Court cautioned:

the mere presence of an intermediary does not excuse the manufacturer from warning those whom it should reasonably expect to be endangered by the use of its product. The issue in every case is whether the original manufacturer has a reasonable assurance that its

Institute for Occupational Health and Safety in the early 1970s showed that the safety practices in the industry were deplorable and that companies appeared to be unaware of the problems with silica dust or the deficiencies in safety equipment and practices. Id. at 175. As the dissent points out, these studies predate Gomez’s exposure by about ten years, but they clearly show that even though the dangers of silica dust had been documented over forty years prior to those studies, the abrasive blasting industry still did not fully appreciate the danger. Id. at 201.

26. See id. at 185.
27. Id. (quoting Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591 (Tex.1986)).
28. Id.
29. Id. (quoting Alm, 717 S.W.2d at 592).
30. Id. (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 cmt. b (1998)).
31. Id.
warning will reach those endangered by the use of its product.\textsuperscript{32}

Because the Texas Supreme Court held that Humble had no duty to warn the abrasive blasting operators of anything related to its products, the narrower issue became whether Humble had a duty to warn end users, \textit{i.e.} employees who used Humble’s product, of the product’s dangers.\textsuperscript{33} The Texas Supreme Court addressed this issue by reviewing the individual duty factors it had identified.

The Texas Supreme Court analyzed the first factor, likelihood of serious injury from a supplier’s failure to warn.\textsuperscript{34} The Texas Supreme Court stated that “[s]ilicosis, unquestionably a serious injury, is likely to result from working around silica dust without properly using protective equipment.”\textsuperscript{35} But the Texas Supreme Court stated “[w]hether such injury was also likely to result from a supplier’s failure to warn workers of the seriousness of silicosis and the importance of wearing an air-fed hood is far from clear on the record before us.”\textsuperscript{36} Essentially, the Texas Supreme Court focused on the “issue” identified in \textit{Alm}, “whether the original manufacturer has a reasonable assurance that its warning will reach those endangered by the use of its product.”\textsuperscript{37} The Texas Supreme Court stated that the record did not reflect “whether flint was supplied mostly in bags or in bulk . . . [and] there [was] no evidence that it was feasible for bulk sellers to warn their customers’ employees . . . .”\textsuperscript{38} Further, the Texas Supreme Court stated the record was “completely silent on whether it was common in the industry for blasting workers to handle bags.”\textsuperscript{39} Thus, it was “unclear whether warnings printed on bags could ordinarily have been expected to reach blasting workers.”\textsuperscript{40} Perhaps one of the most appalling comments was the court’s statement that Humble might not have a duty to warn because “[e]ven if blasting workers ordinarily saw bag labels, there is some suggestion at least that the warnings would have been ineffectual, that they would have continued on in their jobs out of economic necessity.”\textsuperscript{41} The Texas Supreme Court, in effect, condemns a class of workers as too ignorant and powerless to bother warning.

Even though evidence established that Gomez would have seen a warning if Humble provided it, he would have understood it, and he would have never continued to work as a blaster if he read an adequate warning, the Texas Supreme Court identified this as a “fluke” and stated there was “nothing in the record” that showed failure to provide adequate warnings increased the likelihood of serious injury.\textsuperscript{42}

\begin{footnotesize}
\begin{itemize}
\item[32.] \textit{Id.} (citing \textit{Alm}, 717 S.W.2d at 591 (emphasis added)).
\item[33.] \textit{Id.} at 185-86.
\item[34.] \textit{Id.} at 192-93.
\item[35.] \textit{Id.} at 192.
\item[36.] \textit{Id.}
\item[37.] \textit{Id.} at 185 (citing \textit{Alm}, 717 S.W.2d at 591).
\item[38.] \textit{Id.} at 192.
\item[39.] \textit{Id.}
\item[40.] \textit{Id.}
\item[41.] \textit{Id.}
\item[42.] \textit{Id.} at 192-93.
\end{itemize}
\end{footnotesize}
In analyzing the second factor, the Texas Supreme Court acknowledged that the "record establis[h]d that the burden on a supplier of flint in bags is either inconsequential or nonexistent."43

With regard to the third factor, the court stated that "it was obviously feasible for suppliers to print warning labels on bags," but then the court stated it was "not clear from the record whether such labels would have reached blasting workers or would have reduced the risk of silicosis if they had" reached the workers.44 Here, the court confused duty with causation in broad sweeping terms. The Texas Supreme Court stated the "feasibility of printing words on a bag is not in any doubt, but the feasibility of using that medium to communicate any meaningful warning effectively is."45 Then the court focused on the proper use of safety equipment, stating that the problem was proper use of protective equipment and it was not up to Humble to ensure that it was properly used.46

The court, however, misses the point. Neither the employees, nor the operators understood the importance of wearing protective equipment or wearing it properly because they did not understand the risk associated with NOT using it. That is the essence of any warning. Had the warnings been adequate, then the employees could have sought more information from the operators on proper protective equipment use and would have practiced greater diligence in ensuring proper use. Regardless, these are issues of causation or comparative fault, not duty.

Under the Texas Supreme Court's fourth factor, the reliability of operators to warn their own employees, the Texas Supreme Court again stretched for an excuse to not find a duty. The court stated, "the record establishes that [the abrasive blasting operators] routinely neglected safety measures and did not warn employees" even though they "knew the dangers of working around silica dust, were in a far better position than flint suppliers to warn their own employees of those dangers, and could have reduced or eliminated altogether the risk of silicosis by following federal regulations."47 But then the court stated, "there is no evidence that any government agency or industrial safety group ever considered that safety could be improved by suppliers' warnings."48 This does not have anything to do with "the reliability of operators to warn their own employees." It appears that the Texas Supreme Court was simply trying to justify not finding a duty.

Under the court's fifth factor, the existence and efficacy of other protections, the court stated that "the existence of a comprehensive regulatory scheme to protect against norm weights against imposing a common law duty to accomplish the same result if the scheme affords significant

43. Id. at 193.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
The court noted that OSHA regulations prescribed standards for abrasive blasting that were legally enforceable against operators and that, if followed, would have provided safe working conditions. But the Texas Supreme Court also noted that "evidence [was] overwhelming that the regulations were widely disregarded and as a practical matter, afforded workers little protection." If an adequate warning had existed, workers would be in a position to question the non-compliance of their employers because they would have known non-compliance was dangerous.

Under the Texas Supreme Court's sixth factor, the social utility of requiring, or not requiring, suppliers to warn, the court stated "[r]equiring suppliers to warn would avoid some injuries, including Gomez's, but shifting responsibility away from operators might lessen even further their incentives to provide a safe working environment, ultimately resulting in injuries to more workers than if warnings were not given." The lack of logic or coherent thought is astounding. The Texas Supreme Court, in essence, stated if you warn an employee that a product is dangerous, their employer may not provide them the equipment necessary to use it safely because the warning to use safety equipment might lead employers to think their employees do not need it.

In balancing these factors, the Texas Supreme Court stated it could not determine from the record whether a duty should or should not be imposed on flint suppliers, such as Humble, to provide their customers' employees with warnings. The Texas Supreme Court stated:

If most of the harm to abrasive blasting workers was due to the use of flint supplied in bulk, it would be a perverse result if the responsibility for injury fell solely on those doing the least harm—suppliers who sold flint in bags. If abrasive blasting workers do not ordinarily see bag labels, it would do little good to require that the labels be more specific. And if abrasive blasting operators persistently require their employees to work in unsafe conditions, it is not clear that the purposes of imposing a duty to warn—encouraging care and protecting users—can be advanced by requiring flint suppliers to warn that those conditions are indeed unsafe.

As the dissent so aptly pointed out, the majority conflated duty and causation to create vague and ambiguous guidelines for determining whether a duty exists. As characterized by the dissent:

49. Id. at 193-94 (citing Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 714-715 (Tex. 2003) (holding that a common law duty to use ordinary care in taking urine specimens for drug tests should not be imposed on employers when there is a "comprehensive statutory and regulatory scheme" already in place that "affords significant protection to employees who are the subject of random drug tests").

50. Id. at 194.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id. at 197.
Humble had no duty to warn potential users of its product's dangers if it can demonstrate that, industry-wide: (1) some/most/all (it's unclear from the Court's opinion) operators used bulk-supplied rather than bagged flint; (2) any warning given would not have reached some/most/all (it's unclear) blasting workers; and/or (3) some/most/all (it's unclear) blasting workers would have disregarded the warning.  

The dissent argued that the court subverted the analysis developed in Alm, by ignoring its fundamental premise that "a product manufacturer has a duty to inform users of potential hazards associated with the product." The dissent recognized that exceptions to the general rule exist, but such exceptions, "have been narrowly tailored to situations where (1) the manufacturer would have difficulty in providing a warning itself; and (2) 'its intermediary was adequately trained and warned, familiar with the propensities of the product, and capable of passing on a warning.'" "[T]he Court's abandonment of fundamental products-liability principles is an attempt to judicially cabin widespread and oft-abused mass-tort claims that have arisen from latent workplace injuries caused by substances like silica and asbestos." "But as the United States Supreme Court has recognized, the solution to these problems is legislative, not judicial." Gomez is an example of pure judicial legislation by anti-worker activist judges.

B. DUTIES OWED BY A POSSESSOR OF LAND—MILITARY HIGHWAY WATER SUPPLY CORP. v. MORIN, 2005 WL 119933 (TEX. 2005)

In Morin, the Texas Supreme Court narrowly construed the duty a possessor of land owes to the traveling public. Under the Texas Supreme Court's decision, a possessor of land owes no duty to safely maintain open pits on land adjoining a road if the traveling public encounters the pit as a result of an independent accident that causes a vehicle to deviate a short distance from the road, even if that accident was foreseeable. This decision severely limits causes of action against landowners that negligently maintain pits near roads and highways.

Morin involved a wrongful-death and survivorship action stemming from an automobile accident. Mercedes Melendez Morin was driving his car northbound, on a road with a posted speed limit of fifty-five miles per hour, when he hit a horse that darted across the road. Because the county where the accident occurred had no local livestock control laws, livestock could roam freely near road traffic. After it struck the horse,

56. Id.
57. Id. at 198 (citing Alm, 717 S.W.2d at 591).
58. Id.
59. Id. at 203.
60. Id. at 204 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997)).
62. Id.
Morin's vehicle veered across the median and across the southbound lane of traffic before it entered the shoulder of the southbound lane and hit a pit that caused the car to flip. Morin and his front-seat passenger died as a result of this accident.63

The defendant dug the pit to install a water meter, but failed to fill in the pit even though the meter installation was completed months before the accident and even though Texas Department of Transportation regulations required that the pit be filled after completion of the meter installation. Further, the defendant knew for months that the pit was not filled. The pit was between twenty and twenty-five feet from the edge of the southbound lane and approximately 535 feet from the point of Morin's impact with the horse.64

"Several family members and the estates of Morin and [his passenger] sued [the defendant] for negligence."65 After a trial on the merits, the jury found that the defendant and Morin were fifty-two percent and forty-eight percent, respectively, responsible for the accident and awarded damages to the plaintiffs.66 The defendant appealed, asserting that it owed no duty to the plaintiffs as a matter of law.67 The court of appeals held that the defendant owed a duty under the facts of this case.68 The Texas Supreme Court granted review and held that the defendant had no such duty.69

The Texas Supreme Court started with the rule that a "possessor of land who allows an excavation to remain on the land owes a duty to persons who encounter the excavation after: (1) traveling with reasonable care on the highway; and (2) foreseeably deviating from the highway in the ordinary course of travel."70 The Texas Supreme Court assumed that Morin encountered the excavation after "traveling with reasonable care on the highway."71 Therefore, the defendant landowner owed a duty to Morin only if Morin's deviation from the road occurred "in the ordinary course of travel."72

Section 368 of the Restatement (Second) of Torts provides that "a traveler is not 'in the ordinary course of travel' unless the deviation from the road is a normal incident of travel."73 The court stated that, in this determination, "the distance between the highway and the condition is frequently decisive, since those who deviate in any normal manner in the ordinary course of travel cannot reasonably be expected to stray very far from the highway."74

63. Id. at *1, *3.
64. Id.
65. Id. at *2.
66. Id.
67. Id.
68. Id. (citing Military Highway Water Supply Corp. v. Morin, 114 S.W.3d 728, 736, 738-39 (Tex. App.—Corpus Christi 2003, pet. granted)).
69. Id. at *1.
70. Id. (citing Restatement (Second) of Torts § 368 (1965) (emphasis added)).
71. Id. at *3.
72. Id.
73. Id. (citing Restatement (Second) of Torts § 368 cmt. g (emphasis added)).
Accordingly, the Texas Supreme Court focused on two distances in its analysis of whether Morin’s encounter with the pit was “in the ordinary course of travel”: (1) the 535 foot distance between the pit and Morin’s point of impact with the horse; and (2) the twenty to twenty-five foot distance between the road’s edge and the pit.  

The Texas Supreme Court held that Morin did not deviate from road “in the ordinary course of travel” when he hit a horse that darted onto the road, in a county that allowed horses to roam freely next to traffic, and his vehicle veered across the road and hit a pit only twenty to twenty-five feet from the edge of the road.  

The court did not take into account the foreseeability of Morin’s accident—Morin veered off the road only after he hit a horse that darted out into traffic on a road where livestock was free to roam alongside the road. The Texas Supreme Court simply stated that Morin’s accident was a greater deviation from normal travel than the deviation the Texas Supreme Court analyzed in a previous case, De La Garza, and Morin’s accident was, therefore, not within the ordinary course of travel. 

In De La Garza, the Texas Supreme Court held that a driver did not deviate from the road as a normal incident of travel when his car landed in an excavation located within ten feet of the roadway’s edge, after the car traveled approximately 250 feet from the point where the driver fell asleep at the wheel. Although De La Garza cited several decisions from various jurisdictions with similar holdings, the Texas Supreme Court did not explain why deviating from the road as a result of an accident was not “in the ordinary course of travel.” Morin did not shed any additional light on the subject, except that the distance traveled in encountering the pit is a factor in determining whether the landowner owes a duty to the traveling public. 

Based on the Texas Supreme Court holdings in Morin and De La Garza, it is difficult to imagine any deviation from a road that would be considered a normal incident of travel and impose a duty of due care on

---

74. Id. (citing Restatement (Second) of Torts § 368 cmt. h).
75. Id.
76. Id.
77. Id. at *1.
78. Id. (citing City of McAllen v. De La Garza, 898 S.W.2d 809, 810 (Tex. 1995)).
79. De La Garza, 898 S.W.2d at 810.
80. Id. at 811-12 (citing Swope v. N. Ill. Gas Co., 623 N.E.2d 841, 845 (Ill. App. Ct. 1993), appeal denied, 631 N.E.2d 719 (1994) (“it was foreseeable that truck might swerve to miss deer and collide with embankment ten feet from the road, but this was not the type of accident one would expect under normal driving conditions”); Fla. Power & Light Co. v. Macias, 507 So. 2d 1113, 1115-16 (Fla. App. 1987) (“no duty owed by utility company to driver who lost control of his car and hit utility pole, even though plaintiff alleged there were seventeen other accidents involving defendant’s poles in the same area”); Cooper v. Unimin Corp., 639 F. Supp. 1208, 1214 (D. Idaho 1986) (“owner of sand pit owes no duty to trespasser who left roadway to urinate because such a deviation is not in the ordinary course of travel”); Collier v. Redbones Tavern & Rest., Inc, 601 F. Supp. 927, 930-31 (D.N.H. 1985) (“erratic and uncontrolled deviation by drunken and speeding driver is not a normal incident of travel”).
an adjoining landowner. To the Texas Supreme Court, it is apparently rarely "normal" to leave the paved surface. It appears that any deviation from a road caused by an automobile accident, regardless of the accident's foreseeability, is not in "the ordinary course of travel." These cases severely limit causes of action against landowners that negligently maintain pits near roads and highways.


In Reese, the Texas Supreme Court reaffirmed that parents are prohibited from bringing claims on behalf of a stillborn fetus under the Texas wrongful death and survival statutes. Apparently, Christian conservatives do not have the same influence as insurers with the Texas Supreme Court. The Texas Supreme Court also held, for the first time, that the Texas wrongful death and survival statutes were constitutional because parents and their stillborn fetuses were not denied equal protection of the laws.

Tara Reese went to the "emergency room in her seventh month of pregnancy, complaining of a racing pulse and dizziness." The doctors "determined that she had high blood pressure and sent her to the delivery room for observation." Although the doctors had a difficult time detecting the fetus' heart tones, they did nothing to aid the fetus. In the morning, the doctors determined that the fetus would be stillborn. The Reeses, on behalf of their stillborn child, brought various causes of action against the health care providers under the Texas wrongful death and survival statutes.

"The trial court granted summary judgment in favor of all health care providers." The court of appeals reversed the trial court, holding that the Reeses could assert wrongful death and survival actions on behalf of their stillborn fetus. The Texas Supreme Court granted the defendant health care providers' petition for review.

The Texas Supreme Court stated that the common law prevented recovery by a stillborn fetus and the Texas wrongful death and survival statutes did not modify the common law because these statutes only protected the rights of an "individual" or a "person" and thus, did not include a stillborn fetus. The common law dictated that the death of a person extinguished all of the decedent's tort actions and third persons

83. Id. at 97-98.
84. Id. at 94-96.
85. Id. at 96.
87. Reese, 148 S.W.3d at 95.
88. Id. at 97.
who suffered loss by the decedent's death, such as parents, also lost their right to recover.89

Although the Texas Legislature enacted the wrongful death and survival statutes in 1860 and 1895 to “ameliorate this harsh result,” the Texas Supreme Court interpreted these statutes narrowly to exclude stillborn fetuses.90 The Texas wrongful death statute provides: “[a] person is liable for damages arising from an injury that causes an individual’s death if the injury was caused by the person’s or his agent’s or servant’s wrongful act, neglect, carelessness, unskillfulness, or default.”91 And the Texas survival statute provides: “[a] cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.”92 The Texas Supreme Court reasoned that a stillborn fetus is not an “individual” or “person,” and therefore, it concluded that the Texas Legislature did not intend to include an unborn fetus within the scope of these statutes.93

Through contorted reasoning, the Texas Supreme Court “reconciled” its previous decisions.94 In Brown, the Court held that a fetus that suffered injuries in utero but was born alive before it later died was a “patient” and the statute of limitations for its wrongful death began to run from the date of its pre-birth injuries.95 According to the court’s logic, there is nothing inconsistent about starting the statute of limitations for injuries sustained while the “non-individual” and “non-person” fetus is in utero if the fetus is born alive, but denying such a “non-individual” and “non-person” any rights for fatal injuries sustained in utero if the fetus does not survive at least a short time out of the womb. The pattern is clear. If making a fetus an “individual” extinguishes its claims through limitations, it is an “individual.” However, if considering a fetus an “individual” creates liability under the wrongful death statute, a fetus is a “non-individual.”

The Texas Supreme Court also held that the Texas wrongful death and survival statutes, as it interpreted them to exclude cause of action by a stillborn fetus, did not violate the equal protection clause of the U.S. Constitution.96 The Fourteenth Amendment provides that “[n]o State shall . . . deny to any person . . . the equal protection of the laws.”97

89. Id. at 96 (citing W. PAge KEETON Et AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127 at 945 (5th ed. 1984)).
90. Id. at 96-96; WitTY, 727 S.W.2d at 506 (holding that parents of a stillborn fetus had no right to bring actions under the wrongful death or survival statutes).
92. Id. § 71.021(a) (emphasis added).
93. Reese, 148 S.W.3d at 96 (citing WitTY v. AM. Gen. Capital Distrib., Inc., 727 S.W.2d 503, 504 (Tex. 1987)).
94. Id. at 96-97 (citing Witty, 727 S.W.2d at 506; Brown v. Shwarts, 968 S.W.2d 331, 335 (Tex. 1998)).
95. Brown, 968 S.W.2d at 335.
96. Reese, 148 S.W.3d at 97-98.
Accordingly, two classifications were at issue in Reese: (1) "the distinction in the wrongful death statute between parents of a stillborn fetus and parents of a child born alive;" and (2) "the distinction under the survival statute between a fetus that dies in utero and a fetus that is born [alive] but dies subsequent to birth." The court stated that the U.S. Supreme Court's decision in Roe v. Wade settled this issue because the case held that the unborn are not included within the protection of the Fourteenth Amendment, which contains the Equal Protection Clause. Further, the Texas Supreme Court stated that a parent's claim for damages for the death of a child is "entirely derivative of the child's cause of action against a tortfeasor." Therefore, the Texas Supreme Court reasoned that it "is not a violation of the Equal Protection Clause to fail to provide parents with a claim for the wrongful death of a fetus in utero when the Equal Protection Clause does not prohibit a legislative body from withholding a wrongful death cause of action from the fetus."

It is also interesting to note just how blatant the Texas Legislature's bias is in favor of the medical profession. In 2003, the Texas Legislature granted the parents of a stillborn child a cause of action under the wrongful death statute. But the Texas Legislature expressly excluded any cause of action under this statute for actions brought "for the death of an individual who is an unborn child that is brought against . . . a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or health care provider." What is the wisdom behind denying rights to an unborn child killed by a doctor's gross negligence but granting rights to an unborn child killed in a car accident?


In Smith, an ex-wife sued her ex-husband's new wife for criminal conversation and alienation of affection. The Court of Appeals in Houston upheld, as constitutional, sections of the Texas Family Code that specifically abolished these two common law causes of action. This is consistent with Texas tort law trends where causes of action are statuto-

---

98. Reese, 148 S.W.3d at 98.
99. Id. (citing Roe v. Wade, 410 U.S. 113, 158 (1973)).
100. Id. (citing Diaz v. Westphal, 941 S.W.2d 96, 99 (Tex. 1997)).
101. Id.
The "open courts" provision of the Texas Constitution provides that "[a]ll courts shall be open and every person for an injury done to him, in his lands, goods, person or reputation, shall have a remedy by due course of law." However, there is a strong presumption that statutes are valid. A statute violates the "open courts" provision of the Texas Constitution only if it abrogates a well-established common law cause of action "without a showing that the legislative basis for the statute outweighs the denial of the right of redress." The Court held that the Texas Legislature's abolition of the criminal conversation cause of action was constitutional because: (1) this tort was not a well-established common law cause of action, and (2) the legislative basis for the statute outweighed the denial of the right of redress. Criminal conversation is a common law tort affording a spouse a cause of action against a third party who engaged in sexual intercourse with the other spouse. Even though criminal conversation is an old tort with roots in English common law, the court of appeals held that it was not an established common law cause of action because only two years had passed between the first Texas Supreme Court decision which recognized this cause of action and the Texas Legislature's abolition of the cause of action. Further, the court of appeals held that the legislative basis for the statute outweighed the denial of the right of redress.

The court of appeals stated that cases involving criminal conversation were "unsavory" and "unpleasant" and even though innocent spouses suffer from acts of marital infidelity, an award of damages will neither alleviate their emotional distress, nor strengthen their marital ties. But "unpleasant" or "unsavory" facts should not be sufficient justification to eliminate a cause of action. Further, in other torts involving emotional distress or damages to reputation, such as intentional infliction of emotional distress and slander, an award of damages might not alleviate the emotional distress or repair the damage to reputation, but the causes of action exist and are effective deterrents to such behavior. Although, the

---

108. Smith, 126 S.W.3d at 663 (citing TEX. GOV'T CODE ANN. § 311.021 (Vernon 1998) ("it is presumed the Legislature intended (1) the statute to satisfy state and federal constitutions; (2) a just and reasonable result; (3) the result to be feasible of execution; and (4) to favor public interest over private interest")).
109. Id. at 664 (citing Sax v. Votteler, 648 S.W.2d 661, 665-66 (Tex. 1983)).
110. Id. at 664-65.
111. BLACK'S LAW DICTIONARY 402 (8th ed. 2004).
112. Smith, 126 S.W.3d at 664 (citing Felsenthal v. McMillion, 493 S.W.2d 729-30 (Tex. 1973); TEX. FAM. CODE ANN. § 1.106 (Vernon 1998)). The tort of criminal conversation has an old English common law heritage and was expressly recognized by the Supreme Court of Texas in 1973. See Felsenthal, 493 S.W.2d at 729-30. However, two years later, as a direct response to this supreme court decision, the Texas Legislature abolished the cause of action. See TEX. FAM. CODE ANN. § 1.106 (Vernon 1998) ("[a] right of action by one spouse against a third party for criminal conversation is not authorized in this state").
113. Smith, 126 S.W.3d at 664 (citing Felsenthal, 493 S.W.2d at 730-31).
court of appeals stated that the tort of criminal conversation is not an effective deterrent, it provided no discussion to support this conclusion. On the other hand, the court of appeals stated that infidelity is a factor that is considered in divorce. Under the court of appeals' rationale, the aggrieved spouse would need to file for divorce and extract a greater settlement as an effective redress. But this is not redress against the third party. Further, the court of appeals stated that the besmirched spouse might have a cause of action for intentional infliction of emotional distress against the third party. But this cause of action has a very high threshold of "extreme and outrageous" conduct and the court did not note a single case where a plaintiff was successful in bringing such a cause of action.

The court of appeals also held that the Texas Legislature's abolition of the alienation of affection cause of action was constitutional because the legislative basis for the statute outweighs the denial of the right of redress. The common law tort of alienation of affection is a cause of action for willful or malicious interference with a marriage by a third party without justification or cause. The court of appeals found that alienation of affection was an old English common law tort that is well established in Texas. But the Court held that the legislative basis for the statute outweighed the denial of the right of redress. The court stated that "the cost to defend such a suit is great and the harmed spouse rarely recovers." The Legislature referred to alienation of affection as an outdated common law that had no place in modern society. It is not clear what the court or the legislature meant by modern society—perhaps it is a society free of responsibilities that can be redressed in the courts. Based on this, the court stated that this cause of action had limited value. Further, the Court stated that the harmed spouse could use such infidelity to extract a greater division of assets in a

114. Id. Similarly, the dissent in Felsenthal did not justify its argument that the tort of criminal conversation has no deterrent effect. Felsenthal, 493 S.W.2d at 731.
115. Smith, 126 S.W.3d at 665 (citing TEX. Fam. Code Ann. § 7.001 (Vernon 1998); Murff v. Murff, 615 S.W.2d 696, 698-99 (Tex. 1981)).
116. Id. (citing Twymon v. Twymon, 855 S.W.2d 619, 621-22 (Tex. 1993).
117. Id. (citing Stites v. Gillum, 872 S.W.2d 786, 793-94 (Tex. App.—Fort Worth 1994, writ denied) (recognizing a cause of action for intentional infliction of emotional distress against third parties for adultery, but the action was not properly before the court in this case)).
118. Smith, 126 S.W.3d at 665.
119. BLACK'S LAW DICTIONARY 80 (8th ed. 2004).
120. Smith, 126 S.W.3d at 665. The tort of alienation of affection was first recognized by the Texas Supreme Court in 1971. Reagan v. Vaughn, 804 S.W.2d 463, 475 (Tex. 1990). The Texas Legislature did not abolish this cause of action until 1987. TEX. Fam. Code Ann. § 1.107 (Vernon 2004) ("[a] right of action by one spouse against a third party for alienation of affection is not authorized in this state.").
121. Smith, 126 S.W.3d at 666.
122. Id.
123. Id.; Hearings on HB 203 Before the House Comm. on Judiciary, 70th Leg., R.S. (March 16, 1987).
124. Smith, 126 S.W.3d at 666.
Society is represented in our justice system by juries. If a claim has no basis in our modern philandering, promiscuous and adulterous society, the jury can find for the defendant. This is a clear example of judicial legislation.

E. INTENTIONAL INFlictION OF EMOTIONAL DISTRESS UNDER THE SURVIVAL STATUTE—Cortez v. HCCI-SAN ANTONIO, INC., 131 S.W.3d 113, 120 (TEX. APP.—SAN ANTONIO 2004, PET. GRANTED)

In Cortez, a case concerning physical and emotional abuse of an elderly woman in a nursing home, the Court of Appeals in San Antonio bucked the trend on statutory interpretation and preserved a cause of action. The court of appeals held that a claim of intentional infliction of emotional distress is recoverable under the survival statute. However, petition was granted, so the Texas Supreme Court will get an opportunity to eliminate this cause of action as well. This decision confirms that causes of action for non-physical injuries to the person fall within the survival statute.

Under the survival statute, "[a] cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person . . . ." Therefore, a personal injury action that falls within the statute survives the injured person's death and may be prosecuted on her behalf. The cause of action in a survival action is "that which the decedent suffered before [his] death." And the damages recoverable are those the decedent sustained while alive.

No Texas court previously addressed whether a claim for intentional infliction of emotional distress was recoverable under the Texas survival statute. But the court of appeals acknowledged that the Fifth Circuit interpreted the Texas survival statute to exclude such a claim "because that tort does not injure health, reputation, or body" as required by the statute. The Fifth Circuit appeared to interpret the Texas survival stat-

---

125. Id.
127. Id.
128. See TEX. Civ. PRAC. & REM. CODE ANN. § 71.021(a) (Vernon 1997).
129. Id. (emphasis added).
130. TEX. Civ. PRAC. & REM. CODE ANN. § 71.021(b); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992).
131. Russell, 841 S.W.2d at 345.
132. Id.
133. Cortez, 131 S.W.3d at 120.
ute as applying only to causes of action for physical injuries.\textsuperscript{135}

In light of Texas Supreme Court decisions that recognized the recovery of mental anguish damages in actions under the Texas survival statute, the court of appeals did not find the Fifth Circuit's decision persuasive.\textsuperscript{136} Because claims for mental anguish do not require proof of physical injury and are recoverable under the survival statute, the court of appeals held that a claim for intentional infliction of emotional distress, similarly, should survive the claimant's death.\textsuperscript{137}

F. GOVERNMENTAL IMMUNITY—TEXAS DEPARTMENT OF CRIMINAL JUSTICE V. SIMONS, 140 S.W.3d 338, 339 (Tex. 2004); UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. LOUTZENHISER, 140 S.W.3d 351 (Tex. 2004); SAN ANTONIO STATE HOSP. V. COWAN, 128 S.W.3d 244 (Tex. 2004)

In 2004, the Texas Supreme Court provided further guidance for determining waiver of governmental immunity under the Texas Tort Claims Act. In two cases, the Texas Supreme Court addressed the notice provision, examining issues related to the applicability of the provision as well as its jurisdictional implications. The Texas Supreme Court further examined the definition of "use" in the context of the personal property exception to sovereign immunity.

Section 101.101 of the Texas Tort Claims Act provides that "a governmental unit is entitled to receive formal, written notice of a claim against it within six months of the incident from which the claim arises unless it has actual notice of the claim, including knowledge of its 'alleged fault producing or contributing to the death, injury, or property damage.'"\textsuperscript{138} The applicable portions of section 101.101 are as follows:

(a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
(1) the damage or injury claimed;
(2) the time and place of the incident; and
(3) the incident.

\textsuperscript{135} Plumley, 122 F.3d at 311. The Plumley court reached its conclusion after no discussion or analysis, and with only a citation to the Texas Supreme Court's opinion in Boyles v. Kerr, 855 S.W.2d 593, 598 (Tex. 1993), in which the Texas Supreme Court held that it was "not imposing a requirement that emotional distress manifest itself physically to be compensable."

\textsuperscript{136} Cortez, 131 S.W.3d at 120 (citing Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 403 (Tex. 1993); Bedgood v. Madalin, 600 S.W.2d 773, 775 (Tex. 1980); Harris County Hosp. Dist. v. Estrada, 872 S.W.2d 759, 764 (Tex. App.—Houston [1st Dist.] 1993, writ denied)).

\textsuperscript{137} Cortez, 131 S.W.3d at 120.

The notice requirement[ ] provided . . . by Subsection[ ] (a) . . . do[es] not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.\textsuperscript{139}

In \textit{Texas Department of Criminal Justice v. Simons}, the Texas Supreme Court granted petition for review, recognizing that "[t]he court of appeals [had] differed over exactly what . . . knowledge of alleged fault entails . . . ."\textsuperscript{140}

Prior to \textit{Simons}, the Texas Supreme Court held that "actual notice to a governmental unit requires knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved."\textsuperscript{141} \textit{Simons} noted that the application of this standard varied among appellate courts from the narrow view that "to have actual notice, the governmental unit must have the same information it would have had if the claimant had complied with the formal notice requirements,"\textsuperscript{142} to the broader view that "an incident itself gives actual notice if it should trigger an investigation that would or could show the governmental unit at fault."\textsuperscript{143} \textit{Simons} elaborated that in order to satisfy the second element of actual notice set forth in \textit{Cathey}, a governmental unit should "have knowledge that amounts to the same notice to which it is entitled by section 101.101(a),"\textsuperscript{144} including "subjective awareness of . . . fault."\textsuperscript{145} As the Texas Supreme Court stated, "[g]overnmental entities have actual notice to the extent that a prudent entity could ascertain its potential liability stemming from an incident, either by conducting a further investigation or because of its obvious role in contributing to the incident."\textsuperscript{146} The court, however, carefully circumscribed this rule, stating that "[i]t is not enough that a governmental unit should have investigated an incident as a prudent person would have, or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault."\textsuperscript{147}

In \textit{University of Texas Southwestern Medical Center v. Loutzenhiser},\textsuperscript{148} the Texas Supreme Court also addressed application of the term "incident" in section 101.101(a) for injuries that occur \textit{in utero}. Stephen Loutzenhiser was born on August 15, 1992 with a deformed left hand. Eight

\textsuperscript{140.} \textit{Simons}, 140 S.W.3d at 339.
\textsuperscript{141.} \textit{Cathey}, 900 S.W.2d at 341.
\textsuperscript{142.} Nat'l Sports \\ & Spirit, Inc. v. Univ. of N. Tex., 117 S.W.3d 76, 80 (Tex. App.—Fort Worth 2003, no pet.).
\textsuperscript{143.} \textit{Simons}, 140 S.W.3d at 346 (summarizing Crane County v. Saults, 101 S.W.3d 764, 769 (Tex. App.—El Paso 2004, no pet. h.)).
\textsuperscript{144.} \textit{Id.} at 347.
\textsuperscript{145.} \textit{Id.}
\textsuperscript{146.} \textit{Id.} at 346.
\textsuperscript{147.} \textit{Id.} at 347-48.
months earlier, in January 1992, two chorionic villus samplings were performed, which "involves inserting a needle through the uterus into the chorion—the section of the placenta providing the fetus with nutrients via its blood supply—and removing a part of it for chromosomal testing."\textsuperscript{149} Seventeen days after the birth, Stephen's father gave notice to the hospital of his son's birth defect. Since this notice occurred more than six months after the tests were performed, the Medical Center moved for summary judgment on the grounds that section 101.101(a) had not been satisfied. However, the Texas Supreme Court determined that the test alone was only one incident necessary to Stephen's claim and that "equally necessary to the existence of the claim, was Stephen's live birth."\textsuperscript{150} Noting "the longstanding common law rule [is] that the rights of a fetus [are] contingent on live birth,"\textsuperscript{151} the court held that since "Stephen's live birth was an incident giving rise to his claim, and one essential to the existence of the claim," the notice provision's six-month period would not begin until Stephen was born.\textsuperscript{152}

In section 101.021(2) of the Texas Torts Claims Act, governmental immunity is waived for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."\textsuperscript{153} In \textit{San Antonio State Hosp. v. Cowan},\textsuperscript{154} the Texas Supreme Court addressed what constituted a "use" in order to trigger this waiver. The plaintiff, James Roy Cowan, Jr. committed suicide in a hospital, using his suspenders and a piece of pipe from his walker. A probate court ordered that the hospital "[take] possession of Cowan's personal effects, including his suspenders and walker"\textsuperscript{155} and the hospital had done so. However, the hospital proceeded to "allow [Cowan] to keep these latter items with him."\textsuperscript{156} The Texas Supreme Court stated that section 101.021(2) immunity is only waived "when the governmental unit is itself the user."\textsuperscript{157} The court of appeals held "that the [h]ospital used Cowan's walker and suspenders by giving them to him to use."\textsuperscript{158} The Texas Supreme Court reversed, stating that "[a] governmental unit does not 'use' personal property merely by allowing someone else to use it and nothing more."\textsuperscript{159}

\textsuperscript{149} \textit{Id.} at 354.
\textsuperscript{150} \textit{Id.} at 356.
\textsuperscript{151} \textit{Id.} (quoting Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 78 (Tex. 1997) (citing Witty v. Am. Gen. Capital Distribs., Inc., 727 S.W.2d 503, 505 (Tex. 1987)) (also discussing Krishnan v. Sepulveda, 916 S.W.2d 478, 482 (Tex. 1995); Pietila v. Crites, 851 S.W.2d 185, 186 (Tex. 1993); and Yandell v. Delgado, 471 S.W.2d 569, 570 (Tex. 1971)).
\textsuperscript{152} \textit{Id.}
\textsuperscript{154} \textit{San Antonio State Hosp. v. Cowan}, 128 S.W.3d 244 (Tex. 2004).
\textsuperscript{155} \textit{Id.} at 245.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.} at 246.
\textsuperscript{158} \textit{Id.} (discussing \textit{San Antonio State Hosp. v. Cowan}, 75 S.W.3d 19 (Tex. App.—San Antonio 2001), \textit{rev'd}, 128 S.W.3d 244 (Tex. 2004)).
\textsuperscript{159} \textit{Id.}
III. CAUSATION

In order to establish causation, the totality of the evidence must be weighed to determine whether the alleged negligence is responsible for the plaintiff's harm. Traditionally, it is the jury's responsibility, not the judiciary's, to make this critical determination. However, the Texas Supreme Court recently exhibited a propensity for weighing the evidence on review and substituting its opinion for that of the jury.

In *Volkswagen of America, Inc. v. Ramirez*, the Texas Supreme Court reversed the court of appeals judgment that affirmed a jury's finding of negligence. The case involved a highway accident where the plaintiff's Volkswagen Passat bumped a neighboring car and veered over the median, eventually colliding head-on into an oncoming Ford Mustang. The plaintiff alleged that a defect in the rear wheel assembly caused the wheel to fail and led to loss of control of the vehicle. However, the wheel was found lodged within the wheel well 500 yards away from the point that the vehicle began to veer over the median. It was the defendant's position that the impact with the neighboring car caused the plaintiff to veer off course and that the damage to the wheel occurred upon impact with the oncoming car.

According to the Texas Supreme Court, the only evidence supporting the plaintiff's position was the testimony of two experts and the videotaped statement of a witness made to reporters at the scene of the accident. Plaintiff's expert Ronald Walker testified that the wheel remained lodged in the wheel well because "even with the wheel dropping off, the wheel wanted to still have the capability of going faster than the vehicle because it wasn't being slowed down as much by friction." The Texas Supreme Court stated that "Walker did not conduct or cite any tests to support his theory that the [the car's] left wheel could and did remain pocketed in the wheel well as the car veered off U.S. 83, crossed the median, and collided with the Mustang." As a result, the Texas Supreme Court ruled that his testimony was "unreliable and constitute[d] no evidence of causation."

The Texas Supreme Court also discounted the testimony of the eyewitness, ruling that it was inadmissible hearsay evidence. The court of appeals ruled that the testimony was admissible under the "excited utterance" exception to the hearsay rule. The Texas Supreme Court concluded that the excited utterance did not apply because the evidence indicated that the witness's statements were "calmly given . . . after an opportunity for deliberation, rather than made as a spontaneous reaction.

---

162. *Id.* at *1.
163. *Id.* at *4.
164. *Id.* at *5.
165. *Id.*
to the accident." The fact that the statement was admissible as information relied upon by an expert was not addressed.

Thus, according to the Texas Supreme Court, the only evidence remaining to support the plaintiff's position was the testimony of Edward Cox, the Ramirezes' metallurgy expert. The Texas Supreme Court examined this evidence to "determine whether more than a scintilla of evidence exist[ed] to raise a fact issue on the question of causation." The Texas Supreme Court pointed out that Cox's testimony was primarily related to the defective condition of the car's wheel. According to the court, "Cox's testimony fail[ed] to answer a crucial question raised by the Ramirezes' theory of causation—how the floating wheel stayed in the wheel well as the Passat traveled through the median and collided with the Mustang." Therefore, the Texas Supreme Court held that there was no evidence to sustain a finding that the alleged defect proximately caused the accident. Justice Hecht, in his concurrence, asserted that Cox's conclusions could only be supported by his "[p]ersonal credibility" and that "we require more of an expert witness, lest a very convincing charlatan in a lab jacket pull the wool over laymen's eyes."

The Texas Supreme Court was clearly obsessed with the "floating wheel" theory, essentially requiring that a scientific explanation for this specific occurrence be provided in order for causation to be established. It selectively asserted that the only evidence offered by Cox was his observation that grass was found in the wheel hub. According to Cox, this tended to establish that the wheel had already broken by the time the vehicle crossed the median. This alone would at least appear to be some evidence explaining the "floating wheel." But why is this single issue so critical? Certainly, it is puzzling that the wheel would remain within the wheel well, but it hardly seems to be the only factor considered by the jury. As the dissent pointed out, Cox specifically noted three defects in the vehicle:

First, based on microscopic tearing at the base of the threads in the adjustment nut, which holds the bearing assembly intact, he contended that the nut was looser than it should have been. Second, based on false brinell marks of the rollers within the bearing assembly, he concluded that the bearing assembly was damaged in transit because the car was cinched down too tightly. Third, based on the presence of cracking and metal fragments in the bearing assembly, Cox concluded that the metal in the assembly became embrittled by temperature inconsistencies in the manufacturing process. He testified that the embrittled material structure led to cracks, which created steel bearing fragments that were found embedded in the roller

166. Id. at *9.
167. Id. at *10 (citing Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).
169. Id. at *12.
170. Id. at *10.
cage of the Passat, trapped between the inner and outer races and embedded in the surface of the rollers.\textsuperscript{171}

It was also undisputed that the emergency brake did not engage until the Passat collided with the Mustang. After the accident, the markings on the brake pads indicated that the rotor was off center, which tended to establish that the wheel had broken prior to impact.\textsuperscript{172} As the dissent pointed out "\textit{[w]hile Cox's causation testimony is neither ironclad nor exhaustive, it is surely some} evidence that the Passat's bearing failure occurred in the eastbound lane, contributed to Sperling's loss of control, and ultimately caused a catastrophic accident in the westbound lane."\textsuperscript{173} Reviewers must be careful not to let a charlatan in a justice's robe convince them evidence in the record does not exist.

\section*{IV. DAMAGES}

\begin{enumerate}
\item \textbf{A. PROPORTIONATE LIABILITY UNDER THE DRAM SHOP ACT—F.F.P. OPERATING PARTNERS, L.P. v. DUEÑEZ, NO. 02-0381, 2004 WL 1966008 (TEX. SEPT. 3, 2004)}
\end{enumerate}

In this 5-4 split dram shop opinion, the Texas Supreme Court affirmed a $35 million verdict to the Dueñez plaintiffs for their injuries caused by an intoxicated driver. While the Texas Supreme Court reached the same result as the lower courts, the majority rejected the idea that liability under the Dram Shop Act cannot be apportioned.\textsuperscript{174} The majority held that apportionment of responsibility under the Proportionate Responsibility Act applies to all claims brought under the Dram Shop Act, but it nevertheless held that the alcohol provider or "dram shop" is responsible for both its share of the verdict and the share of the verdict assigned to an intoxicated patron. The provider may then recover from the intoxicated patron based upon the percentages of responsibility that the jury apportions between them.\textsuperscript{175}

The dissent accused the majority of saying one thing and doing another, arguing that the Texas Supreme Court's actual holding does not require apportionment of responsibility but instead makes a provider of alcohol joint and severally liable to a claimant for one-hundred percent of the damages regardless of the percentage of responsibility assigned by a jury.\textsuperscript{176} If the dissent had its way, juries would be allowed to apportion dram shop responsibility owed to innocent third parties between the intoxicated patron and the intoxicant provider. This is troublesome because juries in dram shop cases are likely to apportion most, if not all, of the responsibility to the intoxicated patron, which would render the

\begin{enumerate}
\item Id. at *14.
\item Id. at *16.
\item Id.
\item Id. at *1.
\item Id. at *7.
\end{enumerate}
Dram Shop Act meaningless, "at least to the extent the intoxicated patron proves to be insolvent."\textsuperscript{177}

In this case, the Dueñeizes were severely injured when their car was struck head-on by an intoxicated driver who purchased alcohol minutes earlier from a Mr. Cut Rate convenience store owned by F.F.P. Operating Partners, L.P. ("F.F.P."). The driver, Roberto Ruiz, purchased a twelve pack of beer from the store's assistant manager, Carol Solis, after consuming a case-and-a-half of beer that afternoon.\textsuperscript{178}

After purchasing the beer, Ruiz left the store, got into his truck, placed an open beer between his legs, and drove away. Ruiz drove onto a nearby highway where witnesses observed him swerving into oncoming traffic several times. Two drivers dodged his truck to avoid a collision.\textsuperscript{179}

The Dueñeizes were not as lucky. Less than a mile away from the Mr. Cut Rate store, Ruiz crossed over the center line of traffic and hit the Dueñeizes' car head-on.\textsuperscript{180} All five members of the Dueñe family were injured. Nine-year-old Ashley "suffered a traumatic brain injury and will require round-the-clock care for the rest of her life."\textsuperscript{181} "Xavier Dueñe, a corrections officer, also suffered some degree of permanent brain damage."\textsuperscript{182}

The Dueñeizes sued F.F.P. and Ruiz, among others, and F.F.P filed a cross-action against Ruiz, naming him as a responsible third party. The Dueñeizes then nonsuited all defendants except F.F.P. There were no allegations of negligence against the plaintiffs.\textsuperscript{183}

At a pretrial conference, the trial court held that Chapter 33 of the Texas Civil Practice and Remedies Code's provisions on proportionate responsibility did not apply to this type of case, and severed F.F.P.'s cross-action against Ruiz. At trial, the judge did not allow the jury to consider Ruiz's percentage of responsibility for apportionment, and the jury returned a $35 million verdict solely against F.F.P.\textsuperscript{184}

The court of appeals agreed with the trial court, holding:

[I]n third party actions under the Dram Shop Act in which there are no allegations of negligence on the part of the plaintiffs, a provider is vicariously liable for the damages caused by an intoxicated person, and such a provider is not entitled to offset its liability by that of the intoxicated person.\textsuperscript{185}

In reaching that conclusion, the court of appeals narrowed the \textit{Smith v.}
Sewell decision,\textsuperscript{186} in which the Texas Supreme Court held that the comparative responsibility statute applies to all dram shop cases.\textsuperscript{187} The court of appeals distinguished Sewell, concluding that comparative responsibility applies in dram shop cases only when the intoxicated patron sues for his own injuries, and not when the plaintiff is an innocent third party injured by an intoxicated patron.\textsuperscript{188}

The Texas Supreme Court took issue with the court of appeals’ application of its Sewell opinion to this case and granted F.F.P.’s petition for review to address the effect of Chapter 33 to dram shop cases.\textsuperscript{189} The Texas Supreme Court began its analysis by quoting Chapter 33 of the Proportionate Responsibility Act, which applies to “any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.”\textsuperscript{190} Chapter 33 requires the trier of fact to apportion responsibility “with respect to each person’s causing or contributing to cause in any way the harm for which recovery of damages is sought.”\textsuperscript{191}

The Texas Supreme Court noted that Chapter 33 “expressly excludes certain types of cases from its coverage, such as workers’ compensation cases, but it does not exclude actions brought under the Dram Shop Act.”\textsuperscript{192} For this reason, the Texas Supreme Court concluded that the Legislature intended all types of tort cases, not expressly excluded, to be subject to apportionment.\textsuperscript{193}

The Texas Supreme Court noted if dram shop liability were purely vicarious, as the court of appeals held, there would be nothing for the jury to apportion.\textsuperscript{194} But a dram shop’s liability stems in part from its own wrongful conduct, not just from the acts of the intoxicated patron.\textsuperscript{195} Citing Sewell, the Texas Supreme Court reasoned that “[a]lthough the [Dram Shop] Act ties causation to the intoxicated patron’s actions, certainly dram shop liability was fashioned on the notion that providing alcohol to one who is obviously intoxicated to the extent that the public is clearly endangered ‘contributes [in some] way’ to harm that the intoxication causes.”\textsuperscript{196}

Referencing the Restatement for support, the Texas Supreme Court concluded that “a party to whom liability is imputed and who is also independently liable ‘is responsible for the share of the verdict assigned to [the party whose liability is imputed] and is also responsible for the share
of the verdict assigned to its own negligence."197 This means that "the resulting judgment in dram shop cases should aggregate the dram shop’s and driver’s liability so that the plaintiff can fully recover from the provider without assuming the risk of the driver’s insolvency."198 The "dram shop may then recover from the driver based upon the percentages of responsibility that the jury assess[es] between them."199

The Texas Supreme Court ultimately held that even though the court of appeals failed to apportion responsibility between F.F.P. and Ruiz, its judgment was correct because F.F.P. was responsible to the Dueñezes for its own liability and for Ruiz’s imputed liability.200

The dissent disagreed with the majority’s effective holding, i.e., that a provider of alcohol should be vicariously liable for a patron’s intoxication.201 The dissent accused the majority of actually overruling the Texas Supreme Court’s Smith v. Sewell decision, which made no mention of vicarious liability at all, only proportionate responsibility.202

Although the Dram Shop Act imposes liability on providers “for the actions of their . . . customers,”203 the dissent argued that the Texas Legislature did not intend for an alcohol provider to be one-hundred percent liable for the damages caused by an intoxicated patron to an innocent third party.204 The dissent dismissed the majority’s point that the legislative intent of the Dram Shop Act was to hold providers responsible in the event the intoxicated patron proves to be insolvent, stating that, in enacting the Proportionate Responsibility Act, “the Texas Legislature made hard choices and charted a course that this Court must uphold.”205 The dissent concluded that, given the express exceptions to the proportionate responsibility scheme, the Dram Shop Act “cannot reasonably be read to require vicarious liability and joint and several liability in lieu of proportionate responsibility for alcohol providers.”206

B. PROPOSED LEGISLATION LIMITING LIABILITY OF ORGANIZATIONS PROVIDING CHILD WELFARE SERVICES—2005 TEXAS HOUSE BILL NO. 478

On January 18, 2005, Texas Representative Toby Goodman introduced a bill to be enacted “relating to the operation of the child protective services and foster care system.”207 The bill proposes privatization of substitute child care services statewide and caps the liability of agencies

197. Id. at *5 (citing Restatement (Third) of Torts: Apportionment of Liability § 7 cmt. j (2000)).
198. Id.
199. Id.
200. Id. at *6.
201. Id. at *7.
202. Id. at *8.
205. Id. at *11.
206. Id. at *14.
providing child welfare services on behalf of the state. This proposed limit on liability is the latest example of the Texas Legislature’s attempt to scale back the power of juries and dictate what is socially reasonable or unreasonable conduct.

The damages cap is found in section 21 of the bill; it would amend Chapter 97 of the Texas Civil Practice and Remedies Code to read:

Sec. 97.003. LIMIT ON LIABILITY OF CERTAIN ORGANIZATIONS PROVIDING CHILD WELFARE SERVICES.

(a) In an action on a liability claim in which a final judgment is rendered against a nonprofit agency that provides child welfare services on behalf of the state to children in the conservatorship of the state, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply is a total amount, including prejudgment interest, not to exceed $250,000 for each person and $500,000 for each single occurrence of bodily injury or death.

(b) The limitation on civil liability does not apply to reckless conduct or intentional, wilful [sic], or wanton misconduct of a nonprofit agency.

Improving child protective services should be a top priority of the Texas Legislature, but privatizing child welfare services is a risky proposition. Limiting liability of the child welfare service providers is particularly dangerous because the caps make it economically feasible for them to commit negligent acts. The service providers should know that if they fail to provide reasonable services, they will be held accountable for the fullest extent of their liability.

V. MISCELLANEOUS ISSUES

A. DISCOVERY PROCEDURE UNDER THE TEXAS MEDICAL LIABILITY ACT—In re Miller, 133 S.W.3d 816 (Tex. App.—Beaumont 2004)

As if the Texas Medical Liability Act were not procedurally restrictive enough on plaintiffs, the Court of Appeals in Beaumont added another restriction. The court of appeals construed the Texas Medical Liability Act to preclude plaintiffs from orally deposing defendant physicians prior to filing the required expert report.

In this case, Sandra Edgerton sued Dr. Barry R. Miller for medical malpractice. After filing suit, Edgerton noticed the oral deposition of Miller, and Miller moved to quash it. Edgerton filed a motion to compel Miller’s deposition, which the trial court granted. Miller filed a petition for writ of mandamus, arguing that the stay of discovery provision in the recently enacted Texas Medical Liability Act bars plaintiffs from orally...

208. Id.
209. Id.
deposing a defendant physician prior to the required expert report.211

Section 74.351 of the Texas Medical Liability Act contains the following provisions regarding discovery:

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a) [of section 74.351], all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through: (1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure; (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and (3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).212

Miller contended that subsection (u) narrows subsection (s), limiting the allowed depositions upon written questions to two before filing of expert reports.213 He argued that "because oral depositions are not the allowed discovery in subsection (s), ... they are not authorized by subsection (u)." 214

Edgerton acknowledged that subsection (u) limits the number of pre-expert report depositions to two, but asserted that the Legislature intended subsection (u) to allow two oral depositions of parties or nonparties, "notwithstanding" the provisions of subsection (s).215 Edgerton noted that the common meaning of "notwithstanding" is "in spite of."216

Pre-report discovery, including oral depositions, is necessary for the creation of a meaningful, intelligent expert report.217 Oral depositions are particularly necessary in cases where the plaintiff is complaining of inadequate medical documentation as part of the overall medical negligence. The legislature realized this when it wrote subsection (u), expressly allowing the claimants to take two depositions before the expert report is served.

Nevertheless, the court of appeals accepted Miller’s argument, holding that section (u) limits the number of depositions allowed by subsection (s)—depositions upon written questions—to two. The court of appeals concluded that any oral depositions stayed under subsection (s) are not authorized by subsection (u) and that "the trial court erred in compelling

211. Id. at 816-17.
212. Id. at 817 (quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.351(s), (u) (Vernon Supp. 2004)) (emphasis in original).
213. Id.
214. Id.
215. Id. at 818.
216. Id.
217. Id.
Miller's oral deposition before the service of the expert report." 2\textsuperscript{18}

B. THE DEFINITION OF "NUISANCE"—SCHNEIDER NATIONAL CARRIERS, INC. v. BATES, 147 S.W.3D 264 (TEX. 2004)

In Schneider, the Texas Supreme Court refined and distinguished the definitions of "temporary nuisance" and "permanent nuisance." 2\textsuperscript{19} The Texas Supreme Court also provided guidance on the application of these definitions to nuisance facts, although, traditionally, it was left to jurors to decide material factual disputes about frequency, duration, and extent of nuisance conditions. 2\textsuperscript{20} This is often a critical factual determination, because whether a nuisance claim is "temporary" or "permanent" affects when the claim accrues for limitations purposes. Here, the Texas Supreme Court characterized the plaintiffs' nuisance claims as permanent as a matter of law, and thus barred by limitations. 2\textsuperscript{21}

The plaintiffs, Andrea Bates and seventy-eight other individuals, lived near the Houston Ship Channel. The defendants operated a trucking firm; a painting and sandblasting business; and plants that manufactured bleach, wood preservatives, polyesters, and other chemical products. The plaintiffs complained that air contaminants, odors, lights, and noise from the plants interfered with their right to use and enjoy their property. They asserted, among other claims, a nuisance cause of action against the defendants. 2\textsuperscript{22}

The defendants characterized the plaintiffs' allegations as a permanent nuisance and moved for summary judgment based on limitations. 2\textsuperscript{23} The trial court granted the defendants' motions, but the court of appeals reversed, finding a fact question as to whether the alleged nuisances were temporary or permanent. 2\textsuperscript{24} The Texas Supreme Court granted the petition to clarify the distinction as a matter of law. 2\textsuperscript{25}

The limitations period for a nuisance claim is two years, but the accrual date is not defined by statute. 2\textsuperscript{26} The accrual date is a question of law for the courts. 2\textsuperscript{27} For over a century, the Texas Supreme Court has held that accrual of a nuisance claim depends on whether it is permanent or temporary. 2\textsuperscript{28} "A permanent nuisance claim accrues when the [plaintiff's] injury first occurs or is discovered; [while] a temporary nuisance claim accrues anew upon each injury." 2\textsuperscript{29}

\begin{itemize}
  \item \textsuperscript{218.} Id. at 818-19.
  \item \textsuperscript{219.} Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004).
  \item \textsuperscript{220.} Id. at 275.
  \item \textsuperscript{221.} Id. at 268.
  \item \textsuperscript{222.} Id. at 267-68.
  \item \textsuperscript{223.} Id. at 269.
  \item \textsuperscript{224.} Id.
  \item \textsuperscript{225.} Id. at 268.
  \item \textsuperscript{226.} Id. at 270.
  \item \textsuperscript{227.} Id.
  \item \textsuperscript{228.} Id.
  \item \textsuperscript{229.} Id. (emphasis in original).
\end{itemize}
For over one-hundred years in Texas, a permanent nuisance has been defined as one that involves "an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely."\textsuperscript{230} A nuisance is permanent if it is "constant and continuous" and "injury constantly and regularly recurs."\textsuperscript{231}

On the other hand, a "nuisance is temporary if it is of limited duration."\textsuperscript{232} A nuisance is temporary if it is uncertain whether any future injury will occur, or if future injury is likely to occur "only at long intervals."\textsuperscript{233} A nuisance is also considered temporary if it is "occasional, intermittent or recurrent" or "sporadic and contingent upon some irregular force such as rain."\textsuperscript{234}

The Texas Supreme Court noted that the definitions of permanent nuisance and temporary nuisance have remained relatively constant in Texas for many years, but the application of these definitions to the facts of each case was a "continuing problem."\textsuperscript{235} The difficulty in applying the standard definitions stems from the relative nature of the terms involved.\textsuperscript{236} Whether a nuisance is "temporary" or "permanent" obviously turns on a factual inquiry, such as how long the nuisance lasts or how often it occurs.\textsuperscript{237}

In the past, jurors were left to decide material factual disputes about the frequency, duration, and extent of nuisance conditions.\textsuperscript{238} In this case, the Texas Supreme Court indicated that it did not trust jurors to apply the law to the facts without fashioning a "clear standard of reference" for the relative nuisance terms.\textsuperscript{239} The Texas Supreme Court held:

\[\text{[A] nuisance should be deemed temporary only if it is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable centrality [sic]. Conversely, a nuisance should be deemed permanent if it is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably evaluated. Jurors should be asked to settle the question only to the extent there is a dispute regarding what interference has occurred or whether it is likely to continue.}\textsuperscript{240}

Applying these standards to the present case, the Texas Supreme Court found, as a matter of law, that the plaintiffs' alleged nuisances were permanent, ignoring their contentions that fact questions were raised.\textsuperscript{241}

\begin{itemize}
  \item \textsuperscript{230} Id. at 272.
  \item \textsuperscript{231} Id.
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id. at 273.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id. at 275.
  \item \textsuperscript{239} Id.
  \item \textsuperscript{240} Id. at 281.
  \item \textsuperscript{241} Id. at 290-91.
\end{itemize}
VI. CONCLUSION

The trend in personal tort law continues to deviate from the traditional common law approach and moves toward rigid standards that replaces the wisdom of juries considering specific circumstances with the wisdom of legislatures considering abstract concepts of macroeconomics. The Texas Legislature continues to create statutory guidelines in an ad hoc manner in response to intense lobbying pressures from special interest groups. The Texas Supreme Court continues to remove decisions from juries to create its own judge-made rules of reasonable and unreasonable conduct. The net result is an increasingly inflexible and dissociated legal system that denies parties a fair opportunity to redress their specific injuries in light of their specific circumstances. The dictates of the state are replacing the citizen juror, and no one seems to care about, much less fear, the result.