



1980

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Mark T. Josephs, *Application of the Texas Venue Statute to Strict Liability in Tort: Lubbock Manufacture Company v. Sames*, 34 Sw L.J. 1004 (1980)

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III. CONCLUSION

In *Forsham v. Harris* the United States Supreme Court held that records generated and possessed by a private organization receiving federal study grants are not agency records subject to the disclosure requirements of the Freedom of Information Act unless they are in the possession of an agency subject to the Act. The holding affirms the property/control theory used by lower courts in determining which records are subject to FOIA obligations. Moreover, the decision indicates that control is synonymous with a present possessory interest in the records in question. Balancing the interest in preserving grantee autonomy against the interest in promoting maximum disclosure under the FOIA, the Court concluded that extending the FOIA to the work product of private grant recipients was not within the contemplation of Congress at the time the FOIA was enacted.

Michele Healy Ubelaker

Application of the Texas Venue Statute to Strict Liability in Tort: Lubbock Manufacturing Company v. Sames

Jesus Verduzco was driving a tractor-trailer filled with liquified petroleum gas when it overturned and exploded in Maverick County, Texas, causing his death. The trailer had been manufactured and sold by Lubbock Manufacturing Company, a Texas corporation with its principal place of business in Lubbock County, Texas. The administrator of Verduzco's estate filed a suit for wrongful death in Maverick County, alleging strict liability in tort for the defective design of the trailer. Lubbock Manufacturing filed a plea of privilege,¹ arguing that it had a right to be

1. TEX. R. CIV. P. 86 provides:

A plea of privilege to be sued in the county of one's residence shall . . . state that the party claiming such privilege was not, at the institution of such suit, nor at the time of the service of process therein, nor at the time of filing such plea, a resident of the county in which suit was instituted, and shall state the county of his residence, and . . . that "no exception to exclusive venue in the county of one's residence provided by law exists in said cause."

When a plea of privilege is filed in accordance with this rule, it shall be prima facie proof of the defendant's right to change of venue . . .

Under Texas law, the plea of privilege is the only method for a defendant to challenge venue. *Texas Highway Dep't v. Jarrell*, 418 S.W.2d 486 (Tex. 1967). The filing of the plea of privilege places the burden on the plaintiff to controvert the plea by establishing one of the exceptions to TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1980), the Texas venue statute. *General Motors Corp. v. Courtesy Pontiac, Inc.*, 538 S.W.2d 3, 6 (Tex. Civ. App.—Tyler 1976, no writ); *Citizens Standard Life Ins. Co. v. Gilley*, 521 S.W.2d 354, 356 (Tex. Civ. App.—Dallas 1975, no writ); *Fleetwood Constr. Co. v. Western Steel Co.*, 510 S.W.2d 161, 163 (Tex. Civ. App.—Corpus Christi 1974, no writ).

sued in Lubbock County,² the county of its domicile.³ The trial court overruled the plea of privilege, holding that venue was proper in Maverick County because a part of the cause of action, Verduzco's death, had arisen there.⁴ The court of civil appeals affirmed,⁵ but on writ of error the Supreme Court of Texas reversed,⁶ holding that venue was not proper in Maverick County because a part of a cause of action for venue purposes does not arise in the county in which only the physical injury occurs. The Texas Supreme Court then granted a motion for rehearing. *Held, the prior opinion of the Court is withdrawn; judgments of the courts below are affirmed:* In an action for strict liability in tort, venue is proper in the county in which the physical injury occurs. *Lubbock Manufacturing Co. v. Sames*, 598 S.W.2d 234 (Tex. 1980).

I. DAMAGES AS A PART OF A CAUSE OF ACTION

Under the Texas venue statute, article 1995,⁷ no person can be sued out of the county in which he is domiciled, unless the plaintiff establishes that his case falls within one of the enumerated exceptions. Subdivision 23 of the statute contains the exceptions to the general venue rule applicable in suits against private corporations.⁸ One part of subdivision 23 provides that, in a suit against a private corporation, venue may be maintained in the county in which the cause of action or a part thereof arose.⁹ Under this exception, the courts generally have held that damages alone are not a part

2. The basic right to be sued in the county of domicile is set out in TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1980).

3. For venue purposes, domicile means residence. *See* *Mijares v. Paez*, 534 S.W.2d 435 (Tex. 1976).

4. *Lubbock Mfg. Co. v. Sames*, 575 S.W.2d 588, 589-90 (Tex. Civ. App.—Beaumont 1978).

5. *Id.* at 592.

6. *Lubbock Mfg. Co. v. Sames* (Lubbock Manufacturing I), 23 Tex. Sup. Ct. J. 28 (Oct. 17, 1979).

7. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1980).

8. Subdivision 23 provides:

Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; *or in the county in which the cause of action or part thereof arose*; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative.

TEX. REV. CIV. STAT. ANN. art. 1995(23) (Vernon 1964) (emphasis added).

9. The Texas Legislature purposely chose the term "arose." Prior to 1879 the Texas venue statute had provided that an action could be maintained in the county in which the cause of action or a part thereof "accrued." In *Phillio v. Blythe*, 12 Tex. 124 (1854), however, the Texas Supreme Court objected to the inherent subtleties in the term "accrued," and the Texas Legislature subsequently adopted the term "arose" with relation to suits against Texas corporations. 1874 Tex. Gen. Laws, ch. 87, § 1, at 109, 8 H. GAMMEL, LAWS OF TEXAS 107 (1874).

of the cause of action sufficient to support venue under subdivision 23.¹⁰ The fact that damages were sustained in a particular county, without more, has not been sufficient to establish venue in that county.

The question of whether damages constitute a part of a cause of action under subdivision 23 was first considered by the Texas Supreme Court in *Stone Fort National Bank v. Forbess*.¹¹ In *Stone Fort* the plaintiff had deposited \$300 with the defendant bank located in Nacogdoches County, Texas. Thereafter, the plaintiff drew a draft in favor of a second bank located in Randall County, Texas. The Randall County bank then presented the draft for payment at the defendant Nacogdoches County bank, but the defendant failed to honor it. The plaintiff sued for damages in Randall County, alleging that the defendant's refusal to honor the draft had injured his credit in Randall County and had precluded him from entering certain profitable business ventures in that county.¹² On writ of error, the Texas Supreme Court held that venue was improper in Randall County.¹³ The court reasoned that a cause of action within the meaning of subdivision 23 consisted of two elements: the primary right arising out of a transaction and the violation of that right.¹⁴ Because both the transaction creating the right, plaintiff's depositing funds in appellant's bank, and the transaction violating that right, appellant's refusal to pay the draft, occurred in Nacogdoches County, no part of the cause of action arose in Randall County.¹⁵ Thus, the court found that the county in which the right was created or violated would be proper for venue purposes, but that the county in which the damages alone had occurred would not be proper.¹⁶

10. See *Stone Fort Nat'l Bank v. Forbess*, 126 Tex. 568, 91 S.W.2d 674 (1936); *Pesek v. Murrel's Welding Works, Inc.*, 558 S.W.2d 39 (Tex. Civ. App.—San Antonio 1977, writ dismissed); *Burrows v. Texas Kenworth Co.*, 554 S.W.2d 300 (Tex. Civ. App.—Tyler 1977, writ dismissed); *Johns-Manville Sales Corp. v. Haden Co.*, 543 S.W.2d 415 (Tex. Civ. App.—Fort Worth 1976), writ refused *n.r.e. per curiam*, 553 S.W.2d 759 (Tex. 1977); *American Quarter Horse Ass'n v. Rose*, 525 S.W.2d 227 (Tex. Civ. App.—Fort Worth 1975, no writ); *Ben Griffin Tractor Co. v. Garza*, 497 S.W.2d 69 (Tex. Civ. App.—Fort Worth 1973, no writ). *But see* *Teague Brick Sales Co. v. Dewey*, 355 S.W.2d 249 (Tex. Civ. App.—Amarillo 1962, no writ) (allowing venue to be maintained against a brick manufacturer in the county in which the bricks were installed). See also *Van Waters & Rogers, Inc. v. Kilstrom*, 456 S.W.2d 570 (Tex. Civ. App.—Waco 1970, no writ) (duty found to be breached in McLennan County because defendant had delivered product and failed to warn of danger or take steps to prevent explosion in that county); *National Life Co. v. Wolverton*, 163 S.W.2d 655 (Tex. Civ. App.—Waco 1942, no writ) (some part of the right or transaction must have arisen in county in which suit is brought).

11. 126 Tex. 568, 91 S.W.2d 674 (1936).

12. The suit was based on the breach of contractual duties arising out of the bank's relationship with the plaintiff. The plaintiff claimed that the bank had a duty to honor his draft under the terms of their agreement and that the bank was liable in damages for failure to do so. *Id.* at 570, 91 S.W.2d at 675. Additionally, exemplary damages were sought on the ground that the defendant's actions were wilful and malicious and, as a result, had substantially injured plaintiff's business reputation. *Id.*

13. *Id.* at 573, 91 S.W.2d at 677.

14. *Id.*

15. *Id.*

16. *Id.*

Similarly, in *Ben Griffin Tractor Co. v. Garza*¹⁷ the court of appeals limited venue to the county in which either the plaintiff's right or defendant's duty arose or the violation or breach occurred and disregarded for venue purposes the fact that the damages had occurred in another county. In *Ben Griffin* suit was brought in Tarrant County to recover damages for injuries sustained in that county when the plaintiff's automobile collided with a wheel that had sheared off a trailer being pulled by the defendant. The defendant subsequently filed a third party complaint seeking indemnity, or alternatively, contribution from the seller of the trailer who was domiciled in Dallas County. The court of civil appeals held that the trial court erred in overruling the seller's plea of privilege, reasoning that no duty had been breached in Tarrant County, the county in which the accident had occurred.¹⁸ The court stated that damages were not a part of a cause of action for venue purposes¹⁹ and transferred the suit to Dallas County, the seller's county of domicile.

In *Teague Brick Sales Co. v. Dewey*,²⁰ however, the Amarillo court of civil appeals departed from the decisions that had followed *Stone Fort* by holding that the plaintiff had established a cause of action sufficient to support venue in the county in which he had been damaged, even though the defendant was not domiciled in that county. The plaintiff had sued for breach of implied warranty, claiming that the masonry products manufactured by the defendant and used in the plaintiff's home were defective. The home was located in Armstrong County, but the defendant's county of residence was Freestone County. Using a plea of privilege, the defendant asserted its right to be sued in Freestone County, arguing that the fact that the damages had occurred in Armstrong County did not support venue in that county. The court overruled the plea of privilege, reasoning that the plaintiff's cause of action, or a part thereof, had arisen in Armstrong County because the plaintiff "was not damaged until and unless the brick began to crumble and chip after being placed in the walls around the house."²¹ Apparently recognizing that the plaintiff had no cause of action until he was damaged, the court found venue to be proper in the county of injury.²²

The Supreme Court of Texas rejected *Teague Brick* in *Haden Co. v. Johns-Manville Sales Corp.*²³ and reaffirmed its holding in *Stone Fort* that damages are not a part of a cause of action for venue purposes,²⁴ and therefore, are not sufficient to support venue in the county in which only the damages occur. In *Haden* the plaintiff sued Johns-Manville Sales Corporation in Wichita County, alleging breach of an implied warranty of

17. 497 S.W.2d 69 (Tex. Civ. App.—Fort Worth 1973, no writ).

18. *Id.* at 71-72.

19. *Id.* at 71.

20. 355 S.W.2d 249 (Tex. Civ. App.—Amarillo 1962, no writ).

21. *Id.* at 250.

22. *Id.*

23. 553 S.W.2d 759 (Tex. 1977).

24. *Id.*

fitness on asbestos panels sold by the defendant. The panels were purchased and delivered in Dallas County, but proved defective when later installed in Wichita County. The defendant, an Illinois corporation, filed a plea of privilege pursuant to subdivision 27 of article 1995,²⁵ asserting its right to be sued in Dallas County. The plea of privilege was overruled by the trial court, but the court of civil appeals reversed.²⁶ The Texas Supreme Court affirmed the trial court, rejecting the reasoning of *Teague Brick*.²⁷ Thus, until *Lubbock Manufacturing II*, damages were not a part of a cause of action for venue purposes. Rather, to establish venue in Texas a duty had to arise in the county in which the action was brought, or at the very least, the duty had to be breached in that county.²⁸

II. STRICT LIABILITY AND TEXAS VENUE

Since 1942 the Texas courts have recognized that the seller of a defective product may be held strictly liable in tort for damages caused by that product.²⁹ The courts initially imposed strict liability only upon sellers of products made for human consumption,³⁰ but in *McKisson v. Sales Affiliates, Inc.*,³¹ the Supreme Court of Texas, adopting the *Restatement (Second) of Torts* section 402A,³² determined that the sellers of any defective product

25. Subdivision 27 prescribes venue in suits against non-Texas corporations. "Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued. . . ." TEX. REV. CIV. STAT. ANN. art. 1995(27) (Vernon 1964) (emphasis added). While the statutes pertaining to foreign corporations and domestic corporations differ slightly, the courts must still resolve the issue of whether damages are a part of a cause of action and therefore sufficient to maintain venue under either of them.

26. *Johns-Manville Sales Corp. v. Haden Co.*, 543 S.W.2d 415, 420 (Tex. Civ. App.—Fort Worth 1976), writ *ref'd n.r.e. per curiam*, 553 S.W.2d 759 (Tex. 1977).

27. 553 S.W.2d at 760.

28. In addition to the breach of duty requirement, the courts recognized a bias in favor of the defendant, deciding borderline cases against the plaintiff and thus effectively restricting the scope of the venue exceptions. See *Permian Basin Life Ins. Co. v. Stuart*, 357 S.W.2d 615 (Tex. Civ. App.—Houston 1962, writ *dism'd*). See also *Burrows v. Texas Kenworth Co.*, 554 S.W.2d 300 (Tex. Civ. App.—Tyler 1977, writ *dism'd*).

29. See *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (allowing recovery for illness caused by contaminated sausage in action for breach of implied warranty). See also *Sweeney v. Cain*, 243 S.W.2d 874 (Tex. Civ. App.—San Antonio 1951, no writ) (recovery for injuries caused by contaminated soft drink); *Bowman Biscuit Co. v. Hines*, 240 S.W.2d 467 (Tex. Civ. App.—Dallas 1951) (recovery for injuries caused by cookie containing piece of metal wire), *aff'd*, 151 Tex. 370, 251 S.W.2d 153 (1952). For a discussion of the development of the theory of strict liability in tort, see generally Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962); Keeton, *Rights of Disappointed Purchasers*, 32 TEXAS L. REV. 1 (1953); Winship, *Commercial Transactions, Annual Survey of Texas Law*, 33 SW. L.J. 203 (1979).

30. The appellate courts repeatedly evidenced their reluctance to extend strict liability to other defective products until the Texas Supreme Court did so. See, e.g., *Sales Affiliates, Inc. v. McKisson*, 408 S.W.2d 124 (Tex. Civ. App.—Amarillo 1966), *rev'd*, 416 S.W.2d 787 (Tex. 1967); *Capetillo v. Crosby County Fuel Ass'n*, 407 S.W.2d 335 (Tex. Civ. App.—Amarillo 1966, no writ).

31. 416 S.W.2d 787 (Tex. 1967).

32. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably danger-

that caused physical harm could be strictly liable in tort.³³ Under section 402A of the *Restatement (Second)*, anyone who sells a defective product that causes physical harm to a consumer or to his property is strictly liable if that person is in the business of selling such products and if that product reaches the consumer without substantial change in the condition in which it was sold.³⁴ Thus, after *McKisson*, a Texas consumer had to show actual physical injury to recover in a cause of action for strict liability.

Despite *McKisson*, the plaintiff in *Nobility Homes of Texas, Inc. v. Shivers*³⁵ contended that a mere economic loss was sufficient to bring an action for strict liability.³⁶ The Supreme Court of Texas rejected the contention,

ous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
- (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

33. 416 S.W.2d at 789. Considering a claim for injuries received from the application of a beauty product, the court reasoned that no valid distinction existed between products that caused injury through ingestion and those that are dangerous when contacted externally. The plaintiff had suffered scalp burns and loss of hair after using a permanent wave preparation sold by a representative of the defendant beauty supply company. The court, after adopting the language of *Restatement* § 402A, held that the plaintiff had made a case for strict liability in tort. *Id.* at 792-93. In so holding, the court recognized that the jury had found that the preparation was not reasonably fit for the use of giving permanent waves and that the plaintiff's attempted use of the product was the proximate cause of her injuries. *Id.* For a discussion of the early development of strict liability in tort, see Freedman, *Defect in the Product: The Necessary Basis for Product Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Attack Upon the Citadel*, 69 YALE L.J. 1099 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

34. Today, a cause of action in Texas for strict liability in tort is governed by the *Restatement (Second)* subject, however, to a balancing of factors as recognized in *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979). In *Turner* the Texas Supreme Court held that the risk of harm factor could be set against the utility of the product's design in determining whether to hold the manufacturer strictly liable in tort. *Id.* at 849. For a discussion of current interpretations of strict liability in tort, see Keeton, *Torts, Annual Survey of Texas Law*, 34 SW. L.J. 1 (1980).

35. 557 S.W.2d 77 (Tex. 1977). In *Nobility* the purchaser of a mobile home brought an action under § 402A to recover damages for economic loss. Although the trial court, sitting without a jury, had found that the home was defective in both workmanship and materials, no evidence showed that the defects made the home unreasonably dangerous or caused physical harm to the plaintiff or to his property. As a result, the court held that the plaintiff could not recover under a strict liability in tort theory. *Id.* at 78. For a discussion of theories of recovery in products liability law, see Keeton, *Torts, Annual Survey of Texas Law*, 32 SW. L.J. 1 (1978).

36. For a discussion of whether economic loss is sufficient to bring an action for strict liability, see Keeton, *Torts, Annual Survey of Texas Law*, 25 SW. L.J. 1 (1971); Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309 (1973); Comment, *Implied Warranties and "Economic Loss"*, 24 BAYLOR L. REV. 370 (1972); Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145 (1972); Comment, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966); Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

holding that pecuniary loss alone would not support an action for strict liability.³⁷ Instead, the court restated the established view that "[t]here is a distinction between physical harm, or damage, to property and commercial loss"³⁸ and found that physical harm to the ultimate user or consumer or to his property was a prerequisite to a section 402A recovery.³⁹

McKisson and *Nobility Homes* firmly established the principle that actual physical harm is a prerequisite to recovery for strict liability in tort, but neither case addressed the question of venue. When faced with the venue issue, the Texas courts continued to make no distinction between application of subdivision 23 to suits involving strict liability claims and other types of actions.⁴⁰ In *Pesek v. Murrel's Welding Works, Inc.*⁴¹ a decedent's estate brought an action for strict liability against the manufacturer of an oil truck that had been designed and built in Hockley County. Suit was filed in Frio County, the county in which the accident had occurred. After the defendant filed a plea of privilege, the trial court transferred the case to Hockley County. The court of civil appeals affirmed the transfer, holding that the explosion and resulting deaths in Frio County did not support venue in that county under subdivision 23.⁴² Thus, the court affirmed the rule that damages are not a part of a cause of action sufficient to support venue under subdivision 23.

37. 557 S.W.2d at 80.

38. *Id.* (quoting *Melody Home Mfg. Co. v. Morrison*, 455 S.W.2d 825, 826 (Tex. Civ. App.—Houston [1st. Dist.] 1970, no writ)).

39. The court's reasoning follows the stated preference of the courts of appeals, *see Pioneer Hi-Bred Int'l, Inc. v. Talley*, 493 S.W.2d 602 (Tex. Civ. App.—Amarillo 1973, no writ); *Melody Home Mfg. Co. v. Morrison*, 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st. Dist.] 1970, no writ), as well as the California approach to the problem, *see Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Hügel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975) (following *Seely*).

In *Seely* Justice Traynor explained the justification for allowing products liability recovery when physical injury has occurred and for not allowing such recovery when the loss is merely pecuniary:

The distinction rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.

63 Cal. 2d at 15, 403 P.2d at 151, 45 Cal. Rptr. at 23. Traynor's reasoning reflects a traditional reluctance to extend the scope of a defendant's duty for omissions that amount to mere nonfeasance. For a general discussion of the traditional view, *see W. PROSSER, HANDBOOK OF THE LAW OF TORTS* ch. 9, § 56, at 339 (4th ed. 1971). A minority of jurisdictions, however, have extended the doctrine of strict liability to actions involving economic loss. *See Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

40. *Compare Pesek v. Murrel's Welding Works, Inc.*, 558 S.W.2d 39 (Tex. Civ. App.—San Antonio 1977, writ *dism'd*) and *Johns-Manville Sales Corp. v. Haden Co.*, 543 S.W.2d 415 (Tex. Civ. App.—Fort Worth 1976), *writ ref'd n.r.e. per curiam*, 553 S.W.2d 759 (Tex. 1977) with *Stone Fort Nat'l Bank v. Forbess*, 126 Tex. 568, 91 S.W.2d 674 (1936).

41. 558 S.W.2d 39 (Tex. Civ. App.—San Antonio 1977, writ *dism'd*).

42. *Id.* at 44.

III. LUBBOCK MANUFACTURING CO. V. SAMES

In the original opinion in *Lubbock Manufacturing Co. v. Sames* (*Lubbock Manufacturing I*)⁴³ the Texas Supreme Court, in a five-to-four decision, found persuasive the authority and reasoning of *Pesek* and *Stone Fort*.⁴⁴ Justice Barrow, writing for the court, recognized "no valid reason for making a distinction [in the] settled rule [between] cases brought to recover damages under a theory of strict liability in tort because of the defective design of a product" and other types of actions.⁴⁵ Because all acts of manufacturing and design of the product in dispute had taken place in Lubbock County, the court held that the fact that the injury occurred in Maverick County, where suit was filed, was insufficient to maintain venue in that county under subdivision 23.⁴⁶

After the initial decision, the court granted the plaintiff's petition for rehearing.⁴⁷ On rehearing, the court identified the primary issue as whether the single fact that the injury had occurred in the county of suit was sufficient to maintain venue in that county under article 1995, subdivision 23.⁴⁸ Setting aside its earlier opinion, the court concluded that in an action for strict liability in tort venue is proper in the county in which the injury occurs.⁴⁹ The court emphasized that no cause of action for strict liability exists unless actual physical harm to person or property occurs.⁵⁰ Therefore, the court found "no room for questioning the certain fact that *a part of* a cause of action for strict liability in tort arises when and where" the injury occurs.⁵¹ In so holding, the court did not overrule the cases that previously had held that damages are not a part of a cause of action.⁵² Rather, the court distinguished the earlier cases, stating that all of the prior decisions had involved the breach of a contractual obligation.⁵³ The court

43. 23 Tex. Sup. Ct. J. 28 (Oct. 17, 1979).

44. *Id.* at 29. The court cited *Pesek* and *Stone Fort* as authority for the rule that damages are not considered sufficient to support venue. In addition the court cited *Burrows v. Texas Kenworth Co.*, 554 S.W.2d 300 (Tex. Civ. App.—Tyler 1977, writ dismissed); *American Quarter Horse Ass'n v. Rose*, 525 S.W.2d 227 (Tex. Civ. App.—Fort Worth 1975, no writ). 23 Tex. Sup. Ct. J. at 30.

45. 23 Tex. Sup. Ct. J. at 30.

46. *Id.*

47. 598 S.W.2d at 238 (*Lubbock Manufacturing II*). Justice Campbell, writing for the majority, adopted his dissent in *Lubbock Manufacturing I*. All eight justices participating in the rehearing agreed with the holding. In a concurring opinion, however, Justice Barrow would have extended the holding to actions within the meaning of art. 1995(27). *Id.*

48. *Id.* at 235.

49. *Id.* at 237.

50. *Id.* at 236.

51. *Id.* (emphasis in original).

52. *See id.* at 237. *See also* note 10 *supra*.

53. According to the court "[a]ll of these decisions involved a breach of a contractual obligation," 598 S.W.2d at 237, but immediately preceding that statement was a citation to *Pesek*. The court apparently failed to recognize that *Pesek* involved a factual situation almost identical to *Lubbock Manufacturing*. In distinguishing *Pesek* the court merely noted that the plaintiff had failed to prove a cause of action and, therefore, that the plea of privilege was properly granted. In *Pesek* the San Antonio appellate court expressly rejected the notion that the case involved a contractual breach when it stated: "[T]he defendant did not contract to do anything, or participate in any transaction in [the county in which damages occurred]." 558 S.W.2d at 44.

noted that proof of the creation and breach of a contractual right completely establishes a violation of a legal right for which a plaintiff is entitled to at least nominal damages, regardless of whether actual damages are shown.⁵⁴ In contrast, a plaintiff has no cause of action based on strict liability in tort unless actual physical harm to his person or property results.⁵⁵ Therefore, the court concluded that a part of a cause of action sufficient to support venue arises in the county in which that harm occurs.⁵⁶

The court's decision in *Lubbock Manufacturing II* does away with the inconsistency in holding a physical injury essential to recovery for strict liability in tort but insufficient to support venue. The opinion does, however, raise serious practical considerations. Since the court addressed only those actions brought under section 402A of the *Restatement (Second)*, a plaintiff who alleges negligent design and breach of implied warranty, but fails to plead strict liability in tort, will presumably not be able to bring his cause of action in the county where damages occur. Thus, the practical effect of the decision could be to encourage plaintiffs to plead strict liability in tort, primarily as a defense to an anticipated plea of privilege. Arguably, all actions in the products liability area should be afforded the same venue alternatives.

IV. CONCLUSION

In the second of two opinions in *Lubbock Manufacturing Co. v. Sames* the Texas Supreme Court held that in an action for strict liability in tort venue is proper in the county in which the injury occurs. The court distinguished prior decisions that had held that injury alone was insufficient to maintain venue in the county in which the injury had occurred because those decisions had involved a breach of a contractual right entitling the plaintiff to at least nominal damages when creation and breach of that right occurred, regardless of whether actual injury resulted. In contrast,

54. The court recognized that the cases adhering to the *Stone Fort* rule and relied upon by *Lubbock Manufacturing* involved causes of action in which none of the necessary elements had occurred in the county of suit. Accordingly, in those cases, the court concluded that the plaintiff had

alleged a cause of action that was complete and mature, entitling him to nominal damages in vindication of a right, regardless of whether he later was able to prove actual damages. In such instance, it is obvious that whether he suffered any actual damages or the extent thereof would not constitute a part of his cause of action in the venue sense.

598 S.W.2d at 236.

55. *Id.* at 237.

56. *Id.* By carefully distinguishing the earlier cases, the court let stand the established rule that a duty must be created or breached in the county in which the action is brought. According to *Lubbock Manufacturing II*, the element of damages in an action for strict liability in tort must be proven as a prerequisite to recovery. Since that requirement is unique to actions for strict liability in tort, the direct effect of this decision in the basic negligence area should be minimal.