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Personal Torts

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PERSONAL TORTS

*Meredith J. Duncan**

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I. INTRODUCTION

THE following is a discussion of significant personal tort cases decided in Texas during the Survey period, November 1, 2007, to October 31, 2008. This discussion covers a wide variety of important Texas tort issues, ranging from whether a commonly-used pattern jury charge in products liability cases improperly defines legal terms to whether a church member may bring an intentional tort action against a church and its employees. Part II discusses a case that requires a change to the pattern jury charge previously used in products liability actions based on manufacturing defects. Additionally, Part II discusses recent Texas Supreme Court cases clarifying the intersection of the Uniform Commercial Code (UCC) and Texas products liability law as well as the non-liability of an auctioneer in a products action. Part III discusses the supreme court's recent decision defining the contours of a church's liability in a tort action.

II. PRODUCTS LIABILITY

A. PATTERN JURY CHARGE FOR MANUFACTURING DEFECT AND PRODUCING CAUSE

On December 21, 2007, the Texas Supreme Court decided *Ford Motor Co. v. Ledesma*,¹ a products liability action based on a manufacturing defect. In *Ledesma*, the Texas Supreme Court made two significant rulings: (1) that Texas's pattern jury charge commonly used in products liability

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1. 242 S.W.3d 32 (Tex. 2007).

actions provided an incomplete, and therefore erroneous, definition of “manufacturing defect”; and (2) that the frequently submitted definition of “producing cause” used in the pattern jury charge was erroneous.²

In March of 1999, Tiburicio Ledesma purchased a new truck from defendant Ford Motor Company.³ A few months later, while driving the car, Ledesma was involved in an accident in which his car struck two parked cars.⁴ Inspection of the truck after the accident revealed that the rear spring and axle assembly had separated, causing the drive shaft to dislodge from the transmission.⁵ Ledesma sued defendant Ford Motor Company for the damages he sustained, claiming that a manufacturing defect in the truck caused the rear-axle displacement, thereby causing the accident.⁶ In defense, Ford Motor Company claimed that the plaintiff’s poor driving caused the accident, thereby causing the rear axle to detach.⁷ After a jury trial, the court entered judgment in favor of the plaintiff, awarding damages in excess of \$200,000.⁸ Ford Motor Company appealed, claiming in part that the trial court improperly instructed the jury on the definitions of “manufacturing defect” and “producing cause.”⁹ The Austin Court of Appeals affirmed.¹⁰ The Texas Supreme Court reversed and remanded the case for a new trial.¹¹ In its ruling in favor of defendant Ford Motor Company, the supreme court mandated at least two changes to Texas’s pattern jury charge.

There are at least two different types of product liability defects—design defects and manufacturing defects.¹² A design defect is essentially a claim that the defendant’s product has been designed in such a manner as to render it unreasonably dangerous.¹³ Accordingly, an alleged design defect affects every product issued pursuant to that particular design, as it is an attack on the entire line of a particular product. In contrast, a manufacturing defect is a claim alleging that a particular item has been produced incorrectly and not pursuant to its intended design.¹⁴ A claim

2. *Id.* at 35.

3. *Id.*

4. *Id.*

5. *Id.* at 36.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 41. Defendant Ford Motor Company also complained on appeal that the trial court erred in admitting the testimony of two of the plaintiff’s expert witnesses. *Id.* at 37. Ruling against Ford on this issue, the supreme court held that the testimony was sufficiently reliable to warrant its admission. *Id.* at 39.

10. *Id.* at 36-37.

11. *Id.* at 35.

12. *See, e.g.,* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (classifying product defects as either design, manufacturing, or warnings/instruction).

13. *See, e.g., id.* § 2(b) (defining design defect as a product designed in such a manner as to render the product not reasonably safe).

14. *See, e.g., id.* § 2(a) (defining manufacturing defect as a product departing from its intended design); *see also* Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 800 (Tex. 2006) (explaining that pursuant to Texas law, a manufacturing defect exists when a product deviates from its specified or planned output that renders it unreasonably dangerous); Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 434 (Tex. 1997).

based on a manufacturing defect is essentially a claim that the particular item's deviation from its intended design has rendered that item unfit or unreasonably dangerous.¹⁵

In *Ledesma*, the plaintiff's theory at trial was that his truck contained a manufacturing defect that led to his accident.¹⁶ The plaintiff presented expert testimony at trial seeking to prove that the truck's rear axle assembly was constructed improperly and not pursuant to defendant Ford Motor Company's intended design.¹⁷ The plaintiff's claim was that the defendant had simply failed to construct the rear-tire assembly in the manner required by its own specifications.¹⁸ His claim was not an attack against Ford's entire design (a design defect claim), but rather was a claim that the particular truck he bought was improperly constructed (a manufacturing defect claim).

When the case was presented to the jury, the jury was asked over Ford's timely objection to decide whether Ledesma's truck contained a manufacturing defect that was a producing cause of Ledesma's accident.¹⁹ The court instructed the jury:

A "defect" means a condition of the product that renders it unreasonably dangerous. An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics.²⁰

The supreme court held that the instruction submitted to the jury was incomplete and therefore an inaccurate explanation of a manufacturing defect pursuant to Texas law.²¹

First, the supreme court explained that the instruction did not require the jury to determine exactly how the defendant's product deviated from its intended design.²² By omitting this determination, the supreme court explained, the jury was never asked to consider whether the product was in an unreasonably dangerous condition because of that deviation.²³ Without that information, the basis upon which the jury concluded that the product was in an unreasonably dangerous condition remains unclear. This is problematic because, in Texas, distinguishing whether the product was in an unreasonably dangerous condition because of a *design* defect or based on a *manufacturing* defect is very important.²⁴ In Texas, liability

15. *Am. Tobacco*, 951 S.W.2d at 434.

16. *Ledesma*, 242 S.W.3d at 41.

17. *Id.* at 37-38. The plaintiff's specific claim was that the u-bolts used in the rear tire assembly were under-torqued and well below defendant Ford Motor Company's required specifications. *Id.*

18. *Id.* at 38.

19. *Id.* at 41.

20. *Id.* In instructing the jury, the trial court relied upon Texas Pattern Jury Charge 71.3. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 42.

24. *Id.*

for a design defect requires proof of a safer alternative design.²⁵

Because a products claim based on design defect essentially seeks a determination that the product should have been planned and created more safely,²⁶ Texas requires proof that it *could* have been designed more safely. Accordingly, Texas requires proof of the availability of a safer alternative design. In contrast, a products action based on a manufacturing defect merely alleges that something went wrong with the construction of the particular unit in question.²⁷ Proof of an alternative available design is therefore irrelevant.²⁸ In *Ledesma's* case, the failure to ask the jury whether the product deviated from its intended design leaves to speculation whether the jury found the product to contain a design defect or a manufacturing defect.²⁹ This is problematic because if the unreasonably dangerous condition was based upon a design defect, the jury may have imposed liability without considering whether a safer alternative design was available, as required by Texas law.³⁰

In *Ledesma*, the supreme court correctly concluded that subjecting defendant Ford Motor Company to liability without clarifying the basis of its liability is improper. A jury must identify whether it is imposing liability for a design defect or for a manufacturing defect.³¹ To merely ask if a product is in an unreasonably dangerous condition without more potentially subjects a defendant to liability outside of the requirements of Texas law.

In addition to the erroneous definition of a manufacturing defect, Ford Motor Company also complained on appeal—and the supreme court agreed—that the jury was improperly guided as to the definition of “producing cause.”³² In its instruction to the jury, relying again on the pattern jury charge, the trial court defined “producing cause” as: “an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question. There may be more than one producing cause.”³³ The supreme court criticized this definition because of its inability to provide “concrete guidance” to a jury,³⁴ complaining that the terms “efficient” and “exciting” were adjectives “foreign to modern English language” as a means to describe legal cause and, as such, offer little

25. *Id.*

26. See generally David G. Owen, *Design Defects*, 73 MO. L. REV. 291, 297 (2008) (examining design defectiveness as developed in the courts pursuant to Restatement (Second) of Torts and Restatement (Third) of Torts: Products Liability).

27. David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 852 (2002) (examining manufacturing defects in products liability actions).

28. *Ledesma*, 242 S.W.3d at 42.

29. *Id.*

30. *Id.*

31. Texas, like most jurisdictions, requires proof of a safer alternative design in order to impose liability for a design defect. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

32. *Ledesma*, 242 S.W.3d at 45.

33. *Id.* at 41.

34. *Id.* at 46.

practical guidance.³⁵ It held that Texas juries should be instructed that a “producing cause” is one that must be: (1) “a substantial cause of the event in issue”; and (2) “a but-for cause, namely one without which the event would not have occurred.”³⁶

The supreme court correctly ruled for a more helpful and insightful manner to instruct juries. To tell the jury that a producing cause is one that is “efficient” and “exciting” is to tell them close to nothing. Moreover, these terms are likely to be more confusing to juries than helpful. The clearer the court can be in instructing juries, the better. Meaningful definitions in plain English are much more instructive and desirable than employing vague and flowery terms.

Ledesma is significant because it changes pattern jury instructions in Texas in at least two respects: (1) by providing a more complete and accurate definition of a manufacturing defect in products actions, and (2) by providing a more useful and accurate definition of “producing cause.” *Ledesma* also serves as a helpful reminder to Texas practitioners that they are wise not to blindly follow the pattern jury charges as definitive statements of law. Despite the fact that courts of appeals have noted the lower courts’ reluctance to stray from the pattern jury charge instructions for fear that the Texas Supreme Court will not approve, the Texas Supreme Court will not necessarily follow the mandates of the pattern jury charge. In this case, the Texas Supreme Court’s changes to the instructions were prudent and grounded in firmly established tort doctrine.³⁷

B. INTERSECTION OF UCC AND TORT LAW

On June 27, 2008, the Texas Supreme Court decided *JCW Electronics, Inc. v. Garza*,³⁸ a case that afforded the supreme court the opportunity to consider the intersection between tort law, contract law, and principles of comparative fault. In this interesting products liability action, the supreme court clarified the definition of “tort” as used in Texas’s comparative fault statute.³⁹ The supreme court ruled that “tort,” as used in the statute, included a breach of implied warranty claim, the strange child of both contract and tort law.⁴⁰

In late 1999, Rolando Montez was arrested and jailed for public intoxication in Port Isabel, Texas.⁴¹ The Port Isabel jail was equipped with tele-

35. *Id.*

36. *Id.*

37. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998); See also Owen, *supra* note 25, at 291 (providing a thorough analysis of design defect theory in products liability cases).

38. 257 S.W.3d 701 (Tex. 2008).

39. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a)(1) (Vernon 2008) (providing for apportionment of responsibility among responsible parties in “any cause of action based on tort”).

40. *JCW*, 257 S.W.3d at 702. See generally Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457 (1994) (exploring the interrelationships between contract and tort law).

41. *JCW*, 257 S.W.3d at 702.

phones for inmate use manufactured by defendant JCW Electronics, Inc. (JCW).⁴² The day after his arrest, Montez used one of these phones to call his mother and arrange bail.⁴³ Unfortunately, on the day he was to be released, Montez also used the cord from one of these phones to hang himself.⁴⁴ Montez's mother, Pearl Garza, sued the City of Port Isabel and JCW alleging negligence, misrepresentation, and breach of implied warranty for fitness.⁴⁵ When asked to apportion fault among responsible parties, the jury attributed sixty percent fault to Montez, twenty-five percent to the City of Port Isabel, and fifteen percent to JCW.⁴⁶ JCW appealed, complaining that the jury's attribution of sixty percent fault to Montez barred JCW from liability based on Texas's apportionment of fault scheme in products liability actions.⁴⁷

Chapter 33 of Texas's Civil Practices and Remedies Code adopts a comparative fault scheme in "any cause of action based on tort."⁴⁸ Pursuant to the statute, "a claimant may not recover damages if his percentage of responsibility is greater than 50 percent."⁴⁹ JCW claimed that because the jury attributed sixty percent of the fault to Montez, the decedent for whose death the plaintiff was seeking recovery, the plaintiff here was barred.

The heart of JCW's defense was that, in a products liability action, Chapter 33's comparative fault scheme includes causes of action for breach of implied warranty for fitness pursuant to Texas's equivalent to Article 2 of the UCC.⁵⁰ The plaintiff's position was that such a claim is not a tort action but more properly characterized as a contract action.⁵¹ Plaintiff's argument continued that because a breach of warranty claim is not a "tort," Chapter 33 was inapplicable, and the plaintiff was therefore not barred from recovery. The court of appeals agreed with the plaintiff, ruling that Chapter 33 did not apply. The Texas Supreme Court reversed.⁵²

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 702-03. The breach of warranty claim was based on the allegation that JCW had represented to Port Isabel that the telephones were safe for unsupervised use by inmates. *Id.* at 703.

46. *Id.*

47. *Id.*

48. *Id.* at 702 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a)(1) (Vernon 2008)). See generally Mark E. Roszkowski & Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 ST. LOUIS U. L.J. 19, 20 (1988) (discussing the various policies underlying the reconciliation of comparative negligence and strict liability doctrines).

49. *JCW*, 257 S.W.3d at 707 (quoting Act of May 8, 1995, 75th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 2008))). In a wrongful death action, such as the claim here, the statute defines "claimant" as including not only the plaintiff, but the decedent as well. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(1).

50. *JCW*, 257 S.W.3d at 702 n.1 (citing TEX. BUS. & COMM. CODE ANN. §§ 2.101-725 (Vernon 1994)).

51. *Id.* at 704.

52. *Id.* at 708.

The supreme court explained that a breach of warranty claim presents a unique mixture of contract law and tort law.⁵³ JCW's position that the plaintiff's claim for breach of warranty is in fact a tort is based on the peculiar and uncertain character of a breach of warranty claim.⁵⁴ Acknowledging that a breach of implied warranty action may conceptually be characterized either in contract or in tort,⁵⁵ quoting Dean Prosser, the supreme court explained that breach of warranty law is "a freak hybrid born of the illicit intercourse of tort and contract."⁵⁶ The supreme court went on to explain that a breach of warranty action is created by operation of Texas common law and is "grounded more in tort than in contract,"⁵⁷ particularly where the damages sought are for recovery for personal injuries.⁵⁸ Recovery for pure economic injuries is more akin to a contract action.⁵⁹ Applying the law to the facts in this case, because the plaintiff was seeking to recover for personal injuries, this action was properly characterized as a tort action.⁶⁰

Bolstering its conclusion further, the supreme court explained that the legislature intended for a breach of warranty claim to be included within Chapter 33's apportionment of fault scheme.⁶¹ In this statute, the legislature left the term "tort" undefined.⁶² However, the chapter expressly includes all products liability actions.⁶³ A breach of implied warranty claim is just one type of products liability action.⁶⁴ Therefore, the supreme court concluded, such a claim was necessarily intended by the legislature to be included as part of this chapter.⁶⁵ Despite the plaintiff's assertions that the UCC is intended in part to provide uniformity across the states regarding the sale of goods, the supreme court explained that "UCC article 2 does not undertake a comprehensive comparative fault scheme."⁶⁶ Therefore, the Texas legislature could and did properly intend for breach of implied warranty products claims to be governed by Chapter 33. Thus, comparative fault principles apply.⁶⁷

53. *Id.* at 704-05 (quoting William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1126 (1960)); *see also* Galligan, *supra* note 40, at 457, 461-62 (examining various issues that arise when contract law and tort law intersect).

54. *JCW*, 257 S.W.3d at 704-05.

55. *Id.* at 704.

56. *Id.* (quoting Prosser, *supra* note 53, at 1126).

57. *Id.* (quoting *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984)).

58. *Id.* at 705.

59. *Id.*

60. *Id.*

61. *Id.* at 704. Because the incident in question in this case occurred in 1999, the 1995 version of Chapter 33 is the applicable apportionment of responsibility provision. *Id.*

62. *Id.*

63. *Id.*

64. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

65. *JCW*, 257 S.W.3d at 704.

66. *Id.* at 706.

67. *Id.* at 706-07; *see generally* William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 *OKLA. L. REV.* 201, 204 (1994) (taking the

Concurring in the majority's opinion, Chief Justice Jefferson wrote separately, joined by Justice O'Neill.⁶⁸ Agreeing with the majority's application of the comparative fault scheme barring the plaintiff's recovery, Chief Justice Jefferson took issue with the language of apportionment questions generally submitted to Texas juries in similar cases.⁶⁹ He explained that courts should be careful to ask juries to apportion the parties' percentage of *responsibility* rather than the percentage of *negligence*.⁷⁰ Chapter 33 requires the jury to apportion responsibility as to each cause asserted:

'The trier of fact, *as to each cause of action asserted*, shall determine the percentage of responsibility . . . with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, *or by any combination of these . . .*'⁷¹

Chief Justice Jefferson explained that Texas's comparative fault scheme may apply, not only to negligence actions, but also to various theories of recovery, even in the same case.⁷² Accordingly, in such cases, the trial court needs to be sure that the jury is asked what percentage of fault each party is responsible for, regardless of the theory of recovery.⁷³ Asking the jury merely "[w]hat percentage of the negligence that caused the death of the decedent" it finds to be attributable to each of the parties is too narrow a question.⁷⁴ Asking for apportionment of *negligence* fails to require the jury to determine the percentage of fault attributable to the defendant or defendants based on alternate, allowable theories of recovery, such as the breach of warranty claim at issue here.

In this case, failing to ask the jury to apportion fault was immaterial to the outcome because the jury apportioned sixty percent of the fault to Montez's negligence. As long as the jury determined that Montez's negligence was greater than fifty percent, the plaintiff was barred from recovering from any of the defendants.⁷⁵ If the jury had assigned less than fifty percent of the fault to Montez, the issue that Chief Justice Jefferson identified would have been problematic. If Montez's negligence had contributed less than fifty percent to the incident, the failure of the jury to attribute fault to JCW for its breach of warranty would have made it impossible to calculate the amount of damages the plaintiff would have

position that applying comparative fault principles in strict liability products actions is justifiable and appropriate).

68. *JCW*, 257 S.W.3d at 708 (Jefferson, C.J., concurring).

69. *Id.* at 710.

70. *Id.*

71. *Id.* at 709-10 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (Vernon 2008)).

72. *Id.* at 709.

73. *Id.* at 710 n.2.

74. *Id.* at 710.

75. *Id.* at 704 n.4.

been entitled to recover. Under those circumstances, the case could have been properly remanded to the trial court for further determination on apportionment of responsibility.

Chief Justice Jefferson's concern is valid. Because Chapter 33 reflects a comparative *fault* scheme rather than a comparative *negligence* scheme,⁷⁶ Texas trial courts should be careful with the language used to instruct juries in apportioning responsibility.⁷⁷

C. PRODUCTS LIABILITY OF AUCTIONEER

On March 28, 2008, the Texas Supreme Court decided *New Texas Auto Services, L.P. v. Gomez de Hernandez* and clarified that in a Texas products liability action, an auctioneer cannot be held liable for a defective product.⁷⁸ In October 2000, Jose Angel Hernandez Gonzalez bought a 1993 Ford Explorer from Progresso Motors, who had purchased it from defendant Big H, an auctioneer temporarily holding title to the car.⁷⁹ About a year after purchasing the vehicle, Gonzalez was killed in a roll-over accident while driving the car. Representatives of his estate sued the car manufacturer, the tire manufacturer, Big H, and others for products liability, claiming that the car had a defect that caused the accident in which Gonzalez was killed.⁸⁰ Big H's motion for summary judgment was

76. In 1987, Texas adopted a comparative fault scheme, moving away from common law contributory negligence as a defense in negligence actions. At common law, the doctrine of contributory negligence operated to bar a plaintiff from recovery in a negligence action if the plaintiff's own negligence contributed at all to the incident. Over the years, this doctrine was much criticized as leading to harsh results, as it completely barred a plaintiff from recovery, even if the plaintiff was only minimally at fault. See Roszkowski & Prentice, *supra* note 48, at 30-31 (describing the harshness of contributory negligence prior to adoption of comparative fault principles). In response to this harshness, Texas—like most other jurisdictions—has adopted some type of comparative fault scheme. See McNichols, *supra* note 67, at 236-37 (explaining that the vast majority of jurisdictions apply some type of comparative apportionment of responsibility in strict products liability actions); Roszkowski & Prentice, *supra* note 48, 44-45 (discussing Texas's adoption of a comparative causation system); see also *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 418 (Tex. 1984) (the preeminent Texas case in which the supreme court adopted comparative fault principles); *Daly v. Gen. Motors Corp.*, 575 P.2d 1162 (Cal. 1978) (the most influential case applying comparative fault principles to strict liability tort actions). Instead of completely barring a plaintiff's recovery, a comparative fault scheme allows for a plaintiff's recovery to be reduced according to the amount of fault attributable to the plaintiff. Many of these comparative fault schemes bar a plaintiff from recovering if the plaintiff's fault rises to a certain percentage. The percentage varies from state to state.

Although first adopted in the negligence context, many jurisdictions, like Texas, eventually extended the concept of comparative fault to other areas of tort law, including products liability actions, regardless of the theory. See William C. Powers, Jr., *Annual Survey of Texas Law Part I: Private Law Torts Personal*, 38 Sw. L.J. 1, 10-16 (1984) (discussing comparative fault issues in products liability suits). Because comparative or apportionment of responsibility may apply to theories of tort recovery in addition to negligence, "comparative fault" or "apportionment of responsibility" are more appropriate terms to describe this concept of weighing a plaintiff's fault against a defendant's fault to determine whether, and how much, a plaintiff is entitled to recover.

77. See Roszkowski & Prentice, *supra* note 48, at 64-65 (explaining why the term "contributory negligence" can be confusing in comparing fault in products actions).

78. 249 S.W.3d 400, 402 (Tex. 2008).

79. *Id.* at 402.

80. *Id.*

granted at trial,⁸¹ and the court of appeals reversed.⁸² In considering Big H's appeal, the Texas Supreme Court was presented with the issue of whether Big H could be held liable for products liability when Big H served only as an auctioneer of the vehicle and was never the seller or manufacturer of the car.⁸³ On March 28, 2008, the supreme court ruled that, as an auctioneer, Big H could not be held liable for a product's defect.⁸⁴ Reversing the court of appeals, the supreme court held that although products liability law "requires those who *place* products in the stream of commerce to stand behind them[,] it does not require everyone who *facilitates* the stream to do the same."⁸⁵ Here, the supreme court concluded that an auctioneer facilitates, but does not place products in, the stream of commerce and therefore, cannot be held liable for a defective product.⁸⁶

The genesis of Texas products liability law is found in section 402A of the Second Restatement of Torts.⁸⁷ A defendant who sells a product in an unreasonably dangerous defective condition may be held strictly liable for physical injuries caused by that condition.⁸⁸ From its inception, section 402A has limited its scope to those "'engaged in the business of selling'" such products.⁸⁹ The question in this case was whether Big H, an auctioneer of the allegedly defective vehicle, could be held to have placed the product in the stream of commerce.⁹⁰ The court observed that strict products liability is not only reserved for parties involved in selling the product, but also for those involved in distributing the product.⁹¹ However, auctioneers are expressly excluded from liability.⁹² The supreme court concluded that because Big H was not in the business of selling automobiles, but rather in the business of *announcing* the sale of automobiles, Big H could not be held strictly liable for the injuries caused by this allegedly defective product.⁹³

This is an insightful opinion, not just because the supreme court properly relied on the birth and foundation of strict liability in Texas, but also because of the supreme court's careful consideration of the policy issues at play. Justifications for strict products liability include: "(1) compensat-

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 402-03.

88. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

89. *Id.* at 403 (quoting RESTATEMENT (SECOND) OF TORTS § 402A).

90. *Id.* at 402-03. Big H was not in the business of selling cars but rather was in the business of auctioning cars, a very relevant distinction when seeking to impose strict products liability. Big H worked as an agent of both the seller and the buyer, receiving a fee from both for its auctioning services. *See id.* at 404.

91. *Id.* at 404 (citing the RESTATEMENT OF LAW (THIRD) TORTS: PRODUCTS LIABILITY § 1 (1998)).

92. *Id.* (referring to the RESTATEMENT OF LAW (THIRD) TORTS: PRODUCTS LIABILITY § 20 cmt. g (regarding commercial auctioneers)).

93. *Id.* at 405-06.

ing injured consumers, (2) spreading potential losses, and (3) deterring future injuries.”⁹⁴ The supreme court explained:

Businesses that play only an incidental role in a product’s placement are rarely in a position to deter future injuries by changing a product’s design or warnings. If required to spread risks, they must do so across far more products than the one that was defective. And while many businesses may be able to pay compensation, consumers normally expect a product’s manufacturer to be the one who stands behind it.⁹⁵

The supreme court’s careful interpretation of the language of the law, as well as the various policy issues at play, resulted in an opinion that correctly interprets, applies, and clarifies Texas law. It is important for courts to revisit issues of policy as they make their determinations, as such debate is useful in a thoughtful development of the law.⁹⁶

III. INTENTIONAL TORTFEASORS AND THE FIRST AMENDMENT

In *Pleasant Glade Assembly of God v. Schubert*,⁹⁷ the Texas Supreme Court considered whether the First Amendment’s Free Exercise Clause⁹⁸ and Texas’s constitutional counterpart⁹⁹ shield a church, its staff, and its members from liability for intentional torts committed against a church member. The supreme court concluded, over strong dissent, that the First Amendment and its Texas counterpart did in fact protect the church from liability under the circumstances.¹⁰⁰

In 1996, seventeen-year-old Laura Schubert attended church with her family at Pleasant Glade Assembly of God.¹⁰¹ One weekend while her parents were out of town, Laura and her siblings attended various youth activities at the church.¹⁰² While at church on Sunday evening, Laura collapsed, not an uncommon occurrence at this church.¹⁰³ Several church members responded to Laura’s collapse by praying for and “la[y]ing]

94. *Id.* at 404.

95. *Id.*

96. *See, e.g.,* McNichols, *supra* note 67, at 240-44 (discussing the various important policy considerations in the strict products context); Roszkowski & Prentice, *supra* note 48, 23, 32-48 (explaining how it becomes too easy for courts to evade policy concerns after adaptation of comparative fault principles).

97. 264 S.W.3d 1 (Tex. 2008).

98. *See* U.S. CONST. amend. I (providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

99. *See* TEX. CONST. art. I, § 6 (providing, in relevant part, “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion”); *see also* TEX. CONST. art I, § 29 (“To guard against transgressions of the high powers herein delegated, we declare that everything in this ‘Bill of Rights’ is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto . . . shall be void.”).

100. *Schubert*, 264 S.W.3d at 2.

101. *Id.* at 3.

102. *Id.*

103. *Id.*

hands" on her.¹⁰⁴ Laura complained that she did not welcome the church members' actions and that several church members pinned her to the ground and held her against her will for more than two hours over her clear protestations.¹⁰⁵ She also claims that later that same day, church members and staff physically restrained her for another hour,¹⁰⁶ and did so again three days later.¹⁰⁷ As a result of these events,

[Laura was plagued by] angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia [She] became increasingly depressed and suicidal, eventually dropping out of her senior year of high school and abandoning her former plan to attend Bible College and pursue missionary work [She] was diagnosed as suffering from traumatic-stress disorder, which the doctors associated with her physical restraint at the church Ultimately, Laura was classified as disabled by the Social Security Administration and began drawing a monthly disability check.¹⁰⁸

The Schuberts left Pleasant Glade and began attending another church.¹⁰⁹

Laura and her parents sued the church, its pastor, its youth minister, and several church members claiming, *inter alia*, negligence, gross negligence, professional negligence, intentional infliction of emotional distress, false imprisonment, and assault.¹¹⁰ Defendants unsuccessfully sought to dismiss the lawsuit in the trial court, arguing that imposing liability would constitute an unconstitutional infringement of their religious practices in violation of the Free Exercise Clause of both the Federal and Texas Constitutions.¹¹¹ In a subsequent mandamus proceeding initiated by the defendants, the Fort Worth Court of Appeals granted relief to the defendants on the "religious" claims, which did not include Laura's claims for assault and false imprisonment.¹¹² Instead, the assault and false imprisonment claims were tried before a jury, which ruled in favor of the plaintiff and awarded her \$300,000 in damages for pain and suffering, loss of earning capacity, and medical expenses.¹¹³ The defendants appealed, again claiming that the verdict was in violation of their Free Exercise rights under both the Federal and Texas Constitutions.¹¹⁴

The Fort Worth Court of Appeals reversed that part of the trial court's damage award compensating for loss of earning capacity, but affirmed the

104. *Id.*

105. *Id.* at 15 (Jefferson, C.J., dissenting).

106. *Id.*

107. *Id.*

108. *Id.* at 4-5 (majority opinion).

109. *Id.* at 4.

110. *Id.* at 5.

111. *Id.*

112. *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 88 (Tex. App.—Fort Worth 1998, no pet.).

113. *Schubert*, 264 S.W.3d at 5.

114. *Id.* at 2, 6.

rest of the judgment.¹¹⁵ The court of appeals concluded that at this point the defendants were judicially estopped from raising their First Amendment claim because they allowed Laura's claim of assault, battery, and false imprisonment to go forward in the previous mandamus proceeding.¹¹⁶ The defendants again appealed and on petition for review—over strong dissent—a majority of the Texas Supreme Court reversed and dismissed the case, holding that: (1) the defendants were not judicially estopped from asserting their defense; and (2) the defendants were entitled to Free Exercise protection for the plaintiff's emotional damages, which arose from defendants' "laying hands" on her to combat "evil forces."¹¹⁷

In its opinion, the majority first focused on the court of appeals's ruling that the church defendants' failure to seek mandamus relief for Laura's assault, battery, and false imprisonment claims resulted in judicial estoppel.¹¹⁸ The supreme court first explained that the doctrine of judicial estoppel, a procedural rule based on justice and public policy, is applied to prevent a party from gaining an unfair advantage and applies only when a party adopts a position inconsistent with a position maintained successfully at an earlier proceeding.¹¹⁹ The majority explained that the court of appeals improperly ruled that judicial estoppel applied here for at least three reasons: (1) the alleged inconsistent position was asserted in the same case rather than a prior proceeding, (2) the defendants did not gain any advantage by its assertion, and (3) the defendants consistently asserted their First Amendment rights throughout.¹²⁰ The supreme court held that the procedural rule does not apply, and therefore, the defendants were not estopped from asserting their First Amendment defense.¹²¹

The majority next wrestled with the issue of the plaintiff's alleged damages for both physical pain and emotional injuries, and concluded that the imposition of liability is indeed a violation of the Free Exercise Clause.¹²² The First Amendment of the U.S. Constitution provides for the free exercise of one's religion,¹²³ and courts have consistently interpreted this to mean that courts are prohibited from deciding issues of religious doctrine.¹²⁴ As it concerns the facts in this case, Laura's claims are a combi-

115. *Id.*

116. *Pleasant Glade Assembly of God v. Schubert*, 174 S.W.3d 388, 407 (Tex. App.—Fort Worth 2005), *rev'd*, 264 S.W.3d 1 (Tex. 2008).

117. *Schubert*, 264 S.W.3d at 12-13.

118. *Id.* at 6-8.

119. *Id.* at 6.

120. *Id.*

121. *Id.* at 8.

122. *See id.* at 8-13.

123. *See* U.S. CONST. amend. I (providing "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

124. *Schubert*, 264 S.W.3d at 11 (citing *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 709-10 (1976)). For an interesting discussion of the Free Exercise Clause, see Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence From the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008), in which the author argues that Free Exercise does not exempt religious institutions from generally applicable laws that incidentally burden religious exercise.

nation of both secular and religious claims.¹²⁵ The intentional tort claims were based on the defendants' conduct during a common religious practice in their church.¹²⁶ Stripped of its religious context—that the touching and holding down were part of a religious practice—Laura would have had viable claims for assault, battery, and false imprisonment.

However, removing the religious context from the tortious conduct is problematic. As the supreme court explained, “although Laura’s secular injury claims might theoretically be tried without mentioning religion, the imposition of tort liability for engaging in religious activity to which the church members adhere would have an unconstitutional ‘chilling effect’ by compelling the church to abandon core principles of its religious beliefs” and would violate the Free Exercise Clause.¹²⁷ Moreover, the manner in which the trial court permitted imposition of damages complicated things even further. The damages awarded for the commission of these torts sought to compensate the plaintiff for both mental and physical injuries.¹²⁸ Divorcing the physical consequences from the mental consequences would prove much too difficult.¹²⁹ This was problematic because Laura’s emotional injuries caused by, what turned out to be, a negative religious experience were inextricably intertwined with her non-religious or secular injuries caused by the tortious conduct.¹³⁰ The supreme court explained that the laying on of hands, and the mental trauma associated with it, are part of the church’s belief system.¹³¹ “[C]ourts must carefully scrutinize the circumstances so as not to become entangled in a religious dispute.”¹³² Accordingly, Laura had “failed to state a cognizable, secular claim” distinct from the religious claim, and consequently, imposing liability would be a violation of the Free Exercise Clause.¹³³ The supreme court therefore reversed and dismissed the intentional tort claims for want of jurisdiction.¹³⁴

Chief Justice Jefferson, joined by Justices Green and Johnson, dissented.¹³⁵ Chief Justice Jefferson complained that the majority had fashioned a rule by which a “tortfeasor need merely allege a religious motive to deprive a Texas court of jurisdiction to compensate his fellow congregant for emotional damages.”¹³⁶ Chief Justice Jefferson further complained that the majority’s opinion was based on a flawed understanding or interpretation of the Free Exercise doctrine, explaining that the First Amendment “does not sanction intentional abuse in religion’s name.”¹³⁷

125. *Schubert*, 264 S.W.3d at 7.

126. *Id.* at 10-11.

127. *Id.* at 10 (citing *Westbrook v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007)).

128. *Id.* at 10-11.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 12.

133. *Id.* at 13.

134. *Id.*

135. *Id.* (Jefferson, C.J., dissenting).

136. *Id.*

137. *Id.*

The dissenting justices puzzled over the majority's application of judicial estoppel, inasmuch as the church defendants had previously conceded that the assault, battery, and false imprisonment claims presented a secular rather than a religious controversy.¹³⁸ The dissenting justices went on to explain that this case presents secular intentional tort claims at its core.¹³⁹ Agreeing that the First Amendment forbids courts to become embroiled in an assessment of the propriety of religious beliefs or doctrine, the dissenters emphasized that awarding damages for physical injuries arising from assault, battery, or false imprisonment does not require proof of emotional or mental injuries.¹⁴⁰ In fact, the intentional torts of assault, battery, and false imprisonment do not require a showing of mental damages at all.¹⁴¹ Therefore, in this case, if Laura could establish—as she did—that she suffered physical injuries separate and distinct from her emotional injuries as part of her assault, battery, and false imprisonment claims, permitting her recovery for those physical injuries would not be in violation of the church defendants' First Amendment rights.¹⁴² The First Amendment “never has immunized clergy or churches from all causes of action alleging tortuous conduct, . . . ‘[A] church may be held liable for intentional tortious conduct on behalf of its officers or members, even if that conduct is carried out as part of the Church’s religious practices.’”¹⁴³ At trial, the jury was not permitted to hear about the religious beliefs or doctrines of the church defendants or the plaintiff.¹⁴⁴ Instead, it assigned liability to the defendants based on the commission of battery, assault, and false imprisonment claims without considering, or even being informed of, the church defendants' beliefs.¹⁴⁵ That the jury was asked to provide one figure for the plaintiff's mental as well as physical injuries should not preclude the plaintiff from being able to recover for her physical injuries stemming from the battery, assault, and false imprisonment claims.¹⁴⁶

All three dissenting justices—Chief Justice Jefferson, Justice Green, and Justice Johnson—agreed that the defendants should not be afforded First Amendment protection for the plaintiff's battery, assault, and false imprisonment claims. They disagree, however, on how a plaintiff's allowable physical injury damages could be separated from those prohibited by

138. *Id.* at 13-14. In its successful writ of mandamus, the church abandoned its First Amendment claims for those intentional torts, explaining that “no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person.” *Id.*

139. *Id.* at 15.

140. *Id.* at 15-16, 17-18.

141. *Id.*

142. *Id.*

143. *Id.* at 17 (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 677 (Tex. 1996)).

144. *Id.* at 18.

145. *Id.*

146. *Id.* at 20 (“constitutional protection for illegal or tortuous conduct cannot be bootstrapped from the protection of beliefs where it does not otherwise exist”). Rather than allow defendants to shield themselves from liability based on the Free Exercise Clause, the dissenters propose that a more appropriate defense may be the plaintiff's consent. *Id.* at 20, 23 n.1. Consent is a fact issue that must be determined by the jury. *Id.* at 20.

the First Amendment. On the one hand, Chief Justice Jefferson and Justice Green suggest that defendants' First Amendment assertion should be an affirmative defense that must be raised by defendants at trial.¹⁴⁷ If so, the trial court could then conduct the proceedings without reference to religion and include a proximate cause instruction on foreseeability.¹⁴⁸ The jury would then be asked to assess only those damages reasonably connected to the secular injury.¹⁴⁹ In addition to joining Chief Justice Jefferson's opinion, Justice Green also writes separately simply adding that "[i]f a plaintiff's case can be made without relying on religious doctrine, the defendant must be required to respond in kind."¹⁵⁰ Justice Johnson also dissents separately, indicating that in order to prevent improper entanglement of First Amendment issues, he would "preclude damages for those emotional injuries for which there is any evidence of causation by religious beliefs or teachings."¹⁵¹

However, unlike Chief Justice Jefferson and Justice Green, Justice Johnson would not make that preclusion an affirmative defense. Rather, according to Justice Johnson, "whether alleged mental and emotional damages resulted to any degree from religious beliefs and teachings should be determined by the trial court as a matter of law."¹⁵² Any evidence regarding religious practices or beliefs could then be precluded by motions in limine or pretrial hearings, as was done in this case.¹⁵³ The trial court could then submit separate damages questions isolating emotional or psychological injuries, thereby divorcing the First Amendment damages from all other types of damages.¹⁵⁴

Of course, the issue of tort recovery for the injured and the protection of churches based on the Free Exercise Clause is a complex issue. A workable balance needs to be struck. The dissenting justices take the first step at trying to unravel the competing issues at play and arrive at a workable solution. It cannot be denied that the dissenting justices have expressed legitimate concerns, particularly their concern that tortfeasors can avoid liability by alleging a Free Exercise claim. Chief Justice Jefferson's proposal to present separate damages questions seems to be a workable solution. It is not unfamiliar for Texas courts to present multiple issues to a jury. Certainly, such a system would work here, and the result could be that Texas would afford church defendants the protection of their Free Exercise rights while at the same time permit persons injured by their tortious conduct to receive compensation for their secular injuries.

147. *Id.* at 21.

148. *Id.*

149. *Id.* at 21-22.

150. *Id.* at 23 (Green, J., dissenting).

151. *Id.* at 25 (Johnson, J., dissenting).

152. *Id.*

153. *Id.*

154. *Id.*

IV. CONCLUSION

Going forward, these recent Texas Supreme Court decisions will impact Texas tort practice. As a consequence of *Ledesma*, changes will be made to Texas's pattern jury charge in products liability actions in order to refine the proper definitions of "manufacturing defect" and "producing cause."¹⁵⁵ As a consequence of the opinions in *JCW Electronics*, the language used in instructing juries to compare fault in products cases pursuant to Chapter 33 will hopefully change in an effort to clarify that the jury is being asked to compare the fault of the parties, not just the negligence of the parties.¹⁵⁶ As a consequence of *New Texas Auto Services, L.P.*, Texas law going forward is clear that an auctioneer is not a party who may be held liable for injury caused as a result of a defective product.¹⁵⁷ Finally, as a consequence of the various opinions issued in *Pleasant Glade Assembly of God*, the debate regarding the liability of church defendants engaging in intentional tortious behavior in Texas may continue to develop in a thoughtful and workable manner.¹⁵⁸

155. See *supra* Part II.A (discussing *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007)).

156. See *supra* Part II.B (discussing *JCW Elects., Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008)).

157. See *supra* Part II.C (discussing *New Tex. Auto Servs., L.P. v. Gomez de Hernandez*, 248 S.W.3d 400 (Tex. 2008)).

158. See *supra* Part III (discussing *Schubert*, 264 S.W.3d at 1).

