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Personal Torts

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PERSONAL TORTS

David S. Coale*
Jennifer Evans Morris**

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DURING the Survey period, federal and state courts addressed a wide range of issues under Texas tort law. A subtext to many of those issues was the sufficiency of expert testimony under *Daubert* and *Robinson*. Many cases addressed statutes of limitations issues, including the two year limitations provision of the Medical Liability and Insurance Improvement Act and the appropriate tolling rules for legal malpractice claims. The Texas Supreme Court addressed several basic tort issues, including important questions about duty and constructive knowledge in the premises liability context, what constitutes “extreme and outrageous” conduct for purposes of the tort of intentional infliction of emotional distress, and guidelines for class action certification of mass tort litigation.

I. NEGLIGENCE

A. DUTY

The question in *Boyd v. Texas Christian University* was whether Texas Christian University (“TCU”) owed a duty to its students to supervise or control its scholarship football players in a non-university sponsored event held off the school campus.¹ The other issue was whether TCU had a duty to provide a safe environment for its students at an off-campus bar and at a non-TCU sponsored event. The court began by observing that there is generally no duty to control the conduct of third persons.² This general rule does not apply when a special relationship imposes a duty upon the defendant to control a third-person’s conduct in situations such as employer-employee and parent-child relationships. The court of appeals saw no such relationship in this case, and rejected the doctrine of “in loco parentis” as applying solely to minor children. The court also observed in a footnote that liability is not ordinarily imposed upon parents for the actions of an adult child.³

Generally, a public utility has a duty to exercise proper precautions to anticipate and prevent injuries. The degree of care that a public utility must exercise is ordinary or reasonable.⁴ In *Grant v. Southwestern Electric Power Co.*, Grant presented more than a scintilla of evidence that the utility company owed her a duty as to her non-economic damages claims.⁵

1. 8 S.W.3d 758 (Tex. App.—Fort Worth 1999, no pet. h.).

2. *Id.* at 760 (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)).

3. *Id.* at 760 & n.3 (citing *Villacana v. Campbell*, 929 S.W.2d 69, 75-76 (Tex. App.—Corpus Christi 1996, writ denied)).

4. See *Grant v. Southwestern Elec. Power Co.*, 20 S.W.3d 764 (Tex. App.—Texarkana 2000, no pet. h.).

5. *Id.*

Thus, summary judgment on Grant's personal injury claim due to ordinary negligence was inappropriate.⁶

In *Hou-Tex, Inc. v. Landmark Graphics*, Hou-Tex, an oil and gas company, sued Landmark, a computer software developer, for negligence and other torts.⁷ Hou-Tex drilled a well in the wrong location because of a defect in software developed by Landmark. The district court entered summary judgment for Landmark Graphics, and the court of appeals affirmed. Because Hou-Tex suffered only economic damages for its costs of drilling a dry well, the economic loss rule precludes any tort duty by Landmark to Hou-Tex.⁸ Under the economic loss rule, economic damages must accompany actual physical harm to persons or their property to be recovered.⁹

Houston's First District Court of Appeals affirmed summary judgment for the Houston Chronicle in *Arlen v. The Hearst Corp.*, a suit brought by a driver injured by a Chronicle deliverer in a car accident.¹⁰ An independent contractor of the Chronicle employed the deliverer, and the Chronicle asserted that it had no duty to the injured driver.¹¹ The court of appeals agreed, noting that while the Chronicle controlled the start and stop time for deliveries, inspected delivery progress, and received reports on them, this relationship was not enough to trigger liability.¹² According to the *Restatement (Second) of Torts* ("Restatement"), if an employer retains control over any part of the work, the employer "is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care."¹³ Because the control retained by the Chronicle did not relate directly to the accident, the Chronicle was not liable to the injured driver. The court also refused to apply the doctrine of "peculiar risk," found in section 413 of the *Restatement*, which imputes liability to an employer who does not take steps to prevent injury from an independent contractor's negligence regarding a known, peculiar risk.¹⁴ The court declined to be the first Texas court to adopt this doctrine.¹⁵

In *Lukasik v. San Antonio Blue Haven Pools, Inc.*, the court held that swimming pool installers owed no duty as a matter of law to the parents of a child who drowned in a swimming pool because the installer's conduct could not have foreseeably created a risk of injury to a boy that did

6. *Id.* at 776.

7. 26 S.W.3d 103 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

8. *Id.* at 107.

9. Hou-Tex could not maintain an implied warranty action against Landmark because it was not a party in horizontal privity who could sue for breach of implied warranties. Landmark's disclaimers, which include an "as is" clause, precluded Hou-Tex's claim for breach of an expressed warranty. The DTPA was inapplicable because Landmark's alleged deceptive act did not occur in connection with Hou-Tex's transaction for services.

10. 4 S.W.3d 326 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

11. *Id.* at 327.

12. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 414 (1965).

13. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

14. *Id.* § 413; *Arlen*, 4 S.W.3d at 328.

15. *Arlen*, 4 S.W.3d at 328. See *infra* n. 294 for a discussion concerning new legislation addressing changes in employer liability for leased employees.

not live on the property when the pool construction was completed.¹⁶ The plaintiffs unsuccessfully tried to base the installer's liability on alleged misrepresentations about its ability to get a pool alarm. The court, however, held that the defendants undertook no responsibility to make the pool safe from all drowning incidents to future visitors and that "such imposition of responsibility would create devastating social and economic consequences."¹⁷

In *Peavy v. Texas Home Management*, the owners of a court-mandated residence were denied summary judgment after Dickson, a mentally disabled resident, killed a woman while he was on a home visit.¹⁸ The residence provided healthcare, social services, and psychological and psychiatric treatment. Dickson's social worker stated that he had never heard Dickson make threats about specific individuals, nor had he heard of any threats Dickson had made while on weekend release. However, the social worker and residence manager were aware that Dickson had broken the law during home visits, and the manager testified that Dickson had been violent on several occasions and threatened to kill another resident. The residence was the sole decision maker in determining whether Dickson could go home for visits. The court determined there was sufficient evidence to raise a fact question concerning the reasonableness of the defendant's conduct.¹⁹ As for duty, the court distinguished a duty to warn a foreseeable victim from negligence in failing to control a resident. The court noted that cases that have found a duty to control do not require that a victim be readily identifiable.²⁰ The defendant was responsible for controlling Dickson when he became a resident of the facility pursuant to a court-ordered commitment, and it was under a duty to use reasonable care to determine if Dickson should continue unsupervised home visits. The court thus determined that the risk of foreseeability and likelihood of injury were within the knowledge of defendant.²¹

In the case of *Thompson v. CPN Partners*, the mother of a movie theater employee killed in a robbery brought a wrongful death action against the owner and operator of the shopping center where the theater was located.²² The district court granted summary judgment for defendants, and the court of appeals affirmed in part and reversed in part.²³ As to the owner, operator, and security company, the district court's ruling was af-

16. 21 S.W.3d 394 (Tex. App.—San Antonio 2000, no pet. h.).

17. *Id.* at 404.

18. 7 S.W.3d 795 (Tex. App.—Houston [1st Dist.] 1999), *appeal abated*, 16 S.W.3d 104 (Tex. App.—Houston [1st Dist.] 2000).

19. *Id.* at 800.

20. *Id.*

21. *Id.*

22. 23 S.W.3d 64 (Tex. App.—Austin 2000, no pet. h.).

23. *Id.* at 67. Reversal for the security guard and the non-moving corporate defendant was necessary when they had not moved for summary judgment themselves. The Mother Hubbard clause, which stated that all relief not expressly granted was denied, erroneously granted more relief than was requested in the summary judgment motion. *Id.* at 67-68.

firmed because the owner and operator of the center did not have a duty to protect the theater employee from criminal acts of third parties, nor did the contract create one.²⁴

B. CAUSATION

The plaintiff in *Cowart v. Kmart Corp.* alleged that Kmart negligently sold ammunition to a minor.²⁵ The minor customer used the purchased bullets for target practice, and then unloaded the pistol before he drove around drinking beer with friends. During the evening he reloaded the gun and a friend accidentally killed the victim with it.²⁶ The court affirmed a defense summary judgment based on the foreseeability element of proximate cause. The court analyzed the factors set out in section 442 of the *Restatement*, which describes when an intervening force rises to the level of a superseding cause. The court found it significant that, unlike alcohol, the sale of ammunition does not involve a product that impairs the user. Thus, the intervening act did not bring about the kind of harm that would have otherwise resulted from Kmart's negligent sale of ammunition to a minor. Finally, the plaintiffs provided no evidence of any fact that should have alerted any Kmart employee that the customers would put the bullets in the hands of someone who would engage in criminal conduct.

The case of *Green v. City of Friendswood* involved an intersection collision with a firefighter responding to an alarm about a trash fire.²⁷ Appellant sued the firefighter, the City of Friendswood, and the parties responsible for the trash fire. The trial court granted summary judgment for the defendants, and the court of appeals affirmed based on the emergency response defense as to the city and firefighter, and as to the other defendants, the lack of any evidence showing their negligence was a substantial factor in bringing about plaintiffs' injury.²⁸

The executor for the estates of two people killed in a private plane crash brought a negligence suit against a company that replaced one of the vacuum pumps on the plane four years before the crash in *Michaels v. Avitech, Inc.*²⁹ The Southern District Court of Texas granted the defendant's motion for summary judgment. On appeal, the Fifth Circuit affirmed summary judgment, examining each of the plaintiff's negligence theories in turn: (1) Avitech introduced debris contamination into the pumps when it replaced one of them; (2) Avitech spent an insufficient amount of time replacing the pump; and (3) the right pump caused the left pump to fail, which set off a chain reaction resulting in the crash. The court found that the plaintiff made no attempt to rule out other sources

24. *Id.* at 72-73.

25. 20 S.W.3d 779 (Tex. App.—Dallas 2000, no pet. h.).

26. *Id.* at 782.

27. 22 S.W.3d 588 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

28. *Id.* at 594, 595.

29. 202 F.3d 746 (5th Cir. 2000).

of contamination or other causes of pump failure, nor did the plaintiff provide expert evidence that Avitech spent an insufficient amount of time replacing the pump.³⁰ The court also opined that the plaintiff's expert evidence "would likely have been inadmissible at trial under *Daubert* because it failed to exclude other causes."³¹

C. MEDICAL MALPRACTICE

1. Personal Jurisdiction

The plaintiff in *Greeno v. Killebrew* sought to assert specific personal jurisdiction over a physician who had treated his wife while she was traveling in Mississippi.³² After treatment there, she returned to Texas so her further treatment would be covered by her HMO, and she ultimately died in Texas. The Mississippi physician made a phone call to Texas to arrange for her transfer. This single phone call was not enough to confer personal jurisdiction, as the Mississippi doctor had not entered a contract with the plaintiff's deceased wife, made any follow-up inquiries after the transfer, solicited business in Texas, or maintained a Texas client base.³³

2. Duty

The case of *Ramirez v. Carreras* compared medical and common law negligence.³⁴ In a medical negligence claim, a physician's conduct is judged against the standard of what a reasonable, competent, similarly-situated medical professional would do.³⁵ When a doctor performs an impairment examination solely for the benefit of an insurance company, there is no physician-patient relationship, and thus no duty to conduct the examination in accordance with this standard.³⁶ Under general common law principles, however, the doctor is liable for any injury he may cause during the procedure even if there is no physician-patient relationship. The plaintiff's testimony created a fact issue about whether the doctor had injured a pre-existing back condition during an exam, and the court of appeals thus reversed a summary judgment for the doctor on the plaintiff's common law negligence claim.³⁷

In *Kimber v. Sideris*, there was conflicting testimony as to whether a physician was a mere observer to an operation or "voluntarily undertook a duty or an affirmative course of action," such as directing decisions during surgery.³⁸ Thus, there was a fact issue as to whether the physician had

30. *Id.* at 753-54.

31. *Id.* at 753 (referring to *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)).

32. 9 S.W.3d 284 (Tex. App.—San Antonio 1999, no pet. h.).

33. *Id.* at 287.

34. 10 S.W.3d 757 (Tex. App.—Corpus Christi 2000, no pet. h.).

35. *Id.* at 760.

36. *Id.* at 762.

37. *Id.* at 764. Similarly, because there was no physician-patient relationship, the Texas Medical Liability and Insurance Improvement Act did not apply. TEX. REV. CIV. STAT. ANN. art. 4590i § 1.03(a)(4) (Vernon Supp. 2001).

38. 8 S.W.3d 672, 678 (Tex. App.—Amarillo 1999, no pet. h.).

the duty to exercise the care of a reasonable physician toward the plaintiff.³⁹

In the case of *Sosebee v. Hillcrest Baptist Medical Center*, parents sued individually and as next friends of a stillborn child, claiming negligence by the hospital and a delivery nurse.⁴⁰ The court affirmed the rejection of the parents' wrongful death and survival claims, noting that "[t]he Supreme Court of Texas has uniformly held for almost thirty years that an unborn child has no cause of action for prenatal injuries unless the child is born alive."⁴¹ Based on *Krishnan v. Sepulveda*,⁴² the court further held that a father could not recover for mental anguish claims in connection with a stillborn birth. But the court did find that the mother could recover for mental anguish if she proved her own physical injury and anguish independent of the still birth.⁴³ The court reversed a summary judgment against the mother on that claim.⁴⁴

The case of *Escalante v. Koerner*⁴⁵ recognized that under the supreme court's holding in *Edinburg Hospital Authority v. Treviño*,⁴⁶ plaintiffs may not recover for mental anguish arising from medical negligence in connection with the mishandling of a deceased stillborn fetus.⁴⁷ However, the mother could sue for intentional infliction of emotional distress, as the evidence raised a fact issue of whether the treating physician acted in an extreme or outrageous manner in connection with disposal of the fetal remains. The doctor said the parents waived the right to complain about the handling of the remains when they signed a consent form authorizing the hospital to "dispose of, in accordance with the accustomed practice, any tissue or body parts surgically removed."⁴⁸ The court found that the provisions "surgically removed" and "accustomed practice" are ambiguous, and further noted that the form itself, by including a provision requiring the patient to "certify that the this form has been explained," incorporated those explanations by reference into the document and thereby created additional ambiguity.⁴⁹

3. Proof Issues

In *Blan v. Ali*, the court of appeals found that a neurologist was qualified to testify about the standard of care for handling an emergency room patient who suffered a stroke.⁵⁰ The pertinent statute does not require any particular specialization by a doctor witness, so a neurologist with the

39. *Id.*

40. 8 S.W.3d 427 (Tex. App.—Waco 1999, no pet. h.).

41. *Id.* at 431-32.

42. 916 S.W.2d 478, 482 (Tex. 1995).

43. *Sosebee*, 8 S.W.3d at 436.

44. *Id.* at 435-36.

45. 28 S.W.3d 641 (Tex. App.—Corpus Christi 2000, no pet. h.).

46. 941 S.W.2d 76, 79 (Tex. 1997).

47. *Escalante*, 28 S.W.3d at 643.

48. *Id.* at 645.

49. *Id.*

50. 7 S.W.3d 741 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

appropriate knowledge could testify about the emergency care and cardiology issues present in the case.⁵¹ However, the doctor's affidavit failed to: (1) identify what aspect of the plaintiff's condition deteriorated as a result of the alleged negligence; (2) explain how or why the alleged negligence caused deterioration of that condition; (3) identify a better outcome that could have been produced by different actions; or (4) explain how or why a different treatment could have produced such an improved outcome. The affidavit thus failed to raise a fact issue on the element of causation.⁵²

In the unpublished opinion of *Turner v. Peril*, the Dallas Court of Appeals criticized the use of a "boilerplate" counter-affidavit to controvert an affidavit filed pursuant to section 18.001(f) of the Texas Civil Practice & Remedies Code.⁵³ It observed that section 18.001 created considerable efficiencies in the "proving up" of the reasonableness of professional fees and expenses, and held that this goal was thwarted by allowing a counter-affidavit that did not specifically identify deficiencies in the submitted affidavits and the affiant's qualifications to make those observations.⁵⁴

The case of *Steinkamp v. Caremark* involved a professional malpractice claim against a nurse for breaking off a catheter in a patient's arm.⁵⁵ It fell within the "res ipsa loquitur" exception to the need for expert testimony in a medical malpractice case.⁵⁶ The court drew an analogy to a long line of cases in which instruments were left within a body during surgery, where expert testimony has not been required to establish negligence, and reversed the summary judgment in the nurse's favor.⁵⁷

4. Limitations

The question in *Gross v. Kahanek*⁵⁸ was whether prescription refills created a "course of treatment," thus tolling limitations under the Medical Liability and Insurance Improvement Act (the "Act").⁵⁹ To determine when a course of drug treatment ends, a court considers such factors as whether the physician continues to examine or attend the patient and whether the condition requires further services from the physician.⁶⁰ The evidence showed that a physician who prescribes the particular medicine at issue in this case must continually monitor the patient's blood vessels.

51. *Id.* at 744-47 (citing TEX. REV. CIV. STAT. ANN. art. 4590i § 14.01(a) (Vernon Supp. 2001); TEX. R. CIV. EVID. 702)).

52. *Id.* at 748, 749; see generally *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549, 558-59 (Tex. 1995) (faulting a witness's testimony about the cause of death of several trees for not excluding alternative hypotheses).

53. No. 05-97-00930-CV7, 2000 WL 19532 (Tex. App.—Dallas Jan. 13, 2000, no pet. h.).

54. *Id.* at *2.

55. 3 S.W.3d 191 (Tex. App.—El Paso 1999, no pet. h.).

56. *Id.* at 195.

57. *Id.* at 195-98.

58. 3 S.W.3d 518 (Tex. 1999).

59. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 2001).

60. *Gross*, 3 S.W.3d at 521 (citing *Rowntree v. Hunsucker*, 833 S.W.2d 103, 106 (Tex. 1992)).

The course of treatment thus ran until the last prescription refill authorization date in December 1992, which barred the medical malpractice claim filed June 13, 1995. The fact that the plaintiff continued to take the medicine until she died in 1993 was not pertinent to limitations because the defendant was no longer authorizing refills by that date.⁶¹ This conclusion does not bar a survival claim based on damages the deceased suffered while alive.⁶²

Moss v. Shah also analyzed when a course of treatment ended.⁶³ The record revealed only that the plaintiff's retinal detachment had occurred between a 1992 eye surgery and an office visit on November 22, 1994. The court of appeals reasoned that a claim for improper monitoring after surgery could not have begun to run on the date of surgery because the monitoring would not have been necessary but for the surgery.⁶⁴ It found a factual dispute as to when that treatment ended, and reversed the summary judgment in the physician's favor.⁶⁵

The question of the length of a continuous course of treatment was also raised in *Wilson v. Korthauer*.⁶⁶ The evidence showed that the plaintiff consulted with an orthopedist who advised her to continue to wear a splint prescribed by her primary care physician and to see the primary care physician for follow-up care. Roughly six months later, the primary care physician again referred the plaintiff to the orthopedist for treatment of a "distinctly different" orthopedic condition.⁶⁷ The record did not show that the orthopedist advised the plaintiff to return to see him, or that her scheduling of the later visit was due to anything other than the primary care physician's referral. There was thus no continuing course of treatment so as to extend limitations and make a late-filed suit timely.⁶⁸

The case of *Clements v. Conard*⁶⁹ alleged a failure to diagnose breast cancer. The first issue was the two-year limitations provision of the Act. There was no dispute that Conard last saw the plaintiff in May of 1995, although he remained her primary care physician under her HMO plan. The court declined to impose "vicarious liability" on the primary care physician while the plaintiff was seeing another physician.⁷⁰ Limitations thus began to run from at least the 1995 visit, making the 1998 lawsuit untimely.⁷¹

61. *Id.*

62. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon Supp. 2001)); *see also* *Mata v. Simpson*, 27 S.W.3d 147, 149-50 (Tex. App.—San Antonio 2000, no pet. h.) (applying *Kahanek* and finding a continuing course of treatment based on monitoring in connection with prescription renewals).

63. 7 S.W.3d 690 (Tex. App.—El Paso 1999, no pet. h.).

64. *Id.* at 693.

65. *Id.* at 695.

66. 21 S.W.3d 573 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

67. *Id.*

68. *Id.*

69. 21 S.W. 3d 514 (Tex. App.—Amarillo 2000, pet. denied).

70. *Id.* at 520.

71. *Id.* (citing *Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex. 1998)).

In the case of *Gagnier v. Wichelhaus*, the plaintiff sued in 1998 based upon a failure to notice an implanted IUD during a 1995 physical examination.⁷² Because there is no discovery rule under the Medical Liability and Insurance Improvement Act, limitations barred this claim. However, the court of appeals found this result unconstitutional under the open courts provision of the Texas Constitution.⁷³ Plaintiff had to show that: (1) she had a well-recognized common-law cause of action restricted by the statute; and (2) the restriction is unreasonable or arbitrary when balanced against the purpose of the statute.⁷⁴ The first element was not in dispute. As to the second, the defendants claimed that after the 1995 examination, the plaintiff was advised to begin “aggressive” fertility treatment which would have discovered the implanted IUD. The court found that the plaintiffs should not be required to aggressively pursue all recommended tests within two years, particularly when there were other explanations for her infertility which would not have led her to choose that course.⁷⁵ Having found this application of the Act unconstitutional, the question was whether a “reasonable time” passed before suit was filed, and the court found an issue of fact as to whether a ten month delay was reasonable.⁷⁶

The parties in *Finley v. Steenkamp* agreed that the defendant dialysis center was neither a physician nor a health care provider under the Act.⁷⁷ Therefore, the general two-year limitations for a personal injury claim controlled.⁷⁸ Nevertheless, the plaintiff argued that after he sent the defendant a notice letter, the Act tolled limitations for seventy-five days.⁷⁹ The court of appeals observed that the legislative record showed the Act was intended to apply only to health care liability claims and not to other areas “of the Texas legal system or tort law.”⁸⁰ Stating that it “would lead to absurd results” to find that this tolling provision applied to all lawsuits against any defendant, the court found the provision inapplicable to a claim that did not arise under the Act.⁸¹

In *Grace v. Colorito*,⁸² the court of appeals held that a licensed counselor is not a “health care provider” under the Act,⁸³ citing one case in-

72. 17 S.W.3d 739 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

73. *Id.* at 743-45 (citing TEX. CONST. art. I, § 13 (“All courts shall be open, and every person for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law.”)).

74. *Id.* at 744 (citing *Moreno v. Sterling Drug, Inc.*, 787 S.W. 2d. 348, 355 (Tex. 1990)).

75. *Id.* at 744-45.

76. *Id.* at 745-46; *see also* *Batten v. Hunt*, 18 S.W.3d 235, 237 (Tex. App.—Austin 1999, pet. denied) (holding that a failure to order further tests did not create a “lingering tort” for purposes of limitations under the Act).

77. 19 S.W.3d 533 (Tex. App.—Fort Worth 2000, no pet. h.).

78. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2001).

79. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01(a), (c) (Vernon Supp. 2001).

80. *Finley*, 19 S.W.3d at 543 (emphasis omitted) (quoting TEX. REV. CIV. STAT. art. 4590i, §1.02(b)(1), (7) (Vernon Supp. 2001)).

81. *Id.*

82. 4 S.W.3d 765 (Tex. App.—Austin 1999, pet. denied).

83. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 1.03(a)(4), 10.01 (Vernon Supp. 2001).

volving a psychologist and another about a physical therapist.⁸⁴ The strict limitations period of the Act thus did not apply. However, the claim was still untimely under the general statute of limitations unless the plaintiff's alleged incapacity or the discovery rule tolled limitations. The court found insufficient evidence of a lack of capacity. The plaintiff did not offer expert testimony but simply described therapy she had undergone in general terms, without specifics about her medication, her reactions, or specific dates on which the medication caused her to be of unsound mind.⁸⁵ The discovery rule did not apply because her alleged injuries of "false memories" are not "objectively verifiable."⁸⁶

D. LEGAL MALPRACTICE

1. *Personal Jurisdiction*

The defendant attorney in *Eakin v. Acosta* was licensed to practice in a Texas federal district court, but his representation only involved one Florida case, and he did not intend to develop a client base in Texas.⁸⁷ These facts do not create the "continuous and systematic contacts" needed to support general jurisdiction over an out-of-state defendant.⁸⁸ The plaintiff claimed that the attorney made phone calls to Texas in which he misrepresented his experience as an aviation litigator and his degree of loyalty. The court observed that long-distance phone calls to the forum state do not necessarily create specific jurisdiction and that "regardless of the labels [plaintiff] attaches to his claims against [defendant], his suit is one for professional negligence."⁸⁹ Thus, in the absence of fraud allegations, the alleged misrepresentations were not related to the legal work that gave rise to his claim. All of that work was done out-of-state. The court did not attach jurisdictional significance to a fee agreement addendum providing that a Texas lawyer will provide services "subservient to" a non-resident lawyer.⁹⁰

But, on the other hand, sending progress reports, correspondence, and an engagement letter into Texas created a basis for specific personal jurisdiction in the case of *Carlidge v. Hernandez*.⁹¹

84. *Grace*, 4 S.W.3d at 768-69 (citing *Lenhard v. Butler*, 745 S.W.2d 101, 106 (Tex. App.—Fort Worth 1988, writ denied); *Terry v. Barrinuevo*, 961 S.W.2d 528, 530-31 (Tex. App.—Houston [1st Dist.] 1997, no pet.); see also *Fenley v. Hospice in the Pines*, 4 S.W.3d 476, 478-79 (Tex. App.—Beaumont 1999, no pet. h.) (finding that a volunteer medical director at a hospice had a physician-patient relationship with an individual admitted to that hospice for treatment as a terminally-ill patient, thus making him potentially responsible for a claim that the individual was erroneously admitted into the clinic for hospice care).

85. *Grace*, 4 S.W.3d at 769.

86. *Id.* at 770; see *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996); *S.V. v. R.V.*, 933 S.W.2d 1, 19-20 (Tex. 1996).

87. 21 S.W.3d 405 (Tex. App.—San Antonio 2000, no pet. h.).

88. *Id.* at 409.

89. *Id.* at 410.

90. *Id.*

91. 9 S.W.3d 341, 348-49 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

2. Limitations

In *Brents v. Haynes & Boone, L.L.P.*, the court of appeals affirmed a summary judgment based upon the defense of limitations.⁹² A legal malpractice cause of action accrued when the plaintiffs knew “they were at risk of harm” from the attorney’s conduct.⁹³ In this case, the plaintiffs’ cause of action accrued with the delivery of a letter from an HUD official stating that a third party upon receipt of the letter “may . . . commence a civil action” against the plaintiffs.⁹⁴

Several cases addressed whether a malpractice claim against an attorney is tolled during the pendency of the case in which the malpractice allegedly occurred.⁹⁵ The supreme court recently resolved the issue addressed in those cases and held that limitations is tolled.⁹⁶

3. Duty and Public Policy

Former class members sued class counsel in *Smith v. McCleskey, Harri-ger, Brazill, & Graf, L.L.P.*, alleging improper charges for fees and expenses.⁹⁷ Based on authority holding that “[b]oth class action jurisprudence generally . . . and Texas law specifically impose fiduciary duties on attorneys in their relationship with their clients,” the court reversed a defense summary judgment.⁹⁸

The dissatisfied plaintiff in *Lehrer v. Zwernemann* sued a mediator, alleging that the mediator had misrepresented himself as a “third-party neutral” when in fact he acted against the plaintiff’s best interests at the mediation.⁹⁹ The court observed that the mediator had contracted to encourage the parties to enter settlement, and a settlement had resulted. The court dismissed any significance to a prior professional relationship between the mediator and the plaintiff’s lawyer, noting that the plaintiff had been told of the relationship by his attorney.¹⁰⁰ Also, other than saying that he would not have hired the mediator but for the fraud, the plaintiff did not specify any specific injuries.¹⁰¹

In the case of *Van Polen v. Wisch*, a criminal defendant and his parents sued his criminal defense attorney for professional malpractice and breach of contract.¹⁰² Under *Peeler v. Hughes & Luce*,¹⁰³ the criminal defendant’s suit was barred by public policy because he had not been

92. 10 S.W.3d 772 (Tex. App.—Dallas 2000, no pet. h.).

93. *Id.* at 776.

94. *Id.*

95. *Brents*, 10 S.W.3d at 777-78; *Nuñez v. Caldarola*, 2 S.W.3d 755, 758-59 (Tex. App.—Corpus Christi 1999, no pet. h.); *Eiland v. Turpin, Smith, Dyer, Saxe & McDonald*, 16 S.W.3d 461 (Tex. App.—El Paso 2000, no pet. h.).

96. *Apex Towing Co. v. Tolin*, No. 99-1165 (March 1, 2001).

97. 15 S.W.3d 644 (Tex. App.—Eastland 2000, no pet. h.).

98. *Id.* at 647 (quoting *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996)).

99. 14 S.W.3d 775, 777 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

100. *Id.* at 778.

101. *Id.* at 777, 778.

102. 23 S.W.3d 510 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).

103. 909 S.W.2d 494 (Tex. 1995).

exonerated of his criminal conviction by direct appeal.¹⁰⁴ His parents' contract claim was not based on professional negligence, however. It alleged that the attorney failed to honor his contract with them because he did not attend the hearing for which they had hired him to represent the defendant. The court noted that "[w]e distinguish between an action for negligent legal practice and one for breach of contract relating to excessive fees for services," and allowed the parents' contract claim to proceed.¹⁰⁵

The case of *Tate v. Goins, Underkofler, Crawford & Langdon* involved the recurring question of whether a cause of action for legal malpractice is assignable.¹⁰⁶ In 1994, the Texas Supreme Court refused a writ of error in *Zuniga v. Groce, Locke & Hebdon*, thereby agreeing that such an assignment was barred as a matter of public policy since it would "embarrass and demean the legal profession" to permit assignments that would encourage clients to align themselves with plaintiffs against their own lawyers.¹⁰⁷ In the recent case of *Mallios v. Baker*, the Texas Supreme Court held that even if the assignment involved was invalid under *Zuniga*, the plaintiff still had the right to pursue his own malpractice claim in his own name.¹⁰⁸

The assignment at issue in *Tate* allowed the plaintiff to retain some interest in his malpractice claim and also allowed him to bring suit in his own name. He thus argued that the agreement was not an actual assignment, but a mere contemplation of an assignment in the future of any proceeds. However, his former adversary had absolute control over the litigation, including the "unfettered" right to settle and the right to require a full assignment of all claims at some future point. The court of appeals found that this raised the same concerns as *Zuniga* and found that the assignment was void as against public policy.¹⁰⁹ The court also found that the plaintiff could continue to prosecute the claim in his own name.¹¹⁰

E. NEGLIGENT HIRING, TRAINING, AND SUPERVISING

This past year, Texas appeals courts addressed issues surrounding an employer's direct liability to a foreseeable third party for an employee's tort, an employer's alleged duty to investigate claims of an at-will employee before termination, and a related alleged duty to supervise those who participate in the termination.

Ianni v. Loram Maintenance of Way, Inc. involved Tingle, a man who had been working on the railroad "all the live long day" with the help of

104. *Wisch*, 23 S.W.3d at 515-16.

105. *Id.* at 516.

106. 24 S.W.3d 627 (Tex. App.—Dallas 2000, no pet. h.).

107. 878 S.W.2d 313, 317 (Tex. App.—San Antonio 1984, writ ref'd).

108. 11 S.W.3d 157, 159 (Tex. 2000).

109. *Tate*, 24 S.W.3d at 634.

110. *Id.*

crystal methamphetamine to keep him awake and alert.¹¹¹ In fact, the entire work crew, including the foremen, used the drug, and noticed that it made Tingle violent. After Tingle worked for over fourteen hours one day, his pupils were extremely dilated and glassy, his speech was slurred, and he could not walk upright.¹¹² After returning to the motel where he was staying with his wife, he and his wife had a violent argument, during which he shot a police officer who tried to intervene.¹¹³ The trial court granted summary judgment to Tingle's employer, Loram, finding no evidence that the employer had a duty to the police officer, caused the injury, or was grossly negligent.¹¹⁴ The appeals court reversed.¹¹⁵

The court found evidence that the employer had a duty to a third person because Tingle's supervisors knew of (and shared in) his drug use, knew that he was incapacitated at the time of the shooting, and performed an affirmative act of control over Tingle by facilitating his drug use.¹¹⁶ The court noted that Tingle previously had come after a co-worker's wife with a knife, but another co-worker stepped between them and gave the woman a chance to quickly leave. But when Tingle's own wife called the company's employee assistance plan and his supervisors to ask them to remove him from the rail grinding machine, they refused to act. Invoking the often-cited analogy that serving alcohol to an intoxicated driver will result in injury "as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall," the El Paso court said, "[h]ere, the rattlesnake was not only set loose, it was coiled and had already struck once."¹¹⁷

When examining causation evidence, the court again noted that the employer's knowledge of Tingle's drug abuse and the attack on a non-employee raised a fact issue as to whether the injury to Ianni was foreseeable since "[c]losing one's eyes does not negate foreseeability."¹¹⁸ The employer's refusal to intervene, test Tingle for drug use, and subsequently remove him from his job also provided evidence that Loram was the cause-in-fact of Ianni's injuries. Finally, the appeals court found that the employer's failure to act with regard to Tingle's drug use and violence raised a genuine issue of material fact as to every element of gross negligence.¹¹⁹

In *Garcia v. Allen*, Garcia sued his former employer, claiming, among other allegations, that the employer failed to fulfill its duty to adequately investigate a supervisor's report of poor job performance, failed to prop-

111. 16 S.W.3d 508 (Tex. App.—El Paso 2000, pet. denied).

112. *Id.* at 511.

113. *Id.*

114. *Id.*

115. *Id.* at 527.

116. *Id.* at 523-24.

117. *Lanni v. Loram Maint. Of Way, Inc.* 16 S.W.3d 508, 522-23 (Tex. App.—El Paso 2000, pet. denied).

118. *Id.* at 524.

119. *Id.* at 526-27 (citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 22 (Tex. 1994)).

erly hire and supervise its employees, and defamed him.¹²⁰ The claim arose when Garcia, who had permanent medical restrictions resulting from injuries at his previous job, underwent another knee surgery and was subsequently terminated. The trial court granted summary judgment for the defendant on all claims, and the court of appeals affirmed.¹²¹ Considering Garcia's claim that the employer negligently failed to investigate a supervisor's report about his physical inability to perform the job, the appeals court stated in absolute terms that employers do not have a duty to investigate before terminating an at-will employee.¹²² As for Garcia's claim of negligent hiring, supervision, and retention of Garcia's supervisors, the court likewise found that to allow this claim would encourage any at-will employee contesting his termination to sue his employer for failing to adequately hire, train, and supervise the personnel who made the decision to terminate.¹²³ The court reaffirmed previous cases holding that the theory applies only when an actionable tort is committed and held that "employers do not have a duty to supervise their employees in a manner that prevents other employees from being terminated without sufficient justification for the termination."¹²⁴

II. ADDITIONAL TORTS

A. DEFAMATION

1. *Malice*

In *Huckabee v. Time Warner Entertainment Co.*, HBO was sued by a judge profiled in a documentary entitled "Women On Trial," which chronicled four southeast Texas cases in which family courts granted child custody to fathers after each father was accused of child abuse.¹²⁵ The court affirmed judgment for HBO, finding HBO had conclusively proved that the broadcast was made without actual malice.¹²⁶

Respondents and various *amici* suggested that the supreme court should abandon the traditional summary judgment standard in public-figure defamation cases, which allows a defendant to negate actual malice as a matter of law by presenting evidence that he did not publish the statement with knowledge of its falsity or with reckless disregard for its truth.¹²⁷ Instead, respondents argued the court should adopt the federal summary judgment standard established in *Anderson v. Liberty Lobby*,

120. 28 S.W.3d 587 (Tex. App.—Corpus Christi 2000, pet. filed).

121. *Id.* at 590-91, 603.

122. *Id.* at 591 ("To impose upon employers a previously unrecognized duty runs the risk of abrogating the traditional at-will employment relationship, which is the norm in Texas.").

123. *Id.* at 592.

124. *Id.* at 593. The court also affirmed summary judgment on a related defamation claim, finding no evidence from Garcia that the employee's statements about his medical restrictions were untrue. *Id.* at 595-96.

125. 19 S.W.3d 413 (Tex. 2000).

126. *Id.* at 430.

127. *Id.* at 420.

Inc., in which the question is “whether the evidence in the record could support a reasonable jury finding either that the plaintiff had shown actual malice by clear and convincing evidence or that the plaintiff has not.”¹²⁸ The supreme court declined to adopt the federal standard, noting that the federal standard would suggest that the trial court must weigh the evidence at the summary judgment stage, which is contrary to Texas law.¹²⁹ A trial court’s only duty at the summary judgment stage is to determine if a material question of fact exists.¹³⁰ Additionally, the court was concerned that the clear and convincing standard would provide little guidance regarding what evidence is sufficient for a plaintiff to avoid summary judgment.¹³¹ Noting that most of the other jurisdictions had accepted the clear and convincing standard, the supreme court declined to adopt *Anderson*, finding no authority that would constitutionally require it.¹³²

Defendant provided two affidavits describing the research that went into the documentary, stating that there was no belief that the film contained any false statement, and that no one doubted the truth of any statements regarding Judge Huckabee. Because the affidavits were from interested witnesses, the court noted that they would negate actual malice as a matter of law only if they were “clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and [able to be] readily controverted.”¹³³ Because the plaintiff could not present sufficient evidence to raise a fact issue as to whether actual malice existed or whether defendants purposely avoided discovering the truth, the supreme court affirmed the judgment of the court of appeals.¹³⁴

In the case of *Gaylord Broadcasting Co. v. Francis*, the court considered both what constitutes sufficient evidence to create an issue concerning malice and what statements constitute an opinion.¹³⁵ A television reporter reported on the work habits of several Dallas County criminal district court judges, including the plaintiff, and compiled data to support the conclusion that the “record suggests” plaintiff was “hardly working.” The defendants argued that the statements were not defamatory because they were opinions, not malicious, were substantially true, and were privileged. The court found sufficient evidence to create an issue concerning malice, the required standard when public figures are involved, noting that the evidence suggested that some of the evidence used in the broadcast may have been fabricated or improperly extrapolated.¹³⁶ The court also held that “record suggests” was a nominal expression of opinion that

128. 477 U.S. 242, 255-56 (1986).

129. *Huckabee*, 19 S.W.3d. at 421.

130. *Id.* at 422.

131. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 422-23 (Tex. 2000).

132. *Id.* at 423.

133. *Id.* at 424 (citing TEX. R. CIV. P. 166a(c)).

134. *Id.* at 430.

135. 7 S.W.3d 279 (Tex. App.—Dallas 1999, pet. denied).

136. *Id.* at 284-85.

can imply an assertion of objective fact.¹³⁷ Finally, the court held that the statements were not merely criticism of an elected official, but involved subjective criteria resulting in seemingly scientific statistics, which were in fact defamatory of the plaintiff.¹³⁸

2. *Absolute Privilege*

In *Helfand v. Coane*, an attorney sued another lawyer and law firm, alleging defamation and other causes of action.¹³⁹ The claims focused on a letter by the defendant, written to the plaintiff and copied to his client's in-house counsel, accusing plaintiff of lying to courts. The defendant moved for summary judgment based on the absolute privilege for communications made in the course of judicial proceedings, and argued that the remaining claims were also barred because the defamation claim could not be re-characterized to circumvent the privilege. The court identified three elements of the privilege: "(1) the act to which the privilege applies must bear *some relationship*, (2) to a judicial proceeding in which the attorney is employed, and (3) the act must be in *furtherance* of that representation."¹⁴⁰ The court then reversed a "freeze" on discovery imposed by the trial court, stating that more than the underlying letter was required to determine whether the privilege existed, including cross-examination of the defendant and knowledge of the attorneys he referenced in the letter.¹⁴¹

Addressing the absolute privilege for statements made in a judicial proceeding, the trial court granted summary judgment to an attorney and her law firm after they were sued for libel and other torts in *Crain v. Smith*.¹⁴² After the defendant discovered that the plaintiff had prepared and recorded a lien on behalf of its client, but was not an attorney or licensed real estate broker, defendant reported her discovery to the Unauthorized Practice of Law Committee of the State Bar and sent a letter to the plaintiff's "client" demanding damages resulting from filing the lien. The court of appeals affirmed the summary judgment, holding that absolute immunity for libel applies to complaints made to public bodies with judicial-like functions, and also to communications by counsel that detail alleged wrong suffered by a client.¹⁴³

3. *Qualified Privilege*

In *Wal-Mart Stores, Inc. v. Lane*, after an employee complained that a female co-worker spread rumors that he had sexually harassed her, Wal-

137. *Id.* at 283-84.

138. *Id.* at 285.

139. 12 S.W.3d 152 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).

140. *Id.* at 157 (emphasis added) (citing *Russell v. Clark*, 620 S.W.2d 865, 869 (Tex. App.—Dallas 1981, writ ref'd n.r.e.)).

141. *Id.*

142. 22 S.W.3d 58 (Tex. App.—Corpus Christi 2000, no pet. h.).

143. *Id.* at 60-61.

Mart terminated him following an investigation.¹⁴⁴ The employee sued for slander and other causes of action and the jury awarded the plaintiff over \$2 million in damages. The court of appeals reversed and rendered judgment that plaintiff take nothing.¹⁴⁵ Analyzing the qualified privilege an employer has to investigate allegations of wrong-doing, the court found no evidence to support the jury's finding of malice.¹⁴⁶ Therefore, Wal-Mart's statements were made with legal excuse and were not actionable. The court also held that statements made by an hourly employee with no authority or duty to speak for the corporation were not attributable to Wal-Mart.¹⁴⁷

A patron of a pro golf shop sued the company that owned the shop, its general manager, and the company that operated the shop, alleging defamation and other causes of action in *TRT Development Co.-KC v. Meyers*.¹⁴⁸ After an annual employee family day picnic and golf tournament, a patron was approached in the parking lot by shop employees who noticed shirts missing from a rack. The club manager then told the employee's manager. After investigating, the company discovered that the patron/employee had been drinking during the tournament, suspended him, and ultimately fired him. The jury awarded a little over \$54,000 in lost wages, finding that the club manager had made defamatory statements, but without actual malice, and had not interfered with the employee's employment contract. The court found that the statements were qualifiedly privileged because the manager had ultimate responsibility for the pro shop, and therefore had an interest in the subject matter of the communications.¹⁴⁹ The recipient had a corresponding interest in knowing that one of its employees was probably involved in a theft. Additionally, the general manager believed that his statements were true.

In *Texas Monthly, Inc. v. Transamerican Natural Gas Corp.* ("TNG"), TNG sued Texas Monthly and its reporter about an article on prior litigation involving TNG.¹⁵⁰ The issue on appeal was section 73.002(a) of the Civil Practice & Remedies Code, which gives media defendants a qualified privilege when they republish defamatory statements first raised in judicial proceedings, if the statements are "fair, true, and impartial." The truth requirement is satisfied if the statement is substantially correct, which "involves consideration of whether the alleged defamatory statement was more damaging to the plaintiff's reputation in the mind of the average listener than a truthful statement would have been."¹⁵¹ Several statements were considered. The article referred to "wire tapping," and because there was testimony concerning plaintiffs wire tapping activities,

144. 31 S.W.3d 282 (Tex. App.—Corpus Christi 2000, no pet. h.).

145. *Id.* at 297.

146. *Id.* at 293.

147. *Id.* at 289.

148. 15 S.W.3d 281 (Tex. App.—Corpus Christi 2000, no pet. h.).

149. *Id.* at 286-87.

150. 7 S.W.3d 801, 804 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.).

151. *Id.* at 805.

the court concluded that the gist of the statement was a fair, true, and impartial account of the testimony.¹⁵² Another was that an employee quit the company as a matter of conscience. His actual statement was that he quit because "he was 'extremely anxious and fearful about [TNG's] deception to the State of Texas and royalty owners.'"¹⁵³ The court determined that the statement was substantially true because it would make no difference in the mind of the ordinary reader.¹⁵⁴ The court ultimately reversed the court's order denying summary judgment and rendered judgment that plaintiffs take nothing.¹⁵⁵

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Morgan v. Anthony*, the Texas Supreme Court addressed the elements of the tort of intentional infliction of emotional distress.¹⁵⁶ The plaintiff had car trouble and was driving slowly on the shoulder, stalling from time to time. For an extended period, the defendant pulled in front of her in his pickup, got out of the truck, approached the car, made lewd remarks and tried to enter the car. The plaintiff finally made her way to a diner, told a waitress what had happened, and waited for rescue by her father.¹⁵⁷

Summary judgment was granted against the plaintiff in the trial court and the court of appeals affirmed. The supreme court reversed. On the element of intent, the court concluded that the defendant's actions were intentional by their very nature, and also noted that he persisted in pursuit of the plaintiff after she repeatedly asked him to leave her alone and told him that he was frightening her. On the element of outrageous conduct, the court briefly reviewed its earlier holding in *Twyman v. Twyman*,¹⁵⁸ which adopted the definition of intentional infliction of emotional distress set forth in section 46 of the *Restatement (Second) of Torts*. The element of extreme and outrageous conduct requires proof of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."¹⁵⁹ The court found it had "no difficulty in concluding" that there was evidence of sufficient outrageous conduct in this record.¹⁶⁰

The court also found sufficient evidence of severe emotional distress. The court of appeals focused only on evidence of distress in the days and months after the incident, but did not focus on the "great fear and distress" described by the plaintiff about her emotional state during her pur-

152. *Id.* at 807.

153. *Id.* at 808.

154. *Id.*

155. *Id.* at 813.

156. 27 S.W.3d 928 (Tex. 2000).

157. *Id.* at 930-31.

158. 855 S.W.2d 619, 621-22 (Tex. 1993).

159. *Morgan*, 27 S.W.3d at 929 (quoting *Twyman*, 855 S.W.2d at 621).

160. *Id.* at 931.

suit by the defendant, particularly when at one point he was able to open the car door and tried to block her from closing it.¹⁶¹ That evidence, coupled with the fact that she sought medical and psychological treatment from several sources, suffered from depression and nightmares, and had recurring fear and problems with her family, was sufficient to justify proceeding to trial.¹⁶²

The supreme court also addressed intentional infliction of emotional distress claims in *City of Midland v. O'Bryant*.¹⁶³ The alleged outrageous conduct involved the City's decision to reclassify positions formerly held by police officers as civilian positions. Noting its earlier precedent in *GTE Southwest v. Bruce*,¹⁶⁴ which held that the tort "does not lie for ordinary employment disputes" and in the workplace "exists only in the most unusual circumstances," the court found that the City's decision was not extreme and outrageous.¹⁶⁵ The court observed that even wrongful termination does not automatically constitute intentional infliction of emotional distress, and that an employer must have the latitude make to freely the sort of reclassification decision at issue in this case.¹⁶⁶

The case of *Fields v. Teamsters Local Union Number 988* also dealt with what constitutes extreme and outrageous conduct in the employment setting.¹⁶⁷ The court reversed a defense summary judgment, noting that "[n]o case [defendants] cite involves allegations that an employer threatened to fire an employee if she did not succumb to sexual advances."¹⁶⁸ Acknowledging that this case fell somewhere in between "a case of an employer with a gun in hand who threatens an employee" and "an employer who simply uses foul language around the water cooler," it believed that the presence of threats of retaliation was sufficient to create a fact issue on this element of the tort.¹⁶⁹ Citing the *Restatement*, the court noted that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a retaliation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."¹⁷⁰

Similarly, in determining whether "severe emotional distress" had been suffered, the court noted that the plaintiff had been harassed over a three-month period and experienced difficulty performing her job as a

161. *Id.*

162. *Morgan v. Anthony*, 27 S.W.3d 928, 931 (Tex. 2000).

163. 18 S.W.3d 209 (Tex. 2000).

164. 998 S.W.2d 605, 612-13 (Tex. 1999).

165. *City of Midland*, 18 S.W.3d at 217.

166. *Id. Accord Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 719-21 (E.D. Tex. 2000); *Wakefield v. State Farm Ins. Co.*, 75 F. Supp. 2d 545, 550 (N.D. Tex. 1999).

167. 23 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.).

168. *Id.* at 531.

169. *Id.* at 531-32.

170. *Id.* at 532 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965), also citing *Bushell v. Dean*, 781 S.W.2d 652, 654, 658 (Tex. App.—Austin 1989), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991) and RESTATEMENT (SECOND) OF TORTS § 46 illus. 7 (1965)).

result.¹⁷¹ Citing the comments of Justice Hecht in *Twyman*¹⁷² that “outrageousness is a subjective, almost personal, notion” as also providing guidance in the context of determining what constitutes severe distress, the court found that there was sufficient evidence to make summary judgment inappropriate.¹⁷³

Also in the employment setting, the case of *Foye v. Montes* involved a supervisor who called his employee several times to ask for a date, left love notes on her car, and touched her suggestively at a Christmas party.¹⁷⁴ The court agreed that “[w]ithout a doubt, [the supervisor’s] behavior could be described as rude, offensive, and annoying,” but found that it fell short of the high standard required by the tort of intentional infliction of emotional distress.¹⁷⁵ The court did not believe that the average member of the community would exclaim “Outrageous!” upon hearing about the conduct, and cited two cases involving analogous facts that reached similar conclusions.¹⁷⁶ In contrast, the court found sufficient evidence to support the trial court’s finding that the supervisor assaulted Montes by slapping her on one occasion and rubbing his hand on her thigh on another, thereby engaging in “offensive or provocative” contact.¹⁷⁷

The court observed in *Stephan v. Baylor Medical Center at Garland* that absent a false and defamatory statement in a report, the publication of that report about a doctor by a hospital cannot be “extreme or outrageous” as required for intentional infliction of emotional distress.¹⁷⁸

Federal courts also addressed the standards for proving an intentional infliction of emotional distress claim several times this year. In *Walker v. Thompson*, the Fifth Circuit held that “[i]nsults, indignities, threats, annoyances, or petty oppressions, without more, do not rise to the level of intentional infliction of emotional distress.”¹⁷⁹ The Northern District of Texas granted summary judgment to the employer in this race discrimination case, and the Fifth Circuit affirmed the claim of intentional infliction of emotional distress.¹⁸⁰ Although some of the racial slurs and epithets alleged by the plaintiffs may have been illegal in an employment context, and otherwise condemnable, they did not rise to the level of “extreme

171. *Id.* at 534.

172. *Twyman v. Twyman*, 855 S.W.2d 619, 631 (Tex. 1993) (Hecht, J., concurring and dissenting).

173. *Fields v. Teamsters Local Union No. 988*, 23 S.W.3d 517, 534 (Tex. App.—Houston [1st Dist.] 2000, no. pet. h.).

174. 9 S.W.3d 436, 438-39 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

175. *Id.* at 440.

176. *Id.* (citing *Gearhart v. Eye Care Ctrs. of Am., Inc.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995); *Garcia v. Andrews*, 867 S.W.2d 409, 412 (Tex. App.—Corpus Christi 1993, no writ).

177. *Id.* at 441.

178. 20 S.W.3d 880, 892 (Tex. App.—Dallas 2000, no. pet. h.) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993)).

179. 214 F.3d 615, 628 (5th Cir. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

180. *Id.*

and outrageous conduct.”¹⁸¹

In *Tompkins v. Cyr*, a physician whose practice was shut down due to anti-abortion protests sued more than three dozen protestors under several tort causes of action, including intentional infliction of emotional distress.¹⁸² After a jury found eleven defendants liable and awarded Tompkins and his wife \$8.5 million, four defendants appealed, claiming that they were not linked to several alleged anonymous threats and thus could not be liable for harm resulting from them. The Fifth Circuit held that “tortfeasors take their victims as they find them,” and “the anonymous threats—threats of physical harm and even death—made the Tompkinses family particularly vulnerable to psychological harm from the losing defendants’ unlawful conduct.”¹⁸³ The appeals court also found no error in allowing recovery of damages for both emotional distress and mental anguish, finding that some Texas cases treat the two terms distinctly, but because the Tompkinses recovered damages for the same type of injuries under their claim of invasion of privacy, the court vacated the intentional infliction award.¹⁸⁴

In *Skidmore v. Precision Printing and Packaging, Inc.*, the Fifth Circuit vacated a jury award for intentional infliction of emotional distress because it allowed recovery for conduct that *could* have caused emotional distress to female employees in general when the instruction should have limited recovery for conduct that actually caused emotional distress to the plaintiff.¹⁸⁵ With regard to the employer’s liability for its employee’s intentional infliction of emotional distress, the court found no evidence to support the jury’s finding that the employer ratified the conduct by its silence, which requires that the employer possess all material facts and yet take no action.¹⁸⁶

In *LaBarbara v. Angel*, the Eastern District found that a college football coach, college officials, and police did not intend to cause the parents’ emotional distress when they allegedly covered up the details of an accident in which the coach collided with a motorcycle, killing their son.¹⁸⁷ Instead, the “intended and foreseeable consequence of the cover-up was . . . to protect Pearce, the head football coach.”¹⁸⁸

In *Texas v. Crest Asset Management, Inc.*, a Lebanese man who legally changed his name to “Sam Texas” sued his apartment owner and managers for race discrimination and intentional infliction of emotional distress after they called him, among other racial epithets, an “Arab terrorist” and made various threats against him, including a death threat.¹⁸⁹ The

181. *Id.*

182. 202 F.3d 770, 775-76 (5th Cir. 2000).

183. *Id.* at 780.

184. *Id.* at 784-87.

185. 188 F.3d 606, 614 (5th Cir. 1999).

186. *Id.* at 615.

187. 95 F. Supp. 2d 656, 659 (E.D. Tex. 2000).

188. *Id.* at 667.

189. 85 F. Supp. 2d 722, 724 (S.D. Tex. 2000).

Southern District court found that this type of conduct was extreme and outrageous, but Texas did not show that his emotional distress was severe, "more than mere worry, anxiety, vexation, embarrassment, or anger."¹⁹⁰

C. PREMISES LIABILITY

1. Duty

The supreme court focused on foreseeability in *Mellon Mortgage Co. v. Holder*.¹⁹¹ A police officer stopped a woman late at night for an alleged traffic violation and instructed her to follow him to a garage where he sexually assaulted her. The driver sued the garage owner, and the supreme court rendered a take nothing judgment. Declining to classify the plaintiff as an invitee, licensee, or trespasser, the court held that the defendant owed no duty to prevent such an attack.¹⁹² It was not foreseeable that a person would be accosted several blocks from the garage, forced to drive to that garage, and then be sexually assaulted there. The court concluded that the defendant could not have reasonably foreseen that its failure to secure the garage would lead to the plaintiff's injuries; although it was foreseeable that an employee or visitor could be a victim of violent crime there, it was not foreseeable that the plaintiff, of whom the defendant had no knowledge, would be pulled over in her car by a third person over whom the defendant had no control.¹⁹³

Addressing what constitutes control over independent contractors, the Texas Supreme Court ruled against the plaintiff in *Koch Refining Co. v. Chapa*.¹⁹⁴ The plaintiff was hurt when a co-worker accidentally lost his footing while helping plaintiff move a pipe. Before the accident, the plaintiff had asked his supervisor, an independent contractor who had hired plaintiff from an employee-leasing company, about the safety of the way the pipe was to be lifted. Plaintiff hoped that the safety employee hired by the premises owner would overhear the conversation and instruct plaintiff on how to move the pipe. The court held that a premises owner, by merely placing a safety employee on the work site, does not incur a duty to an independent contractor's employees to intervene and insure that they safely perform their work.¹⁹⁵ The safety employee did not exercise a right of supervision over the independent contractors,¹⁹⁶ as he did not instruct the plaintiff on how to lift the pipe and did not control or direct the employee, regardless of the employee's willingness to follow the premise's owner's instructions.

190. *Id.* at 735.

191. 5 S.W.3d 654 (Tex. 1999).

192. *Id.* at 658.

193. *Id.* at 657. The court distinguished *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546 (Tex. 1985), explaining that in *Nixon* the defendant was in violation of an ordinance designed to prevent injury to the general public. *Id.* at 658-60.

194. 11 S.W.3d 153, 154 (Tex. 1999).

195. *Id.* at 156.

196. *Id.* at 155 (citing RESTATEMENT (SECOND) OF TORTS § 414 cmt. a (1965)).

In *Texas Drydock, Inc. v. Davis*, the plaintiff suffered an injury while working for his employer on a cherry-picker crane owned by Texas Drydock.¹⁹⁷ After a verdict for the plaintiff, defendant appealed, challenging whether it controlled or had a right to control the premises at the time the plaintiff was injured. The plaintiff countered that his claim was not for premises liability, but rather was based on section 323 of the *Restatement (Second) of Torts*. This provision, adopted by the Texas Supreme Court, provides that one who renders services to another which should be recognized as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from the failure to exercise reasonable care to perform the undertaking if the failure to exercise such care increases the risk of harm, or the harm is suffered because of the other's reliance upon the undertaking.¹⁹⁸ Specifically, the plaintiff had asked a representative of defendant for some non-skid tape and was told that "he would check into it to see if he could find, and get, [plaintiff] some."¹⁹⁹ Several weeks passed and the tape was not produced. Holding that a promise can constitute an undertaking even if performance does not begin, the court found that the plaintiff had a cause of action under section 323 and that the defendant's premises liability defenses were not relevant.²⁰⁰

After two brothers drowned in a river that flooded while they were fishing, their survivors sued the Texas Parks & Wildlife Department, the owner of the park where the accident occurred, for wrongful death and survival damages based on a premises liability theory.²⁰¹ Ordinarily, a plaintiff who brings a premises liability claim must prove that defendant possessed—that is, owned, occupied or controlled,—the premises where the injury occurred. A party who does not own, occupy, or control the premises may nevertheless owe a duty of care if it undertakes to make the premises safe for others. In this case, the river where the brothers drowned was owned by the State of Texas, not the Texas Parks & Wildlife Department. However, because there was evidence that the department undertook the duty to make the river safe for park visitors and breached that duty by not adequately warning visitors of the impending flood, the Texas Supreme Court remanded the case for retrial of that issue.²⁰²

A distinction between a negligent-activity case and a premises-defect case was drawn in *Laurel v. Herschap*.²⁰³ An employee of a subcontractor sued the general contractor for injuries sustained when a pipe fell on him. Defendant HRS was sued because it allegedly supervised and controlled the employee's activities that caused the pipe to be held in mid-air. Defendant moved for summary judgment, arguing that it was not in

197. 4 S.W.3d 919, 921 (Tex. App.—Beaumont 1999, no pet. h.).

198. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

199. *Davis*, 4 S.W.3d at 921.

200. *Id.* at 922-24.

201. *Wilson v. Tex. Parks & Wildlife Dept.*, 8 S.W.3d 634, 638 (Tex. 1999).

202. *Id.* at 635-36.

203. 5 S.W.3d 799 (Tex. App.—San Antonio 1999, no pet. h.).

possession of the premises and had no knowledge of the defect that caused plaintiff's injuries. The court affirmed the summary judgment for the defendant. The court first determined that this was a negligent activity case and not a premises-defect case, because the pipe would not have fallen on the plaintiff had defendant not caused the pipe to be suspended in mid-air.²⁰⁴ Defendant did not exercise any supervision, direction, or control over the subcontractors in charge of moving the pipe.²⁰⁵

2. Notice

In *Whalen v. Condominium Consulting & Management Services, Inc.*, the plaintiff tripped on a boardwalk that was higher than the other boards.²⁰⁶ Although the plaintiff admitted in her deposition that she was not looking at her feet when she tripped, she also testified that she felt her foot hit the board and when she got up, she saw there was nothing else on the boardwalk that could have caused her fall. The court found sufficient evidence to show constructive notice because it was more likely than not that the board had been protruding long enough that the defendant should have noticed it. The court distinguished this case from *Wal-Mart Stores, Inc. v. Gonzalez*,²⁰⁷ a case in which the Texas Supreme Court held that macaroni salad had not been on the Wal-Mart floor long enough to charge Wal-Mart with constructive notice of the condition, even though dirt was in the salad. In this case, the issue was not a foreign substance, but an erosion of a boardwalk that had existed for a long period of time.²⁰⁸

Macaroni was once again distinguished in *M. Rivas Enterprises, Inc. v. Gaytan*, in which a grocery store customer slipped and fell on a puddle of water that appeared to come from a leaking ice box.²⁰⁹ The court found that the store had constructive knowledge because there was testimony that customers had seen towels by the ice machine, that employees were scolded about not mopping up the wet floor, and testimony that the leak had existed for a long period of time.²¹⁰

D. PRODUCTS LIABILITY

After a detailed analysis of supreme court precedent, the court in *Austin v. Kerr-McGee Refining Corp.*, rejected a proffered expert's testimony because it did not show "general" causation with respect to whether ben-

204. *Id.* at 802.

205. *Id.* at 803.

206. 13 S.W.3d 444, 446 (Tex. App.—Corpus Christi 2000, pet. denied).

207. 968 S.W.2d 934, 938 (Tex. 1998).

208. *Whalen*, 13 S.W.3d at 448.

209. 24 S.W.3d 402, 403 (Tex. App.—Corpus Christi 2000, no pet. h.).

210. *Id.* at 405-06; *see also* *Purcell Constr., Inc. v. Welch*, 17 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.) (finding the defendant had notice of a dangerous hole that it had dug); *Drew v. Harrison County Hosp. Assoc.*, 20 S.W.3d 244 (Tex. App.—Texarkana 2000, no pet. h.) (finding summary judgment improper on a notice issue when testimony showed that two of the defendant's employees had earlier complained of the same kind of elevator drop that injured the plaintiff).

zene exposure caused injury, or “specific” causation based on the specific exposure of the plaintiff, and also failed to affirmatively exclude with reasonable certainty other plausible alternative causes of plaintiff’s condition.²¹¹ Conversely, in *Ford Motor Co. v. Aguiniga*, when a car manufacturer did not present evidence of another cause that could have led to an engine stall, an expert had in fact narrowed the cause to one source, eliminating other possible causes for the stall.²¹² This case also held that the circumstantial evidence offered to prove a design defect did not amount to impermissible “inference stacking.”²¹³

The case of *Jorden v. Ensign-Bickford Co.* presented an immunity issue based on the alleged malfunction of a “stun grenade” manufactured for the United States government for use by police forces.²¹⁴ The trial court granted summary judgment on the plaintiff’s claim of design defect because the defendant established the government contractor defense.²¹⁵ The elements of the defense are: “(1) the United States approved reasonably precise specifications for the equipment at issue; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about any dangers in the use of the equipment that were known to the supplier but not to the United States.”²¹⁶ The first element may be “satisfied by proof that the government accepted and used the product in question in such a manner that its approval of the design can be presumed.”²¹⁷ The defendant’s proof was found lacking because the contract at issue was not shown to be the same as the government-approved specifications, and because the evidence as to continued use was inconclusive about the specific elements of the design and the length of time the product was used.²¹⁸ Fact issues were found on other elements of the defense as well.

Numerous products liability cases were heard by the federal courts this year. In *Dyer v. Danek Medical, Inc.*, the Northern District predicted that Texas courts would apply the “learned intermediary” doctrine to spinal fixation devices.²¹⁹ After numerous back surgeries, a spinal fusion fixation device was implanted in the plaintiff’s spine, and several months later the plaintiff began experiencing debilitating pain. The plaintiff sued the doctor, the hospital, and the manufacturer of the device alleging numerous claims, including products liability and failure to disclose. The court held that Texas courts would apply the “learned intermediary” doctrine, and therefore, the plaintiff would be required to demonstrate that the product supplier’s failure to warn the doctor was a producing cause of

211. 25 S.W.3d 280, 292 (Tex. App.—Texarkana 2000, no pet. h.).

212. 9 S.W.3d 252, 265 (Tex. App.—San Antonio 1999, pet. denied).

213. *Id.* at 266.

214. 20 S.W.3d 847, 849 (Tex. App.—Dallas 2000, no pet. h.).

215. *Id.* at 850.

216. *Id.* (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-06 (1998)).

217. *Id.* at 850-51.

218. *Id.* at 851-54.

219. 115 F. Supp. 2d 732, 737 (N.D. Tex. 2000).

the injury.²²⁰

The learned intermediary doctrine was also addressed by the Southern District in *Anderson v. Sandoz Pharmaceuticals Corp.*²²¹ In that case, the plaintiff took a drug, Parlodel, to treat hyperprolactimia while she was pregnant. The drug company did not recommend that the drug be used to treat the plaintiff's problem and therefore did not warn of side effects, including vasoconstriction, which ultimately caused the plaintiff's injuries. Noting that the learned intermediary doctrine only requires that the manufacturer warn the doctor and not the patient, the court held that there was insufficient evidence that the doctor was adequately warned by the manufacturer.²²² Consequently, the defendant's motion for summary judgment was denied.²²³

Finally, the Eastern District addressed a matter of first impression in *Milbrand v. DaimlerChrysler Corp.*,²²⁴ holding that the Texas statute prohibiting evidence showing whether a plaintiff was wearing a seat belt is substantive and, therefore, must be applied by a federal court adjudicating a case in which jurisdiction is based on diversity.²²⁵ The court held that the Texas seat belt statute does not violate the equal protection clause, and excluded evidence, including expert testimony, that the deceased was not wearing his seat belt at the time of the accident.²²⁶

E. BATTERY

The issue in *Bailey v. C.S.* was whether a four-year-old child could form the intent to commit the tort of battery.²²⁷ The court of appeals reasoned that "there is currently no specific age at which minors are immune from liability for intentional torts as a matter of law," and reversed a summary judgment for the child on this point.²²⁸ The court distinguished *Williams v. Lavender*,²²⁹ which held that a child must be at least twelve to be liable for wilful and malicious conduct, on the basis that *Williams* dealt with whether a minor could form the malicious intent to sustain an award of exemplary damages rather than the mental state needed to commit battery.²³⁰

F. LIQUOR LIABILITY

The case of *Daniel v. Reeder* involved a suit by a minor complaining of

220. *Id.* at 741.

221. 77 F. Supp. 2d 804 (S.D. Tex. 1999).

222. *Id.* at 808-09.

223. *Id.* at 809.

224. 105 F. Supp. 2d 601 (E.D. Tex. 2000).

225. *Id.* at 604-05. See also TEX. TRANSP. CODE ANN. § 545.413(g) (Vernon Supp. 2001).

226. *Milbrand*, 105 F. Supp. 2d at 608.

227. 12 S.W.3d 159, 162 (Tex. App.—Dallas 2000, no pet. h.).

228. *Id.* at 163.

229. 797 S.W.2d 410, 412 (Tex. App.—Fort Worth 1990, no writ).

230. *Bailey*, 12 S.W.3d at 162.

injuries he suffered at a party where alcohol was served.²³¹ The court of appeals concluded that section 106.06 of the Texas Alcoholic Beverage Code creates a duty for third parties not to provide alcohol to party guests under the age of eighteen.²³² It further concluded that the statute set the standard of care for the purpose of civil liability. Summary judgment was proper for the parents of the boy who hosted the party, because the record showed that the alcohol consumed there was purchased by other third parties. However, there was a fact issue about their son's liability, even though he did not purchase the alcohol himself. The court reasoned that "[i]t is at least arguable" that by hosting the party he made the alcohol available within the meaning of the statute.²³³ A dissent argued that, under the supreme court's ruling in *Smith v. Merritt*,²³⁴ Texas law at present provides liability against commercial providers only.²³⁵

Boggs v. Bottomless Pit Cooking Team turned on foreseeability.²³⁶ The question was whether the operators of a booth serving alcohol at a barbecue cook-off could foresee that a third party could become intoxicated, violent, and kill the decedent.²³⁷ The court concluded that the intervening act of murder by the drinker was not foreseeable.²³⁸ Generally, it "was not the kind of harm that would have otherwise resulted from the [defendant's] negligent sale of alcoholic beverages," and no other evidence showed that any employee should have known that the third party would get into a fight with the plaintiff and kill him.²³⁹

G. FALSE IMPRISONMENT

The "shopkeeper's privilege" was discussed in *Raiford v. May Department Stores Co.*²⁴⁰ The court of appeals upheld the jury's finding of no liability based on the affirmative defense of "shopkeeper's privilege," holding that the privilege includes a right to conduct a contemporaneous search.²⁴¹ A jury instruction regarding such a search is not objectionable as a comment on the weight of the evidence.²⁴²

H. WRONGFUL DEATH

A transsexual who was born a man but who underwent sex reassignment surgery to become a woman lacked standing to bring a claim as her

231. 16 S.W.3d 491, 492 (Tex. App.—Beaumont 2000, no pet. h.).

232. *Id.* at 494.

233. *Id.* at 494-95. The trial court affirmed summary judgment for the son on a negligence claim alleging that he encouraged the use of force, finding that the fight which injured the plaintiff began with no foreknowledge by anyone. *Id.* at 496.

234. 940 S.W.2d 602, 605 (Tex. 1997).

235. *Daniel*, 16 S.W.3d. at 496 (Walker, J., dissenting).

236. 25 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

237. *Id.* at 822.

238. *Id.* at 825.

239. *Id.* at 824-25 (citing RESTATEMENT (SECOND) OF TORTS § 442 (1965)).

240. 2 S.W.3d 527 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

241. *Id.* at 531.

242. *Id.* at 532.

husband's surviving spouse (of seven years) under wrongful death and survival statutes in *Littleton v. Prange*.²⁴³ The San Antonio Court of Appeals held as a matter of law that a ceremonial marriage between a man and a transsexual born as a man, but surgically and chemically altered to have the physical characteristics of a woman, was not valid because Texas does not permit marriages between persons of the same sex.²⁴⁴

I. MALICIOUS PROSECUTION

Issues concerning malicious prosecution were addressed in *Lewis v. Continental Airlines, Inc.*,²⁴⁵ which discussed the arrest of a Continental customer who allegedly made comments about bombs after missing his flight. The court ultimately held that Continental was not liable for malicious prosecution because merely reporting facts to the proper authorities does not amount to initiating or procuring a criminal prosecution.²⁴⁶ Significant to the court's analysis was that Continental did not file charges against the customer, but rather a Continental employee merely called security after the customer made comments about having a bomb in his bag and made a witness statement at the officer's request.

III. DEFENSES

In *Chavez v. City of San Antonio* a volunteer tree trimmer sued the city board that operated power lines for damages he sustained when a tree limb fell on a line.²⁴⁷ In affirming a summary judgment for the city, the court found that Chavez violated the Health and Safety Code by failing to notify the board of his work and by bringing the tree limb within six feet of the line.²⁴⁸ It also found he was responsible for the work because he exercised control over the work site.²⁴⁹ Because Chavez was responsible for the work and he violated the Code, he had to indemnify CPS for any damages it may have incurred as a result of his conduct, which effectively precluded any recovery.²⁵⁰

In *Hernandez v. Koch Machinery Co.*, a worker whose arm was severed while working on a steel slitting line sued the marketer and seller of the line for products liability, negligence, and breach of warranty, claiming a design defect caused his injury.²⁵¹ The district court entered summary judgment for the marketer on all claims based on a statute of repose, and the court of appeals reversed. The statute of repose operates like a statute of limitations except it potentially cuts off a right of action before it

243. 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied).

244. *Id.* at 231.

245. 80 F. Supp. 2d 686 (S.D. Tex. 1999).

246. *Id.* at 701.

247. 21 S.W.3d 435 (Tex. App.—San Antonio 2000, pet. denied).

248. *Id.* at 440.

249. *Id.* at 439.

250. *Id.* at 438-39.

251. 16 S.W.3d 48 (Tex. App.—Houston [1st Dist.] 2000, pet. filed).

accrues.²⁵² Koch Machinery was not entitled to statute of repose protection because its work was not sufficiently related to the actual attachment of the splitting line to the property.²⁵³

Religious constitutional issues were addressed in *Turner v. Church of Jesus Christ of Latter-Day Saints*, in which a former missionary brought multiple tort claims against his church for injuries he allegedly suffered during and after his missionary work in Guatemala.²⁵⁴ Noting that the free exercise clause bars government involvement in disputes concerning the structure, leadership, or internal policies of religious institutions, the court held if the plaintiff won his lawsuit, government regulation through the courts would require the church to augment its training program to teach numerous subjects to its missionaries.²⁵⁵ Furthermore, his claims concerning the missionary program and its training program did not "involve provision of a secular service separable from the religious activity."²⁵⁶

The case of *Hawkins v. Trinity Baptist Church* arose from a sexual relationship between a church pastor and a parishioner.²⁵⁷ The aggrieved parishioner and her husband sued the pastor and the church for violation of the Sexual Exploitation by Mental Health Services Provider Act.²⁵⁸ The trial court granted summary judgment for the defendants. The court of appeals found that the minister failed to meet his summary judgment burden to prove that his conduct constituted "religious, moral, and spiritual counseling, teaching and instruction" so as to remove it from the scope of this act.²⁵⁹ His constitutional defense was rejected because his conduct, not his communications, were at issue.²⁶⁰ The plaintiff also alleged a claim for breach of a fiduciary relationship, arising from the pastor-member relationship. No such cause of action has been recognized in Texas and the court expressed concern about creating one for policy reasons.²⁶¹ As for the church, however, no evidence showed that the minister was hired "for any purpose other than to provide religious, moral, and spiritual counseling," thus meaning there was no duty to inquire about his previous record.²⁶²

In *Grant v. Southwestern Electric Power Co.*, an electric utility customer sued the utility for negligence, alleging personal injuries and prop-

252. *Id.* at 52.

253. *Id.* at 55 (citing *Sonnier v. Chisolm-Ryder Co.*, 909 S.W.2d 475 (Tex. 1995)).

254. 18 S.W.3d 877 (Tex. App.—Dallas 2000, no pet. h.).

255. *Id.* at 889, 894.

256. *Id.* at 894; *see also* *Williams v. Gleason*, 26 S.W.3d 54, 60 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (applying doctrine of "ecclesiastical immunity" to defeat defamation claim).

257. 30 S.W.3d 446 (Tex. App.—Tyler 2000, no pet. h.).

258. *Id.* at 448; TEX. CIV. PRAC. & REM. CODE ANN. §§ 81.001-009 (Vernon 1997).

259. *Hawkins*, 30 S.W.3d at 451 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 81.001(7) (Vernon 1997)).

260. *Id.* at 452.

261. *Id.* at 452-53 (citing *Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir. 1994) (Ripple, J., concurring and dissenting)).

262. *Id.* at 454.

erty damage due to electrical problems in her home.²⁶³ The district court entered summary judgment in favor of utility, and the court of appeals affirmed in part and reversed in part. Summary judgment was appropriate as to property damage because of the public utility tariff's limitation of liability.²⁶⁴ A public utility tariff lists a public utility services and rates and acts as a binding contract between the utility company and its customers. As for personal injury, the liability limitation was found to be prima facie unconscionable.²⁶⁵

IV. OTHER ISSUES

A. INSURANCE

In *Henson v. Southern Farm Bureau Casualty Insurance Co.*, the supreme court identified when an insurer obligated to pay uninsured/underinsured benefits would have to pay prejudgment interest as well.²⁶⁶ Prejudgment interest is awarded only if necessary to compensate an injured party for the time that the proceeds he was entitled to receive were withheld. Thus, prejudgment interest runs from the date of entitlement. In the context of uninsured/underinsured benefits, an insured is only entitled to the benefits once an insurer's contractual obligation to pay those benefits is triggered, which occurs when the tort liability of the uninsured/underinsured motorist is established.²⁶⁷ Accordingly, the Court concluded that prejudgment interest begins running from the date that the liability of the motorist is established.²⁶⁸ Thus, an insurer only owes prejudgment interest if it withholds benefits after tort liability is established. In this case, the insurers paid the benefits upon tort liability being established and, therefore, were not liable for prejudgment interest.²⁶⁹

In another prejudgment interest case, *Embrey v. Royal Insurance Co. of America*, the supreme court held that a commercial automobile liability policy did not require the insurer to pay prejudgment interest, in addition to the policy limits, on a claim by a third party against its insured.²⁷⁰ In an agreed judgment in the suit between Royal's insured and Embrey, the trial court awarded Embrey \$678,050 and prejudgment interest. Royal paid the principal but refused to pay the prejudgment award because the principal exhausted the policy limits. The court of appeals agreed that, because the policy limits had been exhausted, the explicit policy language precluded a recovery of prejudgment interest.²⁷¹ The court also concluded that a Supplementary Payments Provision only pro-

263. 20 S.W.3d 764 (Tex. App.—Texarkana 2000, pet. granted).

264. *Id.* at 776.

265. *Id.* at 772, 776.

266. 17 S.W.3d 652 (Tex. 2000).

267. *Id.* at 654.

268. *Id.*

269. *Id.*

270. 22 S.W.3d 414 (Tex. 2000).

271. *Id.* at 416.

vided for the payment of postjudgment interest.²⁷² Finally, the court held that State Board of Insurance General Casualty Bulletin No. 644, which approved an amendatory endorsement stating that all general liability insurance policies effective on or after October 1, 1984 provide coverage for prejudgment interest, did not apply to Royal's policy because the Order did not explicitly say it applied to automobile liability insurance.²⁷³

B. VICARIOUS LIABILITY

In *Smith v. Universal Electric Construction Co.*, an employer was held not liable for injuries sustained by a motorcyclist hit by an employee's personal vehicle as the employee returned to a company-paid motel room after work.²⁷⁴ The trial court granted the employer's motion for directed verdict, finding no evidence that the employee was operating within the course and scope of his employment at the time of the accident, and the court of appeals affirmed.²⁷⁵ The court of appeals looked for evidence that the employee's act was: "(1) within the general authority given him; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed."²⁷⁶ The plaintiff claimed that the trip from the worksite to the motel was part of a "special mission" on behalf of Universal or constituted a dual purpose.²⁷⁷ The court of appeals disagreed, noting that the employee was driving his own personal vehicle after he had ended his workday, repaired the vehicle at his own expense, was not reimbursed by his employer for the use of the vehicle, and was not furthering any business purpose of the employer by driving to a motel after work, even though the employer paid for the motel room for the employee's convenience during a temporary job assignment.²⁷⁸ The plaintiff's evidence that he was paid for twelve hours of work the day of the accident, which would have included the time of the accident, was not probative, because the employee's hours varied from day to day and were not recorded by a time clock.²⁷⁹

Taking the theory of vicarious liability for a car accident even further, the plaintiff in *Greg Lair, Inc. v. Spring* sought to hold a car dealership and its salesman liable for an accident caused by a prospective buyer during a test drive.²⁸⁰ The trial judge found the dealership and salesman vicariously liable as a matter of law because the prospective buyer was engaged in a joint enterprise with the dealership and salesman.²⁸¹ The court of appeals noted that the joint enterprise theory had four elements:

272. *Id.*

273. *Id.* at 417.

274. 30 S.W.3d 435, 441 (Tex. App.—Tyler 2000, no pet. h.).

275. *Id.* at 438.

276. *Id.* (citing *Mata v. Andrews Transp., Inc.*, 900 S.W.2d 363, 366 (Tex. App.—Houston [14th Dist.] 1995, no writ)).

277. *Id.* at 439.

278. *Id.* at 439-41.

279. *Id.* at 441.

280. 23 S.W.3d 443 (Tex. App.—Amarillo 2000, pet. granted).

281. *Id.* at 445.

“(1) an agreement, expressed or implied among the members with a common purpose, (2) a common purpose, (3) a right, expressed or implied, to direct and control the enterprise, and (4) a common business or pecuniary interest.”²⁸² The court found that the plaintiff’s summary judgment evidence did not establish a common pecuniary interest,²⁸³ based on the 1931 case of *Bertrand v. Mutual Motor Co.*, which held that a dealer was not liable for a prospective buyer’s negligence during a test drive.²⁸⁴ That court further held that the buyer could not be an agent of the dealer, since the buyer and dealer’s interests were antagonistic.²⁸⁵ Because these conflicting interests prevent the existence of a common pecuniary interest, no joint enterprise existed between the defendants, and the plaintiff could recover nothing from the dealership or salesman.²⁸⁶

C. WORKERS’ COMPENSATION

A workers’ compensation subrogation claim gave rise to *Harris County v. Carr*, in which a self-insured county and its employee filed a negligence suit in October 1997 against a driver who had injured the employee in a February 1994 car accident.²⁸⁷ The Houston First District Court of Appeals affirmed summary judgment on limitations. The court found that although Harris County may claim a general limitations exemption available to many governmental entities under section 16.061(a) of the Texas Civil Practice and Remedies Code,²⁸⁸ that exemption does not apply when the governmental entity asserts a claim that belongs to a non-exempted person or entity.²⁸⁹ Here, Harris County’s subrogation claim actually belonged to the injured employee, who was subject to a two-year limitations period,²⁹⁰ and thus the county’s suit was barred.²⁹¹

The plaintiff in *Conex International Corp. v. Cox* claimed retaliation for asserting rights under the Texas Workers Compensation Act.²⁹² The jury awarded him \$50,000 because his employer refused to let him follow his doctor’s orders in connection with a hand injury. The employer argued that because the plaintiff had received workers compensation benefits for the injury, his recovery was barred by the doctrine of “election of reme-

282. *Id.* at 445; see also RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (1965).

283. *Greg Lair, Inc.*, 23 S.W.3d at 448.

284. 38 S.W.2d 417, 418 (Tex. Civ. App.—Eastland 1931, writ ref’d).

285. *Id.*

286. *Greg Lair, Inc. v. Spring*, 23 S.W.3d 443, 448 (Tex. App.—Amarillo 2000, pet. granted). The prospective buyer was not a party to the appeal, and all other parties agreed that they would not seek to collect any judgment against the buyer personally in excess of his cumulative insurance policy limits. See *id.* at 445 n.2.

287. 11 S.W.3d 342 (Tex. App.—Houston [1st Dist.] 2000, Rule 53.7(f) motion filed for extension of time to file pet.).

288. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.061(a) (Vernon Supp. 2001).

289. See *Carr*, 11 S.W.3d at 344.

290. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2001).

291. See *Carr*, 11 S.W.3d at 344.

292. 18 S.W.3d 323 (Tex. App.—Beaumont 2000, pet. denied).

dies."²⁹³ The court of appeals agreed and reversed the trial court.²⁹⁴ The court was unpersuaded by the fact that the plaintiff had not filed a claim for benefits, reasoning that the doctrine applied once benefits were accepted.²⁹⁵

D. NEW STATUTES

Numerous statutes relating to topics addressed in this Article were amended this Survey year, most of which were effective September 1, 1999.²⁹⁶ Most notable were numerous changes to the Civil Practices and Remedies Code and changes to the Labor Code (addressing both employment issues and Workers' Compensation issues).²⁹⁷ Several legislative changes were made to Workers' Compensation law this year. Some of the changes to the Labor Code involved issues concerning annual sick leave,²⁹⁸ interlocutory orders,²⁹⁹ intoxication levels,³⁰⁰ medical bills and exams,³⁰¹ returning injured employees to work,³⁰² and volunteers.³⁰³ Several changes are particularly relevant to employers, including statutes addressing the disclosure of information about employees,³⁰⁴ wrongful termination of employees on jury duty,³⁰⁵ and employer responsibility for leased employees.³⁰⁶ The Civil Practice and Remedies Code was amended to address several issues, including the application of a four-year statute of limitations for fraud and breach of fiduciary duty

293. *Id.* at 325.

294. *Id.* at 326-27 (citing *Massey v. Armco Steel*, 652 S.W.2d 932, 933 (Tex. 1983)).

295. *Id.* at 327.

296. See generally WILLIAM V. DORSANEO, III, TEXAS LITIGATION GUIDE; J. HADLEY EDGAR, JR. & JAMES B. SALES, TEXAS TORTS & REMEDIES; JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW.

297. See *supra* Part IV.C.

298. TEX. LAB. CODE ANN. § 501.044 (Vernon Supp. 2001) (addressing exhaustion of sick leave and income benefits).

299. *Id.* §§ 410.032, 410.168.

300. *Id.* § 401.013 (specifying that the alcohol concentration that renders a person intoxicated for purposes of the workers' compensation laws is .08, as specified in the TEX. PENAL CODE ANN. § 49.01(2)).

301. *Id.* §§ 408.027 (requiring insurance carriers to pay the fee allowed under section 413.011 for service rendered by a health care provider rather than the fee charged), 408.151 (Vernon Supp. 2001) (limiting the number of medical examinations that may be required of an employee receiving supplemental income benefits).

302. *Id.* § 408.150 (Vernon Supp. 2001) (addressing the need for vocational rehabilitation and training services).

303. *Id.* § 501.026 (providing for payment of medical expenses to volunteers injured by performing volunteer services for the state during a disaster or scheduled emergency response training).

304. TEX. LAB. CODE ANN. § 103.003(b) (Vernon Supp. 2001) (allowing an employer to disclose job performance information concerning a current or former employee to a prospective employer).

305. TEX. CIV. PRAC. & REM. CODE ANN. § 122.022 (Vernon Supp. 2001) (increasing the penalties for firing an employee because the employee served as a juror).

306. TEX. LAB. CODE ANN. § 91.032 (Vernon Supp. 2001) (providing that a company that leases employees through a staff leasing service retains responsibility for the direction and control of the employees, the goods and services produced by the company, and the acts, errors, and omissions of the employees committed within the scope of their employment).

claims,³⁰⁷ governmental liability,³⁰⁸ limitations on governmental suits brought against gun and ammunition manufacturers,³⁰⁹ and health care provider immunity.³¹⁰

E. CLASS ACTIONS

Rejecting the “certify now and worry later” approach, the supreme court denied certification in *Southwestern Refining Co. v. Bernal*, in which over 900 plaintiffs brought a class action against a refining company alleging personal injuries resulting from a tank explosion at the refinery.³¹¹ Plaintiffs, residents of the surrounding area near the explosion, alleged that the explosion and ensuing fire caused respiratory difficulties, skin irritation, eye irritation, headaches, nausea, lawn spoilage, and pet deaths. The trial court certified the class and divided the proceedings into three phases: (1) determination of general liability and gross negligence; (2) determination of punitive damages; and (3) determination of causation and actual damages. The court of appeals modified the certification order to require determination of actual damages before punitive damages were assessed for the whole class.³¹²

The supreme court reversed, noting that certification is rarely an appropriate device in personal injury cases because they often present difficult “causation and damages issues with highly individualistic variables.”³¹³ The court held that individual issues predominated over common ones, including the proximity of the explosion to the plaintiffs’ homes, the prevailing winds on the day in question, the location of the plaintiffs at the time of the explosion, and the plaintiffs’ individual medical history.³¹⁴ The court rejected any relaxation of individualized treatment of causation and damages in the mass tort context, noting that “[a]ggregating claims can dramatically alter substantive tort jurisprudence [because] [u]nder the traditional tort model, recovery is conditioned on defendant responsibility.”³¹⁵ Specifically, the plaintiff must prove, and the defendant must be given an opportunity to contest, every element of a claim. Thus, the Court held, it is improper to certify a class

307. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon Supp. 2001).

308. *Id.* § 101.0215 (adding school latch-key programs to the list of governmental activities to which the Texas Tort Claims Act applies); *id.* § 75.002 (limiting municipal liability in connection with recreational activities).

309. *Id.* § 128.001(b).

310. *Id.* §§ 84.003-.004 (providing immunity to health care providers working as volunteers for charitable organizations).

311. 22 S.W.3d 425, 435 (Tex. 2000). The supreme court addressed class definition issues in two other cases this Survey year. *See* *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 403 (Tex. 2000) (holding that “class members must be presently ascertainable by reference to objective criteria”); *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 454 (Tex. 2000) (denying certification of class of automobile buyers who suffered damages from peeling paint because the class definition, which required a determination of the merits, failed to meet the “clearly ascertainable” requirements).

312. *Southwestern Refining Co.*, 22 S.W.3d at 429.

313. *Id.* at 436.

314. *Id.*

315. *Id.* at 438.

without knowing how the claims will likely be tried.³¹⁶ The Court went on to say that “[b]y removing individual considerations from the adversarial process, the tort system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, ‘class certification magnifies and strengthens the number of unmeritorious claims.’”³¹⁷

F. GOVERNMENTAL OR OFFICIAL IMMUNITY

Numerous Texas courts addressed immunity under the Texas Tort Claims Act³¹⁸ this year. Perhaps the most significant opinion was the supreme court ruling in *Texas Department of Transportation v. Jones* that governmental immunity defeats subject matter jurisdiction and is thus properly asserted in a plea to the jurisdiction.³¹⁹ The court distinguished “immunity from liability” from “immunity from suit.” Immunity from liability can be waived and is not a jurisdictional bar. By contrast, immunity from suit cannot be waived, and the court lacks subject matter jurisdiction absent consent to suit.³²⁰ Of course, a court may only consider the plaintiff’s pleadings in determining whether waiver exists, and thus whether subject matter jurisdiction exists or not.³²¹

The difference between respondeat superior liability and premises defect liability in relation to governmental immunity was addressed in *City of Baytown v. Peoples*.³²² The court explained that in premises defect cases, a governmental entity may not rely on its employee’s official immunity “because its liability would be based, not on the actions of its employee, but on a condition of tangible personal property.”³²³ The plaintiff’s failure to warn of a dangerous situation created by a malfunctioning traffic signal and failure to fix the signal was a premises defect issue.³²⁴ Thus, the City was not immune despite the City employee’s official immunity.³²⁵

By contrast, another court of appeals held in *Cameron County v. Carrillo*, that a governmental entity was immune where an employee was protected from liability under the doctrine of official immunity.³²⁶ The court based its holding on the fact that the Texas Tort Claims Act waives

316. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

317. *Id.* at 438 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996)).

318. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001-109 (Vernon 1997).

319. 8 S.W.3d 636, 637 (Tex. 1999).

320. *Id.* at 638 (distinguishing *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988)). *But see* *City of Houston v. Lazell-Mosier*, 5 S.W.3d 887, 891 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.) (holding that an averment that “all conditions precedent have occurred or have been performed” is sufficient to invoke subject matter jurisdiction of the court with regard to the notice issue).

321. *See Jones*, 8 S.W.3d at 639; *City of San Augustine v. Parrish*, 10 S.W.3d 734, 737 (Tex. App.—Tyler 1999, no pet. h.); *Montgomery County v. Fuqua*, 22 S.W.3d 662, 665 (Tex. App.—Beaumont 2000, no pet. h.).

322. 9 S.W.3d 391, 395-96 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

323. *Id.* at 394.

324. *Id.* at 396.

325. *Id.*

326. 7 S.W.3d 706, 710 (Tex. App.—Corpus Christi 1999, no pet. h.).

sovereign immunity only where the government would be liable if it were a private person.³²⁷ Because the private person was granted official immunity, the government could not be held liable. The court did not discuss the distinction between premises defect liability and respondeat superior liability.

In an unpublished opinion, the Texas Supreme Court found Texas A & M University liable under the Tort Claims Act for stab wounds sustained by a student who portrayed Vlad the Impaler in the university drama club performance of "Dracula."³²⁸ The injury occurred when another student actor wielding a Bowie knife missed the stab pad on the plaintiff's chest.³²⁹ A jury found that the play's director, the prop master (who choreographed the stage fight), and two faculty advisors were acting as university employees during the accident and "were negligent in their use of tangible personal property."³³⁰ The court of appeals reversed, finding that the director and prop master were independent contractors, and the two faculty advisors were not acting in their paid academic roles at the time.³³¹ The supreme court determined that there was sufficient evidence to support the jury finding that the faculty advisors were university employees at the time of the accident, because they were responsible for enforcing university policies and procedures during the club's activities, and their position as faculty advisors was relevant to their overall compensation.³³²

Waiver of governmental immunity under section 101.060 of the Texas Tort Claims Act was addressed by several courts this year. Under that section, immunity is waived if "the absence, condition, or malfunction of a traffic or road sign . . . is not corrected by the responsible governmental unit within a reasonable time after notice."³³³ In *Reyes v. City of Houston*, survivors of three young men who died in a car accident when their car ran off the end of a dead-end road and hit a chain link fence sued under the Texas Tort Claims Act alleging that the City of Houston was negligent for its failure to warn of and barricade the dead-end.³³⁴ The City's plea to the jurisdiction was denied because the City had notice of a similar accident that had occurred at the same location the month before the accident at issue.³³⁵ In *State ex rel. State Department of Highways and Public Transportations v. Gonzalez*, the court held that repeated vandalism of a stop sign can be considered a "condition" for purposes of section 101.060.³³⁶ In that case, governmental immunity was waived after a stop sign was vandalized six times in a seventeen-day period, resulting in a

327. *Id.*

328. *Bishop v. Tex. A & M Univ.*, No. 99-0634, 2000 WL 854300 (Tex. June 29, 2000).

329. *Id.* at *1.

330. *Id.*

331. *Id.*

332. *Id.* at *2.

333. TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(2) (Vernon 1997).

334. 4 S.W.3d 459, 461 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.).

335. *Id.* at 462.

336. 24 S.W.3d 533, 537 (Tex. App.—Corpus Christi 2000, no pet. h.).

fatal accident. Because the city failed to take corrective action (increased patrolling) until the sixth incident, the court held that there was sufficient evidence for the jury to determine that the State's failure to take corrective action was unreasonable.³³⁷

Two cases addressed governmental immunity in relation to an emergency services' failure to timely respond. In both cases, the courts held that governmental immunity is not waived by the failure to act. In *City of Hildalgo Ambulance Service v. Lira*, the court held that the failure to use and the misuse of information in an emergency situation "does not amount to use or misuse of tangible property."³³⁸ In that case, plaintiffs attempted to circumvent well settled law that there is no waiver of immunity for the non-use of a motor-driven vehicle by alleging that defendants waived their governmental immunity by using or misusing tangible property – specifically, emergency communications equipment.³³⁹ In a similar case, the court held that governmental immunity was not waived after EMS personnel refused to transport a patient from one hospital to another despite the fact that the failure to transport resulted in the untimely death of the patient.³⁴⁰

The claim in *Hampton v. University of Texas - M.D. Anderson Cancer Center* was that a hospital provided a poorly-designed bed to a patient and then misused the bed by not activating the safety equipment.³⁴¹ The hospital obtained summary judgment by claiming that these allegations involved a "non-use" of government property, which is not actionable under the Texas Tort Claims Act.³⁴² The court of appeals disagreed and reversed, characterizing the claim as one for a failure to properly use property. It observed: "If the hospital had really not used the bed, it would have retained possession and not have provided the bed to [the patient]."³⁴³

The protective umbrella of sovereign immunity was extended to a non-profit corporation because it constituted a workforce board in accordance with a Texas statute and was thus a governmental entity in *Alamo Workforce Development, Inc. v. Vann*.³⁴⁴ However, the court specifically noted its unwillingness to extend the "blanket of sovereign immunity to every entity which at first blush exhibits the characteristics of a governmental entity."³⁴⁵

In *Guillen v. City of San Antonio*, the City of San Antonio was immune from a suit filed against it after a doctor's wife died as a result of paramedics' alleged violations of standard medical operating procedures

337. *Id.*

338. 17 S.W.3d 300, 304 (Tex. App.—Corpus Christi 2000, no pet. h.).

339. *Id.*

340. *City of El Paso v. Hernandez*, 16 S.W.3d 409 (Tex. App.—El Paso 2000, pet. denied).

341. 6 S.W.3d 627 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

342. *Id.* at 630.

343. *Id.* at 631.

344. 21 S.W.3d 428, 433 (Tex. App.—San Antonio 2000, no pet. h.).

345. *Id.*

set by the San Antonio Fire Department.³⁴⁶ Although immunity is waived if a claim arises from a municipal employee's violation of a statute or ordinance in responding to a 9-1-1 call, the court refused to expand the statute to include departmental guidelines, which are created by a legislative body and therefore are not a statute or ordinance.³⁴⁷

In a well publicized federal case, the Western District court addressed liability issues under the Federal Tort Claims Act ("FTCA") concerning children who died in the 1993 Branch Davidian conflict.³⁴⁸ Considering the plaintiffs' motions to recuse, reopen, and reconsider the granting of a motion to dismiss and partial summary judgment, the judge denied all of the claimants' motions and set forth his findings of fact and conclusions of law, examining separately the events of the initial service of warrants that led to the stand-off and its eventual fiery conclusion.³⁴⁹ Applying Texas tort law, the court first summarized the state's tort law as it applies to infants, children, and adults.³⁵⁰ Using these principles, the court found that: (1) the plaintiff's claims were barred under the discretionary function exception of the FTCA;³⁵¹ (2) the agents of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") acted reasonably and lawfully in attempting to serve warrants at the compound;³⁵² (3) the ATF and Federal Bureau of Investigation officers were privileged under Texas law to use force as necessary when performing official duties;³⁵³ (4) the use of tanks and tear gas was reasonable to end the fifty-one-day stand-off;³⁵⁴ (5) certain Davidians who started a fire in the compound were a superseding cause of its damage who "broke any purported causal connection between the damage to the building and the Plaintiffs' injuries;"³⁵⁵ and (6) the United States owed no duty to rescue Davidians "from a peril it did not cause."³⁵⁶

A negligence suit, *Michaels v. Avitech, Inc.*,³⁵⁷ was brought by the executor of two people killed in a private plane crash against a company that replaced one of the vacuum pumps on the plane four years before the crash. The Southern District of Texas court granted the defendant's motion for summary judgment. On appeal, the Fifth Circuit affirmed summary judgment, examining each of the plaintiff's negligence theories in turn: (1) Avitech introduced debris contamination into the pumps when it replaced one of them, (2) Avitech spent an insufficient amount of time replacing the pump, and (3) the right pump caused the left pump to fail,

346. 13 S.W.3d 428, 432 (Tex. App.—San Antonio 2000, pet. denied).

347. *Id.* at 433.

348. *Andrade v. United States*, 116 F. Supp. 2d 778 (W.D. Tex. 2000).

349. *Id.* at 783-90.

350. *See id.* at 786-87.

351. *See id.* at 787-89.

352. *See id.* at 787.

353. *See id.* at 788-89.

354. *Andrade v. United States*, 116 F. Supp. 2d 778 (W.D. Tex. 2000).

355. *Id.* at 789.

356. *Id.*

357. 202 F.3d 746 (5th Cir. 2000).

which set off a chain reaction resulting in the crash. The court found that the plaintiff made no attempt to rule out other sources of contamination or other causes of pump failure, nor did the plaintiff provide expert evidence that Avitech spent an insufficient amount of time replacing the pump.³⁵⁸ The court also opined that the plaintiff's expert evidence "would likely have been inadmissible at trial under *Daubert* because it failed to exclude other causes."³⁵⁹

G. DAMAGES

The Fifth Circuit ruled in *Srivastava v. Commissioner* that the portion of damages payable to an attorney as part of a contingent fee arrangement is not gross income for tax purposes.³⁶⁰ The petitioners settled a defamation case for 8.5 million dollars, none of which they reported as gross income. The Fifth Circuit, reviewing a decision of the Tax Court, recognized that the federal circuit courts were split on the issue of taxing contingency fees to the client, but was bound by its previous decision in a 1959 case arising under Alabama law.³⁶¹

Damages were also addressed by the Southern District in *Holland v. United States*, a tax refund case in which the petitioner claimed that disbursements from a trust fund were in exchange for the relinquishment of personal injury tort rights against Phillips 66 Company, which set up the trust in exchange for land next to one of its commercial operations.³⁶² The petitioner claimed that she overpaid income taxes on the trust disbursement and was seeking a refund, but the court found that the only personal injury tort right she could have relinquished as part of the property transfer was nuisance causing emotional harm.³⁶³ Finding no evidence that petitioner could assert such a tort claim, the court held that the trust disbursement was taxable as income.³⁶⁴

358. *Id.* at 753-54.

359. *Id.* at 753 (referring to *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)).

360. 220 F.3d 353 (5th Cir. 2000).

361. *Id.* at 358, 364-65 (referring to *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959)).

362. 94 F. Supp. 2d 787 (S.D. Tex. 2000).

363. *Id.* at 791.

364. *Id.* at 792.