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Personal Torts

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PERSONAL TORTS

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I. INTRODUCTION

PERSONAL torts is an area of law that closely affects all Texans. The very word personal means "of, relating to, or affecting a person."[1] The word tort means "wrongful act for which a civil action will lie . . . ."[2] Personal torts therefore, to exist, must have two components. First, they must relate to or affect a person. Second, a cause of action must lie in civil court as a result of the conduct of the defendant. Very little argument exists regarding whether certain conduct relates to or affects a person. The arguments in Texas courts increasingly center around whether our system of justice is going to allow a civil action to lie in an effort to deter unreasonable conduct and compensate the personal injuries such conduct inflicts.

The first issue in addressing personal torts is whether a tort has occurred at all, meaning whether our society is going to recognize a cause of action for the questioned conduct. If there is no cause of action, there is no tort. Whether a duty exists to control ones conduct, duty meaning a legal duty, so that it does not adversely affect another person is a question raised often in today's Texas Court System. The cases clearly indicate that in Texas, a general duty to be careful and reasonable is disappearing in favor of a more rigid and confined set of duties. The Texas Supreme Court's efforts at "judicial codification" narrowing the duties owed by Texans to one another means that fewer personal torts exist now than in the past. The clear winners in this binge of judicial legislation eliminating well established common law duties on a case by case basis, and thereby personal torts, are the persons factually, but not legally, responsible for harming their fellow citizens. Reducing the number of persons injured by tortuous conduct through eliminating torts is the equivalent of reducing crime by eliminating criminal statutes.

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1. Webster's Ninth New Collegiate Dictionary, 1991.
2. *Id.*

II. DUTY

A. PHYSICIAN-PATIENT RELATIONSHIP AND ON-CALL SPECIALISTS

In *Majzoub v. Appling*,[3] the Houston [First District] Court of Appeals determined that since the defendant had not taken any affirmative action in treating the plaintiff, there was not a physician-patient relationship.[4]

Hassan El Majzoub went to the Rosewood Medical Center emergency room on September 17, 1997, complaining that he could not breathe. The emergency room physician's physical examination of Majzoub "revealed swollen lymph nodes, inflammation of the pharynx, enlarged, swollen tonsils covered with pus-like exudate, and a muffled, hoarse voice."[5] Majzoub also had stridor, which is a high-pitched voice caused by blockage of the larynx. After examining Majzoub, the ER physician asked a nurse to call the on-call otolaryngologist, the defendant Dr. Appling.

Dr. Appling returned the telephone call and spoke to the ER physician. During this telephone call, Dr. Appling discussed Majzoub's symptoms in detail with the ER physician and made recommendations.

The ER physician reported that Majzoub had tested positive for strep and that "he had large, inflamed tonsils that were almost touching."[6] Dr. Appling then instructed the ER physician to give Majzoub a shot of penicillin and a breathing treatment. The ER physician reported that he had already done those things, and Dr. Appling replied, "Well, what we normally do with our patients is to give them a gram of Rocephin . . . and give them Dalalone . . . ."[7] Dr. Appling also told the ER physician to give "an additional shot of the other antibiotic" and "observe the patient, especially after giving him the shot and the breathing treatment," for "thirty minutes to an hour."[8] Dr. Appling then concluded the call by instructing the ER physician to call him back if anything changed and to also call after Majzoub finished the breathing treatment and "let me know how he's doing."[9]

Early the next morning, the ER physician called Dr. Appling to say that he was going to refer Majzoub to Dr. Appling for follow-up treatment. Dr. Appling agreed and instructed the ER physician to have Majzoub call and make an appointment for that morning. That appointment, however, never happened. Later that same morning, Majzoub suffered a respiratory arrest that left him brain dead.

Majzoub's widow sued Dr. Appling for medical malpractice, and the trial court granted Dr. Appling summary judgment on the grounds that there was no physician-patient relationship, and thus no duty on the part

3. Majzoub v. Appling, 95 S.W.3d 432 (Tex. App.—Houston [1st Dist.] 2002, no pet. h.).
4. *Id.* at 438.
5. *Id.* at 434.
6. *Id.*
7. *Id.* at 435.
8. *Id.*
9. *Id.*

of Dr. Appling to treat Majzoub.[10] The court of appeals then affirmed the trial court in a decision that seems to lack sound legal reasoning.

The elements of a medical malpractice case are firmly established. "[A] plaintiff must prove there was (1) a duty to conform to a particular standard of care, (2) a breach of that standard, (3) resultant injury, and (4) a causal connection between the breach of the standard and the injury."[11] The existence of a duty is a question of law,[12] and a physician cannot be liable for medical malpractice unless the physician breaches a duty flowing from a physician-patient relationship.[13]

The Plaintiff's argument in *Majzoub* that there was a physician-patient relationship is compelling:

> [A]lthough Dr. Appling never saw, talked to, or examined Majzoub before the anoxic brain injury, the recommendations Dr. Appling made to [the ER physician] on the telephone, his request to be updated on Majzoub's condition, and his consent to try to see Majzoub in his office the following day establish[ ] the existence of a physician-patient relationship. * * * Dr. Appling took affirmative action when he listened to [the ER physician's] recitation of Majzoub's symptoms and suggested treatment in the form of additional medication, and when he requested that he be called and updated on Majzoub's status following the completion of the breathing treatments.[14]

In *St. John v. Pope*,[15] the Texas Supreme Court stated, "Creation of the physician-patient relationship does not require the formalities of a contract. The fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship."[16] A physician-patient relationship may be established at the express or implied consent of the physician.[17] While consent may be implied, the "on-call" status of a physician does not *automatically* impose

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10. *Id.* at 436.

11. *Id.* (citing Wax v. Johnson, 42 S.W.3d 168, 171 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)).

12. St. John v. Pope, 901 S.W.2d 420, 423 (Tex. 1995).

13. Wheeler v. Yettie Kersting Mem'l Hosp., 866 S.W.2d 32, 38 (Tex. App.—Houston [1st Dist.] 1993, no writ).

14. *Majzoub*, 95 S.W.3d at 437.

15. *St. John*, 901 S.W.2d at 420.

16. *Id.* at 424; *see also* Dougherty v. Gifford, 826 S.W.2d 668, 674 (Tex. App.—Texarkana 1992, no writ) (holding that a physician-patient relationship existed between patient from whom biopsy was taken and doctors who examined tissue from biopsy and negligently misdiagnosed malignant cancer); Bovara v. St. Francis Hosp., 700 N.E.2d 143, 147-48 (Ill. App. Ct. 1998) (finding a genuine issue of fact about whether physician-patient relationship between physicians who provided the service to the hospital of determining whether patients were "candidates" for angioplasty procedure and those patients, even though the physicians never examined the patients); TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(2) (Vernon 2003) (defining "Health care" as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement").

17. *St. John*, 901 S.W.2d at 423.

a duty.[18] The physician may, however, create one if there is some affirmative action on his or her part.[19] There is no need to have direct physical contact with a patient in order to establish that relationship.[20]

Both *St. John* and the case relied upon by Dr. Appling, *Lopez v. Aziz*,[21] demonstrate that *Majzoub* is a case such as those referred to by the Supreme Court in *St. John*, where an on-call physician may establish a physician-patient relationship by implied consent. In *Majzoub*, an ER physician called an on-call specialist in the same area in which the patient was having symptoms. Dr. Appling listened to the patient's symptoms, gave instructions to the ER physician, which the ER physician followed, and planned a follow-up examination. The ER physician was clearly acting beyond the scope of his own qualifications and relying on Dr. Appling's instructions. As he stated in his deposition, he was not comfortable making the decisions as to Majzoub's care on his own and therefore consulted a specialist in that particular area.[22]

In *St. John*, the patient was presented to an ER physician at Central Texas Medical Center with a backache and fever after undergoing back surgery and epidural injections. The ER physician called the on-call internist, Dr. St. John, and told him of the patient's symptoms. However, "[b]ecause St. John's area of specialization was not neurology or neurosurgery, and the [Medical] Center was not able to handle cases involving these specialties, St. John recommended that Pope be referred to a hospital with the requisite neurosurgeon or to the physician who had performed the surgery."[23] That was the extent of Dr. St. John's involvement, and the supreme court correctly held that there was not a physician-patient relationship. Unlike Dr. Appling, Dr. St. John never recommended specific drug treatment, interventional breathing treatment or instructed that he be contacted at a later time.

The *Lopez* decision,[24] relied upon by the Houston [First District] Court of Appeals did not address the duties of an on-call specialist. In *Lopez*, the decedent was suffering from pre-eclampsia, which is toxemia of late pregnancy, prior to delivery of her eleventh child. The decedent's primary care physician, who was handling the decedent's care, consulted once by telephone with an OB/GYN specialist, who simply suggested a "complete laboratory work-up," which the primary care physician subsequently ordered.[25] The *Lopez* court concluded that the consulted doctor "did no more than answer the professional inquiry of a colleague. There is no evidence of any consensual basis for the existence of a physician-

18. *Id.* at 424.
19. Day v. Harkins & Munoz, 961 S.W.2d 278, 280 (Tex. App.—Houston [1st Dist.] 1997, no writ).
20. *St. John*, 901 S.W.2d at 424.
21. Lopez v. Aziz, 852 S.W.2d 303 (Tex. App.—San Antonio 1993, no writ).
22. *Majzoub*, 95 S.W.3d at 435-36.
23. *St. John*, 901 S.W.2d at 422.
24. *Lopez*, 852 S.W.2d at 303.
25. *Id.* at 304.

patient relationship arising out of that one telephone conversation."[26]

The Majzoub family's attorney relied on a Dallas Court of Appeals decision that is directly on point, *Lection v. Dyll*.[27] In *Lection*, as in *Majzoub*, an ER physician called the on-call Neurology specialist to discuss the diagnosis and treatment of a patient.[28] The ER physician telephoned the on-call specialist, "who had an obligation to the hospital to assist, and not merely because [the on-call specialist] was a colleague."[29] The emergency room doctor "sought and relied upon the [on-call physician's] diagnosis and treatment plan."[30]

The summary judgment record in *Lection* showed that the on-call physician diagnosed Lection's condition and told the ER physician that no other treatment was necessary. The Dallas Court of Appeals held that these statements constituted "an evaluation of the information provided and a medical decision concerning Lection's need for treatment and admission to the hospital, and thus [were] 'affirmative acts' towards Lection's treatment."[31] The Dallas Court of Appeals then reversed summary judgment in Dr. Dyll's favor.

The *Majzoub* court also ignored the decision in *Wheeler v. Yettie Kersting Memorial Hospital*.[32] In *Wheeler*, a woman sued several parties for the suffocation death of her baby during a negligent delivery by emergency medical technicians ("EMTs") who were transporting her ninety miles to Galveston.[33] Before transporting Wheeler, the EMTs took her to Yettie Kersting Memorial Hospital, the nearest medical facility, for an assessment to determine whether they could safely transport Wheeler to Galveston. A nurse at Yettie Kersting contacted an on-call physician, Dr. Rodriguez. The nurse gave Dr. Rodriguez medical information about Wheeler, and Dr. Rodriguez approved the transfer. In the subsequent lawsuit, Dr. Rodriquez argued that there was not a physician-patient relationship because he had no duty to give Wheeler care.

In rejecting Dr. Rodriguez's argument, the Houston [First District] Court of Appeals observed that the question was "whether Dr. Rodriguez actually rendered services to Mrs. Wheeler, thus establishing a physician-patient relationship."[34] While Dr. Rodriguez was not requested to examine Wheeler, nor did he actually do so, he was requested to "evaluate certain information and make a medical decision whether Mrs. Wheeler could safely be transferred to [Galveston]."[35] Thus, the court of appeals concluded that "in evaluating the status of Mrs. Wheeler's labor and giving his approval, [Dr. Rodriguez] established a doctor-patient re-

26. *Id.* at 306.
27. Lection v. Dyll, 65 S.W.3d 696 (Tex. App.—Dallas 2001, pet. denied).
28. *Id.* at 707.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Wheeler*, 866 S.W.2d 32.
33. *Id.* at 35-36.
34. *Id.* at 39.
35. *Id.*

lationship with Mrs. Wheeler and accepted the duties which flow from such a relationship."[36]

The reasoning behind the *Lection* and *Wheeler* decisions fits squarely with the facts of *Majzoub*. ER physicians are not qualified to deal with every condition presented in the emergency room. Hospitals therefore have specialists on call for the ER physicians to contact for guidance on conditions beyond their knowledge and capability. Hasan El Majzoub was presented to the emergency room with a critical otolaryngological condition. The ER physician did not feel qualified to make decisions concerning Majzoub's care alone and contacted the on-call otolaryngologist, Dr. Appling. He then relayed Majzoub's symptoms to Dr. Appling for the purpose of diagnosis and treatment. Dr. Appling knew that the ER physician was not qualified to treat Majzoub on his own and expected the ER physician to follow his instructions, which the ER physician did. As in *Lection*, Dr. Appling made an evaluation of the information provided and a medical decision.[37] A physician-patient relationship existed.

B. Special Relationship Creating a Duty to Control the Activities of a Minor

In *Texas Home Management, Inc. v. Peavy*,[38] Anthony Tyrone Dixon was committed to the custody of a county mental health authority, which placed the juvenile in Texas Home Management's ("THM") intermediate care facility, Lakewood House, near Nacogdoches. While in Lakewood House and during his approved trips home to see his mother in Houston, Dixon frequently engaged in serious criminal activity. During a visit to his mother, Dixon shot and killed Edith and O.L. Peavy's daughter. The Peavys filed suit claiming that THM negligently failed to supervise and control Dixon. The trial court granted THM summary judgment, and the intermediate appellate court affirmed.[39] The Texas Supreme Court correctly reversed, holding that THM had sufficient control over Dixon to create a special relationship between THM and Dixon that created a duty to properly supervise Dixon's activities.[40] The outrageous nature of the conduct at issue no doubt played a role in the decision.

The facts recited by the supreme court reveal that Dixon was certainly a danger to society. He assaulted other residents at Lakewood House and seven other students at school. When Dixon went home to Houston, his behavior was worse—two burglaries, an aggravated assault, shoplifting, two unauthorized uses of motor vehicles, and a high-speed chase.

The Texas Supreme Court, in an opinion by Justice Rodriguez, stated that:

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36. *Id.* at 40.
37. *Lection*, 65 S.W.3d at 714-15.
38. Tex. Home Mgmt., Inc. v. Peavy, 89 S.W.3d 30 (Tex. 2002).
39. *Id.* at 32.
40. *Id.*

> [t]he question of legal duty is a multifaceted issue requiring us to balance a number of factors such as the risk and foreseeability of injury, the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case.[41]

The supreme court then noted a duty may arise to control the actions of another if there is (1) a special relationship between the parties, (2) a reasonable foreseeability of harm to the injured person, and (3) public policy reasons that favor holding the actor liable.[42]

Dixon had been placed in Lakewood House due to extreme behavioral problems, including criminal and violent conduct. THM's contract with the state required THM to "train, treat, care for, and control Dixon."[43] The Peavys asserted that THM was negligent for allowing Dixon to continue his trips home to Houston, despite his numerous assaults at Lakewood House and school and his criminal activity while in Houston.

THM countered that it had limited authority to control Dixon because he was a ward of the state and both state and federal regulations encourage home visitation.[44] While federal and state regulations encouraged juveniles to have frequent visits with their mothers, such visits were not required. THM employees had approved Dixon's visits. The regulations THM contracted to follow gave THM the right to control Dixon and imposed a duty to plan for his training and treatment. Thus, the court concluded that a special relationship existed.[45]

THM should have foreseen the danger in allowing Dixon to visit his mother and stopped the visits.[46] "Dixon was involved in nineteen assaults, seven other instances of criminal conduct, and nine incidents of verbal threats while he resided at Lakewood House."[47] The risk of Dixon to harm others was clearly foreseeable.

Lastly, the supreme court examined the public policy reasons for holding THM liable. While noting the importance of integrating the mentally retarded into society, the court also found that there "is also an important interest in protecting the public from dangerous individuals who are already subject to the state's supervision and control."[48]

After considering the existence of a special relationship, the foreseeability of the harm, and public policy considerations, the court concluded that THM failed to "establish as a matter of law that it had no duty to reasonably exercise its right to control Dixon."[49] The case is an excellent

41. *Id.* at 33 (citing Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983).
42. *Id.* at 34 (citation omitted).
43. *Id.*
44. *Id.* (referring to 42 U.S.C. § 483.420(c)(5); 16 TEX. REG. 3525, 3527).
45. *Texas Home Mgmt., Inc.*, 89 S.W.3d at 34-35.
46. *Id.* at 39.
47. *Id.* at 37.
48. *Id.* at 39.
49. *Id.*

example of a straight forward application of clearly established legal principles.

C. Recreational Use Statute

In *City of Bellmead v. Torres*,[50] Nanette Torres and her husband sued the City of Bellmead for injuries that Nanette suffered when a swing in a city park broke. Torres alleged that she was injured due to "a condition or use of personal or real property," and thus alleged waiver of immunity under the Texas Tort Claims Act.[51] The issue was whether the Texas Recreational Use Statute[52] absolved the city of liability.

The Texas Recreational Use Statute states:

> If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:
> (1) assure that the premises are safe for that purpose;
> (2) owe to the person to whom permission is granted a greater degree of care than *is owed to a trespasser on the premises*; or
> (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.[53]

Property owners are not liable for trespassers' injuries so long as the owner did not engage in grossly negligent conduct or act with malicious intent or in bad faith.[54] Since the court concluded that swinging is a recreational activity and there was no evidence that the city acted willfully, wantonly, or was grossly negligent, the city was entitled to summary judgment.

Justice Hankinson dissented. At the time that Torres was injured, the Texas Recreational Use Statute defined recreation with a list of several specific activities.[55] These included "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing and water sports."[56] While this list is not meant to be exhaustive, the majority merely concluded that "sitting on a swing is the type of activity that the [Texas] Legislature intended to include as recreation when they enacted the Statute."[57] Justice Hankinson pointed out that the majority "cites no evidence . . . to support its conclusion."[58] And while four intermediate courts of appeal had also concluded that swinging is "recreation"

50. City of Bellmead v. Torres, 89 S.W.3d 611 (Tex. 2002).
51. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (Vernon 1997).
52. *Id.* § 75.002(c)(1)-(3).
53. *Id.* (emphasis added).
54. *Torres,* 89 S.W.3d at 612.
55. *Id.* at 616.
56. *Id.* at 616-17.
57. *Id.* at 614-15.
58. *Id.* at 616 (Hankinson, J., dissenting).

as defined under the statute,[59] Justice Hankinson pointed out that these courts merely made the same conclusory statement that the Texas Supreme Court was making in *Torres*. Instead of making conclusory statements, Justice Hankinson argued that the court "should discern the common characteristics among the activities on the list, and then determine if swinging shares those characteristics, keeping in mind the history and purpose of the statute."[60] Justice Hankinson then made a well-reasoned analysis that left little doubt that swinging was not, in fact, a form of "recreation" as contemplated by the Texas Recreational Use Statute.

The Legislature originally passed the Texas Recreational Use Statute in 1965, and it originally protected landowners when they allowed others to enter their property to hunt, fish, and camp.[61] The Legislature added swimming, boating, picnicking, hiking, pleasure driving, nature study, water skiing, and water sports in 1981.[62] It later added "cave exploration," "bird watching," and skating in municipal parks. The "text and history" of the statute demonstrate that the legislative intent "is to encourage [private] landowners to allow the public to enjoy outdoor recreation on the landowner's property by limiting the landowner's liability for personal injury."[63] The public policy implications of this decision are dangerous. The statute is not meant to "remov[e] parks from the list of governmental functions for which a municipality's sovereign immunity is waived under the Tort Claims Act, simply because parks are usually located outdoors."[64] And by doing so, "the Court is making very different policy choices from those made by the Legislature."[65] The decision virtually eliminates premises liability in Texas. If "recreation" means swinging, it arguable also means watching football, drinking, riding a roller coaster, attending a party, using a waterslide, jumping on a trampoline and a myriad of other activities. Any person or entity accused of allowing a dangerous condition to exist on their property need only now establish that the plaintiff's purpose on the property was not for business or professional purpose.

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59. *Id.* (citing the following cases for the following propositions: City of Lubbock v. Rule, 68 S.W.3d 853, 858 (Tex. App.—Amarillo 2002, no pet.) (concluding that using playground equipment is "akin to 'picknicking' (albeit without the food)" and thus that it is an activity associated with enjoying nature or the outdoors "cannot reasonably be disputed"); Flye v. City of Waco, 50 S.W.3d 645, 647 (Tex. App.—Waco 2001, no pet.) (applying recreational use statute to pushing a swing when plaintiffs "agree on appeal that they went to the park to engage in activities that fall within the scope of [the statute]"); Kopplin v. City of Garland, 869 S.W.2d 433, 441 (Tex. App.—Dallas 1993, writ denied) ("We conclude that playing on playground equipment on the City's playground is a recreational activity contemplated under [the recreational use statute]."); Martinez v. Harris County, 808 S.W.2d 257, 260 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (concluding that a "reasonable meaning of 'recreation' would include the activity of swinging on a swing-set provided for public use")).

60. *Id.*

61. *Id.*

62. *Id.* at 616-17.

63. *Id.* at 617.

64. *Id.* at 618 (Hankinson J., dissenting).

65. *Id.* (Hankinson, J., dissenting).

C. DRAM SHOP ACT

In *D. Houston, Inc. v. Love*,[66] Melissa Love, an exotic dancer, sued the club where she worked claiming that the club required her to drink with customers to increase their bar tab and then let her drive home drunk. Love was injured after she left work at 1:00 a.m. when her car struck a guard rail on the way home. Between 7:45 p.m. and 11:00 p.m. on the night of the accident, Love consumed twelve drinks. Her blood alcohol level at 4:00 a.m. was still was .225, indicating that at 1:00 a.m. when she left the club, her blood alcohol level "would have been so high that she would have had trouble standing or walking."[67]

The Texas Supreme Court held that: (1) the Dram Shop Act[68] did not abrogate a commercial seller's common law duties as an employer to its employees and independent contractors;[69] (2) if an employer requires its employees or independent contractors to consume alcohol while working in sufficient amounts to become intoxicated, the employer has a duty to take reasonable care to prevent the employee or independent contractor from driving when he or she leaves work; and (3) summary judgment should not have been granted because the employer in this case failed to negate this duty as a matter of law.[70]

In *Reeder v. Daniel*,[71] the defendant, Tyler Reeder, allowed minors to consume alcohol at a party he threw at his house while his parents were away. One of the minors, Jeff Lawson, struck and injured another minor at the party, Andrew Daniel. Under Texas Alcohol and Beverage Code section 106.06, it is a criminal offense to make alcohol available to those under twenty-one.[72] Daniel sued Tyler Reeder under the negligence *per se* doctrine for violating section 106.06. On petition for review, the Texas Supreme Court had to decide if such action was inconsistent with legislative intent.

The Legislature comprehensively regulates alcohol, dividing the Texas Alcoholic Beverage Code into separate criminal and civil liability sections.[73] The civil liability section contains the Dram Shop Act, creating a civil cause of action only against commercial alcohol providers.[74] The Legislature specifically rejected a civil cause of action against social hosts when it enacted section 2.03.[75] The supreme court held that it would therefore be inconsistent with legislative intent to base negligence *per se* on a violation of section 106.06. For the same reasons, the court also declined to recognize a new social-host ordinary negligence duty not to

66. D. Houston, Inc. v. Love, 92 S.W.3d 450 (Tex. 2002).
67. *Id.* at 452.
68. TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995).
69. *Love*, 92 S.W.3d at 454.
70. *Id.* at 457.
71. Reeder v. Daniel, 61 S.W.3d 359 (Tex. 2001).
72. TEX. ALCO. BEV. CODE ANN. § 106.06 (Vernon 2003).
73. *Reeder*, 61 S.W.3d at 363.
74. TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995).
75. *Reeder*, 61 S.W.3d at 363 (citing Smith v. Merritt, 940 S.W.2d 602, 605 (Tex. 1997)).

make alcohol available to minors.[76] The supreme court apparently thinks serving minors alcohol in violation of the law at one's home is a less culpable conduct that encouraging an adult stripper to drink on the job.

E. Texas Tort Claims Act

In *County of Cameron v. Brown*,[77] the parents of Nolan Brown sued Cameron County, the Texas Department of Transportation, and a contractor for the death of their son, who died as a result of a block of light on the Queen Isabella Causeway failing. Nolan Brown was crossing the causeway toward South Padre in the early morning when he lost control of his truck. The truck struck the concrete median between the eastbound and westbound lanes, skidded, and turned over on its side. When it came to rest, Brown attempted to escape through the sunroof when an oncoming car crashed into Brown's truck. When the accident occurred, a block of lights on the east-bound section of the causeway was not functioning. A county park system director had previously reported that the block of lights was not working and called this a "serious safety hazard."[78]

Nolan's parents argued that the dark block of lights constituted a premises defect for which the Texas Tort Claims Act waived governmental immunity. State agencies and counties "generally enjoy sovereign immunity from tort liability unless immunity has been waived" under the Tort Claims Act,[79] which expressly waives sovereign immunity in three general areas: "[(1)] use of publicly owned automobiles, [(2)] premises defects, and [(3)] injuries arising out of conditions or use of property."[80] However, the Act "does not waive immunity for discretionary decisions, such as whether and what type of safety features to provide."[81]

The Texas Tort Claims Act waives sovereign immunity for injury and death caused by a condition of real property "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[82] With respect to ordinary premises defects, the Texas Tort Claims Act limits the governmental duty owed to a claimant to "the duty that a private person owes to a licensee on private property."[83] "Thus, a governmental unit may be liable for an ordinary premises defect only if a private person would be liable to a licensee under the same circumstances."[84] "A property possessor must not injure a licensee by willful, wanton, or grossly negligent conduct, and must use ordinary care either to warn a licensee of a condition that presents an unreasonable risk of

76. *Id.* at 364.
77. County of Cameron v. Brown, 80 S.W.3d 549 (Tex. 2002).
78. *Id.* at 553.
79. *Id.* at 554 (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001(3)(A)-(B), 101.025 (Vernon 1997 & Supp. 2003); Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 611 (Tex. 2000)).
80. *Id.* (quoting Lowe v. Texas Tech Univ., 540 S.W.2d 297, 298 (Tex. 1976)).
81. *Id.*
82. *Id.* (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (Vernon 1997)).
83. *Id.* (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.022(a) (Vernon 1997)).
84. *Id.*

harm of which the possessor is actually aware and the licensee is not, or to make the condition reasonably safe."[85]

The plaintiffs' claims in *County of Cameron* were based upon the defendants' maintenance of the causeway lighting. The majority held that this did not concern discretionary acts, and therefore analyzed the Brown's claim as a premises-defect claim within the Act's immunity waiver.[86]

The County made several arguments on appeal. The County first argued that "it neither owned nor exercised exclusive control over the causeway or its streetlight system, and therefore cannot be held liable for the alleged premises defect."[87] The supreme court, however, noted that "a premises-liability defendant may be held liable for a dangerous condition on the property if it 'assumed control over and responsibility for the premises, even if it did not own or physically occupy the property."[88] "The relevant inquiry is whether the defendant assumed sufficient control over the part of the premises that presented the alleged danger so that the defendant had the responsibility to remedy it."[89] The Browns alleged that the County "maintained the [causeway] pursuant to a contract with the State."[90] Furthermore, there was no dispute that the County had assumed some responsibility for maintaining the causeway's lights. The court concluded that this was adequate to allege the first element of a premises-liability claim — that the County possessed the property.[91]

The County next argued that "the plaintiffs have not alleged a condition posing an unreasonable risk of harm because it was not foreseeable that Brown would lose control of his vehicle and then be struck by a motorist while attempting to exit the wreckage."[92] "A condition poses an unreasonable risk of harm for premises-defect purposes when there is a 'sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen.'"[93] Furthermore, only the general danger must be foreseeable.[94] The court agreed with the intermediate appellate court, stating that, "'the Causeway is more dangerous than an ordinary road' upon the complete failure of a large block of streetlights."[95]

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85. *Id.* at 554-55 (citing State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992)).

86. *Id.* at 555.

87. *Id.*

88. *Id.* at 556 (citing City of Denton v. Page, 701 S.W.2d 831, 835 (Tex. 1986)).

89. *Id.* (citing *Page*, 701 S.W.2d at 833-34, for the holding that "the city did not assume control over a storage building, which was on plaintiff's lot and which housed the alleged dangerous condition").

90. *Id.*

91. *Id.*

92. *Id.* at 555.

93. *Id.* at 556 (citing Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752, 754 (Tex. 1970)).

94. *Id.*

95. *Id.* (citing Brown v. State Dep't of Transp., 80 S.W.3d 594, 599 (Tex. App.—Corpus Christi 2000), *aff'd*, 80 S.W.3d 549 (Tex. 2002)).

> The causeway curves and ascends high above the water, its shoulders are narrow, and concrete barriers prevent motorists who drive onto it from turning around. We cannot say, as a matter of law, that it is unforeseeable that a significant and unexpected change in lighting at night on a narrow and curving causeway could impair a motorist's ability to avoid obstacles that lie ahead.[96]

The court also noted the existence of letters from county employees that notified the county and the Texas Department of Transportation of the danger. These letters referred to the dark block of lights as a "serious safety hazard."[97] The County's park system director specifically warned about the danger to motorists "stranded in poorly lit sections" of the causeway.[98]

The defendants next claimed that "any risk of harm presented by the alleged defect was not unreasonable when weighed against the burden that governmental entities would face if the defendants here could be held liable for the failed block of lighting."[99] The court, however, limited its holding, noting that "[a] governmental unit's sovereign immunity is not waived for failure to install lighting, which is a discretionary decision, or even for not repairing lighting that has been installed if an unreasonably dangerous condition is not thereby created."[100] It limited its holding to this particular causeway's "unique characteristics and the nature of the particular dangerous condition alleged."[101]

The defendants also argued that the condition of "darkness at night is so open and obvious that knowledge of the condition must be imputed to causeway" motorists.[102] The court, however, noted that "the dangerous condition alleged is not merely 'darkness' but a failed block of artificial lighting that caused a sudden, unexpected and significant transition from light to darkness," which "may or may not have been open and obvious to ordinary users considering the causeway's particular characteristics."[103] These "particular characteristics" were the narrowness of the causeway, the curviness of the causeway, the causeway's height above the bay, the existence of a cement barrier separating the two lanes in each direction preventing drivers from turning back, and the narrowness of the shoulder beside the traffic lanes.[104] The morning of the accident, the causeway was lit at the point of entry. It was not necessarily open and obvious to motorists entering the causeway that the road would go dark on a curve high above the bay.[105]

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96. *Id.*
97. *Id.* at 557.
98. *Id.*
99. *Id.* at 555.
100. *Id.* at 557.
101. *Id.*
102. *Id.* at 558.
103. *Id.*
104. *Id.*
105. *Id.*

Justice Jefferson, joined by Justice Owen, wrote a concurrence in which he parted ways with the majority for failing to articulate a "principle to identify in future cases the characteristics that will give rise to a cause of action within the terms of the Act."[106] He argued that the "I know it when I see it" analysis would result in too much uncertainty. The majority opinion, he fears, will "inundate courts with claims against state and local governments for what amounts to discretionary decisions involving the design and illumination of Texas roadways."[107] "[D]arkness," Justice Jefferson claims, "is not an unreasonably dangerous condition."[108]

The analysis of Justice Jefferson and Justice Owen is arguably flawed. While installation of the lights was a discretionary act, the decision whether to properly maintain the lights once installed is not. This is especially true when the state actor is subjectively aware that the failure to do so creates a serious safety hazard. Justice Jefferson writes, however, "At some point along every highway, streetlights end, plunging drivers into darkness."[109] That darkness, however, is almost always visible from a distance and expected. In this case, motorists entering the curved and sloped causeway had no way of knowing that they would be plunged into darkness when they rounded the top of the bridge. Sudden darkness was not the dangerous condition—it was sudden, *unexpected* darkness that the county actually and subjectively considered a serious safety hazard yet failed to correct—as the majority made clear.

Justice Hecht also wrote a dissent with reasoning similar to Justices Jefferson and Owen. Unlike the judicial tone of the concurrence by Jefferson and Owen, however, Justice Hecht chose a condescending tone about the tragic death of this young man:

> Assume for me, if you will, that all roadways that are dark at night are unreasonably dangerous. This is hard, I know, since almost all of the roadways in the world are dark at night and for that reason most cars are equipped with headlamps. But assume that darkness at night is unreasonably dangerous to that we can take that issue off the table. (As an aside, I should point out that sunshine can also make a roadway unreasonably dangerous because it gets in your eyes; but that is not this case, and the Court wisely reserves that issue for, as it were, another day).
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> * * *
>
> Now one might say: well, that's impossible; any *fool* driving along can tell by looking whether a roadway is light or dark . . . . By saying that the darkness was "unexpected," I suppose the Court means that Brown and Martinez had not anticipated as they were driving along that the lights might be out. But when they came upon the darkness, they surely must have thought to themselves, "*Hmmm, the highway's dark here*," just as if they had come to the end of any lighted road-

106. *Id.* at 559 (Jefferson, J., concurring).
107. *Id.* (Jefferson, J., concurring).
108. *Id.* (Jefferson, J., concurring).
109. *Id.* at 560 (Jefferson, J., concurring).

> way. So however unexpected the darkness may have been, it was still plain as day, so to speak. And when the Court says the "transition from light to darkness" was "significant," I confess I haven't a clue what it means. The distinction between darkness that is "significant" and plain old insignificant darkness is lost on me.
>
> * * *
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> Amendment is futile unless, if they allege that Brown did not know when he entered the causeway that some of it was not lighted, they can prevail. Is that allegation, if proved, sufficient to make the County liable for the darkness? Yes, says the Court. Well, then, the County should just pay up. Unless it can prove that Brown had supervision (including x-ray vision to see through the bridge) or was clairvoyant, it can't possibly escape liability, because no one but Superman and Nostradamus could possibly have know, entering the causeway, that the lights were out ahead.[110]

F. Fiduciary Duty

In *Herrin v. Medical Protective Co.*,[111] Bob J. Herrin, M.D., contended that his medical malpractice insurer, The Medical Protective Company ("Medical Protective"), promised him that his consent to a $300,000 medical malpractice settlement "would not in any way affect his liability coverage."[112] The doctor consented to the settlement in 1995, and Medical Protective paid the settlement in early 1996. In April 1997, Medical Protective denied Dr. Herrin's insurance renewal. Dr. Herrin was therefore forced to discontinue his surgery practice.

Dr. Herrin sued Medical Protective on April 9, 1999 for, among other things, breach of fiduciary duty. Medical Protective filed both a no-evidence motion for summary judgment and a traditional motion for summary judgment. The trial court granted Medical Protective's motion for summary judgment on all of Dr. Herrin's claims, without specifying on what grounds it relied in reaching its decision.[113] The Texarkana Court of Appeals reversed the grant of summary judgment, holding that Dr. Herrin's long-standing relationship with the insurance agent raised a question of fact as to the existence of an informal confidential relationship that gave rise to an informal fiduciary duty.[114]

The court stated that informal fiduciary relationships arise in circumstances "where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence."[115] The court found that

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110. *Id.* at 563-65 (Hecht, J., dissenting).

111. Herrin v. Med. Protective Co., 89 S.W.3d 301 (Tex. App.—Texarkana 2002, pet. filed).

112. *Id.* at 304.

113. *Id.*

114. *Id.* at 311.

115. *Id.* at 307-08 (citing Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980); Ho v. Univ. of Tex. at Arlington, 984 S.W.2d 672, 692 (Tex. App.—Amarillo 1998, pet. denied)).

there was evidence that the confidential relationship between Dr. Herrin and Medical Protective, specifically through the insurance agent, Chuck Curtice, gave rise to "a potential informal fiduciary relationship."[116]

During his deposition, Curtice testified that he had known and worked with Dr. Herrin for fifteen years. Dr. Herrin testified that "he trusted Curtice's advice concerning the settlement because of the nature of their long-standing relationship."[117] Curtice had attended the mediation of the medical malpractice case and told Dr. Herrin that "the $300,000 settlement was 'nothing unusual' and would have no effect on his relationship with Medical [Protective]."[118] Dr. Herrin had also been covered by Medical Protective for thirty-one years, and he "testified repeatedly about his trust in Medical [Protective] and their special relationship, which required honesty and disclosure."[119] Thus, "[w]hile informal fiduciary relationships are rarely recognized," the summary judgment evidence in *Herrin* raised the "possibility that a fact-finder could find such a relationship existed."[120] Apparently a claims adjuster for Medical Protective can bind the company to renew an insured's policy indefinitely by making statements to procure consent.

G. General Contractor's Duty to Subcontractor's Employees

In *Lee Lewis Construction, Inc. v. Harrison*,[121] a general contractor challenged the legal sufficiency of the jury's findings that the general contractor owed a duty to a worker, Jimmy Harrison, who fell to his death from the tenth story of a construction site. The Texas Supreme Court held that there was sufficient evidence that the general contractor retained control of the subcontractor's fall protection measures and thus owed a duty to the subcontractor's workers.[122]

The court stated that it is well-established that a general contractor does not ordinarily "owe a duty to ensure that an independent contractor performs its work in a safe manner."[123] The general contractor does have such a duty, however, if it "retains some control over the manner in which the independent contractor performs its work."[124] "The general contractor's duty of care is commensurate with the control that it retains."[125] Section 414 of the Restatement (Second) of Torts explains this principle:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for

116. *Id.* at 308.
117. *Id.*
118. *Id.* at 304.
119. *Id.* at 308.
120. *Id.*
121. Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778 (Tex. 2001).
122. *Id.* at 782.
123. *Id.* at 783 (citing Elliott-Williams Co. v. Diaz, 9 S.W.3d 801, 803 (Tex. 1999); Hoechst-Celanese Corp. v. Mendez, 967 S.W.2d 354, 356 (Tex. 1998)).
124. *Id.* (citing *Diaz*, 9 S.W.3d at 803).
125. *Id.* (citing *Diaz*, 9 S.W.3d at 803; *Mendez*, 967 S.W.2d at 355).

> physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.[126]

A general contractor thus owes a duty of reasonable care to a subcontractor's employee, and consequently "may be liable for injury to that employee, if the general contractor retains control over part of the work to be performed."[127]

A general contractor may create a duty of care to its independent contractor's employees in two ways: "by contract or by actual exercise of control."[128] The Texas Supreme Court has frequently used the phrases "right of control" or "retained control" interchangeably.[129] In *Lee Lewis Construction*, the court reminded us that the distinction is important because "determining what a contract says is generally a question of law for the court, while determining whether someone exercised actual control is a generally a question of fact for the jury."[130]

Evidence at trial supported the family's contention that the contractor observed and expressly approved of decedent's employer using faulty fall-protection equipment. The evidence constituted "more than a scintilla of evidence that [the contractor] retained the right to control fall-protection systems on the jobsite."[131] The contractor had "observed and expressly approved" of the safety measures used by the subcontractor.[132] In fact, the contractor had assigned its superintendent "the responsibility to routinely inspect the ninth and tenth floor addition to the south tower to see to it that the subcontractors and their employees properly utilized fall protection equipment."[133] There was also evidence that the superintendent "definitely did approve" the subcontractor's fall protection system.[134] This, the court held, was more than a scintilla of evidence that the contractor retained control of the subcontractor's fall protection system and therefore had a duty to the subcontractor's employees.[135]

Justice Hecht agreed with the majority's outcome, but felt that the majority omitted a portion of the analysis. Based on section 414 of the Restatement (Second of Torts, there are thus two requirements for an employer to be liable for injuries caused by the work of an independent contractor: (1) the employer must retain control of the work; and (2) the injured party must be someone "for whose safety the employer owes a

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

127. *Lee Lewis Constr.*, 70 S.W.3d at 783 ("When the general contractor exercises some control over a subcontractor's work he may be liable unless he exercises reasonable care in supervising the subcontractor's activity.").

128. *Id.*; *see also* Koch Ref. Co. v. Chapa, 11 S.W.3d 153, 155 (Tex. 1999); Coastal Marine Serv. of Tex., Inc. v. Lawrence, 988 S.W.2d 223, 226 (Tex. 1999).

129. *See Chapa*, 11 S.W.3d at 155; *Lawrence*, 988 S.W.2d at 226.

130. *Lee Lewis Constr.*, 70 S.W.3d at 783.

131. *Id.* at 784.

132. *Id.* at 783-84.

133. *Id.* at 784.

134. *Id.*

135. *Id.*

duty of reasonable care."[136] Justice Hecht did not join the majority opinion because it did not address this second requirement. Justice Hecht, after examining the history of section 414 and the law of other jurisdictions, concluded that "when the Sections of this Chapter speak of liability to 'another' or 'others,' or to 'third persons,' it is to be understood that the employees of the contractor, as well as those of the defendant [employer] himself, are not included."[137]

Justice Hecht provides two reasons to exclude employees of the contractor in this group: (1) liability is inconsistent with the workers' compensation system, and (2) liability is inconsistent with the general nature of the relationship between an independent contractor and its employer."[138] Justice Hecht then provides several considerations supporting these reasons.

As to the first reason—inconsistency with the workers' compensations system—there are three considerations cited by Justice Hecht. First, the cost hiring of a subcontractor presumably includes the cost of the workers' compensation coverage.[139] Since the employer must pay for this coverage (at least indirectly), it should receive the benefits.[140] Second, "[a]n employer should not be exposed to greater risk of liability for wisely entrusting peculiarly dangerous work to a better-skilled independent contractor than if he had undertaken the job with his own less capable employees."[141] Third, "[a] worker should not have greater rights as an employee of an independent contractor than he would have as an employee of the contractor's employer."[142]

The second reason for excluding the contractor's employees—inconsistency with the nature of the employer/independent contractor relationship—had two supporting considerations. First, the independent contractor is in a better position to protect its own employees.[143] In fact, employers often hire independent contractors for their expertise in a particular area and familiarity with the safety precautions necessary for their specialty. Second, "[a]n employer's liability for accidents should not increase the harder he tries to ensure that his independent contractors work safely and decrease the less he cares what happens."[144]

Justice Hecht, nevertheless, agreed with the majority opinion. The family of an employee can sue its employer when the worker is killed due to the employer's gross negligence.[145] "In that situation," Justice Hecht concludes, "holding the employer of an independent contractor liable for

136. *Id.* at 788 n.2 (Hecht, J., concurring quoting RESTATEMENT (SECOND) OF TORTS § 414 (1965)).
137. *Id.* at 794. (Hecht, J., concurring).
138. *Id.* at 795. (Hecht, J., concurring).
139. *Id.* (Hecht, J., concurring).
140. *Id.* (Hecht, J., concurring).
141. *Id.* at 796. (Hecht, J., concurring).
142. *Id.* (Hecht, J., concurring).
143. *Id.* n.47. (Hecht, J., concurring).
144. *Id.* n.47 (Hecht, J., concurring).
145. TEX. LAB. CODE ANN. § 408.001(b) (Vernon 1996).

failing to exercise a retained control over the contractor's work is not inconsistent with the worker's compensation system."[146] The employer of the independent contractor is not denied any benefits of indirectly paying the premiums, he is not exposed to any additional risks to which he would not be exposed if he used his own employees, and the worker has no greater rights simply because he is the employee of an independent contractor.[147]

As to the inconsistency of imposing such liability with the nature of the employer/independent contractor relationship, Justice Hecht states, "[I]t is hardly unreasonable to expect the employer to take some action to prevent a contractor's grossly negligent conduct of which the employer is actually aware."[148] In this case, there is no disincentive for the employer to improve worker safety, and an employer would not be free to sit by and observe grossly negligent conduct.[149]

But since Lee Lewis Construction was so obviously grossly negligent in this case, the court did not have occasion to directly address Justice Hecht's well-articulated policy concerns. The court will likely have occasion to do so in the near future. Thus, Texas attorneys should keep in mind the rule that at least Justices Hecht and Owen will advocate in this situation: An employer is not liable for injuries to the employees of an independent contractor, unless the independent contractor was grossly negligent, and the employer was aware of "an extremely likely and serious risk of harm" to the contractor's employees and was consciously indifferent to it.[150] Although such a radical departure from common law precedent seems better suited for legislative action, expect Justice Hecht to soon seek the change judicially.

H. Federal Employer's Liability Act

In *Union Pacific Railroad Co. v. Williams*,[151] an employee was injured at a train derailment site when flying debris hit him in the back. He sued the company, which requested the trial court to submit a proposed foreseeability jury instruction. The trial court denied the request, and the jury returned a verdict in favor of the employee. The appellate court affirmed and held that the railroad's proposed instruction confused foreseeability with causation. The Texas Supreme Court reversed and remanded, holding that "the proposed instruction relate[d] to Union Pacific's duty to Williams to use reasonable care at the derailment site."[152]

Under the Federal Employers Liability Act ("FELA"), "railroads that engage in interstate commerce are liable in damages to their employees

146. *Lee Lewis Constr.*, 70 S.W.3d at 798. (Hecht, J., concurring).
147. *Id.* (Hecht, J., concurring).
148. *Id.* (Hecht, J., concurring).
149. *Id.* (Hecht, J., concurring).
150. *Id.* at 798-99. (Hecht, J., concurring).
151. Union Pac. R.R. Co. v. Williams, 85 S.W.3d 162 (Tex. 2002).
152. *Id.* at 163.

for injury or death resulting in whole or in part from the negligence of the railroad's employees or defects in its equipment."[153] Under FELA, "a plaintiff must show that the defendant railroad did not use reasonable care under the circumstances."[154] The railroad's duty to use reasonable care in a particular circumstance is determined by whether the railroad could have reasonably foreseen the harm suffered by the injured worker.[155] A worker is not, however, required to prove proximate cause. Under FELA, a defendant is liable if its negligence played any part, however, slight, in causing the injury.[156]

Foreseeability is also, however, an element of duty.[157] Whether a legal duty exists, including the foreseeability element, is typically a legal question.[158] The court in *Williams* notes that if the essential facts about foreseeability as an element of the railroad's duty are disputed, the question is a fact issue for the jury.[159] Evidence is disputed when it "does not conclusively establish the pertinent facts or the reasonable inferences to be drawn from those facts."[160] In *Williams*, there was conflicting testimony by various Union Pacific employees about the potential danger at the derailment site.

In considering the issue, the court overruled *Mitchell v. Missouri-Kansas-Texas Railroad Co.*,[161] "to the extent that it rejected a foreseeability instruction when the evidence about that element of a railroad's duty was disputed."[162] The court also overruled *Mitchell* to the extent that it approved the Fifth Circuit's pattern jury instruction because "it does not place the issue of duty before the jury" even when the railroad's knowledge of the risk was disputed. The court held that, because the evidence of the company's duty was disputed, the trial court should have instructed the jury about this element so that it would be able to resolve the factual issue.[163]

The next issue was how to determine when foreseeability is disputed. The court states in *Williams* that there must be "something more than a

153. *Id.* at 165 (citing 45 U.S.C. § 51 (1986)).

154. *Id.* at 166.

155. *See* Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 118 (1963) (stating that the defendant's duty is "measured by what a reasonably prudent person would anticipate as resulting from a particular condition."); Armstrong v. Kan. City S. Ry. Co., 752 F.2d 1110, 1113 (5th Cir. 1985) (holding that a FELA plaintiff must show that the railroad "with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury."); Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 503 (1957) (holding that the test is whether the railroad was or should have been aware of conditions which created a likelihood that the employee would suffer the type of injury he did); *see also* Ringhiser v. Chesapeake & Ohio Ry. Co., 354 U.S. 901, 901 (1957) (per curiam) (same).

156. *Williams*, 85 S.W.3d at 168.

157. *Id.*

158. Mitchell v. Mo.-Kan.-Tex. R.R. Co., 786 S.W.2d 659, 662 (Tex. 1990).

159. *Williams*, 85 S.W.3d at 168 (citing *Mitchell*, 786 S.W.2d at 662).

160. *Id.* at 166 (quoting Bennett v. Span Indus., Inc., 628 S.W.2d 470, 474 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.)).

161. *Mitchell*, 786 S.W. 2d at 659.

162. *Williams*, 85 S.W.3d at 169.

163. *Id.*

generalized threat" to show foreseeability under FELA.[164] The defendant must know that the conditions create a likelihood that the plaintiff "would suffer the type of injury he did."[165] In *Williams*, no one really doubted that there are dangers at a derailment site, but since there was conflicting testimony as to whether there was a danger of flying objects, the trial court should have instructed the jury on foreseeability.

I. CONSTRUCTIVE NOTICE

In *Wal-Mart Stores, Inc. v. Reece*,[166] Wal-Mart argued that the evidence was legally insufficient to conclude that the store had constructive notice of a "pizza-size" puddle of clear liquid near the snack bar that caused Lizzie Reece to slip and fall.[167] Due to the fall, Ms. Reece injured her knee and required surgery.[168] A Wal-Mart employee, who was responsible for keeping that area clear, was in line directly in front of Ms. Reece and walked right by the puddle. He was also a mere eight feet from Ms. Reece when she fell. Furthermore, the puddle was near the ice and drink machine where Wal-Mart and its employee knew that there were frequent spills. The jury and the intermediate appellate court applied common sense and found that this was sufficient evidence for a jury to find that Wal-Mart had constructive notice. The Texas Supreme Court disagreed, and in a opinion by Justice O'Neill, held that this constituted no evidence, reversed the trial court, and rendered a take-nothing verdict for Wal-Mart.[169]

The Texas Supreme Court noted that "Wal-Mart owed Reece, its invitee, a duty to exercise reasonable care to protect her from dangerous conditions in the store that were known or reasonably discoverable, but it was not an insurer of her safety."[170] To prevail in her case, Ms. Reece had to prove that "Wal-Mart had actual or constructive notice of the spill."[171] "A slip-and-fall plaintiff satisfys the notice element by establishing that (1) the defendant placed the substance on the floor, (2) the defendant actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it."[172] Ms. Reece had "no evidence" that Wal-Mart placed the fluid on the floor or that Wal-Mart actually knew it was there. She therefore had to prove that Wal-Mart had a reasonable opportunity to discover it.

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164. *Id.*
165. *Id.*
166. Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812 (Tex. 2002).
167. *Id.* at 813.
168. *Id.*
169. *Id.*
170. *Id.* at 814.
171. *Id.* (citing Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992); Corbin v. Safeway Stores Inc., 648 S.W.2d 292, 295-96 (Tex. 1983)).
172. *Id.*

Wal-Mart argued that its "employee's proximity to a hazard cannot by itself, impute constructive notice because such a rule would not afford premises owners a fair opportunity to inspect and correct, or warn about, the condition."[173] Wal-Mart also argued that "mere proof an employee might have discovered the condition by being close to it misstates the plaintiff's burden and requires premises owners to be omniscient."[174] Finally, Wal-Mart argued that such a rule "imposes constructive notice the instant a hazard is created, whether or not there was a reasonable opportunity to discover it, thus violating the principle that premises owners are not insurers of their invitees' safety."[175]

These arguments make little sense in this case, and the court should arguably have followed the jury's lead. A Wal-Mart employee walked past the "medium-pizza-size spill" right before Ms. Reece slipped on it. Wal-Mart conceded that this area had frequent spills. Thus, anytime an employee walks past an area where there are frequent spills, he or she should check for a spill. When the employee walked by that spill, that was Wal-Mart's "fair opportunity to inspect and correct, or warn about, the condition."[176] Holding Wal-Mart liable in this case would not be requiring Wal-Mart to be "omniscient"—since its employee walked right by the spill and thus enjoyed a fair opportunity to inspect the area. Finally, nothing in Ms. Reece's argument would impose constructive notice the instant a spill happened. It would, however, impose constructive notice when an employee walks within inches of a spill in an area where the employee knows there is a high risk of spills and does not bother to reasonably inspect the area.

The supreme court noted there seemed to be a split in the appellate districts on the issue of proximity evidence. It noted that some courts seem to hold that "proximity evidence alone is insufficient to establish constructive notice absent some indication that the hazard existed long enough to give the premises owner a reasonable opportunity to discover it,"[177] while other courts "have suggested that evidence of an employee's proximity to a dangerous condition can establish constructive notice."[178]

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173. *Id.*
174. *Id.*
175. *Id.* at 815.
176. *Id.* at 814.
177. *Id.* at 815 (citing the following cases for the following holdings: Wal-Mart Stores, Inc. v. Rosa, 52 S.W.3d 842, 844 (Tex. App.—San Antonio 2001, pet. denied) (holding that employees' proximity to area where plaintiff fell did not tend to prove how long the condition had existed for purposes of charging constructive notice); Furr's, Inc. v. Sigala, 608 S.W.2d 789, 790 (Tex. App.—El Paso 1980, no writ) (holding mere fact employee was in same aisle when and where accident occurred not sufficient); H.E.B. Foods, Inc. v. Moore, 599 S.W.2d 126, 129 (Tex. Civ. App.—Corpus Christi 1980, no writ) (holding fact that employee was in immediate vicinity when plaintiff fell is not sufficient to raise an inference that premises owner should have discovered it); and Great Atl. & Pac. Tea Co. v. Giles, 354 S.W.2d 410, 414-15 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.) (same)).
178. *Id.* (citing the following cases for the following propositions: Wal-Mart Stores, Inc. v. Garcia, 30 S.W.3d 19, 23 (Tex. App.—San Antonio 2000, no pet.) (noting proximity evidence as one reason that the premises owner should have known of the hazard); Duncan v. Black-Eyed Pea U.S.A., Inc., 994 S.W.2d 447, 449-50 (Tex. App.—Beaumont

Even a brief review of these cases demonstrates that there was something more in the cases relying on proximity that had nothing to do with the amount of time the hazard was on the floor. Two such factors are obvious: (1) the conspicuous nature of the hazard, and (2) whether there was a known risk of the hazard. If there is an employee in close proximity to a hazard and one of these two factors is present, that is evidence of constructive notice. The latter of these two was clearly present in *Wal-Mart v. Reece.*

Justice O'Neill, however, dwelled on the absence of evidence concerning the length of time the puddle was on the floor: "The rule requiring proof that a dangerous condition existed for some length of time before a premises owner may be charged with constructive notice is firmly rooted in our jurisprudence."[179] If the hazard was on the floor one second after an employee who was aware of the risk and who had a duty to keep that area clean walked by it, that is long enough.

As Justice O'Neill notes in her opinion,

> The so-called "time-notice rule" is based on the premise that temporal evidence best indicates whether the owner had a reasonable opportunity to discover and remedy a dangerous condition. An employee's proximity to a hazard, with no evidence indicating how long the hazard was there, merely indicates that it was possible for the premises owner to discover the condition, not that the premises owner reasonably should have discovered it. Constructive notice demands a more extensive inquiry. Without some temporal evidence, there is no basis upon which the factfinder can reasonably assess the opportunity the premises owner had to discover the dangerous condition.[180]

Suppose a janitor is seen standing one foot from a large spill in the area of a store that he is responsible for maintaining one minute before an elderly lady slips and falls on the spill and breaks her hip. Assume further that this area is known to have frequent spills that create a hazard, yet the janitor denies that he saw the spill. Under Justice O'Neill's analysis, if the plaintiff could not present at least some evidence as to how long that spill was on the floor before the janitor was seen standing next to it, the plaintiffs cannot recover. Her reasoning for this rule is unsound: "An

1999, pet. denied) (holding evidence that plaintiff fell in an area frequently traversed by defendant's employees sufficient); Furr's Super Market v. Garrett, 615 S.W.2d 280, 281-82 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.) (holding evidence sufficient when five employees were located five to six feet away from hazard for continuous time before, during, and after fall); Albertson's, Inc. v. Mungia, 602 S.W.2d 359, 362-63 (Tex. Civ. App.—Corpus Christi 1980, no writ) (finding circumstantial evidence sufficient when water from ice machine was in close proximity to cash register where employee was positioned, another employee was handing a bag of ice to a store customer when plaintiff fell, and water accumulation was of sufficient size to cause water to run in a stream toward cash register); and Kimbell, Inc. v. Hernandez, 572 S.W.2d 784, 786 (Tex. Civ. App.—El Paso 1978, no writ) (concluding evidence was sufficient where grocery clerk was three or four feet from, and in full view of, the "rather large quantity" of spilled ice that caused the fall)).

179. *Id.* at 815.

180. *Id.* at 816.

employees proximity to a hazard, with no evidence indicating how long the hazard was there, merely indicates that it was *possible* for the premises owner to discover the condition, not that the premises owner reasonably *should* have discovered it."[181]

Are there not other factors besides time that could indicate that the premises owner *should* have noticed the hazard when employees are in close proximity, such as knowledge that there is a risk of spills in the area, the size of the spill, and the conspicuous nature of the spill (ice cream or water)? And while Justice O'Neill alludes to these other factors, she sees them as factors to determine how long in time the hazard has to be there before the premises owner can be charged with constructive notice. She fails to see what the jury so plainly saw in this case. If a spill is on the floor long enough for an employee to walk right by it, while aware of a possibility that it was there and with a duty to keep that area clear of such hazards, that's long enough.

III. CAUSATION

In *Excel Corp. v. Apodaca*,[182] Jimmy Apodaca suffered from cumulative trauma disorders (CTD) while working at Excel's beef packing plant. Apodaca sued Excel, which was a non-subscriber under the Texas Workers' Compensation Act, for negligence and gross negligence in failing to provide a safe workplace. During his last three years working in the beef packing plant, Apodaca's job was to place 40-pound bags of meat onto a cryovac machine that removed air from the bag and sealed it. The job required Apodaca to bend down and grab a 40-pound bag, pick the bag up, turn, and place the bag on the machine. He did this every three seconds. This repeated stress resulted in injuries to Apodaca's neck, back, and wrist.[183]

At trial, the jury found Excel negligent in the design of Apodaca's work area due to the excessive reaching, bending, and pulling without appropriate rest periods and awarded Apodaca $536,472 in damages.[184] On appeal to the Texas Supreme Court, Excel argued that Apodaca had presented no evidence that, if Excel had done something different at the worksite, Apodaca would not have been injured or would not have been injured as severely.[185]

Apodaca presented three categories of evidence to show that his injuries were caused or exacerbated by Excel's failure to provide a safe workplace: "(1) testimony from Excel employees about recommended or requested changes to the cryovac worksite and about recommended ergonomics and medical-management programs; (2) Occupational Safety and Health Administration (OSHA) recommendations about changes to the

181. *Id.* (emphasis added).
182. Excel Corp. v. Apodaca, 81 S.W.3d 817 (Tex. 2002).
183. *Id.* at 819.
184. *Id.*
185. *Id.* at 820.

cryovac worksite and the use of symptoms surveys; and (3) medical testimony linking Apodaca's injuries to his job."[186]

With regard to testimony of employees, Apodaca highlighted the testimony of a safety and ergonomics coordinator at Excel, James Rudd. Among Rudd's job responsibilities was to train Excel employees to "recognize potential contributors to and risk factors for CTDs, learn ways to control risk factors, and encourage early reporting and treatment of CTDs."[187] Rudd testified that in his experience, "cryovac operators specifically were exposed to such risks."[188] Apodaca, Rudd, a former Excel safety director, the chief union steward for Apodaca's floor, Apodaca's supervisor, and other Excel employees all "testified to the difficulties and risks presented by the cryovac operator environment and job requirements."[189]

Apodaca also introduced evidence of several OSHA findings and recommendations. OSHA had recommended annual use of a "symptoms-survey checklist."[190] Such annual surveys can identify work areas or the jobs where there is a high potential for CTD and provide data on the number of workers experiencing some form of CTD. Excel did not use these surveys in the years in which Apodaca worked on the cryovac machine. OSHA and Excel employees had also requested that Excel install a photo eye on the cryovac machine to detect meat bags on the conveyor belt and control the rate at which it delivered bags to the cryovac machine. OSHA also recommended that Excel alter the cryovac operator work space so that the operators would not have to reach more than sixteen to eighteen inches and bend no further than six to ten degrees. This would have reduced "deviated postures and extended reaches, which contribute to CTDs."[191] Excel did not comply with any of the OSHA recommendations.

Finally, Apodaca presented testimony from three treating physicians, who all agreed that at least his wrist problems were work related. One of the three stated that all of his injuries were job related.

While agreeing that the employee testimony, evidence of Excel's failure to follow OSHA recommendations, and the physician testimony established the foreseeability element of proximate cause,[192] the Texas Supreme Court found that there was no evidence of the second element, cause in fact.[193] The test for cause in fact is "whether the act or omission was a substantial factor in causing the injury 'without which the harm

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 821.
190. *Id.*
191. *Id.*
192. Foreseeability means that a person of ordinary intelligence would have anticipated the danger his or her negligence creates. *Id.* at 821-22 (citing El Chico Corp. v. Poole, 732 S.W.2d 306, 313 (Tex. 1987)).
193. *Id.*

would not have occurred.'"[194] "A finding of cause in fact cannot be supported by 'mere conjecture, guess, or speculation,' but "may be based on either direct *or circumstantial evidence.*"[195]

There appears to have been a substantial amount of circumstantial evidence. Apodaca had worked at Excel for more than twenty years. During that time he had held several different positions that were "physically demanding."[196] However, it was not until he began a job that required him to twist, bend, grasp, and pull a 40-pound bag of meat every three seconds that he sustained debilitating injuries to his neck, back, and wrists that rendered him unable to work. Furthermore, the testimony from the Excel employees and the evidence from OSHA made it obvious that the work environment at the cryovac machine was dangerous, and there was no other explanation for Apodaca's crippling injuries. That appears to be at least some circumstantial evidence that the work environment caused Apodaca's injuries.

The Texas Supreme Court simply ignored this evidence in its analysis. The court stated:

> [W]e have reviewed the record in its entirety and can find no evidence that [the OSHA-recommended] symptoms surveys, conducted anonymously to identify worksite problems, would have identified Apodaca's CTD injuries earlier, thereby allowing CTD reversal through conservative treatment. Nor is there any evidence that modifications to the cryovac work environment would have reduced the number of injuries or the CTD incident rate for Apodaca's job. No evidence in the record indicates that had Apodaca performed fewer repetitions per hour, worked at a more comfortable work station, or had a photo eye on his machine, he would not have sustained his injuries. Furthermore, the fact that the meatpacking industry, or even just the cryovac operator position, had a high injury rate is not probative evidence of whether under different conditions, the cryovac operator job would have a lower injury rate. If anything, much of Apodaca's evidence fulfills only the foreseeability element of proximate cause *by demonstrating the dangerous nature of the cryovac operator position.*[197]

The court also noted that Apodaca's doctors had agreed that at least his wrist injury was caused by his work environment. One of the three doctors believed all of his injuries were caused by his job. The court then stated that "no doctor linked those injuries to anything Excel did or failed to do."[198] But that is not true—if the injuries are caused by his work environment, it necessarily follows that they were caused by Excel's failure to provide a safe work environment. Safe work environments do not cause crippling injuries.

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194. *Excel Corp.*, 81 S.W.3d at 820.
195. *Id.* (quoting Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992))(emphasis added).
196. *Id.* at 819.
197. *Id.* at 821-22 (emphasis added).
198. *Id.* at 822.

The court concluded that "the evidence does not show that had Excel modified the cryovac worksite or job requirements, or had it conducted symptoms surveys, Apodaca would not have suffered his injuries or they would have been diagnosed sooner and reversed using other treatments."[199] But the safety and ergonomics coordinator, the risk manager, the other employees, and the physicians agreed that the work environment was dangerous and caused Apodaca's injuries. They also agreed that with the recommended changes the work environment would not be dangerous, *i.e.*, it would not have caused those injuries. That is why they were recommended. So what exactly was missing? What evidence should Apodaca have introduced? The Texas Supreme Court does not say.

IV. OTHER ISSUES

A. Claims Related to a Viable Fetus

In *Reese v. Fort Worth Osteopathic Hospital, Inc.*,[200] the Fort Worth Court of Appeals held that the parents of a viable unborn fetus can seek recovery for the child's death when the death is caused by medical negligence. The court further held that the mother of the fetus could also sue for medical malpractice.

In 1999, the Fort Worth Court of Appeals held in *Parvin v. Dean*,[201] that the Texas Wrongful Death and Survival Statutes allow recovery for the death of a viable fetus. The question presented in *Reese* was whether that holding required the court to "allow appellants to seek recovery for the death of their viable full-term unborn child where the death resulted from acts of medical negligence."[202]

Tara and Donnie Reese's unborn child died *in utero* on May 12, 1998 after Tara was admitted to Fort Worth Osteopathic Hospital for a rapid heartbeat and dizziness. The Reeses sued Tara's treating physicians and the hospital individually and as the legal representatives of Clarence Reese. The defendants filed summary judgment motions arguing that the Reeses could not recover for injury to or the death of an unborn fetus. The defendants also argued that Tara and Donnie Reese could not maintain their individual claims because "they were merely bystanders to any injury and thus are prevented, as a matter of law, from any recovery in medical malpractice cases."[203] The trial court granted the defendants' summary judgment motions.

The Fort Worth Court of Appeals concluded in *Parvin* that "no rational or compelling state interest exists to 'justify the wrongful death and survival statutes' unequal application to born babies while at the same time

199. *Id.*
200. Reese v. Fort Worth Osteopathic Hosp., Inc., 87 S.W.3d 203 (Tex. App.—Fort Worth 2002, pet. filed).
201. Parvin v. Dean, 7 S.W.3d 264 (Tex. App.—Fort Worth 1999, no pet.).
202. *Reese*, 87 S.W.3d at 204.
203. *Id.* at 204-05.

excluding viable but unborn babies and the unequal application to their parents." [204]

The defendants in *Reese* argued that the court should reconsider the *Parvin* opinion, or in the alternative, hold that it did not apply in medical malpractice cases. The court quickly dispatched this argument and affirmed its holding in *Parvin*.[205]

The court next considered the defendants' argument that Tara and Donnie Reese could not maintain individual causes of action for medical malpractice. The plaintiffs' summary judgment evidence included testimony by their expert Dr. Bruce Halbridge, a board certified specialist in obstetrics and gynecology, who testified by affidavit that the defendants doctors' "failure to perform standard fetal diagnostic tests" and the hospital nursing staff's failure "to maintain continuous fetal rate heart monitoring," proximately caused injuries to Tara Reese.[206] Dr. Halbridge also testified that "a timely Caesarean section delivery" would have allowed Tara Reese to avoid a "long and painful delivery" that produced her stillborn child. Tara also provided an affidavit describing her delivery and the "emotional mental pain, anxiety, and sadness" that it caused.[207]

This was obviously evidence that the alleged medical negligence caused injuries to Tara as well as the baby. The court also noted that Tara was the defendants' patient.[208] The court found that Donnie Reese, however, was not a patient and was at least, in part, seeking to bring a bystander claim for the medical treatment provided to his wife.[209] Since Texas law does not recognize bystander recovery in medical malpractice cases,[210] the court upheld this portion of the summary judgment.

B. Scope of the Medical Liability and Insurance Improvement Act

There were several cases decided during the Survey period discussing the scope of the Medical Liability and Insurance Improvement Act ("MLIIA").[211] In *Russell v. Murphy*,[212] the Dallas Court of Appeals held that a patient's claim of violation of the DTPA, breach of contract, and battery claims fell outside the scope of the Medical Liability and Insurance Improvement Act. Johnette Russell was admitted to Zale Lipshy Hospital on September 15, 1998 where she underwent a biopsy requiring anesthesia. Russell told the anesthesiologist that she did not want to be sedated or to lose consciousness and that she only wanted a local anes-

204. *Id.* at 205 (citing *Parvin*, 7 S.W.3d at 274).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 205-06 (citing Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 79 (Tex. 1997)).
209. *Id.*
210. *Id.* at 206 (citing *Edinburg Hosp.*, 941 S.W.2d at 79).
211. Tex. Rev. Civ. Stat. Ann. art. 4590i (Vernon 2003).
212. Russell v. Murphy, 86 S.W.3d 745 (Tex. App.—Dallas 2002, pet. filed).

thetic. Russell claimed that the anesthesiologist agreed. When Russell was taken into the operating room, however, she felt dizzy and lost consciousness. The anesthesiologist had sedated her against her wishes.

Russell sued the anesthesiologist for "violations of the Texas Deceptive Trade Practices Act, breach of oral contract, and battery based on the anesthesiologist 'knowingly and intentionally administering or causing the administration of a sedative.'"[213] After the expiration of 180 days, the anesthesiologist filed a motion to dismiss Russell's claims, contending they were "health care liability claims" subject to the requirements of the MLIIA.[214] Section 13.01(d) of the Act states:

> Not later than the later of the 180th day after the date on which a health care liability claim is filed or the last day of any extended period established under Subsection (f) or (h) of this section, the claimant shall, for each physician or health care provider against whom a claim is asserted:
> (1) furnish to counsel for each physician or health care provider one or more expert reports, with a curriculum vitae of each expert listed in the report; or
> (2) voluntarily nonsuit the action against the physician or health care provider.[215]

Section 13.01(e) states:

> If a claimant has failed, for any defendant physician or health care provider, to comply with subsection (d) of this section within the time required, the court shall, on the motion of the affected physician or health care provider, enter an order awarding as sanctions against the claimant or the claimant's attorney:
> (1) the reasonable attorney's fees and costs of court incurred by that defendant;
> (2) the forfeiture of any cost bond respecting the claimant's claim against that defendant to the extent necessary to pay the award; and
> (3) the dismissal of the action of the claimant against that defendant with prejudice to the claim's refiling.[216]

Russell did not submit such a report (commonly referred to as a "4590i report") within 180 days after filing suit or seek an extension of time.[217] The anesthesiologist therefore argued the claims against him must be dismissed. Russell appealed the trial court's dismissal order arguing that "her claims are not based on allegations of medical negligence but are

213. *Id.* at 747.
214. TEX. REV. CIV. STAT. ANN. art. 4590i § 1.03(a)(4) (Vernon 2003).
215. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(d) (Vernon 2003).
216. *Id.* § 13.01(e).
217. *Russell*, 86 S.W.3d at 747. Section 13.01(r)(6) states:
> "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.
TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(r)(6).

based instead upon a broken promise,"[218] and therefore are not covered by the MLIIA.

The Dallas Court of Appeals framed the issue as "whether the plaintiff's claims against the defendant doctor fall outside the scope of the Medical Liability and Insurance Improvement Act or whether the plaintiff has merely attempted to frame her claims in such a way as to avoid the standards and requirements of the Act."[219] The court had stated that "to determine whether the claim is a 'health care liability claim' covered by the Act," courts must "examine the underlying nature of the plaintiff's claims."[220] To be a "health care liability claim," the plaintiff must be basing the claim on "a health care provider's breach of an accepted standard of medical care, health care, or safety."[221] In examining "the underlying nature of a claim," the "focus is on what a plaintiff must prove to prevail."[222] Does the plaintiff have to prove that a health care provider breached an applicable standard of care?

In *Russell,* the court concluded that Russell did not have to prove that the anesthesiologist breached the standard of care. Russell was not claiming that there was a problem with the way the anesthesiologist administered the sedative or that there was a lack of informed consent. She was properly told about the risks and benefits of the sedative. Russell based her claims on the anesthesiologist giving her the sedative despite her specific request that he not do so. The court therefore found that Russell "simply claims that specific promises and representations were made by [the anesthesiologist] and then broken."[223] Thus, "[t]o succeed on her claims as alleged in her petition, it is not necessary for Russell to show that [the anesthesiologist] breached accepted standards of medical care, health care, or safety."[224] Since Russell was not asserting a health care liability claim, she was not required to file a 4590i report, and the trial court should not have dismissed her case for failing to do so.

In *Rose v. Garland Community Hospital,*[225] the Dallas Court of Appeals held that the plaintiff's negligent credentialing/re-credentialing claims against Garland Community Hospital were not health care liability claims within the scope of the MLIIA.

Debi Rose underwent several cosmetic surgeries at Garland Community Hospital in 1998 and 1999. James H. Fowler, M.D., an ear, nose, and throat specialist, performed the surgeries. Afterwards, Rose suffered "painful and unsightly scarring around her face, breasts, abdomen, and

218. *Russell,* 86 S.W.3d at 748.

219. *Id.* at 748.

220. *Id.* (citing MacGregor Med. Ass'n v. Campbell, 985 S.W.2d 38, 40 (Tex. 1998); Sorokolit v. Rhodes, 889 S.W.2d 239, 242 (Tex. 1994)).

221. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 1.03(a)(4), 12.01(a); *see also Sorokolit,* 889 S.W.2d at 242.

222. *Russell,* 86 S.W.3d at 748.

223. *Id.*

224. *Id.*

225. Rose v. Garland Cmty. Hosp., 87 S.W.3d 188 (Tex. App.—Dallas 2002, no pet.).

other parts of her body."[226] Rose sued Fowler for medical malpractice and Garland Community Hospital for negligent credentialing.[227] Garland Community Hospital moved to dismiss Rose's claims pursuant to section 13.01 of the MLIIA on the ground that Rose had not made a good faith effort to comply with the MLIIA's requirement that she file an expert report.

The Dallas Court of Appeals framed the issue as "whether Rose's negligent credentialing/recredentialing claims against the Hospital are health care liability claims as defined under section 1.03(a)(4) of the Act."[228] The court found that they were not.

The court noted that the hospital is a "health care provider" as defined under the MLIIA and that hospitals have "an independent duty to 'exercise reasonable care in the selection of its medical staff and to periodically monitor and review the medical staff's competence.'"[229] This duty is owed directly to the patient.[230] Credentialing is "a process in which the hospital's governing body or a medical peer review committee approved by the governing body grants a physician authorization to provide specific patient care and treatment services in the hospital within defined limits."[231]

After examining various definitions, the court found that in order for the actions about which the plaintiff complains to be "health care," the "alleged acts or omissions must have been performed or furnished or should have been performed or furnished for, to, or on behalf of [the plaintiff] during her medical care, treatment, or confinement. In other words, the complained-of acts or omissions must be an inseparable part of the rendition of medical services."[232] A hospital makes the initial credentialing decision when the physician applies for privileges. It is separable from the rendition of medical services to the patient.

> [T]he credentialing/recredentialing process is not performed during a patient's medical care, treatment, or confinement. The credentialing/recredentialing process occurs separate from a patient's medical care and before a physician can treat a patient in the hospital; otherwise, the physician would not be allowed to either admit or treat the pa-

226. *Id.* at 189.

227. The specific allegations included (i) allowing Dr. Fowler to perform and continue to perform surgery, (ii) entrusting the operating room and equipment to Dr. Fowler, (iii) recommending, granting, renewing, and continuing Dr. Fowler's staff privileges, (iv) failing to deny or suspend Dr. Fowler's staff privileges and perform a reasonable investigation, and (v) failing to perform a reasonable investigation into the background, qualifications, history of surgical cases, and history of serious malpractice before recommending, granting, renewing, and continuing Dr. Fowler's staff privileges at a time when it knew or should have known the doctor was a reckless and careless physician and constituted a threat to his patients' safety. *Id.*

228. *Id.* at 190.

229. *Id.* at 191 (quoting Mills v. Angel, 995 S.W.2d 262, 268 (Tex. App.—Texarkana 1999, no pet.)).

230. *Id.*

231. *Id.*

232. *Id.* at 192.

> tient. Thus, Rose has not alleged a cause of action against the Hospital claiming it departed from accepted standards of *health care*.[233]

The Dallas Court of Appeals therefore reversed the trial court's dismissal of the case and remanded the case.

C. VICARIOUS LIABILITY—ST. JOSEPH HOSPITAL V. WOLFF

In *St. Joseph Hospital v. Wolff*,[234] the Texas Supreme Court re-examined, among other theories of vicarious liability, the "joint enterprise" theory. St. Joseph appealed a finding that it was vicariously liable for the negligent act of a resident who treated the plaintiff. St. Joseph is a teaching hospital that sponsored a medical residency program. One of its residents negligently treated a patient while the resident, as part of the residency training program, was receiving training at another hospital under the immediate supervision of the other medical institution's agent. The court concluded there was "no evidence to support the jury's findings of joint enterprise, joint venture, 'mission' or non-employee *respondeat superior*, or ratification."[235] The court also concluded that "the undisputed evidence proved conclusively, or as a matter of law, that when the resident treated the patient he was acting as the borrowed employee of the medical institution supervising him."[236]

Stacy Wolff was injured in a traffic accident in 1994 and subsequently flown to Brackenridge Hospital in Austin, Texas. When she arrived, her attending physician, Dr. David Harshaw, and a third-year resident, Dr. Mario Villafani, performed a tracheostomy and inserted a breathing tube in Wolff's throat. Several days later, Wolff began to bleed from the surgical site. Dr. Villafani recognized the bleeding but did not tell the attending physician, Dr. Harshaw, or the chief resident. After one bleeding episode, Wolff went into cardiac and respiratory arrest, which left her with severe brain damage.[237]

During his treatment of Wolff, Dr. Villafani was a resident at St. Joseph Hospital in Houston. The Central Texas Medical Foundation (the "Foundation") was a "participating institution" in St. Joseph's residency program. Austin-area physicians formed the Foundation to operate the residency program at Brackenridge Hospital, which is owned by the City of Austin, and Dr. Harshaw was the Foundation's Director of Surgical Education.[238]

The Wolff family sued various parties for the car wreck and the subsequent medical malpractice. The jury contributed 85% of the liability to Dr. Villafani and found that St. Joseph was also liable under a joint-enterprise theory. St. Joseph appealed, claiming that there was no theory of

233. *Id.* (emphasis added).
234. St. Joseph Hosp. v. Wolff, 94 S.W.3d 513 (Tex. 2002).
235. *Id.* at 517.
236. *Id.*
237. *Id.* at 518-19.
238. *Id.* at 518.

vicarious liability that could be used to sustain the verdict.[239]

The issue before the Texas Supreme Court was whether there was any evidence to support a finding of vicarious liability. The court began by looking at the relationship between Dr. Villafani, St. Joseph, and Brackenridge. Dr. Villafani's employment contract was with St. Joseph. St. Joseph issued Dr. Villafani's paycheck, withholding taxes, social security, and medicare, and reported his income to the IRS on a W-2.[240] It also allowed Dr. Villafani to participate in its employee benefits program.[241] The Foundation then reimbursed St. Joseph for the salary and benefits for residents at Brackenridge.[242] The Foundation set Dr. Villafani's daily work schedule, while St. Joseph set his vacation time and sick leave.

The contract between St. Joseph and the Foundation states that its purpose is "to 'establish an Integrated General Surgery Residency Program at Brackenridge Hospital, as an integral division of St. Joseph['s] General Surgery Residency Program.'"[243] It is common for residency programs to be multi-institutional, yet the program director at the parent institution, in this case St. Joseph, appoints all members of the teaching staff, the teaching director, and the residents at each integrated institution.[244] He also determines the rotations and assignments of residents.[245] The parent institution also assumes final responsibility for the residents' education and the quality of that education.[246]

The Foundation also had certain rights and responsibilities. The Foundation appointed a Director of Surgical Education to supervise the residents while they were at Brackenridge.[247] This was Dr. Harshaw. The Foundation also had the right to prior approval before St. Joseph assigned residents to Brackenridge.[248] The contract stated that the residents were to provide care under the supervision of the Foundation's teaching staff and that each resident was directly responsible to the member of the teaching staff to whom he or she was assigned by Dr. Harshaw.[249] Dr. Harshaw was then responsible to St. Joseph for the quality of the educational experience that the resident received at Brackenridge.[250] Separate and apart from a participating physician's responsibility to teach residents, attending physicians have "an ethical and a legal responsibility for the overall care of the individual patient and for the supervision of the resident involved in the care of that patient."[251]

239. *Id.*
240. *Id.* at 524.
241. *Id.*
242. *Id.*
243. *Id.* at 521.
244. *Id.* at 520.
245. *Id.* at 521
246. *Id.*
247. *Id.* at 522.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*

Comment c to the Restatement (Second) of Torts § 491 states: "The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control."[252] The court adopted the Restatement's definition of "joint enterprise" in *Shoemaker v. Estate of Whistler*.[253] Unlike the Restatement, the trial court's charge defined the third element of joint enterprise as the existence of "a common business or pecuniary interest."[254] St. Joseph appealed, in part, based on an error in this charge. The Texas Supreme Court agreed with St. Joseph.

> Comparing the charge's language ("common business or pecuniary interest") with the Restatement's language (a "community of pecuniary interest in [the common] purpose, among the members [of the group]") confirms that the two phrases do not have the same meaning. Moreover, the charge's wording is in the disjunctive, which would permit the jury to find that the third element of the joint enterprise test was met after finding either a "common business interest" or a "common pecuniary interest."[255]

The court further noted that under the definition given by the trial court, a franchisor and franchisee, or a wholesaler and a retailer, would satisfy this element. These groups usually do not, however, have a "community of pecuniary interest." And while wholesalers and franchisors benefit from the downstream sales of the retailer and franchisee, "their interests in those activities are not held in 'community' with members of the latter group because they are not shared 'without special or distinguishing characteristics.'"[256]

The court was also concerned that the definition given by the trial court did not consider the way the elements interrelate. The elements all center around a particular purpose shared by the members of the joint enterprise, who must "(1) agree to a common purpose; (2) have a community of pecuniary interest in *that* common purpose; and (3) have an equal right of control over the enterprise or project formed to carry out *that* purpose."[257] This aspect of the joint enterprise doctrine is important when there is a "complex, ongoing relationship between the members of the claimed joint enterprise."[258] When such relationships exist between the purported members of the joint enterprise, there could be several different agreements between the parties that encompass different purposes. There may be a "community of interests" or "equal right to a voice in the

252. RESTATEMENT (SECOND) OF TORTS § 491 (1965).
253. Shoemaker v. Estate of Whistler, 513 S.W.2d 10 (Tex. 1974).
254. *St. Joseph Hosp.*, 94 S.W.3d at 527.
255. *Id.*
256. *Id.* at 528.
257. *Id.* (emphasis added).
258. *Id.* at 529.

direction" of the enterprise as to some of these purposes, but not as to others.[259] Because the charge submitted by the trial court "did not require the purpose in which the parties have a community of pecuniary interest to be the same as the purpose of the enterprise or project over which the parties have an equal right of control,"[260] the court sustained this point of error.

The court next examined whether there was sufficient evidence of joint enterprise under the proper definition of joint enterprise. The court interpreted the purpose of the agreement between the Foundation and St. Joseph as "operating the general surgery residency program at Brackenridge Hospital" and found that there was no "community of pecuniary interest for that purpose."[261]

To satisfy the third element, there must be a common monetary interest "shared without special or distinguishing characteristics." St. Joseph did not share with the Foundation any money it received from Medicare based on the number of residents in the program. The Foundation did not share with St. Joseph any money it received from the City of Austin, government assistance programs, or third-party payors. And although the Foundation reimbursed St. Joseph for residents' salaries and benefits, there was no evidence this obligation was related to the fees generated by the residents. The court therefore concluded that there was no evidence of a common pecuniary interest.

The court next considered whether there was a "common purpose between St. Joseph and the Foundation to provide patient care at Brackenridge Hospital."[262] The court stated that "the most critical evidence is that the parties did not share any income from the residency program's operations at Brackenridge."[263] Based on the court's prior discussion, however, the most critical evidence may be that the common purpose of the residency program was to train surgeons — not provide medical care to patients. Since the court found "no evidence of such an interest in any of the possible common purposes between St. Joseph and the Foundation," it rendered judgment that the Wolffs take nothing against St. Joseph under a joint enterprise theory.[264]

The court then examined the joint venture, ratification, *respondeat superior* liability outside the employment context, and the borrowed servant doctrine.

The jury found that St. Joseph and the Foundation were engaged in a joint venture. There is a joint venture "if the persons or entities concerned have (1) a community of interest in the venture; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right

259. *Id.*
260. *Id.*
261. *Id.* at 531, 534.
262. *Id.* at 534.
263. *Id.*
264. *Id.*

of control or management of the venture."[265] Since there was no evidence that St. Joseph and the Foundation had agreed to share profits, there was no joint venture.

"Even if a principal was unaware of its agent's unauthorized action, it may ratify that action and thus become liable for it if the principal retains the benefits of the action after acquiring full knowledge of the unauthorized conduct."[266] The court concluded that there was no evidence St. Joseph expressly ratified Dr. Villafani's treatment of Wolff, or that St. Joseph impliedly ratified Dr. Villafani's conduct "by receiving and retaining any benefits that may have resulted from Dr. Villafani's treatment of Wolff."[267] St. Joseph did not receive any portion of the fees from Wolff's treatment or any other patient at Brackenridge.

The jury also found St. Joseph liable under a theory of *respondeat superior* liability outside the employment context. The elements of this theory are (1) benefit to the defendant and (2) right of control.[268] But St. Joseph's residency program did not receive benefit from Dr. Villafani's treatment of Wolff, there could be no *respondeat superior* liability.

The court last addressed the issue of the borrowed servant doctrine. Under this doctrine, "a general or regular employee of one employer may become the borrowed employee of another with respect to some activities."[269] Liability shifts when "the other employer or its agents have the right to direct and control the employee with respect to the details of the particular work at issue."[270]

While St. Joseph had ultimate responsibility for Dr. Villafani's education, the Foundation controlled the details of patient care at Brackenridge Hospital. The attending physicians and senior residents supervised Dr. Villafani's work. Dr. Harshaw, the Director of Surgical Education, was responsible for the residents' specific training assignments. Furthermore, the Program Contract provided that St. Joseph would "not control the details of the medical tasks performed by the residents when they are assigned to CTMF [the Foundation] save through consultation between and the mutual consent of the Academic Chief of General Surgery at St. Joseph Hospital and CTMF's Director of Surgical Education."[271] Thus, the court concluded, "regardless of any evidence that Villafani was the general or regular employee of St. Joseph, he was acting as the borrowed employee of the Foundation as a matter of law when he treated Wolff."[272] This analysis is thorough, logical, and defensible in every respect.

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265. *Id.* at 535 (citing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176 (Tex. 1997)).

266. *Id.* at 536.

267. *Id.*

268. *Id.* at 537.

269. *Id.* (citing Sparger v. Worley Hosp., Inc., 547 S.W.2d 582, 583 (Tex. 1977); Producers Chem. Co. v. McKay, 366 S.W.2d 220, 225 (Tex. 1963)).

270. *Id.*

271. *Id.* at 543.

272. *Id.* at 542.

D. EMPLOYEE/INDEPENDENT CONTRACTOR

In *Limestone Products Distribution, Inc. v. McNamara*,[273] the wife of Tom McNamara, who was killed when his motorcycle was hit by Coy Mathis's car, sued Mathis's employer, Limestone Products Distribution. When Mathis hit McNamara, he was driving to a Limestone job site to deliver load tickets so that Limestone could bill its customers. The trial court held that because the driver was an independent contractor, the employer was not liable in the survivors' personal injury action. The appellate court agreed, but on rehearing reversed the trial court's grant of summary judgment. The Texas Supreme Court, in a *per curium* opinion, held that while the appellate court correctly identified the legal test for determining independent-contractor status as right to control, it incorrectly applied the test to the facts.[274]

The test for "whether a worker is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work."[275] When analyzing the degree of control, Texas courts should consider:

(1) the independent nature of the worker's business;
(2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job;
(3) the worker's right to control the progress of the work except about final results;
(4) the time for which the worker is employed; and
(5) the method of payment, whether by unit of time or by the job.[276]

Mathis owned his truck and was free to choose his route when making deliveries.[277] He paid for his own gasoline, repairs, and insurance.[278] Limestone did not supply Mathis with any tools or equipment. Limestone paid Mathis with eighty percent of the income from each load he delivered, and he received no pay if there was no work. Limestone reported Mathis's income on a 1099 form, and Mathis paid his own social security and federal income taxes.[279] The court stated that while "some of these factors may not, alone, be enough to demonstrate a worker's independent-contractor status, together they provide conclusive summary-judgment evidence that Mathis was an independent contractor and not Limestone's employee when the accident occurred."[280]

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273. Limestone Prods. Distrib., Inc. v. McNamara, 71 S.W.3d 308 (Tex. 2002).

274. *Id.* at 312.

275. *Id.* at 312 (citing Thompson v. Travelers Indem. Co., 789 S.W.2d 277, 278 (Tex. 1990); Farrell v. Greater Houston Transp. Co., 908 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

276. *Id.* at 312.

277. *Id.* at 310.

278. *Id.*

279. *Id.*

280. *Id.* at 313.

E. LIMITATIONS

In *Shah v. Moss*,[281] Dr. Harshad Shah contended that the Medical Liability and Insurance Improvement Act ("MLIIA") barred Ronald Moss's claims that Dr. Shah negligently performed surgery on Moss's right eye and then negligently failed to provide follow-up care.[282]

On May 1991, Moss saw Dr. Shah for a detached retina in Moss's right eye.[283] In June 1991, Dr. Shah surgically implanted a sclera buckle to secure Moss's retina. Moss continued to have vision problems, but Dr. Shah warned that removing the sclera buckle could lead to another retinal detachment. Dr. Shah finally removed the sclera buckle in November 1992 on the recommendation of a specialist. From November 1992 to October 1993, Dr. Shah conducted five post-surgery "rechecks." More than a year later in November 1994, Moss saw Dr. Shah for a "yearly exam," where he reported a "new floater" in his vision. Dr. Shah discovered that Moss's retina was detached and repaired the second detached retina in December 1994.[284] After this procedure, Moss continued to have blurred vision. After several other procedures, including cataract surgery, Moss lost sight in his right eye.[285] Moss saw Dr. Shah for the last time in July 1995, and Dr. Shah said that could do nothing more to improve Moss's vision.

Moss sued Dr. Shah in June 1996. In his petition, Moss claimed Dr. Shah negligently removed the sclera buckle in November 1992 and that Dr. Shah failed to adequately monitor Moss's eye following the surgery. The trial court granted Dr. Shah summary judgment on limitations.

On appeal, Moss also argued that "his claims [were] not time-barred because Dr. Shah engaged in a negligent course of treatment for Moss's eye problem that continued until his last office visit on July 24, 1995."[286] He also argued that Dr. Shah was not entitled to summary judgment on Moss's fraudulent concealment claim because Dr. Shah's summary judgment motion did not discuss the issue.[287]

Under Article 4590i section 10.01, the limitations period for medical negligence claims begins to run from one of three dates: "(1) the occurrence of the breach or tort, (2) the last date of the relevant course of treatment, or (3) the last date of the relevant hospitalization."[288] In *Husain v. Khatib*, the Texas Supreme Court held that a plaintiff could not simply choose the most favorable date within the three categories.[289] If the date of the alleged tort is ascertainable, limitations runs from that

281. Shah v. Moss, 67 S.W.3d 836 (Tex. 2002).
282. TEX. REV. CIV. STAT. ANN. art. 4590i.
283. *Shah*, 67 S.W.3d at 839.
284. *Id.*
285. *Id.*
286. *Shah*, 67 S.W.3d at 840.
287. *Id.* at 841.
288. TEX. REV. CIV. STAT. art. 4590i, § 10.01; Husain v. Khatib, 964 S.W.2d 918, 919 (Tex. 1998).
289. *Husain*, 964 S.W.2d at 919.

date,[290] and there is no need to examine the second and third categories.[291]

The second category was obviously critical in Moss's case. The court noted that it contemplates a situation "wherein the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment."[292] Since the second retinal detachment occurred some time between the November 1992 surgery and Moss's yearly exam in November 1994, the court of appeals concluded that the tort date was unascertainable and held that the statute of limitations began to run on the last day of the course of treatment.[293] Moss also alleged, however, that the surgery to remove the sclera buckle was performed negligently. The date of that procedure was known—November 28, 1992. Thus, limitations began to run on that date, and the negligent surgery claim was clearly barred by limitations.

The issue of the allegedly negligent follow-up treatment was more difficult. The court noted that Moss's experts had stated that Dr. Shah should have provided follow-up treatment on a weekly or monthly basis after he removed the sclera buckle in November 1992.[294] The majority therefore concluded that "limitations began to run each time Dr. Shah saw Moss, beginning with the first post-surgery visit in November 1992" because "he breached the alleged duty to provide weekly or monthly follow-up treatment on every date he actually saw Moss."[295] The majority found that the statute began to run "the last date Dr. Shah could have ordered additional weekly or monthly office visits," which was the date of the last recheck visit in October 1993.[296] Since Moss did not file suit until June 1996, this claim was barred as well.

As Justice O'Neill points out in the dissent, Moss's retina did not become re-detached until some time after his last "recheck." The re-detachment of his retina is the injury that Moss alleged was caused by the negligent failure to provide proper follow-up treatment. Therefore, "*limitations began to run on Moss's claim before he suffered an injury.*"[297]

A cause of action does not accrue until all elements are present—duty, breach, causation, and damages. Since the date on which Moss's retina became re-detached was not clear, the date of the tort was not readily ascertainable, and limitations should have began to run from the date that the course of treatment was completed. The dissenting justices found that Dr. Shah had not proven as a matter of law that the course of treatment ended with the last "recheck" and summary judgment was

290. *Id.* at 919; Earle v. Ratliff, 998 S.W.2d 882 886 (Tex. 1999).
291. *Husain*, 964 S.W.2d at 919; Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987).
292. *Shah*, 67 S.W.3d at 841 (quoting *Kimball*, 741 S.W.2d at 372).
293. *Id.* at 842.
294. *Id.* at 839.
295. *Id.* at 844.
296. *Id.* at 844-45.
297. *Id.* at 848 (O'Neill, J., dissenting opinion) (emphasis added).

therefore improper.[298] Dr. Moss's expert had testified that Dr. Shah's entire course of treatment was improper — from the date of the first surgery in May 1991 to the date of the last visit in 1995.

The dissent also took issue with the majority's review standard. The court stated that it should resolve all factual disputes in the non-movant's favor.[299] The majority nevertheless states: "Moss's medical records demonstrate that Moss's last 'recheck' visit was on October 23, 1993, and Dr. Shah did not diagnose the second detached retina until Moss visited Dr. Shah more than twelve months later on November 22, 1994."[300] Despite the label placed on these visits, there was a substantial amount of evidence that they were all part of a single course of treatment: (1) Moss was referred to Dr. Shah for treatment of his retinal condition; (2) the buckle-removal and any necessary follow-up treatment related to that condition; (3) Moss saw other experts about different eye problems; (4) Dr. Shah only saw Moss for the retinal condition; and (5) Dr. Shah's notes from the October 1993 exam state that the condition needs to be rechecked in one year. The majority somehow concluded that the November 1994 re-check was totally unrelated. That seems completely illogical considering the evidence and the court's obligation to resolve all factual disputes in the non-movant's favor, but they had to make that assumption to reverse and render for the physician and, as a consequence, for the legions of future physicians providing negligent follow-up care as part of a single course of treatment.

CONCLUSION

Texas courts have once again enjoyed a banner year eliminating the number of personal torts capable of being committed in Texas. Fewer duties apparently means fewer victims, as a person harmed by another who owed him or her no duty simply suffered an "unfortunate result" or an "accident" instead of being actually injured by the unreasonable and careless conduct of another. The primary exceptions to this wave of duty elimination are cases involving murderers and strip clubs. With fewer torts, all Texans should sleep better knowing that they are "safe" from careless doctors, defective product manufacturers and the owners of dangerous premises because Texas courts have determined that it is no longer possible for many of these persons and entities to commit personal torts. We progress toward the elimination of a general duty to act reasonably and carefully.

298. *Id.* at 851.
299. *Id.* at 850.
300. *Id.* at 845.