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Personal Torts

*Frank L. Branson**

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I. NEGLIGENCE

A. Duty

THE concept of duty must evolve in light of the changing conditions and circumstances of society.[1] Changing social conditions lead to the recognition of new duties.[2] In *Berly v. D & L Security Services and Investigations*,[3] the Dallas Court of Appeals noted that violent crime has become a significant and pervasive social problem.[4] As a result, "the common law recognizes the duty to take affirmative action to control or avoid increasing the danger from another's conduct that the actor has at least partially created."[5] The court held that a store security guard may owe a duty to protect bystanders against a shoplifter who becomes violent.[6] Juries may consider whether evidence of prior crimes at the store established an issue as to whether apprehension of a shoplifter that ended in death to a bystander was a reasonably foreseeable occurrence.[7] On the other hand, in *Bird v. W.C.W.*,[8] the Texas Supreme Court declined to find that a psychologist owed a duty to the patient's father to properly identify the child. The psychologist had examined a child and concluded that the child had been abused by his father. The mother filed the psychologist's affidavit in family court to modify a custody order and gain conservatorship of the child. Later, all charges against the father were dropped. The father then sued the psychologist and her employer seeking damages for mental anguish, lost earnings and expenses in defending himself. In order to achieve the goal of eliminating sexual abuse, the court reasoned that professionals must be able to evaluate children to determine whether abuse has occurred.[9] The court also noted that the risk of an erroneous diagnosis of abuse is ameliorated, in part, by the availability of criminal sanctions against a person who knowingly reports false information in a custody proceeding.[10]

The court distinguished *Gooden v. Tips*,[11] in which the Tyler Court of Appeals held that a doctor owed a duty to a third party where the doctor had failed to warn his patient not to drive while taking Quaaludes. The court stated that the limited duty found in *Gooden* did not extend to the *Bird v. W.C.W.* facts because:

> [t]here is little social utility in failing to warn patients about known side-effects of a drug, but there is great social utility in encouraging

1. Berly v. D & L Security Serv. and Investigations, 876 S.W.2d 179, 188 (Tex. App.—Dallas 1994, writ denied).
2. *Id.* (citing Otis Eng'r Corp. v. Clark, 668 S.W.2d 307, 310 (Tex. 1983)).
3. 876 S.W.2d at 179.
4. *Id.* at 188.
5. *Id.*
6. *Id.*
7. *Id.* at 188-89.
8. 868 S.W.2d 767 (Tex. 1994).
9. *Id.*
10. *Id.*
11. 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ).

mental health professionals to assist in the examination and diagnosis of sexual abuse. Furthermore, in Gooden, the plaintiff was harmed by the resulting actions of the patient, not by the condition, treatment, or diagnosis of the patient.[12]

Although the psychologist did not owe a duty to the father in regard to the diagnosis of sexual abuse, the psychologist was not acting in a treatment or diagnosis role when she communicated to the family court through her affidavit that the father was the abuser. The record showed that the psychologist acted no differently than any other lay person in identifying the alleged perpetrator. Her statement was not based on scientific experiment, but upon the outcry of the child.[13] Therefore, the psychologist could be liable for defamation unless some privilege attached to the communication.[14] The Texas Supreme Court held that the psychologist's communication to the court fell within the judicial proceedings privilege.[15]

In *Casarez v. NME Hospitals, Inc.*,[16] the El Paso Court of Appeals held that a doctor who admitted an AIDS patient was not liable to a nurse who allegedly contracted HIV while treating the patient. The court held that the doctor had a duty to ensure that the hospital and workers within the hospital knew that they were treating an AIDS patient.[17] However, in this case the doctor complied with his duty by informing the hospital's infectious disease control committee and quality assurance committee of the patient's AIDS infection.[18] The doctor had a right to rely upon the hospital to institute appropriate isolation procedures and warnings for persons attending and visiting the patient.[19]

In *Verdeur v. King Hospitality Corp.*[20] the Fort Worth Court of Appeals held that an employer does not owe a duty to protect employees from injuring themselves when an employee arrives at work in an intoxicated condition. In *Verdeur*, after arriving for work one evening with alcohol on her breath and in a heavily intoxicated condition, the employee was asked to leave the job. Shortly thereafter, the employee was killed in a car accident. The employee's beneficiaries brought suit under the wrongful death and survival statutes. The court found no duty existed under the facts of the case. The court distinguished *Otis Engineering Corp. v. Clark*,[21] stating that *Otis* only established a duty on the part of the employer to protect innocent third parties injured by the acts of an intoxi-

12. 868 S.W.2d at 770.
13. *Id.*
14. *Id.*
15. *Id.*
16. 883 S.W.2d 360 (Tex. App.—El Paso 1994, writ dism'd by agr.).
17. *Id.* at 364.
18. *Id.*
19. *Id.*
20. 872 S.W.2d 300 (Tex. App.—Fort Worth 1994, writ denied).
21. 668 S.W.2d 307 (Tex. 1983).

cated employee.[22] *Otis* did not create a duty requiring an employer to protect an intoxicated employee from injuring herself.[23]

Likewise, in *DeLuna v. Guynes Printing Co.*,[24] the El Paso Court of Appeals held the employer owed no duty when off-duty employees drink on its premises. Several employees met to drink beer in a parking lot of a common industrial park adjacent to the employer's print shop after work. An employee subsequently injured two people who brought suit against the employer, alleging among other things, that the employer knowingly allowed and failed to prevent the consumption of alcohol on or near its premises.[25] The El Paso Court of Appeals analyzed the case under the *Restatement (Second) of Torts* section 317. Section 317 imposes a duty upon the master to control the intentional harm committed by a servant acting outside the scope of his employment when the servant is on the master's authorized premises or using the master's chattel, and when the master knows that he can control the servant and knows of the necessity and opportunity for exercising such control.[26] The court held that: "it is apparent that if Texas recognizes a Section 317 cause of action, it is only in a limited sense that in order for a duty to arise, the employer must not only have some knowledge of the employee's condition or incapacity, but must exercise some control or perform some affirmative act of control over the employee."[27] In the case at hand, the employee had no history of abusing alcohol on or off the job, the employee had no knowledge that off duty employees were drinking on its premises, and that the employer took no affirmative action to control the employee.[28] Therefore, the employer had no duty with respect to the parties injured as a result of the employee's drinking and driving.[29]

In *Leitch v. Hornsby*[30] the San Antonio Court of Appeals held that the "simple tool rule" is not applicable where the employer has a duty to inspect existing tools, rather than furnish tools.[31] An employee injured his back while lifting a reel of cable wire and claimed his injury could have been prevented if his employer had furnished him a weight-lifting belt. The court relied on *Harrison v. Oliver*,[32] holding that "an employer has a 'nondelegable and continuous' duty to an employee to provide adequate help in performance of his work assignment."[33] The court noted that an industry standard defense is not dispositive because it would re-

22. 872 S.W.2d at 302.
23. *Id.*
24. 884 S.W.2d 206 (Tex. App.—El Paso 1994, writ requested).
25. *Id.* at 207.
26. *Id.* at 208-09.
27. *Id.* at 210.
28. *Id.*
29. 884 S.W.2d at 206.
30. 885 S.W.2d 243 (Tex. App.—San Antonio 1994, no writ).
31. The simple tool rule relieves an employer of the duty to inspect a tool if that tool is under the exclusive control and care of the employee, and the tool is of such a character that the employee should be fully acquainted with its condition. *Id.* at 246.
32. 545 S.W.2d 229 (Tex. App.—Houston [1st Dist.] 1976, writ dism'd).
33. 885 S.W.2d at 247.

move the employer's incentive to improve workplace safety.[34] The corporation, as well as two corporate officers, was found liable. A corporate officer or agent may be held personally liable for corporate wrongdoing in which he is an active participant or has either actual or constructive knowledge of the tortious conduct.[35] In this case, the corporate veil did not need to be pierced to hold the officers personally liable because they were found negligent in their own acts.[36]

The Corpus Christi Court of Appeals addressed the borrowed servant doctrine in *Aguilar v. Wenglar Construction Co.*,[37] In this case, the court held that "the borrowed servant doctrine is implicated when the nominal or general employer loans or supplies an employee to another, who is termed the special employer and who then has temporary responsibility for the employee and his conduct."[38] The *Restatement (Second) of Agency* section 227(c) sets forth the factors to determine whether a special employer exerted the necessary control to establish a borrowed servant relationship: (1) the machine utilized by the borrowing employer is both owned by the general employer and operated by the general's employee; (2) the servant is expected to operate the machine in the way his general employer would expect while giving only the results called for by the borrower; (3) the general employer can substitute another employee at any time; (4) the servant is borrowed for merely a temporary period of time; and (5) the employee has the skill of a specialist.[39] In *Aguilar*, the court found that the plaintiff's foreman controlled such basic things as where the employee stood and what he physically did to help repair the belt. Furthermore, the employee had no training, skill, or experience in performing the task in question and he required basic guidance.[40] The court found this to be exactly the type of direction and control contemplated by the borrowed servant doctrine.[41]

The Fourteenth Court of Appeals recently addressed the question of whether a landlord has a duty to protect tenants from vicious dogs on the premises.[42] Finding no Texas cases on point, the court reviewed cases from other jurisdictions and concluded that a landlord in Texas has a duty to keep common areas reasonably safe from dogs the landlord knows to be vicious.[43] The court set out a two-prong test: (1) the injury must have occurred in a common area under the control of the landlord; and (2) the

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34. *Id.*
35. *Id.* at 249.
36. *Id.* at 250.
37. 871 S.W.2d 829 (Tex. App.—Corpus Christi 1994, no writ).
38. *Id.* at 831.
39. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 227(c) (1958)).
40. *Id.* at 832.
41. *Id.*
42. Baker v. Pennoak Properties Ltd., 874 S.W.2d 274 (Tex. App.—Houston [14th Dist.] 1994, no writ).
43. *Id.* at 275-77.

landlord must have had actual or imputed knowledge of the particular dog's vicious propensities.[44]

In *Allen v. Donath*[45] the Waco Court of Appeals indicated that a golfer has a duty to warn other golfers before hitting the ball. The court followed *Hathaway v. Tascosa Country Club Inc.*,[46] holding that "for a plaintiff to prevail in a cause of action against a fellow golfer, the defendant must have acted recklessly or intentionally."[47] Thus, the standard of care for golfers is the same reckless and intentional conduct standard applicable to competitive contact sports, rather than an ordinary negligence standard.[48]

B. CAUSATION

The Dallas Court of Appeals addressed the issue of causation in *Bel-Ton Elec. Service, Inc. v. Pickle.*[49] An employer contracted with an electrical company to relocate two sets of switches that controlled a hangar door. However, the electrical company moved only one set of switches. An employee programmed the switch that was not moved to automatically close the doors when someone released the switch from the open position. Subsequently, a fellow employee was crushed to death by the doors. The court held that the evidence was sufficient to establish that the electrical company was the proximate cause of the employee's death.[50] When considering the intervening act of the employee who jammed the switch, the court reasoned that "[t]he intervention of an unforeseen cause of the plaintiff's injury does not necessarily mean that there is a new and independent cause of such character as to constitute a superseding cause that will relieve the defendant of liability."[51]

In *Frito-Lay Inc. v. Queen*[52] a company vehicle which was being used by the employee's roommate hit another car and injured two passengers. The passengers sued Frito-Lay under theories of negligent entrustment, negligence per se, and respondeat superior.[53] There was no evidence that Frito-Lay's employee was in the vehicle at the time of the accident or that he had given his roommate permission to drive it.[54] The injured passengers introduced evidence that Frito-Lay failed in their duty to investigate the driving record of their employee before giving him a company vehicle.[55] However, the San Antonio Court of Appeals found the element of

44. *Id.* at 277.
45. 875 S.W.2d 438 (Tex. App.—Waco 1994, writ denied).
46. 846 S.W.2d 614 (Tex. App.—Amarillo 1993, no writ).
47. 875 S.W.2d at 440.
48. *Id.*
49. 877 S.W.2d 789 (Tex. App.—Dallas 1994, writ requested).
50. *Id.* at 796.
51. *Id.*
52. 873 S.W.2d 85 (Tex. App.—San Antonio 1994, writ denied).
53. *Id.* at 86.
54. *Id.*
55. *Id.*

proximate cause lacking because the entrusted driver was not the same driver who caused the accident.[56]

C. Vicarious Liability

During this Survey period, Texas courts decided several cases involving vicarious liability. In *Riley v. Triplex Communications, Inc.*,[57] the Beaumont Court of Appeals recognized a cause of action for negligent promotion. A radio station and a nightclub jointly promoted a ladies night at the nightclub. Police officers responding to an accident caused by an underaged drunk driver were struck by another drunk driver and seriously injured. Both of the drunk drivers had just left the nightclub. The court rejected the argument that Texas courts only recognize a cause of action against the seller, server or provider of alcohol. "[W]e do not believe that our Legislature, through the enactment of Chapter 2, Texas Alcoholic Beverage Code, intended the exoneration of non-providers and non-sellers of alcoholic beverages, who through possible joint enterprise or through possible civil conspiracy, become so interrelated with such providers or sellers, as to defy distinction of conduct and purpose."[58] The court found that the radio station's promotional activities were directed at inducing both legal age patrons and underage patrons to patronize the nightclub and purchase and consume as many alcoholic beverages as time would permit.[59]

The Texas Supreme Court addressed the issue of whether an oil company owes a duty of care to protect service station employees from the criminal acts of third parties. In *Exxon v. Tidwell*,[60] the supreme court held that such a duty is dependent upon the oil company's right of control over the safety and security of the service station.[61] The prior standard for determining whether such a duty existed was whether the oil company maintained the right of control over the gas station's operations.[62] The case was remanded to be decided under the new standard announced by the court.

In *McElroy v. Fitts*[63] the El Paso Court of Appeals upheld a judgment against a mother who negligently entrusted her fifteen-year-old son to drive a pickup truck. The mother purchased the truck for her son who did not have a driver's license and had not received any driver's education. Prior to the accident the son had been given two tickets for driving without a license and the mother had paid the fines. The court of appeals

56. *Id.* at 87.
57. 874 S.W.2d 333 (Tex. App.—Beaumont 1994, writ granted).
58. *Id.* at 349.
59. *Id.* at 350.
60. 867 S.W.2d 19 (Tex. 1993).
61. *Id.* at 23.
62. *Id.*
63. 876 S.W.2d 190 (Tex. App.—El Paso 1994, writ dism'd by agr.).

held that the mother's acts amounted to conscious indifference and supported an award of exemplary damages.[64]

The First Court of Appeals held that a hospital may be liable for the negligent acts of a staff physician. In *Berel v. HCA Health Services, Inc.*,[65] the court held that while a doctor is generally an independent contractor for which a hospital cannot be liable for under the theory of respondeat superior, a doctor is not an independent contractor when the hospital maintains the right to control the details of the work performed by the doctor.[66] In this case, the court also found that the hospital had a statutory duty under the Mental Health Code to provide adequate medical and psychiatric care that could not be delegated away.[67]

In *Stites v. Gillum*[68] the Fort Worth Court of Appeals held that Texas does not recognize a tort for interference with familial relationships. After her husband filed for divorce, the wife filed a counter-petition charging that the husband's alleged mistress interfered with the familial relationship. Because there was not a recognizable cause of action alleged in the counter-petition, the court upheld Rule 13 sanctions against the wife's attorney.[69]

In *Helena Laboratories Corp. v. Snyder*[70] the spouses of two employees alleged to have had an adulterous affair sued the employer for negligent interference with familial relationships. The Texas Supreme Court held that no independent cause of action exists in Texas for the negligent interference with the familial relationship.[71] The supreme court reversed the decision of the Beaumont Court of Appeals which had held that such causes of action had not been abolished. The court of appeals relied on *Kelsey-Seybold Clinic v. Maclay*,[72] in which the Texas Supreme Court stated: ". . . the Clinic owed a duty to the families of its patients to exercise ordinary care to prevent a tortious interference with family relations."[73] The supreme court pointed out that *Maclay* was decided before the enactment of Texas Family Code section 4.06. Section 4.06 "narrowed the 'legally protected family interests' at stake in *Maclay*."[74] The supreme court held that the plaintiffs were essentially alleging a cause of action for alienation of affection which is barred by section 4.06.[75] The supreme court stated that an independent cause of action for negligent interference with the familial relationship would allow an employer to be held responsible for an employee's conduct while the employee is

64. *Id.* at 197.
65. 881 S.W.2d 21 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
66. *Id.* at 23-24.
67. *Id.* at 25.
68. 872 S.W.2d 786 (Tex. App.—Fort Worth 1994, writ denied).
69. *Id.* at 790.
70. 886 S.W.2d 767 (Tex. 1994)(per curiam).
71. *Id.* at 768.
72. 466 S.W.2d 716 (Tex. 1971).
73. *Id.* at 720.
74. 886 S.W.2d at 768.
75. *Id.*

shielded by section 4.06.[76] The supreme court acknowledged that in some circumstances, damages may be recovered for such injuries, but only in connection with some recognized tort.[77]

D. Premises Liability

In *Houston Health Clubs, Inc. v. Rickey*[78] a member of a health club fell on his health club's jogging track and brought suit alleging negligence and a violation of the DTPA. The defendant moved for summary judgment claiming among other things that the DTPA has no application in premises liability cases. The Texarkana Court of Appeals found that the plaintiff contracted to use the premises for a specific purpose and paid money for the right to use the facility rather than simply walking in off the street to shop as an invitee would.[79] Therefore, the court reasoned, the case was not merely a slip and fall tort case.[80] The court of appeals held that the plaintiff was a buyer of services and, as such, his cause of action could be brought under the DTPA.[81] The Texas Supreme Court granted the defendant's application for writ on February 2, 1994. However, on October 6, 1994 the supreme court withdrew its order noting that writ was improvidently granted.

II. PROFESSIONAL NEGLIGENCE

A. Medical Malpractice

Boney v. Mother Francis Hospital[82] dealt with informed consent. The plaintiff sued her oral surgeon and the hospital for damages resulting from implantation of a temporal mandibular joint (TMJ) device in plaintiff's jaw. The Tyler Court of Appeals held that the duty to disclose medical risks and possible complications associated with surgery and the duty to secure written informed consent from the patient is imposed solely upon the treating doctor.[83] The doctor's duty is non-delegable.[84] The hospital in which the surgery takes place does not have a duty to disclose or to secure the patient's informed consent prior to surgery.[85]

In *Parrott v. Caskey*,[86] the Beaumont Court of Appeals held that a decedent's family had a viable claim under the Survival Statute for decedent's premature death after doctors failed to diagnose her cancer.

76. *Id.* at 769.
77. *Id.* at 768.
78. 863 S.W.2d 148 (Tex. App.—Texarkana 1993), *writ granted*, (Feb. 2, 1994), *order withdrawn*, (Oct. 6, 1994).
79. *Id.* at 151.
80. *Id.* at 151-52.
81. *Id.* at 152.
82. 880 S.W.2d 140 (Tex. App.—Tyler 1994, writ requested).
83. *Id.* at 143.
84. *Id.*
85. *Id.*
86. 873 S.W.2d 142 (Tex. App.—Beaumont 1994, no writ).

Kramer v. Lewisville Hospital[87] abrogated a plaintiff's action under any theories of lost chance of survival. However, *Kramer* does not foreclose the decedent's cause of action for damages resulting from the period of time when doctors should have determined her cancerous condition, until such time that she was properly diagnosed.[88]

The Beaumont Court of Appeals also addressed the issue of competency of an expert witness' affidavit. In *Brown v. Bettinger*,[89] the patient claimed that she was injured during a spinal tap. After the defendant filed for summary judgment the plaintiff responded with a controverting affidavit from a doctor. The defendant argued that the affidavit was not competent summary judgment evidence because it failed to establish the doctor's qualifications as an expert. The affidavit did not state whether the doctor had any training in the field of neurology or that he had ever performed a spinal tap. The court held that the doctor's familiarity with the standard of care required in performing spinal taps raised a reasonable inference that he had some knowledge or experience in spinal taps.[90] Therefore, the affidavit was competent summary judgment evidence.

B. Legal Malpractice

The San Antonio Court of Appeals has held that legal malpractice claims are not assignable. In *Zuniga v. Groce, Locke & Hebdon*,[91] the defendant lost his personal injury claim and his insurer became insolvent. Thereafter, the defendant assigned his legal malpractice cause of action to the personal injury plaintiff in exchange for a post judgment covenant not to execute. The court held this assignment violated public policy.[92]

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Fort Worth Court of Appeals upheld a judgment totalling almost $5.8 million against a car dealership that held a deaf mute customer "captive" for more than four hours. In *George Grubbs Enterprises v. Bien*,[93] the car salesman used high pressure sales tactics to obtain a $4000 check from the customer, promising to return it after he showed it to his manager. The salesman then refused to return the check. The salesman also took the customer's keys to the truck the customer was driving and then refused to return the keys. These tactics were all part of a sales system adopted by the car dealership with the purpose to "excite, confuse and pressure the customer in an effort to take every last dime possible from the customer regardless of the consequences."[94] The plaintiff wrote at least twelve notes requesting the return of his check, four notes request-

87. 858 S.W.2d 397 (Tex. 1993).
88. 873 S.W.2d at 150.
89. 882 S.W.2d 953 (Tex. App.—Beaumont 1994, no writ).
90. *Id.* at 958.
91. 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd).
92. *Id.* at 316-18.
93. 881 S.W.2d 843 (Tex. App.—Fort Worth 1994, writ requested).
94. *Id.* at 852.

ing that he be allowed to go home, and two notes threatening to go to the police.[95] The record showed that not only did the salesman refuse the customer's requests, but that they mocked his disability by suggesting that he use a phone and laughing when he threatened to go to the police.[96] The court held that the defendant's conduct was sufficiently extreme and outrageous to support the jury's finding that the defendant intentionally or recklessly inflicted emotional distress.[97] The court also held that the jury's finding was sufficient to support the award of exemplary damages.[98]

The Texarkana Court of Appeals addressed a claim for intentional infliction of emotional distress in *Washington v. Knight.*[99] A diabetic consented to the amputation of his left leg. The wound did not heal properly and he had five more operations. Because the patient had become of unsound mind, his wife consented to the last three operations. Prior to the last operation the wife became unhappy with her husband's treatment, when informed that her husband would require another operation she refused to consent to the surgery. At this time, a nurse ripped out the husband's IV, saying that the husband would not need the IV if the wife would not consent to surgery. Later that day the nurse and a doctor obtained the husband's consent to surgery even though he was of unsound mind. While in the recovery room the husband died of respiratory arrest. The court affirmed summary judgment in favor of the clinic on the wife's bystander claim.[100] The court also affirmed summary judgment in favor of the doctor who performed the surgery regarding the wife's claim for intentional infliction of emotional distress.[101] The doctor's conduct was not extreme or outrageous because he did not know that the wife did not consent to the fifth surgery.[102] However, the court found that the conduct of the nurse and the other doctor could constitute intentional infliction of emotional distress.[103]

IV. PRODUCT LIABILITY

A. Strict Liability

In *Moore v. Brunswick Bowling & Billiards Corp.*[104] the plaintiff was struck by a motorboat while swimming in the San Bernard River. Claims were brought against the boat's manufacturer and the manufacturer of the motor and drive unit under theories of negligence and strict liability.

95. *Id.* at 853.
96. *Id.*
97. *Id.* at 854.
98. 881 S.W.2d at 860. For a discussion of the exemplary damages issues *see infra* Part VIII.C., Exemplary Damages.
99. 887 S.W.2d 221 (Tex. App.—Texarkana 1994, writ requested).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. 37 Tex. Sup. Ct. J. 693 (Apr. 20, 1994).

The plaintiff charged that the motor was defectively designed because there was no propeller guard. The Texas Supreme Court held that the Federal Boat Safety Act[105] does not preempt state law tort claims. The court stated that Texas has a significant state interest in providing compensation and relief for its citizens who are injured on its waterways.[106] This state interest is particularly strong because the Federal Boat Safety Act does not provide compensatory remedies.[107] The court held that preemption clauses must be narrowly construed and that state common law claims will not be preempted unless Congress demonstrates such intent in clear and certain terms.[108]

Similarly, under the heightened presumption against preemption in areas of traditional state control, the Beaumont Court of Appeals held in *Grinnell v. American Tobacco Co.*[109] that the Federal Cigarette Labeling and Advertising Act[110] does not preempt all state common law claims for injuries, damages, or death sustained as a result of cigarette smoking. The Act does not preempt strict liability claims for defective design and manufacture of cigarettes, negligence, strict liability claims for failure to warn, express and implied warranty claims, and claims based on misrepresentations and civil conspiracy.[111] The Act preempts claims based on a failure to warn only to the extent that the claims rely on omissions or material included in a tobacco manufacturer's advertising or promotions.[112]

In *Bridgestone/Firestone, Inc. v. Glyn-Jones*,[113] the Texas Supreme Court held that Texas Revised Civil Statute article 6701d, section 107C(j) does not prevent disclosure of seat belt usage in a case involving defective restraint systems. The plaintiff claimed that the restraint systems were designed and/or manufactured in a defective condition, and that as a result, she was thrown about her vehicle, causing further injury after being struck by another car. Bridgestone/Firestone moved for summary judgment contending that section 107C(j) prohibited the plaintiff from introducing evidence that she was in fact wearing her seat belt at the time of the collision.[114] The Texas statute was enacted to mandate the use of seat belts and to provide a criminal penalty for the failure to wear a seat belt.[115] The last sentence of section 107C(j) states that the "use or nonuse of a safety belt is not admissible evidence in a civil trial."[116] The court held that the legislature did not intend to preclude evidence neces-

105. 46 U.S.C. §§ 4301-4311 (1988).
106. 37 Tex. Sup. Ct. J. at 696.
107. *Id.*
108. *Id.* at 696-97.
109. 883 S.W.2d 791 (Tex. App.—Beaumont 1994, no writ).
110. 15 U.S.C. §§ 1331-1340 (1988).
111. 883 S.W.2d at 798.
112. *Id.*
113. 878 S.W.2d 132 (Tex. 1994).
114. *Id.* at 133.
115. *Id.* at 134.
116. TEX. REV. CIV. STAT. ANN. art. 6701d, § 107C(j) (Vernon Supp. 1995).

sary to a cause of action against a seat belt manufacturer for injuries caused by a defective seat belt.[117]

B. Breach of Warranty

In *Parkway Co. v. Woodruff*,[118] Parkway was the developer of a residential community. It was responsible for the layout, drainage, elevations, gradings, and storm sewers. Parkway sold a lot to a builder, who then built a house and sold it to the Woodruff's. Two years later, Parkway regraded the land next to the Woodruff's house and built a concrete wall that caused water to be diverted onto the Woodruff's property. After the Woodruff's house was flooded several times, they sued under the DTPA and other claims. The court of appeals held that a contract between the developer and home buyers was not necessary for imposition of implied warranty under the DTPA.[119] The court also held that developers owe an implied warranty to develop property in a good and workmanlike manner for consumers who ultimately buy the property from a separate builder.[120] The Texas Supreme Court granted writ to consider Parkway's contention that the lower courts had improperly created a new warranty for future development services.

V. DECEPTIVE TRADE PRACTICES ACT

In *Sorokolit v. Rhodes*,[121] the Texas Supreme Court held that section 12.01(a) of the Medical Liability and Insurance Improvement Act[122] does not preclude an action for knowing misrepresentation or breach of an express warranty under the Deceptive Trade Practices Act (DTPA). The plaintiff went to the defendant doctor for breast augmentation surgery. According to the plaintiff the doctor instructed her and her husband to select a picture of a nude model from a magazine and that, following surgery, her breasts would look just like those in the picture she selected. When the result was not as guaranteed the plaintiff sued for medical malpractice, breach of implied and express warranties under the DTPA, and knowing misrepresentation under the DTPA. The malpractice claims were later dropped, but the plaintiff maintained her DTPA claims contending that the doctor's conduct amounted to false, misleading, and deceptive acts and practices. The court of appeals held that the Medical Liability and Insurance Improvement Act bars DTPA claims for breach of implied warranty, but not DTPA claims based on knowing misrepresentation or breach of express warranty.[123]

117. 878 S.W.2d at 134.
118. 857 S.W.2d 903 (Tex. App.—Houston [1st Dist.] 1993, writ granted).
119. *Id.* at 910.
120. *Id.* (citing Luker v. Arnold, 843 S.W.2d 108, 115-18 (Tex. App.—Fort Worth 1992, no writ)).
121. 37 Tex. Sup. Ct. J. 680 (Apr. 20, 1994).
122. Tex. Rev. Civ. Stat. Ann. art. 4590, § 12.01(a) (Vernon Supp. 1994).
123. 846 S.W.2d 618 (Tex. App.—Fort Worth 1993, writ granted).

The defendant, in its sole point of error, argued that the Medical Liability and Insurance Improvement Act precluded actions for knowing misrepresentation or breach of express warranty under the DTPA. The defendant asserted that section 12.01(a) was meant to exclude all DTPA claims against physicians and health care providers. The Texas Supreme Court held that the language of section 12.01(a) is clear and unambiguous in its language prohibiting only DTPA claims against physicians or health care providers for damages alleged to have resulted from the physician's negligence.[124] However, the court recognized that if the DTPA claim is not based on the physician's breach of the accepted standard of medical care then section 12.01(a) does not preclude suit for violation of the DTPA.[125]

In *Celtic Life Ins. Co. v. Coats*,[126] an independent insurance agent represented that the policy he sold the plaintiff would offer psychiatric hospitalization coverage up to a million dollars. After buying the policy and filing a claim Celtic Life refused to pay more than $10,000 based on a limitation in the policy. The plaintiff sued Celtic Life under the Insurance Code, DTPA, and for fraud and misrepresentation. Celtic Life argued that it should not be held liable for the agent's representations because the agent was merely a soliciting agent with no authority to bind Celtic Life and the jury found that the agent did not have the authority to make representations that were outside the scope of the written document.[127] The supreme court noted that the Texas Insurance Code makes no distinction between recording agents and soliciting agents.[128] Rather, the Code defines agents generally, and as the independent agent performed some of the acts listed in the Code on behalf of Celtic Life, he was clearly an agent of Celtic Life.[129] The supreme court also pointed out that when the jury was asked whether the agent had authority to explain, on Celtic Life's behalf, the benefits of the insurance policy they answered affirmatively.[130] The jury had been instructed that such authority can be actual or apparent.[131] Because the misrepresentation was made in the course of explaining the terms of the policy—a task the jury specifically found to be within the scope of the agent's authority—Celtic Life was liable even though it did not authorize particular representations concerning the policy.[132] The supreme court affirmed the actual damages as awarded; however, treble damages were not available because the Insurance Code requires a finding of knowing conduct and no such finding was made.[133]

124. 37 Tex. Sup. Ct. J. at 681.
125. *Id.* at 682.
126. 885 S.W.2d 96 (Tex. 1994).
127. *Id.* at 98.
128. *Id.*
129. *Id.*
130. *Id.* at 99.
131. 885 S.W.2d at 99.
132. *Id.*
133. *Id.* at 100.

In *State Farm Fire & Casualty Co. v. Gandy*[134] the Texarkana Court of Appeals held that when an insurance carrier involves itself in the relationship between an insured and the insured's attorney, the insured has standing to bring a DTPA action against the carrier for misrepresentations made by the carrier concerning the legal services.[135] In the underlying action, the plaintiff sued her stepfather for damages resulting from his sexual abuse of her. Since some of the abuse took place in the stepfather's home, he called State Farm, who had insured his home during that time, and asked them to defend him. Although State Farm notified the stepfather that there was a question as to whether or not they were obligated to defend him, they finally agreed to do so. State Farm then sent a letter to the attorney that the stepfather had initially retained to defend him against criminal charges, asking that all attorney's bills be sent to them. The attorney had never handled a civil case and improperly answered discovery requests. The stepfather who was under the impression that State Farm had only agreed to pay the bills from the attorney that he already retained, settled for $6 million and assigned his right to causes of action against State Farm to the stepdaughter. The stepdaughter sued State Farm under the DTPA for failure to provide an adequate defense and for recovery on the stepfather's insurance policy.

The Texarkana Court of Appeals found that State Farm's letters and oral communications did not explicitly set out the extent of its responsibility, its relationship with the insured's attorney, or the insured's options to select counsel of his own.[136] The communications used terms of art and insurance language not familiar to those outside the insurance industry or the legal community and left the insured's position unsettled and unclear.[137] The court held that the evidence was sufficient to support the jury's findings of violation under the DTPA.[138]

VI. DEFAMATION AND FALSE LIGHT INVASION OF PRIVACY

Although the Texas Supreme Court denied writ in *Hagler v. Proctor & Gamble Manufacturing Co.*,[139] a majority of the court disapproved the analysis of the court of appeals regarding actual malice. The supreme court stated that actual malice in a defamation case is different from common law malice.[140] "Actual malice in the defamation context does not include ill will, spite or evil motive, but rather requires 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' "[141]

134. 880 S.W.2d 129 (Tex. App.—Texarkana 1994, writ granted).
135. *Id.* at 134.
136. *Id.* at 135.
137. *Id.*
138. *Id.*
139. 884 S.W.2d 771 (Tex. 1994).
140. *Id.*
141. *Id.* at 771-72.

In response to a certified question from the U.S. Court of Appeals for the Fifth Circuit, the Texas Supreme Court held that Texas does not recognize the tort of false light invasion of privacy in *Cain v. Hearst Corp.*[142] The court reasoned that false light largely duplicates other rights of recovery, particularly defamation, and that it lacks many of the procedural limitations that accompany actions for defamation.[143] The court commented that the tort of false light, with its lack of procedural limitations, acted to increase the tension that already exists between free speech constitutional guarantees and tort law.[144]

VII. IMMUNITIES

In *Green International, Inc. v. State of Texas*,[145] a contractor brought suit against the State after they refused to pay the amounts claimed due on construction of three prison units. The first suit was dismissed on the basis of sovereign immunity. The plaintiff obtained the State's consent to sue and filed suit again. The State, however, disputed that consent had been given because the governor had vetoed the legislature's consent resolution. The Austin Court of Appeals held that the State's immunity from suit was not waived, the contractor's claim did not allege a valid takings claim, denial of redress to the contractor did not violate the constitutional open courts provision, and the legislature's resolution consenting to suit never became effective because the governor never approved the resolution.[146] The court noted that the State waives immunity from liability when it enters into a contract, but it retains immunity from suit.[147]

In *Hoffmeyer v. Hoffmeyer*[148] the Eastland Court of Appeals addressed the parental immunity doctrine. A father showed his son and a friend how to shoot a gun at a target located in the father's workshop. After firing the gun, the son's friend unloaded it. The father later reloaded the gun and laid it on a table in plain sight, never telling the boys that he had reloaded the gun. When the father left the two boys alone to go check on his other children, the son's friend picked up the loaded gun and discharged it, killing the son. The mother, who was divorced from the father, sued the father for wrongful death. The court noted that the only exceptions to the doctrine of parental immunity involve intentional or malicious acts, acts within the scope of an employment relationship between parent and child, and acts involving the negligent operation of an

142. 878 S.W.2d 577 (Tex. 1994).
143. *Id.* at 579-80.
144. *Id.* at 580.
145. 877 S.W.2d 428 (Tex. App.—Austin 1994, no writ).
146. *Id.*
147. *Id.* at 432-33.
148. 869 S.W.2d 667 (Tex. App.—Eastland 1994, writ denied).

automobile.[149] The court held that the doctrine of parental immunity applied in this situation and barred the mother's wrongful death claim.[150]

VIII. DAMAGES

A. Actual Damages

In *Dodge v. Watts*[151] the Amarillo Court of Appeals held that a plaintiff may recover for physical impairment when he chooses not to perform the act due to the pain that results from performance of the act. The plaintiff does not have to prove he is physically unable to perform the act.[152]

In determining whether the evidence is sufficient to support an award of damages for lost inheritance, the Texas Supreme Court in *C & H Nationwide, Inc. v. Thompson*[153] held that such damages are economic in nature and must be determined as other economic damages. The court cited *Yowell v. Piper Aircraft Corp.*,[154] which defined loss of inheritance damages as the present value that the deceased, in reasonable probability, would have added to the estate and left at natural death to the statutory wrongful death beneficiaries but for the wrongful death causing the premature death. The evidence should address who would have been among the decedent's beneficiaries, whether ordinary family expenses would have consumed all decedent's income and whether the ordinary circumstances of life would have exhausted any estate.[155] In this case, the court held that the element of what the decedent would have spent to support his family was missing and therefore the award of damages for loss of inheritance could not be upheld.[156]

B. Mental Anguish Damages

The Texas Supreme Court has granted writ in *Krishnan v. Sepulveda*[157] to consider whether or not a cause of action exists for mental anguish caused by the death of an unborn fetus. Parents brought a malpractice action against an obstetrician alleging that the doctor's negligence caused their child to be stillborn. The Corpus Christi Court of Appeals held that the plaintiffs stated a valid cause of action for mental anguish, that the Wrongful Death Act did not apply to an action for death of a fetus, and that funeral expenses of the stillborn child were recoverable.[158] Regarding the claim for mental anguish the court of appeals stated that the

149. *Id.* at 668.
150. *Id.*
151. 876 S.W.2d 542 (Tex. App.—Amarillo 1994, no writ).
152. *Id.* at 544-45.
153. 37 Tex. Sup. Ct. J. 1059 (June 22, 1994).
154. 703 S.W.2d 630 (Tex. 1986).
155. 37 Tex. Sup. Ct. J. at 1066.
156. *Id.*
157. 839 S.W.2d 132 (Tex. App.—Corpus Christi 1992, writ granted).
158. *Id.*

mother had a valid claim for the mental anguish that she suffered as a result of the death of her fetus as a part of the injury to her own body.[159]

In *Gross v. Davies*[160] the Houston Court of Appeals held that the parents of two children who were stillborn have no wrongful death or survival action based on the stillbirths. The court of appeals refused to reconsider the Texas Supreme Court's holdings that there is no such action based on the death of a fetus.[161] However, the court of appeals held that whether the fetus lived or died is immaterial to causes of action for the physical injuries and metal anguish of the parents.[162] In his concurring opinion, Justice Wilson pointed out that the Texas Supreme Court has not held that wrongful death actions based on the death of a fetus are not recognized as a matter of policy.[163] Rather, the supreme court has held that no such cause of action will exist until the Texas legislature says that it exists.[164] Justice Wilson invited the legislature to address this issue, stating that "[i]t is time for the Grosses and others like them to have a firm answer from the one body that can rightly provide it."[165] Justice Wilson did, however, point to Justice Dunn's concurring and dissenting opinion in *Witty v. American Gen. Capital Distribs., Inc.*[166] for the opposing view that the supreme court can and should act to include a fetus within the Wrongful Death Act.

In *State Farm Life Ins. Co. v. Beaston*,[167] the Austin Court of Appeals held that it was not necessary for the plaintiff to establish a "knowing" violation in order to recover jury awarded mental anguish damages. The court of appeals held that the jury finding that the defendant insurer had breached a legal duty under article 21.21 of the Insurance Code is all that is required to recover mental anguish damages.[168] The Texas Supreme Court granted writ to determine if "knowing conduct" is a prerequisite to a mental anguish award.

C. EXEMPLARY DAMAGES

Exemplary damages serve two functions: first, in a function analogous to criminal law, exemplary damages serve to punish the wrongdoer and, second, exemplary damages serve the purpose of deterring such conduct in the future.[169] Traditionally, exemplary damages are permissible when the defendant is not only guilty of tortious conduct but also acts with a

159. *Id.* at 136.
160. 882 S.W.2d 452 (Tex. App.—Houston [1st Dist.] 1994, writ requested).
161. *Id.* at 454.
162. *Id.* at 455.
163. *Id.* at 456 (Wilson, J., concurring).
164. *Id.*
165. *Id.*
166. 697 S.W.2d 636, 641-47 (Tex. App.—Houston [1st Dist.] 1985), *rev'd in part and aff'd in part*, 727 S.W.2d 503 (Tex. 1987).
167. 861 S.W.2d 268 (Tex. App.—Austin 1993, writ granted).
168. *Id.* at 275.
169. DAN B. DOBBS, TORTS AND COMPENSATION 673 (1985).

particular state of mind, most often described as malicious or reckless.[170] Texas has also recognized that exemplary damages may help reimburse the plaintiff for losses such as inconvenience and attorney's fees that are too remote to be considered as elements of strict compensation.[171] The Texas Supreme Court has recently attempted to clarify the test for the awarding of exemplary damages.

In *Burk Royalty*,[172] the court defined gross negligence as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it."[173] This test combines the two recognized tests for gross negligence in American jurisprudence—entire want of care and conscious indifference.[174]

In *Wal-Mart Stores, Inc. v. Alexander*,[175] the court affirmed that the test includes both an objective and a subjective component. A gross negligence finding will be upheld if there is some evidence that (1) the defendant's conduct created an extreme risk of harm, and (2) the defendant was aware of the extreme risk.[176] In *Wal-Mart* the court concluded that there was no evidence on record of an extreme degree of risk so they did not reach the second prong of whether Wal-Mart was aware of the risk.[177]

The Texas Supreme Court withdrew its original opinion in *Transportation Insurance Co. v. Moriel*[178] and then substituted an opinion that defines gross negligence as: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.[179]

In its original *Moriel* opinion, the Texas Supreme Court noted that Texas jurors are instructed on the factors set forth in *Alamo Nat'l Bank v. Kraus*[180] to assist in determining exemplary damage awards. In the substituted opinion the court stated that the *Kraus* factors are to guide Texas courts of appeals in evaluating exemplary damages awards.[181] The supreme court held that the court of appeals, when conducting a factual sufficiency review of an exemplary damages award, must detail the rele-

170. *Id.*
171. Lunsford v. Morris, 746 S.W.2d 471, 471-72 (Tex. 1988); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555-56 (Tex. 1985); Hofer v. Lavender, 679 S.W.2d 470, 474-75 (Tex. 1984).
172. Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981).
173. *Id.* at 920.
174. Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 325 (Tex. 1993).
175. 868 S.W.2d 322 (Tex. 1993).
176. *Id.* at 326.
177. *Id.* at 327.
178. 879 S.W.2d 10 (Tex. 1994).
179. *Id.* at 23.
180. 616 S.W.2d 908, 910 (Tex. 1981).
181. 879 S.W.2d at 28.

vant evidence in its opinion, explaining why that evidence either supports or does not support the award in light of the *Kraus* factors.[182]

In *Moriel*, the Texas Supreme Court also held that a trial court, if presented with a timely motion, should bifurcate the determination of the amount of exemplary damages from the remaining issues.[183] If the jury finds the defendant liable for gross negligence, then the same jury is presented with evidence relevant only to the amount of exemplary damages.[184] The jury determines the proper amount of exemplary damages considering the totality of the evidence presented at both phases of the trial.[185]

The Beaumont Court of Appeals interpreted *Moriel* in *St. Elizabeth Hospital v. Graham*.[186] While recuperating from a severe head injury in the hospital's intensive care unit, the plaintiff was placed in a reclining chair with no restraints. He fell out of the chair and was reinjured. The plaintiff sued the hospital for negligence and gross negligence resulting from the injury sustained when he fell out of the chair. The defendant hospital moved for a bifurcated trial, but the motion was denied.[187] The plaintiff was allowed, over the hospital's objections, to introduce evidence of the hospital's net worth.[188] The jury found the hospital negligent, but not grossly negligent.[189] On appeal, the hospital contended that the trial court erred in denying its motion for a bifurcated trial. Additionally, the hospital argued that the it was error to permit the jury to hear evidence of the hospital's net worth when there was no evidence of gross negligence by the hospital.

Moriel was decided while the appeal in *Graham* was pending. The court of appeals first addressed the issue of a bifurcated trial. The court found that the necessity of a bifurcated trial applied only to cases that were to be tried after June 8, 1994; therefore, the hospital was not entitled to a bifurcated trial.[190] The court next recognized that *Moriel* requires an appellate court to detail the evidence supporting, or not supporting the punitive damages award. However, the court stated: "[s]ince the jury awarded absolutely no punitive damages, we have no duty to perform this tedious task which has been thrust upon us."[191]

The court of appeals next addressed the hospital's argument that the trial court erred in ordering a separate trial on the issue of punitive damages under Texas Rule of Civil Procedure 174. The court of appeals found no error, noting that a trial court has broad discretion in ordering

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182. *Id.* at 31.
183. *Id.* at 30.
184. *Id.*
185. *Id.*
186. 883 S.W.2d 433 (Tex. App.—Beaumont 1994, no writ).
187. *Id.* at 435.
188. *Id.* at 436.
189. *Id.* at 435.
190. *Id.* at 436.
191. 883 S.W.2d at 437.

separate trials.[192] The court did point out that *Moriel* limits that discretion in matters relating to punitive damages.[193] The court stated that "*Moriel* is going to mandate a revision of Rule 174."[194]

In *George Grubb Enterprises v. Bein*,[195] a case involving intentional infliction of emotion distress, the jury awarded exemplary damages of $5 million. The Fort Worth Court of Appeals refused to order a remittitur, finding that under the facts of the case, the exemplary damages were reasonably related to the actual damages of $573,815.[196] The wealth of the defendant was included among the factors that could be considered by the jury in determining the amount of the exemplary damage award. The defendant cited *Moriel* to support its argument that the jury should not have been instructed to consider the wealth of the defendant.[197] The court of appeals pointed out that *Moriel*'s focus was on "procedural safeguards" such as bifurcation, but it did not change the law with respect to what factors a jury should consider in determining the amount of exemplary damages to award.[198] The defendant also argued that the jury should be limited to considering the net worth of the defendant, and not the assets, wealth, or profitability of the defendant.[199] The defendant defined net worth as the amount by which its assets exceed its liabilities.[200] The court of appeals held that a jury's consideration of a defendant's financial status should not be so limited.[201] The court stated that *Moriel* left the issue open, allowing juries to consider any evidence relevant to the amount of exemplary damages.[202]

In *Kline v. O'Quinn*[203] the Fourteenth Court of Appeals held that exemplary damages may be awarded by an arbitrator when the arbitration clause can be construed to include causes of action sounding in tort.

D. Prejudgment Interest

In *Sage Street Assocs. v. Northdale Constr. Co.*,[204] the Texas Supreme Court affirmed that judicially ordered prejudgment interest is not limited by the anti-usury provision of the Texas Constitution. The anti-usury provision applies only to lending and credit transactions, and not to transactions between a party and a court.[205]

192. *Id.*
193. *Id.*
194. *Id.*
195. 881 S.W.2d 843 (Tex. App.—Fort Worth 1994, writ requested).
196. *Id.* at 863.
197. *Id.* at 861.
198. *Id.*
199. *Id.*
200. 881 S.W.2d at 861.
201. *Id.*
202. *Id.*
203. 874 S.W.2d 776 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
204. 863 S.W.2d 438 (Tex. 1993).
205. *Id.* at 440.

In *C & H Nationwide, Inc. v. Thompson*,[206] the Texas Supreme Court held that prejudgment interest should be awarded on the entire judgment, including future damages. Prejudgment interest accrues during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the day the suit is filed, whichever occurs first, and ending on the day preceding the date judgment is rendered.[207]

In *Roberts v. Grande*,[208] the court of appeals held that prejudgment interest should not be added to actual damages before applying a settlement credit.

IX. STATUTE OF LIMITATIONS

The Waco Court of Appeals held that article 4590i, section 10.01 of the Medical Liability and Insurance Improvement Act is unconstitutional as applied to minors.[209] The statute imposes a two-year statute of limitation in health care liability cases, except that minors under the age of twelve years have until their fourteenth birthday to file a claim.[210] In *Wasson v. Weiner*,[211] the plaintiff had surgery to have orthopedic pins inserted in his femur when he was fifteen years old. Sometime later another doctor found that the pins had not been placed properly, and at the age of eighteen, the plaintiff required a total hip replacement. At age nineteen, he filed suit against the first surgeon. The court relied on *Sax v. Votteler*[212] for the rule that "a statute cannot cut off a minor's cause of action before he reaches the age of legal capacity."[213]

In *Ion Casu v. CBI NA-CON, Inc.*,[214] the Fourteenth Court of Appeals addressed tolling a statute of limitations because of mental incompetency. The plaintiff brought suit against two defendants following his injury in a chemical accident. Over two years later, and over two years past the statute of limitations another defendant was added. The court held that the statute of limitations was tolled under Civil Practice and Remedies Code section 16.001 after uncontroverted medical affidavits were presented alleging the plaintiff's mental incompetency.[215] The last defendant added in the suit argued that the plaintiff's failure to join them as a defendant with the statute of limitation was not caused by the plaintiff's mental incompetence, and pointed out that the plaintiff had retained counsel and prior to bringing suit had sent two demand letters to the later joined defendant and had timely filed suit against the two other defendants. How-

206. 37 Tex. Sup. Ct. J. 1059 (June 22, 1994).
207. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.05 § 6(a) (Vernon Supp. 1993).
208. 868 S.W.2d 956 (Tex. App.—Houston [14th Dist.] 1994, no writ).
209. Wasson v. Weiner, 871 S.W.2d 542 (Tex. App.—Waco 1994, writ granted).
210. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1993).
211. 871 S.W.2d at 542.
212. 648 S.W.2d 661 (Tex. 1983).
213. 871 S.W.2d at 543 (citing *Sax*, 648 S.W.2d at 667).
214. 881 S.W.2d 32 (Tex. App.—Houston [14th Dist.] 1994, no writ).
215. *Id.* at 34.

ever, the court held that knowledge of a potential defendant and retention of counsel are not enough to "override" section 16.001.[216]

The court acknowledged that it is possible that the mental incompetence of a client may be used hide legal malpractice, or as an excuse to keep a lawsuit in court when it should be dismissed.[217] The court also recognized that it is also possible that the cause of action of a mentally incompetent client can be kept alive as long as the client is alive. Nevertheless, the court found that such possibilities did not persuade them to reach a different result.[218]

In *Ruiz v. Conoco, Inc.*,[219] the plaintiff was injured in 1984, two years later he brought suit in Harris County to recover for his injuries. In 1987 he filed suit in Zapata County. Both suits were dismissed. In 1989, five years after the accident, the plaintiff was adjudicated mentally incompetent from the date of his accident. Shortly thereafter, the plaintiff filed a third suit relating to the accident through his legal guardian. The last defendant moved for summary judgment on the ground of limitations. The defendant argued that limitations were not tolled while the first two suits were pending because the plaintiff had access to the courts to assert his rights during that time.[220] The Texas Supreme Court held that "the mere commencement of a lawsuit by, or on behalf of, a legally incapacitated individual is, considered alone, insufficient to deny the protection of the tolling provision."[221]

In *Vesecky v. Vesecky*,[222] the Dallas Court of Appeals held that the discovery rule does apply to childhood sexual abuse cases involving repressed memory. In reaching this decision the court relied on *L.C. v. A.D.*[223] in holding that "the discovery rule applies in childhood sexual abuse cases where psychological defense mechanisms prevent discovery."[224] In response to the dissent's contention that *L.C.* should not be relied on because it was a plurality opinion in which no majority expressed a single rationale supporting application of the discovery rule to such cases, the court stated that a majority of the court's justices agreed that the discovery rule applied; the only disagreement was regarding the allocation of evidentiary burdens in a summary judgment situation.[225] As the *Vesecky* case was on review for directed verdict the disagreement between the justices was irrelevant.[226] The court also noted that when a

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216. *Id.*
217. *Id.* at 35.
218. *Id.*
219. 868 S.W.2d 752 (Tex. 1993).
220. *Id.* at 755.
221. *Id.* at 756.
222. 880 S.W.2d 804 (Tex. App.—Dallas 1994, writ granted).
223. No. 05-92-02867-CV, 1994 Tex. App. LEXIS 2729 (Tex. App.—Dallas, Mar. 21, 1994, no writ).
224. 880 S.W.2d at 806.
225. *Id.*
226. *Id.*

plaintiff discovered, or should have discovered, an injury is a question of fact to be submitted to the jury.[227]

The Texas Supreme Court refused the defendant's application for writ of error in *Danesh v. Houston Health Clubs, Inc.*[228] The plaintiff mailed his original petition three days before the statute of limitations expired, but the petition was not file stamped until the day after the statutory time expired. The First Court of Appeals held that under Rule 5 of the Texas Civil Procedures, the plaintiff had timely filed an action by mailing the petition three days before limitations expired.[229]

X. TEXAS TORT CLAIMS ACT

A. PREMISE OR SPECIAL DEFECT

In *State of Texas v. Burris*,[230] a man was killed when he lost control of his vehicle while trying to avoid another vehicle that had made an illegal turn into his path. His widow brought suit against the state claiming that the Texas Department of Transportation had a duty to warn of the possibility of cross-traffic on a highway (even though cars that would be crossing the highway would be making an illegal turn). The plaintiff asserted that such a condition comprises a special defect. The Texas Supreme Court held that "[a] condition may be a special defect only if it is an excavation, obstruction, or some other condition which presents 'an unexpected and unusual danger to ordinary users of roadways.' "[231]

B. USE OR NONUSE OF TANGIBLE PERSONAL PROPERTY

In *University of Texas Medical Branch v. York*[232] the plaintiff, as guardian for his partially paralyzed son, brought suit against the University of Texas Medical Branch at Galveston (UTMB) for negligence in failing to diagnose a broken hip. York contended that misuse of his son's medical records constituted negligent use of tangible property and such misuse was the proximate cause of his son's injuries. The Texas Supreme Court held that although paper is a tangible property, the medical information recorded on the paper is not.[233] Therefore, under the Texas Tort Claims Act[234] the state retained immunity from suit for negligence involving the use, misuse or nonuse of medical information contained in medical records.[235] The court distinguished *Salcedo v. El Paso Hospital Dist.*,[236] in which it upheld a claim of negligence based on a doctor's misreading of

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227. *Id.*
228. 859 S.W.2d 535 (Tex. App.—Houston [1st Dist.] 1993, writ ref'd).
229. *Id.*
230. 877 S.W.2d 298 (Tex. 1994).
231. 877 S.W.2d at 299 (citing State Dept of Highways v. Kitchen, 867 S.W.2d 784 (Tex. 1993) (per curiam)(holding that an icy bridge is not a special defect)).
232. 871 S.W.2d 175 (Tex. 1994).
233. *Id.* at 178-79.
234. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1986).
235. 871 S.W.2d at 179.
236. 659 S.W.2d 30 (Tex. 1983).

an electrocardiogram. The court noted that *Salecedo* alleged misuse of the electrocardiogram which "unquestionably" is tangible personal property.[237] To the extent that *City of Houston v. Arney*[238] and *Jenkins v. State*[239] differ from the Texas Supreme Court's opinion in *York*, the cases were disapproved.

C. Notice Provisions

In *University of Texas Medical Branch v. Greenhouse*,[240] the First Court of Appeals held that the discovery rule does not apply to the notice provisions of the Texas Tort Claims Act.[241] One year after a radical mastectomy the patient complained of pains in her chest. The patient's doctor ordered an MRI which revealed that there was a metal artifact in her chest. The surgeon performing the mastectomy had left thirty-eight metal surgical clips in the patient's chest. Following the MRI, however, the patient's doctor did not specify in his report that the metal artifacts were in the patient's lower chest area. Therefore, the exploratory surgery was based on the doctor's incorrect indication as to where the metal artifact was located. Five months after the patient discovered the discrepancy between the doctor's report and the results of the MRI she gave the hospital notice of her injury. On original submission the hospital argued that it did not receive proper notice under the Tort Claims Act because the patient should have known of her injury after the first MRI. The patient argued that the discovery rule applied.

The court of appeals originally agreed with the plaintiff, holding that the discovery rule applied to the notice requirements of the Texas Tort Claims Act. On rehearing the court reversed and remanded. The court rejected the patient's argument that if the discovery rule does not apply, the Tort Claims Act is unconstitutional as a violation of the open courts provision.[242] The court cited *Moreno v. Sterling Drug Inc.*[243] which set out the two part test to establish an open courts violation: "first, [the litigant] must show she has a well-recognized common-law cause of action that is being restricted; second, she must show the restriction is unreasonable or arbitrary when balanced against the purpose of the statute."[244] The court held that the plaintiff failed to meet the first prong of this test because, but for the Tort Claims Act, the hospital would have been shielded from liability by the doctrine of sovereign immunity.[245] Therefore, the court found that the patient did not have a well-recognized common-law cause of action.[246] The court also cited *State Dept. of High-*

237. 871 S.W.2d at 178.
238. 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ).
239. 570 S.W.2d 175 (Tex. App.—Houston [14th Dist.] 1978, no writ).
240. 889 S.W.2d 427 (Tex. App.—Houston [1st Dist.] 1994, writ requested).
241. Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 1986).
242. 889 S.W.2d at 427.
243. 787 S.W.2d 348 (Tex. 1990).
244. *Id.* at 355.
245. 889 S.W.2d at 427.
246. *Id.*

ways v. Dopyera[247] which held that once a plaintiff invokes the procedural devices of the Tort Claims Act, then he is bound by the limitations and remedies provided in the statute.[248] The court stated: "[w]hile we believe that it is remarkably unfair to deprive [the plaintiff] of her right of recourse against [the hospital] because she was unable, through no fault of her own, to comply with the notice requirements, we must agree with [the hospital] that the trial court erred in applying the discovery rule."[249]

D. Municipal Liability

In *City of Dallas v. Mitchell*,[250] the Texas Supreme Court held that section 75.002 of the Civil Practice and Remedies Code did not shield the City of Dallas from liability when a young boy riding his bicycle in a public park fell into a creek. Under section 75.002 the duty owed could have been no greater than that due a trespasser.[251] However, the supreme court held that the Civil Practice and Remedies Code section 75.002 is inapplicable because it is a general statute whereas the Tort Claims Act section 101.022 is a specific statute governing the duty owed to recreational users of government property, and as such, controls.[252] Under the Tort Claims Act a governmental entity owes the same duty that a private individual would owe to a licensee on private property.[253] The supreme court disapproved *Martinez v. Harris County*[254] and *Tarrant County Water Control and Imp. Dist. No. 1 v. Crossland*[255]

In *Graf v. Harris County*,[256] the First Court of Appeals followed *Mitchell*, holding that where a woman tripped on a step in a county arboretum the county could not claim immunity under Texas Civil Practice and Remedies Code section 75.002.[257] The court then addressed the immunity provided under the Tort Claims Act, section 101.022, finding that if an injured party paid for the use of the premises, the governmental entity is liable for ordinary negligence, but if the injured party did not pay for the use of the premises the governmental entity is liable only for acts of gross negligence.[258]

The Texas Supreme Court granted writ on points that included whether barring judgment against a police officer who struck another driver would violate the open courts provision of the Texas Constitution. In *Thomas v. Oldham*,[259] a Houston police officer was driving his police car when he

247. 843 S.W.2d 50 (Tex. 1992).
248. *Id.* at 54.
249. 889 S.W.2d at 427.
250. 870 S.W.2d 21 (Tex. 1994).
251. *Id.* at 22.
252. *Id.* at 23.
253. *Id.* at 22.
254. 808 S.W.2d 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
255. 781 S.W.2d 427 (Tex. App.—Fort Worth 1989, writ denied).
256. 877 S.W.2d 82 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
257. *Id.* at 84.
258. *Id.* at 85.
259. 864 S.W.2d 121 (Tex. App.—Houston [14th Dist.] 1994, writ granted).

struck a car driven by the plaintiff. A jury found the police officer and the city jointly and severally liable for $250,000, and the police officer individually liable for $429,508.20. The court of appeals reversed the judgment against the police officer, holding that the Tort Claims Act section 101.106 barred such judgment.

Similar issues were also presented in *Gibson v. Spinks*.[260] A passenger was riding in a car struck by a police car. In a trial before the bench, the court held that the town's immunity was waived under the Tort Claims Act, but that the town's liability was statutorily limited to $250,000. The court of appeals affirmed that the police officer was liable for any amount above the statutory cap. The Texas Supreme Court granted writ to harmonize *Gibson* and *Oldham*.[261]

In *Huckabay v. Irving Hospital Authority*,[262] the plaintiff was injured by an x-ray technician at the Irving Hospital. The trial court held that Texas Civil Practice and Remedies Code section 101.023(c) limited the hospital's liability to $100,000. The court of appeals affirmed. The Texas Supreme Court initially granted writ to address the plaintiff's claim that the hospital was a "function of a municipality," raising the limit of liability to $250,000 under the Civil Practice and Remedies Code. The writ was later dismissed.

XI. OTHER AREAS

A. Worker's Compensation

In *Texas Workers' Compensation Comm. v. Garcia*,[263] the Texas Supreme Court upheld the constitutionality of the 1989 Worker's Compensation Act. The court held that the Act did not violate the Texas Constitution's guarantees of open courts, due course of law, equal protection, trial by jury, and obligation of contract.

B. Insurance Policy Exclusions

In *National County Mut. Fire Ins. Co. v. Johnson*,[264] the Texas Supreme Court affirmed that the "family member exclusion" is inconsistent with the public policy underlying the Texas Motor Vehicle Safety-Responsibility Act.[265] In a plurality opinion the supreme court held the exclusion invalid, at least up to the minimum coverage mandated by the compulsory insurance provision of the Act.[266]

However, the Houston Court of Appeals in *Bergensen v. Hartford Ins. Co.*,[267] upheld a family member exclusion in uninsured/underinsured mo-

260. 869 S.W.2d 529 (Tex. App.—Corpus Christi 1993, writ granted).
261. 864 S.W.2d 121.
262. 879 S.W.2d 64 (Tex. App.—Dallas 1993, writ dism'd).
263. 38 Tex. Sup. Ct. J. 235 (Feb. 9, 1995).
264. 879 S.W.2d 1 (Tex. 1993).
265. Tex. Rev. Civ. Stat. Ann. art. 6701h, § 1(10) (Vernon Supp. 1993).
266. 879 S.W.2d at 5.
267. 845 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1992, writ ref'd).

torists provisions of an automobile insurance policy. The court reasoned that the underinsured provision was intended to protect the insureds from other motorists who did not have adequate coverage on their automobiles, not to protect the insureds from their own failure to secure adequate liability insurance.[268]

State Farm Fire & Cas. Co. v. S.S. and G.W.[269] involved an intentional injury exclusion. After engaging in consensual sexual intercourse with G.W. at his home, S.S. contracted genital herpes. S.S. notified G.W. and asked that he compensate her for her injuries. G.W. contacted his home owner's insurance company at this time, but later when S.S. filed suit claiming that G.W. had negligently transmitted the herpes to her, G.W. did not notify the insurance company. S.S. and G.W. settled, agreeing to a judgment of $1 million in favor of S.S. The insurance filed a declaratory judgment action claiming that it was not obligated to pay the $1 million judgment because, among other things, G.W.'s policy contained an intentional injury exclusion. The Texas Supreme Court affirmed the court of appeal's holding that a fact issue existed as to whether G.W. knew that engaging in sexual intercourse with S.S. was substantially certain to result in transmission of herpes to S.S.[270] The record showed that G.W. was operating under the mistaken impression that he could not transmit herpes when he had no active symptoms of the disease.[271]

In *Hernandez v. Gulf Group Lloyds*,[272] the Texas Supreme Court held that an insurer cannot rely on a "settlement without consent" exclusion to deny a claim unless the insurer proves that it was prejudiced by the insured's failure to comply with the consent requirement.

The Texas Supreme Court withdrew its original opinion in *American Physicians Ins. Exch. v. Garcia*,[273] in which it held that the existence of a non-execution covenant between a plaintiff and an insured does not preclude the plaintiff, as the assignee of the insured, from recovering damages from the insurer. The underlying suit was a medical malpractice claim against Garcia. Dr. Garcia was covered by one insurance company during 1982 and another in 1983. Each carried a $500,000 insurance policy. The plaintiffs sent a letter to each insurance company indicating that their malpractice allegations were based on a course of treatment that concluded with one office visit in 1983. Based on the letter both insurance companies agreed to defend Garcia. But, the plaintiffs did not actually plead any negligence occurring in 1983 so the second insurance company notified Garcia that its policy did not apply. Garcia assigned his claims against the insurers to the plaintiffs. In return, the plaintiffs signed a covenant not to execute against Garcia. The plaintiff's ultimately won $2 million in the medical malpractice action. In the new opinion the

268. *Id.* at 377.
269. 858 S.W.2d 374 (Tex. 1993).
270. *Id.* at 378.
271. *Id.* at 379.
272. 875 S.W.2d 691 (Tex. 1994).
273. 876 S.W.2d 842 (Tex. 1994).

court does not address the issue of the non-execution covenant, but reviews the *Stowers* duty to settle.

More recently, in *National Union Fire Ins. Co. v. CBI Indus. Inc.*,[274] the Texas Supreme Court upheld the pollution exclusion contained in most standard CGL insurance policies. Like *Garcia*, *CBI Indus.* deals more with insurance and coverage matters than general tort law. However, both cases present important issues that may arise during the course of tort litigation.

274. 38 Tex. Sup. Ct. J. 332 (Mar. 2, 1995).