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Torts

Lyman G. Hughes

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TORTS

by

Lyman G. Hughes*

I. GROSS NEGLIGENCE

ONE of the most noteworthy decisions during the survey period was the Fifth Circuit's en banc decision in *Maxey v. Freightliner Corp.*,¹ which discussed the impact in federal court of the Texas Supreme Court's decision in *Burk Royalty Co. v. Walls*.² In *Maxey* a truck tractor manufactured by Freightliner overturned, causing the outside fuel tanks to rupture and ignite. The accident killed its two passengers, and their minor children brought a wrongful death action. The jury found that the design of the fuel system on the truck tractor was defective. The trial court awarded the Maxey children \$150,000 in actual damages, but set aside both the jury's finding of gross negligence by Freightliner and its verdict of \$10,000,000 in exemplary damages. The trial judge found, however, that if exemplary damages were held to be recoverable on appeal, then \$10,000,000 was an appropriate award.³ A divided panel of the Fifth Circuit affirmed the trial court's decision,⁴ and the court granted a rehearing en banc.⁵ Following the grant of rehearing, the Texas Supreme Court decided *Burk Royalty*. In *Burk Royalty* the central issue on appeal was the standard that an appellate court should apply to the review of a jury finding of gross negligence.⁶ The supreme court first comprehensively reviewed the development in Texas of the gross negligence concept. The court concluded that the proper test for gross negligence was that set forth in *Missouri Pacific Railroad v. Shuford*:⁷

Gross negligence, to be the ground for exemplary damages, should be 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 rights or welfare of the person or persons to be affected by it.⁸

* B.A., Kansas State University; J.D., Southern Methodist University; Attorney at Law, Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas.

1. 665 F.2d 1367 (5th Cir. 1982) (en banc).

2. 616 S.W.2d 911 (Tex. 1981).

3. *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 966 (N.D. Tex. 1978). For a discussion of the Fifth Circuit's holding with respect to the amount of exemplary damages, see *infra* text accompanying notes 161-68.

4. 623 F.2d 395, 400 (5th Cir. 1980).

5. 634 F.2d 1008 (5th Cir. 1980) (rehearing was without oral argument).

6. 616 S.W.2d at 920-24.

7. 72 Tex. 165, 10 S.W. 408 (1888).

8. *Id.* at 170, 10 S.W. at 411 (emphasis in original).

The supreme court then squarely rejected the "some care" appellate review standard that had developed over the years,⁹ holding that the "no evidence" standard should be applied in the review of gross negligence findings just as it is applied to the review of other findings.¹⁰

The principal question¹¹ at issue in *Maxey* on rehearing was whether *Burk Royalty* changed only the appropriate standard of review or whether it also changed the substantive law of gross negligence. Freightliner argued that *Burk Royalty* made no change in substantive law, but altered only the Texas procedural rules applicable to reviewing directed verdicts and judgments notwithstanding the verdict. Accordingly, the manufacturer argued *Burk Royalty* had no *Erie* application to the federal court, and the federal court should apply its own standard of review as set out in *Boeing Co. v. Shipman*.¹² The nine dissenting and concurring judges of the court agreed with Freightliner.¹³ The fourteen-judge majority disagreed, however, holding that the Texas Supreme Court in *Burk Royalty* "established a uniform Texas definition of gross negligence, and rejected the 'some care' test theretofore often applied by Texas courts in gross negligence cases, as well as by the district court and the panel majority in the case *sub judice*."¹⁴

After reviewing the development of the *Shuford* gross negligence definition, the majority concluded that a "some care" test had been engrafted upon that definition by decisions subsequent to *Shuford*.¹⁵ In particular, the court cited *Sheffield Division, Armco Steel Corp. v. Jones*¹⁶ as adding that as a matter of substantive law, evidence of "some care" by the defendant necessarily precludes a finding of "that entire want of care" contained in the *Shuford* definition.¹⁷ The Fifth Circuit read *Burk Royalty* as rejecting *Sheffield* in its entirety, including the "bright line" concept that there is either entire want of care or there is some care.¹⁸ To the Fifth Circuit it appeared that the Texas Supreme Court had opted for a "more rigorous analysis: rather than simply inquiring whether the defendant ex-

9. 616 S.W.2d at 922. The "some care" test was most clearly articulated in *Sheffield Div., Armco Steel Corp. v. Jones*, 376 S.W.2d 825, 829 (Tex. 1964), which the *Burk Royalty* decision expressly overruled.

10. 616 S.W.2d at 920.

11. In addition to the court's determination as to the amount of exemplary damages, it also approved the trial court's conclusion that Texas courts, when faced with the issue, would hold that exemplary damages are recoverable in strict liability cases. The court did not feel bound, under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to a holding to that effect in *Heil Co. v. Grant*, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.), but found "nothing in Texas law [that] would justify recognition of an automatic bar to awards of exemplary damages in all products liability cases." 665 F.2d at 1371 n.4.

12. 411 F.2d 365, 373-76 (5th Cir. 1969) (en banc) (the substantial evidence test).

13. 665 F.2d at 1379-86.

14. *Id.* at 1371. Interestingly enough, the phrase "some care" does not appear at all in the district court's opinion.

15. *Id.* at 1372.

16. 376 S.W.2d 825 (Tex. 1964) (workmen's compensation action for exemplary damages).

17. 665 F.2d at 1372.

18. *Id.* at 1374.

exercised some care, the proper focus is on the question whether, in light of all of the surrounding circumstances, the requisite mental state is shown."¹⁹ The "requisite mental state," the Fifth Circuit concluded, is a "conscious indifference" by the defendant to the plaintiff's rights, welfare, and safety.²⁰ Thus, the court reversed and remanded *Maxey* to the district court to reexamine the facts in light of both the substantive principles of *Burk Royalty* and the review standard of *Boeing*.

The dissenting and concurring opinions in *Maxey* forcefully argued that *Burk Royalty* did nothing to the substantive standard of gross negligence, but established only the appropriate standard by which appellate courts may review jury findings of gross negligence.²¹ More particularly, the dissent argued that the Texas court merely "struck down the 'some care' procedural rule, substituting the standard Texas 'no evidence' mode of review."²² It pointed out that the Texas court's only express rejection of the "some care" rule, or of *Sheffield*, was in the statement: "[w]e disapprove the use of the 'some care' test in determining legal sufficiency points and overrule those cases applying it."²³ The dissent in *Maxey* also argued that *Sheffield* adopted its definition of gross negligence from *Shuford* and that the definitions of the substantive law are identical.²⁴

The *Maxey* majority likely read more into *Burk Royalty* than the supreme court's opinion can support. As presently composed, the Fifth Circuit court may reflect more the views of the minority than the majority.²⁵ The impact of *Maxey* may be seen, however, in its application in later cases. In the companion case to *Maxey*, *Broussard v. Southern Pacific Transportation Co.*,²⁶ the full court reversed a partial summary judgment in favor of the defendant based upon a record that reflected that the de-

19. *Id.*

20. *Id.*

21. *Id.* at 1380 (Garwood, J., concurring) (quoting *Burk Royalty*, 616 S.W.2d at 920). Judge Garwood rejected the majority's notion that *Burk Royalty* totally repudiated the "some care" rule or formulated a new definition of gross negligence. Instead, he expressed the view that *Burk Royalty* simply offered some "clarification" of the rule. *Id.* at 1381.

22. *Id.* at 1383 (Gee, J., dissenting).

23. *Burk Royalty*, 616 S.W.2d at 922.

24. 665 F.2d at 1385 (Gee, J., dissenting). The dissent noted, however, that *Burk Royalty* disapproved the "arcane distinction between passive and active conduct" carried forward in *Sheffield*. *Id.* at 1385 n.5. Judge Garwood, in his concurring opinion, agreed with Judge Gee's interpretation that *Burk Royalty* made no express repudiation of the substantive law of gross negligence. Judge Garwood, however, did believe that *Burk Royalty* implied "some clarification and qualification of the 'some care' doctrine as a substantive test for determining whether a given act or course of conduct constitutes gross negligence." To Judge Garwood, *Burk Royalty* clarified this doctrine by rejecting an overly mechanical application of the "some care" test, without regard to the defendant's state of mind, or to all of the surrounding facts and circumstances. *Id.* at 1379 (Garwood, J., concurring).

25. The *Maxey* opinion was rendered prior to the split of the Fifth Circuit into two circuits. An analysis of the composition of the court as currently constituted suggests that the case might have been decided differently had it been heard by the present court. Of the thirteen active judges now on the court, five are from the *Maxey* majority and five are from the minority. In addition, Judge Higginbotham, in whose court *Maxey* was tried and whose review of the jury's gross negligence finding was reversed, has since been appointed to the Fifth Circuit.

26. 665 F.2d 1387 (5th Cir. 1982) (en banc).

defendant had exercised some care.²⁷ The Fifth Circuit stated that the inquiry was not whether the defendant's conduct evidenced some care, but whether it demonstrated a conscious indifference to the rights of others.²⁸ The court's holding prompted the dissenters to criticize pointedly the reasoning that "where 'some care' is shown there still may be 'an entire want of care.'" ²⁹

In *Schwartz v. Sears, Roebuck & Co.*³⁰ three justices from the *Maxey* majority affirmed an award of exemplary damages based upon a jury finding of gross negligence. *Schwartz's* significance lies in its approval of the gross negligence definition expressed in *Burk Royalty*.³¹ Ironically, the *Schwartz* court characterized the instruction as the "newly reapproved *Shuford* definition,"³² despite the fact that the definition has been in use in this state for many years and was unaffected by *Burk Royalty*.

Finally, the Fifth Circuit's decision in *Gardner v. Chevron U.S.A., Inc.*³³ should be noted. The court logically concluded that since the jury found the defendant to be not negligent in any of the respects contended, the trial judge properly directed a verdict for the defendant on the issue of gross negligence. The court stated that "[u]nder the rigorous tests outlined in *Burk Royalty*, the jury's finding of ordinary care necessarily precludes the inference of conscious indifference needed to establish gross negligence."³⁴

II. SETTLEMENT, RELEASE, CONTRIBUTION, AND INDEMNITY

Several noteworthy cases were decided during the survey period that affect the complex interplay of settlements and releases with the rights of contribution and indemnity between joint tortfeasors. The most significant case is *Cypress Creek Utility Service Co. v. Muller*.³⁵ In that case the Texas Supreme Court overruled the application of the *Bradshaw v. Baylor University*³⁶ "one satisfaction rule," in comparative negligence actions in

27. *Id.* at 1390.

28. *Id.* at 1389.

29. *Id.* at 1390 (Gee, J., dissenting). Judge Gee stated: "I fancy that such suggestions demonstrate why the law is viewed by laymen as mysterious." *Id.*

30. 669 F.2d 1091 (5th Cir. 1982).

31. The court approved a jury instruction that gross negligence is "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." *Id.* at 1092-93 (quoting *Burk Royalty*, 616 S.W.2d at 920). This standard is likewise used in the jury instructions in 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 3.11, at 70 (1969).

32. 669 F.2d at 1093.

33. 675 F.2d 658 (5th Cir. 1982).

34. *Id.* at 661. The court's frequent reference to "the rigorous test" must be read with reference to whose ox is being gored. It seems clear that jury findings of gross negligence will be more difficult to overcome at the trial court level and more easily sustained on appeal. See, e.g., *Poole v. Missouri Pac. R.R.*, 638 S.W.2d 10 (Tex. Ct. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (judgment n.o.v. appropriate only if there is no evidence of probative force on which jury could base finding of gross negligence). Summary judgment in favor of defendants on gross negligence issues should be rare indeed.

35. 640 S.W.2d 860 (Tex. 1982).

36. 126 Tex. 99, 84 S.W.2d 703 (1935). *Bradshaw* stated that an injured party is entitled

which the jury apportions a percentage of negligence to the settling tortfeasor.

In *Cypress Creek* two passengers, Muller and Seyen, were riding in an automobile driven by Carroll when the vehicle struck a pile of dirt left on the road by Cypress and careened into the oncoming lane of traffic where it struck an automobile driven by Rowden. Muller and Seyen, in one action, sued Carroll, seeking recovery for the injuries sustained in the collision between the Carroll and Rowden vehicles. Rowden sued Carroll and Cypress in a separate action, and the two suits were subsequently consolidated. Carroll filed a cross-action against Cypress, seeking recovery for injuries and property damage, but did not seek contribution. On the other hand, Carroll sought contribution from Rowden but not affirmative relief. Cypress sought contribution from Rowden but not from Carroll.

Prior to trial Rowden settled with Carroll for \$25,000. Cypress elected to take a dollar for dollar credit for this amount to be applied against any judgment Rowden might recover against Cypress. During jury deliberations Seyen settled with Carroll for \$7,500. The jury found Cypress and Carroll negligent and apportioned the negligence eighty percent to Cypress and twenty percent to Carroll. The jury awarded \$730,000 to Muller, \$9,556.97 to Rowden, and \$1,500 to Seyen. The trial court refused to allow Cypress a dollar for dollar credit for either settlement. Instead, the court reduced by twenty percent the jury award to Rowden and Seyen and entered judgment against Cypress for the balance. Both the court of appeals and the supreme court affirmed.³⁷

The supreme court first reviewed the development of the law of contribution from common law through the enactment of article 2212, by which the legislature abrogated the common law principle of no contribution and allowed joint tortfeasors to apportion between them the damages to be paid to the victim of the tort.³⁸ The court then noted the two methods of dealing with the situation in which one or more of the joint tortfeasors settles with the plaintiff before trial.³⁹ The first method was embodied in the "one satisfaction rule" articulated in *Bradshaw*.⁴⁰ Under this rule the nonsettling tortfeasor received a dollar for dollar credit for the amount paid by the settling tortfeasor. The second method of dealing with settle-

to but one satisfaction for his injuries, even though more than one party contributed to those injuries. *Id.* at 104, 84 S.W.2d at 705.

37. 624 S.W.2d 824 (Tex. Ct. App.—Houston [14th Dist.] 1981), *aff'd*, 640 S.W.2d 860 (Tex. 1982).

38. 640 S.W.2d at 861-64; *see* TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). The statute provides:

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort . . . shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from such a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment.

Id.

39. 640 S.W.2d at 862-63.

40. 126 Tex. at 1, 84 S.W.2d at 705.

ment by less than all joint tortfeasors was designed to remedy the situation in which the plaintiff settled with one defendant for a nominal sum and then utilized that defendant's help to secure a large judgment against the remaining defendant. Thus, in *Palestine Contractors, Inc. v. Perkins*⁴¹ the court held that the release of one tortfeasor released the remaining tortfeasors for the settling tortfeasor's proportional amount of the resulting judgment.⁴²

The common practice, in view of the two concurrently approved methods of dealing with settling tortfeasors, has been for the trial court to permit the nonsettling tortfeasors to seek a *Palestine Contractors* proportionate reduction. The court, however, would allow the election of a *Bradshaw* credit if the payment of the nonsettling defendants' proportionate shares would result in the plaintiff's receiving more than the amount of damages found by the jury. This election placed the nonsettling defendants in an advantageous position and, from the plaintiff's perspective, discouraged settlement.

In 1973 the legislature enacted article 2212a, which provides that in negligence actions contribution is permitted among joint tortfeasors in proportion to the percentage of negligent fault the jury finds.⁴³ Section 2 of the statute delineates how a settlement by one or more tortfeasors affects these contribution rights.⁴⁴ If the settling tortfeasor is not a party to the action at the time the case goes to the jury, so that his negligence is not submitted, the remaining defendants receive a *Bradshaw* dollar for dollar credit for the amount of the settlement.⁴⁵ If the settling tortfeasor is a party to the action at the time it goes to the jury, so that his degree of negligence is determined, the nonsettling defendants receive a *Palestine*-like pro rata credit.⁴⁶

In *Cypress Creek* the nonsettling defendant argued that it should be allowed the *Bradshaw* credit despite the fact that the jury had determined the negligence of the settling defendant, Carroll. Cypress argued that the legislature did not intend to remove from the nonsettling defendant the election to choose either the pro tanto or pro rata reduction. Cypress relied heavily on the decisions of the court of civil appeals in *Deal v. Madison*⁴⁷ and *Columbia Engineering International, Ltd. v. Dorman*.⁴⁸ Moreover, Cypress reasoned, the application of the pro rata reduction against the wishes of the defendant would result in the same collusive settlement abuse that *Palestine Contractors* was designed to discourage. Finally, Cypress argued that to disallow the dollar for dollar credit in every

41. 386 S.W.2d 764 (Tex. 1964).

42. *Id.* at 773.

43. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1982).

44. *Id.* § 2.

45. *Id.* § 2(d).

46. *Id.* § 2(e).

47. 576 S.W.2d 409, 420 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (judgment against nonsettling defendant reduced by amount of settlements under § 2(d)).

48. 602 S.W.2d 72, 79 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (one satisfaction rule applied despite jury determination of settling defendant's negligence).

instance would result in unjust enrichment when the total of the judgment and settlement amounts exceeded the damages found by the jury.

The supreme court rejected each of Cypress's arguments in favor of following the plain language of the statute. The court declined to provide an election when none is found in the statute. It observed that the trend in recent years is not to attempt to combat the use of unfair trial tactics, such as the collusive settlement, with changes in substantive law.⁴⁹ Accordingly, the court expressly overruled that application of the *Bradshaw* rule in any case in which article 2212a, section 2(e) applies.⁵⁰

The result in *Cypress Creek* seems unquestionably correct. The language of article 2212a, sections 2(d) and (e) is clear, and the court properly declined to substitute its own judgment for that of the legislature. *Cypress Creek* signals a necessary change in tactics by defendants in cases governed by article 2212a in which one or more defendants have settled. In many instances the nonsettling defendant will have to elect whether to keep the settling defendant in the case.⁵¹

The court of appeals in *McAllen Kentucky Fried Chicken No. 1, Inc. v. Leal*⁵² discussed this tactical decision that often faces the nonsettling defendant. The court held, as in *Cypress Creek*, that the nonsettling defendant must exercise its "strategic option" either to take the dollar for dollar credit by dismissing the claim for contribution, or to submit the issue of the settling defendant's negligence to the jury.⁵³ Thus, having made the election to hold the settling defendant in the action, the court did not allow the nonsettling defendant in this case to request later the dollar reduction.⁵⁴

In determining the credit allowed to a nonsettling tortfeasor, it becomes important to consider the nature of the moneys paid by the settling tortfeasor, and whether the settling party is one from whom contribution may be had under the statutes. Those issues were important in a number of cases decided during the survey period. In *Howard v. General Cable Corp.*⁵⁵ the Fifth Circuit pointed out that under Texas law the settlement and the judgment awarded must represent "common damages" before a court will allow a *Bradshaw* credit.⁵⁶ The court in *Howard* allowed the credit, but the case illustrates the problems that may arise in an action in which the plaintiff seeks exemplary and compensatory damages and the

49. 640 S.W.2d at 866. The court suggested that a permissible safeguard against collusive settlements is to inform the jury of "any settlement which might cause a distorted picture of the parties' true interests." *Id.* at 866.

50. The court expressly did not overrule *Bradshaw* with respect to cases in which art. 2212a, § 2(e) does not apply. *Deal v. Madison*, and *Columbia Eng'g Int'l, Ltd. v. Dorman*, were disapproved by the *Cypress Creek* court to the extent they are inconsistent with the court's opinion. 640 S.W.2d at 865-66.

51. In some instances, of course, the nonsettling defendant, like *Cypress Creek* in the main case, will have no election to make and will be left with the pro rata reduction provided by art. 2212a, § 2(e).

52. 627 S.W.2d 480 (Tex. Ct. App.—Corpus Christi 1981, writ ref'd n.r.e.).

53. *Id.* at 485.

54. *Id.*

55. 674 F.2d 351 (5th Cir. 1982).

56. *Id.* at 358.

settlement agreement does not apportion the settlement fund between the two types of damages.

In *Texas Industries, Inc. v. Lucas*⁵⁷ the court of appeals held that an employer who was immune from liability under the Texas Worker's Compensation Act⁵⁸ was not a "settling party" for purposes of a pro rata reduction of the damages awarded.⁵⁹ The defendants did not seek contribution or indemnification from the employer, but did seek to have the employer's negligence submitted to the jury for the purpose of determining an appropriate proportionate reduction in the damages awarded. The court of appeals, considering the question one of first impression, held that, because the defendants had no cause of action for contribution against the employer, they were not entitled to the credit or reduction provided by article 2212a.⁶⁰

Two cases addressed the unsettled issue of the right to contribution of a party liable under a strict liability theory from a party whose negligence contributes to the plaintiff's injury. In *Bonniwell v. Beech Aircraft Corp.*⁶¹ the court did not reach the question of a strictly liable party's right of contribution from a negligent party under the facts of the case,⁶² but it noted that the question has not been decided and that the supreme court in *General Motors Corp. v. Simmons*⁶³ has called for further legislative study of the issue.⁶⁴ The court of appeals in *Duncan v. Cessna Aircraft Co.*,⁶⁵ however, squarely faced the issue and held that article 2212 permits contribution between negligent and strictly liable tortfeasors.⁶⁶ The court cited *General Motors Corp. v. Simmons* as authority.⁶⁷

III. MALPRACTICE

Two decisions from courts of appeals during the survey period followed the Texas precedent that a physician is not liable in damages to the parents of a healthy child conceived after the unsuccessful performance of sterilization.⁶⁸ The Dallas court in *Sutkin v. Beck*⁶⁹ concluded that damages re-

57. 634 S.W.2d 748 (Tex. Ct. App.—Houston [14th Dist.] 1982, no writ).

58. TEX. REV. CIV. STAT. ANN. art. 8306 (Vernon 1967 & Supp. 1982-1983).

59. 634 S.W.2d at 756-57.

60. *Id.* at 757.

61. 633 S.W.2d 553, 561 (Tex. Ct. App.—Houston [14th Dist.] 1982), *aff'd*, 26 Tex. Sup. Ct. J. 259 (March 12, 1983).

62. *Bonniwell* is worthy of study for its discussion of collateral estoppel and the application of that principle to claims for contribution.

63. 558 S.W.2d 855 (Tex. 1977).

64. *Id.* at 863.

65. 632 S.W.2d 375 (Tex. Ct. App.—Austin 1982, writ granted). The decision is also noteworthy for its discussion of when a party who is not named in a release is "otherwise specifically identified" so as to benefit from the release. *Id.* at 378-81; see *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 (Tex. 1971) (setting forth requirements of full release).

66. 632 S.W.2d at 389.

67. *Id.*

68. See, e.g., *Silva v. Howe*, 608 S.W.2d 840 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 927 (1974); *Hays v. Hall*, 477 S.W.2d 402 (Tex. Civ. App.—Eastland), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1972).

69. 629 S.W.2d 131 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).

sulting from rearing a healthy child are overly speculative.⁷⁰ The Fort Worth court in *Hickman v. Myers*,⁷¹ on the other hand, adopted a public policy stand in reaching the same result. The court in *Hickman* noted that Texas courts have determined that "public sentiment" recognizes that the benefits to parents of a healthy child outweigh the economic loss of rearing and educating the child.⁷² Though the court recognized that society's best interests require that physicians be held to a standard of competence and that liability be imposed when physicians are negligent in the treatment of their patients, the court held that to impose liability upon a doctor for the support of a healthy child would go well beyond the scope of his duty to his patient.⁷³

Based upon *Stukin*, *Hickman*, and the cases cited therein, no doubt exists that, absent legislative action or Texas Supreme Court decision, no liability arises from the birth of a healthy but unwanted child. It is equally clear that the parents of a physically deformed child, born as a result of a physician's negligent sterilization or diagnosis, may recover damages measured by the cost of the care and treatment of the child.⁷⁴ Until the decision of the Dallas court of appeals in *Nelson v. Krusen*,⁷⁵ however, no Texas court had considered the existence of a cause of action for "wrongful life" on behalf of a deformed child.

In *Nelson* the parents sought the diagnosis of the defendant physician as to whether the mother was a carrier of Duchenne Muscular Dystrophy so that a decision could be made whether to terminate the mother's pregnancy. Based upon the physician's favorable diagnosis the parents did not terminate the pregnancy, but the child that was born was afflicted by the disease. The parents and child asserted that the physician's diagnosis was negligently provided. After affirming the trial court's summary judgment against the parents on limitations, the appeals court examined the question of whether the child could maintain an action for "wrongful life." The court found no support for such a cause of action in *Jacobs v. Theimer*,⁷⁶ which recognized a cause of action on behalf of the parents of a deformed or defective child.⁷⁷ The court cited with approval an Ohio federal district court decision holding that *Jacobs* did not give rise to a cause of action on behalf of the child.⁷⁸ The *Nelson* court concluded that unless the supreme court or the Texas Legislature creates such a cause of action, trial courts should grant summary judgment denying relief to the child.⁷⁹

70. *Id.* at 132.

71. 632 S.W.2d 869 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.).

72. *Id.* at 870.

73. *Id.* at 871-72.

74. *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (distinguishing between cause of action for wrongful birth and life of healthy child and one for expenditures related to birth of deformed child).

75. 635 S.W.2d 582 (Tex. Ct. App.—Dallas 1982, no writ).

76. 519 S.W.2d 846 (Tex. 1975).

77. *Id.* at 850.

78. *Smith v. United States*, 392 F. Supp. 654, 656 (N.D. Ohio 1975).

79. 635 S.W.2d at 586. The child in *Nelson* sought damages of two sorts: (1) those

The Fifth Circuit's decision in *Haught v. Maceluch*⁸⁰ is important both in the malpractice area and the negligence field in general, because of the court's discussion of the uninjured bystander rule under Texas law. The facts in the case presented a particularly egregious course of action by the physician attending a mother in labor, resulting in a tragically defective child. The plaintiff-mother sought recovery for the mental anguish she suffered because of the birth of the defective child. The trial court set aside the jury's award of \$118,000 on the ground that Texas law did not permit recovery. The Fifth Circuit concluded that the Texas Supreme Court would have permitted the recovery and reinstated the jury award.⁸¹

After reviewing prior Texas cases⁸² and concluding that Texas law does recognize an uninjured bystander cause of action in some instances,⁸³ the court reasoned that Texas courts would "follow the modern rule of measuring bystander recovery according to the general negligence principle of foreseeability."⁸⁴ The court held that foreseeability in a bystander case would be determined by the three-factor test formulated by the California court in *Dillon v. Legg*⁸⁵: first, whether the plaintiff was located near the scene of the event; second, whether the shock resulted from contemporaneous observation of the event as contrasted to learning of the event from others; and, third, whether the plaintiff and victim were closely related.⁸⁶ Only the second factor was troublesome in the context of the birth of the distressed child. The court ultimately concluded that although the plaintiff was unconscious at the time of delivery and did not learn of the child's permanent disabilities until some days later, the plaintiff nevertheless could be said to have had an experiential perception of the event and to have suffered shocking thoughts about the child's safety.⁸⁷ It should be noted that, although the court's analysis of the Texas law of the uninjured bystander cause of action is important, the court stressed the necessity to examine every case on its own facts in determining foreseeability.⁸⁸

Two additional cases are worthy of brief note. The Texas Supreme

arising from having been born; and (2) those related to the care and treatment of the defect or deformity. The court properly rejected the former as too speculative, but did not offer any rationale for denying the second category of damages except to say that *Jacobs v. Theimer* does not authorize such a claim. In this respect the *Nelson* court somewhat begged the issue.

80. 681 F.2d 291 (5th Cir. 1982).

81. *Id.* at 306.

82. The court reviewed *Kaufman v. Miller*, 414 S.W.2d 164 (Tex. 1967), and *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App.—Texarkana 1978, no writ).

83. 681 F.2d at 297-98 n.6.

84. *Id.* at 298.

85. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

86. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The court recognized a fourth element under Texas law: the distress must manifest itself through physical injury. The court noted the liberal application of this requirement and held that plaintiff's depression, weight gain, nervousness and nightmares satisfied the requirement. 681 F.2d at 299 n.9.

87. 681 F.2d at 300-02.

88. *Id.* at 300. See *Sanchez v. Schindler*, 626 S.W.2d 871, 873-74 (Tex. Ct. App.—Corpus Christi 1981), *reversed*, 26 Tex. Sup. Ct. J. 353 (April 27, 1983) decided during the survey period. Although the court of civil appeals stated that it would apply the more permissive "contemporaneous perception" test of *Landreth v. Reed*, 570 S.W.2d 486, 489 (Tex. Civ. App.—Texarkana 1978, no writ), the plaintiff-mother who was not at the scene of the

Court held in *Roark v. Allen*⁸⁹ that the absence of expert testimony in an area in which laymen cannot infer that a breach of the appropriate standard of care proximately caused the plaintiff's injury required reversal of the jury's award.⁹⁰ In addition, the court held that the doctrine of informed consent applies only to medical practices yet to be performed and is inapplicable retroactively when the patient has already undergone the proposed treatment.⁹¹ In *Schepps v. Presbyterian Hospital*⁹² the Dallas court of appeals rejected the reasoning of an earlier federal court decision and held the notice provision of the Medical Liability and Insurance Improvement Act of Texas⁹³ to be mandatory and not merely directory.⁹⁴

IV. TRADE SECRETS

The use or disclosure of trade secrets or other confidential information gave rise to several decisions during the survey period. In *Vaquero Petroleum Co. v. Simmons*⁹⁵ the plaintiff sought to impose a constructive trust upon properties the defendants acquired through information they received during a fiduciary relationship with the plaintiff. The defendants, however, acquired the property after terminating that relationship. Although the court concluded that the defendants committed no wrong under the facts presented, it strongly suggested that a constructive trust would not be available to remedy the improper use of confidential information if the fiduciary relationship had terminated prior to the use.⁹⁶ The court noted that a constructive trust is a remedy that should be used with caution,⁹⁷ and distinguished cases the plaintiff cited in support of the requested relief as cases involving conduct in breach of a then existing fiduciary relationship.⁹⁸ It appears, however, that the proper rule should be that if a party gains information during the existence of a fiduciary relationship, and the use of that information during such relationship would give rise to the imposition of a constructive trust for the benefit of the beneficiary, then a constructive trust should similarly be available to

accident and only heard that her son was injured in an accident was not allowed to recover for emotional distress. The supreme court, however, overruled the long-standing "pecuniary loss" rule and allowed recovery for emotional distress under the Texas Wrongful Death Statute.

89. 633 S.W.2d 804 (Tex. 1982).

90. *Id.* at 809.

91. *Id.* at 808.

92. 638 S.W.2d 156, 157-58 (Tex. Ct. App.—Dallas 1982, writ granted).

93. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1982).

94. 638 S.W.2d at 157-58. The court rejected *Burdett v. Methodist Hosp.*, 484 F. Supp. 1338 (N.D. Tex. 1980).

95. 636 S.W.2d 762 (Tex. Ct. App.—Corpus Christi 1982, no writ).

96. *Id.* at 767-68.

97. *Id.* at 767; *see* *Pope v. Garrett*, 147 Tex. 18, 25, 211 S.W.2d 559, 562 (1948) (constructive trust imposed upon heirs who prevented intestate from executing will).

98. 636 S.W.2d at 767. The court distinguished the following cases: *Hunter v. Shell Oil Co.*, 198 F.2d 485, 487 (5th Cir. 1952); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576-77 (Tex. 1963); *Omohundro v. Matthews*, 161 Tex. 367, 371, 341 S.W.2d 401, 404 (1960); *Smith v. Bolin*, 153 Tex. 486, 490, 271 S.W.2d 93, 95 (1954); *Fitz-Gerald v. Hull*, 150 Tex. 39, 41-45, 237 S.W.2d 256, 257-58 (1951); *MacDonald v. Follett*, 142 Tex. 616, 622, 180 S.W.2d 334, 338 (1944).

remedy the misuse of such information after the relationship terminates.⁹⁹ As discussed below, even in the absence of an express contract, the law restricts a former employee's use of information obtained in the course of a confidential relationship.¹⁰⁰ Even more so should a person who subjects himself to the restrictions placed upon a fiduciary be subject to the same remedies, irrespective of whether the fiduciary relationship exists at the time the breach of the restrictions occurs.

Two cases decided during the survey period highlight the need for reform of the unique Texas rule that unfairly and unnecessarily restricts the use of information gained by a person as a result of a confidential relationship. In *Reading & Bates Construction Co. v. O'Donnell*¹⁰¹ and *Sikes v. McGraw-Edison Co.*¹⁰² the courts applied the Texas rule that one who acquires confidential or trade secret information during the existence of a confidential relationship may not turn it to his own use even after the information is later made public and is available for use by the rest of the world.¹⁰³

If a good reason for such a rule ever existed, no good reason exists for its continuance. Logic and common sense dictate that a party who is the beneficiary of a restriction upon the disclosure of such information by another party, whether arising by contract or operation of law, loses the benefit of such restriction by making such information public. It is hoped that the supreme court will abolish the rule applied in *Reading* and *Sikes* at the first opportunity.

Additionally, *Sikes* should be noted for its rejection of the defendant's argument that a new product idea was at issue and, as such, was distinguishable from a trade secret.¹⁰⁴ Defendant premised its argument upon *Richter v. Westab, Inc.*,¹⁰⁵ which made such a distinction under the facts of that case.¹⁰⁶ The *Sikes* court, however, found *Richter* factually distinguishable and contrary to Texas law.¹⁰⁷

99. Clearly, if the former fiduciary is under no restriction with respect to the information (e.g., the beneficiary has affirmatively released the former fiduciary) then no "misuse" of the information has occurred and no relief of any sort is appropriate.

100. See *supra* notes 101-06 and accompanying text; see also *K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv.*, 158 Tex. 594, 602, 314 S.W.2d 782, 787 (1958) (disclosure of trade secret in wrongful disregard of confidential relationship); *Hyde Corp. v. Huffines*, 158 Tex. 566, 576, 314 S.W.2d 763, 770 (1958) (in confidential relation of employment, injured party not required to rely upon an express agreement to hold trade secret in confidence).

101. 627 S.W.2d 239 (Tex. Ct. App.—Corpus Christi 1982, writ ref'd n.r.e.).

102. 655 F.2d 731 (5th Cir.), *on rehearing*, 671 F.2d 150 (5th Cir.), *cert. denied*, 102 S. Ct. 3488, 73 L. Ed. 2d 1369 (1982).

103. *Sikes*, 665 F.2d at 734; *Reading*, 627 S.W.2d at 242. The Texas court relied on *Atlas Bradford Co. v. Tuboscope Co.*, 378 S.W.2d 147 (Tex. Civ. App.—Waco 1964, no writ), and the federal court relied on *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, *cert. denied*, 358 U.S. 898 (1958).

104. 665 F.2d at 733-34.

105. 529 F.2d 896 (6th Cir. 1976).

106. *Id.* at 900.

107. 665 F.2d at 733-34.

V. LIBEL

Two cases decided during the survey period make it clear that a party required to show malice in a libel action must present direct evidence of the author's state of mind. In *Foster v. Upchurch*,¹⁰⁸ a venue case decided by the Texas Supreme Court,¹⁰⁹ and *Times-Mirror Co. v. Harden*,¹¹⁰ decided by the Eastland court of appeals, the plaintiffs sought to prove malice by relying upon the inaccuracies and internal inconsistencies in the subject articles themselves. In both cases the courts held that the contents of the articles alone do not show the author's state of mind.¹¹¹ As the *Foster* court stated: "The internal inconsistencies of [the defendant's] article, standing alone, do not meet [the plaintiff's] burden of proof on actual malice. More subjective evidence is required."¹¹²

The Fifth Circuit considered the issue of sufficient proof of malice in Texas in the context of an employer's qualified privilege not to disclose statements he made regarding an employee. In *Gaines v. Cuna Mutual Insurance Society*¹¹³ the federal court first observed that Texas cases have created a qualified privilege that protects an employer's statements concerning an employee if the employer makes the statements in the course, or as a result, of an investigation of the employee's conduct.¹¹⁴ The court noted that the privilege is based upon the public policy that "recognizes the need for the free communication of information to protect business and personal interests."¹¹⁵ To overcome the privilege the plaintiff must prove malice.¹¹⁶

In *Gaines* the plaintiff argued that the employer maliciously published the alleged libelous letter, but offered no direct evidence of the author's state of mind. Although decided well after the decision of the Texas

108. 624 S.W.2d 564 (Tex. 1981).

109. The court issued perhaps its strongest call to date for the modernization of the Texas venue laws. The court stated:

Numerous calls for venue reform have gone unheeded in the past, largely because of resistance from those who are familiar with the complexities of our venue laws and fear the uncertainties of any substantial change. The increasing time and expense of litigation, however, are making our current venue laws an unreasonable burden on litigants, taxpayers, and the judicial system as a whole.

Id. at 566, n.2.

110. 628 S.W.2d 859 (Tex. Ct. App.—Eastland 1982, writ ref'd n.r.e.).

111. *Foster*, 624 S.W.2d at 566; *Times-Mirror*, 628 S.W.2d at 865.

112. 624 S.W.2d at 566.

113. 681 F.2d 982 (5th Cir. 1982).

114. *Id.* at 985; see *Bergman v. Oshman's Sporting Goods, Inc.*, 594 S.W.2d 814 (Tex. Civ. App.—Tyler 1980, no writ); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510 (Tex. Civ. App.—Dallas 1970, writ dism'd w.o.j.); *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *Buck v. Savage*, 323 S.W.2d 363 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); see also *Houston v. Grocers Supply Co.*, 625 S.W.2d 798 (Tex. Ct. App.—Houston [14th District] 1981, no writ) (holding that statements made by personnel director concerning alleged theft by employee entitled to a qualified privilege).

115. 681 F.2d at 986.

116. See *supra* note 113 and cases cited therein.

Supreme Court in *Foster* and the decision in *Times-Mirror*, the Fifth Circuit cited neither decision. Nevertheless, the federal court's reasoning was consistent with the two recent Texas cases in concluding that the plaintiff's circumstantial evidence of actual malice was insufficient to raise a question of fact.¹¹⁷ The Fifth Circuit could have reached the same holding, and shortened its opinion, by relying on the *Foster* and *Times-Mirror* decisions.

None of the three cases discussed above gives guidance as to what evidence is sufficient to establish the author's state of mind short of testimony from the author himself. Direct evidence of the author's knowledge of the statement's falsity is certainly sufficient, but circumstantial evidence of such fact, however plentiful, appears inadequate. The failure to investigate the truth of the statement does not constitute malice,¹¹⁸ and the mere reduction to writing of a statement that could have been made orally is no evidence of malice.¹¹⁹

VI. DUTY

Although it is a venue case, the decision of the Austin court of appeals in *Bernard Johnson, Inc. v. Continental Constructors, Inc.*¹²⁰ is a case of first impression in this state on the issue of whether a supervising architect or engineer owes a duty in tort to a prime contractor, when the architect's or engineer's negligence causes the prime contractor economic damage. Continental Constructors built a bulkhead at Lake Livingston, Texas, under a contract with the Texas Parks and Wildlife Department. The contract called for construction in accordance with plans and specifications prepared by Bernard Johnson and gave Bernard Johnson certain powers and duties as "the architect/engineer." The court construed the contractor's petition to allege a claim in contract and negligence, stating that the architect had certain contractual duties which he breached and also that the architect was negligent in designing and administering the project.¹²¹ The court joined the contract claim with the claim in negligence, reasoning that a party who fails to perform a contractual obligation with care and skill may be liable for negligence as well as for breach of contract.¹²² Because

117. 681 F.2d at 987.

118. *Dunn & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 901 (Tex. 1970); *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969).

119. 681 F.2d at 988.

120. 630 S.W.2d 365 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

121. *Id.* at 367.

122. *Id.* at 369. The court relied upon *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947). The court's observation is a dictum to the case, however, because Bernard Johnson was not a contracting party to the bulkhead contract. The notion that a negligently performed contractual obligation gives rise to a claim in tort as well as in contract, as *Scharrenbeck* suggests, is frequently utilized in an effort to obtain punitive damages in cases which are truly contract cases, thus circumventing decisions such as *A.L. Carter Lumber Co. v. Saide*, 140 Tex. 523, 526, 168 S.W.2d 629, 631 (1943), which hold that exemplary damages are not allowed for breach of contract. *Id.* It is submitted that *Scharrenbeck's* commingling of tort and contract concepts is unnecessary, unsound, and should be abandoned. This principle of *Scharrenbeck* was indirectly undermined by the Texas Supreme Court's decision during the last survey period in *Amoco Prod. Co. v. Alex-*

the architect was not in privity of contract with the contractor, however, the court was unwilling to find that the architect had a contractual duty to the contractor.¹²³

The court then reviewed the question of whether the supervising architect owes a duty at common law. The court noted that some jurisdictions impose upon the architect a duty of ordinary care in favor of the contractor,¹²⁴ but the court found such cases to be "lacking in logical analysis."¹²⁵ The court also rejected the contractor's argument that as a matter of policy the status of architects imposes upon them a duty of care to the contractor.¹²⁶ The court, therefore, concluded that the contractor's allegations set forth no cause of action against the architect.¹²⁷

The dissent in *Bernard Johnson* noted the lack of any controlling Texas authority and the split of authority in other jurisdictions.¹²⁸ Unlike the majority, Chief Judge Phillips found those cases upholding an architect's duty to a contractor to be the better reasoned.¹²⁹ Judge Phillips found support for his decision to join the "pro-duty" line of cases in the earlier Texas appeals court opinion in *I.O.I. Systems, Inc. v. Cleveland*.¹³⁰

Although the Texas Supreme Court refused the writ in *Bernard Johnson* on the basis of no reversible error, the court of appeals was only deciding venue in the action. Nevertheless, the duty issue which was decided by the court of appeals is an important one. It is hoped that the supreme court will seize an early opportunity to provide guidance to the development of the law in this area.

VII. RES IPSA LOQUITUR

The doctrine of *res ipsa loquitur* is a rule of evidence that allows for a finding of negligence when the circumstances surrounding the incident in question constitute sufficient circumstantial evidence to support such a finding.¹³¹ Accordingly, cases discussing the application of the doctrine may be treated elsewhere in this survey issue. Nevertheless, since *res ipsa* is so often considered a tort law rule, it is appropriate to mention here the several cases decided during the survey period that illustrate the accidian-like manner in which courts have expanded and contracted the scope of the *res ipsa* doctrine.

ander, 622 S.W.2d 563 (Tex. 1981), in which the court held that "a breach of [an] implied covenant . . . is an action sounding in contract and will not support recovery of exemplary damages absent proof of an independent tort." *Id.* at 571. See Laity, *Mineral Resources, Annual Survey of Texas Law*, 36 Sw. L.J. 185, 196 (1982), for a discussion of this case.

123. 630 S.W.2d at 370.

124. *Id.* at 371.

125. *Id.*

126. *Id.* at 373-74.

127. *Id.* at 375-76.

128. *Id.* at 376.

129. *Id.*

130. 615 S.W.2d 786, 790 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (duty of reasonable care from architect to contractor).

131. See *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 251 (Tex. 1974).

The beginning point for such an analysis is the supreme court's opinion in *Mobil Chemical Co. v. Bell*.¹³² In *Bell* the court clearly restated the two elements that must be present for application of the res ipsa doctrine: "(1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant."¹³³ The court went on to note, however, that these requirements are not rigid rules and must be reasonably applied to the facts of the given case.¹³⁴

As might be expected in light of *Bell*, the cases during the survey period that considered the application of the res ipsa doctrine are fact-oriented and are helpful only to the practitioner who is faced with an analogous fact situation.¹³⁵ The decision of the Texas Supreme Court in *Marathon Oil Co. v. Sterner*¹³⁶ merits examination, however, for its restrictive application of the doctrine. Briefly stated, the plaintiff was allegedly gassed while repairing a large metal vessel on Marathon's premises. The plaintiff was an employee of a contractor retained to perform the repair, but Marathon was responsible for insuring that the vessel was safe to enter. Marathon was to insure that all gas lines were closed, and each day before anyone was permitted to enter the vessel a Marathon safety person was to check for the presence of harmful gases by the use of an instrument known as a sniffer. Although the Marathon safety person inspected and okayed the vessel on the day in question, the plaintiff was overcome by gas while working in the vessel and suffered resultant injury.

The case was tried to a jury on a res ipsa theory. The jury found for the plaintiff on all issues and awarded \$25,000 in damages. Marathon urged on appeal that no evidence existed that the vessel was under the management and control of Marathon or that the character of the accident was such that it would not ordinarily occur in the absence of negligence. The court of appeals affirmed, but the supreme court reversed and rendered judgment.¹³⁷ The higher court found no evidence that Marathon controlled the vessel or that the accident was of the type that would not ordinarily occur absent negligence.¹³⁸

The supreme court's decision in *Marathon Oil* cannot be squared with

132. 517 S.W.2d 245 (Tex. 1974).

133. *Id.* at 251.

134. *Id.*

135. See *Jones v. Tarrant Util. Co.*, 638 S.W.2d 862 (Tex. 1982) (res ipsa loquitur held applicable in situation involving water damage from storage tank leak); *Sohio Pipeline Co. v. Harmon*, 627 S.W.2d 498 (Tex. Ct. App.—Tyler 1981, no writ) (res ipsa loquitur held applicable in situation involving leak in oil pipeline valve); *Smith v. Little*, 626 S.W.2d 906 (Tex. Ct. App.—Tyler 1981, no writ) (res ipsa loquitur held not applicable in situation involving fire damage to apartment); *Cuellar v. Garcia*, 621 S.W.2d 646 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (res ipsa loquitur held not applicable in situation involving "runaway" automobile).

136. 632 S.W.2d 571 (Tex. 1982).

137. 624 S.W.2d 198 (Tex. Civ. App.—Houston [1st Dist.] 1981), *rev'd*, 632 S.W.2d 571 (Tex. 1982).

138. 632 S.W.2d at 573-74.

the facts of the case as outlined in the opinion of the court of civil appeals. From the facts there recited it seems clear that Marathon was in control of both the vessel and the sources of gas at the time of the incident. Upon learning of the incident, the Marathon safety engineer roped off the vessel and allowed no one else to enter. Marathon was also clearly in control of the piping to the vessel from which the errant gas presumably escaped. Moreover, while it is true that in a complex plant escaping gas could be due to unforeseeable causes, it does not seem improper for a jury to have concluded that the gassing of a worker does not ordinarily occur absent negligence. The supreme court in *Marathon Oil* seems to have been influenced by an obvious disbelief of the plaintiff's claim of injury.¹³⁹ Nevertheless, the case does illustrate the court's willingness to apply a much more restrictive view of the *res ipsa loquitur* doctrine than the court's earlier opinion in *Bell* would suggest.

VIII. DAMAGES

Undoubtedly the most complex damage calculation case to be decided during the survey period was *McDonald v. Bennett*.¹⁴⁰ The plaintiff sought to recover amounts invested by him directly and through his closely held corporation in the acquisition of stock in a corporation owned by the defendants. Following the stock acquisition, plaintiff's corporation spent additional sums attempting to operate the acquired corporation. Nevertheless, the venture failed, and the acquired corporation went into bankruptcy. The plaintiff alleged claims of common law fraud, breach of contract, wrongful interference with contract, slander of title, and wrongful acceleration of debt. The trial court entered judgment in excess of \$500,000 for plaintiff. The Fifth Circuit found the award excessive, however, and ordered remittitur.¹⁴¹

The court was first faced with the issue of whether a sole shareholder is entitled to recover damages sustained by his corporation. The individual plaintiff had purchased the stock of the defendant's corporation in his own name with funds belonging to his closely held corporation. In addition, the individual had caused his corporation to spend additional sums in the venture. The individual plaintiff sought to recover in his own right all

139. The supreme court could not reverse on this ground because some evidence existed to support the jury's finding that the plaintiff's preexisting medical conditions were aggravated by the gassing. The court nevertheless noted at length that the doctor who examined the plaintiff testified that the plaintiff's aggravated problems "could have been [caused by] somebody's perfume for all I know." 632 S.W.2d at 573. Moreover, the court noted that the plaintiff's preexisting problems included:

a neck disc injury; four broken ribs; a knife wound in the chest; sinus and allergy problems that resulted in a nasal polypectomy; high blood pressure; various problems related to being overweight; severe depression requiring hospitalization and use of at least fifty-one electric shock treatments; chronic . . . anxiety attacks; twenty years of smoking at least one pack of cigarettes a day; and drinking eight to ten beers a day.

Id. at 573 n.2.

140. 674 F.2d 1080 (5th Cir. 1982).

141. *Id.* at 1092.

sums expended by his corporation.¹⁴² The trial court allowed the recovery. The defendants argued on appeal that only the corporation was entitled to recover amounts spent by it.

The Fifth Circuit noted the general Texas rule that an action to redress a wrong to a corporation cannot be maintained by a shareholder, even if the shareholder is the owner of all or substantially all of the stock of the corporation.¹⁴³ The plaintiff argued that he fell within an exception to the general rule because he, not the corporation, was the party obligated with respect to the purchased stock. The Fifth Circuit resolved the issue by permitting the plaintiff to recover the purchase price of the stock.¹⁴⁴ In so doing the court followed the rule stated by the Texas Supreme Court in *Heinrichs v. Evins Personnel Consultants, Inc. Number One*¹⁴⁵ that a shareholder may recover amounts advanced by the corporation on his behalf.¹⁴⁶ The court held, however, that the "slender reed" of *Heinrichs* did not permit the plaintiff to recover all amounts paid out by the corporation.¹⁴⁷ Only the corporation could recover amounts the corporation paid in its own behalf. Thus, under the facts presented, the amounts were not recoverable which were expended by the closely held corporation in the attempt to operate the newly acquired corporation successfully.¹⁴⁸

The court next dealt with the trial court's award of damages for mental anguish the plaintiff suffered as a result of the defendant's alleged improper efforts to collect a debt, which contributed to the demise of the venture.¹⁴⁹ The appeals court held that the debt at issue, having been created in connection with the acquisition of stock, was not a debt incurred by a "consumer" within the definition provided by the Texas Debt Collection Act.¹⁵⁰ Although damages for mental anguish alone could be recovered under that Act, some physical injury must be found for recovery outside of

142. Inexplicably, the plaintiff did not assert claims on behalf of the corporation even though it was a party to the suit as a result of being joined as a defendant to the counterclaim.

143. 674 F.2d at 1085; see *Stinnett v. Paramount-Famous Lasky Corp.*, 37 S.W.2d 145, 149 (Tex. Comm'n App. 1931, holding approved).

144. 674 F.2d at 1086.

145. 486 S.W.2d 935 (Tex. 1972).

146. *Id.* at 936; see also *Cullum v. General Motors Acceptance Corp.*, 115 S.W.2d 1196, 1201 (Tex. Civ. App.—Amarillo 1938, no writ) (general rule does not prevent stockholder from suing to recover damages for wrongful acts directly against himself as well as against the corporation).

147. 674 F.2d at 1087.

148. *Id.*

149. The record reflected that the collection efforts of which the plaintiff complained consisted principally of steps toward litigation (demand letters, depositions, etc.). One of the plaintiff's allegations was that he was hospitalized after being subjected to three days of depositions by the defendant's attorney. Practitioners may receive some comfort from the court's observation that "[w]hile discovery can take the form of a withering ordeal, we know of no instance in which the stress created by depositions has formed the basis of a recovery for unreasonable collection efforts." *Id.* at 1089 n.8.

150. *Id.* at 1089. TEX. REV. CIV. STAT. ANN. art. 5069—11.01 (Vernon Supp. 1982-1983) defines a "consumer" as "an individual who owes or allegedly owes a debt created primarily for personal, family, or household purposes."

the Act.¹⁵¹ Since the plaintiff had shown no physical injury, the court allowed no recovery.

The court then reviewed the trial court's application of the "benefit of the bargain" measure of damages recoverable under section 27.01 of the Texas Business and Commerce Code.¹⁵² Under the facts of the case the court found that there was no "benefit of the bargain" because the stock was represented to be worth exactly what the plaintiff had agreed to pay.¹⁵³ Since the plaintiff recovered his purchase price under his common law fraud claim, any recovery under section 27.01 would be duplicative. Finally, the court considered the appropriateness of the trial court's award of \$150,000 in punitive damages in view of the remittitur that reduced the plaintiff's actual damage recovery to approximately \$100,000. The court held that the three-to-two ratio satisfied the Texas proportionality requirement.¹⁵⁴

A noteworthy case presenting a fact situation far less complex, but no less interesting than *McDonald*, was decided by the Corpus Christi court of appeals in *Berry Contracting, Inc. v. Coastal States Petrochemical Co.*¹⁵⁵ Berry had ruptured a natural gas pipeline, which caused the shutdown of Coastal's refinery for forty-nine hours. Coastal alleged no lost profits, no lost sales, and no lost contracts by reason of the shutdown, but rather sought to recover for the loss of the use of its asset for the period of the closure. The lost use of the asset was to be measured by the reasonable market value of the use of the asset for the forty-nine hour period. The jury awarded damages in the amount of \$55,988.48.

The court of appeals reversed, however, finding no evidence to support the jury's damage award.¹⁵⁶ Central to the court's holding was the testimony at trial that it was industry practice for refiners such as Coastal to enter into refinery service contracts only for periods in excess of thirty days. Accordingly, the court concluded that there was no "market" for Coastal's plant for forty-nine hours. The court stated: "Activity in a ready market may be proven to exist during the time the asset is unusable by evidence that an opportunity existed to accrue earnings from the asset, and that its owner would have availed itself of this opportunity."¹⁵⁷ The evidence was conclusive that no "ready market" for refining services existed in the industry for such a short period.¹⁵⁸

151. *See* *Duty v. General Fin. Co.*, 154 Tex. 16, 19, 273 S.W.2d 64, 65 (1954); *Harned v. E-Z Fin. Co.*, 151 Tex. 641, 643, 254 S.W.2d 81, 82 (1953); *United Fin. & Thrift Corp. v. Smith*, 387 S.W.2d 752, 757 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

152. TEX. BUS. & COM. CODE ANN. § 27.01 (Tex. UCC) (Vernon 1968).

153. 674 F.2d at 1091.

154. *Id.* at 1093; *see also* *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377 (5th Cir. 1982) (en banc); discussed *infra* at notes 161-68 and accompanying text; *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331-32 (5th Cir. 1981).

155. 635 S.W.2d 759 (Tex. Ct. App.—Corpus Christi 1982, writ ref'd n.r.e.).

156. *Id.* at 762.

157. *Id.*

158. *Id.*

The court of appeals in *Pickett v. J.J. Willis Trucking Co.*¹⁵⁹ reaffirmed the principle that when a chattel has been totally destroyed, as opposed to merely damaged, no recovery may be had for the loss of the use of the chattel. In *Pickett* the plaintiff's truck had been completely destroyed as a result of the defendant's negligence. In the trial court the plaintiff received a jury award for the value of the truck and an award of "lost business profits." The appeals court held the award of profits to be in the nature of damages for loss of use and therefore not recoverable.¹⁶⁰

In *Maxey v. Freightliner Corp.*¹⁶¹ the Fifth Circuit sitting en banc considered the Texas "proportionality" rule pursuant to which exemplary damages must bear some reasonable relationship to the amount of actual damages awarded. The facts of *Maxey* are discussed above,¹⁶² but it is helpful for purposes of the present analysis to recall that the jury had awarded actual damages of \$150,000 and exemplary damages of \$10,000,000. In the trial court the plaintiffs argued that the federal court was not *Erie*-bound by the Texas proportionality requirements. By the time the case reached the full court, however, it was clear that the requirement would be followed in diversity cases.¹⁶³

The court in *Maxey* would not attempt to set a ratio of exemplary damages to actual damages that would apply to every case. The court noted the five-factor test used by the Texas courts,¹⁶⁴ but chose not to apply it to the facts of *Maxey*.¹⁶⁵ Instead, the court merely held that a ratio of approximately sixty-seven to one was "clearly excessive,"¹⁶⁶ and the court "strongly and firmly disapproved" of the award.¹⁶⁷ It is significant for future cases, however, that the court clearly addressed the award of punitive damages in a case in which the defendant argued that the practice complained of was in accord with industry practice. The court stated:

159. 624 S.W.2d 664 (Tex. Ct. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

160. *Id.* at 668-69. The *Pickett* case is also noteworthy for its holding that a lease clause allocating the risk of loss from one party to another does not afford protection to the first party against the consequences of his own negligence. *Id.* at 668. Thus, in this respect, the court as a matter of "policy," treated the risk of loss provision exactly as an indemnification provision. See *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972) (no indemnity protection against one's own negligence unless contract clearly expresses such a right). The *Pickett* court cited no authority for its policy determination, but the careful practitioner will undoubtedly include in risk of loss clauses language typically incorporated in indemnification clauses in order to protect a party from the consequences of his own negligence.

161. 665 F.2d 1367 (5th Cir. 1982) (en banc).

162. See *supra* notes 1-25 and accompanying text.

163. See *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331-32 (5th Cir. 1981) (applying Texas law in assessing fairness of exemplary damages).

164. The five factors, in addition to the reasonable proportionality requirement, in evaluating the appropriateness of a punitive damage award are: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the defendant's conduct offends a public sense of justice and propriety. *First Bank & Trust Co. v. Roach*, 493 S.W.2d 612, 619 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

165. 665 F.2d at 1377-78.

166. *Id.* On remand the district court approved a ratio of three to one.

167. *Id.* at 1379.

A particular defendant may not be required under Texas law to bear the burden of a punitive damage award aimed at punishing an entire industry. The proportionality requirement obviously is intended in part to stop this very kind of broad punitive motive of a single jury in a single case. As a result, the district court should circumvent a jury's attempt to discipline an entire industry by way of the industry's lone representative in a solitary lawsuit.¹⁶⁸

IX. LOOSE ENDS

A. Collateral Estoppel

In view of Professor Keeton's extensive treatment of the subject of industry-wide liability in last year's survey issue,¹⁶⁹ only brief mention will be made here of the Fifth Circuit's decision in *Hardy v. Johns-Manville Sales Corp.*¹⁷⁰ In this asbestos case the district court, applying *Erie* indicators, held that Texas would adopt a theory of enterprise- or industry-wide liability in asbestos-related product liability cases by applying notions of nonmutual offensive collateral estoppel.¹⁷¹ In effect the court granted partial summary judgment for the plaintiff on the basis of earlier litigation to which the defendants were not parties. Reversing the district court, the Fifth Circuit first held that the federal law of collateral estoppel, not the Texas law, governed.¹⁷² The court then went on to hold that collateral estoppel could not foreclose trial of the fact issues in *Hardy*.¹⁷³

Practitioners involved in toxic substance or other industry-wide litigation undoubtedly have already studied *Hardy* with care. Students of principles of collateral estoppel will find Judge Gee's scholarly opinion to merit close review.

B. Slander of Title

The Texas Supreme Court reversed what one court of appeals case called "[t]he more recent trend of law"¹⁷⁴ and held in *A.H. Belo Corp. v. Sanders*¹⁷⁵ that proof of a specific lost sale or sales is required in order to recover in a slander of title action.¹⁷⁶ Proof of impaired vendability was not enough. Instead, the *Belo* court required the plaintiff to point to an identifiable buyer who was ready, willing, and able to purchase his lots.¹⁷⁷ In so holding, the court reaffirmed the rule expressed in *Shell Oil Co. v. Howth*¹⁷⁸ and expressly overruled the court of appeals decision in *Walker*

168. *Id.* at 1378.

169. See Keeton, *Torts, Annual Survey of Texas Law*, 36 Sw. L.J. 1, 1-14 (1982).

170. 681 F.2d 334 (5th Cir. 1982).

171. 509 F. Supp. 1353, 1359 (E.D. Tex. 1981).

172. 681 F.2d at 337.

173. *Id.* at 348.

174. *Ellis v. Waldrop*, 627 S.W.2d 791, 797 (Tex. Ct. App.—Fort Worth), writ *ref'd n.r.e. per curiam*, 25 Tex. Sup. Ct. J. 336 (May 26, 1982).

175. 632 S.W.2d 145 (Tex. 1982).

176. *Id.* at 146.

177. *Id.* at 145.

178. 138 Tex. 357, 366, 159 S.W.2d 483, 490 (1942).

v. *Ruggles*.¹⁷⁹

C. Invasion of Privacy

Two cases decided during the survey period discuss the cause of action for invasion of privacy. In *Barr v. Arco Chemical Corp.*¹⁸⁰ the federal district court held that an employee's secret tape recording of a meeting with representatives of his corporate employer did not give rise to a cause of action for invasion of privacy on behalf of the corporation.¹⁸¹ Although the basis for the court's ruling is not clear, a reading of its opinion suggests that the court concluded that under Texas law the tort of invasion of privacy is personal in nature and does not extend to a corporation.

In *Palmatier v. Beck*¹⁸² the landlord of the plaintiff's son accepted a check in the amount of \$310 from the plaintiff for the son's past due rent. Fearing that the check would be dishonored by the plaintiff's bank, the landlord called the bank, represented himself to be the plaintiff, and was told the amount of money in the plaintiff's account. The defendant then deposited enough money in the plaintiff's account to make the check good and cashed it. The plaintiff sued the bank and landlord for invasion of privacy.¹⁸³ The court of appeals held that the plaintiff had no cause of action for invasion of privacy,¹⁸⁴ stating that it found no Texas case holding that there was a cause of action under facts similar to those presented. It placed particular emphasis on the fact that the landlord did not reveal the status of plaintiff's bank account to third parties.¹⁸⁵

It appears that *Palmatier* was wrongly decided. *Billings v. Atkinson*,¹⁸⁶ in which the tort of invasion of privacy was first recognized in this state, did not establish a requirement that an invasion of an individual's private business and personal affairs must be followed by a publication of those affairs by the defendant before a cause of action arises. Moreover, in *Gonzales v. Southwestern Bell Telephone Co.*¹⁸⁷ the court of appeals expressly recognized the form of the invasion of privacy tort that involves the "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs."¹⁸⁸ *Gonzales* and the authorities cited therein offer ample support for the existence of a cause of action on behalf of an individual whose private banking and financial affairs are invaded by a person falsely representing himself to be the individual whose privacy is invaded.

179. 540 S.W.2d 470, 474 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

180. 529 F. Supp. 1277 (S.D. Tex. 1982).

181. *Id.* at 1283.

182. 636 S.W.2d 575 (Tex. Ct. App.—Fort Worth 1982, no writ).

183. The plaintiff apparently did not allege a cause of action under the Texas Debt Collection Act, TEX. REV. CIV. STAT. ANN. art. 5069—11 (Vernon Supp. 1982). It would seem, however, that the landlord violated § 5(a) of that Act, which prohibits a debt collector from using a false name while engaged in the collection of a debt.

184. 636 S.W.2d at 578.

185. *Id.* at 577.

186. 489 S.W.2d 858 (Tex. 1973).

187. 555 S.W.2d 219 (Tex. Civ. App.—Corpus Christi 1977, no writ).

188. *Id.* at 221 (emphasis added).

D. Inducing Breach of Contract

An employee acting in his employer's best interest is privileged to induce his employer to breach a contract with a third party so long as he does not use wrongful means.¹⁸⁹ The court of civil appeals in *Eloise Bauer & Associates, Inc. v. Electronic Realty Associates, Inc.*¹⁹⁰ engrafted the exception that the privilege does not apply if the employee is acting to further his own interests rather than those of his employer.¹⁹¹ This exception holds true, according to the court, even when the employee is found to have acted within the course of his employment.¹⁹²

E. "Puffing"

In *Dowling v. NADW Marketing, Inc.*¹⁹³ the Texas Supreme Court held that an advertised "buy-back" agreement contained in a newspaper ad constituted a specific promise and did not constitute mere "puffing."¹⁹⁴ As such, the promise could be made the basis of the plaintiff's action for fraud. In so holding, the court reaffirmed that "[p]uffery" is an expression of opinion by a seller not made as a representation of fact.¹⁹⁵

189. RESTATEMENT (SECOND) OF TORTS §§ 766, 767, 770 (1977 & Supp. 1979); see *Lone Star Steel Co. v. Wahl*, 636 S.W.2d 217, 222 (Tex. Ct. App.—Texarkana 1982, no writ) (evidence of malice necessary for recovery in actions for interference with future contracts).

190. 621 S.W.2d 200 (Tex. Civ. App.—Texarkana 1982, writ ref'd n.r.e.).

191. *Id.* at 203.

192. *Id.*

193. 631 S.W.2d 726 (Tex. 1982).

194. *Id.* at 729.

195. *Id.*

