Personal Torts

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INTRODUCTION

"It is the function of justice not to do wrong to one's fellow-men".

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Cicero, De Officiis I, 97, (Miller Translation, Cambridge Univ. Press 1913).

Tort law is a body of law that creates and provides remedies for civil wrongs that do not arise out of contractual duties or statutes.[1] It is also one of the most practical areas of law—dealing with auto accidents, medical malpractice, and defective baby seats—often touching those who ordinarily have little contact with the legal system. But as esoteric or banal as a survey of tort law may first seem, it is important for three reasons: (1) tort cases directly affect not only the rights of individual parties, but the rights and responsibilities of all individuals and businesses who face similar issues every day; (2) tort cases often resolve fundamental debates within jurisprudence and legal theory having broad reaching affects on other areas of law (for example, the admissibility of expert testimony established in tort cases applies to experts serving in contract cases); and (3) tort cases often reflect the current moral and political philosophy prevailing in our system of jurisprudence.

Over the past year, a distinct pattern has emerged in the disposition of personal injury cases by the Texas Supreme Court. In almost every personal injury case decided during the Survey period, the supreme court has decided in favor of the defendants. With very few exceptions, the cases surveyed resulted in a win for the defendant corporation, insurer, or business and a corresponding loss for the individual plaintiff. The long-term effect of these decisions will be far reaching. The supreme court decided important tort cases in the hot-

1. "Tort" is the Norman word for a "wrong." As traditionally used, this kind of wrong is distinct from a contractual or criminal wrong. G. Edward White, Tort Law in America: An Intellectual History, p. xxiii (2003).

button areas of workers' compensation, personal jurisdiction, subrogation, vicarious liability, and causation. In addition, the Texas courts of appeals made their first foray into the "paid or incurred" debate. These opinions looked at the issue of whether plaintiff may only recover medical expenses she actually paid or whether she may also recover for expenses "incurred" when visiting a treating doctor or hospital. For now, the answer to that question and the future of the collateral source rule[2] remain unclear. But the decisions provide insight and reasoning that may be persuasive in the future. In light of the changing judicial environment in Texas, both plaintiff and defense counsel should pay special attention to decisions that alter well-settled law or establish new principles.

I. WORKERS COMPENSATION

The holding in Entergy Gulf States, Inc. v. Summers,[3] while significant, is far less likely to have a practical impact on an injured employee's right to sue third parties than many commentators suggest. The case broadens, slightly, the definition of a "general contractor"

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2. The purpose of the collateral source rule is based on longstanding and sound public policy recognizing that a tortfeasor should not have the benefit of insurance proceeds procured by the injured party and to which the wrongdoer was not privy. Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 934 (Tex. 1980); see also Texarkana Mem'l Hosp. Inc. v. Murdock, 903 S.W.2d 868, 874 (Tex. App.—Texarkana 1995, writ granted) ("The tortfeasor, however, has no right to get the benefit of a bargain made by [the benefit provider]."), rev'd on other grounds, 946 S.W.2d 836 (Tex. 1997).

3. No. 05-0272, 2007 WL 2458027 (Tex. 2007).

under the Texas Labor Code as it applies to the protections given to employers that provide workers compensation coverage. The protection, known as the "exclusive remedy defense" states that an injured employee's remedy is limited to the coverage provided under the applicable policy of workers' compensation insurance, barring any suit against an employer providing such coverage. Conversely, an injured employee may sue a non-subscriber employer or a third party that is not covered by the statutory protections. In Entergy, the Texas Supreme Court agreed to extend employer protections provided to a "premises owner," in the limited circumstances where a premises owner meets the requirements of a general contractor under the Labor Code. The supreme court stated that "the governing Labor Code definitions of general contractor and subcontractor do not forbid a premises owner from also being a general contractor."[4]

The case itself is very fact intensive. Entergy Gulf States hired International Maintenance Corp. (IMC) to perform construction and maintenance on its Sabine Station plant in Texas.[5] The construction contract referred to IMC as both a 'contractor' and as an 'independent contractor.' It assigns no special reference to Entergy other than to refer to Entergy and its affiliates as "Entergy Companies." Based on these few facts alone, this appears to be a typical business arrangement whereby a premise owner (Entergy) retains a general contractor (IMC) to perform services. This, however, is where the typical nature of the fact pattern stops.

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4. Id. at *3 (emphasis added).

5. Id. *1 n.1.

The portion of the contract defining IMC as an independent contractor specifies that this language should not be construed to bar Entergy from raising the 'statutory employee' defense. Entergy and IMC later amended the contract to "recognize Entergy as the statutory employer of the IMC employees (while IMC would remain the 'direct employer') in order to take advantage of a Louisiana law that shields statutory employers from tort liability." The amended contract also provided that in exchange for a reduced contract price, Entergy would obtain and pay for a policy to provide workers' compensation coverage to IMC's Sabine plant employees. Summers was injured while working for IMC at the Sabine plant. "He applied for and received benefits under the policy, then sued Entergy for negligence."[6]

The Texas Supreme Court looked at the definition of a "general contractor" under the provisions of the Texas Labor Code that make worker's compensation benefits an employee's exclusive remedy against an employer for covered work-related injures.[7] The supreme court concluded that "the governing Labor Code definitions of general contractor and subcontractor do not forbid a premises owner from also being a general contractor."[8] The supreme court held "that a premises owner that undertakes to procure work falls within the statute's definition of a general contractor."[9] The supreme court also noted that

6. Id.

7. Id. at *2 (citing **Tex. Labor Code Ann.** §§ 408.001(a) (Vernon 2006)).

8. Id. at *3.

9. Id. at *1.

a "general contractor 'may enter into a written agreement [with a subcontractor] under which the general contractor provides workers' compensation coverage to the subcontractor and the subcontractor's employees, and such an agreement 'makes the general contractor the employer of the subcontractor and the subcontractor's employees for purposes of the workers' compensation laws."[10] Further, the supreme court limited its analysis to whether a premises owner could also be a general contractor.

Given the narrow scope in this case, [11] and a finding that Summers waived one of its arguments,[12] the Texas Supreme Court found that Entergy met the qualifications of a general contractor as defined by the Labor Code and thus, was entitled to the Labor Code's exclusive-remedy defense.

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10. Id. (citing **Tex. Labor Code Ann.** §§ 406.123(a) and (e) (Vernon 2006)).

11. Summers entire suit was premised on the argument that Entergy did not qualify for the protections of the exclusive-remedy defense under the Texas Labor Code. Therefore, it was unnecessary for Summers to have raised each specific requisite element of the statute at trial, when in fact Summers raised the defense in its entirety as the very premise of its suit. Nonetheless, the supreme court began its opinion by summarily dismissing, and thus not addressing, this requirement. Had it been properly raised, it may well have prevented the statutory employer defense from extending to Entergy, even in this unique situation.

12. The supreme court concluded that Summers did not timely raise the argument related to one of the requisite elements of being a general contractor, and therefore it was waived.

II. "PAID OR INCURRED" AND SUBROGATION

The holding in Daughters of Charity Health Services v. Linnstaedter[13] resolved the apparent conflict between the Texas Property Code, which grants hospitals the right to file liens against an accident victim's causes of action, and the Texas Labor Code's cap on workers' compensation medical payments. Specifically, "whether a hospital paid by a workers' compensation carrier can recover the discount from its full charges by filing a lien against a patient's tort recovery."[14] The supreme court's decision, while significant, is also regularly cited incorrectly as controlling on the issue of "paid and incurred" expenses; an issue incorrectly referenced in a footnote.

The facts of the case are as follows: coworkers Donald Linnstaedter and Kenneth Bolen were riding together in a car during the course of their employment when they were involved in a motor vehicle accident. The coworkers were transported to and treated at the same hospital.[15] The hospital charges totaled $22,704.25, of which the workers' compensation carrier paid $9,737.54. In accordance with the Texas Property Code, the hospital filed a lien for the balance of the charges with the county clerk. The lien attached to the employees' claims against the at-fault driver.[16] Linnstaedter and Bolen settled their claims for $175,000, of which the third-party carrier paid $12,966.71 to pay off the hospital

13. 226 S.W.3d 409 (Tex. 2007).

14. Id.

15. Id.

16. Id.

lien.[17] Linnstaedter and Bolen brought suit against the hospital to recover the $12,966.71 claiming that the hospital's lien was invalid under the workers' compensation caps of the Labor Code.[18] The hospital countered that it had a valid claim under the lien provisions of the Texas Property Code.

"To secure costs a health[care] provider may incur treating accident victims, the Texas Property Code grants hospitals a lien on any cause of action a patient may have against a tortfeasor."[19] "To ensure full coverage for employees protected by workers' compensation, [however,] the Texas Labor Code provides that hospitals 'may not pursue a private claim against a workers' compensation claimant' for all or part of the costs of treatment."[20] The supreme court reasoned that the lien only exists as a result of the underlying claim and that "the only support for a hospital lien is its claim for reimbursement from the patient."[21]

The supreme court determined that "while the Property Code grants hospitals a lien to secure their fees, the Labor Code prohibits liens against compensation patients."[22] "A hospital that treats workers' compensation patients is bound by the Labor Code's

17. Id.

18. Id.

19. Id. at 411 (citing **Tex. Prop. Code Ann.** § 55.002(a) (Vernon 2007)).

20. Id. (citing **Tex. Labor Code Ann.** § 413.042(a) (Vernon 2007)).

21. Id.

22. Id.

provisions."[23] "Included among those provisions are caps on reimbursement, and a bar against asking patients or their compensation carriers for more."[24] The supreme court held that "because hospitals cannot sue such patients for the discount, they cannot accomplish indirectly (by filing a lien) what they could not do directly (by filing suit).[25]

In discussing the hospital's argument, the supreme court noted that the "hospital's most salient point is that in the suit against Jones, Linnstaedter and Bolen sought the full medical charges billed by the hospital rather than the reduced amount paid by their compensation carrier."[26] The supreme court agreed that "a recovery of medical expenses in that amount would be a windfall; as the hospital had no claim for these amounts against the patients, [Linnstaedter and Bolen] in turn had no claim for them against Jones."[27] The supreme court, in footnote 22, cited Allstate Indemnity Co. v. Forth,[28] for the proposition that "an insured who had no exposure for unreimbursed medical expenses had no standing to assert a claim against her insurer for underpayment"[29] and stated that "[t]his rule has since

23. Id.

24. Id.

25. Id. at 410.

26. Id. at 412.

27. Id.

28. 204 S.W.3d 795, 796 (Tex. 2006).

29. Daughters of Charity Health Scv., 226 S.W.3d at 412 n.22.

been codified" in section 41.0105 of the Texas Civil Practice and Remedies Code.[30] However, section 41.0105 is the paid-or-incurred statute enacted as part of HB 4 in 2003, years after the filing of Linnstaedter. As a result, section 41.0105 was not briefed nor argued before the Texas Supreme Court.

Because the applicability of section 41.0105 was not properly before the supreme court, its comments concerning section 41.0105 in footnote 22 are merely obiter dictum.[31] As such, the supreme court's comments constitute neither binding nor persuasive authority.[32] Therefore, the supreme court's comments on the issue of the paid-or-incurred doctrine should not prejudice future litigation.[33]

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30. Id.

31. Obiter dictum is distinguishable from judicial dictum. Obiter dictum "is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case." Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). "Judicial dictum, a statement made by the supreme court made very deliberately after mature consideration and for future guidance in the conduct of litigation, is 'at least persuasive and should be followed unless found to be erroneous.'" Id.

32. Nichols v. Catalano, 216 S.W.3d 413, 416 (Tex. App.—San Antonio 2006, no pet.); Edwards, 9 S.W.3d at 314.

33. BFI Waste Sys. of North Am., Inc. v. North Alamo Water Supply Corp., 251 S.W.3d 30, 30 (Tex. 2007).

Although Mills v. Fletcher[34] was the first opinion to address the Texas paid-or-incurred statute, codified in section 41.0105 of the Texas Civil Practice and Remedies Code, it provides little precedence. The case is a mere plurality opinion and, therefore has no binding precedential value. Even within the San Antonio appellate district it is merely dicta.[35] Because the opinion is merely dicta, it is of no greater precedence than a dissenting opinion and, to the extent either can be considered persuasive authority, it has no more persuasive authority than a dissenting opinion.[36] Therefore, it is important not only to analyze the persuasive value of the plurality opinion, but also that of the dissenting opinion. Regardless, the case is noteworthy on the basis that it is the first case to consider the paid-or-incurred doctrine.

Fletcher sued Mills for personal injuries. The jury found for Fletcher and awarded him

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34. 229 S.W.3d 765 (Tex. App.—San Antonio, 2007, no pet. h.).

35. See, e.g., Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996) (plurality opinions are not binding precedent); Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 176-77 (Tex. 1994); City of Fort Worth v. Crockett, 142 S.W.3d 550, 554 n.23 (Tex. App.—Fort Worth 2004, pet. denied); D.M. Diamond Corp. v. Dunbar Armored, Inc., 124 S.W.3d 655, 659 n.6 (Tex. App.—Houston [14th Dist.] 2003, no pet.); Conner v. Conticarriers & Terminals, Inc., 944 S.W.2d 405, 413 (Tex. App.—Houston [14th Dist.] 1997, no writ) Toubaniaris v. Am. Bureau of Shipping, 916 S.W.2d 21, 24 n.3 (Tex. App.—Houston [1st Dist.] 1995 pet. denied) (plurality opinions are merely dicta).

36. See Toubaniaris, 916 S.W.2d at 24 n.3.

$1,551.00 in past medical expenses. Mills appealed arguing that Fletcher's medical expenses should have been reduced pursuant to Texas Civil Practice and Remedies Code section 41.0105 because his medical providers accepted reduced amounts for their services from his health insurance company.[37] Justice Karen Angelini held that "section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or 'written off.'"[38] Justice Steven C. Hilbig concurred in judgment only. Justice Catherine Stone dissented.

The plurality opinion ignores well-settled law and clear legislative history in reaching several of the conclusions upon which the holding is based. First, the supreme court ignores that "incurred" is well defined in Texas case law in an effort to develop its own result-oriented definition. Although the word "incurred" is not defined in section 41.0105, there is substantial case law defining "incurred" with respect to medical expenses. For instance, the Texas Supreme Court has held that a patient incurs hospital charges even though Medicare actually pays the amount due.[39] Likewise, in Texarkana Memorial Hospital, Inc. v. Murdock,[40] the Texarkana Court of Appeals reviewed a $500,000 jury award for medical expenses where Medicaid paid only $352,784 and the hospital was

37. Id.

38. Id. at 769.

39. Black v. Am. Bankers Ins. Co., 478 S.W.2d 434, 436 (Tex. 1972).

40. 903 S.W.2d 868 (Tex. App.—Texarkana 1995, writ granted), rev'd on other grounds, 946 S.W.2d 836 (Tex. 1997)

statutorily barred from seeking the difference from the patient. Regardless, the court of appeals ruled that the plaintiff "would be liable for all necessary medical expenses incurred by her child."[41] Additionally, the Austin Court of Appeals has twice denied the admissibility of reduced Medicare and Medicaid payments under the collateral source rule.[42]

Second, the plurality opinion mistakenly restricted the collateral source rule to only prevent a wrongdoer from benefiting from insurance independently procured by an injured party to which the wrongdoer was not privy.[43] To the contrary, the collateral source rule is not merely limited to claims involving private insurance procured by the victim. Instead the collateral source rule also applies in other contexts including free medical services given to a plaintiff,[44] fringe benefits received by the plaintiff related to the claim,[45] voluntary payment of wages by an employer,[46] veterans' income and care

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41. Id. at 874.

42. See Wong v. Graham, No. 03-00-00440-CV, 2001 WL 123932, *11 (Tex. App.—Austin Feb. 15, 2001, no pet.) (not designated for publication); Martinez v. Vela, No. 03-98-00707-CV, 2000 WL 12968, at *3 (Tex. App.—Austin Jan. 6, 2000, no pet.) (not designated for publication).

43. Id. at 769 n.3.

44. See Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 934 (Tex. 1980).

45. See McLemore v. Broussard, 670 S.W.2d 301, 303 (Tex. App.—Houston [1st Dist.] 1983, no writ).

46. See Houston Belt & Terminal Ry. Co. v. Johansen, 179 S.W. 853, 853-54 (Tex. 1915).

benefits,[47] Veterans' Administration disability benefits,[48] medical insurance purchased by the plaintiff,[49] reductions in medical expenses actually paid by Medicaid,[50] benefits paid by the Medicaid program,[51] and payments and reductions from Medicare.[52]

Finally, the plurality opinion mistakenly concludes that the legislature intended to abrogate the collateral source rule.[53] A simple review of the legislative history of section 41.0105 demonstrates that the legislature considered amending the collateral source rule, yet ultimately decided against any modifications to the collateral source rule.[54] However,

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47. See Montandon v. Colehour, 469 S.W.2d 222, 229 (Tex. Civ. App.—Fort Worth 1971, no writ).

48. See Traders & Gen. Ins. Co. v. Reed, 376 S.W.2d 591, 593-94 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.).

49. See Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 582 (Tex. App.—Houston [1st Dist.] 1992, no writ).

50. See Texarkana Mem'l Hosp. Inc. v. Murdock, 903 S.W.2d 868, 873 (Tex. App.—Texarkana 1995, writ granted), rev'd on other grounds, 946 S.W.2d 836 (Tex. 1997).

51. See Martinez v. Vela, No. 03-98-00707-CV, 2000 WL 12968, at *3 (Tex. App.—Austin Jan. 6, 2000, no pet.) (not designated for publication).

52. See Wong v. Graham, No. 03-00-00440-CV, 2001 WL 123932, at *11 (Tex. App.—Austin Feb. 15, 2001, no pet.) (not designated for publication).

53. Mills, 229 S.W.3d at 769 n.3 (Stone, J., dissenting).

54. Id. at 771 (citing Kirk L. Pittard, Dead or Alive; The Collateral Source Rule After HB4,

the plurality opinion concludes that the language of section 41.0105 is so clear and unambiguous that an analysis of its meaning does not require a review of the legislative history.[55] In so concluding, the plurality opinion decides that section 41.0105 limits the plaintiff from recovering amounts of medical expenses that have been written off by the health care provider, even though current Texas case law considers write-offs by health care providers a collateral source, which should not be used to reduce the plaintiff's recovery of medical expenses.[56] It is difficult to imagine how the significant legislative history of an ambiguous statute can summarily be dismissed as irrelevant. Moreover, the plurality opinion disregards standard rules of statutory construction, particularly those that presume that the legislature enacts legislation "with complete knowledge of the existing law and with reference to it," and that statutory analysis should include

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The Advocate, Winter 2006, at 76, 76-77 (outlining the five versions of the statute that were considered before section 41.0105 was enacted)).

55. Id. at 769 n.3.

56. See, e.g., Brown, 601 S.W.2d at 934 (analyzing free medical services given to the plaintiff in the context of the collateral source rule); Oil Country Haulers, Inc. v. Griffin, 668 S.W.2d 903, 904 (Tex. App.—Houston [14th Dist.] 1984, no writ) (same); Texarkana Mem'l Hosp., 903 S.W.2d at 873 (Medicaid); Martinez, 2000 WL 12968 at *3 (discussing Medicaid in the context of the collateral source rule); Wong, 2001 WL 123932 at *11 (addressing Medicare in the context of the collateral source rule).

consideration of applicable common law.[57]

All of this seems even more incredible when one considers that at the very time this opinion was issued, the Texas Legislature was in session and repealed Texas Civil Practice & Remedies Code section 41.0105. While subsequent legislative action certainly does not reflect prior legislative intent, it certainly seems to be a good indicator of what the legislature is currently considering. The Texas House of Representatives voted unanimously to repeal section 41.0105, and all but two senators agreed. However, Governor Perry vetoed the legislation after the Texas Legislature was out of session and could no longer override his veto.[58]

The proper analysis of the meaning of section 41.0105 is more adequately set forth in Justice Stone's dissenting opinion. Justice Stone notes that "[t]he language of [section 41.0105] is not a model of clarity, perhaps because it underwent numerous revisions before it was finalized."[59] Justice Stone further explained that regardless of whether section 41.0105 is ambiguous, the supreme court could consider various factors to discern

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57. Helena Chem. Co. & Hyperformer Seed Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001); Acker v. Tex. Water Comm'n, 790 S.W.2d 299, 301 (Tex. 1990).

58. Veto Statement of Gov. Perry to the Members of the Senate and House of Representatives of the 80th Texas Legislature, Regular Session (June 15, 2007) (on file with author).

59. Mills, 229 S.W.3d at 771.

the meaning of the statute.[60] Justice Stone further recognized that the Texas Code Construction Act teaches that when the legislature enacts a statute "it is presumed that the entire statute is meant to be effective; a just and reasonable result is intended; feasible execution of the statute is contemplated; and public interest is favored over an private interest."[61] As Justice Stone concluded, the plurality opinion's interpretation of section 41.0105 failed to comply with any of these presumed statutorily intended outcomes. [62]

Furthermore, Justice Stone found that the plurality's opinion failed to give meaning to the term "incurred" as that term has been interpreted in Texas case law for many years.[63] Justice Stone referred to Black's Law Dictionary, which demonstrates that one incurs liability when one suffers or brings on oneself a liability or expense.[64] Furthermore, Justice Stone cited longstanding and uncontroverted case law that holds that medical charges are incurred at the time the services are rendered to the patient.[65] Noting that there are situations in which medical expenses are not paid, but are nevertheless incurred, Justice Stone acknowledged that there are certain situations in which the terms "paid" and

60. Id. at 771.

61. Id. (citing **Tex. Gov't Code Ann.** § 311.021 (Vernon 2005)).

62. Id.

63. Id.

64. Id. (citing **Black's Law Dictionary** 782 (8th ed. 2004).

65. Id. (citing Black v. Am. Bankers Ins. Co., 478 S.W.2d at 434 (Tex. 1972)).

"incurred" must take on different meanings.[66]

Justice Stone further rejected the plurality's conclusion because it failed to "produce a just or reasonable result."[67] According to Justice Stone, under the plurality's opinion, a "wrongdoer is rewarded by the injured party's foresight [in obtaining] medical insurance, [and] in many instances it will likely be the wrongdoer's liability insurance carrier that actually benefits from the injured party's foresight."[68] As Justice Stone pointed out, "insult is added to injury when the injured party pays premiums for medial insurance coverage and then watches the benefits of that coverage lower the accountability of the tortfeasor for her negligent conduct."[69]

Justice Stone further noted that health care providers often take months to generate medical bills, to be followed by health insurance carriers who take the several additional months to review, process, and pay the bills.[70] Therefore, at what point is a court to determine when the bills have been incurred?[71] Justice Stone asked "what happens when there is a dispute regarding the amounts due or the extent of coverage?"[72] Furthermore,

66. Id.

67. Id. at 771-72.

68. Id. at 772 (emphasis added).

69. Id.

70. Id.

71. Id.

72. Id.

"what if adjustments are made after litigation is initiated or concluded?"[73] Justice Stone noted that section 41.0105 does not provide answers to such questions, and concluded that the reason the statute is silent on these issues is because the statute was "not intended to spawn these issues."[74] Justice Stone finally concluded that "[t]here is simply no indication that the collateral source rule was eliminated by section 41.0105, thus there is no need for these questions to arise."[75]

In a thoughtful analysis regarding the public and private interests associated with section 41.0105, Justice Stone noted that the public interests demonstrate that "(1) citizens should be responsible and purchase medical insurance to the extent they are financially able to do so; (2) responsible citizens should reap the full benefit of insurance coverage they have purchased; (3) tortfeasors should be held accountable for their actions; and (4) tortfeasors should not be fortuitous beneficiaries of an injured party's foresight to purchase medical insurance."[76] Justice Stone further noted that the private interest appears to be "that of liability insurance carriers seeking to minimize their expenses in resolving liability claims."[77] However, Justice Stone concluded that there was "nothing in the statute

73. Id.

74. Id.

75. Id.

76. Id.

77. Id.

indicating the [l]egislature sought to elevate the private interests above public interests."[78] In fact, the language of the statute itself suggests the contrary. The legislature rejected the earlier draft versions of section 41.0105 that eliminated the collateral source rule, thus signaling its belief in the public benefit of maintaining the collateral source rule.

Gore v. Faye[79] dealt with the procedural issue of when evidence relating to the limitation of section 41.0105, the paid or incurred statute, should be presented: either (a) pre-verdict to the jury for its consideration, or (b) post-verdict to the court alone for its sole consideration pre-judgment.[80] Thus, the Amarillo Court of Appeals narrowly addressed, "whether the trial court was required to implement section 41.0105 through presentation of evidence to the jury."[81]

Faye sued Gore for personal injuries arising out of an automobile collision.[82] At trial, Faye introduced evidence through statutory affidavits of the amounts charged for treatment by four of her healthcare providers.[83] The itemized statements attached to the affidavits were redacted, reflecting only the initial charges and not the amounts paid,

78. Id.

79. 253 S.W. 3d 785 (Tex. App.—Amarillo, 2008 no pet.).

80. **Tex. Civ. Prac. & Rem. Code** § 41.0105 (Vernon 2008).

81. Id. at *4.

82. Gore, 253 S.W.3d at 786.

83. Id. at 787.

adjusted, or discounted.[84] During trial, the court denied Gore's request to submit evidence to the jury of the payments and discounts applied to the medical bills.[85] The trial court ruled that this was a "post-verdict pre-judgment matter" and permitted Gore to submit the evidence to the court only for consideration post-verdict and pre-judgment.[86]

Gore appealed arguing that section 41.0105 required the court to admit evidence of payments and discounts applied on Faye's medical bills for the jury to consider, as opposed to solely for post-verdict prejudgment consideration as the trial court had ruled.[87]

The Amarillo Court of Appeals, ruled that section 41.0105 is a post-verdict matter and that evidence relating to the limitation of section 41.0105 is not proper jury evidence, reasoning that "section 41.0105 contains no procedural direction for its application at trial."[88] The court further noted that, "admission of such evidence before the jury in a personal injury case involves a significant departure from existing trial practice in Texas."[89] The court held that "[w]ithout a more explicit statutory provision or guidance from our supreme court, [it saw] no abuse of discretion in the trial court's decision to apply section

84. Id.

85. Id. at 788.

86. Id. at 789.

87. Id.

88. Id.

89. Id. at 790.

41.0105 post-verdict."[90]

In Fortis Benefits v. Cantu,[91] a landmark case that reversed nearly three decades of settled law, the Texas Supreme Court set aside the made whole doctrine as it applies to health insurance subrogation claims in Texas.[92] The made whole doctrine, as enunciated in the 1980 case of Ortiz v. Great Southern Fire & Casualty Insurance Co., states that an insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the third party causing the loss or their insurer.[93] In finding that contract subrogation rights prevail over equitable subrogation rights, the supreme court effectively subjugated the rights of injured Texans in favor of insurance companies.

The precise issue as the Texas Supreme Court framed it was "whether the equitable 'made-whole' doctrine—the rule that an insurer is not entitled to subrogation of medical benefits unless the insured has been 'made whole'—trumps an insurer's contract-based

90. Id.

91. 234 S.W.3d 642 (Tex. 2007).

92. The very purpose of the made-whole doctrine is that when a liable third party has insufficient funds to make the injured victim and the injured victim's insurer whole for the losses suffered, the insurer should bear the loss because it contracted and received premiums for this very risk. See Ortiz v. Great So. Fire & Cas. Ins. Co., 597 S.W.2d 342, 344 (Tex. 1980) (quoting Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512, 514 (Wis. 1977)).

93. Id.; Ortiz, 597 S.W.2d at 344.

subrogation right."[94] The supreme court held "that the 'made-whole' doctrine must yield to Fortis's right to contractual subrogation under the plain terms of the insurance policy."[95] In order to reach this inequitable result, the supreme court not only ignored decades of its own precedent and years of precedent from other courts, but also failed to recognize a health insurance contract as an adhesion contract promulgated by insurance conglomerates with far superior bargaining power than most insureds. Thus, the supreme court literally modified the contractual language by reading the words "first money" into the contract to establish when and how much Fortis should receive.

Vanessa Cantu was rendered a paraplegic as the result of a car accident on April 12, 1998.[96] She subsequently sued the driver of the car in which she was the passenger (Michael Patman), the driver's employer (Sundance Resources, Inc.), the vehicle seller, and Ford Motor Company.[97] Fortis, Ms. Cantu's medical insurer through her father, intervened to recover the monies it paid under the medical insurance policy.[98] All parties agreed that Fortis need not participate in pre-trial or trial proceedings but could assert subrogation

94. Fortis Benefits (Fortis II), 234 S.W.3d at 644.

95. Id.

96. Id. at 644. For further factual details, see also Fortis Benefits v. Cantu (Fortis I), 170 S.W.3d 755, 756 (Tex. App.—Waco, 2005, pet. granted), rev'd, 234 S.W.3d 642 (Tex. 2007).

97. Fortis II, 234 S.W.3d at 644.

98. Id.

and reimbursement claims only against Ms. Cantu after rendition of a verdict.[99]

Prior to trial, Ms. Cantu settled her claims with all defendants for $1.445 million.[100] Her medical expenses totaled $378,500, and Fortis claimed to have paid $247,534.14 of this total.[101] In Fortis' action against Ms. Cantu, the parties disagreed regarding the portion of the settlement proceeds, if any, that should be paid over to Fortis.[102] Ms. Cantu moved for summary judgment, arguing that she had not been "made whole" by the settlement because two "life care plans" estimated her future medical expenses to be $1.7 million and $5.3 million.[103] Because her past and future medical expenses, "exceeded the amount of settlement plus what Fortis had already paid," "the 'made-whole' doctrine precluded Fortis' contractual claims of subrogation and reimbursement."[104] Ms. Cantu's summary judgment evidence also consisted of her attorney's affidavit confirming that she had incurred $378,500 in past medical expenses and attached the two life-care plans.[105]

The Waco Court of Appeals noted that Fortis objected to Ms. Cantu's summary judgment evidence, but did not specifically object to her attorney's affidavit of past medical expenses

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99. Id.

100. Id.

101. Id.

102. Id.

103. Id.

104. Id.

105. Fortis I, 170 S.W.3d at 757.

or to the life-care plans as hearsay.[106] Fortis submitted an employee affidavit proving up the $247,534.14 it paid for Ms. Cantu's medical expenses.[107] This affidavit also stated that unless the court held that Fortis was not obligated to pay future medical expenses, there was a "reasonable probability" that Fortis would continue "to be obligated to process" Cantu's future medical benefits provided numerous conditions were met including the policy remaining in force indefinitely.[108] Fortis did not provide any specific amount of future medical expenses, creating a fact issue as to that amount.[109] The policy had a lifetime maximum benefit of $2 million, of which $247,534.14 had been paid.[110]

After reviewing this evidence and entertaining argument of counsel, the trial court entered summary judgment in favor of Ms. Cantu.[111] The Waco Court of Appeals affirmed.[112] The Waco Court of Appeals stated that "[a]n insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss."[113] The appellate court relied on well-settled law that,

106. Id.

107. Id.

108. Id. (emphasis added).

109. Id. at 758.

110. Id.

111. Id.

112. Id.

113. Id. (citing Ortiz 597 S.W.2d at 343).

"[w]hile an insurance contract providing expressly for subrogation may remove from the realm of equity the question of whether the insurer has a right to subrogation, it cannot answer the question of when an insurer is actually entitled to subrogation or how much it should receive."[114] The court's reasoning relied on fundamental precepts of insurance law:

> [t]he principal purpose of an insurance contract is to protect the insured from loss, thereby placing the risk of loss on the insurer [because] the insurer has accepted payments from the insured to accept this risk of loss [and] therefore, if 'either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is the risk the insured has paid it to assume.[115]

After conducting its review, the Waco court concluded that, "[t]his basic principle cannot be summarily overcome by a boiler-plate provision in an insurance contract that purports to entitle the insurer to subrogation out of the first monies received by the insured."[116] "To find otherwise would be to defeat the fundamental contractual expectations of the average insured."[117] Accordingly, the court of appeals held that "Fortis's contractual subrogation and reimbursement rights are subject to the made-whole doctrine."[118]

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114. Id. (citing Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 637 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.)).

115. See id. (internal citations omitted).

116. Id.

117. Id. (citing Oss v. United Servs. Auto. Ass'n, 807 F.2d 457, 460 (5th Cir. 1987)).

118. Id.

Fortis immediately appealed to the Texas Supreme Court. Justice Willet delivered the supreme court's opinion. After a brief recitation of facts, the Texas Supreme Court explained the genesis of the made-whole doctrine from the Ortiz case, a case concerning property loss.[119] In that case, the supreme court stated that equity cuts both ways, such that while equitable subrogation prevents the insured from receiving a double recovery (once from the insurer and again from the tortfeasor), it also prevents the insurer from recovering from the insured when the insured's total recovery is less than his total loss.[120] Distinguishing the present case from Ortiz, the supreme court then opined that "Ortiz would govern if Fortis merely asserted a claim for equitable subrogation."[121] The supreme court found that Fortis was not citing equitable principles, but separate contractual rights of subrogation and reimbursement.[122] Finding that contract rights trump equitable principles, the supreme court held that the made-whole doctrine did not displace Fortis's contractual subrogation or reimbursement provisions.[123]

The supreme court had to overcome several other hurdles, however, in order to decide whether Fortis's contract rights trumped Cantu's equitable rights. First, the supreme court summarily rejected years of precedent where courts applied the equitable principles of the

119. Fortis II, 234 S.W.3d at 644.

120. Id. at 645.

121. Id.

122. Id.

123. Id.

made-whole doctrine to contractual subrogation claims.[124]

Second, the supreme court had to reconcile public policy concerns by holding that Fortis's contractual subrogation and reimbursement provisions trump equitable public policy concerns. The supreme court relied on a distinguishable case involving a statutory worker's compensation policy to make its otherwise unsupported global finding that, "[n]either subrogation nor reimbursement clauses violate Texas public policy."[125] The supreme court also relied on mere obitur dicta in footnote 51 to infer that Fortis's contract bears the tacit approval of the TDI because the Texas "Insurance Code requires insurers to submit their insurance forms to the [Texas Department of Insurance ("TDI")] for approval" and because "TDI can disapprove forms it deems unjust [but] did not do so here."[126]

Third, the supreme court sidestepped the issue of whether a health insurance carrier has inequitable bargaining power. The fact is that Ms. Cantu was covered by a health insurance policy issued to her father's employer under which Ms. Cantu was covered.[127] While the supreme court concedes that this was likely an adhesion contract, it relied on one of its recent opinions to hold that even "adhesion contracts are not automatically unconscionable

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124. See id. at 645-46. (refusing to apply the holding and reasoning of Oss v. United Servs. Auto. Ass'n, 807 F.2d 457 (5th Cir. 1987)), and Esparza v. Scott & White Health Plan, 909 S.W.2d 548 (Tex. App.—Austin 1995, writ denied)).

125. Id. at 649 (citing Ortiz, 597 S.W.2d 342, 343).

126. Id. at n.51.

127. Fortis I, 170 S.W.3d at 757.

or void."[128] The supreme court then stated, again in pure obitur dicta, that it is not per se unconscionable for an insurer to include a subrogation or reimbursement clause in an adhesion contract.[129]

Once the supreme court brushed aside all obstacles to Fortis's recovery, they had to resolve the question of when an insurer is actually entitled to subrogation and how much it should receive. In other words, was Fortis entitled to "first money" under the terms of its contract language? Fortis's contract did not spell-out who received money first or that the insurer had a claim to "first money," instead stating only that Fortis was subrogated to all rights of recovery that Cantu had against anyone.[130] The supreme court noted that "[n]owhere does this provision suggest that Cantu must first be "made-whole" for Fortis to recover."[131] Of course, the converse was also true.[132] Disregarding an established rule of constitution that a contract, particularly an adhesion contract, should be construed against the drafter of the contract, the supreme court read nonexistent language into the Fortis contract in determining that Fortis was in fact entitled to "first money."[133]

The supreme court's landmark holding in Fortis marks one more example of how the

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128. Fortis II, 234 S.W.3d at 650 n.53.

129. Id.

130. Id.

131. Id.

132. Id.

133. Id.

Texas Supreme Court has subjugated the rights of individuals to the rights of big business. While providing a favorable environment for companies to do business in the state may be a lofty goal, it should be buffered with safeguards and protections for those not in a position to protect themselves.

III. PRE-TRIAL AND DISCOVERY

In Low v. Henry,[134] a prescription drug products liability case where medical malpractice was pleaded in the alternative, the Texas Supreme Court broadened attorney sanctions under chapter 10 of the Texas Civil Practice and Remedies Code to cover claims made in the alternative.

The plaintiff, a widow whose husband died in 1999 after taking the prescription drug Propulsid, sued the manufacturer of the drug and the individual doctors believed to have prescribed the drug to the plaintiff's deceased husband.[135] The medical malpractice claims against the doctors were brought in the alternative, while the thrust of the suit were the claims against the drug's manufacturer. The medical records obtained by the plaintiff's attorney prior to filing suit did not indicate whether the accused doctors had actually prescribed the drug to the plaintiff. Citing a lack of evidence establishing that the doctors had prescribed the drug to the decedent, the doctors filed motions for sanctions against the plaintiff widow and her attorney under Texas Rule of Civil Procedure 13 and chapters 9 and 10 of the Texas Civil Practice and Remedies Code. The plaintiff's attorney subsequently

134. 221 S.W.3d 609 (Tex. 2007).

135. Id. at 613

withdrew from representing the plaintiff, but the trial court permitted the doctors to move forward on their motions for sanctions against the attorney. The attorney contested the sanctions on the basis that the medical malpractice claims were made in the alternative to the claims against the manufacturer. The trial court sided with the doctors and imposed $50,000 in sanctions against the attorney citing only chapter 10 of the Texas Civil Practice and Remedies Code.[136] The attorney appealed.

The supreme court considered the application of chapter 10 of the Texas Civil Practice and Remedies Code to alternative pleadings. As permitted under Texas Rule of Civil Procedure 48, pleading in the alternative allows multiple allegations, which may even conflict, to be alleged against a defendant, but there still must be a reasonable basis for each alternative allegation.[137] By signing the pleading, the signer certifies that each claim, each allegation, and each denial is based on the signatory's "best knowledge, information, and belief, formed after reasonable inquiry."[138] The statute dictates that each claim and each allegation be individually evaluated for support. Similarly, the fact that an allegation or claim is alleged against several defendants—so-called "group pleadings"—does not relieve the party from meeting the express requirements of chapter 10. Each claim against each defendant must satisfy chapter 10 of the Texas Civil Practice and Remedies Code.

The supreme court determined that sanctions were merited, but remanded the case to

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136. Id.

137. **Tex. R. Civ. P.** 48

138. **Tex. Civ. Prac. & Rem. Code Ann.** § 10.001 (Vernon 2002).

the trial court to reconsider the amount of the penalty as there was no evidence that sanctions imposed were based on expenses, court costs, or attorney's fees as required by the statue.

In In re Graco Children's Products, Inc.,[139] a products liability case, the plaintiffs were not allowed to seek discovery of a defendant manufacturer's testing or state of mind in relation to its other products. Plaintiffs' five-week-old son died during an automobile rollover accident near McComb, Mississippi, allegedly due to a faulty harness clip on the infant's car seat which failed to restrain him proximately causing the death.[140] Graco was the manufacturer of the car seat.

Two weeks before trial, Graco entered into a provisional settlement with the Consumer Products Safety Commission, agreeing to pay a "$4 million dollar penalty—the largest penalty ever imposed by the agency—for failing to report defects in more than a dozen products, including high chairs, swings, strollers, toddler beds and infant carriers."[141] But the sole defect cited in Graco's car seats was the carrying handle used only when walking, not driving. Following the settlement between Graco and the Consumer Products Safety Commission, the plaintiff's attorney immediately served a notice of deposition and a request for production on Graco, seeking twenty categories of documents relating to the products recalled for product defects, complaints received by Graco, or any person

139. 210 S.W.3d 598 (Tex. 2006)

140. Id. at 601.

141. Id. at 600.

involved with the products or the investigation. Graco objected on the basis that the recall was unrelated to the car seat or defects described in plaintiff's suit, and would require Graco to produce approximately 20,000 pages of documents located in three states.[142] The trial court ordered Graco to produce two representatives for deposition as well as all the documents that the plaintiff requested. Later, when the appellate court denied relief, Graco filed a writ of mandamus to the Texas Supreme Court.

Though the supreme court acknowledged the general rule that "the scope of discovery is within the trial court's discretion,"[143] the supreme court sided with the manufacturer in ruling that the plaintiff's request for discovery was overly broad.[144] On the basis of relevance, the supreme court ruled that the plaintiff could not seek additional discovery on the defendant's alleged failure to conduct rollover testing of other similar products, such as high chairs and strollers.[145] Thus, the manufacturer's state of mind about the efficacy of the car seat did not permit further discovery into the manufacturer's state of mind as to the safety of their other products. In sum, the plaintiff was denied the right to make any inquiry about any of the other products manufactured by Graco to establish Graco's negligence in the instant case.

142. Id.

143. Id. at 600.

144. Id. at 601.

145. Id.

In In re Allied Chemical Corporation,[146] a mass tort case, the Texas Supreme Court ruled that six months is insufficient to provide the defense with a reasonable opportunity to prepare for the first plaintiff's trial, where the plaintiff's experts had not yet been designated.[147]

Approximately 1,900 plaintiffs in Hidalgo County brought a mass tort suit against thirty defendants, for exposure to a "toxic soup" of chemical fumes and leaks from several sites where pesticides were mixed or stored.[148] Through discovery the plaintiffs provided the defendants a "long list of chemicals to which they were potentially exposed, and medical articles and expert reports suggesting some of those chemicals were capable of causing or significantly contributing to some of their diseases. But the plaintiffs did not designate an expert to establish a nexus between their injuries and the defendant's products.

Five years after the case was filed, the trial court consolidated five of the claims and set a trial date. The parties were given a little more than six months to prepare for trial.[149] The defendants sought writ of mandamus to preclude trial on the basis that the plaintiffs had not yet identified a causation expert. The Thirteenth Court of Appeals declined to intervene in what was essentially a discovery or docketing dispute. The defendants then filed a writ of mandamus to the Texas Supreme Court.

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146. 227 S.W.3d 652 (Tex. 2007).

147. Id. at 659.

148. Id. at 654.

149. Id.

In the opinion of the supreme court, setting a trial before the plaintiff's designate their expert could result in a "monumental waste of judicial resources."[150] The supreme court went on to emphasize that in a mass toxic tort action, a claimant must do more than identify the products and provide medical articles and expert reports.[151] The claimant must also designate a medical expert who can connect the plaintiffs' diseases to the defendants' products.[152] Once an expert was designated, the defendants must be given a "reasonable opportunity" to prepare for trial. The supreme court did not define "reasonable opportunity." But in the mass tort context at least, six months from identification of plaintiff's experts was not, in the supreme court's opinion, enough time to permit the defendants to form their defense. Siding with the defendants, the supreme court granted a conditional mandamus and ordered the trial court to vacate its order setting any of the plaintiffs' claims for trial.[153]

In In re Allstate County Mutual Insurance Co.,[154] the Texas Supreme Court intervened on behalf of an insurance company to limit scope of discovery into an insurance company's claims practices. Following a car accident, two plaintiffs filed suit against the at-fault driver and her insurance carrier, Allstate County Mutual Insurance Company, and Allstate's

150. Id. at 658.

151. Id. at 656.

152. Id.

153. Id. at 659.

154. 227 S.W.3d 667 (Tex. 2007).

adjuster Gonzalez.[155] As part of their discovery, the plaintiffs sent the insurer and its adjuster 65 requests for admission, 59 interrogatories, and 89 requests for production. The various discovery requests included requests for transcripts of all testimony given by any Allstate agent on the topic of insurance, every court order where a court found Allstate made a wrongful assessment in the value of a damaged vehicle, personnel files of every Allstate employee that had, according to a Texas court, wrongfully assessed the value of a damaged vehicle, and all documents relating to Allstate's status as a corporation as well as its net worth. Allstate and Gonzalez objected to the plaintiffs' requests as irrelevant (and thus necessarily overbroad), then filed a writ of mandamus.[156]

Based on the scope of plaintiff's claims relating to a specific auto accident and the amount in controversy, the supreme court sided with the insurance company and directed the trial court to vacate its discovery order with instructions that any discovery, if allowed, must be reasonable and narrowly tailored to the specific accident or claim.[157] Further, the supreme court found that any discovery requests into reasons why Allstate might have reneged on settlement offers in the past, would be irrelevant in proving motive or intent under Texas Rule of Evidence 404; Texas Rule of Civil Procedure 192.3; and Texas Rule of Evidence 401.[158] Thus, plaintiffs were specifically prohibited from seeking discovery on

155. Id. at 668.

156. Id.

157. Id. at 670.

158. Id. at 669-70.

virtually any issue relating to the insurer's claims process.

IV. CAUSATION

In Jackson v. Axelrad,[159] the Texas Supreme Court held that in the medical malpractice context a doctor, because of his medical training, may be deemed to have proportionate responsibility for his injuries.[160] In an unusual medical malpractice case, a psychiatrist sued his internist for failure to diagnose diverticulitis. Following months of suffering from intermittent abdominal cramps and diarrhea, the plaintiff experienced an abrupt episode of acute pain prompting him to seek treatment.[161] The defendant internist, who was also a doctor, made a diagnosis of fecal impaction and prescribed a laxative and an enema to relieve the symptoms. As it turned out, the defendant was wrong. The plaintiff was actually suffering from diverticulitis. In such circumstances, an enema is not an appropriate treatment because of the risk of perforating the colon.

At home, the plaintiff complied with his doctor's orders. Immediately following treatment, the plaintiff experienced chills, nausea, rigors, and severe abdominal pain.[162] His wife rushed him to the emergency room. The defendant internist did not come to the emergency room, and the plaintiff was seen by another doctor. The new doctor operated on the plaintiff for a suspected appendicitis. Following surgery, the plaintiff learned that he

159. 221 S.W.3d 650 (Tex. 2007).

160. Id. at 652.

161. Id.

162. Id.

had actually been suffering from diverticulitis and a perforated colon.[163] Treatment included removal of a section of the plaintiff's colon, construction of a temporary colostomy, followed by surgery to reconnect the colon. A severe drug reaction further complicated the plaintiff's recovery.

At trial, the plaintiff and defendant each claimed the other was negligent. The jury agreed with them both, but attributed slightly more fault to the plaintiff, finding him fifty-one percent responsible and the defendant only forty-nine percent responsible. Therefore, the trial court entered a take nothing judgment in favor of the defendant.[164] The court of appeals reversed and remanded the case for a new trial, disregarding any negligence finding against the plaintiff on the basis that laymen are generally under no duty to volunteer information to their doctor during medical treatment.[165] The defendant internist filed an appeal to the Texas Supreme Court.

The Texas Supreme Court, siding with the defendant internist, granted the defendant's petition on the basis that the court of appeals disregarded evidence that the plaintiff did not report when his abdominal pain began.[166] In rendering its opinion, the supreme court

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163. Id.

164. See **Tex. Civ. Prac. & Rem. Code Ann.** § 33.001 (Vernon 2008) ("In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.").

165. Id.

166. Jackson, 221 S.W.3d at 652.

concluded that jurors could consider the plaintiff's expertise and training as a physician.[167] In cases involving medical negligence, the patient carries the burden of proof of establishing that the physician defendant has "undertaken a mode or form of treatment which a reasonable and prudent member of the medical profession would not have undertaken under the same or similar circumstances."[168] The factors to be considered include: the physician defendant's expertise and the means available to him or her, the patient's health, and the current state of medical knowledge.[169] Therefore in a medical malpractice case, a plaintiff physician, even a physician in an unrelated field such as psychiatry, is held to a higher standard than a layperson and can be assessed proportionate responsibility by the finder of fact.

More broadly, the supreme court went on to suggest that any patient's statement to a doctor concerning his or her health may play a critical role in the responsibility of the treating physician.[170] The accepted standard prior to this case had been that a patient has a duty to cooperate in diagnosis in only two instances: (1) responding truthfully to questions posed by a physician and (2) volunteering information that is both significant and unknown to the physician. However, the supreme court disagreed that a patient's duties

167. Id.

168. Id. at 655.

169. Id.

170. Id. at 654.

were confined to only these categories.[171] Instead, the supreme court set out a broader fact-based standard: "[t]he specificity of a doctor's questions and a patient's responses will necessarily depend on many factors—the language skills of each, their specialized knowledge, the length of their relationship, the urgency of the situation, the frequency of previous examinations, the patient's current condition, and so on."[172] Thus, the supreme court suggests that the content and timing of a patient's statements to his or her doctor will play a vital role in determining the doctor's culpability in a medical negligence case.

In Mack Trucks, Inc. v. Tamez,[173] another wrongful death case decided in favor of the defendant, the Texas Supreme Court further restricted the admissibility of expert testimony by ruling that a causation expert must provide reliable methodology to support his or her opinions.[174] The driver of petroleum tanker was killed when his truck overturned.[175] Following the accident, a fire erupted causing the tractor, the trailer, and its cargo to all burn in the fire. The driver escaped, but was badly burned and subsequently died from his injuries. The driver's survivors filed suit against the tractor's manufacturer, Mack Trucks, Inc. ("Mack"), asserting claims for negligence, strict liability, breach of implied warranty, and misrepresentation. Specifically, the plaintiffs alleged that Mack failed to

171. Id.

172. Id. at 655.

173. 206 S.W.3d 572 (Tex 2006).

174. Id. at 581.

175. Id. at 575.

warn the driver that the tractor had design and manufacturing defects including: (1) a fuel system unreasonably prone to releasing fuel during an accident, and (2) ignition sources, such as hot manifolds and electric batteries, which were located in areas conducive to the ignition of released fuel. Plaintiffs designated an expert on design defects and causation to testify about post-collision, fuel-fed fires.[176]

A Robinson[177] hearing was held on Mack's motion to exclude the expert's testimony. At that hearing the expert opined that the tractor's battery was the source for igniting the tractor's diesel fuel because it was located too close to the tractor's fuel tanks. The tractor's own fuel in turn ignited the crude oil being transported in the attached trailer. The expert labeled it a "fire triangle."[178] The expert did not testify how the rollover occurred or how different parts of the vehicle would have been affected or harmed during the rollover. In addition, he did not testify that he had inspected the remains of the burned tractor and trailer, or performed or reviewed any reconstruction analysis.

Defendants moved to exclude the plaintiff's expert testimony and for summary judgment on the basis of an absence of evidentiary proof as to causation. In response to the motion for summary judgment, the plaintiffs filed the expert's deposition and his expert report with the court. They also later submitted the expert's testimony through a bill of

176. Id.

177. See E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

178. Mack Trucks, 206 S.W.3d at 576, 580.

exceptions.[179] Nevertheless, the trial court granted summary judgment in favor of Mack. The court of appeals reversed, based on the evidence included in the bill of exceptions.[180] The Texas Supreme Court disagreed.

The supreme court concluded that the expert testimony set out mere "factors" and "facts" that were consistent with his opinions; specifically, that the fire began when the tractor's battery ignited the diesel fuel in its own tanks. The reliability inquiry as to the admissibility of the expert's testimony asks whether the methodology and analysis used by the expert to reach his conclusions are reliable, not whether his conclusions appear to be valid.[181] Applied in this case, the expert would be required to present some evidence as to the methodology that reliably supported his opinions that the "ignition" and "fuel" parts of the fire triangle were supplied, respectively, by the tractor's battery system and fuel system, in order for the supreme court to accept the expert's testimony on causation as reliable. The fact that fuel system design could have lead to the separation of the hoses during the accident was, standing alone, not sufficient evidence that the hoses did separate. The plaintiff's needed to provide more than mere evidence of a fuel leak to survive summary judgment on their theory that the fire was caused by a defect in the design and manufacture of tractor's fuel system. [182]

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179. See **Tex. R. Evid.** 103(a)(2); **Tex. R. App. P.** 33 (comment to 1997 change).

180. Mack Trucks, 206 S.W.3d at 576.

181. Id. at 581; see also Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004).

182. Mack Trucks, 206 S.W.3d at 582; see also Ford Motor Co. v. Ridgway, 135 S.W.3d 598,

The supreme court zeroed in on the fact that the expert had not inspected the actual ignition system and fuel system of the burned tractor and trailer, or performed or reviewed a reconstruction analysis and, thus, could not testify as to having direct personal knowledge of the alleged defects of this specific vehicle.[183] Because of this weakness, the supreme court reversed and held that the plaintiff take nothing. The supreme court further admonished the court of appeals for having considered as evidence the testimony submitted through the bill of exceptions.[184]

In sum, the Texas Supreme Court ruled that the causation testimony of plaintiff's expert was inadmissible.[185] Having dismissed the expert's opinion on causation, the plaintiffs were without any other evidence on causation, since only an expert could provide testimony on causation in this type of case.[186] The supreme court ordered a take-nothing

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600-01 (Tex. 2004); Gen'l Motors Corp. v. Iracheta, 161 S.W.3d 462, 470 (Tex. 2005); Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 137 (Tex. 2004).

183. Mack Trucks, 206 S.W.3d at 580.

184. The supreme court's admonishment of the court of appeals about reviewing evidence set out in a bill of exceptions leaves one to wonder how a practitioner would preserve excluded evidence at the time of trial. If the plaintiffs' counsel had not made a bill of exceptions to offer the expert's testimony, the case may well have never been reviewed at all.

185. See Mack Trucks, 206 S.W.3d at 580.

186. See Alexander v. Turtur & Assocs., 146 S.W.3d 113, 119-20 (Tex. 2004) (holding that

judgment be entered in favor of the defendants.

In a tragic auto case, Guevara v. Ferrer,[187] the Texas Supreme Court revised its long-standing position in Morgan,[188] in ruling that testimony from laypersons, even if supported by medical records, is legally insufficient to establish causation in a wrongful death case.[189]

An elderly man, Arturo Labao, was a passenger in his son-in-law's car when another motorist turned in front of them causing an accident.[190] Mr. Labao was injured during the accident and died approximately six months later. His daughter and son-in-law filed suit against the other driver for wrongful death. At trial, the plaintiffs testified about the extent of Mr. Labao's injuries and the medical treatment he received following the accident. The plaintiffs also introduced into evidence medical bills demonstrating total medical expenses of more than $1 million. A limited portion of the medical records were introduced into the record at trial, but no medical testimony was given. The medical records referred to the accident, treatment received as a result of the accident, and other medical conditions such as hypertension, heart disease, and joint disease.

The jury awarded Arturo's family over $1.1 million for Arturo's medical expenses and

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expert testimony is required when an issue involves matters beyond jurors' common understanding).

187. 247 S.W.3d 662 (Tex. 2007).

188. See Morgan v. Compugraphic Corp., 675 S.W.2d 729 (Tex. 1984).

189. Id.

190. Id. at 663.

$125,000 for his pain and mental anguish.[191] Although the defendant did not argue that the treatments Arturo received were unnecessary or that the charges were unreasonable, the defendant moved for judgment notwithstanding the verdict on the ground that there was no evidence of a causal link between the conditions treated and the accident. The plaintiffs argued that lay testimony of Arturo having no such conditions prior to the accident, facts about the accident itself, and the sequence of treatments following the accident were sufficient to establish a causal relationship. Regardless, the trial court granted the defendant's motion for judgment notwithstanding the verdict and entered a take-nothing judgment.

The plaintiffs appealed citing Morgan v. Compugraphic Corp.[192] In Morgan the Texas Supreme Court held that testimony from layperson's alone was legally sufficient evidence to establish causation. The court of appeals had agreed that the Morgan standard applied and concluded that the testimony at trial "established a sequence of events which provided a strong, logically traceable connection between the event and the condition" so that a layperson could "determine, with reasonable probability, there was some evidence of the causal relationship between the event and the condition."[193] The court of appeals reversed and remanded to the trial court ordering it to enter a judgment based on the jury's verdict. The defendant appealed, asking the supreme court to reconsider its ruling in Morgan. It

191. Id. at 665.

192. 675 S.W.2d 729 (Tex. 1984)

193. Guevara, 247 S.W. 3d at 665.

did.

Morgan has been the law for more than twenty years. In Morgan, the supreme court stated that expert medical evidence was not needed to establish that chemical fumes from a typesetting machine caused Morgan's medical symptoms.[194] Testimony of lay witnesses on causation was sufficient. The supreme court stated that "lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is [generally] sufficient proof of causation."[195] The supreme court retreated from its ruling in Morgan by distinguishing the case as being fact specific, stating that it "merely applied the rule to a particular set of facts."[196]

The trial evidence presented in personal injury cases, generally includes evidence as to the injured person's condition prior to the accident, the circumstances surrounding the accident, evidence as to the injured person's condition after the accident, and evidence as to the injured person's progress through the prescribed course of treatment following the accident.[197] This type of evidence "establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition" is sufficient to support a finding of causation between an accident and basic physical conditions that are: "(1) within the common knowledge and experience of laypersons, (2) did not exist before

194. Id. at 666, see Morgan, 675 S.W.2d 733.

195. Guevara, 247 S.W.3d at 666.

196. Id.

197. Id. at 666-67.

the accident, (3) appeared after and close in time to the accident, and (4) are within the common knowledge and experience of laypersons, caused by automobile accidents."[198]

In Arturo's case, the medical billing records included, among other expenses, the cost of (1) multiple abdominal surgeries; (2) three separate stays in health care facilities, one being more than three months in duration; (3) a wide variety of pharmaceutical supplies and drugs; (4) numerous laboratory procedures; (5) treatments for respiratory failure; (6) varied forms of physical therapy; (7) treatments for kidney failure; and (8) assorted miscellaneous medical charges. Such treatments suggest complex medical conditions that require expert testimony as to causation.[199] Instead, if Arturo had suffered injuries such as broken bones, cuts, and bruises, and the lay witnesses provided undisputed evidence that he did not have such injuries prior to the accident, then the conditions and causal link between the accident and his physical condition would ordinarily be within the common knowledge and general experience of laypersons.[200]

Because Arturo's treatments occurred over an extended period of months and was not confined to the traditional types of injuries treated immediately after an accident, such as broken bones or lacerations, the supreme court concluded that mere lay testimony coupled with the records was not legally sufficient to prove that all of the treatments resulted from

198. Id. at 669.

199. See Leitch v. Hornsby, 935 S.W.2d 114, 119 (Tex.1996); Lenger v. Physician's Gen. Hosp., Inc., 455 S.W.2d 703, 706 (Tex. 1970).

200. Guevara, 247 S.W.3d at 667.

the accident.[201] Rather, expert testimony would be required. However, the supreme court did acknowledge that lay testimony is alone sufficient to support a finding of causation in the limited circumstances where both the occurrence in question and injuries complained of are of the nature laypersons can evaluate based upon their common knowledge and general experience.[202]

The supreme court remanded the case to the El Paso Court of Appeals to consider remittitur as to expenses for which expert evidence is required, and if the amounts could not be determined, then the case was to be remanded to the trial court for a new trial.

V. IMMUNITY

In a case where an innocent bystander was injured during a police pursuit, City of San Antonio v. Ytuarte,[203] the Texas Supreme Court enhanced governmental-immunity protection by requiring that courts evaluate not only the risk to the public of engaging in pursuit, but also the need to apprehend the suspect.[204] Delores Ytuarte sued the City of San Antonio ("San Antonio") for personal injuries that resulted from a police pursuit of an armed robbery suspect.[205] The pursuit began after police spotted an aggravated robbery

201. Id. at 669-70.

202. Id. at 668.

203. 229 S.W.3d 318, 319-20 (Tex. 2007).

204. Id.

205. Id. at 319-20.

suspect driving a stolen suburban.[206] The pursuit continued for twenty minutes until officers received a command from their sergeant to back off in an apparent effort to trick the suspect into thinking the chase was over.[207] Some time after this order, the suspect crashed into a parked car and injured the plaintiff, Delores Ytuarte.[208]

The trial court denied San Antonio's motion for summary judgment premised on governmental immunity.[209] On interlocutory appeal, the San Antonio Court of Appeals affirmed and San Antonio filed a petition for review with the supreme court. [210] Holding that the decision of the court of appeals conflicted with a prior decision of the supreme court, the court granted review.[211]

In general, a police officer who performs his duties in good faith is immune from civil suit.[212] In order to determine whether a particular police officer acted in good faith the supreme court considers the officer's conduct against the balance of two factors.[213] "[A]n officer acts in good faith if a reasonably prudent officer under the same or similar

206. Id.

207. Id.

208. Id.

209. Id. at 320.

210. Id.

211. Id.

212. Id. at 319.

213. Id.

circumstances could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing (rather than terminating) the pursuit."[214] If the defendant police officer puts forward evidence of good faith in light of these factors, the plaintiff must do more to controvert this proof than present evidence that a reasonably prudent officer could have decided to end the pursuit.[215] Indeed, the plaintiff must show that "no reasonable officer in the defendant's position could have thought that the situation justified the officer's actions."[216] Thus, in effect, the plaintiff must establish, conclusively, that the officer acted unreasonably.[217]

In reversing the court of appeals, the supreme court noted that the court of appeals did not analyze the evidence against the Wadewitz factors at all.[218] Instead of looking at the need to apprehend the suspect and the risk to the public of doing so in a pursuit, the court of appeals focused on whether the officers were still in pursuit of the suspect when he crashed into Ytuarte.[219] In doing so, the court of appeals unnecessarily evaluated a fact issue that was irrelevant to the application of governmental immunity. The supreme court

214. Id.

215. Id.

216. Id.

217. Id.

218. Id. at 320.

219. Id.

believed this constituted error.[220]

The supreme court engaged in its own analysis of whether there was a factual dispute with respect to the Wadewitz factors.[221] The supreme court noted that the officers' deposition testimony sufficiently addressed both the need to apprehend the suspect and the risk to the public in doing so.[222] The supreme court went on to address both parties' expert testimony in light of the requirement that "expert testimony on good faith must address what a reasonabl[y] prudent officer could have believed under the circumstances as well as the need and risk factors."[223] San Antonio's expert testified in deposition about both the need to apprehend the suspect and the risk of pursuing the suspect and concluded that the officers acted in good faith.[224] On the other hand, Ytuarte's expert testified about the risk involved but not the need to apprehend the suspect.[225] Thus, the supreme court held that Ytuarte's evidence was insufficient to controvert San Antonio's proof of good faith.[226] Accordingly, the supreme court reversed the court of appeals and dismissed the

220. Id.

221. Id. at 321.

222. Id.

223. Id.

224. Id.

225. Id.

226. Id.

plaintiff's case.[227]

In City of Dallas v. Thompson,[228] a sovereign immunity case, the Texas Supreme Court posited that the "possibility that a dangerous condition can develop over time" is not knowledge that the condition is dangerous.

Margaret Thompson sued the City of Dallas ("Dallas") when she was injured at Love Field Airport.[229] Thompson was walking through a lobby area when she tripped on a coverplate that protruded from the floor.[230] Dallas knew the coverplate could become loose over time and when it did, they would tighten it.[231] Accident logs showed that people had tripped over the particular coverplate at issue but no one had tripped for the three years previous to Thompson's accident.[232] The trial court granted Dallas's plea to the jurisdiction on sovereign immunity grounds.[233] The court of appeals reversed.[234] The supreme court granted Dallas's petition for review.

While a city is generally immune from suit unless there is evidence that it had actually

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227. Id.

228. 210 S.W.3d 601 (Tex. 2007).

229. Id. at 602 (Tex. 2007).

230. Id. at 603.

231. Id.

232. Id.

233. Id.

234. Id.

knowledge of the alleged dangerous condition, Thompson argued that Dallas actually knew the coverplate could come loose over time and present a danger to those walking in the lobby.[235] The supreme court dismissed Thompson's evidence on the theory that mere knowledge that materials deteriorate over time does not amount to actual knowledge that the condition is dangerous.[236] Even though Dallas knew specifically that the coverplate was prone to come loose and present a danger and had installed extra screws in other coverplates to prevent people from tripping, the court held that this was not enough.[237] Instead, the supreme court stated that knowledge of "the possibility that a dangerous condition can develop over time" is not knowledge that the condition is dangerous.[238] Based on the supreme court's reasoning, Dallas had no actual knowledge of the dangerous condition and was therefore entitled to immunity.[239] Plaintiff's case was dismissed.

VI. VICARIOUS AND DERIVATIVE LIABILITY

In considering the application of proportional responsibility to Texas Dram Shop Act claims, the Texas Supreme Court ruled, in F.F.P. Operating Partners, L.P. v. Duenez,[240] that responsibility must be allocated between the liquor provider and an alcohol consuming

235. Id.

236. Id.

237. Id. at 604.

238. Id.

239. Id.

240. 237 S.W.3d 680, 682 (Tex. 2007).

patron.

Five members of the Duenez family sued F.F.P. Operating Partners, L.P. ("F.F.P.") under the Texas Dram Shop Act after they were injured in a collision with a drunk driver who purchased alcoholic beverages from a Mr. Cut Rate convenience store owned by F.F.P.[241] The drunk driver, Roberto Ruiz, after already having consumed a case and a half of beer, stopped at Mr. Cut Rate to buy more.[242] At Mr. Cut Rate, he purchased another twelve-pack of beer, returned to his truck, opened one of the cans, put it between his legs, and drove away.[243] A mile and a half from the convenience store he swerved across the center line of the highway, causing a head-on collision with the Duenez family.[244] Everyone suffered injuries.[245]

Ruiz was charged criminally with intoxication assault to which he pleaded guilty resulting in a prison sentence.[246] The Duenez family filed a civil suit against Ruiz, F.F.P., the store clerk who sold the beer to Ruiz, and several other parties.[247] F.F.P. filed a cross-claim against Ruiz, naming him as a responsible third party and a contribution defendant.

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241. Id. at 682.

242. Id.

243. Id.

244. Id.

245. Id.

246. Id.

247. Id.

Shortly thereafter the Duenez family nonsuited every defendant except F.F.P.[248] The trial court granted partial summary judgment in favor of the Duenezes, ruling that the proportionate responsibility statute (chapter 33 of the Texas Civil Practices and Remedies Code) did not apply to the case.[249] Accordingly, the trial court severed F.F.P.'s cross-claim against Ruiz, and F.F.P. was left as the only defendant at trial.[250] The trial court refused to submit any questions to the jury regarding Ruiz's responsibility or the proportionate responsibility of Ruiz and F.F.P., and the jury returned a $35 million verdict against F.F.P.[251]

The Corpus Christi Court of Appeals affirmed the trial court's rulings, and F.F.P. appealed.[252] The Texas Supreme Court issued its initial opinion on September 3, 2004, and nearly a year later granted F.F.P.'s motion for rehearing.[253] After oral arguments, the supreme court issued a second opinion on November 3, 2006.[254] The supreme court denied the Duenez family's motion for rehearing and issued a third opinion to replace the November 3, 2006 opinion.[255]

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248. Id. at 682-83.

249. Id. at 683.

250. Id.

251. Id.

252. Id.

253. Id. at 682.

254. Id.

255. Id.

The Texas legislature enacted the Dram Shop Act to hold liquor providers liable when their intoxicated patrons injure others.[256] F.F.P. sought to include Ruiz in the charge because he was liable for his own share of the damages.[257] The supreme court ultimately supported this position, but did so largely in response to the dissents. Two justices, O'Neill and Jefferson, offered separate and unique dissents reasoning that even if Ruiz's name had been submitted and found liable by a jury, F.F.P. would have been responsible for both its share and Ruiz's share of the judgment. Thus, no harm arose from refusing to submit him. The rest of the supreme court disagreed with them.

Justice O'Neill based her conclusion on the language of the Dram Shop Act which states that alcohol providers are liable "for the actions of their customers, members, or guests."[258] Justice O'Neill argues that even though chapter 33 of the Texas Civil Practice and Remedies Code applies, this language in the Dram Shop Act along with the common law principle that imputed liability makes a defendant liable for both its share and the share assigned to the party from which liability is imputed.[259] The rest of the justices disagreed and held that the language of the statute does not make F.F.P. liable for Ruiz's potential share and neither do

256. Id.; see **Tex. Alco. Bev. Code Ann.** § 2.03 (Vernon 2007).

257. 237 S.W.3d at 682.

258. Id. at 703 (O'Neill, J. dissenting); see also **Tex. Alco. Bev. Code Ann.** § 2.03.

259. F.F.P., 237 S.W.3d at 682; see also **Tex. Civ. Prac. & Rem. Code Ann.** § 33.002-.003 (Vernon 2008) (directing the assignment of proportionate responsibility in tort actions).

any other common law principles.[260]

Chief Justice Jefferson dissented based on an analogy between vicarious liability in the negligent entrustment context and the Dram Shop Act.[261] Jefferson, like O'Neill argued that F.F.P. would be liable for both its share of the verdict and any share assigned to Ruiz because of the common law doctrine of vicarious liability, which holds that, "a principal [is] liable for the conduct of his employee or agent."[262]

The supreme court, in distinguishing dram shop liability from negligent entrustment and negligent hiring cases, held that "the [alcohol consuming] patron is not the agent or employee of the dram shop, the provider has no control or right to control the patron, and the patron's actions causing the accident are not in furtherance of the provider's business."[263] Thus, under the Texas Dram Shop Act, the name of the alcohol consuming patron should be submitted along with the liquor provider to the jury for proper assessment of responsibility.[264]

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260. F.F.P., 237 S.W.3d at 686.

261. Id. at 697.

262. Id. at 686.

263. Id. According to the court's ruling in Duenez, a trial court may refuse to submit the tortfeasor in a negligent entrustment or negligent hiring case.

264. See id. at 686-94. The court also discussed the broad import of Chapter 33 and, importantly, that any case involving multiple non-exempt responsible parties is subject to it. Additionally, the court additionally disregarded the potential for defendants to

The Texas Supreme Court defined the meaning of a negligent activity claim as a claim that "arises from activity actively ongoing at the time of the accident" in In re Texas Department of Transportation,[265] a highway fatality case. In that case, Courtney Forman died while riding in a car that went off the road into a river where she drowned.[266] Courtney's parents, Barbara and Steven Foreman, filed suit in Travis County Probate Court against the Texas Department of Transportation ("TxDOT"), Gillespie County ("the County"), and others, including the driver, alleging negligence, gross negligence, premises defect, and special defect or "injury-by-traffic-control-device."[267] The plaintiffs brought their claims under the Texas Tort Claims Act ("TTCA").[268] The court of appeals denied mandamus relief, so TxDOT and the County sought mandamus relief from the Texas

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undermine the purpose of the Dram Shop Act—to discourage liquor sales to drunk drivers. Liquor providers may now reduce their liability by the wrongful conduct of a drunk that is likely insolvent. Id. at 687-90. They base this disregard, in part, on the fact that "it is not true that juries will always assign most of the responsibility . . . to the [drunk] patron." Id. at 693. While it may not always true, it seems that a jury's contempt for drunk drivers is more than probable.

265. 218 S.W.3d 74 (Tex. 2007).

266. Id.

267. Id. at 75-76.

268. Id.

Supreme Court.[269]

The TTCA contains a mandatory venue provision that requires claims made pursuant to the TTCA to be brought in the county in which all, or part of, the cause of action arose.[270] The Foremans argued that venue was proper in Travis County because one of their TTCA claims arose, at least in part, in Travis County. Specifically, they allege that "the negligent decisions and actions by TxDOT employees and agents in Travis County resulted in the condition of the premises at the accident site in Gillespie County [were therefore] part of a premise defect or special defect cause of action."[271] However, the supreme court disagreed. It highlighted its previous distinctions between causes of action based on negligent activities and those based on premises defects.[272] "A negligent activity claim arises from activity contemporaneous with the occurrence, whereas a premises defect claim is based on the property itself being unsafe."[273] Thus, while the Foremans alleged that "TxDOT failed to use ordinary care" in the design and maintenance of the bridge and roadway, those

269. Id. at 76.

270. Id. (citing **Tex. Civ. Prac. & Rem. Code Ann.** § 101.102(a) (Vernon 2005)).

271. Id. at 76.

272. Id. at 77 (citing State v. Shumake, 199 S.W.3d 279, 284 (Tex. 2006); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 753 (Tex. 1998); Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992)).

273. Id. (citing Shumake, 199 S.W.3d at 284; Keetch, 845 S.W.2d at 264).

activities were not actively ongoing at the time of the accident.[274] Put another way, the supreme court explained that "such negligent activities would be causes of the conditions at the scene of the accident," but not the proximate cause.[275]

The supreme court therefore concluded that the Foremans did not properly plead a negligence (or gross negligence) cause of action that would include the allegedly negligent acts or omissions that took place in Travis County.[276] They properly pleaded causes of action only for premises defect or special defect as to the bridge and roadway in Gillespie County, but failed to adequately plead a cause of action against TxDOT and the County for which Travis County would be a proper venue.[277] The supreme court conditionally granted mandamus relief directing the probate court to transfer venue of the underlying case against TxDOT and Gillespie County, to Gillespie County.[278]

VII. FRAUD DAMAGES

In Baylor University v. Sonnichsen,[279] a volleyball coach sued Baylor University

274. Id. at 78.

275. Id.

276. Id.

277. Id. at 78-79.

278. Id. at 79. The supreme court also rejected the Foremans' "injury by traffic control device" and "joint enterprise" causes of action as insufficient to properly plead a negligence cause of action that arose, in part, in Travis County. Id. at 78.

279. 221 S.W.3d 632 (Tex. 2007).

("Baylor") for breach of an oral contract and fraud for failing to enter into a coaching contract. The Texas Supreme Court, ruling in favor of Baylor, found that the only damages not barred by statute of frauds in a contract dispute are out-of-pocket damages.

Tom Sonnichsen was hired to be Baylor's women's volleyball coach in 1989.[280] At that time, Baylor did not issue written contracts to most of its coaches, and did not issue one to Sonnichsen.[281] In May 1995, however, Baylor administrators told their coaching staff, including Sonnichsen, that they planned to begin providing written contracts to their coaching staff. Specifically, Sonnichsen contended, that Baylor orally agreed to enter into a two-year contract with him.[282] Baylor in fact prepared a one-year written contract for Sonnichsen but never delivered it to him.[283] Then in December 1995, Baylor sent Sonnichsen a letter informing him that while he would be paid for his work, he would not receive a contract for the 1996-1997 school year.[284] Sonnichsen subsequently sued Baylor for (1) breach of an oral contract to enter into a two-year written employment contract with him for the years 1995-1997 and (2) fraud arising from Baylor's representations that it would issue him a two-year written contract.[285]

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280. Id. at 633.

281. Id.

282. Id. at 634.

283. Id.

284. Id.

285. Id.

The trial court granted Baylor summary judgment on both of Sonnichsen's claims based on the statute of frauds.[286] The Waco Court of Appeals affirmed the judgment as to the breach of contract claim, but held that, as to the fraud claim, the statute of frauds barred only benefit-of-the-bargain damages.[287] The court of appeals severed and remanded the fraud claim on the basis that Sonnichsen's damages were broader than just benefit-of-the-bargain damages. On remand, the trial court granted a summary judgment motion filed by Baylor based on Sonnichsen's failure to plead for damages other than benefit-of the bargain damages.[288] On appeal, a divided court of appeals held that the trial court abused its discretion by sustaining the special exception without giving Sonnichsen another opportunity to amend his pleadings.[289] Baylor petitioned for review.[290]

The Texas Supreme Court sided with Baylor. Regarding the breach of contract claim, the supreme court held that the trial court was not required to give Sonnichsen an opportunity to amend his pleading because the defect could not be cured by amendment.[291] The supreme court explained that Baylor's written but undelivered contract could not be a

286. Id.

287. Id.

288. Id.

289. Id.

290. Id.

291. Id. at 635.

binding contract because there was no mutual assent.[292] Contracts require mutual assent to be enforceable, and mutual assent "generally consists of signatures of the parties and delivery with the intent to bind."[293] Thus, because Baylor never delivered the written contract to Sonnichsen, there was no evidence of mutual agreement.[294] The supreme court said this problem could not be corrected by an amended pleading, so the trial court did not abuse its discretion in dismissing the breach of contract claim.[295]

The supreme court also sided with Baylor on Sonnichsen's fraud claim.[296] Relying on Haase v. Glazner[297] the supreme court noted that benefit-of-the-bargain damages are barred when they are based on an unenforceable contract.[298] Out-of-pocket damages for

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292. Id.

293. Id. (citing Angelou v. African Overseas Union, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

294. Id.

295. Id. In addition, the Supreme Court ruled that the new factual allegations contained in Sonnichsen's second amended petition regarding representations made by Baylor administrators did not support a "new" breach of contract claim. The facts merely supported his previous breach of contract claim, which was properly dismissed under the statute of frauds. Id.

296. Id. at 637.

297. 62 S.W.3d 795 (Tex. 2001).

298. Id. at 800.

fraud, on the other hand, are not barred.[299] Thus, the nature of the damages Sonnichsen sought would govern the success of his fraud claim.[300] The supreme court examined all of Sonnichsen's alleged damages and determined that they were all claims for benefit-of-the-bargain damages.[301] The supreme court therefore ruled that, because the damages were the same damages Sonnichsen sought to recover under an unenforceable contract, the trial court correctly granted summary judgment in favor of Baylor on the fraud claim.[302] Accordingly, the supreme court reversed the judgment of the court of appeals and rendered a take-nothing judgment against Sonnichsen.[303]

VIII. STANDARD OF REVIEW

In Goodyear Tire & Rubber Co. v. Mayes,[304] the Texas Supreme Court finds that on summary judgment, the appellate court must consider undisputed evidence in the

299. Id.

300. Sonnichsen, 221 S.W.3d at 636.

301. Id. at 636-37. Sonnichsen's alleged damages included his, "1) inability to obtain employment during the 1996-1997 season, 2) the lost opportunity to advance his career and increase earning capacity, 3) the lost revenues from a 1996 summer volleyball camp, and 4) loss of tuition benefits he could have used to complete his master's degree." Id.

302. Id. at 637.

303. Id.

304. 236 S.W.3d 754 (Tex. 2007).

record.[305] Corte Adams worked for Goodyear at its location in Bryan, Texas.[306] He was a hard worker—working long shifts—coupled with long-distance commuting back and forth to Houston. On February 26, 1999, Adams left for Houston from Bryan in a Goodyear vehicle. After finding the tire store (to which he was supposed to deliver tires) closed, he stopped at his dad's house, ate dinner and consumed alcohol. He left the house at around 3:00 to purchase cigarettes at a convenience store. The trip did not go as planned. Indeed, Adams fell asleep at the wheel, crossed the center line into oncoming traffic, and caused a head-on collision with a truck driven by Patrick Mayes who was injured in the crash.[307] Mayes sued Adams and Goodyear. The trial court granted summary judgment for Goodyear on the issue of course and scope of employment. The court of appeals reversed.[308]

The Texas Supreme Court disagreed. While it is true that an appellate court reviewing a summary judgment must consider the evidence in the light most favorable to the non-movant and indulge every reasonable inference in favor of the non-movant, the court is not free to ignore undisputed evidence that is not favorable to the non-movant.[309] The court of appeals here, in determining that there was sufficient evidence to raise a question of fact

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305. Id. at 757.

306. Id.

307. Id.

308. Id.

309. Id. at 757.

regarding whether Adams was acting within the scope of his employment at the time of the accident, considered "only the evidence favorable to Mayes, ignoring undisputed evidence in the record that cannot be disregarded."[310] This, the supreme court held, was error.[311] The supreme court found there to be undisputed evidence that Adams was running a personal errand in the Goodyear vehicle when the collision occurred, and this evidence was sufficient to establish that he was not acting in furtherance of his employer's business at the time.[312] Thus, the supreme court reversed the judgment of the court of appeals, and rendered a take-nothing judgment against Mayes.[313]

310. Id.

311. Id.

312. Id. The supreme court also declared that Adams's receipt of workers' compensation benefits from Goodyear was not competent evidence that Adams was acting within the scope of employment when the accident occurred, id., and that there was no evidence that Goodyear negligently entrusted the vehicle to Adams, id.

313. Id. at 758.