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# Justice Franklin S. Spears: Unsung Hero of Texas Justice In Memoriam.

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# JUSTICE FRANKLIN S. SPEARS: UNSUNG HERO OF TEXAS JUSTICE

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When Franklin S. Spears died last April, Texans lost an unsung modern hero. While Justice Spears was a towering figure to those who followed the development of the common law in Texas in the 1980s, the public at large had no way of knowing how many times and in how many ways he served them by working to assure a vitalized and independent court system. Those of us who worked with Franklin on a daily basis will always miss his wisdom, his humor, and his passionate devotion to justice and fairness.

Like so many Texas judges, Justice Spears came to judicial service through politics. His father was elected to the Texas House of Representatives when Franklin was three years old, and then went on to serve nearly ten years in the Texas Senate. Franklin attended Southern Methodist University for two years and then transferred to the University of Texas (then only at Austin) where he was elected president of the student body. Although Franklin liked to claim that he would have been a deep-carpet corporate lawyer but for his first year Property grade at the University of Texas School of Law, I am convinced that elective office was in his blood. After two years of service in the infantry, where he was principally stationed in Germany, Franklin came home to San Antonio and was elected to the Texas House of Representatives in 1958. Only 27 years old, he defeated his opponent by a two-to-one margin. During his second term in the House, Franklin won a landslide victory in a special election to the Texas Senate when Henry B. Gonzalez resigned to go to Washington.

As a legislator, Franklin was an articulate and independent voice for San Antonio. For example, he was the driving force behind the legislation establishing a medical school in San Antonio. He was

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also the archetypal "young man in a hurry." Perhaps mindful of his own father's death from a heart attack at age 42, he had little interest in sitting on the back bench while awaiting his "turn" for higher office. So when Waggoner Carr vacated the Office of the Attorney General in 1966 to run for the United States Senate, Franklin attempted to move up. While his "blow the whistle on crime" campaign generated considerable enthusiasm, Franklin ultimately lost a runoff election to a better-known, better-financed candidate.

Although his legislative career had ended, Franklin was by no means finished with public service. Perhaps he was influenced by his Uncle Adrian, then United States district judge for the Western District of Texas. Perhaps he recalled his work on Justice Few Brewster's 1954 re-election campaign for the Supreme Court of Texas. Whatever his inspiration, Spears sought and accepted Governor John Connally's appointment to the 57th Judicial District in September 1968, following Sol Casseb's resignation to re-enter private law practice.

After ten years on the trial court bench, Franklin announced his intention to run for the supreme court position being vacated by retiring Justice Price Daniel. Opposed by a district judge from East Texas, Franklin won the State Bar Judicial Poll by more than four to one and the Democratic nomination (then still tantamount to election) by nearly three to one. He took the oath of office from Chief Justice Greenhill, his former employer during the Brewster campaign, on January 2, 1979.[1]

Perhaps no justice in recent history has had a more auspicious start on the supreme court than Franklin Spears. While the court assigns opinions by random lot, what a justice does with those assignments is largely volitional, and Justice Spears made the most of his opportunities. His first three opinions for the court were *Royal Globe Insurance Company v. Bar Consultants, Inc.*,[2] the seminal case on an insurance company's liability under the DTPA for a local recording agent's misrepresentations; *Stoner v. Thompson*,[3] the leading case on post-answer default judgments; and *Eichelberger v. Eichelberger*,[4] arguably the most articulate Texas pronouncement

1. *See Spears on Supreme Court*, 42 TEX. BAR J. 219, 219 (1979).
2. 577 S.W.2d 688 (Tex. 1979).
3. 578 S.W.2d 679 (Tex. 1979).
4. 582 S.W.2d 395 (Tex. 1979).

of the doctrine of inherent judicial power. Before his first year was ended, Justice Spears delivered seven other opinions, including those for the court in *City of Houston v. Clear Creek Basin Authority*,[5] which invigorated Texas summary judgment practice, and *Patterson Dental Co. v. Dunn*,[6] which clarified the allocation of peremptory challenges. All five of these cases have been cited in at least thirty subsequent judicial opinions, led by *Clear Creek* with 1,215 citations! Franklin Spears, young by judicial standards, was still in a hurry.

Unfortunately, the heart problems that would eventually claim his life were already manifesting themselves. Having already suffered one heart attack before coming to the court and another in the fall of 1981, Franklin suffered a stroke while hospitalized after a third heart attack. Although his cognitive ability was unimpaired, his short term memory was affected. Worse, he could no longer read. He considered resigning, but his colleagues persuaded him to stay and attempt to recover. When Justice Spears returned to work, he refused to shirk his duties. His law clerks read all the memoranda and opinions to him, and he dictated his own work. Through extensive therapy and sheer determination, Franklin regained almost all of his abilities. As long as he served on the court, though, his reading speed was diminished. This forced him to spend many long hours preparing for each week's conference. More than one of his law clerks call him the bravest man they have ever met.

Although Franklin himself believed that his health problems kept him from achieving his full potential on the court, his standing among the bench and bar was undiminished. His eloquence remained powerful, and his commitment to justice was still unwavering. In 1984, Franklin ran unopposed in both the primary and general election. As in 1978, he polled more votes than any other judge in Texas at the general election. Though no one knew it at the time, it was the end of an era; no supreme court justice since Spears has been wholly uncontested since his 1984 campaign. In

5. 589 S.W.2d 671 (Tex. 1979).
6. 592 S.W.2d 914 (Tex. 1979).

1987, a random survey of Texas lawyers ranked Justice Spears second only to the then chief justice in competence.[7]

Most court watchers would probably have considered Justice Spears as one of the court's "progressive" or "activist" members. He was not embarrassed to change the common law when he thought it was outdated or just plain wrong. In *Sanchez v. Schindler*,[8] for example, he wrote the opinion that abandoned the pecuniary loss rule in wrongful death cases, arguing that the court should look to "present social realities"[9] to "interpret the laws of Texas to avoid inequity."[10] He rejected the dissenting justices' complaint that the Court was bound by the legislature's failure to accomplish this change by amending the Wrongful Death Act, stating:

> This court originally imposed the pecuniary loss rule as a limitation of the damages recoverable under the Texas Wrongful Death Act. It is, therefore, logical for this court to now act in response to the needs of a modern society, and abolish the antiquated rule in favor of recovery of loss of society and mental anguish. . . . This court should not be bound by the prior legislative inaction in an area like tort law which has traditionally been developed primarily through the judicial process.[11]

Likewise, Justice Spears invoked the "need[s]" of "a changing society" in *El Chico Corp. v. Poole*[12] to create a business host duty against the seller of alcoholic beverages. Similarly, he examined the underlying changes in the post-war national economy in *Melody Homes Manufacturing Co. v. Barnes*,[13] which imposed an implied warranty to repair or modify existing tangible goods or property to a good and workmanlike manner. He flatly rejected the *caveat emptor* rule in this context as "an anachronism patently out of harmony with modern service buying practices."[14]

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7. *See* Mark Obbie, *Poll: High Court Seriously Damaged*, TEX. LAW., Dec. 14, 1987, at 1, 14 (reporting results of Texas Lawyer Poll conducted by Savitz Research Center).

8. 651 S.W.2d 249 (Tex. 1983).

9. *Sanchez*, 651 S.W.2d at 251.

10. *Id.* at 252.

11. *Id.*

12. 732 S.W.2d 306 (Tex. 1987).

13. 741 S.W.2d 349 (Tex. 1987).

14. *Melody Homes*, 741 S.W.2d at 354.

Spears often said that "justice" was both his title and his job. If the existing law did not make sense when it was applied to the facts under consideration, his antennae went up. If Texas was out of step with most other states, he became suspicious. Only when he was satisfied that the law was still sound, or that the decision properly rested in another branch of government, would he acquiesce in the status quo.

Yet Justice Spears was never doctrinaire in his judicial philosophy. In *Azar Nut Co. v. Caille*,[15] he dissented from a decision permitting the recovery of exemplary damages in suits brought for retaliatory discharge for filing a workers' compensation claim. Noting that the "court is not responsible for omissions in legislation,"[16] he chastised the majority for "rewriting the statute to further some vague disingenuous public policy goals."[17] Justice Spears also dissented from the Court's decision in *Williams v. Glash*[18] because he believed that parties ought to be held to their agreements. The mere fact that physical injuries from a car accident manifested themselves only after the plaintiff executed a full release did not, for Spears, justify a claim of mutual mistake.

Justice Spears was also determined to preserve certain evidentiary thresholds which, whatever their harsh effect in a particular case, might work generally to discourage frivolous or fraudulent claims. Thus, he dissented in *Garza v. Maverick Market, Inc.*,[19] and *Brown v. Edwards Transfer Co., Inc.*,[20] which permitted illegitimate children to recover in wrongful death suits. Likewise, he dissented from the abolition of the physical manifestation requirement to recover emotional distress in wrongful death suits in *Moore v. Lillebo*,[21] and in claims for an independent tort of negligent infliction of emotional distress in *St. Elizabeth Hospital v. Garrard*.[22] Defending the necessity of the physical manifestation requirement to "assure that the emotional injury reaches a compensable level," he explained in *Garrard*:

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15. 734 S.W.2d 667 (Tex. 1987).
16. *Azar Nut Co.*, 734 S.W.2d at 671 (Spears, J., dissenting).
17. *Id.* at 671 (Spears, J., dissenting).
18. 789 S.W.2d 261, 265 (Tex. 1990) (Spears, J., dissenting).
19. 768 S.W.2d 273, 276 (Tex. 1989) (Spears, J., dissenting).
20. 764 S.W.2d 220, 226 (Tex. 1988) (Spears, J., dissenting).
21. 722 S.W.2d 683, 688 (Tex. 1986) (Spears, J., dissenting).
22. 730 S.W.2d 649, 654-55 (Tex. 1987) (Spears, J., dissenting).

> The court tacitly suggests jurors are best suited to determine whether and to what extent the defendant caused compensable mental anguish. While jurors are the arbitrators, we must not shirk our responsibility to establish the measurements for recovery and our duty to provide the framework in which a jury performs its essential function.[23]

Not surprisingly, Justice Spears's centrist views not only led him into different alliances on different cases, but sometimes even caused him to draw fire from multiple perspectives in the same case, as in *Nelson v. Krusen*[24] and *Melody Homes*.[25] He did not relish these intramural skirmishes on minute points, however. He was happiest when writing broad pronouncements that purported to clarify and unify complicated areas of the law, as in his famous opinion on appellate review of jury findings of gross negligence, *Burk Royalty Co. v. Walls*,[26] or his virtual treatise on the rendition of judgments in multiple-party products liability actions, *Duncan v. Cessna Aircraft Co.*[27]

While not easily typecast as a "liberal" or a "conservative," some themes were consistent throughout Justice Spears's work on the court. For instance, he always believed in a strong and independent judiciary. Thus, his opinion in *Vondy v. Commissioners Court of Uvalde County*[28] required Uvalde County to fund its constables' salaries because "[t]he legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately."[29] In *Mays v. Fifth Court of Appeals*,[30] he wrote a concurring opinion for the majority of the court reasserting the necessity of inherent judicial power "not only to preserve the judicial branch of government, but also to preserve for the people *their* security and freedom."[31] And in *LeCroy v. Han-*

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23. *Garrard*, 730 S.W.2d at 655.

24. 678 S.W.2d 918, 925, 931, 935 (Tex. 1984) (Robertson, J., concurring) (Kilgarlin, J., concurring and dissenting) (Gonzalez, J., concurring and dissenting) (Wallace, J., joined by McGee, J., dissenting).

25. *Melody Homes*, 741 S.W.2d at 356, 361 (Tex. 1987) (Campbell, J., joined by Wallace, J., concurring) (Gonzalez, J., joined by Hill, C.J., concurring) (Mauzy, J., concurring).

26. 616 S.W.2d 911 (Tex. 1981).

27. 665 S.W.2d 414 (Tex. 1984).

28. 620 S.W.2d 104 (Tex. 1981).

29. *Vondy*, 620 S.W.2d at 110.

30. 755 S.W.2d 78 (Tex. 1988).

31. *Mays*, 755 S.W.2d at 80 (Spears, J., concurring).

*lon*,[32] he wrote the court's opinion striking down a fee statute that allocated a portion of the district court filing fee to the general revenue fund rather than directly to court-related purposes.

Concomitant with the authority he accorded to judges, however, Justice Spears insisted that they conduct themselves in a completely ethical manner. He wrote in his concurrence in *Sun Exploration & Production Co. v. Jackson*[33] that "[t]he judiciary must be extremely diligent in avoiding any appearance of impropriety and it must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence."[34] Perhaps the most vigorous dissent of his tenure came during his final year on the court in *Sears v. Bayoud*.[35] In *Bayoud*, Justice Spears expressed his belief that the other members of his own political party on the court had fallen below the requisite ethical standards by erroneously interpreting the Constitution to remove a Republican supreme court candidate from the ballot.[36]

As the *Bayoud* opinion reveals, Justice Spears had no use for party politics in the judiciary. And while he strongly supported the election of judges,[37] he had complete disdain for the notion of single-member judicial districts, favored by many groups and most of the legislators in his own party as a remedy for the lack of racial diversity in the Texas judiciary. I remember taking him home to grab a coat and tie so that he could participate in an impromptu press conference with Governor Clements and me to denounce such a proposal.

Franklin also made substantial contributions in his role as Court Liaison to the State Bar of Texas. Appointed by Chief Justice Pope when Charles Barrow retired in 1984, Justice Spears was a key figure in devising and implementing an improved grievance and discipline system for the bar.

From my personal standpoint, however, Justice Spears's greatest contribution was his role as a unifying force during a very difficult

32. 713 S.W.2d 335 (Tex. 1986).

33. 783 S.W.2d 202, 205 (Tex. 1989) (Spears, J., concurring).

34. *Jackson*, 783 S.W.2d at 206.

35. 786 S.W.2d 248, 254 (Tex. 1990) (Spears, J., dissenting).

36. *Bayoud*, 786 S.W.2d at 254–58 (Spears, J., dissenting).

37. Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 524 (1988) (concluding that supporters who advocate an appointed judiciary inherently mistrust general public, and abolishing election of judges retreats from democratic principles).

period in the court's history. When I succeeded Chief Justice Hill in 1988, the court was the subject of nationwide ridicule and derision. Scandals and successive resignations had left the justices politically and philosophically divided. Spears, by then the senior justice, was in fact the only member either not on the ballot in 1988 or personally invested in the outcome of those elections. He alone had the trust and confidence of all the other members, and he used his influence to keep our relations cordial and our conferences civil. His wise counsel and firm leadership were vital in enabling me to function as a new chief justice.

Those of us who worked intimately with Franklin will never forget his rapier wit and his outrageous puns. He had a habit of memorializing a justice's more outrageous or unfortunate statements on small scraps of paper, to be pulled from under the conference table glass and thrown back in a subsequent debate. His humor was usually good-natured, frequently directed against himself, and more often than not, used to drive home a needed point.

By the time I reached the court, Franklin knew he would not run again. He and his wife, Becky, were anxious to return to San Antonio, where he would have more time for barbershop quartetting, golf and family. One year before his retirement, Franklin discovered that, despite two open heart surgeries, he would need a heart transplant. He arranged for and underwent that harrowing procedure with his usual fortitude and good humor. In fact, after his surgery, whenever changing position on any issue, he would emphasize: "After all, I've had a change of heart." The transplant gave him six useful years as a mediator and expert witness, and six very happy years with Becky on the golf course. He died suddenly at home, fully-dressed for a mediation, widely mourned but fondly remembered by all whose lives he touched.