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Juries under Siege.

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JURIES UNDER SIEGE

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I. INTRODUCTION

By the end of the 1980s, the expansion of rights and remedies in the Texas court system reached its apex.[1] The business community,

1. *See* Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 51 (1997) (noting that tort law reached a "leftward apex" in the 1970s to mid-1980s); *see also* Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992) (noting that Texas law, since the 1970s, favored tort plaintiffs); Lee Shidlofsky, *The Changing Face of*

manufacturers' associations, the interest groups representing health services and physicians, and the insurance industry were angry; they felt betrayed by juries and by the entire judicial process.[2] Furthermore, the investigative news program *60 Minutes* aired a damning program on the alliances between certain members of the then Texas Supreme Court and several wealthy trial lawyers.[3] Many trial lawyers had become overly prosperous and had drifted away from a base of shared identity with their clients. In addition, the legendary, skilled Executive Director of the Texas Trial Lawyers Association, Phil Gauss, died in 1987.[4] Things were ripe for a change. And change they did.

The various groups who felt victimized by the judicial system of the 1980s were not a homogenous group, but whatever differences they had were set aside to concentrate on electing conservative, activist judges to the Texas Supreme Court.[5] This joint effort was highly successful. In 1988, Thomas Phillips, a former Baker & Botts lawyer, and district judge in Houston, became Chief Justice

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First-Party Bad Faith Claims in Texas, 50 SMU L. REV. 867, 867 (1997) (contending that in the mid- to late-1980s, Texas courts favored insureds over insurers).

2. *See* Rogers v. Bradley, 909 S.W.2d 872, 875-76 (Tex. 1995) (Gammage, J., declaration of recusal) (quoting the transcript of a video used by the political action committee of the Texas Medical Association (TEX-PAC) for the 1992 general election). The TEX-PAC video accused powerful personal injury lawyers of seizing control of the Texas Supreme Court in the 1970s in order to rewrite the law and tilt justice in their favor. *See id.* at 875. As a result, the video stated that "[b]usiness and health care were forced to run for cover. . . . Insurance premiums soared. Hospitals and doctors were forced out of business. Corporations fled Texas. New businesses stayed away." *Id.; see* Lee Shidlofsky, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 SMU L. REV. 867, 867 (1997) (stating that during the pro-insured period of Texas law, insurers "contemplated their future existence in the Lone Star State").

3. *See 60 Minutes: Justice for Sale?* (CBS television broadcast, Dec. 6, 1987) (discussing perceived problems in the Texas judiciary), *cited in* Justice Craig Enoch, *Foreword: Annual Survey of Texas Law*, 48 SMU L. REV. 723, 723 n.3 (1995). The focus of the *60 Minutes* program was the case, *Texaco v. Pennzoil*, and the campaign contributions made to the presiding judge. *See* Justice Craig Enoch, *Foreword: Annual Survey of Texas Law*, 48 SMU L. REV. 723, 723-24 (1995); *see also* Texaco v. Pennzoil, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (upholding the trial court's denial of a motion to recuse the presiding judge), *cert. dism'd*, 485 U.S. 994 (1988).

4. *See ATLA Award Honors Phil Gauss*, 50 TEX. B.J. 1230, 1230 (1987).

5. *See, e.g.*, *Bradley*, 909 S.W.2d app. at 876 (listing the script to Tex-Pac's video used in support of conservative candidates); Jay D. Reeve, *Judicial Tort Reform: Bad Faith Cannot Be Predicated upon the Denial of a Claim for an Invalid Reason If a Valid Reason Is Later Shown:* Republic Insurance Co. v. Stoker, *903 S.W.2d 338 (Tex. 1995)*, 27 TEX. TECH L. REV. 351, 381 n.256 (1996) (discussing tort-reform lobbyists' efforts to elect a conservative Court).

of the Texas Supreme Court.[6] He was joined on the Court by Nathan Hecht in 1989.[7] Hecht had previously been with the Dallas firm of Locke, Purnell, Boren, Laney and Neely and had also served as a Dallas trial and appellate judge.[8] By 1991, conservative, activist judges had a majority on the Court;[9] Phillips and Hecht then provided the leadership to move the Court sharply to the right.[10]

With this new Court, previous expansions of the law were stopped, then rolled backwards. Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons.[11] Legal tools of "no duty," "no proximate cause," "no evidence," "insufficient evidence," "unreliable experts," "unqualified experts," and "junk science" wiped out many jury verdicts.[12] Damages, too, did not go unnoticed. Juries' assessments

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6. *See* Kelley Jones, *Governor Appoints Thomas Phillips Texas Supreme Court Chief Justice*, 51 TEX. B.J. 66, 66 (198·).

7. *See Six Justices on Supreme Court Sworn-In During December and January*, 52 TEX. B.J. 188, 188 (1989).

8. *See* THE AMERICAN BENCH: JUDGES OF THE NATION 2296 (9th ed. 1997); VI MARTINDALE-HUBBELL LAW DIRECTORY 358B (1980).

9. *See* Texas Citizen Action, *The Texas Supreme Court in 1996-97: Insurers, Physicians Win Big Before a Defendant-Oriented Court* (visited July 19, 1998) < http://www.texasca.org/courtwatch/TSCwr.htm> (characterizing the . court's makeup after 1991 as conservative); *see also* Bruce Davidson, *Important Races Get Overlooked*, SAN ANTONIO EXPRESS-NEWS, Aug. 6, 1998, at B5 (describing the Court as currently ultra-conservative), *available in* LEXIS, News Library, Curnws File.

10. *See* Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1732 (1996) (noting that the Court moved to the right after 1991); Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 60 (1997) (stating that the "[c]ourt has taken on a decidedly defense-oriented stance").

11. *See, e.g.*, Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 526 (Tex. 1997) (reversing a jury verdict of over $2 million); Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 938 S.W.2d 27, 29 (Tex. 1996) (per curiam) (reversing a jury verdict that found the insurer had engaged in deceptive trade practices); Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 446 (Tex. 1996) (reversing a jury verdict that granted exemplary damages); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 13 (Tex. 1994) (reversing a jury award of over $1 million); American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 843 (Tex. 1994) (reversing a jury verdict of over $2 million); May v. United Serv. Ass'n of Am., 844 S.W.2d 666, 666-67 (Tex. 1992) (reversing a jury finding of negligence).

12. *See, e.g.*, Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756-57 (Tex. 1998) (limiting the duty owed by premises owners to prevent criminal acts of third parties); Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343 (Tex. 1998) (finding no causal link between the hospital leaving the outer door open and the mental patient escaping); Praesel v. Johnson, 967 S.W.2d 391, 398 (Tex. 1998)

were wiped out by increasingly harsher standards for mental anguish and punitive damages.[13] Summary judgments took on a new life, preventing a large number of cases from ever reaching a jury.[14] Statutes of limitations, particularly in medical cases, were interpreted much more narrowly, adding to the number of summary judgments.[15]

By the mid-1990s, there were at least seven, and frequently eight, conservative justices on the Court.[16] Those interests that were ag-

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(holding that a doctor owed no duty to third parties to warn an epileptic patient not to drive); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997) (concluding that the expert testimony constituted no evidence because it was unreliable), *cert. denied*, 118 S.Ct. 1799 (1998); Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 586 (Tex. 1996) (determining that the hospital was immune from suit under the Texas Tort Claims Act); *May*, 844 S.W.2d at 674 (finding no evidence supporting a jury verdict of agent negligence); *see also* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1699 n.2 (citing cases in which the Texas Supreme Court overturned jury verdicts because of a lack of evidence); Jane Elliott, *Mood Swings: A Conservative Court Discovers a Moderate State of Mind*, TEX. LAW., July 13, 1998, at 1 (noting the Court's "tendency to take issues from juries in favor of determining there is no legal duty on the part of the defendants").

13. *See, e.g.*, Saenz v. Fidelity Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996) (finding that a jury determination regarding the amount of mental anguish damages may be reversed for insufficient evidence); *Moriel*, 879 S.W.2d at 23-24 (limiting punitive damages in insurance bad faith cases).

14. *See, e.g.*, *Bossley*, 968 S.W.2d at 340 (affirming a summary judgment in favor of mental institution); Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 146 (Tex. 1994) (affirming the trial court's summary judgment on plaintiff's insurance and DTPA claims); Kassen v. Hatley, 887 S.W.2d 4, 7 (Tex. 1994) (affirming the trial court's directed verdict in favor of a physician and nurse).

15. *See, e.g.*, Husain v. Khatib, 964 S.W.2d 918, 919 (Tex. 1998) (holding that the limitations period may begin running before the patient knows of the medical condition); Bala v. Maxwell, 909 S.W.2d 889, 891-93 (Tex. 1995) (narrowly applying the statute of limitations in favor of the physician).

16. This list includes Chief Justice Thomas R. Phillips, Justice Nathan L. Hecht, Justice Priscilla R. Owen, Justice Greg Abbott, Justice Craig T. Enoch, Justice James A. Baker, and Justice John Cornyn. *See* Bruce Davidson, *Important Races Get Overlooked*, SAN ANTONIO EXPRESS-NEWS, Aug. 6, 1998, at B5 (describing Justice Spector as the last remaining moderate on the Court and noting that Justice Gonzalez, though a Democrat, is conservative), *available in* LEXIS, News Library, Curnws File. It is too soon to determine in which category the newest member of the Court, Justice Deborah Hankinson, will fit. She replaced Justice Cornyn, who gave up the bench to run for Texas Attorney General. *See* Editorial, DALLAS MORNING NEWS, Apr. 12, 1998, at 3J (discussing Justice Cornyn's resignation), *available in* 1998 WL 2527814. Based on early decisions in which Hankinson has participated, some Court watchers predict that she will help form a new moderate center on the Court. *See* Jane Elliott, *Mood Swings: A Conservative Court Discovers a Moderate State of Mind*, TEX. LAW., July 13, 1998, at 1, 27. Justice Gonzalez, a Democrat, frequently sides with the conservative members of the Court. *See* Nathan Koppel et al.,

grieved by the expansive court of the 1980s are now in total control; the victory is complete.[17] For example, in the 1997-98 term of the Court, defendants won sixty-nine percent of the time;[18] the term before, 1996-97, defendants won about three-fourths of the time.[19] But with certain defendants, the results are even more one-sided.[20] Either in whole or in part, insurance companies won almost all of their substantive cases in 1996 and 1997;[21] physicians,

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Pro-Defense Term Winds Down with a Pro-Plaintiff Bang, TEX. LAW., July 20, 1998, at 4 (citing recent pro-plaintiff cases to which Justice Gonzalez dissented).

17. *Cf.* Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 97 (1997) (stating that the current Court has "bought into" the tort reform movement).

18. *See* Nathan Koppel et al., *Pro-Defense Term Winds Down with a Pro-Plaintiff Bang*, TEX. LAW., July 20, 1998, at 4 (citing a study by Texas Citizen Action).

19. *See* Texas Citizen Action, *The Texas Supreme Court in 1996-97: Insurers, Physicians Win Big Before a Defendant-Oriented Court* (visited July 19, 1998) < http://www.texasca.org/courtwatch/TSCwr.htm>.

20. *See id.* (indicating that insurance companies, governmental entities, and medical defendants won, by far, a majority of their cases).

21. *See, e.g.*, United States Fire Ins. Co. v. Williams, 955 S.W.2d 267, 269 (Tex. 1997) (per curiam) (holding that an insurer cannot be liable for bad faith if it simply misinterprets a rule); Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1, 950 S.W.2d 371, 372 (Tex. 1997) (holding that the insurer could only be taxed 6% prejudgment interest, thus reversing the trial court's assessment of 10%); Trinity Universal Ins. v. Cowan, 945 S.W.2d 819, 825, 828 (Tex. 1997) (holding that the term "bodily injury" in an insurance contract does not include purely emotional injuries and that the term "accident" does not include intentional torts); Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455, 456 (Tex. 1997) (holding that assigning the claim to the plaintiff, who may then seek judgment against the insurer, is invalid if done prior to a fully adversarial trial, if the insurer tendered a defense, and if the insurer accepted coverage or made a good faith effort to adjudicate coverage issues prior to the trial); Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 72 (Tex. 1997) (holding that the good faith duty ends when the parties agree to a judgment); National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997) (per curiam) (stating that insurer had no duty to defend where the insured fired a gun while driving and caused injury to another); Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 938 S.W.2d 27, 28 (Tex. 1996) (per curiam) (barring bad faith claims by third-party claimants); Franks v. Sematech, Inc., 936 S.W.2d 959, 960 (Tex. 1996) (reversing the trial court's dismissal of a carrier's subrogation claim). *Franks*, which held that an employee could intervene in a subrogation claim after the statute of limitations on the original injury claim had run as long as that claim had been brought within the statute, actually represents a victory for the insurer *and* the insured. *See Franks*, 936 S.W.2d at 960-61. In reaching its decision, the Court reversed the trial court's dismissal of the subrogation claim, which was decided after the intervention was dismissed; the intervention was dismissed because it was putatively outside the statute of limitations, and the subrogation claim was a derivative of the original suit. *See id.*

In two other cases that involved insurance companies, the Texas Supreme Court overturned the jury's award of exemplary damages. *See* State Farm Lloyds v. Nicolau, 951

hospital and pharmaceutical companies won all seven of their cases;[22] governmental entities won six out of seven of their cases.[23] Although no one would contend that all of these cases were de-

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S.W.2d 444, 446 (Tex. 1997) (explaining that no evidence confirmed the jury's award of exemplary damages); Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 49 (Tex. 1997) (reversing the jury's award of exemplary damages because no evidence supported a finding for exemplary damages). However, an insurer lost one case, *Gallagher v. Fire Insurance Exchange*. *See generally* Gallagher v. Fire Ins. Exch., 950 S.W.2d 370 (Tex. 1997). However, the holding was not on substantive grounds; the Court gave the plaintiff the right to supplement the record of the case on appeal. *See id.* at 371.

22. *See* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 730 (Tex. 1997) (disqualifying expert testimony in Benedictin case and finding legally insufficient evidence to support judgment); St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 508 (Tex. 1997) (holding the hospital immune in a negligent credentialing case); Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 840 (Tex. 1997) (remanding upon finding insufficient evidence to support jury award); Memorial Med. Ctr. v. Keszler, 943 S.W.2d 433, 435 (Tex. 1997) (finding that a doctor-employee's release and settlement barred all employment claims and that the post-injury release of a gross negligence claim does not violate public policy); Goode v. Shoukfeh, 943 S.W.2d 441, 446-47, 449 (Tex. 1997) (accepting the physician's justification for peremptory strikes and finding that his attorney's voir dire notes were privileged); Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 82 (Tex. 1997) (refusing to grant father's bystander claim after his child was delivered stillborn); Diaz v. Westphal, 941 S.W.2d 96, 101 (Tex. 1997) (finding wrongful death claim time-barred); *see also* Scott & White Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596-97 (Tex. 1996) (recognizing the trial court's plenary power to award sanctions against plaintiffs in a malpractice suit).

23. *See* Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 405-08 (Tex. 1997) (holding that because the suit sought damages, the State was immune even though pleadings included violations of state law); University of Tex. at Dallas v. Ntreh, 947 S.W.2d 202, 202 (Tex. 1997) (accepting an immunity claim in a breach of employment contract case); Texas Utils. Elec. Co. v. Timmons, 947 S.W.2d 191, 201 (Tex. 1997) (finding that the attractive nuisance doctrine did not apply to an electrical tower because the child knew the high-voltage line was dangerous); City of Grapevine v. Roberts, 946 S.W.2d 841, 842-43 (Tex. 1997) (ruling that a cracked and crumbling city sidewalk was an ordinary defect rather than a special defect under the Tort Claims Act); San Antonio Indep. Sch. Dist. v. McKinney, 936 S.W.2d 279, 281-82 (Tex. 1996) (applying res judicata to bar a state court claim of racially motivated termination); City of San Antonio v. Rodriguez, 931 S.W.2d 535, 536-37 (Tex. 1996) (disapproving a jury instruction in a premises defect case and remanding the case for a new trial); *see also* Newman v. Obersteller, 960 S.W.2d 621, 622-23 (Tex. 1997) (finding a coach immune from suit because of the school's immunity); Downing v. Brown, 935 S.W.2d 112, 113-14 (Tex. 1996) (finding a teacher to be protected by official immunity in maintaining classroom discipline); State *ex rel.* Angelini v. Hardberger, 932 S.W.2d 489, 492 (Tex. 1996) (declaring that the statute that deems a vacancy to occur in a state office on the date of acceptance or on the eighth day after receipt, whichever is earlier, cannot trigger an election where the justice submitted a prospective resignation), *enforcement enjoined*, LULAC v. State, 995 F. Supp. 719 (W.D. Tex. 1998). In *Wadewitz v. Montgomery*, the Court reversed a summary judgment in favor of a police officer, finding that there was some evidence that the officer had acted in bad faith, and thus, waived official immunity. *See* Wadewitz v. Montgomery, 951 S.W.2d 464, 467 (Tex. 1997).

cided "wrongly," the appearance of bias leads one to the conclusion that the current Court favors its judgment over that of a jury.

The ripple effect of the Court's conservative philosophy on the judicial process is substantial. Summary judgments are much in the ascendancy, reducing the number of jury verdicts.[24] Jury verdicts, few as they may be, are now subject to harsh scrutiny by conscientious appellate judges who are sworn to follow the Texas Supreme Court's precedent and who are aware that the chance of reversal increases if a large plaintiff's verdict is affirmed.[25] And the larger the verdict, the greater the chance of reversal.[26] If a verdict escapes intermediate appellate scrutiny, it has a more formidable review at the Supreme Court level.

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24. *See* Walt Borges, *Supreme Court's Term Showcases Defendant's Landslide*, TEX. LAW., Aug. 5, 1996, at 19 (noting that University of Texas law professor Alex Albright has predicted the Texas Supreme Court will continue to uphold summary judgments involving issues of legal duty and no evidence), *available in* LEXIS, Legnew library, Txlawr file; Walt Borges, *The Court's Big Chill; The Texas Supreme Court All but Froze out Plaintiffs in 1995*, TEX. LAW., Sept. 4, 1995, at 1 (discussing an interview with Houston lawyer Kathy Butler, in which she states that the Texas Supreme Court will continue to dispose of more cases by summary judgment), *available in* LEXIS, Legnew library, Txlawr file. Courts will continue in this trend of granting summary judgments because the Texas Supreme Court has recently amended the summary judgment rule in a way that will increase the number of cases disposed of at the summary judgment level. *See* Robert W. Clore, Comment, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813, 817 (1998) (stating that courts are more likely to grant summary judgment under the new rule); *Group Says Rule Could Limit Suits*, SAN ANTONIO EXPRESS-NEWS, Aug. 20, 1997, at 2B (discussing how a public interest group, Texas Citizen Action, has warned that the new rule "could keep legitimate cases from going to trial").

25. *See* Bank One, Texas, N.A. v. Stewart, 967 S.W.2d 419, 456 (Tex. App.—Houston [14th Dist.] 1998, writ requested) (overturning a $17 million judgment); *see also* First Am. Title Ins. Co. v. Willard, 949 S.W.2d 342, 354 (Tex. App.—Tyler 1997, writ denied) (reversing trial court's award of $25,000 in exemplary damages and additional damages of $50,000 as well as overturning $45,000 associated with deceptive practices); Houston Mercantile Exch. Corp. v. Dailey Petroleum Corp., 930 S.W.2d 242, 245, 249 (Tex. App.—Houston [14th Dist.] 1996, no writ) (overturning trial court award of $1.6 million for actual damages and over $2 million in punitive damages).

26. *See, e.g., Stewart*, 967 S.W.2d at 453 (indicating the assertion of trial error in the jury awarding actual damages to Stewart in the amount of $1,500,000 and to LRI for $3,400,000); *Willard*, 949 S.W.2d at 354 (reversing the trial court's judgment that Willard recover $150,000 in actual damages and $300,000 for deceptive practices as well as reversing the recovery of $25,000 in exemplary damages and $50,000 in additional damages to Lone Star from First American); Purina Mills, Inc. v. Odell, 948 S.W.2d 927, 930 (Tex. App.—Texarkana 1997, writ denied) (rejecting the jury award of $631,000 for damages to Odell); *Houston Mercantile*, 930 S.W.2d at 245, 249 (reversing actual damage award of $1.6 million).

Justice Hecht has made no secret of his belief that a jury should not be permitted to consider certain issues.[27] Writing a concurring opinion, which was joined by Chief Justice Phillips, Justice Owen, and Justice Gonzalez, in a bad faith insurance case, *Universe Life Insurance Co. v. Giles,*[28] Justice Hecht complained that "bad faith [is] whatever any particular jury thinks it is."[29] Setting out what he and the other concurring judges regarded as an intolerable state of affairs, he expanded, "The jury has become fact finder and final arbiter, subject only to the court of appeals' review of the factual sufficiency of the evidence."[30] Whether an insurer had "no reasonable basis" to deny a claim, according to Justice Hecht, should not be treated as a factual matter to be decided by the jury; rather, he stated, "I believe the issue should be one of law."[31]

In short, Justice Hecht's position would allow the Texas Supreme Court to ultimately decide what was "no reasonable basis." As Justice Spector, writing for the *Giles* majority, correctly pointed out, "Those joining Justice Hecht's concurrence would take the resolution of bad-faith disputes away from the juries that have been deciding bad faith cases for more than a decade."[32] Significantly, Justice Hecht missed obtaining a majority for this viewpoint by

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27. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 70 (Tex. 1997) (Hecht, J., concurring) (arguing that the question of whether no reasonable basis existed in an insurance company's denial of a claim should be a question of law, and not a question of fact for the jury).

28. 950 S.W.2d 48 (Tex. 1997).

29. *Giles*, 950 S.W.2d at 58 (Hecht, J., concurring).

30. *Id.* at 59 (Hecht, J., concurring). Justice Hecht's displeasure in submitting this issue to a jury is further illustrated by his dissenting opinion in *State Farm Lloyds v. Nicolau. See* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 453-54 (Tex. 1997) (Hecht, J., dissenting). In that case, Justice Hecht asserted:

> For plaintiffs, bad faith is more like Hollywood television's Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you play whenever you want, and if you win you hit the jackpot—tens, maybe hundreds, of thousands of dollars for the awful mental anguish that invariably seems to accompany denial of even the smallest insurance claim, and millions in punitive damages.

Id. (Hecht, J., dissenting). Although Chief Justice Phillips joined Justice Hecht in the remainder of his dissenting opinion, Chief Justice Phillips did not join in the section containing the above quote. *See id.* at 453 (Hecht, J., dissenting).

31. *Giles*, 950 S.W.2d at 70 (Hecht, J., concurring).

32. *Id.* at 49.

only one vote and, at the time the opinion in *Giles* was issued, ten more insurance bad faith cases were pending before the Court.[33]

Although *Giles* was an insurance bad faith case, there is no reason to think that Justice Hecht, and the other concurring justices, would limit their reasoning to bad faith cases. Juries routinely decide whether a standard of care has been breached in many cases, some much more complicated than a relatively simple issue of whether an insurance company had "no reasonable basis" in not paying a claim.[34] Legal authors like to think of a clear break between matters of fact that are decided by the jury and matters of law that are decided by the judge.[35] The reality, however, is somewhat more blended.[36]

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33. *See id.* at 58 (Hecht, J., concurring). Assuming that Justice Hecht is unable to form a majority coalition, verdicts in favor of juries under the "no reasonable basis" standard in *Giles* may have a chance for survival even with the Court's current composition, at least with respect to actual damage awards. In *State Farm Fire & Casualty Co. v. Simmons*, Chief Justice Phillips, Justice Gonzalez, and Justice Hankinson joined Justice Spector's majority opinion, which was also joined by Justices Baker and Abbott, finding legally sufficient evidence of bad faith. *See* State Farm Fire & Cas. Co. v. Simmons, 963 S.W.2d 42, 43 (Tex. 1998). Continuing its trend in past cases, however, the Court reversed the punitive damages award. *See id.* at 47-48.

34. *See* Circle Dot Ranch, Inc. v. Sidwell Oil & Gas, Inc., 891 S.W.2d 342, 347 (Tex. App.—Amarillo 1995, writ denied) (holding that the issue of whether an oil and gas lessee breached the duty of a reasonably prudent operator in exercising a pooling option must be remanded for the jury to determine); Republic-Vanguard Life Ins. Co. v. Walters, 728 S.W.2d 415, 421 (Tex. App.—Houston [1st Dist.] 1987, no writ) (noting that the issue of whether an insurer met the prudent person standard "was within the province of the jury"); Coan v. Winters, 646 S.W.2d 655, 657 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (stating that in medical malpractice cases, the jury is to determine whether a doctor breached the standard of care); Stanton v. Westbrook, 598 S.W.2d 331, 331 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (indicating that whether a doctor departed from the required standard of care is an issue for the jury).

35. *See* Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 11 (1997) (describing a jury charge where the judge instructs members of the jury that it is their duty to decide matters of fact, while the judge is to decide matters of law); Louis S. Silvestri, Note, *A Statutory Solution to the Mischiefs of* Markman v. Westview Instruments, Inc., 63 BROOK. L. REV. 279, 296 (1997) (noting that matters of fact are separate from matters of law); *see also* Markman v. Westview Instruments, Inc., 517 U.S. 370, 387 (1996) (indicating that whether the judge or the jury decides a particular issue depends upon whether the issue involves a question of fact or a question of law).

36. *See* Villarreal v. State, 935 S.W.2d 134, 155 (Tex. Crim. App. 1996) (Meyers, J., dissenting) (arguing that the difference between question of law and question of fact is largely a matter of convention); Ball v. Kerrville Indep. Sch. Dist., 504 S.W.2d 791, 795 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (stating that distinguishing between questions of law and questions of fact "is, at best tenuous").

When a jury decides a product liability case, medical malpractice claim, or even a simple automobile-wreck case, and is given a broad-form submission to fill out, it is not just finding facts. Texas courts moved away from granulated findings of fact twenty-five years ago, when Texas Rule of Civil Procedure 277 was amended to permit the broad-form submission of jury questions.[37] In a typical case, a jury finds facts and applies them to a standard of care, which is a matter of law. If, on the other hand, the Court decides that liability is a matter of law, then the jury's right to find facts will simply attenuate into nothingness.

Former Texas Supreme Court Justice Mauzy has been widely condemned for his explanation as to why the Supreme Court reached a different opinion from an earlier case.[38] Mauzy said, "The answer to that question is that the makeup of this court has changed."[39] The statement was certainly injudicious, and to the degree that it implied that this was a satisfactory reason, the statement is worthy of condemnation. However, Justice Mauzy was not necessarily wrong. A more dramatic illustration of the point could not be thought of than to study the Phillips/Hecht Court of the 1990s. Apologists for the Court frequently point out that the excesses of this Court are no worse than the excesses of the 1980s Court, whose opinions were slanted the other way.[40] That may or may not be true, and this Article does not seek to verify or deny this viewpoint. It seems idle to do so. The public is not well-served

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37. *See* TEX. R. CIV. P. 277; *see also* H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258, 260 (Tex. 1992) (recognizing that Rule 277 requires broad-form submissions whenever "feasible"); Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984) (indicating that "broad issues have been repeatedly approved by this court as the correct method for jury submission").

38. *See* Rogers v. Bradley, 909 S.W.2d 872, app. at 876 (Tex. 1995) (quoting from the *60 Minutes* interview with Justice Mauzy).

39. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring).

40. *See* Mary Flood, *Justice Still for Sale? Clock is Ticking on the Answer*, WALL ST.J., June 24, 1998, at T1 (noting that the *60 Minutes* episode, *Justice for Sale*, was the impetus for "a sweeping change in the court, replacing a Democratic majority whose decisions frequently favored plaintiffs with a solidly pro-business, Republican majority"), *available in* 1998 WL-WSJ 3499114; Editorial, *Is Justice Still for Sale?*, AUSTIN AM.-STATESMAN, June 25, 1998, at A12 (stating that "[t]he main differences in the court today and the court 11 years ago are that the old court was controlled by Democrats and the new court by Republicans, and that plaintiffs' lawyers were the big contributors then and corporate defense lawyers are the big donors today"), *available in* 1998 WL 3615574.

by a Hatfields-and-McCoy system of jurisprudence, regardless of which way things are being slanted.

It is probably true that no judge is one hundred percent objective. Judges are human, and to one degree or another, shaped by heritage, experiences, and education. As the great legal scholar Justice Benjamin Cardozo wrote:

> We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.[41]

Given this imperfection in every judge, if it is an imperfection, every judge has an obligation to do the best he or she can to be as objective as possible. If a political philosophy shapes all cases that come before a policy-making high court, and that philosophy blows in the wind of the public opinion that is in vogue at the moment, then the entire jurisprudence of a state changes with each election. This leaves neither predictability nor stability in the law; *si a jure discedas, vagus eris, et erunt omnia omnibus incerta.* "If you depart from the law, you will go astray, and everything will become uncertain to everybody."[42]

The purpose of this Article is to look closely at some of the representative decisions of the Phillips/Hecht Court, particularly in the areas of insurance, health care, governmental immunity, premises liability, and employment. Specifically, this Article focuses on the Court's treatment of stare decisis and its impact on the jury system and future jurisprudence. This Article concludes that over the last ten years the Court has taken great measures to limit the power of juries in a myriad of cases. Notwithstanding this trend over the last ten years, this Article also discusses four recent decisions[43] that

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41. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

42. SIR EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND, OR A COMMENTARY ON LITTLETON 2289 (1628).

43. *See* Uniroyal Goodrich Tire Co. v. Martinez, 42 Tex. Sup. Ct. J. 42, 43, 1998 WL 716932 (Oct. 15, 1998) (holding that a warning does not establish that a dangerous product is not defective); H.E. Butt Grocery Co. v. Bilotto, 41 Tex. Sup. Ct. J. 1213, 1215 1998 WL 388586 (July 14, 1998) (upholding the law that juries can be informed of the legal effect of their decisions); Balandran v. Safeco Ins. Co. of America, 972 S.W.2d 738, 739 (Tex. 1998) (construing policy language in the Texas Standard Homeowner's Policy in favor of coverage); Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1, 2 (Tex. 1998) (deciding that common-

were surprisingly uncharacteristic of the Court's previous decisions and poses the question of whether these decisions indicate a retreat from the Court's conservative ideology or whether they are an election-year anomoly.

II. INSURANCE

The Phillips/Hecht Court has aggressively narrowed traditional concepts of duty and evidentiary standards in cases involving insurance claims.[44] Statistics show that insurance companies rarely lose before this Court.[45] Jury verdicts are overturned, or the damages greatly amputated.[46] Because of space limitations, it is not possible to cover every insurance case handled by the current Court. This

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law claims relating to a vehicle's passenger restraint system are not preempted by the National Traffic and Motor Vehicle Safety Act of 1966).

44. *See, e.g.*, Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 938 S.W.2d 27, 27 (Tex. 1996) (per curiam) (holding that an insurer owes no duty of good faith and fair dealing to the insured in investigating and defending claims by third parties against the insured); Saenz v. Fidelity & Guar. Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996) (reversing the trial court's award of mental anguish because "[t]here must be evidence that the amount found is fair and reasonable compensation"); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994) (requiring an "extreme degree of risk" and "actual, subjective awareness of the risk" by the actor before punitive damages can be awarded); *cf.* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 70 (Hecht, J., concurring) (arguing for the adoption of a legal standard to determine whether "no reasonable basis" existed in insurance bad faith suits).

45. *State High Court Favors Business, Report Finds*, DALLAS MORNING NEWS, July 24, 1997, at 29A (quoting Walt Borges, Director of Citizen's Court Watch program, Texas Citizen Action; calling insurance companies "big winners" before the current Court). *See generally* Trinity Universal Ins. Co. v. Bleeker, 966 S.W.2d 489 (Tex. 1998); State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38 (Tex. 1998); Farmers Texas County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81 (Tex. 1997); United States Fire Ins. Co. v. Williams, 955 S.W.2d 267 (Tex. 1997); Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819 (Tex. 1997); Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455 (Tex. 1997); National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139 (Tex. 1997); *Head*, 938 S.W.2d at 27; *Saenz*, 925 S.W.2d at 607; State Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430 (Tex. 1995); National Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517 (Tex. 1995); Republic Ins. Co. v. Stoker, 903 S.W.2d 338 (Tex. 1995); Transport Ins. Co. v. Faircloth, 898 S.W.2d 269 (Tex. 1995); National Union Fire Ins. Co. v. Reyna, 897 S.W.2d 777 (Tex. 1995); Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170 (Tex. 1995); State Farm Mut. Auto. Ins. Co. v. Azima, 896 S.W.2d 177 (Tex. 1995); Travelers Indem. Co. v. Fuller, 892 S.W.2d 848 (Tex. 1995). The preceding list covers only those insurance cases that hold against the insured from 1995 to the present. *But see, e.g.*, Liberty Mut. Ins. Co. v. Garrison Contractors, Inc., 966 S.W.2d 482 (Tex. 1998); State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997); *Giles*, 950 S.W.2d at 48; Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278 (Tex. 1994).

46. *See, e.g.*, *Moriel*, 879 S.W.2d at 13 (stating that the plaintiff "did not present legally sufficient evidence of gross negligence" to support an award of $1 million in punitive dam-

section concentrates on two areas where the Court either overturned jury verdicts under a putative no-evidence review or narrowed the duty of the insurer so that the question of whether a duty was breached never reached the jury.

A. *Common-Law Agent Liability*

The first way in which the Court has attacked jury verdicts is by narrowing an insurance agent's common-law duty. *May v. United Service Association of America*, decided by the Court in 1992, provides a good example.[47] In that case, Faith and Daryl May spoke with Rex Wiley, who represented Preston Insurance Agency, Inc., in 1983 about purchasing health insurance.[48] In her initial conversation with Wiley, Faith told him that she had lost an infant some years before and that she and her husband wanted children and wanted a policy that covered pregnancy and childbirth.[49] Wiley then sold the Mays a "Double Eagle" group policy that was relatively inexpensive.[50] Unfortunately, the policy allowed the underwriter to cancel the entire group at any time.[51] The policy also permitted the underwriter to defer coverage on group members or covered dependents who were hospitalized or totally disabled at the time coverage began.[52]

In 1984, the "Double Eagle" group coverage was terminated by the existing underwriter.[53] Faith, pregnant at the time, phoned Wiley to make sure that her maternity coverage would not be affected by the change.[54] He assured her that another underwriter had agreed to underwrite an identical coverage plan and there would be no change in her coverage.[55]

In August 1984, Jared May was born with congenital heart and lung disorders.[56] The new insurance carrier covered the immediate

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ages); May v. United Serv. Ass'n of Am., 844 S.W.2d 666, 674 (Tex. 1992) (affirming the court of appeals' judgment that overturned the jury verdict).

47. 884 S.W.2d 666, 667 (Tex. 1992).
48. *May*, 844 S.W.2d at 667.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.* at 667-68
56. *See id.* at 668.

and substantial expense involved.[57] However, this carrier terminated the group a year later, and another company voluntarily assumed coverage.[58] The new company, Keystone Life Insurance Company, classified Jared May as totally disabled, and because he was disabled at the time the Mays' coverage began, it also refused to cover his expenses.[59] Jared remained without coverage until his death in 1987.[60]

The Mays brought suit against Preston and Keystone, seeking damages for unpaid bills and mental anguish, as well as punitive damages.[61] They alleged misrepresentation and negligence.[62] The jury rejected the misrepresentation claim, but it found that Preston was negligent.[63] The jury awarded the Mays $140,000 in unpaid medical expenses.[64] Preston appealed.[65] Partly by redefining an insurer's duty to its insured and partly by conducting a factual sufficiency review in the guise of a legal sufficiency review,[66] the high Court ruled that the parents take nothing.[67]

Writing for the majority, Chief Justice Phillips acknowledged that an insurance agent who agrees to procure insurance for another owes "a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so."[68] However, Phillips said that an in-

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57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.* The suits against Keystone and others were severed because those companies were in receivership proceedings. *See id.*

62. *See id.* The duty to notify the insured of a policy's expiration date has been established by at least two Texas cases. *See* Kitching v. Zamora, 695 S.W.2d 553, 554 (Tex. 1985) (holding the agent liable for failing to notify the insured that the policy was due to expire); Trinity Universal Ins. Co. v. Burnette, 560 S.W.2d 440, 444 (Tex. Civ. App.—Beaumont 1977, no writ) (stating that an insurer has a duty to ensure that an automatically renewing policy is, in fact, renewed).

63. *See May*, 844 S.W.2d at 668.

64. *See* Preston Ins. Agency v. May, 788 S.W.2d 608, 609 (Tex. App.—Texarkana 1990), *aff'd*, 844 S.W.2d 666 (Tex. 1992).

65. *See id.*

66. *See May*, 844 S.W.2d at 674 (Doggett, J., dissenting) (accusing the Court of conducting a factual sufficiency review); *id.* at 678 (Gammage, J., dissenting) (accusing the majority of changing the duty requirement to reach its result).

67. *See id.* at 674.

68. *Id.* at 669. This duty was established in two court of appeals cases. *See* Scott v. Conner, 403 S.W.2d 453, 458 (Tex. Civ. App.—Beaumont 1966, no writ) (stating that "[a]n insurance broker agreeing to obtain insurance owes a legal duty to obtain same, and, if he

sured must demonstrate that the insured was misled into believing that a policy in the insured's name existed.[69] The Court then narrowed the common-law duty of insurance agents to two components: (1) the duty to use reasonable diligence in attempting to place requested insurance, and (2) the duty to inform the client promptly if unable to do so.[70] The Court acknowledged that liability might be extended beyond misrepresentations if the plaintiff shows that there was an "explicit agreement, a course of dealing, or other evidence establishing an undertaking by the agent to determine the customer's insurance needs and to counsel the customer as to how those needs can best be met."[71] The Court said this was not the case here and reversed the verdict.[72]

The majority's rationale overturns a jury verdict at a high legal price to unknowing insureds.[73] First, the Court changed the question to be given to a jury. While the jury was asked in *May* whether the insurer had been negligent or behaved unreasonably, the Supreme Court held that the correct question was only whether the insurance agent had misled the insureds.[74] From there, it was relatively easy to find no evidence supporting the jury's verdict. The jury had already rejected the Mays' misrepresentation claim,[75] therefore ending the Mays' case. The jury's finding of negli-

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cannot, to notify his principal of failure"); Burroughs v. Bunch, 210 S.W.2d 211, 214 (Tex. Civ. App.—El Paso 1948, writ ref'd) (recognizing that "[a]n insurance broker agreeing to obtain insurance owes the legal duty to obtain same an if he can not do so to notify his principal of failure").

69. *See May*, 844 S.W.2d at 669. Phillips noted that in both *Scott* and *Burroughs*, the insured had been misled into believing that he was insured when, in fact, he was not. *See id.* Another case in which an insurer was misled to believe that coverage existed is *Rainey-Mapes v. Queen Charters, Inc.*, in which the court found the insurer liable because the agent assured a shipowner that a trip from the Virgin Islands to Houston was covered when, in fact, the policy excluded parts of the route. *See* Rainey-Mapes v. Queen Charters, Inc., 729 S.W.2d 907, 913-14 (Tex. App.—San Antonio 1987, writ dism'd).

70. *See May*, 844 S.W.2d at 669; *see also* Moore v. Whitney-Vaky Ins. Agency, 966 S.W.2d 690, 692 (Tex. App.—San Antonio 1998, no pet. h.) (citing *May* for the common-law duty of an insurance agent).

71. *May*, 844 S.W.2d at 670 n.10.

72. *See id.* at 674.

73. *See id.* at 674 (Doggett, J., dissenting) (accusing the majority of replacing the jury's deliberations with its own opinions).

74. *Id.* at 669.

75. *See id.* at 670.

gence—that the defendants had failed to act reasonably—became irrelevant.[76]

In addition, the Court elected to disregard evidence that supported the jury's verdict. In a review of the legal sufficiency of the evidence before a jury, the Court was required to consider *only* the evidence supporting the verdict.[77] This standard is designed to afford high deference to jury verdicts.[78] The Court in *May*, however, ignored evidence upon which the verdict might have been based. Even assuming, under the new standard, that liability for conduct that falls short of actual misrepresentation may only be found where the agent has affirmatively held himself out to be an advisor, there was evidence to support the jury's verdict.

Faith May had testified that she specifically informed the agent of the family's needs and concerns regarding maternity and infant coverage.[79] In addition, the Mays had contacted Wiley each time the underwriter of their policy changed, and each time Wiley encouraged the Mays to stay with the "Double Eagle" policy.[80] Wiley had also testified that he did not investigate other, single-carrier policies that might have avoided the total failure of coverage for Jared's illness.[81] Essentially, the jurors had sifted through the evidence and found negligence.[82] However, the Court significantly narrowed the rules, causing the verdict to vanish.[83]

In *May*, the Texas Supreme Court placed Texas juries in a double bind. By narrowing an insurance agent's common law duty, the Supreme Court has virtually eliminated the cause of action for

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76. *See id.* at 676 (Gammage, J., dissenting) (criticizing the majority for "fail[ing] to properly recognize the evidence and clear inferences from it").

77. *See* Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 458 (Tex. 1992) (discussing the standard of review for a "no evidence" appeal).

78. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1699 n.3 (1997) (stating that sufficiency standards of review in Texas show "extraordinary deference to juries").

79. *See May*, 844 S.W.2d at 678 (Gammage, J. dissenting). Justice Mauzy joined in the dissent. *See id.*

80. *See id.* (Gammage, J., dissenting).

81. *See id.* at 677 (Gammage, J., dissenting) (observing that an agent has a duty to have knowledge of the different companies and terms available to the insured) (citation omitted).

82. *See May*, 844 S.W.2d at 668.

83. *See id.* at 669-75.

breaching this duty.[84] Claimants are now left to argue that their case falls within the narrow exception in *May*. However, as *May* demonstrates, doing so will prove to be difficult.

B. *Interpreting Policy Language*

Another way in which the Court has limited the jury's role is by construing language as a matter of law. Construing language in this manner enables the Court to interpret policy language narrowly, without the involvement of a jury. This narrow interpretation is illustrated in *Grain Dealers Mutual Insurance v. McKee*[85] and *Trinity Universal Insurance Co. v. Cowan*,[86] both decided in 1997.

In *McKee,* the Court used rules of contract construction to find that a car owner's daughter was not covered under the car's insurance policy.[87] In this case, Gerald McKee's young daughter was a passenger in a car owned by her step-sister's husband.[88] The car was involved in a collision, and McKee's daughter was injured.[89] McKee was covered at the time by a Business Auto Policy, issued to Future Investments, Inc., a corporation of which McKee was the sole shareholder and president.[90] When the insurer denied coverage, McKee sued.[91] A trial court granted summary judgment in McKee's favor on the issue of coverage, finding that his daughter was covered under a provision in the contract that stated that an insured under the policy included "you and any designated person and any family member of either" and an additional provision that stated that an insured under the policy included "you or any family

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84. Since *May*, no case raising this claim has made its way to the Texas Supreme Court. Only a handful of cases have been decided by courts of appeals, but an insured has not been successful in any of these decisions. *See, e.g.*, *Moore*, 966 S.W.2d at 693 (stating that an agent has no duty to disclose the policy limits to the insured); Sledge v. Mullin, 927 S.W.2d 89, 93 (Tex. App.—Fort Worth 1996, no writ). *But see* Liberty Mut. Ins. Co. v. Garrison Contractors, Inc., 966 S.W.2d 482 (Tex. 1998) (holding that an insurance agent may be sued under Article 21.21 of the Insurance Code).

85. 943 S.W.2d 455 (Tex. 1997).

86. 945 S.W.2d 819 (Tex. 1997).

87. *See* Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455, 458-60 (Tex. 1997).

88. *See id.* at 456.

89. *See id.*

90. *See id.*

91. *See id.*

member while occupying or when struck by any auto."[92] The court of appeals affirmed, finding the policy ambiguous, thereby requiring the court to adopt the construction in favor of the insured and in favor of coverage.[93]

The Supreme Court later reversed, holding that the disputed policy was issued to a corporation, not to an individual.[94] The corporation failed to designate a person in a space provided for such designation and did not list vehicles to be covered under the policy.[95] Further, the policy provided that a child cannot be "related . . . by blood, marriage, or adoption" to a corporation.[96]

Justice Spector, dissenting, agreed with the two lower courts that the language of the policy, viewed in light of the circumstances of its execution, was ambiguous.[97] The corporation in whose name the policy was ordered was solely owned by McKee.[98] The coverage that McKee paid for included family members.[99] Citing several cases from other jurisdictions reaching an opposite conclusion under similar facts, Justice Spector wrote, "The majority's conclusion that the policy language at issue here is not ambiguous defies common sense: the two lower courts in this case and the courts of several other states have discerned a lack of clarity that escapes the majority."[100]

In a case involving the interpretation of a homeowner's insurance policy, *Trinity Universal Insurance Co. v. Cowan,*[101] the Court again rejected the reasoning of the trial court and the court of appeals.[102] In particular, the Court held that purely emotional injuries are not "bodily injuries" that trigger an insured's duty to

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92. *Id.* at 456-57 (discussing the lower court's granting of summary judgment and reviewing the terms of the insurance policy).

93. Grain Dealers Mut. Ins. Co. v. McKee, 911 S.W.2d 775, 779-81 (Tex. App.—San Antonio 1995), *rev'd*, 943 S.W.2d 455.

94. *See McKee*, 943 S.W.2d at 457.

95. *See id.*

96. *Id.*

97. *See id.* at 460 (Spector, J., dissenting).

98. *See id.* (Spector, J., dissenting).

99. *See id.* (Spector, J., dissenting).

100. *Id.* at 461 (Spector, J., dissenting).

101. 945 S.W.2d 819.

102. *See* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 823 (Tex. 1997) (disagreeing with the lower court's holding that purely emotional injuries are bodily injuries within a homeowner's insurance policy); *cf.* National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 142 (Tex. 1997) (reversing the appellate court and find-

defend.[103] In *Cowan*, Gage, a photo lab clerk, made extra prints of four provocative pictures taken of Nicole Cowan from film she had brought to the lab for developing.[104] Gage showed the pictures to some friends, and eventually a friend of Cowan happened to see the pictures and told Cowan what had happened.[105]

Cowan sued Gage and the lab, alleging negligence and gross negligence and claiming she had suffered mental injury, including loss of privacy, humiliation, embarrassment, fear, mental anguish, and frustration.[106] Gage turned the claim over to his parents' homeowners' insurance carrier, Trinity, who initially agreed to defend him under a reservation of rights but who later denied coverage and withdrew from the case.[107] Cowan and Gage then entered into an agreement by which Gage agreed to assign any claims he had against Trinity in exchange for Cowan's promise not to execute a judgment against him.[108] The clerk did not appear at the nonjury trial against him, and the trial court entered a judgment for Cowan, awarding her $250,000.[109]

Cowan then sued Trinity, claiming that the insurer had acted in bad faith in denying Gage's claim.[110] The trial court granted Cowan's partial summary judgment motion on the issue of coverage and denied Trinity's motion on the issue of bad faith, and subsequently, the parties settled most of their claims, with Trinity reserving the right to appeal on coverage.[111] The court of appeals affirmed.[112]

The Supreme Court reversed, finding that the term "bodily injury" does not include emotional injuries.[113] The Court chose to disregard the evidence that Cowan had suffered headaches, stom-

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ing that a trucker's insurance policy did not cover a claim that the insured was operating the truck when he negligently discharged a firearm and struck another person).

103. *See Cowan*, 945 S.W.2d at 823.

104. *See id.* at 820.

105. *See id.* at 820-21.

106. *See id.* at 821.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. Trinity Universal Ins. Co. v. Cowan, 906 S.W.2d 124, 126 (Tex. App.—Austin 1995), *rev'd*, 945 S.W.2d 819 (Tex. 1997).

113. *See Cowan*, 945 S.W.2d at 823.

achaches, and sleeplessness.[114] Although the court of appeals had held that a claim of mental anguish "implicitly raises a claim for the resulting physical manifestations,"[115] the Supreme Court stated that, "*even assuming* that physical manifestations are inseparable from mental anguish in some cases, in the context of determining an insurer's duty to defend we will not presume a claim for physical manifestations when none is pleaded."[116] The Court determined that physical injuries may be, and must be, separated from emotional injuries, despite the fact that this is contrary to the general human experience.[117] In doing so, it denied Cowan her $250,000 judgment.

Both *McKee* and *Cowan* demonstrate the Court's willingness to overturn lower court decisions that find policy language to be ambiguous. By finding policy language to be unambiguous, the Court is able to construe insurance policies as a matter of law. Doing so eliminates the involvement of juries because coverage issues then become ripe for summary judgment.

C. *Extra-Contractual Liability*

The third area in which the Court has limited the jury's role in insurance law is in the area of extra-contractual liability. The extra-contractual duties owed to an insured by the insurer are set out by case law and statute.[118] By 1990, Texas law was clear that insurers owed a duty not to be negligent in the settling of either first-party or third-party claims.[119] In addition, at least one case inter-

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114. *See id.* at 825 (refusing to read into the pleadings allegations of physical injury where none were specifically alleged).

115. *Cowan*, 906 S.W.2d at 130-31.

116. *Cowan*, 945 S.W.2d at 825.

117. *See id.* at 826.

118. *See, e.g.,* TEX. BUS. & COM. CODE ANN. § 17.50(a) (4) (Vernon Supp. 1998) (making violations of the Insurance Code actionable under the DTPA); TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1998) (dealing with unfair practices in the insurance industry); Arnold v. National County Mut. Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (establishing the common-law duty of good faith and fair dealing); Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved) (setting out the common-law duty to settle third-party claims).

119. *See Arnold*, 725 S.W.2d at 167 (holding insurance companies to the degree of care and diligence as would be exercised by an individual of ordinary care and prudence managing his own business). A third-party claim arises when a third party wins against an insured for an amount in excess of the available coverage or when the insurer in some way mismanages a third-party claim. *See* Kelly H. Thompson, Comment, *Bad Faith: Limiting*

preted governing statutes to provide broad protections to individuals who had entered into adhesion contracts with insurance companies.[120]

The 1990s saw a retreat from those protections provided by earlier courts. The Court accomplished this retreat by narrowing the extra-contractual duties owed by insurers.[121] By narrowing the duties owed by insurers, the Court also narrows the questions presented to the jury. In fact, a strong minority of the Court has suggested that it would completely remove the issue of an extra-contractual duty from jury consideration.[122]

1. Overview of Protections Afforded to Insureds

In *Stowers Furniture Co. v. American Indemnity Co.*,[123] decided in 1929, the Texas Supreme Court held that insurers owed to their insureds a common-law duty of good faith and fair dealing in their settlement of third-party claims against the insured.[124] *Stowers* addressed an inherent tension in the relationship between an insurer and its insured. When a claim is brought against an insured, his desire will be to settle the claim in order to avoid any personal liability in excess of the policy amount.[125] The insurer, on the other hand, has little to lose by refusing to settle; the policy itself sets the

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Insurers' Extra-Contractual Liability in Texas, 41 Sw. L.J. 719, 721 (1987). A first-party claim arises from coverage that the insurer contracts to pay directly to the insured. *See id.* In first-party claims, the only parties are the insured and the insurer. *See id.*

120. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988) (holding that an insured's claim did not preclude an alternative claim under the DTPA because statutory remedies in the DTPA and insurance code are cumulative).

121. *See* Trinity Universal Ins. Co. v. Bleeker, 966 S.W.2d 489, 491 (Tex. 1998) (holding that the *Stowers* duty does not arise until a full offer of release is made to the insured); Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc. 938 S.W.2d 27, 28-29 (Tex. 1997) (per curiam) (stating that no duty of good faith and fair dealing is owed by an insurer in settling third-party claims); American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 847-48 (Tex. 1994) (determining that the *Stowers* duty arises only as to the cause of action specifically plead against the insured).

122. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 70 (Tex. 1997) (Hecht, J., concurring).

123. 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

124. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 548 (Tex. Comm'n App. 1929, holding approved).

125. *See* Kelly H. Thompson, Comment, *Bad Faith: Limiting Insurers' Extra-Contractual Liability in Texas*, 41 Sw. L.J. 719, 722 (1987).

limit of its liability, and the insurer has already assumed the risk of losing that amount by selling the policy.[126]

The *Stowers* Court attempted to alleviate this inherent tension by creating a common-law cause of action sounding in tort that holds insurers liable for negligently failing to settle third-party claims. After *Stowers*, insurance companies can no longer rely on the policy to limit their liability; they now may be exposed to liability in the form of damages for negligent conduct in settling third-party claims against their insureds. To succeed on this claim, an insured must prove that the insurer failed to act reasonably.[127]

In *Arnold v. National County Mutual Insurance Co.*,[128] decided in 1987, an earlier Court expanded the *Stowers* doctrine and adopted a common-law duty of good faith and fair dealing between insurers and their insureds.[129] The Court reasoned that a "special relationship" exists between an insured and the insurer.[130] This special relationship "arises out of the parties' unequal bargaining positions and the nature of insurance contracts which would allow

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126. *See id.*

127. *See* Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, 215 S.W.2d 904, 927 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.) (discussing the insurer's duty of care).

128. 725 S.W.2d 165 (Tex. 1987).

129. In addition to the *Stowers* duty to settle and the common-law duty of good faith and fair dealing, insurers owe insureds duties under several Texas statutes. For example, the Texas Insurance Code governs the conduct of insurers specifically. *See* TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1998) (defining unfair practices in the insurance industry). In addition, the Deceptive Trade Practices-Consumer Protection Act governs insurance companies doing business in Texas as well. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon Supp. 1998) (stating that a consumer may maintain an action against *any* person for "false, misleading, or deceptive act[s]").

130. *See* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987). This "special relationship" was later expanded beyond the liability insurance context. *See* Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212-13 (Tex. 1988) (applying the tort to Workers' compensation cases). Other special relationships include that between an executive and a mineral estate, see Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984), and that between joint venturers, see Heritage Resources, Inc. v. Anschultz Corp., 689 S.W.2d 952, 956 (Tex. App.—El Paso 1985, writ ref'd n.r.e.). The "special-relationship" duty has been rejected in a wealth of other contexts. *See* Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 280 (Tex. 1998) (rejecting the duty of good faith in principal-surety relationships); Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 71 (Tex. 1997) (refusing to apply the duty to judgment creditor-debtor relationships); Great Am. Ins. Co. v. North Austin Mun. Util. Dist., 908 S.W.2d 415, 419-20 (Tex. 1995) (declaring that the relationship between a surety and obligee is not subject to the duty of good faith and fair dealing).

unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims."[131] Because of this relationship, the Court held that insurers owe their insureds a duty of good faith and fair dealing.[132] The Court stated that without such a duty, "insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed."[133] The Court held that, when an insurer has breached the duty, it may be liable for punitive damages as well as actual damages.[134]

2. The Court's Retreat from Insurers' Common-Law Duties

During the 1990s, the Court retreated from the duties imposed by *Stowers* and *Arnold.* In a number of cases over the last decade, the Court has consistently narrowed the scope of these duties. As a result, the jury's involvement in extra-contractual liability cases has become more limited because more cases can be disposed of summarily on the ground that no duty existed.

a. The *Stowers* Duty to Settle Third-Party Claims

In the 1987 case of *Ranger County Mutual Insurance Co. v. Guin*,[135] the Supreme Court held that, because the *Stowers* duty extends to the investigation of claims and the preparation for a defense, as well as to reasonable attempts at settlement, an offer to settle within the limits of the insurance policy is not a prerequisite to a claim alleging a *Stowers* breach.[136] Under the rationale outlined in *Stowers*, this holding makes good sense. An insurance company with a duty to defend wholly controls settlement negotiations. Furthermore, a conflict of interest arises not merely when a settlement offer inside the policy limits is made, but from the mo-

131. *Arnold*, 725 S.W.2d at 167.
132. *See id.*
133. *Id.*
134. *See id.* at 168.
135. 723 S.W.2d 656 (Tex. 1987).
136. Ranger County Mut. Ins. Co. v. Guin, 723 S.W.2d 656, 659 (Tex. 1987); *see also* James Martin Truss, Casenote, Stowers *Doctrine—A Settlement Offer Above Policy Limits Does Not Trigger an Insurer's* Stowers *Duty to Act Reasonably*, 26 ST. MARY'S L.J. 673, 695-97 (1995) (contending that the Texas Supreme Court in *Ranger County* "eschewed an argument that an offer to settle within policy limits is a necessary prerequisite to a *Stowers* breach, holding instead that the *Stowers* duty extends to investigation, preparation for defense, trial, and reasonable attempts at settlement").

ment a claim is made against the insured's policy.[137] An insurer should not be allowed to hide behind an offer that does not yet bring the claim within the policy limits.[138] However, the present Court has made a retreat from this rationale.

In 1994, the Court decided *American Physicians Insurance Exchange v. Garcia*,[139] holding that a jury will not be allowed to consider whether an insurance company's behavior in settling a third-party claim was reasonable unless the plaintiff can show that a settlement offer *within the policy limits* was made.[140] In 1984, Dr. Ramon Garcia, M.D. was sued for negligently prescribing medications that worsened a patient's condition.[141] Between 1980 and 1982, Garcia was covered by three consecutive malpractice insurance policies issued by Insurance Corporation of America (ICA).[142] In 1983, Garcia purchased a policy with a $500,000 limit from American Physicians Insurance Exchange (APIE).[143]

The plaintiffs in the suit against Garcia notified him in December 1983 that they intended to sue him for negligence in connection with treatment from September 1980 "to the present time."[144] Only one of the patient's office visits occurred during the coverage period of APIE and, accordingly, APIE notified Garcia that most of the claim would be covered by the ICA policies.[145] APIE and ICA agreed to cover the settlement or judgment on a pro rata basis and to split defense fees evenly.[146]

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137. *See* James Martin Truss, Casenote, Stowers *Doctrine—A Settlement Offer Above Policy Limits Does Not Trigger an Insurer's* Stowers *Duty to Act Reasonably*, 26 ST. MARY'S L.J. 673, 698-700 n.10 (1995) (stating that because of the potential for latent conflicts and because of the nature of the relationship between the parties, insurers have a duty to initiate settlements).

138. *See id.* (reflecting upon the insurer's duty to look to the best interest of the insured).

139. 876 S.W.2d 842 (Tex. 1994).

140. American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 843 (Tex. 1994).

141. *See id.*

142. *See id.* In 1980, Garcia was covered by a policy with limits of $100,000. *See id.* In 1981 and 1982, he was covered under consecutive one-year policies, each with limits of $500,000. *See id.*

143. *See id.* at 843-44.

144. *See id.* at 844.

145. *See id.*

146. *See id.*

The plaintiffs filed five amended petitions, none of which alleged malpractice in APIE's coverage period.[147] In July 1985, APIE notified Garcia that its policy was not applicable.[148] However, one of ICA's attorneys, apparently confused about the agreement between ICA and APIE, told the plaintiffs that the two companies had agreed to split the cost of settlement down the middle and that a total of $600,000 was available.[149] He then attempted to correct his error by stating that the policies could not be aggregated and that the total amount of coverage was $500,000.[150] The plaintiffs' attorney made a settlement demand for $600,000.[151] After learning of an additional ICA policy of $500,000, the plaintiffs raised their offer to $1.1 million.[152] They raised the offer again, on the first day of trial, to $1.6 million.[153] Also on the first day of trial, the plaintiffs filed a Sixth Amended Petition, which alleged malpractice that continued into 1983, thereby implicating the APIE policy.[154]

The jury found against Garcia and awarded the plaintiffs $2,235,483.30.[155] The plaintiffs, pursuant to a non-execution agreement entered with Garcia, then sued in his name against his insurers, alleging that the companies had violated their *Stowers* duty to accept a reasonable settlement demand within policy limits.[156] The jury found that APIE had violated its *Stowers* duty and, in addition, had violated the DTPA and the Texas Insurance Code.[157] Damages against APIE were assessed at $2,235,000 in compensatory damages, $250,000 in exemplary damages, and $250,000 in additional damages under the DTPA.[158] The plaintiffs elected to have judgment rendered solely on the Insurance Code findings.[159]

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147. *See id.*
148. *See id.* at 845.
149. *See id.* at 844.
150. *See id.*
151. *See id.* at 844-45.
152. *See id.* at 845.
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.* at 845-46.
158. *See id.* at 846.
159. *See id.*

The Supreme Court reversed both the jury verdict and the appeals court's judgment.[160] The Court held that the *Stowers* duty to settle was not triggered until the claimant made a settlement offer that fell within the policy limits.[161] In addition, the Court held that the offer must fall within the scope of coverage, and the terms of the offer must be "such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment."[162]

By premising the *Stowers* duty on whether the claimant made a timely claim within the policy limits and within the scope of coverage, the Supreme Court has removed from jury consideration any other grounds for finding that the insurer has handled the settlement process negligently.[163] As the dissent in *Garcia* pointed out, APIE did virtually nothing for sixteen months to investigate or establish whether or not its coverage was implicated in the suit.[164] By agreeing that one of the plaintiffs' claims fell within its coverage period, the company allowed Garcia to believe that his policy with them was, in fact, implicated.[165] According to the Court, "APIE never made a good faith effort to evaluate the settlement value of the case, never investigated or explored the possibility of settlement, never discussed settlement with the opposing party and never engaged in reasonable settlement negotiations with the opposing party."[166]

The rigid formula established by the Court prevents a jury from considering the insurer's behavior in the fluid and usually informal settlement process.[167] *Garcia* demonstrates the Court's fear that allowing juries to operate without rigidly controlled, policy-ori-

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160. *See id.*

161. *See id.*

162. *Id.* at 849. Justices Hightower, Doggett, Gammage, and Spector dissented. *See id.* at 855 (Hightower, J., dissenting).

163. *See* Ranger County Mut. Ins. Co. v. Guin, 723 S.W.2d 656, 659 (Tex. 1987) (stating that the *Stowers* duty encompasses the entire agency relationship); *Garcia*, 876 S.W.2d at 865 (Hightower, J., dissenting) (stating that the majority's narrow holding implies that insurers have no duty to act reasonably in business management until they receive a formal settlement demand within the policy limits).

164. *See Garcia*, 876 S.W.2d at 865 (Hightower, J., dissenting).

165. *See id.* (Hightower, J., dissenting).

166. *Id.* (Hightower, J., dissenting),

167. *See id.* (Hightower, J., dissenting) (noting that the settlement process is "not a rigid and formalized procedure").

ented legal standards will lead to erroneous results.[168] By narrowing the concept of duty, the Court elevates its own policy concerns over the good-faith determinations of a jury of what is reasonable conduct.[169]

Even more alarming than the Court's opinion in *Garcia* was the Court's unanimous opinion in *Trinity Universal Insurance Co. v. Bleeker*,[170] decided in 1998. In *Bleeker*, a drunken driver struck a pickup truck in July of 1990, killing or seriously injuring fourteen people.[171] The drunken driver carried the minimum legal amount of insurance of $40,000 per accident, and hospital bills alone exceeded $40,000 within four days of the accident.[172] The hospital filed liens for more than $40,000 approximately two weeks after the accident.[173]

In April 1991, an attorney for five of the injured individuals demanded the drunken driver's insurer pay its policy limits into the court registry.[174] The insurer refused to pay unless it obtained a full release from the drunken driver.[175] Although the attorney was later engaged to represent all fourteen claimants, no additional demand was made.[176]

The claimants ultimately obtained an $11.5 million judgment against the insured, who assigned his claim against the insurer to the claimants.[177] The claimants sued the insurer for various claims, including its failure to settle under the *Stowers* doctrine.[178] The trial court rendered judgment in favor of the claimants, awarding

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168. *See id.* at 865-66 (Hightower, J., dissenting) (stating that the majority mistakenly believes that affirming a broad duty would force the insurer to make unilateral settlement offers, offer policy limits in every case, bid against itself, and make the first settlement offer to the opposing party); *cf.* William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 245 (1986) (stating that "[n]arrow duties of the past no longer effectively allocate societal losses").

169. *See* William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 245 (1986) (noting that the determination of duty always involves deciding facts and the interplay of factual and legal questions).

170. 966 S.W.2d 489 (Tex. 1998).

171. *See* Trinity Universal Ins. Co. v. Bleeker, 966 S.W.2d 489, 490 (Tex. 1998).

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* The claimants also asserted claims under the DTPA and Insurance Code, as well as for the breach of the common-law duty of good faith and fair dealing. *See id.*

them actual damages of $13 million, trebled under the DTPA to $38.5 million.[179] The court of appeals reversed all claims except the $13 million *Stowers* award and one DTPA claim for unconscionable conduct that was remanded for a new trial.[180]

The Supreme Court reversed, holding that the insurer never had a *Stowers* duty to settle because the claimants never offered a full release.[181] The Court noted that to invoke the *Stowers* doctrine, "a settlement demand must propose to release the insured fully in exchange for a stated sum of money."[182] The Court reasoned that none of the settlement offers included a release of the hospital liens.[183]

Based on this holding, an insurer's *Stower*s duty will now be at the mercy of hospitals over whom neither the insured nor the injured third party has control. Because a hospital's decision to release or not to release a lien will control the third party's ability to fully release the insurer, any meaningful *Stowers* duty has been brought to an end. In the absence of such a duty, cases that previously went to a jury for resolution will be decided as a matter of law. How fitting that due to the holding in *Bleeker*, the future of *Stowers* claims is indeed "bleaker."

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179. *See id.*

180. *See id.* at 490-91.

181. *See id.* at 490-92.

182. *See id.* at 491 (quoting Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 314 (Tex. 1994)).

183. *See id.* The Court noted:

> When a hospital lien exists, a release is not valid unless:
> (1) the hospital's charges were paid in full before the execution and delivery of the release;
> (2) the hospital's charges were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or
> (3) the hospital is a party to the release.

Id. (citing TEX. PROP. CODE ANN. § 55.007(a)).

The Court also reversed the appellate court's remand of the DTPA claim based on the absence of a producing cause. *See id.* at 491-92. Bleeker claimed that the insurer's failure to inform him or his attorney of the settlement offer was unconscionable conduct. *See id.* at 491. The Court held that Bleeker failed to produce any evidence that Bleeker would have wanted to accept the settlement offer if he had been informed of it. *See id.*

b. The Duty of Good Faith and Fair Dealing

The Supreme Court has also narrowed the first-party duty of good faith and fair dealing established in *Arnold.* In the 1996 case of *Maryland Insurance Co. v. Head Industrial Coatings & Services, Inc.,*[184] the Court held that an insurer owes no duty of good faith and fair dealing in the investigation of claims by third parties against their insureds.[185] In that case, Head Industrial contracted to do work for Texas Utilities ("TU") and agreed to indemnify TU for any claims arising from the work and to purchase contractual liability insurance to meet this obligation.[186] Through its agent, Head purchased a general liability policy from Maryland Insurance Co. ("Maryland").[187] Although Head told the agent it wanted contractual liability coverage, a clerical error resulted in such coverage being excluded.[188] Subsequently, Nelson, a Head employee, sued Head and TU for injuries he suffered on TU's premises.[189] When TU requested indemnification, Maryland determined that the claim was not covered under the policy, and it denied coverage to Head.[190]

In the personal injury trial, Nelson won a judgment against TU, and TU recovered on its indemnity cross claim against Head.[191] Nelson, in Head's name, then brought suit against Maryland for wrongful denial of its claim.[192] Head settled with Nelson and TU, and the two assigned their claims against Maryland to Head and agreed not to execute the underlying judgment.[193] At the wrongful denial trial, Maryland admitted that Head's claim was covered and offered to pay the policy benefits.[194] The plaintiffs refused, and a jury found that Maryland had violated the Insurance Code by en-

184. 938 S.W.2d 27 (Tex. 1996) (per curiam).

185. Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 938 S.W.2d 27, 28-29 (Tex. 1996) (per curiam).

186. *See id.* at 27.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.* at 27-28.

192. *See id.* at 28.

193. *See id.*

194. *See id.*

gaging in unfair or deceptive trade practices.[195] The jury awarded Head damages of $1.8 million.[196]

The Texarkana court of appeals affirmed and modified the judgment.[197] That court found that a breach of the duty of good faith and fair dealing can constitute an unfair or deceptive act under Article 21.21 of the Texas Insurance Code.[198] Because a carrier is liable for the acts of its agent that breach the duty of good faith and fair dealing,[199] the court of appeals held that there was sufficient evidence of bad faith, based on the agent's failure to secure the proper coverage.[200] The court of appeals held that the agent's failure to admit his error amounted to a misrepresentation.[201] The court further held that the misrepresentation was made knowingly.[202]

The Texas Supreme Court reversed the jury verdict and the judgment of the appeals court. The Court held that an insured's sole remedy in third-party insurance cases is based on the *Stowers* duty to settle within policy limits and contractual duties.[203] Although the Court provided little rationale for its holding, it cited a concurrence by Justice Cornyn in an earlier case, *Texas Farmers Insurance Co. v. Soriano,*[204] in support of the proposition.[205]

In *Soriano,* Justice Cornyn argued that identifying a tort duty of good faith and fair dealing in the third-party context would necessarily mean supplanting the negligence standard for failure to settle

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195. *See id.*

196. *See id.*

197. *See* Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 906 S.W.2d 218, 238 (Tex. App.—Texarkana 1995), *rev'd*, 938 S.W.2d 27 (Tex. 1996) (per curiam). The appellate court reduced the actual damages to $500,000. *See id.* at 238.

198. *See id.* at 225; *see also* TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1998).

199. *See* Natividad v. Alexis, 875 S.W.2d 695, 698 (Tex. 1994) (stating that "[w]hen the insurance carrier has contracted with agents or contractors for the performance of claims handling services, the carrier remains liable for actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier").

200. *See Head*, 906 S.W.2d at 227.

201. *See id.*

202. *See id.*

203. See Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 938 S.W.2d 27, 28-29 (Tex. 1996) (per curiam).

204. 881 S.W.2d 312 (Tex. 1994).

205. *See Head*, 938 S.W.2d at 28.

that was established in *Stowers*.[206] According to Cornyn, the breach of the *Stowers* duty, grounded in principles of negligence, is easier for claimants to establish.[207] Cornyn then wrote that claimants should not be denied this easier burden.[208]

Although it may be true that the duty of good faith and fair dealing has a higher burden of proof than the *Stowers* duty, Justice Cornyn's argument that establishing this duty in the third-party context would eliminate the *Stowers* duty is fallacious. The law has always recognized a broad spectrum of civil misconduct, ranging from negligence, to gross negligence, to intentional behavior.[209] The plaintiff has different burdens of proof in each instance, and the consequences for an unsuccessful defendant vary. In *Head*, for example, there was sufficient evidence to find that the agent had engaged in misrepresentations to the insured. Such conduct exceeds the conduct proscribed by *Stowers*, particularly if the misrepresentations were committed knowingly.

After *Head*, a jury will not be permitted to find that an insurer, in the third-party context, acted more than negligently as defined by *Stowers*.[210] It is true, as one court has held, that "[a] finding of bad faith cannot be premised solely on the breach of . . . the duty to defend."[211] But what if the plaintiff can prove more than the

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206. *See* Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 318 (Tex. 1994) (Cornyn, J., concurring).

207. *See id.* at 318-19 (Cornyn, J., concurring). According to Justice Cornyn, the breach of the duty of good faith and fair dealing required the claimants to demonstrate that there was no reasonable basis for denying the claim, a higher burden of proof. *See id.* (Cornyn, J., concurring); *see also* Kelly H. Thompson, Comment, *Bad Faith: Limiting Insurers' Extra-Contractual Liability in Texas*, 41 Sw. L.J. 719, 720 (1987) (stating that "[b]ad faith implies something more than mere negligence, errors in judgment, bad manners, or breakdowns in communications"). The bad faith standard, thus, affords insurers the right to deny invalid or questionable claims. In the third-party context, however, where the insurer's conflict of interest with his insured arises, the Court protects the insured from excess judgments resulting from the insurer's refusal to accept reasonable settlement offers.

208. *See Soriano*, 881 S.W.2d at 318 (Cornyn, J., concurring).

209. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 71-72 (Tex. 1997) (Hecht, J., concurring) (discussing the difference between reckless and intentional conduct) (citing RESTATEMENT (SECOND) OF TORTS § 12 (1965)).

210. *Cf. Soriano*, 881 S.W.2d at 319 n.2 (observing that seventeen states apply "some combination" of bad faith and negligence standards); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1123 (1990) (stating that "[t]he practical distinction between a negligent failure to settle and a bad faith failure to settle remains elusive").

211. Snug Harbor, Ltd. v. Zurich Ins., 968 F.2d 538, 546 (5th Cir. 1992).

breach of that negligence duty? Because a jury is now precluded from finding that an insurer breached a duty of good faith and did so knowingly, such a jury may not punish insurers for conduct more egregious than that described in *Stowers,* as *Stowers* has been limited by *Garcia* and *Bleeker.* Neither the punitive damages made available in *Arnold* in the first-party context, nor the additional damages sanctioned by the Texas Insurance Code, are available in third-party claims.

Thus, the Supreme Court in *Head* has pigeonholed the duties owed by insurers. In the first-party context, insurers owe a general duty to settle unless there is a reasonable basis for denial. Moreover, as the Court later held, that duty does not extend beyond an agreed settlement between the insured and the insurer.[212] In other words, once the parties have settled, the insurer owes only the contractual duties set out by the settlement; the "special relationship" between the insured and insurer under the policy has vanished.[213] In the third-party context, insurers owe a general duty to reasonably settle, *if* the claimant makes the appropriate offer and provides a full release.[214]

Lost in the creation of these exclusive duties is the duty to behave reasonably, and the belief that Texas juries are competent to determine such reasonableness.[215] In *Garcia* and *Bleeker*, the Court effectively stripped the jury of its power to determine whether the insurer has breached its *Stowers* duty. In *Head*, the Court took from the jury the power to determine that an insurer, acting in the third-party context, had engaged in knowing misconduct in the handling of third-party claims. Consequently, the Court has removed from juries the power to decide, in a number of situations, whether an insurance company's actions were reasonable.

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212. *See* Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 72 (Tex. 1997) (holding that the insurer's duties ended once the agreed judgment was signed and entered by the trial court).

213. *See id.* at 70. The Court's holding in *Aiello* took from the plaintiffs a jury award of $16,500 in mental anguish damages and $200,000 in exemplary damages. *See id.*

214. *See* American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 848 (Tex. 1994). In *Garcia*, the Court stated that a *Stowers* negligence claim could not be raised in the first-party context. *See id.* at 847 n.10.

215. *See* Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 340 (Tex. 1995) (reversing a jury verdict and holding that the insurer cannot breach duty of good faith if it denies coverage for an illegitimate reason, as long as a legitimate reason existed at the time of the denial).

3. Statutory Duties and Standing

The third way in which the Phillips/Hecht Court has narrowed extra-contractual duties owed by insurers is by eliminating statutory remedies in the third-party context and, because of the sweeping nature of its holdings, perhaps attempting to do so in the first-party context.[216] In 1994, the Court held in *Watson v. Allstate*[217] that a third-party claimant may not bring suit against an insurer under the DTPA or the Texas Insurance Code for unfair settlement practices.[218] In so holding, the Court attacked the very rationale it had given in an earlier decision, *Vail v. Texas Farm Bureau Mutual Insurance Co.*,[219] for providing such protection in the *first-party* context. Although the Texas Legislature has prevented *Watson* from realizing its full potential,[220] *Watson's* sweeping pronouncement and potential breadth highlight the willingness of the Court to prevent juries from deciding disputes between insurers and insureds.

In order to fully understand the import of *Watson*, understanding *Vail* is important. In *Vail*, decided in 1988, the Supreme Court held that an insured could recover from the insurer under the DTPA and the Texas Insurance Code for unfair claims practices.[221] The

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216. *See* Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 150 (Tex. 1994) (asserting that "permitting a separate and direct cause of action in favor of third party claimants allows third parties to sue for unfair claim settlement practices *even though the insured has no claim for an unfair settlement practice*").

217. 876 S.W.2d 145 (Tex. 1994).

218. *See Watson*, 876 S.W.2d at 150.

219. 754 S.W.2d 129 (Tex. 1988).

220. *See* TEX. INS. CODE ANN. art. 21.21 § 4(10) (Vernon Supp. 1998) (proscribing unfair settlement practices).

221. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 132-33 (Tex. 1988). The Vails purchased a fire insurance policy from Texas Farm in 1978. *See id.* at 130. Their home burned during the term of the policy. *See id.* at 130-31. The insurance company informed the Vails that, because they had not prepared an adequate list of the contents destroyed by the fire, it would not cover the claim. *See id.* at 131. However, this reason had no bearing on the duty to pay under the policy. *See id.* The company then hired an engineering firm to conduct an arson investigation. *See id.* The firm concluded that no fire-setting materials were present on the site. *See id.* The company then asked the Fire Marshal's office to conduct an investigation. *See id.* That investigation revealed some evidence of arson. *See id.*

However, at trial, expert testimony was that the samples were tested under questionable conditions. *See id.* Based on the Fire Marshal's investigation, the company changed the basis of denial from the inadequate list to arson. *See id.* The Vails sued for unfair claims practices under the DTPA and the Insurance Code. *See id.* The jury found that the insur-

Court held that Section 17.50(a)(4) of the DTPA incorporates Article 21.21 of the Insurance Code.[222] The Vails, the majority stated, were seeking relief from conduct proscribed by Section 16 of Article 21.21 of the Insurance Code.[223] Conversely, Texas Farm argued that the remedy for unfair settlement practices in the Insurance Code is limited to Article 21.21-2,[224] which authorizes the State Board of Insurance to issue cease and desist orders.[225] In other words, according to Texas Farm, there is no private cause of action for unfair settlement practices under the Insurance Code. The Court, however, noted that

Section 16 [of Article 21.21] permits recovery by any person who has been injured by another's engaging in:

[1] any of the practices declared to be unfair or deceptive by Section 4 of article 21.21;

[2] conduct defined in rules or regulations lawfully adopted by the Board under article 21.21 as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance; or

any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice.[226]

Referring to an order by the State Board of Insurance that stated unfair practices include those *defined* by the provisions of the In-

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ance company had intentionally failed to exercise good faith in processing the Vails' claim by refusing to settle after liability became reasonably clear. *See id.* The judgment awarded the Vails the full policy limit, trebled, and attorneys fees and prejudgment interest. *See id.* The court of appeals reversed the trebling portion of the judgment, holding that there was no private cause of action under the DTPA or the Insurance Code for unfair settlement practices. *See id.*

222. *See id.* The relevant section provided:

> A consumer may maintain an action where any of the following constitutes a producing cause of actual damages:
>
> . . . .
>
> (4) The use or employment by any person of an act or practice in violation of Art. 21.21, Texas Insurance Code, as amended, or rules and regulations issued by the State Board of Insurance under Art. 21.21, Texas Insurance Code, as amended.

Id. at 132 (citing TEX. BUS. & COMM. CODE ANN. § 17.50 (a) (4) (Vernon 1987)).

223. *See Vail*, 754 S.W.2d at 133.

224. *See id.* at 132.

225. *See* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981 & Supp. 1998).

226. *Vail*, 754 S.W.2d at 132-33 (quoting TEX. INS. CODE ANN. art. 21.21 § 16(a) (Vernon Supp. 1998)).

surance Code, the Court noted that Article 21.21-2 defines as unfair, "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear."[227] Although Article 21.21-2 does not itself confer a private cause of action, the Court held that it may be used definitionally as the basis for a cause of action under Section 17.50(a)(4) of the DTPA.[228]

In addition, the Vails were able to recover under Section 16 of Article 21.21 of the Insurance Code, by incorporating Section 17.46 of the DTPA into that provision.[229] Section 17.46 prohibits "false, misleading, or deceptive acts or practices."[230] Article 21.21 of the Insurance Code makes actionable any conduct prohibited by Section 17.46.[231] The Court held that the Vails had obtained a jury finding on whether their insured engaged in the alleged act, unfair settlement practices, and whether the act was deceptive.[232] Thus, the Vails were also entitled to recover under the DTPA.

In *Watson*, the Court gave assurances that *Vail* was still law, while at the same time completely rejecting the rationale supporting that decision.[233] While *Watson* was not a jury case, its outcome demonstrates the impact that narrowly defining the duties owed by insurers will have. That is, many questions will never reach a jury.

In *Watson*, Townsley, who was insured by Allstate, struck Watson's vehicle.[234] Watson did not pursue Townsley for a judgment, but sued Allstate directly, claiming violations of the duty of good

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227. *Id.* at 133 (citation omitted).

228. *See id.* at 134.

229. *See id.* at 136.

230. *See id.* at 135. This list has been held not to be exclusive. *See id.*; *see also* Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1978) (stating that "[t]he deceptive acts or practices listed in subsection 17.46(b) do not form an exclusive list. . .."). When an unlisted practice is alleged, the plaintiff must obtain a finding that the act occurred and that it was deceptive. *See id.*

231. *See Vail*, 754 S.W.2d at 135; Aetna Cas. & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987).

232. *See Vail*, 754 S.W.2d at 136.

233. *See* Watson v. Allstate Ins. Co., 876 S.W.2d 145, 149 (Tex. 1993) (stating that "we are particularly mindful of the duties imposed on insurers as to their insureds"); *id.* at 152 (Doggett, J., dissenting) (noting that *Watson* repudiates the rationale set out in *Vail*); *see also* Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 47 SMU L. REV. 1227, 1234-37 (1994) (noting the broad inconsistencies between *Vail* and *Watson*).

234. *See Watson*, 876 S.W.2d at 146.

faith and fair dealing, DTPA violations, and unfair insurance practices.[235] The trial court granted summary judgment against Watson on all claims.[236] The court of appeals upheld the summary judgment on the breach of the duty of good faith and fair dealing and on the DTPA violations.[237] However, the court found that Watson was entitled to sue under Article 21.21, Section 16 of the Texas Insurance Code.[238] The court reversed the case and remanded for a trial on that issue.[239]

A split Supreme Court affirmed the judgment of the court of appeals denying the DTPA and the common law bad faith claims.[240] It reversed the judgment as to the Insurance Code that entitled the claimant to sue.[241] The Court held that Section 4 of Article 21.21 did not specifically proscribe unfair settlement practices as unfair or deceptive.[242] The only Board of Insurance order that prohibited unfair settlement practices, according to the Court, was promulgated pursuant to Article 21.21-2, and that provision did not create a private cause of action.[243] The Court reached this conclusion in spite of *Vail*, and in spite of the fact that the Insurance Board filed two amicus briefs in the case, *supporting* Watson's position.[244] In those briefs, the Board argued that it agreed with the *Vail* holding and that it had always believed Article 21.21 afforded protection for claimants like Watson.[245] The Court could

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235. *See id.*

236. *See id.* at 147.

237. *See id.*

238. *See* Watson v. Allstate Ins. Co., 828 S.W.2d 423, 425 (Tex. App.—Fort Worth 1991), *aff'd in part, rev'd in part*, 876 S.W.2d 145 (Tex. 1993). Watson relied on a State Board of Insurance rule prohibiting unfair settlement practices to support her claim. *See id.* at 427 (stating that Watson alleged Allstate was in violation of § 21.203 of the Texas Administrative Code).

239. *See Watson,* 828 S.W.2d at 425.

240. *See Watson*, 876 S.W.2d at 150. Justice Spector concurred in the judgment only, stating that if Watson first obtained a judgment against Townley, she should be able to directly sue Allstate. *See id.* at 150-51 (Spector, J., concurring). Justice Doggett wrote a bitter dissent, and was joined by Justice Gammage. *See id.* at 151 (Doggett, J., dissenting).

241. *See id.* at 150.

242. *See id.* at 147.

243. *See id.* at 148-49.

244. *See* Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 47 SMU L. REV. 1227, 1237 (1994) (discussing the Insurance Board's amicus briefs filed in support of Kathleen Watson's position).

245. *See id.* (discussing the Insurance Board's argument that the Board "had always interpreted Article 21.21 and its own regulations consistent with Ms. Watson's right to

find no relief for Watson under Section 17.46 of the DTPA, because that provision did not specifically name unfair settlement practices as an unfair practice actionable under Article 21.21.[246]

On its face, *Watson* is limited to the third-party claims. The Court held that Watson, who was not an insured, had no standing to sue under Article 21.21.[247] The Court in *Watson* stated that the protection offered in *Vail* arose from the "special relationship" between an insurer and its insured.[248] In doing so, the Court wrote the "special relationship" requirement into a statute that did not otherwise call for it. Although a "special relationship" is the predicate for the common-law duty of good faith, the Insurance Code did not at the time contain such a predicate. In fact, the Code purported to protect *any person.* Clearly, Watson was a person.[249] Under the terms of the statute itself, Watson had standing.[250]

Watson struck a major blow to third-party claimants wishing to complain of unfair treatment by Texas insurance companies.[251] Not only did the Court ignore its own statutory construction set out in *Vail* and the statutory construction of the Insurance Board in order to reach its result, but no jury will ever again be asked to

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sue"). Normally, the Insurance Board's interpretation of a statute it is charged with enforcing is to be given deference. *See* Direlco, Inc. v. Bullock, 711 S.W.2d 360, 363 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (holding that the court should give deference to the construction that an administering agency gives a statute). The *Direlco* opinion was cited by Justice Enoch in his dissent to *National County Mutual Fire Insurance Co. v. Johnson. See* National County Mut. Fire Ins. Co. v. Johnson, 879 S.W.2d 1, 7-8 (Tex. 1993) (Enoch, J., dissenting). Chief Justice Phillips, as well as Justices Gonzalez and Hecht, joined Enoch's dissent. *See id.* at 5. In that dissent, Enoch took issue with the majority's alleged refusal to defer to the Texas Board of Insurance. *See id.* at 6-9 (Enoch, J., dissenting). In *Johnson*, the Court abrogated the family-member exclusion in liability policies for automobiles. *See* Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 47 SMU L. REV. 1227, 1237 (1994) (noting that Justice Enoch criticized the court for abrogating this exclusion).

246. *See Watson*, 876 S.W.2d at 149.

247. *See* English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983).

248. *See Watson*, 876 S.W.2d at 149.

249. *See* Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 47 SMU L. REV. 1227, 1234 (1994) (discussing who constitutes a "person" for purposes of Article 21.21).

250. *See id. at* 1241 (noting that other courts have "brushed aside" the meaning of the statute to require that a person be an insured in order to have standing to sue).

251. *See* Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 273 (Tex. 1995) (relying on *Watson* and Section 17.46(b) (23) of the DTPA and holding that a third party may not sue under the Texas Insurance Code, because the party is not a "consumer" as required by that provision).

determine if an insurer violated a consumer statute in its handling of a third-party claim.

Watson's broad rationale also threatened first-party claimants, because first-party claimants also frequently rely on the Insurance Code to pursue claims against unscrupulous insurance companies.[252] In 1995, the Legislature eliminated that threat by amending the Insurance Code specifically to include unfair settlement practices as actionable misconduct.[253] However, the amendments also expressly prohibit a third-party claimant from asserting an unfair settlement practices claim under the Insurance Code.[254]

4. Evidentiary Standards and Review

Another area in which the Court's distrust of juries is particularly evident is its attempts at clarifying the standards of review for bad faith claims. Since 1987 when the Court established the common-law duty of good faith and fair dealing in *Arnold*, it has struggled in articulating the standard that an appellate court should use in reviewing a jury finding on the issue. The Court identified the standard of care to be applied in such cases in 1988, in *Aranda v. Insurance Co. of North America*.[255]

In *Aranda*, a plaintiff was required to show "(1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy *and* (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim."[256] Because the *Aranda* test contained an objective and a subjective component, confusion quickly arose in

252. *See, e.g.*, Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 70 (Tex. 1997); Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc., 938 S.W.2d 27, 28 (Tex. 1996) (per curiam); Jerry v. Kentucky Cent. Ins. Co., 836 S.W.2d 812, 813 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

253. *See* TEX. INS. CODE ANN. art. 21.21 § 4(10) (Vernon Supp. 1998). This change applies to actions accruing on or after September 1, 1995, and to all actions filed on or after September 1, 1996, regardless of the date of accrual.

254. *See id.*

255. 748 S.W.2d 210 (Tex. 1988).

256. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 213 (Tex. 1988). Despite the attempt in *Aranda* to clarify the standard of review for bad-faith claims, the tort of bad faith has been subject to criticism for being ill-defined. *See* Columbia Universal Life Ins. Co. v. Miles, 923 S.W.2d 803, 810 (Tex. App.—El Paso 1996, writ denied) (stating that "the Supreme Court, in its attempt to clarify the legal sufficiency standard for bad-faith claims against insurance companies, has ultimately done little to provide lower courts with any guidance for conducting a legal sufficiency review").

the courts of appeals over how to conduct a no-evidence review of a claim of a violation of the duty of good faith and fair dealing.[257] In addressing this question, the Supreme Court further narrowed the protections for insureds in the third-party context.

The Supreme Court first attempted to settle the issue of the appropriate method for conducting a legal sufficiency review in *Lyons v. Millers Casualty Insurance Co.*, decided in 1993.[258] In *Lyons,* the Court held that in order to conduct a legal sufficiency review of the evidence in bad faith claims, a reviewing court must determine whether "[t]he evidence presented, viewed in the light most favorable to the prevailing party, . . . [allows] the logical inference that the insurer had no reasonable basis to delay or deny payment of the claim, and that it knew or should have known it had no reasonable basis for its actions."[259]

If the *Lyons* holding seems like a modification of traditional no-evidence review in Texas, a decision reached the following year in *National Union Fire Insurance Co. v. Dominguez*[260] makes it clear that it was. In *Dominguez,* the Supreme Court acknowledged that in a bad faith no-evidence review, a court must give weight only to the evidence supporting the judgment and ignore all contrary evidence. However, the Court continued, such a review can only occur *after* the reviewing court determines what potential basis an insurance company may have had for denying a claim.[261]

In essence, the plaintiff was being asked, in *Lyons* and *Dominguez*, to prove a negative—"the absence of a reasonable basis for denying a claim."[262] Because a judgment for bad faith could be supported by merely the absence of evidence of a reasonable basis, no judgment could be reversed for want of evidence,[263] unless, as the *Lyons* majority held, the insurer's evidence of a reasonable ba-

257. *See* Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 48 SMU L. REV. 1351, 1353 (1995) (discussing the disagreement that arose between two courts of appeals as to how the *Aranda* standard should be reviewed).

258. 866 S.W.2d 597 (Tex. 1993).

259. Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993).

260. 873 S.W.2d 373 (Tex. 1994)

261. *See* National Union Fire Ins. Co. v. Dominguez, 873 S.W.2d 373, 376-77 (Tex. 1994).

262. *Id.* at 376; *see also* Universe Life. Ins. Co. v. Giles, 950 S.W.2d 48, 51 (Tex. 1997) (stating that "[a] plaintiff in a bad-faith case must prove the *absence* of a reasonable basis to deny the claim, a negative proposition").

263. *See Giles*, 950 S.W.2d at 72 (Hecht, J., concurring).

sis is taken into account. Thus, in spite of the traditional no-evidence review requirement that only evidence supporting the judgment be considered, under *Lyons*, evidence would be weighed. Because reviewing courts were commanded to determine on what basis the company denied or delayed payment, a no-evidence review was transformed into a factual sufficiency review, where the higher courts weighed and commented upon the evidence.[264] As Justice Doggett noted, "The majority continues its practice of wearing blinders when evaluating facts not helpful to insurance companies while violating the constitutional mandate that review by this Court is limited to legal, not factual, sufficiency."[265]

The Supreme Court attempted to clarify further the standard for reviewing bad faith claims in a 1997 case, *Universe Life Insurance Co. v. Giles*.[266] In *Giles,* a majority of the Court refined the standard for reviewing bad faith claims. Adopting the test used in the Texas Insurance Code, the Court held that a plaintiff must prove that a carrier failed to attempt to settle a claim after the carrier's liability had become "reasonably clear."[267] According to the majority, this new "reasonably clear" standard "eliminate[d] the conflict with our no-evidence standard of review."[268] There is merit to this contention. As a result of *Giles*, the plaintiff's requirement is framed as the burden to establish a *positive* fact—that liability had become reasonably clear. This differs from establishing a negative *fact*—that the insurer had no reasonable basis to deny or delay

264. *See Lyons*, 866 S.W.2d at 602-03 (Doggett, J., dissenting) (criticizing the majority for disregarding the constitutionally mandated no-evidence standard). One commentator has argued that the Court in *Giles* was, in reality, merely redefining the duty of the insurer. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1709 (1997). According to Powers, the Court found that an insurer's duty of good faith is not to make a reasonable investigation, but "to avoid denying coverage when there is *no* reasonable basis for doing so." *Id.* Because there was an investigator's report in *Lyons* showing some reasonable basis for denying coverage, then there was no duty as a matter of law. *See id.* This description of the opinion is not materially different from the one I give here. In either event, the Court has engaged in weighing evidence—either to determine that no duty exists and thus remove the question from the jury, or to determine that the evidence was insufficient to support the jury's finding.

265. *Dominguez*, 873 S.W.2d at 379 (Doggett, J., dissenting). Justice Gammage joined in this dissent. *See id.* at 377 (Doggett, J., dissenting).

266. 950 S.W.2d 48 (Tex. 1997).

267. *See Giles*, 950 S.W.2d at 55. The Court emphasized, however, that the Insurance Code does not, alone, govern common-law good faith and fair dealing. *See id.*

268. *Id.*

payment. Thus, a reviewing court will not be forced to weigh the evidence, but will be able to simply look at all evidence in favor of a judgment favoring an insured to determine if the insured proves that fact with more than a scintilla of evidence.

As the Court demonstrated in a case issued the same day, *United States Fire Insurance Co. v. Williams,*[269] the standard set out in *Giles* can simplify determining whether summary judgment was granted or denied properly in the trial court. In *Williams,* the Court stated that evidence that "only shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith."[270] In that case, the insurer established that it had denied coverage on the basis of its interpretation of a statute.[271] The Court stated that because the Court had held in *Giles* that liability attaches only when an insurer knew or should have known that coverage was reasonably clear, the insurer cannot be liable for simple mistakes.[272] Even if *Giles* functions to clarify the standards by which courts review bad faith cases, the opinion suggests that a new threat to insureds looms ahead—the threat that the entire issue of bad faith could become a matter of law rather than a question of fact for a jury to resolve.[273]

In a concurrence consisting of four of the Court's nine justices, Justice Hecht argued that whether an insurer acted in bad faith in

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269. 955 S.W.2d 267 (Tex. 1997).

270. United States Fire Ins. Co. v. Williams, 955 S.W.2d 267, 268 (Tex. 1997).

271. *See id.* Essie Williams sued the insurer, arguing that it had improperly paid her husband's accidental death benefits to another woman, Lessie Voyd, whom the husband had named as his beneficiary. *See id.* The insurer argued that it had relied on Worker's Compensation Commission Rule 132.3, which provides that a surviving spouse who abandons the insured without good cause for more than a year preceding the death is ineligible for benefits. *See id.*

272. *See id. But see* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 448 (Tex. 1997) (stating that an insurer's reliance on an expert's report alone will not foreclose a bad faith claim).

273. It is unclear from the Court's subsequent opinion in *State Farm Fire & Casualty Co. v. Simmons* whether that threat has lessened. *See* State Farm Fire & Cas. Co. v. Simmons, 963 S.W.2d 42, 44 (Tex. 1998) (maintaining that "whether an insurer has breached its duty of good faith and fair dealing is a fact issue"). Although Justice Hecht continued to express his complaints regarding the majority's "no reasonable basis" standard in his dissenting opinion (joined by Justice Owen), Chief Justice Phillips, Justice Gonzalez and Justice Hankinson all joined the majority opinion. *See id.* at 48. Whether the composition of the majority opinion in this case reflects a shift in the previous position of Chief Justice Phillips and Justice Gonzalez with regard to the jury's role in bad faith cases or an acceptance of the principle of *stare decisis* remains to be seen.

denying or delaying payment on a claim should be made a question of law.[274] Justice Hecht argued that bad faith should be found only when an insurer has engaged in intentional or reckless behavior, but not when the insurer has merely acted negligently.[275] Justice Hecht further stated that the standard for bad faith must exceed that for negligence.[276] Bad faith must be "the . . . unscrupulous taking advantage of an insured's disadvantageous position relative to the insurer."[277] Justice Hecht agreed that the "reasonably clear" standard adopted by the majority is probably the correct standard for reviewing bad faith cases.[278] However, he contended that whether liability is reasonably clear is a legal question, not a factual question.[279] In a telling statement, he wrote that "treating the issue as one of law allows the courts to begin *to categorize* the conduct which risks bad-faith liability and thus develop the practical parameters of the tort."[280] And yet, the Supreme Court has had little difficulty categorizing and refining the tort so far.[281]

Justice Hecht's approach, if accepted, will greatly narrow or preclude the role of the jury in determining insurer liability. Justice Hecht correctly notes that the existence of a duty is a question of law, but the Court has already answered the question of whether a duty exists by establishing the duty of good faith and fair dealing in *Arnold*.[282] However, the Court has continued to play a role in bad faith cases by developing and refining a standard of review, by making legal determinations of the damages available, and by conducting no-evidence reviews. Once a duty is established, it is up to

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274. *See* Universe Life. Ins. Co. v. Giles, 950 S.W.2d 48, 70 (Tex. 1997) (Hecht, J., concurring). Hecht's concurrence was joined by Chief Justice Phillips, Justice Gonzalez, and Justice Owen. *See id.* at 58 (Hecht, J., concurring).

275. *See id.* at 60 (Hecht, J., concurring).

276. *See id.* at 64-65 (Hecht, J., concurring).

277. *Id.* at 64 (Hecht, J., concurring).

278. *See id.* at 69 (Hecht, J., concurring).

279. *See id.* at 70 (Hecht, J., concurring).

280. *Id.* (emphasis added) (Hecht, J., concurring).

281. *See, e.g.*, Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 23-24 (Tex. 1994) (limiting punitive damages in the bad faith context); Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 598 (Tex. 1993) (giving the Court "the opportunity to clarify the method by which Texas courts should conduct legal sufficiency review of factfindings"); Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212 (Tex. 1988) (defining the standard of care for insurers).

282. *See generally* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987) (holding that in Texas, "a duty of good faith and fair dealing exists").

a jury, not the Supreme Court, to determine whether such a duty has been breached.[283]

5. Damages

Beyond the issue of breach, however, lies the question of damages. The Supreme Court has expressed a deep reluctance to let juries award damages for particularly culpable behavior. Although *Arnold* recognized a plaintiff's right to collect punitive and mental anguish damages in a bad faith claim,[284] neither punitive nor mental anguish damages fare well before the current Court. The Court's first and most significant decision on damages in this area is the 1994 case *Transportation Insurance Co. v. Moriel.*[285]

In that case, Juan Moriel, the plaintiff, suffered injuries at work for which he was later hospitalized.[286] After his release, Moriel experienced a loss of movement in one leg and impotence.[287] When his doctors could not find a physical cause for the impotence, they referred him to a clinic at the Baylor College of Medicine in Houston.[288] His insurance company, Transportation, agreed to cover the costs of tests.[289] The tests indicated that the impotence had a physical component.[290]

Ultimately, Transportation did not pay for the Baylor tests for two years, and the company delayed for more than one year the payment of other medical bills.[291] Moriel then filed a Workers' Compensation claim against Transportation and was awarded over $30,000.[292] Transportation appealed to the district court and, in that appeal, Moriel added a claim that Transportation had breached its duty of good faith and fair dealing by unreasonably delaying in the payment of his claims.[293] The bad faith claim was tried to a jury, which found that Transportation had acted with

283. *See Giles*, 950 S.W.2d at 56 (stating that "[w]e have long recognized that the Texas Constitution confers an exceptionally broad jury trial right upon litigants").
284. *See Arnold*, 725 S.W.2d at 168.
285. 879 S.W.2d 10 (Tex. 1994).
286. *See Moriel*, 879 S.W.2d at 13.
287. *See id.*
288. *See id.*
289. *See id.*
290. *See id.* at 14.
291. *See id.*
292. *See id.*
293. *See id.*

reckless disregard of Moriel's rights in delaying the claims without a reasonable basis.[294] The jury awarded Moriel $101,000 in actual damages and $1 million in punitive damages.[295] The court of appeals affirmed.[296]

The Supreme Court reversed both the jury verdict and the judgment of the court of appeals and created a "new standard for . . . recovering punitive damages for breach of the duty of good faith and fair dealing."[297] The Court began by noting that at least a finding of gross negligence is required for the awarding of punitive damages.[298] The Court was dissatisfied with the traditional definition of gross negligence as it was being applied by the appellate courts.[299] That definition stated that gross negligence "should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it."[300]

The Court stated that this standard had eliminated the difference between gross negligence and ordinary negligence, because a jury was allowed to *infer* gross negligence by looking to see whether there was some carelessness rather than determining whether there was an "entire want of care."[301] To eliminate the possibility of such an inference, the Court established another, more difficult, standard: under *Moriel,* gross negligence is "such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected."[302] To prove gross negligence, a plaintiff must show "that the act [complained of] was likely to result in serious harm and that

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294. *See id.*

295. *See id.*

296. *See* Transportation Ins. Co. v. Moriel, 814 S.W.2d 144, 145 (Tex. App.—El Paso 1991), *rev'd*, 879 S.W.2d 10 (Tex. 1994).

297. Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 48 SMU L. REV. 1351, 1372 (1995).

298. *See Moriel*, 879 S.W.2d at 19.

299. *See id.* at 20-21. The lower courts applied the standard created in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

300. *See Burk*, 616 S.W.2d at 920.

301. *See Moriel*, 879 S.W.2d at 20-21.

302. *Id.* at 22 (adopting the statutory definition of gross negligence). This statutory standard for gross negligence was codified in the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997).

the defendant was consciously indifferent to the risk of harm."[303] Showing that a reasonable person would have realized that the conduct created an extreme risk would be insufficient.[304]

Finally, in cases of bad faith, an insurer may be liable for punitive damages only if its conduct created a risk of serious harm, and the insurer was aware that the insured would probably suffer such harm as a result of the conduct.[305] In addition, the injury must rise above mental anguish, mere inconvenience, annoyance, or delay.[306] The harm must be extraordinary such as death, grievous physical injury, or financial ruin.[307] *Moriel*'s explicit holding—that the injury suffered must be independent and qualitatively different from injuries suffered from a breach of contract and bad faith[308]—will make punitive damages awards virtually impossible.

Furthermore, as two commentators have noted, *Moriel* "all but eliminated the possibility that an insurer will be liable for punitive damages if by some chance it breaches [the duty of good faith and fair dealing]."[309] This effect of *Moriel*'s holding is problematic. Why should the plaintiff's injuries be different from those that would arise from bad faith? Punitive damages are a tool for juries to punish defendants for particularly egregious acts of bad faith, where the defendants acted when they knew or should have known that injury would result or where the injury was particularly serious.[310] Punitive damages have traditionally given jurors a mechanism for expressing the outrage of their community or for

303. *Moriel*, 879 S.W.2d at 22.

304. *See id.*

305. *See id.* at 23-24.

306. *See id.* at 24.

307. *See id.*; *see also* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 450 (Tex. 1997) (finding that the insurer did not know denying the claim would result in property damage and that, in fact, the denial did not result in property damage).

308. *See Moriel*, 879 S.W.2d at 24.

309. Philip K. Maxwell & Tim Labadie, *Annual Survey of Texas Law: Insurance Law*, 48 SMU L. REV. 1351, 1373-74 (1995). The Court also adopted two procedural standards in order to rein in punitive damages awards. *See id.* at 1374. The first of these was the bifurcation, at the request of one of the parties, of the issue of punitive damages from all other issues in the trial. *See Moriel*, 879 S.W.2d at 30. The second was to require all courts of appeals, when conducting a factual sufficiency review of a punitive damages award, to detail the relevant evidence and explain why the evidence supports or does not support the award. *See id.* at 31.

310. *See Moriel*, 879 S.W.2d at 16 (recognizing that "punitive (or exemplary) damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct").

punishing particularly terrible behavior that an actual damages award might not adequately punish.[311] In *Moriel*, the Supreme Court showed a distinct reluctance to let the jury speak for the community. It would be the Court, not the jury, who would decide what kinds of conduct should be punished.

In 1996, the Court usurped power from the jury again. In *Saenz v. Fidelity & Guaranty Insurance Underwriters*,[312] the Supreme Court drastically reduced a jury's traditional right to award damages for mental anguish.[313] Before *Saenz*, the amount of a jury award in Texas for mental anguish was generally not reviewable.[314] However, in *Saenz*, the Supreme Court held that the amount of a jury award is subject to factual sufficiency review, like any other jury determination.[315]

Corina Saenz suffered a concussion at work.[316] After the injury, she began experiencing recurring headaches, drowsiness, and seizures; she was later diagnosed with post-concussion syndrome, a potentially long-term disorder.[317] Although she settled her claim

311. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (deciding that punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Moriel*, 879 S.W.2d at 17 (explaining that "punitive damages are levied for the public purpose of punishment and deterrence"); Lunsford v. Morris, 746 S.W.2d 471, 471 (Tex. 1988) (citing Graham v. Roder, 5 Tex. 141, 149 (1849) for the proposition that "punitive damages are justified by [a] blending of the interests of society with those of the aggrieved individual"); JOHN GUINTHER, THE JURY IN AMERICA 227 (1988) (observing that jurors are the peoples' "only direct representative within the justice system").

312. 925 S.W.2d 607 (Tex. 1996).

313. *See* Saenz v. Fidelity Guar. Ins. Underwriters, 925 S.W.2d 607, 614 (Tex. 1996).

314. *See* Peter v. Ogden Ground Servs., Inc., 915 S.W.2d 648, 651 (Tex. App.—Houston [14th Dist.] 1996, no writ) (stating that determining the amount of mental anguish damages should be left to the trier of fact); Transit Management Co. v. Sanchez, 886 S.W.2d 823, 826 (Tex. App.—San Antonio 1994, no writ) (indicating that when an appellate court questions a jury's finding of a mental anguish award, it would be improper to break the award down into its components and consider the jury's "scribbling out" to the side); Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755, 763 (Tex. App.—Corpus Christi 1988, writ denied) (recognizing that damage awards for injuries are within the province of the fact finder).

315. *See Saenz*, 925 S.W.2d at 614 (stressing that the law mandates that appellate courts review jury awards).

316. *See id.* at 608.

317. *See id.* at 609.

with her insurer, she eventually sued the insurer and the adjuster for bad faith settlement practices.[318]

The jury found in favor of Saenz and awarded her actual damages.[319] In addition, the jury awarded Saenz $4 million in punitive damages against Fidelity and another $250,000 in punitive damages against the adjuster.[320] The court of appeals affirmed the judgment on all matters except for the punitive damages award and future medical expenses.[321] In affirming the mental damages award, the appellate court relied on the principle that mental anguish damages are particularly suited for jury determination.[322]

Justice Hecht wrote for the Texas Supreme Court majority of five, reversing the jury verdict and the judgment of the court of appeals.[323] In addition to finding that Saenz's testimony of mental anguish was insufficient under *Parkway Co. v. Woodruff*,[324] the Court found that the *amount* awarded was not supported by the evidence.[325] The Court noted that the correct standard in reviewing the amount was that the plaintiff must show "evidence that the amount found is fair and reasonable compensation."[326] Although there was a concurring opinion by Chief Justice Phillips, joined by Justices Cornyn and Owen, and a dissent by Justice Spector, no judge took issue with the majority's holding that a reviewing court

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318. *See id.* at 608. Saenz testified that she repeatedly told her adjuster that she was concerned about compensation under the Texas Workers' Compensation Act for the lifetime medical treatment she feared she was facing. *See id.* According to Saenz, the adjuster told her that she was only eligible for a maximum of five years of benefits; this was a misrepresentation. *See id.* Eventually, Saenz agreed to settle for $65,000 and five-years coverage. *See id.* at 609. When Saenz learned that she had, in fact, been eligible for lifetime benefits, she sued the company and the adjuster. *See id.* at 610.

319. *See* Fidelity & Guar. Ins. Underwriters, Inc. v. Saenz, 865 S.W.2d 103, 113 (Tex. App.—Corpus Christi 1993) (en banc), *rev'd*, 925 S.W.2d 607 (Tex. 1996).

320. *See id.*

321. *See Saenz*, 865 S.W.2d at 108.

322. *See id.* at 113-14.

323. *See Saenz*, 925 S.W.2d at 608.

324. 901 S.W.2d 434, 444 (Tex. 1995). In *Parkway*, the Court held that mental anguish damages must be supported by either (1) evidence of the nature, duration, or severity of the plaintiff's anguish, in order to establish a substantial disruption in the plaintiff's daily routine; or (2) other evidence showing that the plaintiff suffered from a high degree of mental pain that is "more than mere worry, anxiety, vexation, embarrassment, or anger." Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995).

325. *See Saenz*, 925 S.W.2d at 614.

326. *Id.*

could review the *amount* of a mental anguish award for legally sufficient evidence.[327]

In short, the Court now substitutes its subjective opinions for the subjective decision of twelve jurors. The Court admitted in *Saenz* that determining mental anguish damages is a difficult task because of the "impossibility of any exact evaluation."[328] That admission demonstrates why the question of mental anguish damages is appropriately given to juries.[329] To write that the jury should not be given discretion in determining mental anguish damages supposes that a judge's subjectivity yields better results than that of twelve other persons. The truth is that the extent of mental anguish damages in a given case may indeed be a matter upon which reasonable minds may differ. However, a jury of the parties' peers, reflective of the community and the circumstances of any given situation, would appear to be better-equipped than a judge to make that difficult determination. Determining mental anguish damages is distinctly a fact matter—not a matter of law.[330]

After *Saenz*, appellate courts are now asked to answer a question that, in Texas, has always been answered by a jury: whether the *amount* of the award is *reasonable*. The integrity of the system is protected adequately by review of the jury's determination to award such damages in the first place. Thus, the jury's determination of the amount of the award should in all but the most egregious cases be left to the jury's discretion.

The Court's disposition of cases in the area of insurance law shows the Court's deep mistrust for the ability of juries to determine what is reasonable or unreasonable and how much in dam-

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327. *See* Julie M. Kennerson, Note, Saenz v. Fidelity & Guaranty Insurance Underwriters: *The Texas Supreme Court Continues to Refine Texas's Mental Anguish Jurisprudence*, 35 HOUS. L. REV. 279, 288 (1998).

328. *Saenz*, 925 S.W.2d at 614.

329. *See* Julie M. Kennerson, Note, Saenz v. Fidelity & Guaranty Insurance Underwriters: *The Texas Supreme Court Continues to Refine Texas's Mental Anguish Jurisprudence*, 35 HOUS. L. REV. 279, 297 (1998) (observing that "the issue of who is best able to translate a subjective, non-pecuniary harm into a monetary damage award" is the type of determination for which the jury system was designed).

330. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 453 (1996) (Scalia, J., dissenting) (stating "the proper measure of damages 'involves only a question of fact'" (quoting St. Louis I.M. & S.R. Co. v. Craft, 237 U.S. 648, 661 (1915))); Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 n.2 (Tex. 1989) (stating that the determination of damages is a question of fact).

ages is necessary to compensate and punish. In addition, the Court has narrowed the scope of the duty owed to insureds, and it has also engaged in a more thorough review of issues that were once exclusively within the province of the jury. Thus, the Court has swung the pendulum sharply in favor of insurance companies.

III. HEALTH CARE

In health care cases, the Texas Supreme Court used three broad legal theories to overturn jury verdicts, restrict jury verdicts, or prevent cases from reaching the jury.[331] These legal theories are:

1. A diminishing legal duty owed by health care providers to patients or their survivors;
2. Increasingly harsher evidentiary hurdles for patients' expert witnesses; and
3. Strict interpretations in statute of limitation cases.

In addition, the Court firmly held to the line of existing case law that refuses to recognize any right to damages for personal injury or wrongful death for the loss of a fetus based on the reasoning that a fetus is not a person.

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331. The following summarizes other theories or legal principles used by the Court during the 1996-97 term to decide cases in favor of physicians and hospitals. In *Texarkana Memorial Hospital Inc. v. Murdock*, the Texas Supreme Court reversed a judgment against a hospital, finding no evidence to link the total amount of expenses for the subsequent treatment of an injured baby to the hospital's original negligence in failing to properly treat the baby for meconium aspiration. *See* Texarkana Mem'l Hosp., Inc. v. Murdock, 946 S.W.2d 836, 841 (Tex. 1997). The Court held some of the expenses for subsequent treatment could have been for conditions having causes independent of the hospital's original negligence. *See id.* at 840. In addition, in *Goode v. Shoukfeh*, the Court found in favor of a physician in a medical malpractice case involving issues relating to jury strikes. *See* Goode v. Shoukfeh, 943 S.W.2d 441, 446-47 (Tex. 1997).

The Court also emphasized the care that a plaintiff must take in determining which defendants to sue. *See* Scott & White Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596-97 (Tex. 1996). In *Scott*, the Court held that a trial court had plenary jurisdiction to grant a motion for sanctions against a plaintiff who had sued thirty-one of a hospital's doctors even though the motion was not pending when the plaintiff non-suited all but two of the doctors after the case had been pending for two and a half years. *See id.*

Finally, in the one case during the 1996-97 term, *Memorial Medical Center v. Keszler*, which pitted a physician against a hospital, the Court held that a release signed by a physician in settlement of his suit based on the hospital's revocation of his staff and clinical privileges also released his claim for toxic exposure. *See* Memorial Med. Ctr. v. Keszler, 943 S.W.2d 433, 435 (Tex. 1997) (per curiam).

A. *The Duty Owed by Health Care Providers*

Because duty is a question of law, a case will not reach a jury unless the court initially determines that a duty exists.[332] By overturning lower court decisions that find the existence of a duty, the Court has nullified jury verdicts against health care providers or prevented juries from considering the liability of health providers for injuries to their patients. In *Otis Engineering Corp. v. Clark*,[333] decided in 1983, an earlier Texas Supreme Court provided a basis for a court's analysis of the question of duty.

In *Otis Engineering*, the Court considered whether an employer had a duty to a third party not to allow an intoxicated employee to drive home.[334] The Court held that numerous factors must be considered in determining whether a duty should be imposed, including: "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer."[335] The Court noted that its decision required a determination of whether "changing social standards and increasing complexities of human relationships in today's society justify imposing a duty upon an employer to act reasonably when he exercises control over his servants."[336]

Utilizing Dean Prosser's concept of duty, the Court contended that changing social conditions should lead to the recognition of new duties where "reasonable men would recognize [a duty] and agree that it exists."[337] Citing previous cases that had extended the

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332. *See* Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998) (stating that "whether a duty exists is a question of law for the court to decide"); *see also* Markman v. Westview Instruments, Inc., 517 U.S. 370, 387 (1996) (indicating that questions of fact are decided by a jury while questions of law are decided by the court).

333. 668 S.W.2d 307 (Tex. 1983).

334. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983). The employee had a history of drinking on the job. *See id.* On the night in question, the employee appeared intoxicated, and his supervisor suggested that he should go home. *See id.* The supervisor escorted the employee to the parking lot, and, in response to the supervisor's inquiry, the employee responded that he could make it home without assistance. *See id.* Thirty minutes later, the employee was involved in a fatal car accident three miles from the plant. *See id.* Acting on a hunch, the supervisor went to the police station after hearing of the accident to determine whether the employee had been involved. *See id.*

335. *Id.* at 309.

336. *Id.* at 310.

337. *Id.* (quoting WILLIAM L. PROSSER, THE LAW OF TORTS § 56 at 327 (4th ed. 1971)). The earlier Court's reliance on Dean Prosser's approach to duty may be the impe-

concept of duty in the employer liability area, the Court imposed a duty to act reasonably on employers who exercise control over an incapacitated employee.[338] The Court analogized the duty to cases in which "a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons."[339]

Given its broad principles, *Otis Engineering* provides general guidance regarding factors to be used in determining whether a duty exists.[340] In addition, the reasoning in *Otis Engineering* supports the fluidity of a duty concept that changes in conformity to society demands. More recent cases decided by the Texas Supreme Court, however, refuse to recognize these broad principles, electing to limit the applicability of *Otis Engineering* to other cases with similar facts.

For example, in the 1998 case of *Chambers v. Hermann Hospital Estate*,[341] Johnny Long, Jr., was brought to the emergency room of a hospital and was treated for seizures and alcohol withdrawal.[342] Long was sedated because he was violently combative.[343] The day following his admission, Long was transferred to the neurological

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tus that led to the recent Court's rejection of the general duty factors and considerations announced in *Otis Engineering*. The Prosser approach encompassed Dean Keeton's theory of duty. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1703-04 (1997) (noting that Prosser reported for the *Restatement (Second) of Torts*, which reflected Keeton's theory). The Keeton-Prosser model allocates more power to the jury by adopting a broad duty to act reasonably. *See id.* at 1702-04 (explaining that the focus of the Keeton approach is breach and proximate cause, which are questions for the jury). The opposing approach, adopted by Dean Green, empowers a judge to define duty narrowly. *See id.* at 1702-04 (noting that Green's approach focuses on duty, which is a question of law).

338. *See Otis Eng'g Corp.*, 668 S.W.2d at 311 (citing Missouri, K. & T. Ry. Co. v. Wood, 95 Tex. 223, 66 S.W. 449 (1902) and Sylvester v. Northwestern Hosp., 53 N.W.2d 17 (Minn. 1952)).

339. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 319 (1965)).

340. *See id.* (comparing the duty regarding an incapacitated employee with the duty regarding a dangerous person). The general nature of the duty regarding an incapacitated employee can be inferred from the duty of one who can exercise control over a dangerous person to act reasonably careful. *See id.*

341. 961 S.W.2d 177 (Tex. App.—Houston [1st Dist.] 1996), *rev'd sub nom.* Van Horn v. Chambers, 970 S.W.2d 542 (Tex. 1998).

342. *See* Chambers v. Hermann Hosp. Estate, 961 S.W.2d 177, 179 (Tex. App.—Houston [1st Dist.] 1996), *rev'd sub nom.* Van Horn v. Chambers, 970 S.W.2d 542 (Tex. 1998).

343. *See id.* Long was "kicking, biting, and hitting" the medical attendants. *Id.* After he was sedated, anti-seizure drugs and medication for alcohol withdrawal were administered, and Long was secured with leather restraints. *See id.*

critical care unit, and Dr. Gage Van Horn became his attending physician.[344] The following day, Van Horn transferred Long to an unsecured floor for general patients.[345] When Long attempted to leave the hospital the following morning, a patient-care technician, a food-service worker, and a medical student attempted to restrain him.[346] The patient-care technician and food-service worker were killed when they crashed through a grill in the ensuing struggle and fell 24 feet to the concrete below.[347] The issue presented was whether Van Horn owed a duty to the patient-care technician and food-service worker.[348]

The court of appeals held that a physician owes a duty to non-patient third parties based on the decision in *Otis Engineering*.[349] The appeals court rejected Van Horn's contention that the duty in *Otis Engineering* was limited to the employer-employee relationship.[350] The court was persuaded that the source of the harm was similar to that in *Otis Engineering*; that is, the actions were of a person whom the defendant took charge but failed to reasonably control.[351] The court distinguished the Texas Supreme Court's decision in *Bird v. W.C.W.*,[352] explaining that the source of harm in *Bird* was the substance of a professional's diagnosis, as opposed to a failure to control the actions of a patient.[353]

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344. *See id.*

345. *See id.* In the evening, Long refused tranquilizers to treat his agitation. *See id.*

346. *See id.* In his effort to leave the hospital, Long assaulted a nurse. *See id.*

347. *See id.* The grill covered an air shaft opening. *See id.* Long and the medical student were injured from the fall. *See id.* The medical student, as well as the parents, widow and daughter of the patient care technician sued Van Horn, the hospital, and related entities for various claims. *See id.*

348. *See id.* The court also addressed whether the claims against the hospital defendants were barred by the Texas Workers' Compensation Act. *See id.*

349. *See id.* at 189.

350. *See id.* The appellate court explained that the duty imposed in *Otis Engineering* arose from a person voluntarily intervening into a situation, not exclusively from the employer-employee relationship. *See id.* The appellate court further noted that the cases cited by the Court in *Otis Engineering* did not arise in the employment context. *See id.* at 190.

351. *See id.* at 190.

352. 868 S.W.2d 767 (Tex. 1994).

353. *See Chambers*, 961 S.W.2d at 190-91. The appellate court's distinction of *Bird* was based on the Court's statement that although the claim was "couched in terms of negligent misdiagnosis, the essence of the father's claim is that it was Bird's *communication* of her diagnosis that caused him emotional harm and related financial damages." Bird v. W.C.W., 868 S.W.2d 767, 768-69 (Tex. 1994).

The Texas Supreme Court reversed the appellate court, declining to extend *Otis Engineering* beyond the employer-employee context.[354] Rather than challenge the general analysis regarding duty contained in *Otis Engineering,* the Court elected to limit the decision to its facts.[355] In addition, the Court rejected reliance on Sections 315 and 319 of the *Restatement (Second) of Torts* to impose liability.[356] Most interesting in the Court's rejection of those theories, however, were the broad pronouncements on which the reasoning was based.

Although Section 315 imposes a duty upon a party to control a third person to prevent him from causing physical harm to another party where a special relationship exists between the two parties,[357] the Court stated that "[n]o Texas court has held that the physician-patient relationship is such a relationship."[358] With regard to Section 319, which imposes a duty to control on a person who takes charge of a third person whom the person knows or should know is likely to cause bodily injury to others,[359] the Court asserted that it had not adopted Section 319 as the law in Texas.[360] Instead of applying a risk-utility analysis to determine whether such a duty

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354. *See* Van Horn v. Chambers, 970 S.W.2d 542, 547 (Tex. 1998).

355. *See id.* The Court based its distinction on the absence of a right to control similar to the one implicit in the master-servant relationship. *See id.*

356. *See id.* at 546-47.

357. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965).

358. *Chambers*, 970 S.W.2d at 546. Section 315 of the *Restatement (Second) of Torts* provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965). The Court also noted that the special relationship must be accompanied by an inherent right to control, which a doctor does not exercise over a patient. *See Chambers*, 970 S.W.2d at 546 (distinguishing this case from *Otis Engineering* on the grounds that no "right to control implicit in the master-servant relationship" existed in the facts of the present case).

359. *See* RESTATEMENT (SECOND) OF TORTS § 319 (1965). Section 319 of the *Restatement (Second) of Torts* states that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.*

360. *See Chambers*, 970 S.W.2d at 547. The Court further stated that Section 319 would not apply because no inherent right to control a patient exists and Section 319 does not apply to a negligent omission. *See id.*

should be adopted despite an absence of its recognition in the past, the Court ignored the possibility that societal values may have changed and public policy may now dictate an expansion of such liability.

One has to wonder what impact the Court's general rejection of liability under Section 319 will have when it addresses the issue[361] that was avoided in the 1996 case of *Kerrville State Hospital v. Clark*.[362] In *Clark*, Gary Ligon was the estranged husband of Rebecca Clark Ligon.[363] Having had a history of mental problems, Gary was taken to Kerrville State Hospital for treatment after he threatened Rebecca and resisted arrest in April of 1989.[364] In May of 1989, Gary was determined not to be manifestly dangerous and began an outpatient commitment pursuant to a court order.[365] On May 22, 1990, Gary was voluntarily admitted to the hospital for inpatient treatment.[366] Gary appeared to have been drinking and was not taking his medication at the proper levels.[367] The hospital released Gary at his request on May 24, 1990, reinstating the outpatient commitment.[368] On June 1, 1990, Gary brutally murdered Rebecca, decapitating, dismembering, and burning her body.[369]

The Austin court of appeals acknowledged that a doctor generally owes a duty only to patients.[370] However, the court distin-

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361. The Court has granted a petition for review in a case in which it may address this issue. *See generally* Thapar v. Zezulka, 41 Tex. Sup. Ct. J. 1044 (July 3, 1998). In *Thapar*, a psychiatrist began treating a patient for post-traumatic stress disorder in 1985, and the patient was repeatedly hospitalized between 1985 and September 1988. *See id.* at 1044. During his treatment in August 1988, the patient expressed a desire to kill his step-father. *See id.* When he was discharged, the nurse noted that he was somewhat withdrawn and confused. *See id.* The psychiatrist did not warn the step-father of the patient's discharge, and the patient shot the step-father on September 28, 1988. *See id.* One of the issues granted in the petition for review was: "In a medical malpractice case, does a physician owe a *Tarasoff* duty to warn in the absence of facts and circumstances giving rise to a legal duty under Sections 315-319 of the *Restatement (Second) of Torts*?" *Id.* at 1045.

362. 923 S.W.2d 582 (Tex. 1996).

363. *See* Kerrville State Hosp. v. Clark, 900 S.W.2d 425, 429 (Tex. App.—Austin 1995), *rev'd*, 923 S.W.2d 582 (Tex. 1996).

364. *See id.*

365. *See id.* A Kerrville psychiatrist recommended the outpatient commitment to enable the hospital to monitor Gary's medication. *See id.*

366. *See id.*

367. *See* Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 583 (Tex. 1996).

368. *See id.*

369. *See id.*

370. *See Clark*, 900 S.W.2d at 436. The hospital argued that a doctor's duty to his or her patients could not be extended to include a patient's victims. *See id.* at 435-36.

guished the cases supporting this general proposition, noting that those cases did not involve a patient "who the doctor knew or had reason to know was dangerous."[371] The court concluded that the facts presented fit "squarely within Section 319" of the *Restatement (Second) of Torts* because the hospital had "two options in exercising control over Gary," including petitioning a court to require inpatient commitment based on Gary's medication noncompliance or injecting Gary with a medication that would have stabilized his condition for at least one month.[372] Because the hospital took charge of Gary when it voluntarily admitted him on May 22, 1990, the appellate court held that the hospital had a duty to ensure Gary's medication compliance.[373]

A majority of the Texas Supreme Court reversed the Austin court of appeals on the issue of sovereign immunity; therefore, the majority opinion did not address the issue of duty.[374] Justice Abbott filed a dissenting opinion, asserting that sovereign immunity was waived.[375] Because Justice Abbott would not reverse on the basis of sovereign immunity, he addressed the issue of duty and concluded that Section 319 established a duty of care.[376] Based on the Court's wholesale rejection of Section 319 as a basis for liability in *Chambers*, uncertainty exists as to whether Justice Abbott can convince a majority of the Court that Section 319 should be used as a basis for imposing a duty upon a doctor who takes charge of a patient that the doctor knows or has reason to know is dangerous.[377]

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371. *See id.* at 436.

372. *See id.*

373. *See id.* Applying a risk-utility analysis, the court found that the risk, foreseeability, and likelihood of injury were high, but there was no social utility in the hospital's failure to medicate Gary, given his history of medication noncompliance. *See id.*

374. *See Clark*, 923 S.W.2d at 584 n.2, 586 (holding that no reason existed to consider the other issues because the claims were barred by sovereign immunity).

375. *See id.* at 586-87 (Abbott, J., dissenting).

376. *See id.* at 587-88 (Abbott, J., dissenting).

377. Justice Abbott did not participate in the *Chambers* opinion. *See* Van Horn v. Chambers, 970 S.W.2d 542, 547 (Tex. 1998). Chief Justice Phillips, Justice Cornyn, and Justice Spector joined Justice Abbott in his dissenting opinion in *Clark*. *See Clark*, 923 S.W.2d at 586 (Abbott, J., dissenting). *See generally* William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 289-91 (1986) (discussing the extension of the duty to third parties as a broad view of duty necessary to permit fluctuation with growing social consciousness).

Another case in which the Court broadly rejected the possibility of a new theory of liability is *Baptist Memorial Hospital System v. Sampson*,[378] decided in 1998. In that case, the Court addressed whether a hospital could be found vicariously liable for the negligence of emergency room physicians.[379] The San Antonio court of appeals held that two distinct theories for imposing liability on a hospital for the negligence of emergency room physicians had been recognized by the San Antonio court and other jurisdictions.[380] The appellate court explained that one theory, agency by estoppel, arose under Section 267 of the *Restatement (Second) of Agency*;[381] the other theory, apparent agency, arose under Section 429 of the *Restatement (Second) of Torts*.[382] The court recognized that

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378. 969 S.W.2d 945 (Tex. 1998).

379. *See* Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 946 (Tex. 1998). The plaintiff, Rhea Sampson, was bitten on the arm by an unknown insect. *See id.* An emergency room physician diagnosed Sampson as having an allergic reaction and sent her home with medication for pain and swelling. *See id.* When she returned to the hospital after her condition worsened, the same diagnosis and treatment were given, and Sampson was sent home again. *See id.* After an additional fourteen hours, Sampson went to a different hospital as her condition rapidly deteriorated and was admitted to the intensive care unit in septic shock. *See id.* Sampson's bite was diagnosed as that of a brown recluse spider, and she continues to experience recurring medical problems. *See id.* at 946-47.

380. *See* Sampson v. Baptist Mem'l Hosp. Sys., 940 S.W.2d 128, 131 (Tex. App.—San Antonio 1996), *rev'd*, 969 S.W.2d 945 (Tex. 1998). The San Antonio court cited its prior decision in Baptist Mem'l Hosp. Sys. v. Smith, 822 S.W.2d 67, 72-73 (Tex. App.—San Antonio 1991, writ denied), as well as opinions from other states. *See id.* Two commentators have considered these theories in discussing whether liability should be imposed on health maintenance organizations. *See* Jim M. Perdue & Stephen R. Baxley, *Cutting Costs—Cutting Care: Can Texas Managed Health Care Systems and HMOs Be Liable for the Medical Malpractice of Physicians?*, 27 ST. MARY'S L.J. 23, 29-39 (1995) (advocating that "Texas courts should hold HMOs liable for their member-physician's malpractice," and discussing whether the theories of respondeat superior, apparent agency, agency by estoppel, and nondelegable duty may be used as a means for doing so); *cf.* John D. Hodson, Annotation, *Liability of Hospital or Sanitarium for Negligence of Physician or Surgeon*, 51 A.L.R.4TH 235 (1987).

381. *See Sampson*, 940 S.W.2d at 131. Section 267 of the *Restatement (Second) of Agency* provides:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

382. *See Sampson*, 940 S.W.2d at 131. Section 429 provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negli-

"agency by estoppel" was "generally more difficult to prove because a representation or holding out *and* actual reliance must be shown."[383] Although apparent agency also requires proof of a "holding out" by the hospital, the court of appeals noted the increasing trend was to find this requirement satisfied when the hospital holds itself out to the public as a provider of emergency medical services.[384] Without commenting on this recent trend and attempting to refute the policy reasons underlying its adoption in other jurisdictions, the Texas Supreme Court simply held that "[t]o the extent that the *Restatement (Second) of Torts* Section 429 proposes a conflicting standard for establishing liability, we expressly decline to adopt it."[385]

Although the Court gave no reason for rejecting the trend toward adopting Section 429, it offered three sentences in explanation of its refusal to take the additional step, encouraged by the lower court, of imposing a nondelegable duty on hospitals for the negligence of emergency room physicians.[386] The Court reasoned that such a duty is not necessary because a patient injured by a

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gence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

RESTATEMENT (SECOND) OF TORTS § 429 (1965).

383. *See Sampson*, 940 S.W.2d at 132 (emphasis added). The elements of agency by estoppel include: "(1) a third party has a reasonable belief in an agent's authority; (2) the belief is generated by some holding out or neglect of the principal; and (3) the third party justifiably relies on the representation of authority." *See id.* Only two elements are required to be shown under the theory of apparent agency recognized by the San Antonio court, including: "(1) the patient must look to the hospital, rather than the individual physician, for treatment; and (2) the hospital must 'hold out' the physician as its employee." *See id.* Proof of reliance is not required under the second theory. *See id.*

384. *See id.* at 133. The trend is based on large modern-day hospitals becoming well-run businesses that "spend enormous dollars competitively advertising their services to induce patients to utilize their services." *See id.*

385. Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 949 (Tex. 1998).

386. *See id.* at 948-49. In encouraging the Texas Supreme Court to take this additional step, the San Antonio court asserted:

> Emergency rooms are aptly named and vital to public policy. There exists no other place to find immediate medical care. The dynamics that drive paying patients to a hospital's emergency rooms are known well. Either a sudden injury occurs, a child breaks his arm or an individual suffers a heart attack, or an existing medical condition worsens, a diabetic lapses into a coma, demanding immediate medical attention at the nearest emergency room. The catch phrase in legal nomenclature, "time is of the essence," takes on real meaning. Generally, one cannot choose to pass by the nearest emergency room, and after arrival, it would be improvident to depart in hope of finding one that provides services through employees rather than independent contrac-

physician's malpractice has a cause of action against the negligent physician.[387] This, however, is overly simplistic.

As the court of appeals noted, hospitals are increasingly "engaged in sophisticated managed care structuring and advertising in an effort to induce patients and insurance companies to use their services."[388] Hospitals should be required to "accept the responsibility that attaches to the services it undertakes to generate revenues."[389] Yet, after the Court's decision in *Sampson*, hospitals will continue to earn increasing revenues for attracting patients to their emergency rooms, and patients injured during the course of treatment will have no recourse against hospitals because these patients will continue to have "no other place to go" but the nearest emergency room.[390]

In those cases in which the Court has applied a risk-utility analysis, the Court has moved away from an emphasis on foreseeability in order to focus on other factors.[391] In *Praesel v. Johnson*,[392] another case decided in 1998, the issue presented was "whether a physician owes a duty to third parties to warn an epileptic patient not to drive or to report the patient's condition to state authorities that govern the issuance of drivers' licenses."[393]

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tors. The patient is there and must rely on the services available and agree to pay the premium charged for those services.

Sampson, 940 S.W.2d at 136. Two commentators have encouraged Texas courts to adopt a nondelegable duty to impose similar liability on HMOs. *See* Jim M. Perdue & Stephen R. Baxley, *Cutting Costs-Cutting Care: Can Texas Managed Health Care Systems and HMOs Be Liable for the Medical Malpractice of Physicians?*, 27 ST. MARY'S L.J. 23, 38-39 (1995).

387. *See* Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 949 (Tex. 1998). The Court also reasoned that the patient could sue the hospital if the hospital was negligent in performing a duty that the hospital owed directly to the patient. *See id.* However, in *St. Luke's Episcopal Hospital v. Agbor*, the Court limited the effectiveness of pursuing a claim against a hospital for negligent credentialing by holding that the patient was required to show malice on the part of the hospital in order to recover. *See* St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 504 (Tex. 1997).

388. *Sampson*, 940 S.W.2d at 138.

389. *Id.*

390. *See id.*

391. *See* Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990) (stating that of all the factors, "foreseeabilty of the risk is 'the foremost and dominant consideration'" (quoting El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987))).

392. 967 S.W.2d 391 (Tex. 1998).

393. Praesal v. Johnson, 967 S.W.2d 391, 392 (Tex. 1998). In this case, an epileptic patient was involved in a fatal car accident in 1991. *See* Praesal v. Johnson, 925 S.W.2d 255, 256 (Tex. App.—Corpus Christi 1996), *rev'd*, 967 S.W.2d 391, 392 (Tex. 1998). Three of the defendants last reported treating the patient in 1986. *See id.* The other defendant admit-

The Corpus Christi court of appeals concluded that under existing precedent, a physician has a duty to third parties to warn a patient not to drive when the doctor's actions have threatened the third party, but not when the doctor's actions have simply failed to provide a beneficial safeguard that may have protected the third party.[394] The court further noted that the plaintiffs complained that the defendants' nonfeasance caused the accident and asserted that the determination of whether it should be the first to recognize such a duty required the consideration of several factors, "including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."[395] The law of other states could also be taken into account, and the court considered a case decided by the Iowa Supreme Court, recognizing the public as the beneficiary of "a physician's duty to warn epileptic patients not to drive."[396] The appellate court concluded that summary judgment was improper as to the physician to whom the driver had reported renewed seizure activity seven months before the collision.[397] The court reasoned:

> There is little social utility in a doctor's failure to warn certain patients suffering from uncontrolled epilepsy that they should not drive. The magnitude of the burden inherent in requiring doctors to warn such epileptic patients not to drive is minimal when it is based on the patient's disclosure of a recent seizure. And, finally, a doctor's free exercise of professional judgment is not infringed by imposing a duty to warn his epileptic patients to avoid driving until their seizures are under control.[398]

The Supreme Court dispensed with the common-law duty to warn by asserting that the risk of driving should have been obvious

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ted the patient had informed him seven months before the accident of a seizure that occurred three months earlier. *See id.*

394. *See Praesal*, 925 S.W.2d at 258.

395. *Id.* (quoting Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).

396. *Id. See generally* Gregory G. Sarno, Annotation, *Liability of Physician, for Injury to or Death of Third Party, Due to Failure to Disclose Driving Related Impediment*, 43 A.L.R.4TH 153 (1986) (discussing the laws of various states).

397. *See Praesal*, 925 S.W.2d at 259-60.

398. *Id.* at 259.

to the patient.[399] Although the Court appeared to agree that the burden of requiring the physician to warn the patient regarding the dangers of driving would be minimal, the Court contended that "many patients do not heed the admonitions of their physicians."[400] Focusing instead on what it perceived to be the great consequence of "substantial liability," the Court declined to impose a common-law duty on physicians to warn epileptic patients not to drive.[401]

The contrasting reasoning in the two *Praesel* decisions is a good example of how a different result can be reached depending upon the policy approach utilized. Another good example is the difference in the reasoning between the intermediate and Supreme Court decisions in *Garcia v. Santa Rosa Health Care Corp.*[402]

In *Garcia*, decided in 1998, the issue presented was "whether a duty exists on the part of a health care provider or supplier of products to notify a third party that he or she may have been exposed to HIV through someone the health care professional suspects of having AIDS as a result of the professional's services or products."[403] In *Garcia*, the third party affected by the absence of

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399. *See* Praesal v. Johnson, 967 S.W.2d 391, 398 (Tex. 1998) (pointing out that patients diagnosed with epilepsy should know they might experience seizures).

400. *Id.*

401. *See id.* The Court also declined to find negligence per se in the failure to report a patient's epileptic condition. *See id.* The Court noted that the statutes permit, but do not require, a physician to inform the Department of Public Safety, when a driver suffers from epilepsy. *See id.* at 394. The Court further noted that a patient's license is not automatically revoked when the information regarding the condition is reported. *See id.* at 395. Although the Court recognized that the general public was within the class of persons the statute was intended to protect, the Court concluded that the permissive reporting requirement provided no sound basis for imposing liability per se. *See id.* The Court reasoned that a physician's failure to report would not be substandard in every instance, and, because the report would not necessarily result in the revocation of the driver's license, compliance with the reporting requirement would not directly protect the general public. *See id.*

402. 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996), *rev'd*, 964 S.W.2d 940 (Tex. 1998).

403. Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372, 376 (Tex. App.—Corpus Christi 1996), *rev'd*, 964 S.W.2d 940 (Tex. 1998). The plaintiff, Linda Balderas Garcia, sued Santa Rosa Health Care Corporation for negligently failing to notify her that her former husband probably had AIDS. *See id.* at 375. Her former husband was a hemophiliac and was likely infected from blood products supplied by Santa Rosa in the mid-1980s. *See id.* Although Santa Rosa scheduled Garcia's former husband for yearly exams, it allegedly never notified him that he could be infected with HIV. *See id.* Since Garcia's former husband failed to keep his yearly appointments, he did not discover his AIDS infection until he was tested in 1989. *See id.* Balderas and Garcia met in 1987, were married in 1988,

notification was the spouse of the individual.[404] The appellate court noted that the hospital's information indicating that the individual was infected with AIDS was not derived from an AIDS test but from the condition of their blood supply, which placed the individual at risk for developing AIDS.[405] The appellate court then recognized that an application of a risk-utility analysis was required to determine whether a legal duty existed.[406] The appellate court concluded that once the hospital learned that its blood was infected and that the individual was probably infected, the hospital could also foresee the risk that the individual could spread the disease to others, and the risk, foreseeability, and likelihood of the injury from the spread of the infection justified placing some burden on the hospital to reasonably notify those with whom the individual may have had intimate contact.[407]

The Texas Supreme Court reversed, holding that the applicable statutes precluded the hospital from disclosing the information.[408] The Court noted that under the 1987 version of the Communicable Disease Prevention and Control Act (CDPCA) the information could not have been released because only test results were subject to disclosure, and the individual in question was never actually tested.[409] Furthermore, under the 1989 version of the CDPCA, the Court concluded the hospital could not have notified the spouse of the individual because the individual had not tested positive when the hospital sent notices to the individual.[410] The Court reasoned that no duty could be owed for the hospital's failure to notify the spouse because such a notice would have violated the 1989 statute.[411]

Prior to the Texas Supreme Court's decision, at least one commentator advocated the enactment of state legislation to require professionals to notify third parties who are at risk for contracting AIDS from a client or patient the professional suspects has

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and were divorced sometime after Balderas filed suit against Santa Rosa in 1991. *See id.* at 375-76. Balderas died in 1993. *See id.* at 376 n.1.

404. *See id.* at 375.

405. *See id.* at 376.

406. *See id.*

407. *See id.*

408. *See* Santa Rosa Health Care Corp. v. Garcia, 964 S.W.2d 940, 944 (Tex. 1998).

409. *See id.* at 942-43.

410. *See id.* at 943-44.

411. *See id.* at 944.

AIDS.[412] The commentator noted that Texas law supported a duty to warn but that statutory restrictions mandated confidentiality.[413] Unfortunately, after the Texas Supreme Court's decision in *Garcia*, no duty to warn third parties of AIDS exposure will likely be imposed absent legislative action.

Before juries will be able to consider whether health care practitioners should be liable to their patients or to third parties for the practitioner's action or inaction, the Court must be willing to assess the duty question under the traditional risk-utility analysis in light of changing societal standards. Absent this reconsideration of the duty issue, no case, in which the existence of a duty is questionable, will be decided in favor of recognizing a duty unless such a case falls squarely within the parameters of an already-recognized duty. As a result, fewer health care cases involving an issue of whether a duty exists will ever reach trial, and the jury's role will continue to be limited. Even if such cases reach trial, the court has also restricted the evidence that the jury may consider in reaching a verdict.

B. *Evidentiary Standards*

Recent Texas Supreme Court decisions have limited the ability of juries to determine liability in health care cases by restricting the types of evidence the jury may consider. By imposing ever-increasing evidentiary hurdles, the Texas Supreme Court has made the qualification of experts more difficult and has prevented the jury from hearing evidence it was previously able to consider.[414]

For instance, in *Broders v. Heise*,[415] a case decided by the Court in 1996, the Heises sued various defendants for their failure to diagnose and treat their daughter in a timely manner after she was assaulted.[416] The defendants, Presbyterian Hospital and three

412. *See* Tammy R. Wavle, Comment, *HIV and AIDS Test Results and the Duty to Warn Third Parties: A Proposal for Uniform Guidelines for Texas Professionals*, 28 ST. MARY'S L.J. 783, 824-30 (1997) (emphasizing the importance of a disclosure statute to protect third parties).

413. *See id.*

414. For a discussion of the qualifications requirements prior to the recent Texas Supreme Court decisions, see Darrell L. Keith, *Medical Expert Testimony in Texas Medical Malpractice Cases*, 43 BAYLOR L. REV. 1, 7-16 (1991).

415. 924 S.W.2d 148 (Tex. 1996).

416. *See* Broders v. Heise, 924 S.W.2d 148, 150 (Tex. 1996). The Heises' daughter, Kathleen Heise, was taken to a hospital after she was found unconscious on a sidewalk

emergency room physicians, claimed that the Heises' daughter had sustained "an irreversible, untreatable, and fatal brain injury at the time of the assault," therefore, no negligence on the part of the defendants could have caused the death of the Heises' daughter.[417] At trial, the plaintiffs called an emergency room physician to testify.[418] Although the trial court allowed the emergency room physician to testify generally regarding the standard of care, negligence, and foreseeability, his testimony regarding causation was excluded based on the defendants' contention that only a neurosurgeon was qualified to give that testimony.[419]

The Eastland court of appeals held that the trial court erred in excluding the testimony.[420] The appellate court reasoned that Rule 702 of the Texas Rules of Civil Evidence required only that the physician possess knowledge and skill not possessed by people generally and that his testimony would assist the jury.[421] The court rejected any requirement that the physician was required to be a specialist in the particular area in which he was called to testify.[422]

The Texas Supreme Court reversed, holding that although the emergency room physician "knew both that neurosurgeons should be called to treat head injuries and what treatments they could provide, he never testified that he knew, from either experience or study, the effectiveness of those treatments in general, let alone in this case."[423] Although the Court explained that its holding did not mean that a specialist is required to testify regarding causation, the offering party must establish "'knowledge, skill, experience, training, or education' regarding the specific issue before the court [that] would qualify the expert to give an opinion on that particular

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after being assaulted and perhaps choked. *See id.* When Kathleen arrived at the hospital, she was conscious and could walk, but continued to vomit. *See id.* Kathleen refused treatment until the following morning, when an examination revealed no internal injuries. *See id.* Kathleen was released only to return that evening because she was "vomiting, sensitive to light, and suffering an intense headache." *See id.* A CT scan was performed, and a neurosurgeon was consulted, who concluded Kathleen had suffered a fractured skull, with both bleeding and swelling in her brain. *See id.* Kathleen died the next day. *See id.*

417. *See id.*

418. *See id.*

419. *See id.* at 151.

420. *See* Heise v. Presbyterian Hosp. of Dallas, 888 S.W.2d 264, 266 (Tex. App.—Eastland 1994), *rev'd sub nom.* Broders v. Heise, 924 S.W.2d 148 (Tex. 1996).

421. *See id.*

422. *See id.*

423. *Broders*, 924 S.W.2d at 153.

subject."[424] Thus, *Heise* leaves open the question of whether an attorney can risk designating a non-specialist and having that expert's testimony excluded at trial, particularly on the heels of the Court's subsequent decision in *United Blood Services v. Longoria* the following year, in 1997.[425]

Although *Longoria* was an appeal from a summary judgment, the Court held that the appellate court erred in holding that the trial court abused its discretion in rejecting an expert's testimony regarding the standard of care for the blood-banking industry.[426] The court of appeals held that the expert's degrees in bacteriology, anthropology, and public health, as well as his self-education in epidemiology, showed sufficient expertise for summary judgment purposes.[427] The Texas Supreme Court reversed, holding that the objections to the expert's qualifications demonstrated that the expert lacked the necessary "knowledge, skill, experience, training, or education."[428]

The holdings in *Broders* and *Longoria* are further examples of the Court's reluctance to allow juries to decide cases; these holdings illustrate the difficulty attorneys face in presenting health care cases to a jury. Unless attorneys can obtain an expert who is specially qualified to testify in a specific area, plaintiffs in health care cases will be denied the opportunity to present evidence that is likely to be crucial to their case. By making it increasingly difficult

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424. *Id.*

425. 938 S.W.2d 29 (Tex. 1997). In *Longoria*, the parents of San Juanita Longoria sued a blood supplier after their daughter died at the age of four. *See* United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997). The Longorias' daughter had contracted acquired immune deficiency syndrome (AIDS) and cytomegalovirus (CMV) following a blood transfusion shortly after her birth. *See id.* The blood was supplied by United Blood Services. *Id.* The court of appeals reversed the first summary judgment in favor of United Blood Services, holding a question of fact was raised regarding the failure to screen for CMV and whether testing might have eliminated high AIDS risk donors. *See* Longoria v. United Blood Servs., 907 S.W.2d 605, 617 (Tex. App.—Corpus Christi 1995), *rev'd*, 938 S.W.2d 29 (Tex. 1997).

426. *See Longoria*, 938 S.W.2d at 30.

427. *See id.*

428. *Id.* at 31. Despite the holding in *Longoria*, several courts of appeals have reached seemingly different conclusions. *See* Hall v. Huff, 957 S.W.2d 90, 99-101 (Tex. App.—Texarkana 1997, pet. denied) (holding the trial court abused its discretion in disallowing the testimony of a physician on the nursing standard of care); Silvas v. Ghiatas, 954 S.W.2d 50, 53-54 (Tex. App.—San Antonio 1997, pet. denied) (holding that an orthopedic surgeon is qualified to testify regarding radiology).

to qualify experts, the Court prevents a jury from hearing critical evidence that it previously was permitted to consider.

In addition to imposing an increased burden for proving an expert's qualifications, the Court has also made proving the reliability of an expert's testimony more difficult. In 1997, the Texas Supreme Court reversed a jury's verdict based on scientific evidentiary standards in *Merrell Dow Pharmaceuticals v. Havner*.[429] By determining that an expert's testimony was not reliable, the Court was able to declare the testimony to be no evidence to support the jury's verdict.[430]

Havner will be problematic for parties to a jury trial in the future.[431] The parties in a lawsuit will need to take the additional step of providing sufficient evidence to prove that the underlying data supporting an expert's testimony is sound and that the conclusions drawn from that data are based on a reliable methodology.[432] Even in cases where a trial court is convinced that the data and methodology are reliable, an appellate court will be able to overturn any verdict reached by a jury by holding to the contrary.[433] In

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429. *See* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 730 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998). Kelly Havner was born with a limb reduction birth defect, and the issue presented was whether the drug Benedictin caused that defect. *See id.* at 708. A jury found in favor of the Havners and awarded $3.75 million in actual damages and $30 million in punitive damages. *See id.* at 709. The trial court reduced the punitive damage award to $15 million, and the Corpus Christi court of appeals, on rehearing en banc, affirmed the actual damage award but reversed and rendered the punitive damage award. *See id.*

430. *See id.* at 730.

431. *See generally* Linda Daniels & Angela Moore, Expert Witnesses: Handling a Challenge Under *Daubert/Robinson/Hartman* (May 1998) (unpublished article on file with the *St. Mary's Law Journal*). The authors of this paper liken *Daubert/Robinson* to a "two headed dragon with a barbed tail and a venomous forked tongue." *Id.* at 17. The authors note that thousands of dollars may be spent in expert fees and hours of research and preparation may be undertaken to prepare and learn about "teratogenicity, confidence intervals, significance testing, statistical extrapolation variances, *in vivo* and *in vitro* studies, chondrogenesis, and doxylaminc succinct" studies only to have the judgment reversed based on an appellate finding that "a record you had to rent additional space to store has 'no evidence' of the very point you" believed must have been sufficiently supported. *Id.*

432. *See Havner*, 953 S.W.2d at 714.

433. *See id.* at 708 (overturning a jury finding for legally insufficient evidence). In *Havner*, the issue of scientifically reliability was repeatedly considered by the trial court. *See id.* at 708-09. Merrell Dow filed a summary judgment, and an extensive hearing was undertaken by the trial court. *See id.* In addition, Merrell Dow raised the issue in motions in limine, seeking to exclude certain expert testimony and evidence. *See id.* at 709. The issues raised in the motions were extensively briefed, another lengthy hearing was con-

reality, cases in which expert testimony is critical will be "tried" at the appellate court level, rather than the trial court level.[434]

C. *Statute of Limitations*

The Court has also prevented health care cases from reaching juries by liberally construing statutes of limitation in favor of health care providers. In *Husain v. Khatib*,[435] a case decided in 1998, the Texas Supreme Court used limitations to keep a medical malpractice case from reaching a jury. In *Husain*, Ilham Khatib sued various defendants for failing to diagnose and treat her breast cancer.[436] Ilham initially consulted a physician in December 1989 and complained of "thickness" in her breast; however, the physician concluded that Ilham did not have cancer after examining the results from a mammogram performed in January 1990.[437] In September 1991, Ilham consulted the physician regarding an unrelated condition, and the physician again examined her breasts but did not order additional tests.[438] In August 1992, the physician ex-

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ducted, and the motions were denied by the trial court. *See id.* Finally, Merrell Dow objected to the admission of the testimony at trial and moved for a directed verdict at the close of the evidence. *See id.*

434. A more recent products liability case demonstrates the extent to which the Court is willing to extend the expert evidentiary hurdles. In *Gammill v. Jack Williams Chevrolet, Inc.*, the trial court excluded two expert witnesses, holding that they were not qualified to testify and that their opinions were not scientifically reliable. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 715 (Tex. 1998). The Texas Supreme Court affirmed, noting "[j]ust as not every physician is qualified to testify as an expert in every medical malpractice case, not every mechanical engineer is qualified to testify as an expert in every products liability case." *Id.* at 719.

Following the Supreme Court of the United States and the Texas Court of Criminal Appeals, the Texas Supreme Court held that the reliability rules governing admissibility apply to both novel and conventional scientific evidence. *See id.* at 721-22. To ensure that the expert evidentiary hurdles affect all cases, the Court went a step further and held that the same reliability requirement applies to all expert testimony, not just testimony regarding scientific evidence. *See id.* at 727. Therefore, in cases involving expert testimony, more cases will likely be resolved after prolonged hearings regarding expert qualification and reliability, and those cases in which jury verdicts are rendered may readily be overturned on appeal based on a failure to comply with the evidentiary hurdles.

435. 964 S.W.2d 918 (Tex. 1998).

436. *See* Khatib v. Husain, 949 S.W.2d 805, 808 (Tex. App.—Fort Worth 1997), *rev'd*, 964 S.W.2d 918 (Tex. 1998).

437. *See id.* at 809. The physician initially consulted was Dr. Tehmina Husain. *See id.* Dr. Miguel R. Alday performed the mammogram, and both Dr. Tehmina Husain and her husband, Dr. Asif Husain, reviewed the mammogram and concluded that Ilham had fibrocystic disease. *See id.*

438. *See id.*

amined Ilham's breasts for a third time and ordered a mammogram.[439] In September 1992, Ilham was informed that she had breast cancer.[440] Ilham consulted another physician, who informed her that biopsies should have been performed following the mammogram in 1990.[441] Ilham retained an attorney in May 1993, who immediately sent notice letters, and suit was filed in November 1994.[442]

The Fort Worth court of appeals held that limitations began to run on the final day of the physician's course of treatment, or September 1992.[443] The Texas Supreme Court reversed, holding the statute began to run in September 1991, when the doctor failed to order additional tests.[444] Based on the Supreme Court's holding, limitations can begin to run before a patient is aware of a medical condition. Yet, Ilham was never informed that she had cancer until September of 1992. Nevertheless, based on the Court's holding, Ilham was already one year into her limitations period when she was diagonosed with cancer; thus, her case will never be presented to a jury.

Another case that will never reach a jury is a minor child's claim against a doctor for negligent treatment of the child's deceased father in *Diaz v. Westphal*.[445] The child's mother sued the doctor in 1993, claiming that his negligent treatment caused the father to contract cancer and die.[446] The doctor treated the father from 1977

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439. *See id.*

440. *See id.*

441. *See id.*

442. *See id.*

443. *See id.* at 810. The appellate court determined that when an injury occurs during a course of treatment for a given condition, the last day of the course of treatment is the only readily ascertainable date of the breach. *See id.* Under the appellate court's analysis, Ilham's claim was within the limitations period because the notice letters sent in May of 1993, after Ilham retained an attorney, extended the two year limitations statute by 75 days. *See id.* at 810-11.

444. *See* Husain v. Khatib, 964 S.W.2d 918, 920 (Tex. 1998).

445. 941 S.W.2d 96 (Tex. 1997). The defendant doctor prescribed Cytoxan to treat the father's Hodgkin's disease. *See* Diaz v. Westphal, 941 S.W.2d 96, 97 (Tex. 1997). The father used Cytoxan from 1977 to 1984. *See id.* In 1984, the father began bleeding from his urinary tract, and an emergency room physician advised him that the bleeding was caused by the Cytoxan which he had been taking for too long. *See id.* The father subsequently developed bladder cancer, and a lawsuit was brought by the mother on the child's behalf. *See id.* The lawsuit alleged that the doctor's negligence in prescribing Cytoxan for the prolonged period of time caused the cancer. *See id.*

446. *See id.*

to 1984.[447] The cancer was discovered in April 1991, and the father died in April 1992.[448] The Corpus Christi court of appeals held that the child's claim was not barred by limitations based on the application of the discovery rule and the open courts doctrine.[449] The Texas Supreme Court reversed, holding that the discovery rule had been abolished in cases governed by the Medical Liability Act and that the open courts doctrine was inapplicable to the child's claim because the claim was wholly statutory in nature.[450]

Husain and *Diaz* are yet two more examples of the Court's attempts at limiting the number of cases that are tried before a jury. Given the holdings in these cases, health care providers are increasingly likely to explore more inventive approaches to the limitations defense in health care cases. Their continued success will decrease the likelihood that health care cases will be decided by a jury.

D. *Injury or Death of a Fetus*

In addition to its steadfast refusal to recognize duties owed by health care providers, the Court has also continued to refuse to recognize causes of action involving injury to, or death of, a fetus. Absent the Court's recognition of these types of claims, plaintiffs seeking to recover for such injuries will never be able to present their cases to a jury. For example, in the 1997 case of *Edinburg Hospital Authority v. Trevino*,[451] the Texas Supreme Court expanded its refusal to recognize a cause of action for the loss of a fetus or for negligent treatment of a stillborn fetus.[452]

In *Trevino*, the Court held that a mother cannot recover as a bystander for the loss of her fetus because a hospital does not owe a duty to a fetus that was not born alive.[453] In addition, the Court held that the husband could not recover for the mental anguish he suffered in witnessing the negligent treatment of his wife because

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447. *See id.*

448. *See id.*

449. *See* Westphal v. Diaz, 918 S.W.2d 543, 546-47 (Tex. App.—Corpus Christi 1996), *rev'd*, 941 S.W.2d 96 (Tex. 1997).

450. See *Diaz*, 941 S.W.2d at 101.

451. 941 S.W.2d 76 (Tex. 1997).

452. *See* Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 79 (Tex. 1997) (refusing to recognize a bystander cause of action for a mother's loss of her fetus).

453. *See id.*

"[t]he very nature of medical treatment is often traumatic to the layperson . . . [and a] bystander may not be able to distinguish between medical treatment that helps the patient and conduct that is harmful."[454] The husband had witnessed his wife bleeding heavily after contractions, saw bloodclots in her bedpan, waited for his wife to undergo an emergency caesarian section, and was subsequently told that his child was stillborn.[455]

This refusal to recognize the cause of action for loss of a fetus is based on the 1987 decision of *Witty v. American General Distributors, Inc.*[456] Although ten years had passed since *Witty* was decided, the Court showed no interest in re-examining the risk-utility analysis of this duty rule in light of changing societal values.[457] As Justice Gonzalez asserted in his dissenting opinion, "there should be no difference in tort law whether the child's death occurs just before or just after birth."[458] The Court's opinion "perpetuates the fiction that a full-term, pre-birth baby is nothing more than a glob of tissue that is part of the mother's body and thus not worthy of legal protection."[459]

These holdings provide yet another example of the Court's unwillingness to recognize a cause of action, leaving citizens with no recourse for their losses. This unwillingness prevents a jury from deciding whether health care professionals' conduct fall below the community's idea of acceptable behavior. Until the Court recognizes that Texas has "an important, if not compelling, interest in protecting the life of an unborn child," parents, like the Trevinos, will continue to be uncompensated for the loss of a child caused by the negligence of health care professionals.[460]

In the area of health care in general during the last several years, the Texas Supreme Court has severely limited the jury's role in resolving disputes in three different ways. First, the Court has minimized the duty health care providers owe to their patients, which

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454. *Id.* at 81.

455. *See id.* at 80.

456. 727 S.W.2d 503 (Tex. 1987); *see also* Pietila v. Crites, 851 S.W.2d 185 (Tex. 1993) (following and applying the holding in *Witty*).

457. *See* Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 79 (Tex. 1997) (adhering to the rule that a hospital owes no duty to a fetus not born alive).

458. *Trevino*, 941 S.W.2d at 85 (Gonzalez, J., dissenting).

459. *Id.* (Gonzalez, J., dissenting).

460. *See id.* at 92 (Gonzalez, J., dissenting).

has resulted in fewer instances in which the jury is asked to determine whether a duty was, in fact, breached. The second way the Court has limited the jury's role is by creating increasingly difficult standards for admitting expert testimony. To this end, the Court has stripped from juries the power of deciding how much weight to give to a particular expert. Finally, the Court has continued to construe statutes of limitation strictly so as to prevent many parties who were harmed by health care providers from bringing their case before a jury. As a result of these cases, the Court has placed numerous obstacles in the path of health care consumers who desire to have their cases heard by a jury.

IV. SUITS AGAINST THE GOVERNMENT

Governmental liability is yet another area of the law in which the court has restricted jury involvement. In the 1996-1997 term of the Texas Supreme Court, the government won six of the seven cases in which it was a defendant.[461] Some of those cases involved areas of the law that are treated elsewhere in this Article or areas that are beyond the scope of this Article. For example, three of the cases involved ordinary tort principles.[462] Another case turned on a procedural point.[463] Three of the cases, however, dealt with a matter that has been favored by the Phillips/Hecht Court: governmental immunity.[464] Because the Court usually finds the govern-

461. *See* Texas Citizen Action, *The Texas Supreme Court in 1996-97: Insurers, Physicians Win Big Before a Defendant-Oriented Court* (visited July 19, 1998) < http://www.texasca.org/courtwatch/tscwr.htm> (discussing how a review of the cases on appeal to the Texas Supreme Court have primarily resulted in the defendant winning, particularly if the defendant is an insurance company, health care provider, or a governmental entity).

462. *See* Texas Util. Elec. Co. v. Timmons, 947 S.W.2d 191, 196 (Tex. 1997) (stating that the attractive nuisance doctrine does not apply to an electrical tower); City of Grapevine v. Roberts, 946 S.W.2d 841, 843 (Tex. 1997) (holding the city to a lower standard upon finding that a crumbled sidewalk was not a "special defect"); City of San Antonio v. Rodriguez, 931 S.W.2d 535, 537 (Tex. 1996) (disapproving the jury instruction in a premises defect case).

463. *See* San Antonio Indep. Sch. Dist. v. McKinney, 936 S.W.2d 279, 284 (Tex. 1996) (barring an employment claim on the basis of res judicata).

464. *See* Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 420 (Tex. 1997) (holding the State immune from liability and suit in contract actions); Wadewitz v. Montgomery, 951 S.W.2d 464, 467 (Tex. 1997) (reversing summary judgment where the Court found some evidence to support a finding that a police officer acted in bad faith); University of Tex. at Dallas v. Ntreh, 947 S.W.2d 202, 202 (Tex. 1997) (holding the State immune in a breach of employment contract case). One case, *Downing v. Brown*, dealt with official immunity. *See* Downing v. Brown, 935 S.W.2d 112, 113 (Tex. 1996) (per curiam) (addressing whether

ment immune from suit,[465] thereby removing yet another issue from jury consideration, immunity, both sovereign and official, is the focus of the following discussion.

Laws shielding the government or a government actor from legal liability have long existed and have been established in Texas since 1847.[466] However, in Texas, the doctrine of governmental immunity, which encompasses both sovereign and official immunity,[467] has been modified over time from total to limited immunity.[468] Liability may now be found where the governmental entity waives its immunity.[469] The Texas Tort Claims Act provides the specific circumstances under which governmental entities waive their sovereign immunity.[470] Conversely, whether an individual state

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a teacher was immune from personal liability). Another case held a school coach to be immune from suit on the basis of the school's immunity. *See* Newman v. Obersteller, 960 S.W.2d 621, 622-23 (Tex. 1997).

465. *See, e.g.*, Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 489, 491 (Tex. 1998); City of Tyler v. Likes, 962 S.W.2d 489, 491 (Tex. 1997); Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 405 (Tex. 1997); Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 584 (Tex. 1996); Dallas County v. Harper, 913 S.W.2d 207, 208 (Tex. 1995); DeWitt v. Harris County, 904 S.W.2d 650, 654 (Tex. 1995); Kassen v. Hatley, 887 S.W.2d 4, 9 (Tex. 1994); Harris County v. Dillard, 883 S.W.2d 166, 168 (Tex. 1994); University of Tex. Med. Branch v. York, 871 S.W.2d 175, 179 (Tex. 1994); LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992); State Dep't of Highways & Pub. Transp. v. Dopyera, 834 S.W.2d 50, 51 (Tex. 1992). *But see* Kuhl v. City of Garland, 910 S.W.2d 929, 931 (Tex. 1995) (per curiam) (concluding that the city waived immunity); City of LaPorte v. Barfield, 898 S.W.2d 288, 299 (Tex. 1995) (denying the defense of immunity); Texas Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 684 (Tex. 1993) (determining that the government may be held to have waived immunity); Delaney v. University of Houston, 835 S.W.2d 56, 60 (Tex. 1992) (discounting the state's claim of immunity).

466. *See* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 679-81 (1996) (noting that Texas first adopted governmental immunity in 1847).

467. *See id.* at 694 (stating that "governmental immunity" is an umbrella term for all types of immunity for governmental entities and actors).

468. *Compare* Texas Highway Dep't v. Weber, 219 S.W.2d 70, 71 (Tex. 1949) (declaring the state's absolute right to immunity from torts committed in the course of its duties), *with* Green Int'l, Inc. v. State, 877 S.W.2d 428, 432 (Tex. App.—Austin 1994, writ dism'd) (listing several mechanisms a state may use to waive its immunity).

469. *See* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 693 (1996) (indicating that in Texas the common-law doctrine of governmental immunity has been modified by statutory waivers).

470. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997) (listing when a state governmental unit can be held liable).

employee may or may not claim official immunity is governed by common-law standards.[471]

The current Texas Supreme Court has narrowly interpreted both the statutory waiver provision and the common-law standard. As a result, the number of fact questions left for a jury to answer in cases involving governmental immunity has significantly decreased. In addition, the Court increasingly has limited the definitions of statutory terms and the established standards of conduct, making a finding of government liability even more unlikely.

A. *Sovereign Immunity*

Under the term "sovereign immunity," all governmental entities are presumptively entitled to immunity from suit.[472] A state entity can waive this immunity; in fact, Texas has done so, in part, under the Texas Tort Claims Act.[473] Under the Act, immunity is waived in three areas: use of public vehicles, premises defects, and "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[474] The Texas Supreme Court, however, has limited a jury's ability to decide whether a governmental entity has waived its immunity under the Act in at least two ways—by narrowly interpreting both tort causation principles and what constitutes use of property.

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471. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 653-58 (Tex. 1994) (establishing the standard for official immunity); *see also* Kassen v. Hatley, 887 S.W.2d 4, 10-12 (Tex. 1994) (discussing the official immunity standard in relation to physicians employed by the government).

472. *See* James A. Burt, *The Tortured Trial at Sovereign Immunity in Missouri*, 54 J. MO. B. 189, 190 (1998) (recounting the history of sovereign immunity in Missiouri and the nuances that accompany the statutory exceptions to governmental immunity); *Government Tort Liability*, 111 HARV. L. REV. 2009, 2010 (1998) (exploring the common law and statutory exceptions to governmental immunity); Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 695-96 (1996) (discussing the scope of sovereign immunity in Texas).

473. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 1997) (stating that "[s]overeign immunity to suit is waived and abolished"); *see also* Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 584 (Tex. 1996) (recognizing the state's ability to waive its immunity).

474. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997).

1. Use and Non-Use of Property

Few areas of Texas jurisprudence are as confusing and inconsistent as the body of case law attempting to determine whether a suit against a governmental entity involves the use or non-use of property.[475] Earlier opinions adopted interpretations that favored the possibility of liability, but the 1990s Court has either ignored or reinterpreted earlier cases in such a way as to protect the government from suit in nearly all cases.[476] The current Court has stated that, for a governmental actor to "use" property for purposes of the Texas Tort Claims Act, the actor must "put or bring [the property] into action or service; to employ for or apply to a given purpose."[477] This approach diverges from earlier cases holding that the *failure* to provide property might also constitute "use."[478]

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475. *See* University of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994) (describing the Court's history of interpreting use, non-use, and misuse of property as "arduous"); Jennifer D. Brandt, Note, *The Plague of Medical Malpractice in Public Hospitals-Texas Adopts a New Standard for Determining Whether a Doctor Has Official Immunity:* Kassen v. Hatley, *887 S.W.2d 4 (Tex. 1994)*, 26 TEX. TECH L. REV. 959, 989-90 (1995) (stating that cases interpreting a waiver of sovereign immunity have become so confusing that there is no way to predict the outcome in a given case). In at least three cases, the Supreme Court has asked for guidance on this issue from the Legislature. *See, e.g.*, Robinson v. Central Tex. MHMR Ctr., 780 S.W.2d 169, 170 (Tex. 1989) (criticizing the Legislature for not acting to correct a problem brought to its attention thirteen years prior to this decision); Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983) (stating that "the legislature has not changed the troublesome waiver provision"); Lowe v. Texas Tech Univ., 540 S.W.2d 297, 301 (Tex. 1976) (Greenhill, C.J., concurring) (urging the Legislature to clarify its intent in waiving governmental liability).

476. *Compare* Robinson v. Central Texas MHMR Ctr., 780 S.W.2d 169, 170-71 (Tex. 1989) (holding that a MHMR facility was not protected by sovereign immunity because of its failure to use property), *and* Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 31 (Tex. 1983) (finding that a suit against a governmental entity arising from the death of a patient was not precluded by sovereign immunity because the hospital "misused" property), *with* Kerrville State Hosp. v. Clark, 923 S.W. 582, 586 (Tex. 1996) (permitting a hospital to be covered by sovereign immunity because the non-use of property does not fit within the use definition), *and* Kassen v. Hatley, 887 S.W.2d 4, 14 (Tex. 1994) (allowing a government entity to be shielded by sovereign immunity because a claim can not arise by the non-use of property).

477. *Clark*, 923 S.W.2d at 584 (quoting Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208, 211 (Tex. 1989)).

478. *See Salcedo*, 659 S.W.2d at 32 (stating that "condition or use" of property implies that the property was furnished, was defective, or was wrongly used) (citing *Lowe*, 540 S.W.2d at 302 (Greenhill, C.J., concurring). *Salcedo* extended the scope of government liability to include the misuse of property. *See id.* at 32-33 (holding that the plaintiff's allegation regarding misuse of property constituted a waiver of immunity, and thus, a cause of action under the Texas Tort Claims Act); Jennifer D. Brandt, Note, *The Plague of Medical Malpractice in Public Hospitals—Texas Adopts a New Standard for Determining*

In *Robinson v. Central Texas MHMR Center,*[479] decided in 1989, the Court considered whether a state mental health center had waived immunity from liability when the facility failed to provide a life preserver during a swimming outing for an epileptic patient in its care.[480] The *Robinson* majority looked for guidance in an earlier Supreme Court decision, *Lowe v. Texas Tech University.*[481] In *Lowe*, the Court held that a university could be liable for failure to provide a knee brace to a football player, because that failure amounted to the provision of "defective equipment."[482] Protective devices, the Court stated, are "integral parts of the football uniform."[483] Relying on this precedent, the Court held in *Robinson* that failure to provide a vital part of necessary equipment, including a life preserver, amounted to a misuse of tangible personal property, for which the government could be held liable.[484]

In cases like *Lowe* and *Robinson* that broadly construe the Texas Tort Claims Act to favor suits against government entities, the Court has relied on three particular sources. First, the Court observed that Dean Keeton, in a report to the Texas Legislature, stated that most conduct resulting in personal injury would invoke a waiver of immunity under the Act.[485] Second, the Court noted that the Act itself called for a liberal interpretation, providing that "[t]he provisions of this Act shall be liberally construed to achieve

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Whether a Doctor Has Official Immunity: Kassen v. Hatley, *887 S.W.2d 4 (Tex. 1994)*, 26 TEX. TECH L. REV. 959, 966 (1995) (indicating that the *Salcedo* holding "expanded the scope of governmental liability under section 101.021(2) to include wrongful conduct that involves the misuse of tangible property").

479. 780 S.W.2d 169 (Tex. 1989).

480. *See* Robinson v. Central Tex. MHMR Ctr., 780 S.W.2d 169, 171 (Tex. 1989). Chief Justice Phillips, Justice Cook, and Justice Hecht dissented from the majority opinion. *See id.* at 171-72. Justice Spears concurred. *See id.* at 171.

481. 540 S.W.2d 297 (Tex. 1976).

482. *See* Lowe v. Texas Tech Univ., 540 S.W.2d 297, 300 (Tex. 1976).

483. *Id.*

484. *See Robinson*, 780 S.W.2d at 171.

485. *See* Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983) (quoting Dean Keeton's statement in a legislative report on the Texas Tort Claims Act). Keeton stated:

> Most negligent conduct that results in personal injury involves either the use of tangible property or the creation or maintenance of a dangerous condition of tangible property. So it seems to me that whereas this might appear to be a somewhat restrictive waiver of immunity it is not so in fact. It is a very general one but productive of undesirable litigation over its meaning.

Id. (citation omitted).

the purposes hereof."[486] Finally, some justices also argued that the Legislature's silence, in the face of several liberal decisions by the Supreme Court, signaled the Legislature's acquiescence to the liberal construction by the Court.[487]

Nonetheless, the Phillips/Hecht Court has not been persuaded by these sources or previous cases. Two cases signaling a retreat from broadly construing the Texas Tort Claims Act are *Kassen v. Hatley*,[488] decided in 1994, and *Kerrville State Hospital v. Clark*, decided in 1996.[489] Both cases involved the administration of drugs, and, in both cases, the Court held that a hospital was immune from liability for injuries caused to patients.[490]

In *Kassen*, Pennie Johnson, diagnosed with a borderline antisocial personality disorder, was being treated as an outpatient at the forensic unit of the Dallas County Mental Health and Mental Re-

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486. *Id.* (citation omitted). The Texas Tort Claims Act is now subject to the principles of code construction provided in the Code Construction Act. *See* University of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 n.3 (Tex. 1994). The Code Construction Act requires that, in construing statutes, a court consider, "(1) the object sought to be obtained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; (7) title (caption), preamble, and emergency provision." TEX. GOV'T CODE ANN. § 311.023 (Vernon 1988).

487. *See* Texas Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 683-84 (Tex. 1992) (referring to the number of opportunities available to the Legislature to amend the Texas Tort Claims Act waiver provision); *Robinson*, 780 S.W.2d at 171 (discussing the "prolonged legislative silence and implicit acquiescence in precedent of this court" in response to the dissent's criticism that the majority is ignoring its duty to interpret the waiver provision); *Salcedo*, 659 S.W.2d at 32 (reasoning that the waiver provision has remained susceptible to different interpretations because of the Legislature's failure to clarify it); *see also* Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 587 (Tex. 1996) (Abbott, J., dissenting) (criticizing the majority for ignoring its previous proclamation that legislative inaction in the wake of judicial interpretation evidences the Legislature's adoption of that interpretation); *York*, 871 S.W.2d at 180 (Gammage, J., dissenting) (noting the Legislature's failure to change the Act's clear and unequivocal language defining "tangible").

488. 887 S.W.2d 4 (Tex. 1994).

489. 923 S.W.2d 582 (Tex. 1996).

490. *See Clark*, 923 S.W.2d at 586 (holding that because Kerrville State Hospital's failure to prescribe a drug did not fall within the Texas Tort Claim Act's definition of "use," the Hospital did not waive its sovereign immunity); Kassen v. Hatley, 887 S.W.2d 4, 14 (Tex. 1994) (reaffirming the principal that "non-use of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity" and finding that the sequence of events in this case does not raise a claim from "use" of medication).

tardation System.[491] Caught by police late one night on a Dallas expressway threatening to harm herself, Johnson was taken to the psychiatric emergency room at Parkland Memorial Hospital.[492] At the hospital, she told physicians that she had seriously exceeded the prescribed dosage of her medication that day.[493] When the medical staff later caught her taking even more pills, they confiscated her medication.[494]

Acting on a recommendation in Johnson's file, both her examining physician and the charge nurse, Lisa Kassen, did not admit Johnson for in-patient treatment; instead, they sent her home.[495] Johnson demanded that the staff return her medication.[496] However, when she further threatened to throw herself in front of a car if her medication was not returned, Kassen and the physician decided not to give her the pills.[497] Johnson then left the hospital and, a short time later, committed suicide by walking into traffic.[498]

Johnson's parents, Judy Hatley and William Johnson, sued on Johnson's behalf, arguing that the hospital, the diagnosing physician, and Kassen, caused their daughter's death by depriving her of her medication.[499] The defendants raised immunity as an affirmative defense.[500] The Dallas court of appeals rejected all claims of official and sovereign immunity.[501] On the issue of sovereign immunity, the appellate court held that the plaintiffs had stated a claim under the Texas Tort Claims Act by alleging misuse of Johnson's medical records and her medication.[502]

The Supreme Court, in reversing the court of appeals, distinguished the cases on which the appellate court had rested its deci-

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491. *See Kassen*, 887 S.W.2d at 7.

492. *See id.*

493. *See id.* Johnson told doctors she had taken her medication seven times that day. *See id.*

494. *See id.*

495. *See id.*

496. *See id.*

497. *See id.*

498. *See id.*

499. *See id.*

500. *See id.* at 8. The trial court also granted Kassen's directed verdict on the issue of official immunity. *See id.*

501. *See* Hatley v. Kassen, 859 S.W.2d 367, 373-80 (Tex. App.—Dallas 1992), *aff'd in part, rev'd in part,* 887 S.W.2d 4 (Tex. 1994).

502. *See id.* at 377-78.

sion.[503] The Court held that the hospital's refusal to return to Johnson her prescription medication was a "non-use" of tangible personal property.[504] Use, the Court held, must mean to "put or bring into action or service."[505] The Court did not cite its own prior cases holding that the failure to use safety equipment amounted to misuse of property; instead, the Court stated, "We conclude that the *non-use* of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity."[506] The Court's holding, however, did not acknowledge that the *non-use* of available drugs was, in reality, the retention of drugs that were prescribed to and belonged to Pennie Johnson.[507]

The second of the Court's non-use cases involving medication is *Kerrville State Hospital v. Clark*.[508] In that case, James and Genevie Clark sued Kerrville State Hospital (KSH) after their daughter, Rebecca, was murdered, decapitated, and dismembered by Rebecca's husband, Gary Ligon.[509] Ligon had experienced mental problems in the past and, after threatening his wife in 1989, was taken to KSH for treatment.[510] The hospital determined that he was "manifestly dangerous" and scheduled him to be transferred to a maximum security unit.[511] The unit, however, had no

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503. *See Kassen*, 887 S.W.2d at 14. The Supreme Court also agreed that the individual defendants could not rely on official immunity, holding that doctors who are employed by the government may be shielded by official immunity only when acting within governmental, not medical, discretion. *See id.* at 11.

504. *See id.*

505. *Id.* (quoting LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992)).

506. *Id.* (emphasis added).

507. *See id.* at 15 (Gammage, J., concurring in part, dissenting in part) (stating, "I am incredulous that the majority call it a 'non-use' of tangible physical property to *confiscate* medication prescribed by other physicians from the owner for whom it was prescribed, and then knowingly and consciously *withhold* it from her"); Jennifer D. Brandt, Note, *The Plague of Medical Malpractice in Public Hospitals-Texas Adopts a New Standard for Determining Whether a Doctor Has Official Immunity*: Kassen v. Hatley, *887 S.W.2d 4 (Tex. 1994)*, 26 TEX. TECH L. REV. 959, 988 (1995) (calling the retention of Johnson's prescription a "clear example of the misuse of tangible property"). Chief Justice Phillips also dissented on the issue of whether the hospital had "not used" the drugs. *See Kassen*, 887 S.W.2d at 14 (Phillips, C.J., dissenting). Justice Doggett also dissented. *See id.* at 15 (Gammage, J., concurring in part, dissenting in part).

508. 923 S.W.2d 582 (Tex. 1996).

509. *See* Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 583 (Tex. 1996).

510. *See id.*

511. *See id.*

vacancies, and Ligon remained at KSH for a month until, at the next meeting of the Institutional Review Board, the staff determined that he was no longer dangerous and could be treated as an outpatient.[512] Ligon was then placed on a medication regimen that was monitored for almost a year.[513] In the spring of 1990, Ligon voluntarily committed himself for further treatment.[514] Some evidence showed that he had been drinking and that he had not taken his medication as directed.[515] Nevertheless, Ligon was released at his request only two days later.[516] A week after his release, he murdered his wife and burned her body.[517]

At trial, Rebecca's parents claimed that KSH caused their daughter's death by failing to administer Ligon's medication intravenously before releasing him, when the hospital knew that Ligon was not properly self-administering the drug.[518] A jury awarded the Clarks damages of over $2 million, which the trial court reduced to $250,000, the maximum allowable under the Texas Tort Claims Act.[519] The court of appeals affirmed this verdict.[520]

In reversing the lower courts, the Supreme Court characterized case law supporting the Clark's position as aberrant.[521] *Lowe* and *Robinson*, the Court stated, "represent perhaps the outer bounds of what we have defined as use of tangible personal property."[522] Those cases, according to the Court, could be limited to the proposition that a governmental entity could be liable for providing property that lacked "an integral safety component."[523] Such was not the case where a hospital merely decided to allow a patient to self-administer his medication rather than be given the medication

512. *See id.*
513. *See id.*
514. *See id.*
515. *See id.*
516. *See id.*
517. *See id.*
518. *See id.* at 584.
519. *See id.* at 583. The trial court also had granted a judgment not withstanding the verdict in favor of the defendant, the Texas Department of Mental Health & Mental Retardation. *See id.*
520. *See* Kerrville State Hosp. v. Clark, 900 S.W.2d 425, 439 (Tex. App.—Austin 1995, writ granted) (affirming the trial court's judgment, including its rejection of KSH's sovereign immunity defense), *rev'd*, 923 S.W.2d 582 (Tex. 1996).
521. *See Clark*, 923 S.W.2d at 585.
522. *Id.* at 585.
523. *Id.*

through injection.[524] According to the Court, that discretionary decision could be attacked by asserting that the hospital might have made a better choice, but such an assertion would not be sufficient to establish a waiver.[525]

Justice Abbott wrote on behalf of the four dissenting justices.[526] The dissent argued that the hospital's failure to administer Ligon's drug intravenously was a *misuse* rather than a *non-use* of tangible personal property because, as in *Lowe* and *Robinson*, the hospital knew of the circumstances that militated an intravenous administration of drugs.[527] Ligon had not been taking his medication and, without it, he was manifestly dangerous.[528] Liability should be implicated, the dissent reasoned, whenever the plaintiff claims to have suffered injuries resulting from "the negligent use of property in some respect deficient or inappropriate for the purpose for which it was used."[529] Precedent, Justice Abbott wrote, mandated a waiver of immunity.[530]

If the majority went to great lengths to *distinguish* precedent in *Kerrville State Hospital*, it appears to have *ignored* precedent in another sovereign immunity case, *University of Texas Medical Branch v. York*, decided in 1994.[531] In *York*, the Supreme Court limited a decision that was two years old, *Texas Department of Mental Health & Mental Retardation v. Petty*,[532] to apply only to cases that were factually identical.[533]

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524. *See id.*

525. *See id.* (stating that a waiver of the university's immunity would have arisen if it had provided the plaintiff with a knee brace, so long as the plaintiff could demonstrate that another type of brace would have given him better protection).

526. *See id.* at 586 (Abbott, J., dissenting).

527. *See id.* at 587 (Abbott, J., dissenting).

528. *See id.* (Abbott, J., dissenting).

529. *Id.* (Abbott, J., dissenting) (quoting Hopkins v. Spring Indep. Sch. Dist., 706 S.W.2d 325, 327 (Tex. App.—Houston [14th Dist.] 1986), *aff'd*, 736 S.W.2d 617 (Tex. 1987)).

530. *See id.* (Abbott, J., dissenting). Justice Abbott also argued that the hospital owed a duty to Rebecca and that the Clarks had presented legally sufficient evidence that the hospital was the cause of their daughter's death. *See id.* at 587-89.

531. 871 S.W.2d 175 (Tex. 1994).

532. 848 S.W.2d 680 (Tex. 1992).

533. *See* University of Tex. Med. Branch v. York, 871 S.W.2d 175, 176 (Tex. 1994) (limiting the decision in Texas Department of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680 (Tex. 1992)).

In *Petty*, the Court held that a patient's medical records were tangible personal property, the misuse of which could cause actionable personal injury to a patient.[534] In that case, eighty-four-year-old Opal Petty sued the Texas Department of Mental Health and Mental Retardation when she was finally released, after fifty years, from confinement as a mental patient.[535] Petty claimed that she had been repeatedly misdiagnosed with various mental illnesses and had been confined in violation of her constitutional rights.[536] A jury found in her favor, and the court of appeals affirmed the judgment.[537]

The Supreme Court also affirmed, holding that Petty's medical records were generated for the purposes of making a diagnosis and rendering treatment.[538] In reaching that decision, the Court relied on an earlier opinion, *Salcedo v. El Paso Hospital District,*[539] which held that the misreading of a patient's electrocardiogram graph amounted to the misuse of tangible personal property.[540] Because Petty's records, like the electrocardiogram graph in *Salcedo*, were generated for that purpose, they could be misused, and that misuse could cause injury.[541] Thus, in affirming, the Court relied, in part, on precedent such as *Salcedo* that construed the Texas Tort Claims Act broadly to favor suits against the government, and, further in part, on the Legislature's silence in the face of *Salcedo* and decisions such as *Lowe* and *Robinson*.[542]

However, two years later, in *York*, the Court rendered *Petty* a virtual nullity.[543] In that case, Robert York sued the University of

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534. *See* Texas Department of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 683 (Tex. 1992).

535. *See id.* at 681.

536. *See id.*

537. *See* Texas Dep't of Mental Health & Mental Retardation v. Petty, 817 S.W.2d 707, 710 (Tex. App.—Austin 1991), *aff'd*, 848 S.W.2d 680 (Tex. 1992).

538. *See Petty*, 848 S.W.2d at 683. *Petty* was a plurality opinion. Four justices joined in the opinion; one justice, Justice Cook, concurred only in the judgment. *See id.* at 685. Four justices, Chief Justice Phillips, Justice Cornyn, Justice Gonzalez, and Justice Hecht, dissented. *See id.*

539. 659 S.W.2d 30 (Tex. 1983).

540. *See* Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983).

541. *See Petty*, 848 S.W.2d at 683.

542. *See id.* at 684.

543. *See* University of Tex. Med. Branch v. York, 871 S.W.2d 175, 176-77 (Tex. 1994) (explaining that because *Petty* was a plurality opinion it has little precedential value and may be looked to for guidance, but is not binding); *see also* Vera E. Munoz, Note, Univer-

Texas Medical Branch at Galveston for failing to diagnose his son's broken hip.[544] The jury found in favor of York, awarding $200,000 in damages, and subsequently the court of appeals affirmed that judgment.[545] The Texas Supreme Court, however, reversed the jury verdict, arguing that *Petty* was not controlling precedent because it had been a plurality opinion.[546] The Court also limited *Salcedo* by holding that that case stood for the proposition that the misuse of hospital *equipment*, such as an electrocardiogram, was actionable, but the misuse of a written record was not actionable because such misuse was seen as nothing more than a conduit for intangible, abstract information.[547] A hospital, the Court held, could not be liable for the misuse of *information.*[548]

The dissent found the majority's distinction between *York* and *Salcedo* to be specious.[549] The dissenting justices saw no difference between the information wrongly interpreted in an electrocardiogram graph and the information misinterpreted in a patient's records; both were generated so that a patient could be diagnosed and treated.[550] Finally, the dissent accused the majority of ignoring

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sity of Texas Medical Branch at Galveston v. York: *Information Is Not Tangible Personal Property for the Purpose of Waiving Sovereign Immunity*, 47 BAYLOR L. REV. 265, 267 (1995) (stating that "[t]he *York* holding essentially forecloses medical malpractice claims against the sovereign involving decisions based on any information contained in medical records"). Joining in the *York* majority opinion, written by Justice Enoch, were Chief Justice Phillips, Justice Gonzalez, Justice Hightower, Justice Hecht, and Justice Cornyn. *See York*, 871 S.W.2d at 175.

544. *See York*, 871 S.W.2d at 175.

545. *See* University of Tex. Med. Branch v. York, 808 S.W.2d 106, 111, 112 (Tex. App.—Houston [1st Dist.] 1991), *rev'd*, 871 S.W.2d 175 (Tex. 1994). The trial court added $50,000 in prejudgment interest. *See id.* at 107. The appellate court added post-judgment interest. *See id.* at 112.

546. *See York*, 871 S.W.2d at 176-77 (citing Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756-58, 779 (1987)).

547. *See id.* at 178-79. In holding that information embodied in a physical form is intangible, Texas is in the minority. *See* Vera E. Munoz, Note, University of Texas Medical Branch at Galveston v. York: *Information Is Not Tangible Personal Property for the Purpose of Waiving Sovereign Immunity*, 47 BAYLOR L. REV. 265, 283 (1995). Texas is also in the minority by holding that the misuse of information contained in medical records does not waive immunity. *See id.* at 282.

548. *See York*, 871 S.W.2d at 179.

549. *See id.* at 179-81 (Gammage, J., dissenting) (condemning the majority's attempt to distinguish *Salcedo*). Justice Gammage's dissenting opinion was joined by Justices Doggett and Spector. *See id.* at 179 (Gammage, J., dissenting).

550. *See id.* (Gammage, J., dissenting).

well-established precedent to which the Legislature had apparently acquiesced.[551]

In an opinion issued in 1998, regarding the waiver of sovereign immunity, the Court shifted the emphasis from the use/non-use question to the issue of causation.[552] Nonetheless, the Court reached the same result—no governmental liability.[553] In *Dallas County Mental Health and Mental Retardation v. Bossley*,[554] the Court further narrowed *Salcedo* by holding that the injury complained of must do more than *involve* the use or misuse of property in order for immunity to be waived.[555]

In that case, a young man, Bossley, had been involuntarily committed to Parkland Memorial Hospital in Dallas after attempting suicide.[556] He was transferred to a treatment facility and seemed to be recovering until counselors noted a deterioration in his condition.[557] Another patient reported that Bossley had asked him to get a gun so that Bossley could kill himself when he got out.[558] Bossley was ordered to return to Parkland for further evaluation in a more restrictive environment.[559] In response to this order, staff at the treatment facility locked the front door, pursuant to standard operating procedures.[560] However, the staff left open a self-locking glass door just inside the front door.[561] As an employee was leaving for lunch, Bossley escaped through this open door, pushed past the employee who had unlocked and opened the front door, and

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551. *See id.* at 182 (Gammage, J., dissenting). Justice Gammage wrote, "This court will henceforth inflict injustice on the citizens of our state meant to be protected by the Tort Claims Act, without regard to the established purpose and meaning of Section 101.021." *Id.*

552. *See* Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343 (Tex. 1998) (discussing that to waive immunity, death or personally injury "must be proximately caused by the condition or use of tangible property").

553. *See id.*

554. 968 S.W.2d 339 (Tex. 1998).

555. *See id.* at 342. The majority wrote that *Salcedo* had been limited to its facts by *York*. *See id.*

556. *See id.* at 340.

557. *See id.*

558. *See id.*

559. *See id.*

560. *See id.*

561. *See id.*

ran.[562] Pursued by facility personnel, he ran nearly half a mile, crossed the path of a truck, and was killed.[563]

Bossley's parents sued, claiming, in part, that the State had waived its immunity through its misuse of tangible personal property, the inner glass door.[564] The court of appeals rejected the hospital's claim of immunity, relying on the holding in *Salcedo* that a claim could be sufficient if the injury involved the use of tangible property.[565] The Supreme Court though reversed, stating that in *Salcedo* it had held that the involvement of property is *necessary*, but not *solely* sufficient for waiver of immunity.[566] Proximate causation was still required and, here, Bossley's death was "distant geographically, temporally, and causally from the open doors."[567] The Court did not address whether leaving the doors open involved the use of tangible property; rather, it held that leaving the doors open could not have *caused* Bossley's injury.[568]

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562. *See id.* at 340-41.

563. *See id.* at 341.

564. *See id.*

565. *See* Bossley v. Dallas County Mental Health & Mental Retardation, 934 S.W.2d 689, 695 (Tex. App.—Dallas 1995), *rev'd*, 968 S.W.2d 339 (Tex. 1998).

566. See *Bossley*, 968 S.W.2d at 342.

567. *Id.* at 343.

568. *See id.* (stating that an unlocked door was too far removed to have caused the suicide). At least one court has argued that the question of whether the property was "used" for purposes of the statute and whether the property caused the plaintiff's injury are closely related. *See* Lowe v. Harris County Hosp. Dist., 809 S.W.2d 502, 504 (Tex. App.—Houston [14th Dist.] 1989, no writ). In *Lowe*, the Houston court argued that it is not enough that the property be "used," it must also be sufficiently involved in causing the injury in order to find a waiver of liability. *See id.* According to that court, to stretch the concept of causation would be to stretch the concept of "use" as well. *See id.; cf.* Jennifer D. Brandt, Note, *The Plague of Medical Malpractice in Public Hospitals—Texas Adopts a New Standard for Determining Whether a Doctor Has Official Immunity:* Kassen v. Hatley, *887 S.W.2d 4 (Tex. 1994)*, 26 TEX. TECH L. REV. 959, 986-87 (1995) (arguing that, in *Kassen*, the Court should have based its decision on the lack of proximate cause, rather than on the nonuse of property).

The *Bossley* holding reflects a trend on the part of the Court to tighten causation principles in tort law generally. *See* Kassen v. Hatley, 887 S.W.2d 4, 14 (Tex. 1994) (finding that plaintiff's claim was improper because causation could not be based on his use of drugs); *Lowe*, 809 S.W.2d at 504 (stating that mere usage does not satisfy the statutory requirement for causation). Two justices, Justice Abbott and Justice Spector, dissented to the majority opinion in *Bossley*. *See Bossley*, 968 S.W.2d at 344 (Abbott, J., dissenting). They argued that the summary judgment evidence before the trial court raised a fact issue on whether or not Bossley's injury was foreseeable. *See id.* (Abbott, J., dissenting). According to the dissent, "an intervening act of a third party will "not excuse the first wrongdoer if such act should have been foreseen." *Id.* (Abbott, J., dissenting) (citing Northwest Mall,

In *Bossley*, Justice Hecht wrote that "[p]roperty does not cause injury if it does no more than furnish the condition that makes the injury possible."[569] This view is overly simplistic. Property, in and of itself, does not usually cause the injury; it only does so as a part of the causation chain. As Justice Abbott, writing for the dissent, noted:

> While it is true that the doors did not injure Bossley by actually physically striking him, this is not the test. The test is simply whether the doors were a proximate cause of Bossley's injury. Fact issues clearly exist concerning whether the use or condition of the doors was a substantial factor in bringing about Bossley's injury. Absent the use or condition of the doors, Bossley would still be in the hospital—he would have never escaped and would not have had the opportunity to jump in front of a truck.[570]

However, if Justice Hecht's view of causation continues to dominate the Court, many more Texas Tort Claims Act cases involving property are unlikely to appear.

Because of the Texas Supreme Court's increasingly narrow construction of the Texas Tort Claims Act, jurors will be asked less and less often to determine if a governmental entity's use of tangible property injured a claimant. Cases limiting what it means to "use" property will guarantee more summary judgments or, if the case should make it to trial, more reversals at the appellate level. Causation will most likely continue to be litigated in trials as a question of fact, but jury verdicts finding such causation will be increasingly vulnerable to determinations that no causation existed as a matter of law.

2. Operation of Emergency Vehicles

Another area of governmental immunity in which the Court has narrowed the waiver of immunity is in the operation of emergency vehicles. By narrowly limiting the range of conduct for which a jury can find a defendant liable, the Court has severely limited the jury's role in cases in which an emergency vehicle has been involved in an accident.

Inc. v. Lubri-Lon Int'l, Inc., 681 S.W.2d 797, 803 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)).

569. *Bossley*, 968 S.W.2d at 343.

570. *Id.* at 345 (Abbott, J., dissenting).

The Texas Tort Claims Act's waiver of immunity does not apply to the actions of employees while responding to emergency calls if the employees act in compliance with relevant laws and ordinances, or, if there is no relevant law, if the employees do not act with "conscious indifference or reckless disregard" for the safety of others.[571] Texas law also provides various privileges to the operators of emergency vehicles.[572] These privileges, however, are limited.[573]

The Texas Supreme Court recently joined a minority of states in holding that these statutory provisions envision liability for the drivers of emergency vehicles only if those drivers have acted recklessly.[574] In the 1998 case of *City of Amarillo v. Martin*,[575] a firefighter crashed into two vehicles after driving through a red light while responding to an emergency call.[576] Martin, a passenger in one of the vehicles, sued the City of Amarillo, claiming that the fire fighter's negligence had caused the accident.[577] The case was tried to the bench, and the trial court rendered judgment in favor of Martin, holding that the driver had been negligent.[578] The court of appeals affirmed.[579]

In reversing the judgment of the trial court and the court of appeals, the Texas Supreme Court held that the operator of an emergency vehicle could only be held liable for reckless conduct.[580] Because the cause of action accrued prior to 1995, the Court interpreted a past version of the statute that was in effect at the time of

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571. TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (Vernon 1997).

572. *See generally* TEX. TRANSP. CODE ANN. §§ 546.001-.005 (Vernon Supp. 1998) (providing the statutory rules and regulations regarding the operation of emergency vehicles).

573. *See id.* §§ 546.001-.002 (articulating the limits to permissible conduct when operating an emergency vehicle).

574. *See* City of Amarillo v. Martin, 971 S.W.2d 426, 430 (Tex. 1998) (holding that Article 6701(d), Section 24(e) of the Uniform Vehicle Code "imposes liability for reckless operation of an emergency vehicle in an emergency situation").

575. 971 S.W.2d at 427.

576. *See Martin*, 971 S.W.2d at 427.

577. *See id.*

578. *See id.*

579. *See* City of Amarillo v. Martin, 912 S.W.2d 349, 354 (Tex. App.—Amarillo 1995), *rev'd*, 971 S.W.2d 426 (Tex. 1998).

580. *See Martin*, 971 S.W.2d at 428.

the injury.[581] That statute stated that the privileges afforded emergency vehicle drivers do not "relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."[582]

In interpreting this provision to waive immunity only for reckless behavior, and thereby virtually ignoring the "due regard" language, the Court acknowledged that it was in the minority of the nation's jurisdictions.[583] The Court listed decisions in nine states that had interpreted similar statutes to waive immunity for merely negligent acts.[584] The Court cited cases from another ten states that had imposed a negligence standard, but placed "great emphasis on the circumstances of emergency action."[585] The Court could name only five states that waived immunity solely for reckless behavior.[586]

Despite being in the minority, the Court argued that, based on principles of statutory construction and public interest, the appropriate standard was recklessness.[587] However, this decision contradicted two prior opinions by the Court that equated "due regard" to negligence.[588] Nonetheless, the Court held that while the section's language about "due regard" meant that a driver did have a

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581. *See id.* (referring to Article 6701d of the Texas Traffic Regulations, which were repealed and replaced by Section 546 of the Transportation Code).

582. *Id.* (citation omitted).

583. *See id.* at 429.

584. *See id.* at 428-29 (citing cases from Alabama, Arizona, Arkansas, Delaware, Maryland, Michigan, Minnesota, Tennessee, and Wisconsin).

585. *Id.* at 429 (citing cases from Alaska, California, Illinois, Indiana, Kansas, Montana, Nebraska, New Jersey, Oregon, and Washington).

586. *See id.* (citing cases from courts in Iowa, Louisiana, New York, Rhode Island, and Vermont).

587. *See id.* at 430 (indicating that statutory construction determines the standard to be recklessness, and that public policy is best served by this construction because it reduces emergency response delays).

588. *Compare id.* (holding that, to recover for injuries resulting from the operation of emergency vehicles, a plaintiff must show that the driver "has committed an act that the operator knew or should have known posed a high degree of risk of serious injury"), *with* City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (discussing the due regard provision in a section entitled "negligence"), *and* Travis v. City of Mesquite, 830 S.W.2d 94, 98-99 (Tex. 1992) (discussing Article 6701d in a negligence cause of action).

duty not to drive negligently, the statute only imposed *liability* for reckless conduct.[589]

Justice Spector, writing in dissent, criticized the majority for failing to harmonize the two standards articulated in the statute.[590] She stated that under the language and structure of the provision, the recklessness standard applied to the specific activities that emergency vehicle drivers are privileged to perform and that the "due regard," or negligence, standard applied to all other conduct.[591] She noted that the 1995 amendments made it clear that the Legislature envisioned two standards, each of which was to have independent effect.[592] The statute, as amended, reads: "This chapter does not relieve the operator of an authorized emergency vehicle from: (1) the duty to operate the vehicle with appropriate regard for the safety of all persons; or (2) the consequences of reckless disregard for the safety of others."[593] It is unclear whether the newly articulated standard in the amended statute will influence the majority's thinking in future cases. Although the majority stated in its opinion that the law in effect at the time of the injury must apply, it did not address the amendments, even in response to the dissent's argument that they were some evidence of legislative intent.[594]

Finally, Justice Spector also reasoned in her dissent that public policy mandated that drivers of emergency vehicles be held liable, in some instances, for their negligent acts.[595] Justice Spector pointed out that Texas ranks second in the nation in the number of people killed in police chases.[596] She also noted that still more citizens are killed by fire engines, ambulances, or police cars responding to various emergencies.[597] In response to these concerns, the same majority that had based its decision in part on the public pol-

589. *See Martin*, 971 S.W.2d at 431.

590. *See id.* at 432 (Spector, J., dissenting) (alleging that the majority did not "attempt to harmonize the apparent conflict between the 'due regard' and 'reckless disregard' clauses").

591. *See id.* (Spector, J., dissenting).

592. *See id.* (Spector, J., dissenting).

593. TEX. TRANSP. CODE ANN. § 546.005 (Vernon Supp. 1998).

594. *See Martin*, 971 S.W.2d at 428.

595. *See id.* at 434 (Spector, J., dissenting).

596. *See id.* (Spector, J., dissenting) (citing *Deadly Pursuits*, PORTLAND OREGONIAN, Jan. 22, 1998, at D1).

597. *See id.* (Spector, J., dissenting).

icy concern of protecting emergency vehicle drivers in the pursuit of their duty, wrote:

> We are aware of statistical data showing the frequency with which emergency vehicles, particularly police cars in hot pursuit of criminal suspects are associated with injurious or fatal traffic accidents. Some judges are influenced by such statistics, and perhaps they are, or should be, part of the legislative mix. But once the Legislature has made its policy choice by enacting the statute, this Court is constrained to interpret the statutory language, not to decide upon and implement its own policy choices based on legislative facts.[598]

Although *Martin* was not a case tried before a jury, if the holding remains good law in light of statutory amendments, it seriously narrows the range of conduct for which a jury may find the driver of an emergency vehicle culpable. Thus, in essence, *Martin* silences the voice of the jury. It also overrides the Legislature by refusing to give meaningful effect to the words "due regard."[599]

3. Contracts

Juries also may not be permitted to consider the liability of the State even in cases in which the State has voluntarily entered into a contract and a contractual dispute has arisen. In *Federal Sign v. Texas Southern University*,[600] decided in 1997, the Court resolved a dispute between two courts of appeals,[601] holding that the State does not automatically waive immunity from suit when it enters a contract with a private person or entity.[602]

When confronted with this issue, some state appellate courts had held that the State waives immunity from *liability* when it con-

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598. *Id.* at 432 (Spector, J., dissenting) (citations omitted).

599. *See id.* at 432-34 (Spector, J., dissenting) (stating that the majority's decision "frustrates the Legislature's intent to require due and appropriate care by emergency vehicle drivers").

600. 951 S.W.2d 401 (Tex. 1997).

601. *See* Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 406 (Tex. 1997). The dispute between the courts of appeals involved the issue of whether the state automatically waives immunity when it contracts with a private party. *Compare* Alcorn v. Vaksman, 877 S.W.2d 390, 393 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (finding that the State does not automatically waive its immunity from liability), *with* Couch v. Ector County, 860 S.W.2d 659, 661 (Tex. App.—El Paso 1993, no writ) (finding that the State does not waive liability when it contracts), *overruled* by Federal Sign v. Texas S. Univ., 951 S.W.2d 401 (Tex. 1997).

602. *See Federal Sign*, 951 S.W.2d at 408.

tracts, but not immunity from *suit*.[603] Other courts had held that the State waives both immunity from liability and immunity from suit when it contracts.[604] In *Federal Sign*, the Texas Supreme Court adopted the former view.

In *Federal Sign*, the Supreme Court found that, although the State may be liable under a contract, it may be sued on that liability only with the express consent of the Legislature.[605] The Court rejected arguments by Federal Sign that this holding destroyed mutuality of remedy between the parties when it stated, "Unlike a contract lacking mutuality of obligation, a contract lacking mutuality of remedy is not illusory and void. Mutuality of remedy does not concern contractual formation and does not imply that one party lacks a remedy of any kind."[606]

Justice Enoch, joined by justices Spector and Abbott, dissented.[607] They argued that a waiver of immunity from liability is useless to those entering contracts with the State unless the State also waives liability from suit.[608] State entities, Justice Enoch argued, expect those with whom they contract to honor their agreements; in fact, the State will seek redress if those agreements are not honored.[609] Thus, according to Justice Enoch, private citizens should have a right to the same expectations.[610] Because the State regularly appropriates the funds necessary to meet its contractual obligations, allowing private citizens such redress would not task

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603. *See id.* at 406 (listing cases which hold that a state waives immunity from liability when it contracts with a citizen, but that it retains immunity from being sued on the contract).

604. *See, e.g., Alcorn*, 877 S.W.2d at 403; Green Int'l, Inc. v. State, 877 S.W.2d 428, 432-33 (Tex. App.—Austin 1994, writ dism'd by agr.); Courtney v. University of Tex. Sys., 806 S.W.2d 277, 282-83 (Tex. App.—Fort Worth 1991, writ denied). These cases relied on an earlier Texas case, *Fristoe v. Blum*, which stated:

> It is well settled that so long as the state is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen; but when it becomes . . . a party to a contract with a citizen, the same law applies to it as under like conditions governs the contract of an individual.

Fristoe v. Blum, 92 Tex. 76, 80, 45 S.W. 998, 999 (1898).

605. *See Federal Sign*, 951 S.W.2d at 408 (overruling prior cases holding that the mere act of contracting waives the State's immunity from suit).

606. *Id.* at 409 (citations omitted).

607. *See id.* at 416 (Enoch, J., dissenting).

608. *See id.* at 417-18 (Enoch, J., dissenting).

609. *See id.* at 418 (Enoch, J., dissenting).

610. *See id.* (Enoch, J., dissenting).

the public fisc.[611] The dissent also noted that the Court's refusal to find that when the State enters a contract it waives both types of immunity is contrary to the overwhelming body of law from other jurisdictions.[612]

In *Federal Sign*, the Court left those with whom the State has contracted only one recourse if the State breaches the contract—to petition the State for permission to sue it.[613] Although in his concurrence Justice Hecht admitted that the courts are "better suited to resolve factual and legal issues in contract disputes,"[614] he and the majority left the matter to the whims of a purely political body.[615]

Because most cases will probably not fall within the narrow exception discussed in *Federal Sign*, many plaintiffs bringing suits involving contracts with the state will be left without any meaningful form of redress. Thus, the inevitable result of this holding is an increase in the number of summary judgments in favor of the State on the issue of immunity in contract cases. An increase in summary judgments means a decrease in cases considered by a jury.[616]

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611. *See id.* at 417 (Enoch, J., dissenting) (arguing that the justification for sovereign immunity, that it protects the state's financial resources from depletion, is not present in the context of contracts).

612. *See id.* at 419-20 (Enoch, J., dissenting). *See generally* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 706-707 (1996) (noting that approximately half the jurisdictions have waived immunity in contracts by statute or constitution, and many states have done so judicially). Before *Federal Sign*, only three states had upheld sovereign immunity in suits based upon contracts with the state—Arkansas, Vermont, and Kentucky. *See id.* at 707.

613. *See Federal Sign*, 951 S.W.2d at 409. The Court also stated that this holding, which destroys the mutuality of a remedy, does not render a contract with the state illusory, because contracts that lack mutuality of a remedy are not void. *See id.*; *cf.* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 701 (1996) (arguing that the "subtle distinction" creates astomutuality obstacles for an injured citizen wishing to sue the state).

614. *Federal Sign*, 951 S.W.2d at 415 (Hecht, J., concurring).

615. *See id.* at 418 (Enoch, J., dissenting) (acknowledging Justice Hecht's argument that disputes involving immunity "should be resolved free from the political considerations . . . accompany[ing] the Legislature's decision to permit suit").

616. *Cf.* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 703 & n.126 (1996) (observing that distinguishing between liability and suit has "prevented many victims from obtaining relief when a state agency breaches a contract").

B. *Official Immunity*

Official immunity is the second form of governmental immunity in which the Court has taken steps to keep cases from the jury. Government officers, sued in their individual capacity, may be protected from liability by the affirmative defense of official immunity.[617] State employees may claim this immunity by establishing that the suit against them arose from the performance of discretionary duties performed in good faith, so long as the employee acted within the scope of the employee's authority.[618]

Whether a state employee acted in good faith has proven difficult for courts to determine.[619] In the 1994 case of *City of Lancaster v. Chambers,*[620] the Texas Supreme Court attempted to simplify the inquiry by adopting the test used in federal immunity cases.[621] That objective test asks whether a "reasonably prudent official, under the same or similar circumstances, could have believed that the action complained of was warranted."[622] This inquiry necessar-

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617. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (stating that government employees have a right to assert the affirmative defense of official immunity with a "suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority").

618. *See id.* A discretionary act "involves personal deliberation, decision, and judgment." *Id.* at 654. In *Downing v. Brown*, the Court held that disciplining a classroom is a discretionary, not a ministerial, act. *See* Downing v. Brown, 935 S.W.2d 112, 114 (Tex. 1996) (per curiam). In that case, a student and her mother sued a junior high school and a teacher after the student had undergone years of threats and, finally, two beatings, from another student at school. *See id.* at 113. Although the school required its teachers to maintain a discipline plan and the teacher did not have such a plan, the Court found that discipline was, per se, discretionary. *See id.* at 113-14. The Court's decision reversed the court of appeals' determination that summary judgment in favor of the teacher was inappropriate. *See id.*

619. *See Chambers*, 883 S.W.2d at 655 (acknowledging the difficulty in applying the good faith doctrine); Travis v. City of Mesquite, 830 S.W.2d 94, 104-105 (Tex. 1992) (Cornyn, J., concurring) (noting that "good faith" has become an elusive concept for courts to apply).

620. 883 S.W.2d 650 (Tex. 1994).

621. *See Chambers*, 883 S.W.2d at 656. In *County of Sacramento v. Lewis*, the Supreme Court of the United States held that a police officer does not violate an individual's due process rights, under the federal constitution, through deliberate or reckless disregard for life in a police car chase. *See* County of Sacramento v. Lewis, 118 S. Ct. 1708, 1710 (1998). Such a violation would occur only if the officer's conduct shocked the conscience. *See id.* at 1718; *see also Chambers*, 883 S.W.2d at 661 (interpreting the United States Constitution and reaching the same conclusion).

622. O'Bryant v. City of Midland, 949 S.W.2d 406, 411 (Tex. App.—Austin 1997, pet. granted); *see also* Chris DeMeo, Note, City of Lancaster v. Chambers: *Official Immunity*

ily involves a balancing of the need to act and the risks that will accompany the act.[623] At the summary judgment level, an official may meet the necessary burden by showing that a reasonable official might have believed the act to be justified.[624] The official does not have to prove that she would have been unreasonable not to take the action or that all reasonable officials would have taken the same action.[625] To controvert the official's summary judgment proof, however, a plaintiff must show that "no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts."[626]

The Court's failure in *Chambers* to establish what type of proof would support an official's motion for summary judgment immediately caused problems for appellate courts trying to apply the new test.[627] The Court attempted to clarify the matter in 1997, in the case *Wadewitz v. Montgomery*.[628] In *Wadewitz,* the Court upheld the denial of a summary judgment motion based on official immunity.[629] The Court held that in order to conclusively establish good faith in a motion for summary judgment, a defendant's proof must address the balancing test set out in *Chambers*.[630] In other words, the proof must address both the need for the action and the risks incurred in taking the action.[631] Therefore, under *Wadewitz*, it is not sufficient to rely on an expert's testimony that a reasonable official might have acted as the defendant acted, if the expert has not taken into account both sides of this balancing test.[632]

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and the Special Problem of High Speed Chases, 47 BAYLOR L. REV. 551, 566 (1995) (stating that courts need not find subjective intent on the part of officials to impose liability).

623. *See Chambers*, 883 S.W.2d at 656-67.

624. *See id.*

625. *See id.* at 657 (citing Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993)).

626. *Id.*

627. *See* Chris DeMeo, Note, City of Lancaster v. Chambers: *Official Immunity and the Special Problem of High Speed Chases*, 47 BAYLOR L. REV. 551, 566 (1995) (noting that *Chambers* provided "little guidance" for determining what conduct will waive immunity).

628. 951 S.W.2d 464 (Tex. 1997).

629. *See* Wadewitz v. Montgomery, 951 S.W.2d 464, 465 (Tex. 1997).

630. *See id.* at 467 (citing *Chambers*, 883 S.W.2d at 656).

631. *See id.* (discussing the two prongs of the *Chambers* test).

632. *See id.* In *Wadewitz*, an expert's affidavit testified as to reasonableness, based on the defendant's account of the incident. *See id.* at 466. Since the defendant did not address the need and risk in his affidavit, the expert's affidavit was held to be conclusory and insufficient. *See id.* at 467.

At least one question remains in applying the *Chambers* test—whether, under a standard of objective reasonableness, an official's possibly pretextual justification for his act will support a summary judgment motion if the plaintiff challenges that reason. This question goes to the heart of summary judgment standards in Texas, and given the Court's expansive protection of governmental entities and officials, whether the Court's resolution of this issue will protect a plaintiff's right to take his case to a jury is questionable.[633] However, the Court has granted petition for review on two cases from the Austin court of appeals, apparently in order to answer this question.[634]

In *Dalrymple v. University of Texas System,*[635] Dr. Brent Dalrymple sued the University of Texas system and several administrators when he was removed from tenure-track status and terminated from employment.[636] Dalrymple claimed that he had been terminated in violation of his constitutional rights.[637] The individual defendants filed motions for summary judgment on several grounds, including official immunity.[638] As evidence of good faith, the defendants proved that Dalrymple had not been published in peer-reviewed journals during his four-year term at the University and that merit evaluations up to the time of his dismissal had expressed discontent with his failure to publish.[639] The trial court granted the officials' motions, although the judge gave no reason for the judgment.[640]

Dalrymple appealed.[641] In addressing official immunity, the court of appeals first held that the officials had met their prima

633. *Cf.* James C. Harrington, *Corporations Captivate the High Court*, TEX. LAW., July 13, 1998, at 23 (accusing the Texas Supreme Court of protecting the "errant government," among others).

634. *See* Brewerton v. Dalrymple, 41 Tex. Sup. Ct. J. 513, 513 (1998) (granting petition for *Dalrymple*); City of Midland v. O'Bryant, 41 Tex. Sup. Ct. J. 514, 514 (1998) (granting petition for *O'Bryant*).

635. 949 S.W.2d 395 (Tex. App.—Austin 1997, no writ).

636. *See* Dalrymple v. University of Tex. Sys., 949 S.W.2d 395, 398 (Tex. App.—Austin 1997, pet. granted).

637. *See Dalrymple*, 949 S.W.2d at 399. Dalrymple also alleged "intentional infliction of emotional distress, tortious interference with [his work] relationships; and violations of the Whistleblower Act." *Id.*

638. *See id.*

639. *See id.* at 400-01.

640. *See id.* at 399.

641. *See id.*

facie burden of establishing that defense.[642] At that point, the burden shifted to Dalrymple to raise a fact issue as to good faith.[643] The appellate court noted that Dalyrmple's burden, as articulated by *Chambers*, was to establish that no reasonable person in the movant's position could have thought the defendant's acts were justified.[644] The court also noted that this burden appeared to be quite high.[645] However, the court also concluded that *Chambers* could not have entirely eliminated consideration of subjective elements[646] because in cases such as Dalyrmple's, the parties may dispute not just the reasonableness of the official's act, but whether the reasons given by the official are truthful.[647] Thus, according to the court, because the allegations in *Dalrymple* were of intentional misconduct rather than negligent misconduct, whether the officials were "plainly incompetent or willfully violated the law" would necessarily require some subjective consideration.[648]

The Austin court also held that the non-movant's allegations at the summary judgment stage must be accepted as true.[649] In other words, if the nonmovant alleges that the reasons for the official's action were improper or demonstrate bad faith, those allegations must be accepted as true, otherwise the "good faith" test would be rendered a "good pretext" test.[650] Relying on this reasoning, the court rephrased the *Chambers* test, holding that "a nonmovant seeking to defeat summary judgment on the issue of good faith must show no reasonable person in the official's position could have thought *the nonmovant's version of the facts* justified the ac-

642. *See id.*

643. *See id.*

644. *See id.*

645. *See id.* (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 656-57 (Tex. 1994)).

646. *See id.* at 402.

647. *See id.* at 401 (noting the difficulty in applying the *Chambers* test to facts like *Dalrymple*).

648. *See id.* at 402 (refusing to interpret *Chambers* in a way that eliminates the subjective component from the good faith test).

649. *See id.*

650. *See id.* at 401.

tion."[651] The Austin court reiterated this test in another case issued the same day, *O'Bryant v. City of Midland.*[652]

The Supreme Court has granted petitions for review in both cases and has certified, as one complete question for review, whether the Austin court improperly applied *Chambers.*[653] Although how the Texas Supreme Court will answer this question is unclear, the Court has shown a willingness to protect the government officials from liability.[654] However, if the plaintiff brings for-

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651. *Id.* at 402; *see* O'Bryant v. City of Midland, 949 S.W.2d 406, 412 (Tex. 1997) (applying the same test in a retaliatory employment action); Martinez v. Mikel, 960 S.W.2d 158, 160-61 (Tex. App.—San Antonio 1997, no pet.) (applying the same test in a suit against a police officer).

In *Mikel*, the issue was whether official immunity protected a Texas Department of Public Safety Trooper who shot a young man during a burglary investigation. *See Mikel*, 960 S.W.2d at 159-60. The officer claimed the young man had "removed his hand from his pockets and made an assertive movement" toward him. *See id.* at 159. However, the victim testified that he kept his hands out "of his pockets and at his sides at all times" during the incident. *See id.* This testimony was supported by the affidavits of witnesses. *See id.* The court held that the reasonableness of the officer's act depended on the factual issue of whether the victim's hands had been in his pocket. *See id.* at 160. While acknowledging that *Chambers* and *Wadewitz* require an objective test, the court continued, "we do not believe that even a generous interpretation of *Wadewitz* and *Chambers* suggests that summary judgment would be proper when an officer's perception of the facts squarely conflicts with eye-witness testimony." *Id.* at 160-61. Any other view, the court stated, "would amount to the recognition of absolute immunity and would contradict the well-established rules which guide our review of a summary judgment order." *Id.* at 161.

652. 949 S.W.2d 406 (Tex. App.—Austin 1997, pet. granted). In *O'Bryant*, the plaintiff brought suit against the city for intentional infliction of emotional distress, tortious interference with contractual relations, breach of the duty of good faith and fair dealing, negligence and gross negligence, unlawful employment discrimination and retaliation in violation of the Texas Labor Code, violations of rights guaranteed under the Texas Constitution after he was relegated to a lower paying position. *See* id. at 409. Prior to being relegated to the lower paying position, the plaintiff had brought suit against the city for violations of the Americans with Disabilities Act and for unlawful employment discrimination. *See id.* at 408-09. The City moved for summary judgment on the basis of sovereign immunity, in addition to several other defenses. *See id.* On appeal, the defendants argued that it discharged the plaintiff in good faith. *See id.* at 410. In determining that summary judgment was improper as to the good faith defense, the court stated that "a nonmovant seeking to defeat summary judgment on the issue of good faith must show no reasonable person in the official's position could have thought *the non-movant's version of the facts* justified the action." *See id.* at 412.

653. *See* Brewerton v. Dalrymple, 41 Tex. Sup. Ct. J. 513, 513 (1998) (granting petition for review of *Dalrymple*); City of Midland v. O'Bryant, 41 Tex. Sup. Ct. J. 514, 514 (1998) (granting petition for review of *O'Bryant*).

654. *See, e.g.*, Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 403 (Tex. 1997) (holding that contract claims against the State are barred by sovereign immunity); Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 586 (Tex. 1996) (stating that plaintiffs could not recover against a state hospital because the hospital did not waive its immunity); City of Beaumont

ward evidence that the governmental official is relying on a pretextual excuse for his acts in order to invoke immunity, that fact issue should be resolved by a jury. Otherwise, as the Austin court has pointed out, courts will be required to accept any pretextual reason as long as it is objectively reasonable, and official immunity will shield all government acts because plaintiffs will not be able to controvert the reasonableness of hypothetical excuses.[655]

The Court's mistrust of jury verdicts is especially evident in the area of governmental immunity. Through a variety of rulings, the Court has restricted a plaintiff's ability to overcome a defense of sovereign or official immunity. By limiting instances in which the government can be sued, the court is ensuring that more cases involving the government will be either dismissed before trial or reversed at the appellate level. In either case, the courts, and not the juries, are becoming the final arbitrators of disputes involving the government.

V. PREMISES LIABILITY

The Texas Supreme Court has also severely constrained the role of the jury in the context of premises liability. In Texas, property rights are extremely important; in fact, land was the primary reason most settlers came to Texas.[656] As such, it is not surprising that premises liability has traditionally been narrowly construed and probably will continue to be so in the future. What is noteworthy, however, is that the Phillips/Hecht Court has found ways to make premises liability law even more conservative than would be presumed. For instance, in Texas, jury verdicts favoring individuals harmed on another's property are repeatedly overturned by the Supreme Court on the basis that the jury was instructed to apply improper legal theories or given the wrong questions to answer.[657]

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v. Bouillion, 896 S.W.2d 143, 149 (Tex. 1995) (holding that Texas citizens may not sue the government for damages under the Texas Bill of Rights).

655. *See Federal Sign*, 951 S.W.2d at 401 (noting that a summary judgment "nonmovant's task appears onerous because often even an intentional, ill-motivated action may be explained by some plausible, yet hypothetical, rationale").

656. Robert V. Urias, Comment, *The Tierra Amarilla Grant, Reies Tijerina, and the Courthouse Raid*, 16 CHICANO-LATINO L. REV. 141, 141 (1995) (discussing how Spain and Mexico attracted settlers to Texas by awarding parcels of land).

657. *See, e.g.*, Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998) (concluding that the trial court's jury instruction in a premises liability case constituted reversible error); Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382, 384-85

The court has viewed with deep mistrust the use of the "reasonable care" standard in premises liability cases.[658] As a result, a premises liability verdict based on a jury's affirmative response to an issue posed as the failure to use reasonable care is virtually doomed to reversal.[659]

The Court has also made existing conservative law even more conservative by significantly changing the standard of a landowner's duty where criminal acts of third parties are the immediate cause of the injury. For example, in *Dallas County Mental Health & Mental Retardation v. Bossley*,[660] the Court narrowed the causation element, at least as to Texas Tort Claims Act cases, by holding that "property does not cause injury if it does no more than furnish the condition that makes the injury possible."[661] Notably, property is inanimate and passive by nature. Thus, in the great majority of cases where a person is injured, the property does just what the standard says it should not do—furnishes the condition that makes the injury possible.

Although *Bossley* is too new to determine whether its holding will be confined to Texas Tort Claims Act cases, causation language is generally universal. Under the Texas Tort Claims Act, a governmental unit is only liable for "personal injury and death [proximately] caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[662] In short, the causation standard for a case brought under the Act is the same as that for any personal injury or wrongful death claim. Therefore, if the property itself must be the actor that causes the injury, then premises liability claims will not be successful. The Court's treatment of duty in injuries that foreseeably occur on property, but are actually carried out by a criminal act of a third party, appears to

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(Tex. 1987) (holding that the trial court erred in submitting its jury charge in a premises liability case).

658. *See, e.g.*, Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 529 (Tex. 1997) (reversing a trial court's decision to use a "simple negligence" jury charge in a premises defect suit).

659. *See Olivio*, 952 S.W.2d at 529 (noting that the use of a negligence jury charge in a premises liability case is grounds for reversal).

660. 968 S.W.2d 339 (Tex. 1998).

661. Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343 (Tex. 1998). For a more detailed discussion of *Bossley*, see *supra* Part IV.

662. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997).

dovetail and extinguish most premises liability claims, along with the jury verdicts that accompany them.

A. *History and Modern Trend*

At common law, liability to individuals injured on another's property depended upon the "status" of the individual.[663] The duty owed to the individual was determined by whether the individual was categorized as an invitee,[664] licensee,[665] or trespasser.[666] This distinction has deep historical roots, but most jurisdictions, including England, have eliminated or modified it in order to reflect

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663. For an excellent discussion of the historical development of the common law categories, see Kathryn E. Eriksen, *Premises Liability in Texas—Time for a "Reasonable Change,"* 17 ST. MARY'S L.J. 417, 421-436 (1986).

664. An invitee is one who enters the property of another by invitation, express or implied, for a purpose that relates to the activities of the occupant of the property. *See* Kathryn E. Eriksen, *Premises Liability in Texas—Time for a "Reasonable Change,"* 17 ST. MARY'S L.J. 417, 429-36 (1986). An invitee is owed the highest duty of care among the three classifications, "reasonable care under all circumstances." *See id.* at 430. *See generally* G. Robert Friedman & Kathleen J. Worthington, *Trends in Holding Business Organizations Liable for the Criminal Acts of Third Persons on the Premises: A Texas Perspective*, 32 S. TEX. L. REV. 257, 260-68 (1991) (discussing the common-law premises liability classifications); William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 252-53 (1986) (discussing the three-tiered system for defining duty in premises liability cases).

665. A licensee is one who enters the property of another with permission, express or implied, for personal reasons. *See* Kathryn E. Eriksen, *Premises Liability in Texas—Time for a "Reasonable Change,"* 17 ST. MARY'S L.J. 417, 428 (1986). A premises owner is negligent with respect to a condition of the premises that injures a licensee if:

(a) the condition posed an unreasonable risk of harm;
(b) defendant owner had actual knowledge of the danger;
(c) plaintiff did not have actual knowledge of the danger; and
(d) defendant failed to exercise ordinary care to protect plaintiff from danger, by both failing to adequately warn plaintiff of the condition and failing to make that condition reasonably safe.

State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996). *See generally* G. Robert Friedman & Kathleen J. Worthington, *Trends in Holding Business Organizations Liable for the Criminal Acts of Third Persons on the Premises: A Texas Perspective*, 32 S. TEX. L. REV. 257, 260-62 (1991) (discussing the duty owed to a licensee); William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 261-62 (1986) (discussing the licensee-invitee distinction).

666. A trespasser is one who enters the property of another without the occupant's consent. *See* Kathryn E. Eriksen, *Premises Liability in Texas—Time for a "Reasonable Change,"* 17 ST. MARY'S L.J. 417, 425 (1986). The only duty owed to a trespasser is "to refrain from willfully or wantonly causing the trespasser injury." *Id.* at 425-26. There are a few exceptions to the general rule that relate to attractive nuisances, easement holders, and frequent trespassers. *See id.* at 427-28.

changing community values.[667] Conversely, the Texas Supreme

667. Some of these jurisdictions have eliminated only the invitee-licensee distinction and have retained the trespasser distinction. *See, e.g.,* 740 ILL. COMP. STAT. ANN. 130/2 (West 1993) (abolishing the common-law invitee-licensee distinction); Occupiers' Liability Act of 1957, 5 & 6 Eliz. 2 ch. 31 § 2(2) (Eng.) (providing that the duty of care regarding premises "is a duty to take such care as in all the circumstances of the case is reasonable"); Wood v. Camp, 284 So. 2d 691, 695 (Fla. 1973) (stating that "we . . . eliminate the distinction between commercial (business or public) visitors and social guests upon the premises, applying to both the single standard of reasonable care under the circumstances"); Jones v. Hansen, 867 P.2d 303, 310 (Kan. 1994) (providing that "the duty owed by an occupier of land to invitees and licensees alike is one of reasonable care under all the circumstances"); Poulin v. Colby College, 402 A.2d 846, 850-51 (Me. 1979) (finding "no reason for denying a plaintiff the opportunity to recover damages for injuries sustained due to the negligence of a landowner merely because the former was a licensee and not an invitee"); Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973) (stating that "[w]e no longer follow the common law distinction between licensees and invitees and, instead, create a common duty of reasonable care which the occupier owes to all lawful visitors.") (footnote omitted); Peterson v. Balach, 199 N.W.2d 639, 642 (Minn. 1972) (stating, "We herewith abolish the traditional distinctions governing licensees and invitees but decline to rule on the question of a landowner's duty toward trespassers."); Ford v. Board of County Comm'rs, 879 P.2d 766, 771 (N.M. 1994) (deciding that "[r]ather than continue to hinge liability of a landowner upon whether an entrant upon land is an invitee or licensee, we will apply . . . the ordinary principles of negligence to govern a landowner's conduct as to a licensee and invitee"); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977) (explaining that "rather than continue to predicate liability on the status of an entrant, we have decided to apply the ordinary principles of negligence to govern a landowner's conduct as to a licensee and an invitee . . . . [and, w]e do not change our rule as to trespassers"); Hudson v. Gaitan, 675 S.W.2d 699, 703 (Tenn. 1984) (asserting that "[t]he common law classifications of one injured on land of another as an 'invitee' or 'licensee' are no longer determinative in this jurisdiction in assessing the duty of care owed by the landowner to the person injured"); Antoniewicz v. Reszcynski, 236 N.W.2d 1, 11 (Wis. 1975) (proclaiming that "[w]e therefore . . . abolish the special immunities that heretofore applied to licensees and invitees."). Other jurisdictions have abolished the invitee-licensee-trespasser distinction in its entirety. *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (deciding that "[w]e believe that the common law classifications are now equally alien to modern tort law, primarily because they establish immunities from liability which no longer comport with accepted values and common experience"); Webb v. Sitka, 561 P.2d 731, 733 (Alaska 1977) (rejecting "the difference between the common law categories and no longer . . . predicat[ing] liability of a landowner upon the status of the person entering upon the land"); Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (recognizing "that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion"); Mile High Fence Co. v. Radovich, 489 P.2d 308, 314-15 (Colo. 1971) (adopting the rule that an occupant of land is to "act as a reasonable man in view of the probability or foreseeability of injury to others"); Pickard v. Honolulu, 452 P.2d 445, 446 (Haw. 1969) (noting "that the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others"); Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367, 371 (La. 1976) (agreeing with the California Supreme Court's approach in *Rowland v. Christian*); Limberhand v. Big Ditch Co., 706 P.2d 491, 496 (Mont. 1985) (indicating that there is no distinction "between social guests and invitees in determining the liability of the

Court not only is keeping the status quo, but through legal interpretation of causation and duty, it appears to be moving the law backwards.

Forty years ago, when the Supreme Court of the United States rejected the common-law classification scheme in admiralty law, Justice Stewart stated:

> In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."[668]

This movement has led at least twelve jurisdictions to abandon the common law entirely in favor of a single duty of reasonable care;[669]

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landowner for injuries received); Ouellette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976) (deciding that "[w]hatever the social and policy considerations that led to the judicial creation of the invitee, licensee and trespasser immunities [sic] they no longer retain their viability under modern conditions and it is fitting and proper that they be laid to judicial rest"); Basso v. Miller, 352 N.E.2d 868, 872-73 (N.Y. 1976) (abandoning "the classifications entirely and announc[ing] . . . adherence to the single standard of reasonable care under the circumstances where by foreseeability shall be a measure of liability); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 333 (R.I. 1975) (stating that "we assign the trichotomy to the historical past, [and] we substitute in its place the basic tort test of reasonableness").

668. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1958) (footnote omitted) (quoting Kermarec v. Compagnie Generale Transatlantique, 245 F.2d 175, 180 (2d Cir. 1957) (Clark, C.J., dissenting), *vacated*, 358 U.S. 625 (1958)).

669. These jurisdictions include Alaska, California, Colorado, District of Columbia, Hawaii, Illinois, Louisiana, Montana, Nevada, New Hampshire, New York, and Rhode Island. *See* Carter v. Kinney, 896 S.W.2d 926, 929-30 n.3 (Mo. 1995) (identifying jurisdictions that have abandoned the common-law doctrine); Heins v. Webster County, 552 N.W.2d 51, 54 (Neb. 1996) (listing jurisdictions that have adopted the duty of reasonable care); *see also* Richard L. Ferrell, III, *Emerging Trends in Premises Liability Law: Ohio's Latest Modification Continues to Chip Away at Bedrock Principles*, 21 OHIO N.U. L. REV. 1121, 1122 n.8 (1995) (citing cases from courts that have abandoned the common-law doctrine); Kathryn E. Eriksen, *Premises Liability in Texas—Time for a "Reasonable Change,"* 17 ST. MARY'S L.J. 417, 453-56 (1986) (discussing the abandonment of the "no duty rule"); Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party As Invitee, Licensee, or Trespasser*, 22 A.L.R.4TH 294, 301-03 (1983)

however, the legislature in one jurisdiction later reinstated the distinctions,[670] and another jurisdiction restored the category of trespasser.[671] Eleven other jurisdictions have abolished the invitee-licensee distinction while retaining the trespasser classification.[672] One state has rejected the invitee-licensee distinction by statute,[673]and the invitee-licensee distinction was also abrogated by statute in England.[674]

When the Supreme Court of Nebraska abolished the invitee-licensee distinction in 1996, it noted that thirty-six states and the District of Columbia had reconsidered the common-law classifications.[675] Twenty-three of those jurisdictions abolished either some or all of the categories, while only fourteen states expressly retained them.[676] These fourteen states continue to apply the common-law classifications without specifically addressing their continuing validity.[677] Texas falls in this last category: applying a common-law scheme that has been rejected by its originators and our highest court as unworkable.

(noting that several jurisdictions have rejected the common-law doctrine, including Alaska, California, Colorado, District of Columbia, Hawaii, Illinois, Louisiana, New Hampshire, New York, and Rhode Island).

670. *See* COLO. REV. STAT. § 13-21-155(3) (1998) (reinstating the trespasser-licensee-invitee distinction); *see also Carter*, 896 S.W.2d at 929-30 n. 3 (explaining that, in 1990, Colorado reinstated the trespasser-licensee-invitee distinction by statute).

671. *See* Tantimonico v. Allendale Mut. Ins. Co., 637 A.2d 1056, 1061-62 (R.I. 1994) (reinstating the common law distinction as to trespassers).

672. *See Carter*, 896 S.W.2d at 929-30 n.3 (noting the jurisdictions that have abandoned the licensee-invitee distinction, but have retained the trespasser distinction). *Heins*, 552 N.W.2d at 54 (listing the jurisdictions that have abandoned the common-law invitee-licensee distinction). These jurisdictions include Florida, Kansas, Maine, Massachusetts, Minnesota, New Mexico, North Dakota, Oregon, Tennessee, Wisconsin, and Wyoming. *See Carter*, 896 S.W.2d 929 n.3, *Heins*, 552 N.W.2d at 54.

673. *See* 740 ILL. COMP. STAT. ANN. 130/2 (West 1993); *see also* Richard L. Ferrell, III, *Emerging Trends in Premises Liability Law: Ohio's Latest Modification Continues to Chip Away at Bedrock Principles*, 21 OHIO N.U. L. REV. 1121, 1122 n.9 (1995) (citing to two states' statutes that have abrogated the common-law distinction).

674. *See* Jones v. Hansen, 867 P.2d 303, 307 (Kan. 1994) (citing Occupiers' Liability Act of 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.) as abrogating the invitee-licensee distinction).

675. *See Heins*, 552 N.W.2d at 55.

676. *See id.*

677. *See id.*

B. *Premises Defect v. Negligent Activity*

By maintaining rigid classifications of premise defects, the Court has kept in place the necessary means to overturn jury findings of premises liability. For example, in *Clayton W. Williams, Jr., Inc. v. Olivo*,[678] decided in 1997, an oil well worker, David Olivo, was partially paralyzed after he fell from a pipe rack on to a drill pipe thread protector that had been left on the ground during a previous work shift.[679] A jury awarded Olivo and his wife $2,028,354 in actual damages, plus $521,800 in exemplary damages.[680] The San Antonio court of appeals reversed the exemplary damages award but affirmed the remainder of the trial court's judgment.[681]

The Texas Supreme Court first considered what duty the general contractor owed Olivo, who was an employee of an independent contractor.[682] The Court noted that a general contractor in control of a premises is potentially liable for two types of negligence relating to the safety of a premises—"that arising from an activity on the premises, and that arising from a premises defect."[683] The Court concluded that the case did not present a negligent activity claim because Olivo's injury was caused by the thread protector

678. 952 S.W.2d 523 (Tex. 1997).

679. *See* Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 526-27 (Tex. 1997). "A thread protector is a cap that screws onto the end of a drill pipe to protect its threads before it is moved to a rig." Clayton W. Williams, Jr., Inc. v. Olivo, 912 S.W.2d 319, 324 (Tex. App.—San Antonio 1995), *rev'd*, 952 S.W.2d 523 (Tex. 1997).

680. *See Olivo,* 952 S.W.2d at 527. The Olivos sought damages for past and future physical injury, "physical disfigurement, physical impairment, mental anguish, medical expenses, loss of income, loss of household services, and loss of consortium." *Olivo*, 912 S.W.2d at 324.

681. *See Olivo*, 912 S.W.2d at 335. The San Antonio court of appeals reversed the exemplary damages award because it found no evidence to support the jury's finding of gross negligence. *See id.* at 334. The court stated that the evidence showed that the defendant was simply careless, which did not support a finding of gross negligence. *See id.*

682. *See Olivo*, 952 S.W.2d at 526-27. Clayton W. Williams, Jr., Inc. was the general contractor who operated an oil and gas lease and contracted with Olivo's employer, Diamond M Onshore, Inc., to drill a well. *See id.* at 526. Olivo was hired by Diamond M to work as a floor hand on a drilling crew. *See id.* Olivo was responsible for moving drill pipe from a pipe rack to a catwalk. *See id.* The pipe was hoisted from the catwalk to the rig floor and connected to drill pipe in the well. *See id.* Olivo slipped when he was stepping off the pipe rack while moving pipe onto the catwalk. *See id.*

683. *Id.* at 527. The Court noted that overlapping duties existed in this case because the general contractor not only was an owner and occupier of the land, but also was a general contractor with control over the premises. *See id.*

being left on the ground, not by any contemporaneous negligent activity.[684]

The Court then considered the two types of premises defects for which a general contractor may be liable: (1) those existing on the premises when the independent contractor entered or that were created by someone other than the independent contractor, and (2) those created by the independent contractor.[685] With regard to the first type of defect, the general contractor owed a duty to inspect and warn the independent contractor of any dangerous conditions.[686] With regard to the second category, the general contractor owed no duty to warn, because the general contractor was not responsible for ensuring that the independent contractor works in a safe manner.[687] Regarding this second category, an exception to the no duty rule exists if the general contractor retained supervisory control over the work, in which case the general contractor must exercise its supervisory control with reasonable care to prevent injury to others.[688]

The Texas Supreme Court agreed with the court of appeals that the case fit in the second category of defect—one caused by the independent contractor.[689] However, the Court disagreed that Olivo's injury also stemmed from the general contractor's failure to properly exercise supervisory control and to provide a safe workplace and safety devices, a charge submitted to the jury as a simple negligence theory of recovery.[690] The Court concluded that a simple negligence question, unaccompanied by instructions or definitions setting forth the elements required to be proven in a premises defect case, could not support Olivo's recovery.[691]

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684. *See id.* According to the Court, a negligent activity claim is only assertable when the plaintiff is "harmed by or as a contemporaneous result of the activity itself." *Id.* (citing Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992)).

685. *See id.*

686. *See id.*

687. *See id.*

688. *See id.* (citing Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985)). Control can be retained either by a contractual right to control or through the exercise of actual control. *See id.*

689. *See id.* at 528.

690. *Id.* at 528-29.

691. *See id.* at 529. The elements that must be submitted in a premises defect case include:

> (1) [a]ctual or constructive knowledge of some condition on the premises by the owner/operator; (2) [t]hat the condition posed an unreasonable risk of harm; (3) [t]hat

Olivo illustrates how the Court's adherence to the rigid classification distinctions can result in injustice. A jury determined that the general contractor breached a duty owed to Olivo and awarded him damages.[692] The trial court and appellate court agreed.[693] Based on the complicated classification structure, however, the Supreme Court held that the case was not properly submitted, leaving Olivo uncompensated for his partial paralysis.[694]

Dallas Market Center Development Co. v. Liedeker,[695] decided in 1997, is another example of the Court reversing a premises liability case that had been upheld by both the trial court and the appellate court.[696] In *Liedeker*, a florist was injured when the entry gate on a freight elevator automatically lowered.[697] The warning bell had been muffled by the hotel because it was annoying to guests.[698] The trial court charged the jury that a passenger in an elevator is owed a high degree of care rather than a duty of ordinary care.[699] The Dallas court of appeals affirmed, but the Texas Supreme Court reversed and remanded the case for further proceedings.[700]

The Court noted that "other states are divided over the duty of elevator owners."[701] The Court elected to follow a 1953 decision and refused to impose the higher burden of care.[702] The Court further noted that the case was a premises defect case, and the jury

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the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) [t]hat the owner/operator's failure to use such care proximately caused the plaintiff's injuries.

Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992).

692. *See Olivo*, 952 S.W.2d at 527.

693. *See id.*

694. *See id.* at 530.

695. 958 S.W.2d 382 (Tex. 1997) (per curiam).

696. *See* Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382, 387 Tex. 1997) (per curiam) (reversing the award of damages in a case involving injuries sustained on a hotel freight elevator).

697. *See Liedeker*, 958 S.W.2d at 383. The gate struck the florist's head, injuring her neck. *See id.*

698. *See id.*

699. *See id.* The charge defined negligence as the failure to use the "care that would have been used by a very cautious, competent, and prudent person." *Id.*

700. *See id.* at 385.

701. *Id.* at 384.

702. *See id.* (following Triangle Motors v. Richmond, 152 Tex. 354, 358, 258 S.W.2d 60, 62 (1953) by imposing a duty to use ordinary care to prevent an unreasonable risk of harm).

charge did not contain all of the essential elements.[703] Until the Court or the Texas legislature recognizes the unworkable nature of the classification scheme, the likelihood that a jury's verdict will be reversed based on jury charge error remains high.

In rejecting the classification approach, other courts reason that the system creates confusion and judicial waste.[704] The classification system effectively precludes a jury from applying community standards.[705] In a modern society, jurors are more likely to be landowners and are better able to understand the extent of and limitations on the protection a landowner can provide.[706] The Court, in zealously guarding the status quo in Texas and rolling back any small exceptions that have been created by previous courts, reflects a belief that juries are not to be trusted.[707] But in recent years, juries have frequently decided in the defendant's favor.[708] They exercise their own tort reform and have no compunction in unceremoniously burying the "frivolous lawsuit."[709] The public is perfectly capable of expressing its concept of right and wrong, reasonableness and unreasonableness. In addition, the

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703. *See id.* at 385 (enumerating the essential elements for premises liability claims as set forth in *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992)).

704. *See, e.g.*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 103 (D.C. Cir. 1972) (recognizing that the classifications "have become increasingly difficult to apply"), Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (declining to follow the classification process).

705. *See Smith*, 469 F.2d at 102 (expressing that the basis for immunity from liability should be community standards); *Rowland*, 443 P.2d at 568 (holding that liability should be based on a reasonableness standard).

706. *See* Tab H. Keener, *Can the Submission of a Premises Liability Case Be Simplified?*, 28 TEX. TECH L. REV. 1161, 1172 (1997) (recognizing that jurors are in the best position to "allocate society's resources regarding personal injury" (quoting Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 553 (Tex. 1985))).

707. See *id.* (discussing that resistance to the abolition of the traditional classifications in premises liability focuses on the lack of jury control).

708. *See* A. Phillip Brooks, *Dry Spell for Texas Defense Lawyers; Cap on Punitive Damages, Other Reforms Taking Unexpected Toll; Lawyers Blindsided by Effects of Changes*, AUSTIN-AM. STATESMAN, May 24, 1998, at A1 (noting that juries are becoming less sympathetic to plaintiffs), *available in* 1998 WL 3611694; Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, WALL ST. J., Mar. 21, 1994, at B1 (discussing a decrease in the number of pro-plaintiff jury awards in the areas of personal injury, products liability, and medical malpractice), *available in* 1994 WL-WSJ 300549.

709. *Cf.* Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, WALL ST. J., Mar. 21, 1994, at B1 (noting that juries have become less sympathetic to plaintiffs), *available in* 1994 WL-WSJ 300549.

emphasis in Texas on broad-form submission of jury questions further supports the adoption of a single duty of reasonable care in premises liability cases.[710]

Another reason advanced for abolishing the common law categories is the rejection of the premise that land is predominant over life and that a landowner changes his conduct in relation to the nature of the entrant.[711] As Justice Peters reasoned in *Rowland v. Christian*:[712]

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.[713]

Allocating the costs and risks of human injury is far too complex an equation to be decided solely upon the status of the entrant, particularly when the resolution of the status question "prevents the jury from ever determining the fundamental question [of] whether the defendant has acted reasonably in light of all the circumstances in a particular case."[714] The standard of "reasonable care under all the circumstances" enables a jury, as representatives of the community, to achieve an allocation of the costs of human injury that conforms to community standards of acceptable landowner behavior.[715] Under such a standard, landowners do not become

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710. *See* Tab H. Keener, *Can the Submission of a Premises Liability Case Be Simplified?*, 28 TEX. TECH L. REV. 1161, 1172-73 (1997) (stating that a general negligence theory for all premises liability cases would alleviate the confusion); *see also* TEX. R. CIV. P. 277 (stating that broad form questions shall be submitted to the jury whenever feasible).

711. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972) (explaining that human safety may be more vital than a landowner's unlimited freedom).

712. 443 P.2d 561 (Cal. 1968).

713. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968).

714. Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973); *see Smith*, 469 F.2d at 102 (noting that for centuries the costs of personal negligence have been allocated by juries according to the standard of reasonable care under all the circumstances).

715. *See Smith*, 469 F.2d at 102; *see also Mounsey*, 297 N.E.2d at 53 (noting that the trial judge properly instructed the jury to determine the safety of sidewalks).

insurers of their property because foreseeability is still a factor, and the status of the entrant must be considered in determining the foreseeability of that entrant's presence. The single standard simply permits the jury "to determine what burdens of care are unreasonable in light of the relative expense and difficulty they impose on the owner or occupier as weighed against the probability and seriousness of the *foreseeable* harm to others."[716]

C. *Ordinary Defect v. Special Defect*

Another area of premises liability law where the Court's steadfast use of the classification scheme precludes a jury's consideration of claims involving injuries due to a premises defect are cases involving governmental entities. In those cases, the nature of the defect defines the duty owed to the individual.[717] If the defect is an ordinary premise defect, a governmental entity owes the individual the same duty owed to a licensee.[718] If the defect is a special defect, the individual is owed the same duty as an invitee[719] and, as a result, is afforded greater protection because proof that the entity had actual knowledge of the condition is not required. Although the link between the nature of the defect and the classification of the individual is statutory,[720] the determination of whether a defect is ordinary or special is left to the courts. This determination can have a significant effect on the outcome of a case, as demonstrated in the recent 1997 opinion of *City of Grapevine v. Roberts*.[721]

In *Roberts*, Geri Roberts was walking down the steps from an elevated sidewalk toward a curb at an intersection, carrying her purse and her twenty-one-month-old daughter.[722] Roberts began to lose her balance and stepped into a hole in the step that was created by concrete cracking and crumbling away.[723] Roberts fell backward and dropped her baby into the street.[724] As a result of

716. *Mounsey*, 297 N.E.2d at 53 (emphasis added).

717. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (Vernon 1997) (distinguishing between the level of duty owed for an ordinary defect and a special defect).

718. *See id.* § 101.022(a).

719. *See id.* § 101.022(b).

720. *See id.* § 101.022 (specifying the duty owed as to ordinary and special defects).

721. 946 S.W.2d 841 (Tex. 1997).

722. *See* City of Grapevine v. Roberts, 946 S.W.2d 841, 842 (Tex. 1997).

723. *See id.*

724. *See id.*

the fall, Roberts sustained a sprained right ankle and a fractured left ankle that required metal screws.[725]

The Fort Worth court of appeals noted that the steps Roberts was descending comprised the entrance to a governmentally-mandated pedestrian crosswalk.[726] The court further noted that the hole in the step constituted a significant portion of the crosswalk entrance.[727] The court concluded that the hole was a special defect, asserting that to hold otherwise "would merely encourage municipalities to neglect to maintain and keep safe their delineated crosswalks because any injured party, even to escape summary judgment, would be forced to prove the municipality had actual knowledge of the defect."[728]

The Texas Supreme Court disagreed, noting that the statute defined special defects to include "excavation or obstructions on highways, roads or streets."[729] Although the Court stated that it recognized that the defects listed in the statute were non-exclusive, the Court asserted that "[c]onstruing a partially cracked and crumbled sidewalk step to be an excavation or obstruction grossly strains the definitions of those conditions."[730] The Court did not address the appellate court's reasoning that the steps constituted a governmentally-mandated crosswalk entrance; however, the Court did contest the appellate court's finding regarding the size of the hole.[731] Although the appellate court asserted that the hole constituted a significant portion of the crosswalk's entrance, the Supreme Court viewed the photographs differently, concluding that "only portions of the lowest step showed some cracking and crumbling."[732]

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725. *See id.*

726. *See* Roberts v. City of Grapevine, 923 S.W.2d 169, 172 (Tex. App.—Fort Worth 1996), *writ denied*, 946 S.W.2d 841 (Tex. 1997) (per curiam). The Supreme Court denied writ because the lower court's error was not "of such importance to the jurisprudence of the state to require correction;" however, it did disagree with the lower court's analysis). *See Roberts*, 946 S.W. at 843.

727. *See Roberts*, 923 S.W.2d at 172.

728. *Id.*

729. *See Roberts*, 946 S.W.2d at 843 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b) (Vernon 1997)).

730. *Id.*

731. *See id.* (concluding that the photographs of the steps only revealed "some cracking and crumbling," not an "excavation or obstruction").

732. *Id.*

The Fort Worth court of appeals and the Supreme Court looked at the same photographs in *Roberts* and reached opposite results. These difficult results were different simply due to a different subjective interpretation of the same defect. The subjectiveness of such decisions emphasizes the need to re-examine the common law classification system in favor of a simpler, more just approach to be decided by a jury.

D. *Criminal Acts of Third Parties*

The Court also has restricted the numbers of premises liability cases that will reach a jury by narrowing the duty owed by the property owner for the criminal acts of third parties in a 1998 case, *Timberwalk Apartments, Partners, Inc. v. Cain.*[733] In *Timberwalk*, Tammy Rene Cain was sexually assaulted in her apartment by an intruder.[734] Although the jury in *Timberwalk* found that Tammy Rene Cain's injuries were caused by her own negligence, the Houston court of appeals for the Fourteenth District concluded that an error in the jury charge "probably kept the jury from considering the gravamen of Cain's complaint, that the apartment complex had a duty to, but did not, provide adequate security measures to protect its tenants."[735]

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733. *See* Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757-58 (Tex. 1998) (finding that property owners do not have a duty to assess crime in the area, nor can unreported crimes trigger foreseeability).

734. *See id.* at 751. The intruder was convicted for the sexual assault. *Id.*

735. Cain v. Timberwalk Apts., Ptnr, Inc., 942 S.W.2d 697, 702 (Tex. App.—Houston [14th Dist.] 1997), *aff'd in part, rev'd in part*, 972 S.W.2d 749 (Tex. 1998). The Houston court of appeals concluded that the trial court erred in submitting a negligence definition approved for slip and fall cases but deemed inappropriate under the facts in a premises liability case. *See id.* at 701-02. The definition submitted was as follows: "'Negligence' with respect to Timberwalk and Sovereign means failure to use ordinary care to reduce or eliminate an unreasonable risk of harm *created by a premises condition* which the owner or occupier knows about or in the exercise of ordinary care should know about." *Id.* at 701. Cain argued that the definition "did not include the duty to take precautions to prevent foreseeable criminal acts of a third party" and was so restrictive as to not "extend to or include any security measures." *Id.* The Houston court of appeals concluded that the erroneous definition, coupled with an additional instruction regarding the landlord's duty to repair, improperly limited the scope of the jury's inquiry. *See id.* at 702. The instruction to which the court referred was as follows:

> You are instructed that a landlord shall make a diligent effort to repair or remedy a condition if the tenant specifies the condition in a notice to the person to whom or to the place where rent is normally paid and the condition materially affects the physical

The Texas Supreme Court agreed with the court of appeals that the jury charge was erroneous; however, the Court further asserted that the charge error would not require reversal if Timberwalk owed no duty to provide security measures.[736] Timberwalk contended that they did not have any duty to Cain because the criminal act of the intruder was unforeseeable.[737] The appellate court held that "evidence of eleven sexual assaults within a one mile radius of the Timberwalk apartment complex" and an expert's testimony that security measures were inadequate were sufficient to raise an issue of fact on foreseeability.[738] The Texas Supreme Court disagreed with the Houston Court's assessment, adopting a multi-factor test for determining foreseeability.[739]

The first factor to be applied under this new foreseeability test is proximity.[740] This factor requires "evidence that other crimes have occurred on the property or in its immediate vicinity."[741] The second factor focuses on recentness and frequency.[742] A claim will be strengthened by evidence of "a significant number of crimes [oc-

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health and safety of an ordinary tenant. The tenant's notice must be in writing only if the tenant's lease is in writing and requires written notice.

Id. at 701. Testimony was introduced in the record that the written notice requirement in Cain's lease was not enforced, and tenants were encouraged to call the office with complaints. *See id.* at 699-700. The jury's confusion with the instruction was evidenced by the following note that was sent during deliberations: "Question: In the instructions is this the law we are supposed to go by pertaining to the contract-or a general guideline?" *Id.* at 701.

736. *See Timberwalk Apartments, Partners, Inc.*, 972 S.W.2d at 756 (reasoning that, although the error resulted in an improper judgment, there is no need to retry the case if Timberwalk owed no duty).

737. *See id.* (noting that Timberwalk had no previous security problems). Timberwalk's contention was based on the general rule that a landlord only has a legal duty to protect invitees from the criminal acts of third parties if "he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." *See id.*

738. *Cain*, 942 S.W.2d at 703.

739. *See Timberwalk Apartments, Partners, Inc.*, 972 S.W.2d at 756-59 (enumerating the factors as regency, frequency, proximity, similarity, and publicity, which must be considered together to determine foreseeability).

740. *See id.* at 757 (requiring criminal activity to be close to the landowner's property).

741. *Id.* Although the Court did not eliminate the possibility that evidence of remote criminal activity could indicate approaching crime, it indicated that such evidence must be strong and show a likely risk of criminal conduct on the landowner's property. *See id.* (setting parameters for remoteness of criminal activity).

742. *See id.* at 757-58 (asserting that the commission of a few crimes not occurring in a close time frame will negate foreseeability).

curring] within a short period of time."[743] Under the third factor, similarity, "the previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger."[744] Publicity is the final factor that must be considered.[745] Wide publicity of criminal activity or actual knowledge by the landlord strengthens the foreseeability of future crimes.[746]

Although the Houston court relied on the evidence of eleven sexual assaults in a one mile radius, the Texas Supreme Court asserted that there were only eleven calls reporting sexual assaults, not eleven incident reports.[747] The Court further noted that there was no evidence that Timberwalk knew of the six assault-type crimes that occurred in the vicinity.[748] The Court concluded that because the risk that Cain would be sexually assaulted was not foreseeable, Timberwalk owed no duty to provide additional security measures.[749]

While the Court's holding does not appear extraordinary in light of the manner in which it analyzed the facts, the impact of the multi-factor test will have far-reaching consequences in premises liability cases involving criminal acts of third parties. The test excludes consideration of additional factors considered by other courts and commentators.[750] For example, the test does not require the consideration of the "nature, condition and location of the defendant's premises."[751] In other words, "[I]f the place or

743. *Id.* According to the Court, the absence of previous crimes or evidence of a few crimes over an extended period of time negates foreseeability. *See id.* at 758.

744. *Id.* The Court noted that criminal acts of vandalism and theft are not sufficiently similar to the criminal act of stabbing so as to make a stabbing foreseeable. *See id.* In addition, multiple reports of domestic violence are not sufficiently similar to third party criminal acts. *See id.* However, multiple criminal acts of assault and robbery would be sufficiently similar to other violent crimes, like murder and sexual assault. *See id.*

745. *See id.*

746. *See id.* The Court indicated that unreported criminal activity will not be considered as evidence of foreseeability. *See id.* at 758-59. In addition, property owners have no duty to determine the risk of crime absent knowledge of past incidents. *See id.* at 759.

747. *See id.* at 752.

748. *See id.* at 759.

749. *See id.*

750. *See id.* at 759-60 (Spector, J., concurring) (discussing other factors used by courts and commentators to establish foreseeability in premises liability cases).

751. *Id.* at 759 (Spector, J., concurring) (quoting Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 661 (Cal. 1985)). Justice Spector also quotes comment f to Section 344 of the Restatement (Second) of Torts, which states: "[i]f the place or *character* of [a] business . . . is such that [the landowner] should reasonably anticipate careless or criminal conduct on

character of a business is such that the landowner may be said to have created 'an especial temptation and opportunity for criminal misconduct,' . . . then this [should] also [be] a factor to consider in determining whether criminal conduct is foreseeable."[752] By limiting the factors to be considered, the Court limits the chance that a premises liability case involving the criminal acts of a third party will ever reach a jury.[753]

Lefmark Management Co. v. Old[754] is another premises liability case in which the Texas Supreme Court did not recognize the existence of a duty to protect against the criminal acts of a third party.[755] In *Old*, a variety of crimes had occurred at a shopping center from 1991 to 1993, including several burglaries and robberies.[756] On June 27, 1993, an armed robbery occurred at a doughnut store in the shopping center.[757] When robbers returned to the doughnut store on July 13, 1993, Winona Old's husband was shot and killed.[758]

Old sued various entities, including the former property management company, Lefmark Management Company, whose services had been terminated on April 13, 1993.[759] Lefmark contended that it owed no duty to Old's husband because it was no longer in con-

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the part of third persons, either generally or at some particular time, [the landowner] may be under a duty to take precautions against it . . . ." *Id.* at 759-60 (Spector, J., concurring).

752. *Id.* at 760 (Spector, J., concurring) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 201 (5th ed. 1984)).

753. *Cf.* G. Robert Friedman & Kathleen J. Worthington, *Trends in Holding Business Organizations Liable for the Criminal Acts of Third Persons on the Premises: A Texas Perspective*, 32 S. TEX. L. REV. 257, 274-75 (1991) (comparing the restrictive "prior similar incidents" rule with the "totality of the circumstances" test). Additional arguments against the test adopted by the Court include: (1) the test rewards premises owners for not providing adequate security before criminal activity in an effort to deter such activity; (2) the test will lead to arbitrary results and distinctions as courts decide whether prior criminal incidents are sufficiently similar; and (3) the test removes too may cases from the jury. *See id.* at 275-78.

754. 946 S.W.2d 52 (Tex. 1997).

755. Lefmark Management Co. v. Old, 946 S.W.2d 52, 55 (Tex. 1997) (refusing to adopt Section 353 of the Restatement (Second) of Torts, which holds a vendor of land liable for failing to disclose dangerous conditions of the property).

756. *See Old*, 946 S.W.2d at 53. In fact, on January 19, 1993, a risk manager for a grocery store at the shopping center wrote the property management company and asked the company to conduct a security risk assessment for the property. *See id.*

757. *See id.*

758. *See id.*

759. *See id.* At the time its services were terminated, Lefmark had not conducted a security risk assessment as requested by the grocery store. *Id.*

trol of the property at the time of the occurrence in question.[760] The trial court granted summary judgment in favor of Lefmark, but the court of appeals reversed, holding that Lefmark had a "duty to disclose to its successors any dangerous conditions affecting the shopping center."[761] The appellate court likened the duty to that owed by a vendor to disclose the existence of any dangerous condition in existence at the time the vendor transfers possession of his property.[762]

The Texas Supreme Court reversed, holding that it had never adopted the vendor duty relied upon by the appellate court, and even if such duty existed, the property management company was not a vendor who owed such a duty.[763] By concluding that Lefmark owed no duty to Old, a disgruntled property management company whose services have been terminated could exact revenge against the property owner by actively concealing the potential for criminal activity. Assuming the property owner could still be held liable under the multi-factor test adopted in *Timberwalk*, the property management company, which could have taken action to prevent the injury but did not, avoids any sort of responsibility for its inaction.[764]

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760. *See id.* In response to this contention, Old reasoned: "Under defendant's theory, had Lefmark known of a time bomb buried in the Fairbank's Plaza parking lot during its control period, it would have been relieved of liability for the bomb's damage had it exploded after defendant was relieved of its management duties." Old v. Lefmark Management Co., 908 S.W.2d 16, 19 (Tex. App.—Houston [1st Dist.] 1995), *rev'd*, 946 S.W.2d 52 (Tex. 1997).

761. *Old*, 908 S.W.2d at 20-21.

762. *See id.* at 20. The Houston court of appeals relied on Section 353 of the Restatement (Second) of Torts with regard to the duty imposed on vendors. *See id.*

763. See *Old*, 946 S.W.2d at 54-55.

764. The danger in the Court's holding is further illustrated by a decision from one of the intermediate courts, which was bound to follow the holding. *See* Fields v. Moore, 953 S.W.2d 523, 525 (Tex. App.—Texarkana 1997, no pet.) (allowing a landlord to escape liability in spite of her failure to warn a tenant that she was living next to a convicted criminal who suffered from psychiatric problems). In *Fields*, a landlord who rented a house to Deborah Fields also owned a vacant parcel of land adjacent to the house she rented to Fields. *See id.* at 523. Approximately a year and a half after Fields rented the house, the landlord permitted her son to reside in a mobile home that he had moved on to the parcel of land. *See id.* The landlord's son had been convicted of "various drug and alcohol, theft, and burglary offenses, and had undergone psychiatric care after he suffered a serious head injury in an automobile accident in the early 1980s." *Id.* The landlord did not inform Fields about her son's history, and after her son lived next to Fields for about five months, he broke into Fields' house and sexually assaulted her. *See id.* at 523-24. Fields' two children witnessed at least a portion of the assault. *See id.* The Texarkana court of appeals

The holdings in *Cain* and *Old* demonstrate the Court's willingness to narrow the duties owed by a property owner. By narrowing the duty concept and relying on the archaic premises liability categorizations, the Court has taken extreme measures to protect the rights of property owners, providing such defendants with the means of disposing of these cases at the summary judgment stage. Thus, using the precedent set forth in these two cases, trial courts will be able to dispose of similar cases on the grounds that no duty on the part of the premises owner exists. Accordingly, the number of cases a jury will be called upon in the future to consider will be few.

VI. EMPLOYMENT

Jury involvement in employment cases has traditionally been limited for two reasons. Not only does the law strongly favor the employer over the employee, but the Texas Supreme Court has traditionally adhered to stare decisis to keep employment cases from ever reaching the juries.[765] In the past, the Court has relied on precedent as a basis for refusing to create any exceptions to the general "at will" rule.[766] This precedent, however, has eroded the concept of "at-will employment" into a mere euphemism.

Case law uses quid-pro-quo terms, such as the employer's right to fire and the employee's right to quit. This use of quid-pro-quo terms reminds one of "the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under bridges, from begging in the streets, and from stealing bread."[767] Reality,

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explained that although the landlord knew of her son's history of offenses involving drugs and alcohol, her son did not have a history of violent or sex offenses. *See id.* at 524-25. The court held that there was no evidence that it was reasonably foreseeable to the landlord that her son would commit a violent assault against Fields. *See id.*

765. *See, e.g.*, Federal Express v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993) (reiterating Texas' long-standing rule of employment at will); Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 724 (Tex. 1990) (explaining the narrow exceptions the courts have recognized in the employment-at-will doctrine); East Line & R.R.R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888) (allowing an employer, who employed a worker for an indefinite period, to terminate his employee at will without cause, thus beginning the state's tradition of recognizing employment at will).

766. *See* Austin v. Healthtrust, Inc., 967 S.W.2d 400, 401 (Tex. 1998) (refusing to expand the common law to create a private whistleblower exception to the employment-at-will doctrine); Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998) (stating that the employment-at-will doctrine has been recognized for over a century).

767. ANATOLE FRANCE, LE LYS ROUGE 87 (1894).

however, suggests that a more correct term would be simply the "right to fire," as that right is practically unlimited in Texas.[768] Likewise, discharged employees who suffer the dire economic consequences of being fired are almost always the parties seeking relief—not vice versa. Unfortunately, those fired employees soon discover the unbending reality of current precedent that prevents them from ever taking their case to a jury.

Some appellate courts have held that an employer's oral statements not to fire an employee unless good cause was established, in addition to other promises or assurances by an employer, could alter the "at-will" doctrine.[769] The Supreme Court, however, has disagreed. The current Court has made it clear that a jury verdict favoring the employee-claimant likely will not be upheld, unless the employer's termination of the employee breaches a formal

768. *See, e.g.*, Bonita K. Roberts, *The More Things Change, the More They Stay the Same: The Employment-at-Will Doctrine in Texas*, 25 ST. MARY'S L.J. 435, 435 (1993) (explaining that the basic tenet of the employment-at-will doctrine "is that the employer can terminate the relationship at anytime, for any reason, including a bad reason, as long as the reason is not illegal"); Cortlan H. Maddux, Comment, *EMPLOYERS BEWARE! The Emerging Use of Promissory Estoppel As an Exception to Employment at Will*, 49 BAYLOR L. REV. 197, 201-03 (1997) (noting that Texas courts have long revered the employment-at-will doctrine and that only one judicially created exception exists to the doctrine, despite its long existence); Cyndi M. Benedict et al., *Annual Survey of Texas Law: Employment and Labor Law*, 50 SMU L. REV. 1101, 1102-04 (1997) (commenting that the employment-at-will doctrine has remained intact in Texas during the previous 105 years); Rebecca Guerra, Comment, *Oral Contracts to Fire for Good Cause Only: Texas Courts Putting the Cart Before the Horse*, 47 BAYLOR L. REV. 1181, 1185-86 (1995) (discussing that there is only one exception to the employment-at-will doctrine in Texas common law); John W. Ferguson, Jr., Note, *Texas Supreme Court Refuses to Recognize a "Whistleblower" Exception to the At-Will Employment Rule for Private Employees*: Winters v. Houston Chronicle Publishing Co., *795 S.W.2d 723 (Tex. 1990)*, 22 TEX. TECH L. REV. 1215, 1220 (1991) (relating that the limitations on the employment-at-will doctrine are extremely narrow); *see also* Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4th 544, 549-50 (1982) (observing that although the general rule for the employment-at-will doctrine holds that an employer may terminate its employee without incurring liability, some jurisdictions have departed from this traditional rule).

769. *See, e.g.*, Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825, 826 (Tex. App.—Austin 1989, writ dism'd) (allowing an oral agreement to modify the at-will status); Kelley v. Apache Prods., Inc., 709 S.W.2d 772, 774 Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (permitting an oral agreement to modify an at-will contract); Johnson v. Ford Motor Co., 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (explaining that an oral agreement that changes the at-will relationship is enforceable).

written agreement.[770] In essence, all attempts to establish limited exceptions to the "at-will" doctrine in order to protect employees have been doomed to failure.

Recent decisions by the Court also demonstrate a tendency to inhibit employees' recovery in workers' compensation cases.[771] Further opinions reflect the Court's disfavor of any common law claim against employers.[772] A review of various employment cases makes it clear that an employee's claim has little chance to survive, even if it is supported by a jury verdict and subsequent favorable appellate review.

A. *At-Will Employment*

With one narrow exception, Texas has adhered to the at-will employment doctrine for over a century, precluding juries from considering the fate of discharged employees.[773] The at-will doctrine was initially adopted by the Texas Supreme Court in *East Line & R. R. R. Co. v. Scott*[774] in 1888.[775] The only exception to that doc-

770. *See, e.g.*, *Brown*, 965 S.W.2d at 503 (explaining that oral modifications to an at-will employment contract are not sufficiently specific or definite to alter the at-will relationship); Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991) (explaining that the statute of frauds would render a modification that is otherwise incapable of being performed within one year).

771. *See, e.g.*, Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 312 (Tex. 1997) (limiting an employee's recovery of workers' compensation benefits); Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 454 (Tex. 1996) (restricting the award of punitive damages in a workers' compensation case).

772. *See, e.g.*, Southwestern Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998) (reversing an employee's award of damages based on the intentional infliction of emotional distress); Johnson & Johnson Med. v. Sanchez, 924 S.W.2d 925, 930 (Tex. 1996) (holding that there was no evidence that supported the employee's claim of reliance).

773. *See Brown*, 965 S.W.2d at 502 (discussing the longevity of the employment-at-will doctrine); *see also* Cyndi M. Benedict et al., *Annual Survey of Texas Law: Employment and Labor Law*, 50 SMU L. REV. 1101, 1002-03 n.3 (1997) (providing that the employment-at-will doctrine has remained intact for the last 105 years, with only one narrow exception).

774. 72 Tex. 70, 10 S.W. 99 (1888).

775. *See* East Line & R. R. R. Co. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (finding that "when the term of service is left to the discretion of either party . . . either may put an end to it at will, and so without cause").

trine was announced in *Sabine Pilot Service, Inc. v. Hauck*[776] in 1985.[777]

In *Sabine Pilot*, a deckhand refused to illegally pump the bilges of the boat on which he worked into the water after observing a placard that stated such pumping was illegal.[778] The deckhand sued his employer after he was terminated, alleging that he was fired for refusing to perform an illegal act.[779] The employer contended that the deckhand was discharged for other derelictions of duty unrelated to the pumping activity.[780]

The issue presented to the Texas Supreme Court was whether "an allegation by an employee that he was discharged for refusing to perform an illegal act states a cause of action."[781] The Court rejected the employer's contention that any exception to the at-will doctrine should be statutorily created, asserting that the Court was "free to judicially amend a judicially created doctrine."[782] After carefully considering the changes in American society and employment relationships, the Court held that public policy required a narrow exception to the at-will doctrine, enabling employees who are discharged solely for refusing to perform an illegal act to recover for wrongful discharge.[783] Although the narrowness of the Court's decision in *Sabine Pilot* did not preclude the Court from "broadening the exception when warranted in a proper case,"[784]

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776. 687 S.W.2d 733 (Tex. 1985).

777. *See* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (creating an exception to the employment-at-will doctrine for the termination of an employee "for the sole reason that the employee refused to perform an illegal act").

778. *See id.* at 734. After observing the placard, the deckhand contacted the Coast Guard, who confirmed that the pumping activity would be illegal. *See id.*

779. *See id.*

780. *See id.* The derelictions for which the employer allegedly fired the deckhand included his refusal to swab the deck and man a radio watch. *See id.*

781. *Id.*

782. *Id.* at 735.

783. *See id.* at 735. The Court noted that courts in twenty-two states had adopted exceptions to the at-will doctrine over the past thirty years, and exceptions continually have been advocated by commentators. *See id.* In this particular case, the Court relied on the laws that criminalized the pumping activity as reflective of public policy. *See id.*

784. *See id.* at 735 (Kilgarlin, J., concurring). Justice Kilgarlin contended that the "at-will doctrine was a 'relic of early industrial times' conjuring up 'visions of the sweat shops described by Charles Dickens and his contemporaries.'" *Id.* (Kilgarlin, J., concurring). Justice Kilgarlin asserted that "the doctrine belongs in a museum, not in [Texas] law." *Id.* (Kilgarlin, J., concurring). Justice Kilgarlin believed that *Sabine Pilot* foreshadowed future

the Court has repeatedly refused to adopt any other exceptions to the at-will doctrine.

In 1998, the Court was given an opportunity, in *Austin v. Healthtrust, Inc.—The Hospital Co.*,[785] to adopt an exception for private "whistleblowers," or employees who report unlawful, dangerous or unethical activities of their employers.[786] In that case, an emergency room nurse informed her supervisor, verbally and in writing, that another emergency room nurse "appeared to be under the influence of drugs" and was distributing prescription medication to patients without proper authorization.[787] Five months later, the nurse who reported the activity was terminated by her supervisor, whom the nurse later discovered to be a family friend of the nurse she had reported.[788]

The issue presented to the Texas Supreme Court was whether Texas should recognize a "common-law cause of action for retaliatory discharge of a private employee who reports the illegal activities of others in the workplace."[789] The Court declined to adopt such a cause of action, asserting that "it would be unwise for this Court to expand the common law because to do so would essentially eclipse more narrowly-crafted statutory whistleblower causes of action."[790] The Court noted that although it was not bound by

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expansion of employers' liability in tort. *See* William W. Kilgarlin & Sandra Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 S. TEX. L. REV. 241, 274 (1986).

785. 967 S.W.2d 400 (Tex. 1998).

786. *See* Austin v. Healthtrust, Inc.-The Hospital Co., 967 S.W.2d 400, 400 (Tex. 1998). The Court initially considered whether an exception to the employment-at-will doctrine should be recognized in *Winters v. Houston Chronicle Publishing Co.* *See* Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 724 (Tex. 1990). Although the majority in *Winters* recognized that other jurisdictions had provided protection for private sector employees that reported illegal workplace activity, the majority simply declined "to do so at [that] time under [those] facts." *Id.* at 725. The employee in that case was terminated six months after he reported to upper-level management that the newspaper for which he worked was "falsely reporting an inflated number of paid subscribers" and that he was given an opportunity by his immediate supervisor to participate in a kickback scheme with plastic bag manufacturers. *See id.* at 723. The employee also reported that several employees were stealing inventory. *See id.*

787. *See Austin*, 967 S.W.2d at 400. The emergency room nurse was instructed to not disclose the information she reported, and the nurse complied with these instructions. *See id.*

788. *See id.*

789. *Id.*

790. *Id.* at 401. The Court emphasized that a bill proposed to create a cause of action for private whistleblowers in the 1995 legislative session had failed. *See id.* In a similar factual scenario, the Court also refused to recognize a claim by a partner in a law firm who

the Legislature's policy decisions in determining whether to adopt a common-law claim, those boundaries drawn by the Legislature informed its decision.[791] Although Justice Gonzalez added in a concurring opinion that the Court would still carry its burden and duty of amending the at-will doctrine in the future if a compelling scenario of injustice was presented,[792] one has to wonder whether any situation would be sufficient to compel the current Court to adopt any such amendment. Other recent opinions by the Court regarding the at-will employment doctrine make it unlikely.

In *Montgomery County Hospital District v. Brown*,[793] decided by the Court in 1998, the issue presented was whether an at-will employment relationship could be modified by an employer's oral assurances that an employee would not be terminated without good cause so long as the employee performed satisfactorily.[794] The employee who brought suit in *Brown* was told that she could keep her job as long as she was doing her job and that she would not be fired without good reason or good cause.[795] The employee testified that this representation was an important factor in her decision to relocate and accept the position that was being offered by the employer.[796]

Justice Hecht, writing for the majority, held that "an employer's oral assurances that an employee whose work is satisfactory will not be terminated without good cause . . . do not modify an employee's at-will status absent a definite, stated intention to the con-

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was forced to leave after reporting her suspicions about client overbilling by a more senior partner. *See* Bohatch v. Butler & Binion, 41 Tex. Sup. Ct. J. 308, 309, 1998 WL 19482 (Jan. 22, 1998). The Court rejected the argument that public policy mandated protection for a whistleblower partner in order to encourage compliance with the rules of professional conduct and to protect clients from overbilling. *See id.* at 310. The Court held that one partner does not have a duty to remain partners with the other partners. *See id.* at 311.

791. *See Austin*, 967 S.W.2d at 403. The Court relied on the flexibility that the Legislature has to craft limitations periods and administrative schemes. *See id.* The Court also noted that since the nurse's firing, a whistleblower statute had been enacted to protect hospital employees. *See id.*

792. *See id.* at 404 (Gonzalez, J., concurring). Justice Gonzalez wrote separately because he feared that the "tenor" of the majority opinion might signal a retreat from the Court's ability to craft exceptions to the at-will doctrine. *See id.* at 404.

793. 965 S.W.2d 501 (Tex. 1998).

794. *See* Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 501 (Tex. 1998).

795. *See id.* at 502.

796. *See id.*

trary."[797] The fact that the employee took actions to her detriment based on the employer's statements was held to be of no legal consequence.[798] The Court also concluded that the general statements made to the employee were not proof that the employer intended to make a binding employment contract.[799]

Thus, under the holding in *Brown*, except under clearly specified circumstances, only proof of an unequivocal indication that the employer definitely intended to be bound not to terminate an employee will satisfy the Court's evidentiary burden with regard to the existence of a satisfaction contract.[800] Furthermore, even if the terms "good cause" or "good reason" are used by the employer, the employer will not be found to have entered into a satisfaction contract absent an agreement on what those terms encompass.[801] As a result, employers are free to make substantial promises to potential employees, but those employees are not entitled to rely on the promises that are made. Absent some knowledge of this area of the law, the potential for prospective employees to be duped by employers is great, and employees who believe the promises made to them will later discover that they are without a legal claim to present to a jury for the damages they have incurred.[802]

Another case in which the Texas Supreme Court has thwarted an attempt to create an exception to the at-will employment doctrine is the 1998 case of *Texas Mexican Railway Co. v. Bouchet*.[803] The

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797. *Id.* at 501.

798. *See id.* at 502 (stating that "an employee who has no formal agreement with his employer cannot construct one out of indefinite comments, encouragements, or assurances").

799. *See id.*

800. *See id.*

801. *See id.*

802. A duped employee may consider pursuing a claim for promissory estoppel. *See generally* Cortlan H. Maddux, *EMPLOYERS BEWARE! The Emerging Use of Promissory Estoppel As an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997) (outlining the possibilities of bringing a promissory estoppel action against an employer).

803. 963 S.W.2d 52 (Tex. 1998). The plaintiff in *Bouchet* was an employee who had injured his back while in the course and scope of his employment. *See* Texas Mexican Ry. Co. v. Bouchet, 963 S.W.2d 52, 53 (Tex. 1998). While the parties were negotiating a settlement of the employee's claim, the employer paid the employee's medical bills, transportation costs for medical care, and salary. *See id.* at 54. The employer discontinued these payments after the employee sued the employer under the Federal Employers Liability Act. *See id.* After the employee was terminated, he added a claim to his suit, contending

issue presented in *Bouchet* was whether employees can sue employers who are nonsubscribers to the Texas Workers' Compensation Act for actions that would violate Article 8307c of that Act.[804] The San Antonio court of appeals noted that Article 8307c was initially designed to protect against discriminatory actions by employers as a result of injured workers making claims, hiring attorneys, or instituting proceedings to recover damages for injuries.[805] When the workers' compensation laws were rewritten in 1989, Article 8307c was moved to Section 451.001 of the Labor Code.[806] Relying on other authorities which concluded that Section 451.001 was no longer tied to the workers' compensation scheme or statute, the appellate court concluded that there was no philosophical or rational reason not to apply the prohibition against retaliatory discrimination to nonsubscribers.[807] According to the court, the law's rationale and the injured employee's plight are the same whether

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that the employer denied him benefits and discharged him in retaliation for filing the suit. *See id.*

804. *See id.* at 53. Article 8307c was codified in 1993 as Sections 451.001 to 451.003 of the Texas Labor Code. *See id.* at 54 n.1; *see also* Act of May 12, 1993, 73d Leg., R.S., ch. 269 § 1, 1993 Tex. Gen. Laws 987, 1235-36 (enacting Chapter 451 of the Labor Code); *id.* at ch. 269, § 5(1) at 1273. Before the 1993 codification, Article 8307c provided, in pertinent part:

> No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Act of April 20, 1971, 62d Leg., R.S., ch. 115, 1971 Tex. Gen. Laws 884, *repealed by* Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 5(1) 1971 Tex. Gen. Laws 884, 1273.

805. *See* Bouchet v. Texas Mexican Ry. Co., 915 S.W.2d 107, 110 (Tex. App.—San Antonio 1996) (stating that the purpose for Article 8307c is to protect workers who exercise their rights under the Texas Workmen's Compensation Act), *rev'd*, 963 S.W.2d 52 (Tex. 1998) .

806. *See id.* (noting that Article 8307c was deleted from the workers' compensation bill).

807. *See id.* (relying on *Chatman v. Saks Fifth Ave. of Tex., Inc.*, 762 F. Supp. 152, 154 (S.D. Tex. 1991), which pointed out that "[t]he Western District of Texas also has held that retaliatory discharge claims do not arise under the workers' compensation laws"). One basis for holding that the retaliatory discharge claim is independent of the workers' compensation laws relates to the procedural differences between the claims. *See Chatman*, 762 F. Supp. at 155 (noting that an employer who subscribes to the workmen's compensation system cannot be sued by an employee for injuries sustained). A benefits claim is filed with the Texas Workers' Compensation Commission, while a retaliation claim is filed as a suit against the employer. *See id.* (differentiating between a claim for benefits and a claim for retaliatory discharge because the employee filed a claim for those benefits).

the employee is discriminated against by a subscriber or a nonsubscriber.[808]

The Texas Supreme Court reversed the court of appeals' decision, contending that the appellate court's interpretation of the law was contrary to the Legislature's purpose in enacting the statute.[809] The Court concluded that the Legislature did not intend to alter that purpose when Article 8307c was codified as Section 451.001.[810] As a result of this holding, injured employees who seek legal remedies against nonsubscribing employers can be discharged or otherwise punished without recourse, despite the fact that it is the employer, and not the employee, who elects whether to become a subscriber. Furthermore, by refusing to recognize a cause of action in favor of these employees, the Court prevents a jury from considering their plight.

B. *Workers' Compensation*

In addition to refusing to recognize a cause of action in favor of employees discharged by nonsubscribing employees after they seek legal remedies for their work-related injuries, the Texas Supreme Court has also restricted the recovery available to employees of subscribing employers who retaliate against employees for filing workers' compensation claims.[811] In the 1997 case, *Trico Technologies Corp. v. Montiel*,[812] an employee was terminated after filing a claim for workers' compensation benefits.[813] During pre-trial discovery, the employer learned that the employee had lied on a pre-employment physical examination questionnaire that was part of

808. *See Bouchet*, 915 S.W.2d at 111 (stating that employees should be able to recover benefits without penalty).

809. *See Bouchet*, 963 S.W.2d at 55 (stating that the Legislature intended to protect "persons," as defined statutorily and who brought the claim).

810. *See id.* at 56 (asserting that the language of the statute was not changed by the codification and that Section 451.001 of the Texas Labor Code continues to reference workers' compensation claims or relate back to the workers' compensation laws).

811. *See id.* (holding that an employer's retaliation against an employee for filing a FELA claim against the employer is not actionable under Article 8307c of the Texas Workers' Compensation Act).

812. 949 S.W.2d 308 (Tex. 1997).

813. *See* Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997). The suit was filed by the employee's administrator after the employee's death. *See id.*

the employment application.[814] The employer asserted that its discovery barred the employee's claims because it would not have hired the employee if it had known the employee lied on the questionnaire, and it also would have immediately terminated the employee upon discovering such lies.[815]

In *Montiel*, the Supreme Court adopted the "after-acquired evidence doctrine," holding that after-acquired evidence, which would support an employee's discharge, bars reinstatement and limits the employee's recovery of damages for retaliatory discharge from the date of discharge to the date of the employer's discovery of the evidence.[816] The Court reasoned that this position was a compromise between punishing the employer for its wrongful acts and protecting the employer from the dishonesty of the employee.[817] Although under the doctrine the employer is required to prove that the after-acquired evidence would have resulted in the employee's discharge if still employed, the doctrine permits employers to search their files after retaliation claims have been filed in an effort to formulate a defense, despite the fact that the search would not otherwise have been undertaken, and the information may not otherwise have been discovered. In addition, adopting the after-acquired evidence doctrine limits a jury's ability to award damages based on the wrongful conduct of the employer because juries will be required to consider an employers' after-acquired justifications in terminating an employee.

In *Continental Coffee Products Co. v. Cazarez*,[818] decided in 1996, the Court called into question a jury's exemplary damage

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814. *See id.* The employee stated that he had never received treatment for alcoholism or medical or emotional conditions; however, the employee had actually been diagnosed an alcoholic and was previously hospitalized for alcohol-related problems. *See id.*

815. *See id.* (describing the employer's argument on motion for summary judgment, which was granted by the trial court but reversed by the court of appeals).

816. *See id.* at 312 (proclaiming that evidence supporting discharge bars recovery of damages).

817. *See id.* This "compromise" position was based on the position taken by the Supreme Court of the United States in *McKennon v. Nashville Banner Publishing Co. See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 354-55 (1995). In *McKennon*, the Supreme Court rejected an approach to after-acquired evidence that would completely bar an employee's recovery. *See id.* at 354-55. *See generally* William J. Collins III, *An Exception for Deception: Why* McKennon *Should Not Be Extended to Employment Application Misrepresentations of Pre-Existing Injuries*, 37 S. TEX. L. REV. 745, 748 (1996) (discussing pre-existing injuries and discharge).

818. 937 S.W.2d 444 (Tex. 1996).

award.[819] In that case, Juanita Cazarez filed a workers' compensation claim after she sustained a work-related ankle injury in April 1991.[820] Despite her supervisor's questions as to whether she had been wearing proper shoes, Cazarez's medical bills were paid, and she received weekly benefits; however, her status was constantly monitored by the employment manager, who frequently contacted Cazarez, her physician, and the insurance carrier.[821] On September 30, 1991, Cazarez's physician released her to return to work on October 28, 1991.[822] On that same date, Cazarez phoned the employment manager's clerk and informed the clerk that she had the flu and was waiting to receive the ankle supports her physician had prescribed.[823] On October 30, 1991, the employment manager phoned Cazarez, and Cazarez informed him that she would probably be at work Friday, November 1, or Monday, November 4, at the latest.[824] Nonetheless, Cazarez failed to call or report to work from November 1 through November 7.[825] Despite the prior close monitoring and telephone contact, the employment manager did not contact Cazarez during this period; however, his clerk had spoken with Cazarez's son, who stated that his mother was not well.[826] The clerk reported this information to the employment manager.[827]

On November 8, the employment manager notified Cazarez that she had been terminated for violating the company's "3-day No Call/No Show Rule."[828] On the same day, Cazarez told the employment manager that she had been to her physician.[829] The employment manager expressed doubt as to the veracity of Cazarez's

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819. *See* Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 452-55 (Tex. 1996) (alleging that the act not only must be unlawful but also must be wanton and malicious).

820. *See* Continental Coffee Prods. Co. v. Cazarez, 903 S.W.2d 70, 73 (Tex. App.—Houston [14th Dist.] 1995), *aff'd in part, rev'd in part*, 937 S.W.2d 444 (Tex. 1996). Cazarez was a production assistant and primarily performed janitorial duties. *See id.* at 73.

821. *See id.* at 73, 78 (representing that the employment manager's file questioned whether the cause of Cazarez's injury was, in reality, either a bad back or bad knees).

822. *See id.* at 73. After her termination, the physician amended his report to reflect that Cazarez had not been released to return to work until November 18, 1991. *See id.*

823. *See id.*

824. *See id.*

825. *See id.*

826. *See id.* at 78.

827. *See id.*

828. *See id.* at 73. The rule was contained in the company's collective bargaining agreement and in the plant work rules. *See id.*

829. *See id.* at 78.

statement and refused the requests of both Cazarez and the insurance carrier to reconsider the termination.[830] The employment manager did not attempt to contact Cazarez's physician before or after the termination, but reported to both the Texas Employment Commission and the insurance carrier that Cazarez had voluntarily resigned.[831]

The Fourteenth Court of Appeals held that the evidence was legally and factually sufficient to support the jury's award of $500,000 in exemplary damages for retaliatory discharge.[832] The Texas Supreme Court reversed, contending that the appellate court failed to set forth the malice standard it applied when reviewing the evidence supporting the exemplary damage award.[833] The Court held that actual malice must be shown through evidence of "ill-will, spite, or a specific intent to cause injury to the employee."[834] However, the Court's criticism of the appellate court is questionable because the court of appeals expressly stated that it disagreed with the employer's argument that there was no evidence of "ill-will, spite, evil motive, or purposeful injury."[835] This statement expressed the precise test for malice that the Supreme Court adopted.

In addition, the Supreme Court's statements to justify its "no evidence" finding are disingenuous. Although the employment manager may not have physically met with Cazarez, the record shows that they had repeated phone contact and that the employment manager disbelieved both the cause of Cazarez's injury and Cazarez's assertion that she had visited her doctor when she did not report to work.[836] Furthermore, although the employment manager may not have reviewed Cazarez's file before the firing,[837] evidence demonstrated that he had closely monitored Cazarez's status.[838] In light of this evidence in the record contradicting the Court's analysis, the only reasonable conclusion to be reached

830. *See id.*
831. *See id.*
832. *See id.* at 78, 81.
833. *See* Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 452 (Tex. 1996).
834. *Id.* at 454.
835. *Cazarez*, 903 S.W.2d at 80.
836. *See id.* at 73, 78.
837. *See Cazarez*, 937 S.W.2d at 454.
838. *See Cazarez*, 903 S.W.2d at 73, 78.

from the Court's opinion in *Cazarez* is that the Court disfavors juries' awards of punitive damage in retaliatory discharge cases.

Unfortunately, the Court's track record in workers' compensation cases has not improved. In 1998, the Court granted a petition for review in the case of *Manasco v. Lumbermens Mutual Casualty Co.*[839] In *Manasco*, an injured employee sought to have an administrative tribunal reconsider the issues of Maximum Medical Improvement (MMI) and Impairment Rating (IR) based on a substantial change of condition.[840] The issue presented to the appellate court was whether the Workers' Compensation Act should be construed "to permit consideration of a substantial change of condition at the administrative level as well as in the district court."[841] The court of appeals held that the district court could properly consider the issue of compensability based on a substantial change of condition and an increase in the employee's impairment rating.[842]

The appellate court had taken a "common sense approach" in its reasoning, attempting to avoid depriving an injured worker of compensation based on the development of a substantial change in condition subsequent to the original injury.[843] The Texas Supreme Court, however, rejected this "common sense" approach and held that evidence of a substantial change of condition can only be presented if the party already appealed the decision in a contested case hearing to an appeals panel and sought to appeal that panel's

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839. 971 S.W.2d 60 (Tex. 1998).

840. *See* Manasco v. Lumbermens Mut. Cas. Co., 951 S.W.2d 286, 289 (Tex. App.—Beaumont 1997, no writ), *rev'd*, 971 S.W.2d 60 (Tex. 1998). The employee was certified to have reached MMI and was assigned a 30% IR by his treating physician in October 1992. *See id.* After the carrier disputed the IR, the Texas Workers' Compensation Commission designated a different physician, who reported that the employee had an IR of 7%. *See id.* A Benefits Review Conference recommended that the 7% IR be assigned, and a hearing officer at a contested case hearing determined that the designated doctor's assignment of 7% had not been overcome by the "great weight of contrary medical evidence." *See id.* The employee did not appeal that decision; however, a third physician subsequently performed back surgery on the employee. *See id.* After the surgery, the employee requested a Benefits Review Conference based on a substantial change in his condition. *See id.* His request was denied based on his failure to appeal the initial decision from the contested case hearing. *See id.*

841. *Id.*

842. *See id.* at 291.

843. *See id.* (explaining that a "common sense approach" is essential because of possible deprivation of an injured worker).

decision in district court.[844] By its holding, as Justice Spector noted, the Court effectively precludes an injured worker who unwittingly waived his rights to proceed further in the absence of knowledge regarding the true extent of his condition from seeking additional recovery.[845]

The Court has also recently granted a petition for review in another workers' compensation case, *Texas Workers' Compensation Insurance Fund v. Rodriguez*.[846] Gerardo Rodriguez's employer gave him two ten-minute breaks each day during which he remained "on the clock."[847] Routinely, Rodriguez and other employees would go outside during these breaks and toss a football.[848] Rodriguez did not consider tossing the football to be part of his job responsibilities, but his supervisors approved this activity.[849]

During one of these breaks, as he was jogging to catch the ball, Rodriguez stepped into a hole on the company's premises and twisted his knee.[850] Rodriguez's doctor released him to return to work approximately four months later, and the company assigned him to light duty.[851] After a few months, the company transferred Rodriguez back to his original position of grinding fiberglass, where he worked until he had surgery.[852] When Rodriguez at-

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844. *See* Lumbermens Mut. Cas. Co. v. Manasco, 971 S.W.2d 60, 63 (Tex. 1998).

845. *See id.* at 64-65 (Spector, J., dissenting) (emphasizing the procedural pitfalls that riddle the workers' compensation laws and create the potential for workers to unwittingly waive their rights, particularly in light of the laws' adoption of disincentives that discourage attorneys from representing workers in the administrative process). In 1995, the Court held that the limitations on attorneys fees were constitutional. *See* Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 533 (Tex. 1995). Justice Spector cautions that ombudsmen must ensure that they fully inform injured workers of the consequences of their actions in each step of the process. *See Manasco*, 971 S.W.2d at 65 (Spector, J., dissenting).

846. *See* Texas Workers' Compensation Ins. Fund v. Rodriguez, 41 Tex. Sup. Ct. J. 867, 868 (June 5, 1998) (granting petition for review).

847. *See* Texas Workers' Compensation Ins. Fund v. Rodriguez, 953 S.W.2d 765, 766 (Tex. App.—Corpus Christi 1997, pet. granted). Rodriguez punched in when he arrived at work in the morning, punched out for lunch, punched in when he returned from lunch, and punched out when he left work. *See id.* Rodriguez was required to return to work during his breaks if he was summoned by his supervisor. *See id.*

848. *See id.* The vice-president of the company also participated in this activity. *See id.*

849. *See id.* Rodriguez considered tossing the football to be a social activity. *See id.*

850. *See id.* at 767.

851. *See id.* The injury occurred in January 1993, and Rodriguez returned to work in April. *See id.*

852. *See id.* Rodriguez had surgery in September 1993. *See id.*

tempted to return to work approximately seven months after the surgery, he was informed that he had been terminated.[853]

On appeal from a contested case hearing, an appeals panel held that "Rodriguez was injured in the course and scope of his employment under the personal comfort doctrine" and "the recreational-social activity doctrine."[854] The Texas Workers' Compensation Insurance Fund ("Fund") appealed to the district court, which granted summary judgment in favor of Rodriguez.[855] The appellate court affirmed, holding that the break originated in, and was in furtherance of, the company's business "because to be grinding unceasingly at the tasks assigned by [the company] would be a hazard to [the employee] and others and would not be the most efficient means of conducting [the company's] business."[856] The appellate court concluded that it was immaterial that Rodriguez was tossing a football as opposed to walking across the shop's yard.[857]

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853. *See id.*

854. *See id.* At a benefits review conference, the parties had been unable to reach an agreement as to when he was injured. *See id.* A hearing officer ruled at the contested case hearing that Rodriguez was not in the course and scope of his employment. *See id.* The hearing officer also ruled that Rodriguez did not have a disability because his injury was non-compensable. *See id.*

The personal comfort doctrine has been described as follows:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Id. at 767 n.4 (quoting 1A ARTHUR LARSON ET AL., LARSON'S WORKERS' COMPENSATION LAW § 21.00 (1990)).

855. *See id.*

856. *Id.* at 769. The court quoted Section 401.011(12) of the Texas Labor Code, which provides the following two-part definition of course and scope of employment: "(1) 'an activity of any kind or character that has to do with and originate in the work, business, trade, or profession of the employer,' and (2) 'performed by an employee while engaged in or about the furtherance of the affairs or business of the employer.'" *Id.* at 768 (quoting TEX. LAB. CODE ANN. § 401.011(12) (Vernon 1996)). The court asserted that "[c]ourse and scope of employment is not limited to the exact moment when the employee reports for work, the moment when the employee's labors are completed, or to the place where work is done." *Id.*

857. *See id.* at 769. The court also held that the tossing of the football was a reasonable expectancy of Rodriguez's employment because the company condoned the activity. *See id.*

The first issue on which the Texas Supreme Court has granted review is whether "employers and their insurance carriers [can] be held liable as a matter of law to employees injured while voluntarily engaged during breaks in recreational or athletic activities unrelated to their job duties?"[858] Given the Court's unwillingness to impose liability on employers, it would be surprising if Rodriguez ultimately prevails in this appeal. Such a result would also contradict the Court's previous jurisprudence.

C. *Common-Law Claims Against Employers*

Given the Court's strict adherence to the at-will employment doctrine,[859] discharged employees often attempt to rely on other common-law claims to seek recourse for their injuries.[860] When juries award injured employees damages for these claims, however, the Texas Supreme Court has demonstrated an increased willingness to trump the jury's verdict and take away the damage awards.[861]

In *Southwestern Bell Mobile Systems, Inc. v. Franco*,[862] decided by the Texas Supreme Court in 1998, two employees sued their employer for intentional infliction of emotional distress following their termination.[863] The employees claimed that their cause of action arose from their termination in retaliation for reporting sexual

858. Texas Workers' Compensation Ins. Fund v. Rodriguez, 41 Tex. Sup. Ct. J. 867, 868 (June 5, 1998).

859. *See* East Line & R. R. R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888) (adopting the employment at-will doctrine); Wal-Mart Stores, Inc. v. Coward, 829 S.W.2d 340, 343 (Tex. App.—Beaumont 1992, writ denied) (noting that "[t]o date, the Supreme Court has created only one narrow exception to the Employment-At-Will doctrine").

860. *See* Southwestern Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 53 (Tex. 1998) (considering a former employee's action for intentional infliction of emotional distress); Byars v. City of Austin, 910 S.W.2d 520, 521 (Tex. App.—Austin 1995, writ denied) (discussing a former city employee's claim for breach of employment contract, reverse racial discrimination, and violation of procedural and substantive due process rights).

861. *See, e.g.*, *Franco*, 971 S.W.2d at 56 (reversing the jury's verdict as to the plaintiffs' claim of intentional infliction of emotional distress and punitive damages); Johnson & Johnson, Med. Inc. v. Sanchez, 924 S.W.2d 925, 930 (Tex. 1996) (reversing the jury's verdict in favor of the plaintiff as to the claim of fraud).

862. 971 S.W.2d 52 (Tex. 1998).

863. *See Franco*, 971 S.W.2d at 53. The employees also alleged retaliatory discharge and defamation. *See id.* Prior to 1993, the employees might have asserted claims for negligent infliction of emotional distress; however, in *Boyles v. Kerr*, the Court held that no duty existed "not to negligently inflict emotional distress." Boyles v. Kerr, 855 S.W.2d 593, 597 (Tex. 1993).

harassment.[864] A jury found for the employees and awarded each employee actual and punitive damages.[865]

The Corpus Christi court of appeals held that evidence supporting a retaliatory discharge finding may also support a finding of extreme and outrageous conduct for the purposes of a claim for intentional infliction of emotional distress.[866] The Texas Supreme Court reversed, holding that the record revealed no evidence of extreme and outrageous conduct.[867] The Court stated that the termination for retaliatory discharge, coupled with the evidence that the employees were terminated and forced to remove their belongings in the unnecessary presence of co-workers, fell "far short of being legally sufficient to prove that [the company's] conduct was extreme and outrageous."[868]

The Court's holding in *Franco* provides no encouragement to the employees in another case in which petition for review has been granted. In *GTE Southwest, Inc. v. Bruce*,[869] three employees sued their employer for intentional infliction of emotional distress.[870] A jury awarded the employees $275,000, and the employer appealed, asserting as one point of error that the evidence was legally and factually insufficient to support the jury's finding of extreme and outrageous behavior.[871] The Texarkana court of appeals set forth the testimony of the employees regarding the conduct of their supervisor in great detail and stated that after reading Texas law re-

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864. *See* Southwestern Bell Mobile Sys., Inc. v. Franco, 951 S.W.2d 218, 222 (Tex. App.—Corpus Christi 1997), *aff'd in part, rev'd in part*, 971 S.W.2d 52 (1998). Each employee was the recipient of unwelcome sexual advances from the company's director of operations. *See id.*

865. *See id.* One employee was awarded $25,500 in actual damages and $20,000 in punitive damages. *See id.* The other employee was awarded $20,000 in actual damages and $25,500 in punitive damages. *See id.*

866. *See Franco*, 951 S.W.2d at 224. The jury found that the company had retaliated against the employees for complaining of sexual harassment, and the company did not challenge that finding. *See id.* at 221, 224.

867. *See Franco*, 971 S.W.2d at 53.

868. *See id.* at 54.

869. 956 S.W.2d 636 (Tex. App.—Texarkana 1997, pet. granted).

870. *See* GTE Southwest, Inc. v. Bruce, 956 S.W.2d 636, 638 (Tex. App.—Texarkana 1997, pet. granted).

871. *See id.* The employer asserted a total of seventeen points of error. *See id.*

garding intentional infliction of emotional distress, "there may be a desire to cry out for more guidance."[872]

After examining the supervisor's overall behavior, the court asserted that the supervisor's rages, his "charging" at employees and his use of profanity may be acceptable from a football coach or in a boot camp, but such conduct was not common in a civilian workplace.[873] The court held that the testimony clearly showed that the supervisor intentionally intimidated, humiliated, frightened, and embarrassed the employees and was legally sufficient to support the finding of extreme and outrageous conduct.[874]

In its analysis, the appellate court referred to Justice Nathan Hecht's concurring and dissenting opinion in *Twyman v. Twyman*,[875] the leading Texas Supreme Court case on the intentional infliction of emotional distress. The court noted that Justice Hecht opined in *Twyman* that the nebulous outrageousness conduct standard would result in erratic decisions without a unifying principle.[876] Although the court agreed that jurors would be required to judge the defendant's conduct by their own personal experiences, the *Bruce* court noted that the same principle always had been applied with respect to the tort of negligence.[877] The

872. *Id.* at 646. The employees testified that the supervisor continually threatened to terminate them and that they were required to perform tasks that were not within their job responsibilities. *See id.* at 644-45. One employee was required to purchase a vacuum cleaner and vacuum her office, despite the fact that the office had a contract with a cleaning company. *See id.* at 644. That employee testified that other employees laughed at her, and the vacuuming disrupted the office. *See id.* Another employee was required to clean tobacco spit off a wall, and a third employee was required to clean spots off a rug. *See id.* at 644-45. In addition, the employees testified that the supervisor would go into a rage and "charge" the employees by running at them, "hands down, head bent, lunging forward," getting "uncomfortably close to the employees' faces," where he would yell at them. *Id.* at 645. The supervisor screamed in one employee's face on numerous occasions, and another employee thought the supervisor was going to hit her. *See id.* The supervisor made one employee wear a post-it note that read, "Don't forget your paperwork." *Id.* In addition, in the process of showing a training film, the supervisor put in another tape of a comedian "talking about women's breasts and breast milk." *Id.* Numerous complaints were also made regarding the supervisor's use of profanity. *See id.*

873. *See id.* at 647.

874. *See id.*

875. 855 S.W.2d 619 (Tex. 1993).

876. *See Bruce*, 956 S.W.2d at 646.

877. *See id.* Despite "the shelves of law books . . . filled with a myriad of cases," the Court contended it was unlikely to find a fact situation in any case that was exactly on point with another case involving allegations of intentional infliction of emotional distress. *See id.* According to the Court, "[w]hen dealing with human conduct, the situations that

court concluded that constant change in acceptable standards of conduct in society prevented the crystallization of a "bright line between tolerable conduct and outrageous conduct."[878]

Although the Texarkana court of appeals affirmed the trial court's judgment, permitting the employees to recover the damages awarded by the jury, the Texas Supreme Court has granted petition for review.[879] One of the issues to be decided on review is whether "the court of appeals erred in determining that the conduct complained of by plaintiffs was extreme and outrageous."[880] Although the Texarkana court's opinion cried out for more guidance, whether the Supreme Court will eliminate the jury's verdict in the course of providing that guidance is uncertain.[881]

In another recent employment case involving a common-law claim, *Johnson & Johnson Medical, Inc. v. Sanchez*,[882] the Texas Supreme Court took a $275,000 jury award away from an injured employee.[883] In that case, the employee asserted a fraud claim against the employer based on the employer's misrepresentations that the employee would be permitted to return to work following an injury.[884] The employee specifically alleged the following misrepresentations:

(a) that the employee's lay-off status was indefinite;
(b) that the employee had recall rights under a labor agreement;
(c) that light duty work was not available when the employee was released to perform light duty work;

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may arise are far in excess of the possible sequences of the chess game or the stars in a clear night sky." *Id.*

878. *Id.* The Court also stated, "As Justice Oliver Wendall Holmes declared, 'A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in color and content *according to the circumstances and time in which it is used.*'" *Id.*

879. *See* GTE Southwest, Inc. v. Bruce, 41 Tex. Sup. Ct. J. 589, 589 (Mar. 28, 1998) (granting petition for review).

880. *Id.* at 590.

881. *See generally* Cyndi M. Benedict et al., *Annual Survey of Texas Law: Employment and Labor Law*, 50 SMU L. REV. 1101, 1119-24 (1997) (discussing various intermediate appellate court decisions regarding intentional infliction of emotional distress in the employment setting).

882. 924 S.W.2d 925 (Tex. 1996).

883. *See* Johnson & Johnson Med., Inc. v. Sanchez, 924 S.W.2d 925, 930 (Tex. 1996).

884. *See* Sanchez v. Johnson & Johnson Med., Inc., 860 S.W.2d 503, 507-08 (Tex. App.—El Paso 1993), *aff'd in part, rev'd in part*, 924 S.W.2d 925 (Tex. 1996). The employee also asserted claims for wrongful discharge and breach of contract. *See id.*

(d) that if the employee's doctor released her to full duty she would be recalled to any openings for which the company doctor determined she was eligible or she would remain on lay-off;
(e) that she would be given a job when she was released for full duty; and
(f) that she was "standing in line" for a job.[885]

The El Paso court of appeals concluded that the evidence supported the jury's finding of misrepresentation.[886] The court noted that the employee was injured by not seeking full-time employment based on the employer's representations and that the employment she was able to later secure paid less than she was previously paid by the employer.[887] The court held that when fraud is found in an employment relationship, "damages in the form of lost wages and benefits would appear to be the only appropriate remedy."[888] The court concluded that to deny such recovery would allow an employer "to commit fraud with impunity."[889]

Nevertheless, the Texas Supreme Court reversed, holding that the employee failed to prove that she relied on the employer's representation.[890] The Court did not explain its disagreement with the appellate court's analysis of the employee's reliance upon not seeking full-time employment or of the damages the employee sustained when she had to obtain a lesser-paying job. Instead, the Court merely stated that the employee "obtained other employment during the period in question."[891] With that simple statement, the Court again eliminated a damage award in favor of an injured employee on a common-law claim.[892]

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885. *See id.* at 510-11.

886. *See id.* at 511. There was evidence that the employee had already been terminated when the representations were made to her. *See id.* In addition, there was evidence that light duty positions were available when she was released to return to work. *See id.*

887. *See id.* (discussing the recall of employees and the letter that the appellant received).

888. *Id.* at 513-15. For a general discussion regarding damages recoverable for wrongful discharge, see Francis M. Dougherty, Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R.4TH 1131 (1986).

889. *Sanchez*, 860 S.W.2d at 515.

890. *See* Johnson & Johnson Med., Inc. v. Sanchez, 924 S.W.2d 925, 929-30 (Tex. 1996).

891. *Id.* at 930.

892. *Id.* *See generally* Cyndi M. Benedict et al., *Annual Survey of Texas Law: Employment and Labor Law*, 50 SMU L. REV. 1101, 1134-37 (1997) (discussing cases in which employees allege fraud or misrepresentation claims against employers).

In each of the cases discussed, the employee pled a recognized common-law claim, and a properly charged jury awarded the employee damages. However, rather than deferring to the jury's resolution of the facts, the Texas Supreme Court second guessed the verdict, causing it to vanish. Thus, the Court's unwillingness to allow juries to decide employment cases has been especially evident in its steadfast adherence to the employment-at-will doctrine and its strict application of no-evidence review to workers' compensation and common-law employment claims. By applying these principles, the court has removed even more issues from consideration by a jury. In addition, strictly adhering to the employment-at-will doctrine, the Court has created precedent that will ensure fewer cases will survive summary judgment. Moreover, by applying a stringent no-evidence review of jury findings, the Court has empowered itself to rewrite jury verdicts.

VII. THE END OF THE 1997-1998 TERM: PENDULUM SWING OR ANOMALY?

Although the Court has taken great measures to limit juries' roles in deciding cases, an unusual thing happened near the end of the 1997-98 term. The Court decided four cases quite atypically—all four results were pro-consumer.[893] The surprise generated by these opinions immediately drew the attention of both the *Texas Lawyer* and the *Wall Street Journal*.[894] It is too early to tell whether the Court has reached the far right swing of the pendulum, or

893. *See* Uniroyal Goodrich Tire Co. v. Martinez, 42 Tex. Sup. Ct. J. 43, 43, 1998 WL 716932 (Oct. 15, 1998) (allowing a products liability plaintiff to recover despite the fact that warnings were present on the defective product); H.E. Butt Grocery Co. v. Bilotto, 41 Tex. Sup. Ct. J. 1213, 1215, 1998 WL 388586 (July 14, 1998) (allowing the jury to be instructed in a way that would apprise them of the legal effect of their findings); Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1, 13 (Tex. 1998) (holding that the National Traffic and Motor Vehicle Safety Act did not preempt a plaintiff's common law claim against a vehicle manufacturer for a defect in the passenger restraint system); Balandran v. Safeco Ins. Co., 972 S.W.2d 738, 742 (Tex. 1998) (construing the Texas Standard Homeowner's Policy to provide coverage for loss caused by plumbing leaks); *see also* Mobil Corp. v. Ellender, 968 S.W.2d 917, 929 (Tex. 1998) (affirming a punitive damages award of over $2 million in a toxic tort case).

894. *See* Janet Elliott, *Mood Swings: A Conservative Court Discovers a Moderate State of Mind*, TEX. LAW., July 13, 1998, at 1 (describing several recent decisions as key wins for plaintiffs); Mary Flood, *Court Gives Consumers Rare Wins*, WALL ST. J., July 8, 1998, at T1 (stating that some observers see the pro-consumer decisions as a sign that the court is siding with injured plaintiffs in cases of products liability).

whether these decisions represent an election-year anomaly or a response to a "well-publicized return of the *60 Minutes* cameras."[895]

A. *The Pro-Consumer Decisions*

1. *Hyundai Motor Co. v. Alvarado*

In *Hyundai Motor Co. v. Alvarado*,[896] the Court considered whether the National Traffic and Motor Vehicle Safety Act of 1966 (the "Act") expressly or impliedly preempted "common-law claims asserting that a vehicle's passenger restraint system was defectively designed because the manufacturer failed to install lap belts."[897] The Act expressly prohibited states from adopting a motor vehicle safety standard if a federal standard had been established; however, the Act also provided that compliance with a federal standard did "not exempt any person from liability under common law."[898] A federal standard establishing crash protection performance requirements had been adopted, and Hyundai had complied with one of the optional methods for meeting those requirements.[899]

Initially, the Court held that Alvarado's common-law claims were not expressly preempted by the Act.[900] The Court asserted three reasons for this holding: (1) the Act's preemption language refers to legislative or administrative enactments; (2) one of the problems sought to be alleviated by the Act were existing state law enactments; and (3) the Act contained a savings clause for common-law claims.[901] The Court then examined whether Alvarado's

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895. Janet Elliott, *Mood Swings: A Conservative Court Discovers a Moderate State of Mind*, TEX. LAW., July 13, 1998, at 1, 27. Four members of the Court, Justices Greg Abbott, Craig T. Enoch, Deborah G. Hankinson, and Rose Spector, face reelection in 1998. *See id.* at 1. Justices James A. Baker, Greg Abbott and Deborah G. Hankinson are mentioned frequently as possible members of an emerging moderate coalition. *See id.*

896. 974 S.W.2d 1 (Tex. 1998).

897. *Alvarado*, 974 S.W.2d at 2. Mario Alvarado, a passenger in a Hyundai Excel driven by a classmate, was paralyzed from the chest down after he was ejected through the sunroof of the car. *See id.* Alvarado was ejected when the car skidded off the road and rolled over. *See id.*

898. *Id.* at 3.

899. *See id.* at 4.

900. *See id.* at 8 (explaining that Congress did not have a "clear and manifest" intent to preempt the common-law claim brought by Alvarado).

901. *See id.* at 6-8.

claims were impliedly preempted.[902] The Court concluded that the Act's "language, context, and legislative history" revealed no unequivocal mandate to oust common law.[903] In the end, the Court rejected a potential defense that would have ended the case with a summary judgment. Indeed, the Court could have chosen, as it has done in several of the previously discussed areas, to limit or abolish the cause of action.

2. *Balandran v. Safeco Insurance Co. of America*

The case of *Balandran v. Safeco Insurance Co. of America*[904] presented the Court with a question certified from the United States Court of Appeals for the Fifth Circuit.[905] The issue presented was "whether the 1991 Texas Standard Homeowner's Policy—Form B covers damage to the insured's dwelling from foundation movement caused by an underground plumbing leak."[906] The Court found that the policy was ambiguous and noted that when an exclusionary provision of an insurance policy is ambiguous, the rules of construction require the Court to adopt the insured's interpretation, provided that the interpretation is not unreasonable.[907]

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902. *See id.* at 9-13.

903. *Id.* at 13.

904. 972 S.W.2d 738 (Tex. 1998).

905. *See* Balandran v. Safeco Ins. Co. of Am., 972 S.W.2d 738, 739 (Tex. 1998).

906. *Id.* The Balandrans' home was damaged by a plumbing leak that caused the soil to expand, resulting in structural damage to the home's foundation as well as its interior and exterior finishes. *See id.* Safeco denied the Balandrans' claim under a policy in the form of the 1991 Texas Standard Homeowner's Policy—Form B. *See id.* A jury awarded the Balandrans $66,500 for the structural damage caused by the plumbing leak; however, the trial court rendered a take-nothing judgment based on Safeco's contention that the policy excluded coverage for the structural damage. *See id.*

907. *See id.* at 740-41. The policy provided two types of coverage. *See id.* at 739. "Coverage A" insured the dwelling but excluded, in Section 1(h), loss caused by "settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls or swimming pools." *Id.* "Coverage B" insured personal property against twelve enumerated perils, including "accidental discharge, leakage or overflow of water or steam from within a plumbing, heating or air conditioning system or household appliance." *Id.* at 740. Coverage for the accidental leakage peril included the "cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance." *Id.* The policy then stated that "[e]xclusions 1.a through 1.h under Section I Exclusions do not apply to loss caused by this peril." *Id.* The Balandrans argued that the last sentence, referred to as the "exclusion repeal provision," meant that exclusion 1(h) did not apply to plumbing leaks. *Id.* Safeco contended that "Coverage B" was limited to personal property coverage, and therefore interpreted the

In addition to finding that the Balandrans' interpretation was reasonable, the Court asserted that Safeco's interpretation rendered part of the policy language meaningless.[908] Furthermore, the Court noted that the committee that had drafted the standard form was charged with simplifying the form without restricting coverage then available, and coverage was available for foundation damage caused by a plumbing leak prior to the adoption of the standard form.[909] The Court held that exclusion 1(h) did not apply to "loss caused by the accidental discharge, leakage or overflow of water or steam from within a plumbing, heating or air conditioning system or household appliance."[910] Consequently, the decision in *Balandran* was a drastic departure from the Court's prior approach, or construing insurance policies as a matter of law, and that favored the insurers.

3. *Uniroyal Goodrich Tire Co. v. Martinez*

In *Uniroyal Goodrich Tire Co. v. Martinez*,[911] Robert Martinez was struck and injured by a 16" Goodrich tire that exploded as he was mounting the tire onto a 16.5" rim.[912] A warning label was attached to the tire and conspicuously stated, "DANGER NEVER MOUNT A 16" SIZE DIAMETER TIRE ON A 16.5" RIM."[913] The San Antonio court of appeals held that an adequate product warning did not conclusively establish that the tire was not defective; thus the court affirmed a $5.5 million actual damage award in favor of the Martinezes.[914]

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exclusion repeal provision to apply only to personal property losses. *See id.* The Court held that the policy was subject to two reasonable interpretations, rendering it ambiguous. *See id.* at 741.

908. *See id.* The Court noted that exclusion 1(h) applied only to damage to the dwelling. *See id.* Therefore, according to the Court, if coverage for damage caused by plumbing leaks was limited to personal property, there would be no reason to provide that exclusion 1(h) was not applicable under "Coverage B." *See id.* at 742.

909. *See id.* at 742.

910. *Id.*

911. 42 Tex. Sup. Ct. J. 43, 1998 WL 716932 (Oct. 15, 1998).

912. *See* Uniroyal Goodrich Tire Co. v. Martinez, 42 Tex. Sup. Ct. J. 43, 43, 1998 WL 716932 (Oct. 15, 1998).

913. *See id.* The warning label also contained a pictograph of an exploding tire causing a worker to be thrown into the air. *See id.*

914. *See Uniroyal*, 928 S.W.2d 64, 69-70 (Tex. App.—San Antonio 1995), *aff'd*, 42 Tex. Sup. Ct. J. 43, 1998 WL 716932 (Oct. 15, 1998). The San Antonio court reversed the $11.5

The issue presented to the Texas Supreme Court was "whether a manufacturer who knew of a safer alternative product design [can be] liable in strict products liability for injuries caused by the use of its product that the user could have avoided by following the product's warnings."[915] In arguing against liability, Goodrich heavily relied on comment j to Section 402A of the *Restatement (Second) of Torts*, which provided that a product is not in defective condition or unreasonably dangerous if it is safe when the product's warning is followed.[916] In response to Goodrich's argument, the Court noted that the approach taken by comment j had been expressly rejected by the newly released RESTATEMENT (THIRD) OF TORTS, which provides that the adoption of a safer design is required over a warning when the safer design can reasonably be implemented.[917] The Court further noted that comment j is referred to in the Reporter's Notes of the new RESTATEMENT as "unfortunate language" that "has elicited heavy criticism from a host of commentators."[918] The Court held that the jury was entitled to consider both the warning and the evidence of alternative designs and that some evidence supported the jury's finding of product defect.[919] Hence, the Court ruled in favor of the plaintiff, which was quite dissimilar from its previous opinions.

4. *H.E. Butt Grocery Co. v. Bilotto*

In *H.E. Butt Grocery Co. v. Bilotto*,[920] the Court gave its approval to broad-form jury submissions. *Bilotto* was a slip-and-fall case that presented an important issue concerning broad-form jury submissions.[921] The issue in *Bilotto* was "whether a jury charge in-

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million punitive damages award, finding no evidence of gross negligence. *See id.* at 70-72, 76.

915. *Martinez*, 42 Tex. Sup. Ct. J. at 43 .

916. *See id.* at 47. Comment j states: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." RESTATEMENT (SECOND) OF TORTS § 402A cmt. j. (1965).

917. *See id.*

918. *Id.*

919. *See id.* at 48-50. The plaintiffs presented evidence that Goodrich's competitors had developed a safer alternative design in the early 1980s, but Goodrich failed to adopt that design a year after the tire that injured Martinez was manufactured. *See id.* at 45.

920. 41 Tex. Sup. Ct. J. 1213, 1998 WL 388586 (July 14, 1998).

921. *See* H.E. Butt Grocery Co. v. Billotto, 41 Tex. Sup. Ct. J. 1213, 1213, 1998 WL 388586 (July 14, 1998).

struction predicating a damages question on a finding of fifty percent or less comparative negligence [violated] Rule 277" of the Texas Rules of Civil Procedure.[922] The crux of the case was the following instruction that appeared after the question requiring the jury to attribute percentage causation:

> If, in answer to Question No. 1, you have answered "NO" for VINNIE BILOTTO, or if, in answer to Question No. 2 you have found that 50 percent or less of the negligence that caused the occurrence is attributable to VINNIE BILOTTO, then answer Question No. 3. Otherwise, do not answer Question No. 3.[923]

The defendant, H.E. Butt Grocery Co. (H-E-B), contended that this instruction impermissibly informed the jury of the legal effect of its answer.[924]

The Court asserted that the 1987 amendments to Rule 277 expressly authorized the conditional submission of the damages question.[925] The Court further asserted that the instruction only incidentally informed the jury of the legal effect of its answers, which was expressly permissible under Rule 277.[926] Therefore, the Court held that the trial court did not err in submitting the instruction, and surprisingly, it upheld the lower court's decision favoring the consumer.[927]

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922. *Id.* at 1213. The first question in the jury charge asked whether the negligence of any of the listed persons, H.E. Butt Grocery Company ("H-E-B") and Bilotto, proximately caused the occurrence in question. *See id.* The second question asked the jury to attribute a percentage of negligence to each person found to have been negligent. *See id.* The third question asked the jury to assess the amount of damages that would reasonably compensate Bilotto. *See id.*

923. *Id.* at 1214. According to the Court, the instruction was nearly identical to Texas Pattern Jury Charge 80.1, which "does not directly inform the jury of the legal effect of its answers, but merely directs the jury only if certain conditions are satisfied." *Id.* at 1214-15.

924. *Id.* at 1214.

925. *See id.* The Court refused to apply the holding of an earlier opinion that disapproved of a similar instruction, concluding that the earlier case was decided prior to the 1987 amendments to Texas Rule of Civil Procedure 277. *See id.* at 1215 (rejecting the holding of *Grasso v. Cannon Ball Motor Freight Lines*, 125 Tex. 154, 81 S.W.2d 482 (Tex. 1935)).

926. *See id.* at 1214.

927. *See id.* at 1215. Although the Court noted a trend developing among the states to permit the jury to know the ultimate effect of its answers, the Court concluded that it was not overruling the Texas case law that prohibited directly informing the jury of the legal effect of their answers. *See id.*

B. *The Future*

Whether a moderate block of justices is emerging on the Court based upon the four cases described above is difficult, and probably impossible, to ascertain. Justice Spector has always been a moderate voice, and her position is occasionally joined by one or another justice, but rarely enough to create a majority. Nonetheless, Justice Spector wrote the majority opinions in both *Alvarado*[928] and *Bilotto*[929] and voted with the majority in *Martinez* and *Balandran*, which were both authored by Chief Justice Phillips.[930] Unfortunately, Justice Hankinson has too short a track record on the Court to draw any conclusions as to her stance. In essence, the four decisions referred to above are a departure from the Court's pattern of the last ten years. But, whether these cases reflect a sea of change or an election-year attempt at attracting moderate voters remains to be seen.

VIII. CONCLUSION

For almost a decade, the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts. In every area of the law, the Phillips/Hecht Court has overturned or limited potential recovery by injured individuals. In all areas of the law, concepts of duty, causation, no-evidence, and qualifications of experts have been greatly altered. Because stare decisis is so important and virtually a commandment to both an intermediary appellate and trial court, these concepts may stay as the Court has crafted them for a long time. Each decision in these various areas of the law chips away at an injured party's ability to present a case to a jury.

Although lip service is given to the importance of the jury, the decisions of the Court demonstrate that, in fact, the jury verdict does not mean much. This erosion of the jury's significance undercuts a major tenet of democracy—that the community of the parties in litigation should determine the justice of the dispute.[931] This

928. *See* Hyundai Motor Co. v. Alvarado, 974 S.W.2d 1, 2 (Tex. 1998).

929. *See Billotto*, 41 Tex. Sup. Ct. J. at 1213.

930. *See* Uniroyal Goodrich Tire Co. v. Martinez, 42 Tex. Sup. Ct. J. 43, 43, 1998 WL 716932 (Oct. 15, 1998); Balandran v. Safeco Ins. Co., 972 S.W.2d 738, 739 (Tex. 1998).

931. *See* Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1864 (1998) (identifying juries "[a]s a part of democratic self-government, the jury is supposed to serve the people by checking the judge");

principle harkens back to the Greek Republic, where the citizens' voice was considered the voice of the Republic.[932] In the final analysis, we trust the wisdom of the people, or we reject the jury in favor of a more elite voice.

Predictability in the law is greatly needed. Predictably in the law does not refer to the predictability that a Democrat will vote one partisan way, and a Republican will vote another partisan way; rather, it refers to the predictability that the law will be interpreted consistently, regardless of who the judge is or the judge's party affiliation. Predictability in the law also concerns itself with the idea that a jury will *always* have the last word in deciding the facts and that a judge will not disturb those findings when he would have held otherwise.

The four recent decisions of the Court in *Alvarado, Balandran, Uniroyal,* and *Bilotto* may indeed signal the beginning of a more balanced Court. Or, they may not. As Aristotle once said, "[O]ne swallow does not make a spring."[933] Time will tell. One thing is certain—the new term of the Court will be watched even more closely than in years passed to determine whether a change is in progress or an effort is simply being made to widen the electoral base and deflect building criticism.

Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 112-13 (emphasizing the role of jurors as essential to the democratic process).

932. *See* ARISTOTLE, POLITICS 1274a2, at 165 (H. Rackham trans., Harvard Univ. Press 1950) (explaining that a fundamental feature of democracy is the establishment of the courts "from all the citizens"); DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 34 (1978) (stating that the concept of the jury was invented in Athens and is regarded "as a fundamental part of democracy"). The jury of ordinary citizens was composed of a "limited number of ordinary citizens representing all the citizens: a part of the community [that] stood for the whole, and the decisions of the part counted as decisions of the whole." *Id.*

933. ARISTOTLE, NICOMACHEAN ETHICS 1098a20, at 17 (Terence Irwin trans., Hackett Publ'g Co. 1985).