

NO. 01-0851

IN THE
SUPREME COURT OF TEXAS

TEXAS FARM BUREAU MUTUAL INSURANCE COMPANIES,
Petitioners,
vs.
JAMES SEARS, ET UX.,
Respondents.

On Appeal from the Tenth Court of Appeals
Waco, Texas
No. 10-00-050-CV

PETITIONERS' REPLY TO RESPONDENTS' BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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I. Sears' Most Egregious Distortions of Fact

While Farm Bureau's Petitioners' Brief on the Merits ("Petitioners' Brief") dealt with many of Sears' anticipated "factual" arguments, Farm Bureau must nonetheless correct the most egregious of Sears' distortions of the facts. First, Sears' Respondents' Brief on the Merits ("Respondents' Brief") repeatedly assumes that Mrs. Sears filed a negligent investigation claim against Farm Bureau. *See, e.g.*, Respondents' Brief at 1 (Sears' Second Issue Presented for Review). Because she was never investigated by Farm Bureau, Mrs. Sears asserted only an intentional infliction of emotional distress claim, upon which the jury declined to find in her favor. CR 525.

Second, Sears' portrayal of himself as an unheeded whistle-blower ignores Sears' role in the mishandling of the Priest and Willingham claims. Sears also repeatedly asserts that Farm Bureau and the investigators engaged in a personal "vendetta" against Sears despite the fact that the investigation largely centered upon Don Lackey and Mickey Walker—the major players in the fraud scheme. Moreover, that there was no direct evidence linking Sears to the kickback scheme¹ at the time of Bill Graham's First Report is of no legal significance—particularly since subsequent evidence linked Sears to the mishandling of the Priest and Willingham claims, which evidence was included in Graham's investigative reports to Farm Bureau and was reported to Bob Peacock by

¹ Inexplicably, Sears assumes that Farm Bureau has taken the position that the decision to terminate his Agent's Contract had nothing to do with the investigation. *See* Respondents' Brief at 7 (n.2) and 33 (n.11). Farm Bureau has consistently argued and proved that it terminated Sears' Agent's Contract because the investigation uncovered evidence that Sears had mishandled the Willingham and Priest claims—not because it thought Sears was taking kickbacks.

Darren Callaway before Peacock's termination of Sears' Contract. RR 2:146-47; RR 3:68-71, 84, 91-93, 117-35, 146-51, 160-61, 164-70, 175-77, 179-83.

Notwithstanding Sears' rhetoric about his **1983** trip to Waco with his Agency Manager, Joe Sweat, to complain that Sears' compensation was directly affected by a suspected Lackey/Walker fraud scheme (Respondents' Brief at 3), Sears ignores the fact that the loss ratio contingency plan did not go into effect until **1984**. See RR 3:143-45; 183-84; PX-1. Sears' portrayal of himself as an unheeded whistle-blower is further undercut by the fact that when Sears was expressly asked by the State Board of Insurance to respond to the allegations made in the anonymous letter, Sears' response said not a single word about Lackey's and Walker's fraud scheme. RR 4:123; DX-4.

Further, in an attempt to divert the Court's attention from the fact that Sears frequently recommended (and even hired) Walker to do the repairs for his clients (*see, e.g.*, RR 4:79-81, 98-101), Sears claims that "Lackey and Walker controlled **all** the repairs performed in Nacogdoches, and all of Texas Farm Bureau's agents in town were forced to deal with Lackey/Walker if their insureds' property was to be repaired." Respondents' Brief at 3. It is simply not true that Sears' only option was to recommend Walker or that no other Nacogdoches contractor did repair work on Farm Bureau insureds' claims during the relevant time period. RR 3:189-92; RR 4:74-75. Indeed, Sears' own windstorm claim was repaired by Reneau & Sons Roofing. RR 4:75-77.

Additionally, without a shred of evidentiary support, Sears alleges that Graham illegally obtained Sears' telephone records. Respondents' Brief at 6-7. Graham did not obtain Sears' telephone records. RR 3:77-78.

Finally, claiming that he was "accused, 'investigated,' convicted, . . . and harassed" (Respondents' Brief at 8), Sears makes much of the fact that in mid-January 1991, Graham's transcribed interviews and their voluminous attachments (which included Lackey's claim files involving Walker for the 1989-90 time period) were turned over to the State Board of Insurance, the United States postal inspectors, the U.S. Attorney's office, and various other federal agencies, including the Internal Revenue Service ("IRS"). RR 2:146-47; RR 3:68-71, 160-61, 176. In a transparent attempt to evade the impact of Farm Bureau's legal arguments and authorities on this issue, Sears resorts to wholly unsupported allegations that Farm Bureau "knowingly made false accusations of both criminal conduct and non-criminal wrongdoing" against Sears to these various authorities. Respondents' Brief at 41-42; *see also* Sears' Third Issue Presented for Review. There is not a scintilla of evidence that Farm Bureau made claims about Sears to these authorities "knowing" them to be false.

II. Sears' Most Egregious Distortions of Law

A. Sears' Voluntary Undertaking Theory Fails

Sears also distorts the law. For example, although Sears concedes that Farm Bureau had the right to terminate his at-will contract for good reason, no reason, or bad reason, he claims that Farm Bureau is liable in negligence under the wholly inapplicable "voluntary undertaking" theory of liability. Respondents' Brief at 10. That is, simply

because Farm Bureau conducted an investigation before terminating his Agents' Contract, Sears would have this Court believe that:

. . . this **voluntary decision** to perform an **obligation** it had **no right to perform** gives rise to liability for the **negligent performance of this duty** because the danger of the foreseeable harm the negligent performance of this act presents outweighs the burden of preventing this harm.

Respondents' Brief at 11 (emphasis added).

Not only does this argument conflate a "voluntary undertaking" theory of liability with a risk/utility analysis, but also it remains a mystery how a "voluntary decision" could arise out of an "obligation" one has "no right to perform." Nonetheless, despite the tortured logic of this argument, it appears that Sears proposes a per-se rule of tort liability for any "foreseeable" harm (even economic losses) under "all circumstances" anytime anyone "acts." Respondents' Brief at 16.

Thus, despite the Waco majority's purported rejection of the voluntary undertaking theory, Sears openly embraces that theory, premising his claim on the mistaken notion that Farm Bureau was completely free to decide whether or not to investigate complaints of employee wrongdoing. Sears constructs a false dichotomy between investigations that are supposedly voluntary (*i.e.*, where no express statutory mandate to investigate exists) and those that are required by statute, as in *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 293-94 (Tex. App.—Corpus Christi 2000, pet. denied). *See, e.g.*, Respondents' Brief at 11, 20-21.

In so doing, Sears ignores the public policy encouraging employers to investigate possible wrongdoing, as well as the specter of potential liabilities resulting from failure to

investigate. It is clear that Farm Bureau was obliged to investigate allegations of misconduct that, if true, were causing harm to its insureds, its stockholders, and itself. The possibility of such harm meant that Farm Bureau's decision to investigate, as the Waco court recognized, "was not truly voluntary." *Texas Farm Bureau Ins. Cos. v. Sears*, 54 S.W.3d 361, 368 (Tex. App.—Waco 2001, pet. filed). Further, even Sears impliedly acknowledges this fact when he claims that, as a result of the anonymous letter that had been copied to the State Board of Insurance, "the specter of a state investigation belatedly goaded Farm Bureau" into investigating the kickback scheme. Respondents' Brief at 4.

Sears' argument that employers can avoid liability by simply electing not to conduct investigations presumes incorrectly, among other things, that a discharge under the at-will rule is 100 percent divorced from a pre-discharge investigation. An investigation is inextricably intertwined with the decision to exercise or not exercise the right to discharge at-will. Allowing a cause of action based upon a pre-discharge investigation will produce the very result that the at-will rule is intended to avoid. Further, an investigation is inherently subjective to a large extent, as is an evaluation of the results of the investigation.

Sears' argument that employers "always hold the ace of trumps" because they can choose whether to fire at will or whether to investigate, simply underscores the merit of

Farm Bureau’s public policy arguments.² Respondents’ Brief at 15. It is not in the best interest of either employers or employees for an employer to decide not to conduct an investigation where there is suspected wrongdoing by an employee. What employee would prefer that he or she simply be discharged without any attempt on the part of the employer to discover the truth? What employer would wish to be burdened with having to choose between giving up its right to discharge at will and its right to manage its work force by conducting an investigation where warranted?

Finally, it is not surprising that Sears fails to direct this Court’s attention to any Texas case or any case anywhere in the United States holding that an employer who elects to conduct a pre-termination investigation of an at-will employee may be subject to liability for “negligent investigation.”³ As demonstrated by Petitioners’ Brief (at 13-17), the vast majority of Texas courts and courts from other jurisdictions have refused to recognize a negligent investigation on the ground that to do so would radically alter the policies underlying the at-will rule. This Court should do likewise.

B. Sears’ Application of the Risk/Utility Test Likewise Fails

Likewise, this Court should reverse the lower court’s duty holding based upon a faulty risk/utility analysis. *See* Petitioners’ Brief at 20-26. Sears predictably emphasizes

² Indeed, Sears does not dispute Farm Bureau’s “accurate summary” of the three choices left to an employer if a duty of care is imposed in “undertaken” investigations. Respondents’ Brief at 15; *see also id.* at 16-17.

³ Curiously, Sears appears not to realize that the Beaumont Court of Appeals’ holding in *Mission Petroleum Carriers, Inc. v. Solomon*, 37 S.W.3d 482 (Tex. App.—Beaumont 2001, pet. granted), supports Sears’ duty arguments. And, although Sears suggests that Montana supports the Waco Court’s position in this case (Respondents’ Brief at 22 n.6), this is simply not the case. *See* Section III(C), *infra*.

the fact the harm at issue here was foreseeable. But that harm—the loss of a job that Farm Bureau could have terminated at will—simply does not warrant the imposition of a duty to reasonably investigate. This is particularly the case given that imposing such a duty would: abrogate the at-will rule; conflict with federal and state anti-discrimination laws; lower the bar imposed by other common law torts for employment at-will plaintiffs; force the judiciary to act as a super-personnel department; open the door to other “negligence exceptions” to the at-will rule; and involves an unworkable standard of care.

1. Sears’ “Careless Driver” Hypothetical Does Not Advance His Position

Although Sears attempts to address some of these concerns, again, his primary focus is on the “foreseeable harm” factor of the risk/utility test. Thus, Sears takes Farm Bureau to task for allegedly arguing that “new duties are only imposed under [the risk/utility test in *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994)] if the potential harm is one of serious bodily injury or death.” Respondents’ Brief at 13. According to Sears, “nothing in *Bird* suggests that the risk/utility test is inapplicable to foreseeable risks like “economic loss” from the loss of one’s job. *Id.* While Sears’ argument is technically correct, he fails to direct this Court’s attention to a single case in which this Court applied the risk/utility test to create a new common law duty in a case involving purely economic losses arising from the loss of an at-will contract. Instead, Sears conflates property damage with economic loss by utilizing a hypothetical involving property damage caused by a “careless driver.” *Id.* at 13-14.

But Sears' hypothetical is simply inapplicable here. A tort duty to drive with reasonable care as required by traffic control laws reflects the strong interest in promoting public health and safety by protecting people and their property from injury. Unlike Sears' negligence claim, the harm that a negligent driving claim seeks to compensate is not solely economic, as Sears would characterize it, but again, is the kind of personal injury or property damage that tort law is designed to protect. And, while the tort duty to drive reasonably stems from the same source as the traffic control laws, the same cannot be said for the lower court's investigative duty and the employment at-will doctrine. As many courts have already observed, a duty of care in reaching a decision to terminate at-will employment cannot coexist with the right to terminate for any reason or no reason at all. *See* Petitioners' Brief at 13-17 (citing cases).

2. *Bird* Demonstrates that the “Foreseeable Harm” Factor Must Be Considered in Light of Countervailing Concerns

While Sears correctly observed that nothing in *Bird* suggests that the risk/utility test is confined to cases involving serious bodily injury or property damage as opposed to the risk of harm at issue in this case, Farm Bureau observes that in *Bird* the risk of harm at issue was being falsely accused of sexually abusing one's child. Such a risk is, of course, graver than the risk of losing a job that even Sears concedes could have been terminated at-will.

The *Bird* case further demonstrates that reliance on “foreseeability” as the paramount consideration in applying the risk/utility test is misplaced. Thus, although this Court acknowledged that “the harm to a parent accused of sexual abuse is foreseeable,” it

emphasized that “foreseeability alone is not a sufficient basis for creating a new duty.” *Bird*, 868 S.W.2d at 769 (citations omitted). Hence, Sears’ suggestion that tort law is designed to protect against **any** foreseeable harm is just plain wrong.

The *Bird* case also teaches that the determination whether to create a new duty must be considered “in light of countervailing concerns”—*i.e.*, the determination is not to be made in a vacuum. In *Bird*, the countervailing concerns included the “utility of eradicating sexual abuse.” *Id.* Because “[e]valuating children to determine whether sexual abuse has occurred is essential to that goal,” this Court reasoned that “mental health professionals should be allowed to exercise their professional judgment in diagnosing sexual abuse of a child without judicial imposition of a countervailing duty to third parties.” *Id.*

3. The Countervailing Concerns at Issue in This Case Mandate a No Duty Holding

Likewise, in this case, the determination whether to create a duty to exercise reasonable care in pre-discharge investigations must be considered in light of the countervailing concerns underlying the employment at-will rule. Employers should be allowed to use their business judgment in determining whether to discharge an at-will employee based on evidence uncovered in an investigation without judicial imposition of a duty to the employee being investigated to conduct the investigation under an (unworkable) ordinary care standard. Indeed, as even Sears impliedly concedes, imposing such a duty would saddle employers with the burden of balancing their right (and often duty) to investigate with their right to terminate at-will. Further, imposing a

duty on employers who do investigate would be particularly burdensome in those instances where an employer is statutorily required to investigate. *See* Petitioners’ Brief at 25-26.

As these countervailing concerns demonstrate, Sears’ arguments (and the lower court’s) that the common law duty at issue here would not affect the law governing at-will employment relationships is nonsense. The freedom to terminate an at-will relationship simply cannot be reconciled with the tort duty of reasonable care imposed by the Court of Appeals. If an employer can discharge a worker for bad faith reasons without liability, it makes no sense that an employer should incur liability for a discharge based on carelessly formed ones—particularly since the law should encourage employers to conduct pre-discharge investigations.

4. Sears’ Arguments that the Burdens Imposed by the Investigative Duty Miss the Mark

Sears, however, would have this Court turn a blind eye to Farm Bureau’s policy arguments (and its correct risk/utility analysis) solely on the ground that the employer always “holds the ace of trumps”: it can fire an at-will employee without liability so long as it chooses not to conduct an investigation. Respondents’ Brief at 15. Again, Sears conflates the “voluntary undertaking” theory with a risk/utility analysis. Thus, according to Sears, whenever an employer “chooses” to investigate, the at-will rule and the policy considerations are trumped by the “countervailing interest” in having parties discharge their “duties” in a “reasonable manner” to avoid all “foreseeable harm” resulting from the undertaken (but negligent) action. Respondents’ Brief at 16.

Thus, Sears simply brushes aside the conflict between the duty at issue and the at-will rule by concluding that “the question of whether an employer is put into the situation where he might be liable is solely within his control” by virtue of making a decision whether to discharge the employee without an investigation. Respondents’ Brief at 16. The logical extension of this argument is, of course, that Sears would have preferred for Farm Bureau to terminate his Agent’s Contract based solely upon receipt of the anonymous letter without bothering to investigate the allegations made against Sears. While Sears may well insist after the fact that he would have preferred discharge without an investigation, it is just as likely that he would have sued Farm Bureau for failing to investigate had Farm Bureau simply terminated his Agent’s Contract upon receipt of the anonymous letter.

In addition to his “ace of trumps” argument, Sears discounts the unreasonable burdens imposed upon employers by the duty at issue by insisting that the employer could “control” the investigation itself so as to “safeguard” against negligence, and that this “chosen burden” is “light” because such employers have “an independent interest” in “finding out [the truth about] what happened.” Respondents’ Brief at 12. Thus, according to Sears, this “alignment of interests means that there is ordinarily no extra burden placed on the investigating party above that which it has already elected to assume.” *Id.* at 12-13; *see also id.* at 15. Again, Sears confuses a voluntary undertaking theory with a risk/utility analysis, and essentially ignores Farm Bureau’s concerns about the unworkable nature of the “negligence” standard. Indeed, Sears simply asserts that

“avoiding negligence in an investigation is not difficult” because employees are not “entitled to a perfect investigation, or even to an investigation of a high quality.” Respondents’ Brief at 15 (quoting *Sears*, 54 S.W.3d at 372).

But, as demonstrated in Farm Bureau’s Petitioners’ Brief, “negligence” is simply not a workable standard for assessing an internal workplace investigation and will inevitably force the judiciary to second-guess the employer’s determination regarding the weight to be given to disputed facts. *See* Petitioners’ Brief at 18-19. Most investigations are not conducted by professional investigators (or even attorneys trained to build a paper trail). Again, in nearly every investigation there are disputed facts requiring employers to make credibility determinations. Thus, any reasonably intelligent attorney could always argue that one additional witness should have been interviewed (*e.g.*, Sears’ counsel made much ado over the investigators’ failure to interview the Nacogdoches Chief of Police about Sears and about their alleged failure to interview Sears’ Agency Manager, Joe Sweat); that the evidence should have been weighed and balanced differently (*e.g.*, Sears’ counsel put much emphasis on the fact that there were inconsistencies in the investigator’s reports); that the quantum of control over the investigator should have been different (*e.g.*, Sears’ counsel repeatedly faulted Farm Bureau for not “controlling” the professional fraud investigator); or that a particular witness should not have been interviewed (*e.g.*, although the investigators did not interview Mickey Walker, the crooked contractor and convicted child molester, until after Sears’ contract was terminated, Sears’ counsel repeatedly alleged that the investigators negligently relied on

the word of a convicted felon). *See Sears*, 54 S.W.3d at 371 (concluding that the above factors, taken as a whole, constitute some evidence that Farm Bureau’s investigation was negligent).

The point is that the adequacy of an investigation is tied to whether the facts support the termination or discharge, which means that the negligent investigation cause of action is inherently tied to an employer’s exercise of its “at-will” rights. Again, this assault on the at-will rule must be repelled.

C. Farm Bureau’s Authorities Mandate the Conclusion that Imposition of the Duty Imposed by the Lower Court Would Abrogate the At-Will Rule

Predictably, without citing a single Texas case that supports the imposition of the duty at issue here, *Sears* attempts to render irrelevant or inapplicable all of Farm Bureau’s Texas cases. For example, *Sears* alleges that the reasoning in *Lane*, was “contradictory and flawed” and should be ignored because the Court did not perform the *Bird* risk/utility analysis. Respondents’ Brief at 21 (citing *Lane*, 31 S.W.3d at 293-94). *Sears*’ characterization of the *Lane* court’s reasoning as “contradictory and flawed,” however, is based upon *Sears*’ failure to recognize that there were **two** holdings in *Lane*. First, the court held that the employer could not be held liable under a voluntary undertaking theory because it was statutorily required to investigate the sexual harassment complaint. *Lane*, 31 S.W.3d at 293. Second, the court declined to impose a common law duty to exercise care in the investigation because such a duty would conflict with the employment at-will rule. *Id.* at 294. This reasoning is hardly “contradictory and flawed” and conforms to the reasoning of virtually every court in the country which has addressed

the issues raised here. Further, as Farm Bureau demonstrated in its Petitioners' Brief (at 13-14; *see also id.* at xv-xvi), its Texas authorities mandate the conclusion that the lower court's duty holding must be reversed.

With respect to Farm Bureau's authorities from other jurisdictions, Sears concedes that "some of the cases cited by Farm Bureau are on point and are not readily distinguishable, and that a claim of negligent investigation does not appear to be available under the law of Alaska, Iowa, Michigan, Washington and Wyoming." Respondents' Brief at 22, n.6.

Indeed, as Farm Bureau has previously noted, a majority of jurisdictions that have rejected a duty of good faith and fair dealing in the employment context also refused to recognize a duty of reasonable care in reaching a decision to terminate an at-will employee. Petitioners' Brief at 14-17. Nonetheless, Sears tries to distinguish the rules in Connecticut, Florida, Maryland, Oregon, Pennsylvania, and South Carolina on the ground that they involve wrongful termination claims based on a negligent failure to investigate, rather than a negligently conducted investigation. Sears' distinction, however, is one without a difference: his claim still rests on a decision to terminate an at-will contract, which Farm Bureau could do for any lawful reason, or no reason at all. *See Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 82 (Iowa 2001).

Sears also misconstrues several cases; but those cases undeniably support the conclusion that the majority rule favors rejection of Sears' negligence cause of action. For example, though Sears attempts to interpret *Gilbert v. Essex Group, Inc.*, 930

F. Supp. 683 (D.N.H. 1993), as holding the employer to a good cause standard, the *Gilbert* court actually declared that New Hampshire “does not recognize an employer’s duty not to terminate an employee without good cause.” *Id.* at 690. Clearly, *Gilbert*’s statement means that New Hampshire follows the employment at-will rule. Sears similarly misreads *Gossage v. Little Caesar Enters., Inc.*, 698 F. Supp. 160, 163 (S.D. Ind. 1988) (refusing to recognize at-will employee’s negligence claim against employer for accusing her of theft and subsequently suspending and discharging her), and *Salazar v. Furr’s, Inc.*, 629 F. Supp. 1403, 1410 (D.N.M. 1986) (refusing to recognize negligence claim against employer in employee discharge situation because it would substantially erode the employment at-will rule).

Finally, Sears suggests that Montana supports the Waco Court’s position in this case (Respondents’ Brief at 22, n.6), but that is simply not true. Although the Montana Supreme Court briefly endorsed a “negligent discharge” cause of action, it has long since rescinded that endorsement, holding that “an employer is not under a duty to use reasonable care in decision-making.” *Heltborg v. Modern Mach.*, 795 P.2d 954 (Mont. 1990); accord *Kittleson v. Archie Cochrane Motors, Inc.*, 813 P.2d 424, 426 (Mont. 1991) (“negligent discharge is no longer a recognized exception to termination of employment ‘at will’”). Furthermore, unlike Texas, Montana is among the minority of jurisdictions that recognizes a duty of good faith and fair dealing in the employment relationship, and apparently stands alone in imposing a statutory just cause standard for

discharge. *See* Mont. Code Ann. § 39-2-904. Texas has no reason to recognize a cause of action that even Montana has rejected.

III. Sears' Arguments Regarding Farm Bureau's Evidentiary Challenge to the Jury's Negligence Findings Lack Merit

A. Sears Failed to Rebut Farm Bureau's Challenge to the Standard of Care

Contrary to Sears' claim of waiver (Respondents' Brief at 24), Farm Bureau properly preserved its no evidence challenge to the standard of care issue in its objections to the charge, motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial. RR 5:8-9, 15-16, 114-18; CR 609, 682-83.

Sears also argues that he did not need to provide evidence of the standard of care applicable to good investigative practice because a duty of ordinary care arises when a party undertakes an investigation.⁴ Respondents' Brief at 24. Sears' assertion, however, merely begs the question of whether a duty exists at all. This Court has refused to recognize an amorphous duty not to cause harm. *See Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993) (criticizing the dissent's effort to limit the rejected negligence cause of action by observing that a voluntary undertaking that puts another at risk is simply another way of saying that the harm is foreseeable).

⁴ *Figure World, Inc. v. Farley*, 680 S.W.2d 33 (Tex. App.—Austin 1984, writ ref'd n.r.e.), does not support the notion that the ordinary care standard should apply in this case. In *Figure World*, where the jury was charged with determining whether a fitness instructor was negligent in shouting at a customer, the court pointed to a Fitness World supervisor's testimony "that shouting at a customer would be unprofessional and unusual" as showing that the instructor's behavior breached her duty of care. *Id.* at 36. Thus, even when the duty to use ordinary care supplies the applicable standard, there must be some evidence that the defendant did not use ordinary care. Furthermore, a defined standard of care should apply to the investigation of reported misconduct in the insurance industry because it is a much more complex endeavor than, for example, the type of incident at issue in *Figure World*.

Moreover, a duty of ordinary care may arise only when one person's actions collide with the right of another. Here, Farm Bureau's right to investigate allegations of wrongdoing, *see Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646-47, (Tex. 1995), did not encroach on any recognized right of Sears. Sears had no right to continued retention under the at-will contract.

B. Sears Fails to Set Forth Any Evidence Supporting the Jury's Negligence Finding

Even if Sears were correct that a "general standard of ordinary care" is applicable, Sears fails to set forth any evidence that the investigation was negligent with respect to Sears (which is necessary to satisfy the proximate cause element of negligence), much less provide the Court with citations to the record. Instead, Sears relies upon the lower court's holding that several factors, "taken as a whole," could lead "reasonable and fair-minded people" to differ about their conclusions about whether the investigation was negligently conducted. Respondents' Brief at 24-25 (citing *Sears*, 54 S.W.3d at 371).

Rather than squarely address Farm Bureau's criticism of the lower court's reliance on these irrelevant factors, Sears first asserts that Farm Bureau's alleged "reliance" on the testimony of a Farm Bureau employee "in the context of a no evidence challenge is inappropriate." Respondents' Brief at 25. Although Sears fails to identify the employee or the specific testimony at issue, Farm Bureau assumes he is referring to Peacock's testimony that Sears' Contract was terminated because of Sears' mishandling of the Willingham and Priest claims and not because Peacock thought Sears was taking kickbacks. Petitioners' Brief at 31.

Sears' argument misses the mark; Farm Bureau relied on Peacock's testimony about his reasons for terminating Sears' Contract to demonstrate that Sears did not and cannot meet his burden of proof by simply adducing some evidence that the investigation was "generally" negligent. As even the lower court recognized, Sears' burden of proof includes proving that "a negligent investigation caused him to be fired." *Sears*, 54 S.W.3d at 372. Again, the point is that Sears relied on Peacock's testimony to demonstrate that each of the factors listed by the Court of Appeals and relied on by Sears goes to the issue whether the investigation was **generally** negligent. These factors had little, if anything, to do with whether Farm Bureau negligently investigated Sears in particular—*i.e.*, whether Farm Bureau's conclusion that Sears mishandled the Willingham and Priest claims was the product of a negligent investigation as to Sears in particular.

Next, Sears argues that the investigator's failure "even [to] **ask** [Sears' supervisor, Sweat]" about Sears during the investigation is "some evidence" supporting the jury's negligence finding. Respondents' Brief at 26 (emphasis supplied by Sears). This allegation, however, contradicts Sears' statement one page earlier that Sweat indicated to the investigator that he "did not think [Mr.] Sears was involved in the fraud scheme." *Id.* at 25. *See also* RR 2:110-11; RR 3:29, 38, 41-42 (evidence regarding what Sweat told Graham about Sears and about the 1983 trip to Waco).

IV. Sears' Arguments Regarding Farm Bureau's Evidentiary Challenges to the Jury's Damages Findings Also Lack Merit

A. There Is No Evidence of Mental Anguish

Sears' Respondents' Brief fails to direct this Court to any evidence in the record that Sears suffered any mental anguish. This failure is not surprising given the fact that the record is completely silent on Sears' mental anguish, as opposed to the economic consequences of losing his job. Instead, Sears simply details those economic consequences and focuses on his wife's testimony about **her** mental anguish—neither of which is any evidence of Sears' alleged mental anguish.

B. There Is No Evidence of Pecuniary Loss

Sears' contention that he proved damages is unsupportable. Sears misplaces his reliance on cases dealing with statutory remedies for retaliatory termination which contain explicit damages provisions. *See* Respondents' Brief at 30-31 (citing cases); *Goodman v. Page*, 984 S.W.2d 299, 305 (Tex. App.—Fort Worth 1998, pet. denied) (retaliatory discharge under Texas Health & Safety Code § 242.133, which explicitly provides for recovery of “lost wages,” not payments to an independent contractor otherwise defined by a written contract); *Canutillo Indep. Sch. Dist. v. Olivares*, 917 S.W.2d 494 (Tex. App.—El Paso 1996, no writ) (retaliatory discharge under Texas Labor Code § 451.001). This Court has made abundantly clear that it will not overstep its common-law power by trampling the statutory scheme devised by the Legislature. *Austin v. HealthTrust, Inc.-The Hospital Co.*, 967 S.W.2d 400, 403 (Tex. 1998). The common-law remedy sought here, if available, would motivate employees to circumvent the

legislatively prescribed remedies for retaliation by bringing an action for negligent investigation, and thus eviscerate specific measures already adopted by the Legislature. *See id.*

Sears' situation also differs from the typical at-will employee in that he signed a written contract that required additional payment to him if Farm Bureau chose to exercise the termination-at-will provision. For these reasons, the contractual lost pecuniary income measure of damages properly applies to his claim.

Finally, Sears' contentions notwithstanding, Farm Bureau terminated Sears' Contract for dishonesty; hence, under his Contract he was entitled to no renewal premiums. RR 3:84, 91-93, 117-35, 145-51, 164-70, 175-77, 179-83; DX-1 at ¶ 5B. In short, there is no evidence of any pecuniary loss resulting from Farm Bureau's allegedly negligent conduct.

V. Sears' Attempted Rebuttal of Farm Bureau's Arguments Regarding His Intentional Infliction of Emotional Distress Claim Fails

A. Farm Bureau's Conduct Was Not Extreme and Outrageous

Sears can argue that he should prevail on his intentional infliction of emotional distress claim only by imagining that the facts and the record are different. *See* Respondents' Brief at 1, 33-41. Sears argues that Farm Bureau's conduct was extreme and outrageous based on the erroneous and unsupported premise that Farm Bureau "knowingly assert[ed] false claims in a gratuitous attempt to harm" Sears. Respondents' Brief at 38, 41. No evidence, however, suggests that Farm Bureau attempted to do anything more than investigate a complaint of wrongdoing and report the findings of its

investigation to appropriate law enforcement authorities. *See* Petitioners' Brief at 38-41. Accordingly, Sears' efforts to distinguish *Diamond Shamrock Refining & Mktg., Inc. v. Mendez*, 844 S.W.2d 198 (Tex. 1992), are unavailing. As with Mendez's intentional infliction of emotional distress claim in *Diamond Shamrock*, Sears' claim against Farm Bureau boils down to a mere dispute over Farm Bureau's findings.

Further, because the Court of Appeals' holding rests on Farm Bureau's report of information that was not knowingly false, but rather on the assumption that it was obtained in a negligent manner, it amounts to recognition of a cause of action for negligent infliction of emotional distress contrary to this Court's ruling in *Kerr*, 855 S.W.2d at 597. Farm Bureau's exercise of its rights in investigating suspected wrongdoing and reporting the results of its investigation to the authorities is not extreme and outrageous as a matter of law, even if one assumes for the sake of argument that Farm Bureau's investigation could have been more thorough.

Borrowing from malicious prosecution law, Sears further urges this Court to conclude that failure to make a full and fair disclosure to enforcement authorities amounts to extreme and outrageous conduct. Respondents' Brief at 41-42. That argument fails to invigorate his intentional infliction of emotional distress claim because there is no showing that full and fair disclosure did not occur: the facts demonstrate that Farm Bureau turned over to the authorities the whole of the investigators' transcribed interviews and their voluminous attachments. RR 2:146-47; RR 3:68-71; 160-61; 176. And, more importantly, Sears—who was never contacted, let alone prosecuted by any of

those authorities—disregards the delicate balance of competing public policies struck in the malicious prosecution tort, which requires strict adherence to all seven elements. *See Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 290-91 (Tex. 1994); Petitioners’ Brief at 27-28. As a “gap-filler” tort, intentional infliction of emotional distress should not serve as an end run around the stringent elements of a malicious prosecution cause of action. *See Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998).

Finally, not a scintilla of evidence suggests that Farm Bureau intended to inflict emotional distress on Sears, or that severe emotional distress was the primary risk created by Farm Bureau’s investigation and reporting activities. *See* Petitioners’ Brief at 41, n.9. The facts illustrate that, even if Sears had suffered emotional distress (although no evidence suggests that he did), any such distress would have been “merely incidental” to Farm Bureau’s fraud investigation and reporting of the results of that investigation—which necessarily included references to Sears—to state and federal agencies. *See Standard Fruit & Vegetable Co.*, 985 S.W.2d at 67-68.

B. Not a Scintilla of Evidence Suggests That Farm Bureau’s Conduct Caused Sears Any Emotional Distress

Sears glosses over his failure to adduce any direct evidence of mental anguish or emotional distress (Respondents’ Brief at 26-29, 43-44), appearing to rely on the Waco Court’s “inference” that Sears suffered distress from the economic consequences of the termination of the at-will Agent’s Contract. As set forth in Petitioners’ Brief (at 42), the lower court’s “inference” based upon the economic consequences of Sears’ loss of his livelihood has no connection to Farm Bureau’s alleged extreme and outrageous conduct,

i.e., its reporting activity. In fact, because Sears was never contacted by any of the authorities who received Farm Bureau's report, he had no knowledge of those reports, and thus could not have experienced any emotional distress arising from this reporting activity. While Sears did receive a 1099 form that allegedly reported inaccurate information to the IRS, the evidence nowhere indicates whether Sears had any kind of emotional reaction to receiving that form. There is simply no evidence of any harm resulting from Farm Bureau's reporting activity.

Finally, Sears suggests that Farm Bureau's tactics in conducting the investigation were extreme and outrageous (Respondents' Brief at 40); but the specific acts that Sears points to fail to bolster his intentional infliction of emotional distress claim. For example, while Sears complains that Graham lied to him and (allegedly) accessed his private telephone records, Sears never offered any evidence demonstrating how those investigative techniques affected him. In short, the record is devoid of any evidence indicating that Sears suffered severe emotional distress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2002, a true and correct copy of the above and foregoing Petitioners' Reply to Respondents' Brief on the Merits was properly forwarded to the following counsel of record in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by Federal Express, as indicated below:

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