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THE TEXAS EMPLOYER'S LIABILITY IN TORT FOR INJURIES TO AN EMPLOYEE OCCURRING IN THE COURSE OF THE EMPLOYMENT

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I. INTRODUCTION

In 1989 the Texas Legislature repealed the former workers' com-

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pensation law[1] and replaced it with the new Texas Workers' Compensation Act.[2] The new Act took effect on January 1, 1991.[3] On the matters explored in this Article, the new Act probably makes no changes. The provisions of both the old and new laws are identified in footnotes. When it is debatable whether the new Act makes a change, the relevant language of the old and new statutes is set forth and compared.

The focus of this Article is tort suits by employees or their families based on personal injury or death occurring in the course and scope of the workers' employment. If an injury does not occur in the course and scope of the employment, the defendant's status as employer becomes irrelevant;[4] the lawsuit is simply a common-law tort action, and the defendant has all of the common-law defenses.[5]

II. TORT LITIGATION BY EMPLOYEES AGAINST NONSUBSCRIBING EMPLOYERS

Most states require most industrial employers to obtain workers' compensation coverage. The trade-off is that an employer who is covered by the workers' compensation system is generally immune from tort liability to its workers for injuries sustained in the course and scope of the workers' employment.

In Texas, however, workers' compensation coverage is essentially

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1. Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 271, *repealed by* TEX. REV. CIV. STAT. ANN. arts 8308-1.01 to 8308-11.10 (Vernon Supp. 1993).

2. TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 to 8308-11.10.

3. Remember that the constitutionality of the new Act is under attack. A leading practice guide cautions as follows:

> The constitutionality of the 1989 Texas Workers' Compensation Act is under review by the San Antonio Court of Appeals. An initial ruling in *Garcia v. Eagle Pass Auto Electric, Inc.*, Cause No. 90-11-10301-CV in the 365th District Court of Maverick County, Texas, has found that the Act uses "arbitrary and unreasonable" impairment standards and limits workers' access to the courts. Until a final, unappealable judgment is rendered in this judicial challenge, practitioners are advised to exercise extreme caution in determining what law governs an occupational injury in the state.

1 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW 5 (Supp. 1993).

4. *See* Ellison v. Trailite, Inc., 580 S.W.2d 614, 615-16 (Tex. App.—Houston [14th Dist.] 1979, no writ) (holding that injury on employer's premises to employee who had just been fired and was waiting for her severance check was outside course of employment and therefore subject to normal tort law).

5. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 62.02(1)(c), (3)(d) (1992).

voluntary for the employer.[6] The new and old statutes are alike in providing that a nonsubscribing employer is subject to negligence liability to injured employees and to the legal beneficiaries of fatally injured employees. The employer is these cases is precluded from invoking the affirmative defenses of assumption of risk, contributory negligence, and the fellow servant rule.[7] Aside from the loss of these defenses, "no other penalty is imposed by law on an employer for electing not to carry workers' compensation insurance."[8]

A. *The Plaintiff's Case in Chief*

When a worker sustains injury in the course and scope of her employment, she can sue the nonsubscribing employer in tort. There are no doctrinal differences from general tort litigation. Plaintiffs in such cases have often prevailed by showing that the injuries proximately resulted from the employer's failure to use reasonable care in (1) providing a safe work place, (2) supplying an adequate number of workers to conduct the work safely, (3) selecting careful and competent

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6. In theory employees can also opt out of the workers' compensation system. *See* TEX. REV. CIV. STAT. ANN. art. 8308-3.08 (Vernon Supp. 1993). An opt-out employee has a tort action against the employer in which the normal defenses obtain. *Id.* I have found no reported case involving an employee who opted out of the system. The predecessor provision was Article 8306, Section 3a. Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 271, *repealed by* TEX. REV. CIV. STAT. ANN. arts 8308-1.01 to 8308-11.10 (Vernon Supp. 1993).

7. TEX. REV. CIV. STAT. ANN. art. 8308-3.03 (Vernon Supp. 1993). Article 8308-3.03 states:

> (a) In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that: (1) the employee was guilty of contributory-negligence; (2) the employee assumed the risk of injury or death; or (3) the injury or death was caused by the negligence of a fellow employee.
>
> (b) This section does not reinstate or otherwise affect the availability of these or other defenses at common law.
>
> (c) The employer may defend the action on the ground that the injury was caused by an intentional act of the employee to bring about the injury or while the employee was in a state of intoxication.

Id. TEX. REV. CIV. STAT. ANN. art. 8308-3.04 (Vernon Supp. 1993) provides: "In all such actions against an employer who does not have workers' compensation insurance coverage, it is necessary to a recovery for the plaintiff to prove negligence of the employer or some agent or servant of the employer acting within the general scope of his employment." *Id.* Functionally identical provisions appeared in the previous law as Article 8306, Sections 1 and 4. Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 270-71, *repealed by* TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 to 8308-11.10 (Vernon Supp. 1993).

8. Gary Thornton, *Litigation Involving Non-Subscribers to Workers' Compensation Insurance*, 54 TEX. B.J. 318, 318 (1991).

workers, (4) furnishing and maintaining reasonably safe appliances, (5) instructing workers on safety procedures, or (6) posting safety rules.[9] Other recent decisions suggest that on an appropriate showing a nonsubscribing employer[10] may be held liable for the intentional or reckless infliction of emotional distress,[11] sexual harassment,[12] and perhaps for invasion of privacy.[13]

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9. Gary Thornton, *Litigation Involving Non-Subscribers to Workers' Compensation Insurance*, 54 TEX. B.J. 318, 318-20 (1991).

10. None of the opinions discussed in notes 11-13 explicitly indicate that the defendant employer was a nonsubscriber to the workers' compensation system. But subscribing employers are liable to nonfatally-injured employees only when *intentional* misconduct or injury is proved. In the cases discussed in notes 11-13 the courts gave no indication of concern for the intent requirement; one must therefore assume that the defendants in such cases are nonsubscribers. *But cf.* Mitchell v. Aetna Casualty & Sur. Co., 722 S.W.2d 522, 524 (Tex. App.—Beaumont 1986, writ ref. n.r.e.) (holding that employee can sue subscribing employer for violation of federal legislation prohibiting sexual harassment and sex discrimination and thereafter seek state workers' compensation benefits).

11. Diamond Shamrock v. Mendez, 844 S.W.2d 198, 201-02 (Tex. 1992). In *Diamond Shamrock*, a worker fired for theft sued his former employer for, inter alia, the intentional infliction of emotional distress. *Id.* at 198. The Texas Supreme Court's discussion of that tort theory began by quoting Section 46 of the *Restatement (Second) of Torts*, which addresses recovery for the intentional or reckless infliction of severe emotional distress through extreme and outrageous conduct. *Id.* at 201. The supreme court then stated:

> We have never recognized this tort, but a number of Texas courts of appeals have done so (citations omitted), as have courts in many other jurisdictions. We need not decide in this case whether the tort exists in Texas, because Mendez failed to offer more than a scintilla of evidence of an essential element of the tort . . . , the presence of outrageous conduct.

Id. at 201-02. Three justices dissented, arguing that the emotional distress tort is well recognized and that the *Diamond Shamrock* employer's theft charges amounted to outrageous conduct. *Diamond Shamrock*, 844 S.W.2d at 203, 212, 213. The plaintiff in *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 307 (5th Cir. 1989), recovered for the employer's intentional or reckless infliction of emotional distress on showing that a supervisory employee put checks in her purse in order to make it appear that she was a thief. In *Bushell v. Dean*, 781 S.W.2d 652, 659 (Tex. App.—Austin 1989), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991), the court upheld an award of damages for the intentional or reckless infliction of emotional distress in a sexual harassment context. *Id.*

12. *Bushell*, 781 S.W.2d at 654. In addition to her emotional distress claim, the *Bushell* plaintiff separately claimed for sexual harassment pursuant to Article 5221K, Section 5.01 of the Texas Revised Civil Statutes Annotated. *Id.* The court of appeals reversed the plaintiff's award under that claim on evidentiary grounds and remanded for a new trial. *Id.* at 654-57, 659. The supreme court reversed the court of appeals and remanded the case to that court for further consideration. Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991).

13. The four traditional categories of tortious invasion of privacy are: (1) intrusion into the victim's seclusion; (2) publicizing embarrassing private facts; (3) appropriating the victim's name or likeness for commercial purposes; and (4) portraying the victim in a false light. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984). The opinion in *Diamond Shamrock* states that it is an open question whether Texas recognizes the "false light" invasion of privacy theory, but suggests the other three headings of the pri-

B. *Affirmative Defenses*

The nonsubscribing employer can defend against the employee's tort suit on the basis that the injuries were intentionally self-inflicted or were the result of the employee's intoxication.[14] As indicated above, however, the assumed risk, contributory negligence, and fellow servant defenses are statutorily abolished.[15] The loss of these defenses is seen as a penalty for nonsubscription.

The penalty is significant. Although the nonsubscribing employer's inability to invoke the assumed risk defense no longer has any meaning—because assumed risk has been absorbed by the law of comparative fault[16]—stripping the nonsubscribing employer of the fellow servant defense increases the employer's exposure to an extent. And, the loss of the contributory negligence defense is quite a serious consequence of an employer's nonsubscription to the workers' compensation system. The unavailability of the contributory negligence defense means that an employer whose fault, however slight, was a proximate cause of the injuries will owe full damages, notwithstanding any perception that the injured employee was also at fault in a way that was a proximate cause of the injuries. Theoretically the employer will owe full damages even when the facts suggest that the employer's fault was as little as 1% of the total causative fault and that the injured employee's fault was as much as 99% of the total causative fault.[17]

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vacy tort are recognized. *Diamond Shamrock*, 844 S.W.2d at 200. The supreme court found it unnecessary to decide whether the "false-light" theory is valid because it concluded that in any event the plaintiff had failed to prove an essential element of that tort, "actual malice" (defined as knowledge or reckless disregard of falsity and the false light in which the victim would be placed). *Id.* at 200-01. Three justices dissented, arguing that prior decisions recognize all four of the privacy theories and that defendant had waived its right to rely on any "actual-malice" requirement. *Id.* at 207, 212-216, 219-20.

14. TEX. REV. CIV. STAT. ANN. art. 8308-3.03(c) (Vernon Supp. 1993). The predecessor provision provided for the same effect. TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (Vernon 1967).

15. TEX. REV. CIV. STAT. ANN. art. 8308-3.03 (Vernon Supp. 1993).

16. Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975). *Farley* abolished assumed risk except for strict liability actions. *Id.* As amended in 1987, the Texas Civil Practice and Remedies Code sets up a "comparative responsibility" defense for both negligence and strict liability cases. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1993). The defense is defined to include victim conduct "causing or contributing to cause [the injury] in any way, whether by negligent act or omission, . . . [or] by other conduct or activity violative of the applicable legal standard. . . ." *Id.* at § 33.011(4) (Vernon Supp. 1993).

17. *Cf.* Otis Elevator Co. v. Joseph, 749 S.W.2d 920, 922 (Tex. App.—Houston [1st Dist.] 1988, no writ) (deceased employee's 65% fault did not affect plaintiff's right to full recovery in action for exemplary damages based on death of employee).

Several writers have argued that, despite the statutory abolition of the contributory negligence defense, the nonsubscribing employer can nevertheless sometimes invoke the victim's fault as a basis for defeating liability. These writers assert that such an employer can avoid liability "by showing that the employee's own negligence was the sole proximate cause of the injury."[18] Their argument seems unsound.

Saying that the employee's fault was the "sole proximate cause" of the harm may occassionally be a left-handed way of saying the defendant was not guilty of any negligent conduct, or that on general principles applicable to the proximate cause issue any negligent conduct on the defendant's part was not a proximate cause of the injuries. When "sole proximate cause" is used in that way it is merely awkward phrasing, and there is no particularly objection to it.

But the "sole proximate cause" argument under discussion purports to be much more than a reminder of normal proximate cause principles. The writers referenced above contend that the victim's negligence can sometimes be such, in and of itself, as to keep the defendant's negligent conduct from being regarded as a proximate cause of the injuries. In that guise the "sole proximate cause" argument is pernicious. Allowing a defendant whose negligent conduct has been shown to be a proximate cause of the harm to escape liability by pointing to the victim's fault as "sole proximate cause" would amount to smuggling the abolished contributory negligence defense into these cases through the back door. This "sole proximate cause" fallacy has been widely debunked in the general comparative fault literature.[19] The Texas decisions sometimes cited in support of the "sole proximate cause" argument contain some suggestive language but in fact

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18. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKER'S COMPENSATION LAW § 62.02(3)(a) (1992). Gary Thornton, *Litigation Involving Non-Subscribers to Workers' Compensation Insurance*, 54 TEX. B.J. 318, 322 (1991). "While the defense of contributory-negligence is unavailable . . . , nevertheless, negligence of the injured worker which is the sole proximate cause of his injuries defeats his recovery." *Id.*

19. *See, e.g.*, DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 379-80 (1989) (relating "sole proximate cause" to contributory negligence bar to recovery); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 4.4 (2d ed. 1986) (arguing that this interpretation assigns broader meaning to "proximate cause" than in other contexts and defeats the purpose of comparative negligence system); *see also* DAVID W. ROBERTSON, THE LOUISIANA LAW OF COMPARATIVE FAULT: A DECADE OF PROGRESS 22-28 (1991) (discussing effect of "sole proximate cause" on recovery); David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 LA. L. REV. 1341, 1341-43 (1984) (arguing that victim's fault should not entirely remove him from scope of protection).

do not allow any such "sole proximate cause" defense.[20] Clearly the intended meaning of the statutory abolition of the contributory negligence defense is that the victim's fault neither defeats nor diminishes recovery. One should not be able to avoid this effect by changing the name of the victim-fault defense from "contributory negligence" to "sole proximate cause."

III. SUBSCRIBING EMPLOYERS' LIABILITY FOR INTENTIONAL HARM

The subscribing employer's liability for workers' compensation benefits is said to be "the exclusive remedy of an employee or legal beneficiary against the employer or an agent, servant, or employee of the employer for the death of or a work-related injury sustained by a covered employee."[21] However, liability for intentional injury is a long-standing exception.

The intentional injury exception is not spelled out in the workers' compensation statutes; it is based on constitutional reasoning. When the constitutionality of the original 1913 Texas workers' compensation statute was challenged in the Texas Supreme Court, the court held that the statute could not constitutionally abrogate an injured employee's cause of action in tort for intentional harm:

> Notwithstanding the breadth of some of [the statute's] terms, its evident purpose was to confine its operation to only accidental injuries, and its scope is to be so limited. . . . The Bill of Rights, Section 13, Article I of the Constitution provides that "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." . . . It is therefore not to be doubted that the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the Constitution and could not be taken away. . . . This Act does not affect the right of redress for that class of wrongs. The injuries, or wrongs, with which it

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20. *E.g.*, Najera v. Great Atlantic & Pacific Tea Co., 207 S.W.2d 365 (Tex. 1948); Turner v. Lone Star Indus. Inc., 733 S.W.2d 242 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); Texas Farm Products Co. v. Stock, 657 S.W.2d 494 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

21. TEX. REV. CIV. STAT. ANN. art. 8308-4.01(a) (Vernon Supp. 1993). The functionally identical provision in the former statute was Article 8306, Section 3. Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 271, *repealed by* TEX. REV. CIV. STAT. ANN. arts 8308-1.01 to 8308-11.10 (Vernon Supp. 1993).

deals are accidental injuries or wrongs.[22]

Since that time, the existence of the injured employee's cause of action for "intentional injury" has been unquestioned.[23]

A. *The Meaning of Intent*

According to a new national workers' compensation casebook, "[e]ither by express statutory provision or judicial construction, every state allows employees to sue their employers in tort for intended injuries."[24] The decisions nationwide reflect three views of the meaning of the intent requirement in this context. The strictest view requires the plaintiff to show that the defendant-employer subjectively desired to injure the employee.[25] A second view allows recovery when the defendant-employer either subjectively desired the consequences of its conduct or knew to a substantial certainty that such consequences would ensue.[26] A third view would find "intent" when the employer committed an intentional act that created a highly unreasonable risk of harm.[27]

Texas falls into the second group.[28] The leading case in Texas is *Reed Tool Co. v. Copelin*.[29] In *Copelin*, the worker was hurt by a dangerous workplace machine that had been made still more dangerous by the employer's modifications. Notwithstanding a strong showing by the plaintiff that the employer knew that using the machine—nicknamed "jaws"[30]—was extremely risky, the Texas Supreme Court upheld summary judgment for the defendant and stated: "[T]he intentional failure to furnish a safe place to work does not rise to the level of intentional injury except when the employer believes his conduct is substantially certain to cause the injury."[31] The same view-

22. Middleton v. Texas Power & Light Co., 108 Tex. 96, 108-08, 185 S.W. 556, 560 (1916), *aff'd*, 249 U.S. 152 (1919).

23. *See* Howard Nations & James B. Bennett, *Recovery of Exemplary Damages Under the Texas Workers' Compensation Act*, 19 S. TEX. L.J. 431, 432 (1978) (stating that all common law rights are retained when injury is intentional).

24. JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION CASES AND MATERIALS 430 (3d ed. 1993).

25. *Id.*

26. *Id.*

27. *Id.* at 428-29.

28. *See generally* David C. Goldberg, Note, 17 ST. MARY'S L.J. 513 (1986).

29. 689 S.W.2d 404 (Tex. 1985).

30. *Id.* at 408.

31. *Id.* at 407.

point—that neither highly aggravated negligence nor recklessness rises [or sinks?] to the level of intent—is reflected by the supreme court's holding in *Castleberry v. Goolsby Building Corp.*[32] that an allegation of "gross, wanton, and willful negligence" does not allege an intentional injury.[33] The cases make clear that the requisite desire or substantially certain knowledge must be attributable to a relatively high-ranking official or supervisory employee; it is not enough for the plaintiff to show that she was battered or otherwise intentionally harmed by a fellow employee.[34]

With the supreme court's 1989 decision in *Rodriguez v. Naylor Industries*,[35] the rule permitting recovery in tort when the employer knew to a substantial certainty that its conduct would produce injury[36] arguably gained new vitality. Over the employee's protest, the employer in *Rodriguez* insisted that the employee drive a truck with defective tires.[37] Even after one blowout, the employer continued to insist.[38] Soon a second blowout overturned the truck and injured the worker.[39] Reversing the lower courts' award of summary judgment to the employer, the unanimous supreme court held that a triable issue of fact existed on the element of knowledge to a substantial certainty.[40] A court of appeals recently reached a similar conclusion in *Kielwin v. Gulf Nuclear, Inc.*[41] The court reversed a summary judgment for defendant and remanded the case for trial on the issue of whether the defendant knew to a substantial certainty that radioactive contamination of the employee would result from the employer's conduct.

In both *Rodriguez* and *Kielwin* the defendants testified that they did

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32. 617 S.W.2d 665 (Tex. 1981).

33. *Castleberry*, 617 S.W.2d at 666.

34. *E.g.*, Horton v. Montgomery Ward & Co., 827 S.W.2d 361 (Tex. App.—San Antonio 1992, writ denied).

35. 763 S.W.2d 411 (Tex. 1989).

36. *Cf.* Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 377 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (stating that employer's knowledge that assault was substantially certain to occur justified holding employer liable for intending battery). This version of the "transferred intent" doctrine is consistent with mainstream intentional tort thinking. But the supreme court later indicated, somewhat ambiguously, that "*Bennight* is limited to its facts." Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985).

37. *Rodriguez*, 763 S.W.2d at 412.

38. *Id.*

39. *Id.*

40. *Id.* at 413.

41. 783 S.W.2d 746, 748 (Tex. App.—Houston [14th Dist.] 1990, no writ).

not "believe" that injury was substantially certain to follow from their conduct and tried to argue that such testimony should be conclusive on the issue of belief. The courts rejected this argument on the implicit view that the issue is the somewhat objective issue of *knowledge* rather than the purely subjective issue of *belief*. As the supreme court stated in *Rodriguez*, "[t]here are a number of ways to establish . . . intent other than asking the employer how he felt about an injury causing event after it has already occurred."[42]

B. *Affirmative Defenses*

Treatment of the affirmative defenses available to an employer sued for intentionally causing a workplace injury is largely a matter of speculation. I have found no cases shedding light on the matter. The lack of reported cases is probably explained by the stringency of the intent requirement, which keeps virtually all cases from proceeding to a point at which affirmative defenses need to be addressed.

In the general tort law neither assumption of risk nor contributory negligence is a defense to intentional tort liability.[43] There is no reason why intentional tort litigation against employers should be different.

Respecting the fellow servant defense,[44] there seems to be no clear doctrinal barrier to prevent its use in intentional injury cases. But it is difficult to conceive of a case in which a plaintiff could satisfy the intent requirement and still run afoul of a fellow servant argument.

As indicated above, the Workers' Compensation Act provides that a worker's intentional self-injury and intoxication are defenses available to a nonsubscribing employer.[45] These defenses should probably not apply against either a subscribing or a nonsubscribing employer when intent can be shown. For example, if the *Rodriguez* plaintiff

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42. *Rodriguez*, 763 S.W.2d at 413.

43. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.002(a), 33.011(4) (Vernon Supp. 1993).

44. Funk Farms, Inc. v. Montoya, 736 S.W.2d 803, 806 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). The fellow servant doctrine provides that an employer will not generally be liable in tort for injuries suffered by one employee that were proximately caused by the negligence of a fellow servant. Fellow servants are defined as "those workers who serve the same master, work under the same control, derive their authority and compensation from the same common source, and engage in the same general business." *Id.* (citing H. & T.C. Railway Co. v. Rider, 62 Tex. 267, 269 (1884)).

45. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 575 & n.69 (5th ed. 1984).

could have proved intent—that is, if the plaintiff could have demonstrated that the employer knew to a virtual certainty that the tires were so defective that a dangerous wreck was bound to happen—any showing of the driver's intoxication should probably neither have defeated nor diminished the plaintiff's recovery.[46] In general intentional tort law, one cannot escape liability by arguing that the victim was drunk. There is no apparent reason to apply a differing approach here.[47]

This leaves for consideration the general-law defenses to intentional tort liability: consent and the privileges pertaining to defense of person and defense of property. These defenses will presumably apply in intentional tort litigation against employers. As indicated above, I have found no case in which any of these defenses came into play.

IV. THE SUBSCRIBING EMPLOYER'S LIABILITY FOR EXEMPLARY DAMAGES WHEN GROSS NEGLIGENCE FATALLY INJURES AN EMPLOYEE[48]

The Texas Constitution provides that "[e]very person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be. . . ."[49]

The new Texas Workers' Compensation Act implements the application of that constitutional provision against subscribing employers by providing in Article 8308-4.01(b) that:

> [The exclusive remedy provision] does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence. For

46. Rodriguez v. Naylor Indust., 763 S.W.2d 411, 412 (Tex. 1989).

47. Intoxication and intentional self-injury should not be affirmative defenses. But when an injury was caused by the worker's conduct in either respect, the employer may sometimes be able to use that fact to show that its alleged intentional conduct was not a cause-in-fact of the injuries. Compare the text accompanying notes 18-20. Gary Thornton, *Litigation Involving Non-Subscribers to Workers' Compensation Insurance*, 54 TEX. B.J. 318, 322 (1991).

48. When considering exemplary damages in any context nowadays one must contend with the potential due process limits on state law that emanate from *Pacific Mutual Life Insurance Co. v. Haslip*, __ U.S. __, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). For a clear explanation of the meaning of *Haslip*, see Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1380-86 (5th Cir. 1991) (reviewing Mississippi punitive damages award).

49. TEX. CONST. art. 16, § 26.

> the purposes of this section, "gross negligence" has the meaning assigned to it by Section 41.001, Civil Practice and Remedies Code.[50]

The referenced Civil Practice and Remedies Code definition of "gross negligence" is as follows: " 'Gross negligence' means more than momentary thoughtlessness, inadvertence, or error of judgment. It means 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."[51]

The previous workers' compensation statute contained no definition of gross negligence. Otherwise, it was functionally identical to the new Act.[52]

A. *The Grounds for Liability: "Gross Negligence"*

The plaintiff must show that the fatal injuries were "caused by an intentional act or omission of the employer or by the employer's gross negligence."[53] "Intentional act" in this context presumably has the meaning discussed above in Section II. The meaning of "gross negligence" remains to be explored. "Most exemplary damages claims [in these death cases] have involved allegations of gross negligence."[54]

The new statutory definition of gross negligence[55] probably does not change the law. The leading cases on this point under the previous workers' compensation law were the supreme court's decisions in *Burk Royalty Co. v. Walls*[56] and *Williams v. Steves Industries*.[57] In

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50. TEX. REV. CIV. STAT. ANN. art. 8308-4.01(b) (Vernon Supp. 1993).

51. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1993).

52. The previous workers' compensation provision stated:

> Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employé whose death is occasioned by homicide from the wilful act or omission or gross negligence of any person, firm or corporation from the employer of such employé at the time of the injury causing the death of the latter. In any suit so brought for exemplary damages, the trial shall be de novo, and no presumption shall exist that any award, ruling or finding of the Industrial Accident Board was correct. In any such suit, such award, ruling or finding shall neither be pleaded nor offered in evidence.

Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen Laws 271, *repealed by* TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 to 8308-11.10 (Vernon Supp. 1993).

53. TEX. REV. CIV. STAT. ANN. art. 8308-4.01(b) (Vernon Supp. 1993).

54. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW, § 61.04(1)(a), at 61-18 (Supp. 1992).

55. TEX. REV. CIV. STAT. ANN. art. 8308-4.01(b) (Vernon Supp. 1993).

56. 616 S.W.2d 911 (Tex. 1981).

57. 699 S.W.2d 570 (Tex. 1985). *Williams* was an action for exemplary damages in a

Burk, the supreme court affirmed an award of exemplary damages when the employer's fault resulted in a worker's death in an oil well fire. "Gross negligence" was defined as "such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference" to the worker's safety.[58] After laying down that definition, the court reviewed the jury's finding of gross negligence in such a way as to indicate that "entire want of care" is not to be taken literally; the ultimate question is whether under all of the circumstances a conclusion of conscious indifference is indicated. The court stated, "In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care."[59] Four years later in *Williams*, the court reiterated the *Burk* definition[60] and stated that the emphasis should be on "the 'conscious indifference' component."[61]

The new statutory definition seems functionally identical. In a recent court of appeals decision affirming an award of exemplary damages against an employer, the court explicitly held that the *Burk* and *Williams* definition of "gross negligence" is identical to the new definition in Section 41.001(5) of the Civil Practice and Remedies Code.[62] Thus, the key question remains whether the total circumstances show the defendant's "conscious indifference" to the victim's safety.[63]

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context other than workplace injuries. *Id.* at 571. But exemplary damages are never available unless gross negligence—or worse—can be shown, and the court's discussion of the definition of gross negligence can be regarded as fully pertinent to the workplace fatality exemplary damages cause of action.

58. *Burk*, 616 S.W.2d at 920.

59. *Id.* at 922.

60. *Williams*, 699 S.W.2d at 572.

61. *Id.* at 573.

62. Beverly Enters. of Tex., Inc. v. Leath, 829 S.W.2d 382, 386 (Tex. App.—Waco 1992, n.w.h.). *Leath* was an action by a living employee against a nonsubscribing employer. *Id.* at 385. But the "gross negligence" reasoning is fully applicable in the fatal injury or exemplary damages context.

63. "Conscious indifference" is a subjective mental state. But "inasmuch as the defendant is unlikely to confess subjective blameworthiness, the plaintiff must be allowed to prove subjective fault by reference to [the] defendant's behavior. . . ." DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 354 (1989). In other words, if the circumstances are such that anyone in defendant's shoes is bound consciously to have realized that an unacceptable risk was being created, conscious indifference can be inferred, despite the defendant's strenuous disavowal. The controversial "conscious indifference" language in *Williams* was meant probably to indicate only that truism: "[A] plaintiff may objectively prove a defendant's gross negligence by proving that under the surrounding circumstances a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others." *Williams*, 699 S.W.2d at 573. The quoted language, which is repeated in *Clifton v. Southern Pa-*

It should be noted in passing that what Texas law is calling "gross negligence" would be called "recklessness" in most states. In mainstream thinking, gross negligence is highly risky behavior in which the "subjective" element of conscious indifference is *not* shown; when that subjective element *is* shown, the conduct is generally called "recklessness."[64] In effect, Texas has defined "gross negligence" to mean recklessness.[65]

B. *Showing Actual Damages*

"Under Texas law, exemplary damages are generally not recoverable in the absence of proof that the plaintiff has sustained actual loss or injury."[66] Using that general view, the supreme court in the 1934 decision *Fort Worth Elevators Co. v. Russell*[67] held that plaintiffs in these fatal-injury-to-employee cases had to allege, prove, and secure jury findings on the existence and amount of actual damages in order to recover the exemplary damages contemplated by the statute.[68]

In 1987, the Texas Supreme Court made a major change. *Wright v. Gifford-Hill & Co.*[69] did away with the required finding of the amount of actual damages.[70] The supreme court explained:

> The plaintiff in a workers' compensation case cannot recover actual damages. Consequently, the questions of ordinary negligence and actual damages are not involved in an action to recover exemplary damages for the death of an employee covered by workers' compensation insurance. Therefore, it is a waste of the jury's time and efforts to re-

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cific Transportation Co., could also be taken to mean that a defendant who does not harbor the subjectively blameworthy "conscious indifference" mental state might be liable on a showing that a reasonable person would have harbored that mental state. Clifton v. Southern Pac. Transp. Co., 709 S.W.2d 636, 640 (Tex. 1986). The Civil Practice and Remedies Code put to rest the latter interpretation of *Williams* and *Clifton* by redefining gross negligence as actual "conscious indifference." TEX. REV. CIV. STAT. ANN. art. 8308-4.01(b); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1993); *see* John Montford & Will Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System, Part Two*, 25 HOUS. L. REV. 245, 317-23 (1988) (explaining controversy and detailing legislative history).

64. DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 354-55 (1989).

65. *Williams*, 699 S.W.2d at 573. "The Texas definition is a hybrid definition, distinctive to this state and unusual by comparison to the law of other states." *Id.*

66. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.02(3)(a) at 61-15 (1992).

67. 123 Tex. 128, 70 S.W.2d 397 (1934).

68. *Fort Worth Elevators Co.*, 133 Tex. at 150, 70 S.W.2d at 409.

69. 725 S.W.2d 712 (Tex. 1987).

70. *Wright*, 725 S.W.2d 712, 714 (Tex. 1987).

> quire a finding of an amount of actual damages in such a case. In the interest of judicial economy, we disapprove that portion of *Fort Worth Elevators* which states that a plaintiff must secure a jury finding as to the amount of actual damages in a wrongful death cases arising under [this provision of the workmen's compensation statute].
>
> After introducing evidence of [the existence of] actual damage and securing jury findings that the gross negligence of Gifford-Hill proximately caused the death of her husband, Mrs. Wright would have been entitled to recover actual damages but for the Workers' Compensation Act. The plaintiff need not secure a finding on the amount of actual damages in order to recover exemplary damages. . . .[71]

C. *Limiting the Amount of Exemplary Damages*

The Civil Practice and Remedies Code sets a general ceiling on exemplary damages—the greater of $200,000 or four times the actual damages.[72] But this limitation is explicitly made inapplicable to "an action to recover exemplary damages against an employer by the employee's beneficiaries in a death action arising out of the course and scope of employment where the employer is a subscriber under the workers' compensation laws of this state."[73] The only limits are therefore general standards of reasonableness, looking to such factors as "(1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which such conduct offends the public sense of justice and propriety."[74] It is important to note that one traditional aid in controlling the amount of an exemplary damages award—looking to the ratio of exemplary damages to actual damages—is no longer available in these cases under the holding in *Wright*.

D. *Who Can Sue?*

The exemplary damages action is confined to the deceased em-

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71. *Id.* at 714 (citations omitted).

72. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1993).

73. TEX. CIV. PRAC. & REM. CODE ANN. § 41.002(b)(4) (Vernon Supp. 1993). Note that the ceiling on exemplary damages *is* applicable in litigation against nonsubscribing employers. *E.g.*, Beverly Enters. of Tex., Inc. v. Leath, 829 S.W.2d 382, 387-88 (Tex. App.—Waco 1992, no writ).

74. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.10 (1992).

ployee's spouse and "heirs of the body." It seems settled that the term "heirs of the body" includes only natural children. Parents and siblings are not included,[75] and neither, presumably, are grandchildren or adoptive children.

E. *Affirmative Defenses*

The Civil Practice and Remedies Code merges the defenses of assumed risk and contributory negligence into a single "comparative responsibility" defense.[76] The Code further provides that the comparative responsibility defense is not applicable in "actions against an employer for exemplary damages arising out of the death of an employee."[77] Thus the only affirmative defense available in these fatal injury exemplary damages cases is the fellow servant doctrine.

In its heyday, the fellow servant doctrine provided that an employer could not be liable to a worker injured by the negligence of a fellow worker.[78] Today the defense is considerably more limited. It does not apply when the injury-producing fault was that of a supervisory employee.[79] The defense is also unavailable when the injury-producing fault constitutes the breach of a so-called "nondelegable" duty of the employer.[80] Employers' recognized nondelegable duties include promulgating safety rules and regulations, warning employees of workplace hazards, furnishing reasonably safe machinery and instrumentalities, providing a reasonably safe place to work, and selecting and training competent fellow workers.[81]

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75. *See* 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.02.

76. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(4) (Vernon Supp. 1993). The Texas Civil Practice & Remedies Code defines comparative responsibility to include victim conduct "causing or contributing to cause [the injury] in any way, whether by negligent act or omission, [or] by other conduct or activity violative of the applicable legal standard." *Id.*

77. TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(b)(1) (Vernon Supp. 1993).

78. *See generally* 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.06(3)(b) (1992) (defining fellow servant doctrine).

79. *See, e.g.*, Funk Farms, Inc. v. Montoya, 736 S.W.2d 803, 806 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (holding master responsible for negligent acts of employees with vice-principal status).

80. *See, e.g.*, Missouri Valley, Inc. v. Putman, 627 S.W.2d 829, 833 (Tex. App.—Amarillo 1982, no writ) (providing safety rules is nondelegable duty of master).

81. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.07(3) (1992).

V. ELECTION-OF-REMEDIES CONSIDERATIONS

A. *The Action for Intentional Harm*

"An injured employee's acceptance of compensation benefits under the [Workers' Compensation] Act for nonfatal injuries inflicted by an intentional act constitutes an election of remedies and precludes the employee from bringing a subsequent cause of action against the employer seeking actual and exemplary damages based on the commission of an intentional tort."[82] Until very recently the decisions on this point have all indicated that the binding election occurs when the employee claims, receives, or accepts compensation benefits.[83] The theory has been that the two remedies—workers' compensation for accidental injury and tort damages for intentional injury—are mutually exclusive, such that a worker's choice of the accidental-injury route should estop her from later pursuing the inconsistent intentional injury route.[84] A recent decision of the Dallas Court of Appeals may signal the beginnings of a change in thinking.[85] In *Ramirez v. Pecan Deluxe Candy Co.*,[86] the court of appeals determined that a binding election does not occur until the worker has made a *knowing* choice to forgo the intentional injury remedy, and that such a knowing choice might not occur until there has been a "final settlement" of the case seeking workers' compensation benefits.[87]

The election of remedies theory would presumably work in reverse and mean that a worker who sues for intentional tort damages is thereby precluded from seeking workers' compensation benefits for that injury. I have no cases directly on point.[88] The election of remedies theory is not powerful enough to prevent the spouse of a worker who has accepted compensation from suing the employer in inten-

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82. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.01(3)(c).

83. *E.g.*, Massey v. Armco Steel Co., 652 S.W.2d 932 (Tex. 1983); Reed Tool Co. v. Copelin, 610 S.W.2d 736 (Tex. 1980), *appeal after remand*, 689 S.W.2d 404 (Tex. 1985).

84. 3 HOWARD L. NATIONS & JOHN C. KILPATRICK, TEXAS WORKERS' COMPENSATION LAW § 61.01(3)(c), at 61-10. The theory of mutual exclusivity thus goes back to the *Middleton* notion that "accidental" and "intentional" are mutually exclusive concepts.

85. Ramirez v. Pecan Deluxe Candy Co., 839 S.W.2d 101, 106-07 (Tex. App.—Dallas 1992, writ denied).

86. 839 S.W.2d 101 (Tex. App.—Dallas 1992, writ denied).

87. *Id.* at 106-07.

88. *But c.f.* Mitchell v. Aetna Casualty & Sur. Co., 722 S.W.2d 522, 524 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (holding that employee's filing and then compromising federal sex discrimination claim does not preclude pursuing state compensation remedy).

tional tort and seeking damages for lost consortium. The cases allow intentional tort actions by spouses of those workers who have sought or accepted compensation, reasoning that the action for loss of consortium, sometimes thought of as derivative, is the spouse's separate property.[89] Almost all of the cases seeking intentional tort damages against subscribing employers seem to be brought by workers' spouses.[90] Because the intentional injury remedy is seldom successful, counsel for injured workers probably feel bound in virtually all cases to advise the workers to seek compensation and thus forgo the intentional remedy. The potential availability of the intentional injury remedy to a worker's spouse is presumably an occasional consolation in these cases.

B. *The Action for Exemplary Damages for Gross Negligence Resulting in Death*

The statute and the cases contemplate that the exemplary damages action will lie although workers' compensation benefits have been sought or paid. There is no election of remedies problem.

C. *Other Contexts*

In several contexts a worker can pursue or receive compensation benefits and thereafter seek tort damages without running afoul of an election of remedies doctrine. For example, after unsuccessfully pursuing workers' compensation benefits a worker can sue the employer on the theory that the injuries did not occur in the course and scope of the employment.[91] Similarly, receiving workers' compensation benefits does not preclude a tort suit asserting that the employer failed to comply with the notice provisions of the Act and thus should be liable in tort as a nonsubscribing employer.[92]

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89. *See Reed*, 689 S.W.2d at 405 (describing action by spouse for loss of consortium).

90. *E.g.*, Rodriguez v. Naylor Indus., Inc., 763 S.W.2d 411 (Tex. 1989); *Reed Tool*, 689 S.W.2d 404; Bennight v. Western Auto Supply Co., 670 S.W.2d 373 (Tex. App.—Austin, 1984, writ ref'd n.r.e.).

91. *E.g.*, Wasson v. Stracener, 786 S.W.2d 414 (Tex. App.—Texarkana 1990, writ denied).

92. *E.g.*, Ferguson v. Hosp. Corp. Int'l, 769 F.2d 268 (5th Cir. 1985).

VI. POTENTIAL AREAS OF EMPLOYER LIABILITY NOT EXPLORED HERE

Decisions in other states have held that employers covered by workers' compensation may nevertheless be liable for fraudulently concealing workers' employment-related illnesses or injuries;[93] for violating federal and state civil-rights statutes addressing sex, age, and race discrimination;[94] and for discriminating against handicapped workers.[95] None of these areas of potential liability has been explored in this paper.

In some states an employer covered by the workers' compensation system may nonetheless be liable in tort for certain types of injuries that are not compensable under the workers' compensation statute.[96] Texas cases indicate that this theory of employer liability is not viable here.[97]

A few states have used a "dual capacity" theory to hold that an employer who is covered by the workers' compensation system can be liable in tort in its capacity as the manufacturer of the machine that injured the worker. The "dual capacity" theory has seemingly been rejected in Texas.[98]

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93. JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION CASES AND MATERIALS 430 (3d ed. 1993); *cf.* Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 211 (Tex. 1988) (allowing action by claimant who asserts that carrier has breach its duty of good faith); Massey v. Armco Steel Co., 652 S.W.2d 932, 933 (Tex. 1983) (noting viability of claim for carrier's breach of good faith).

94. JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION CASES AND MATERIALS 443 (3d ed. 1993) (reviewing employer liability); *cf.* Bushell v. Dean, 781 S.W.2d 652, 654 (Tex. App.—Austin 1989) (allowing sex discrimination suit against employer), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991); Mitchell v. Aetna Casualty & Sur. Co., 722 S.W.2d 522, 524 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (holding that employee's filing and later compromising federal sex discrimination claim does not preclude seeking state compensation claim).

95. *E.g.*, Cox v. Glazer Steel Corp., 606 So. 2d 518 (La. 1992).

96. *See* JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION CASES AND MATERIALS 444 (3d ed. 1993) (discussing employer liability for tort actions regardless of workers' compensation).

97. *E.g.*, McAlister v. Medina Elec. Co-op, 830 S.W.2d 659 (Tex. App.—San Antonio 1992, writ denied).

98. *See* Gina Fulkerson, Note, *Workers' Compensation: Dual Capacity in Texas-When the Employer "Wears Two Hats"*, 34 BAYLOR L. REV. 473, 473 (1982) (recognizing two Texas court of appeals rejecting dual capacity theory); Gus Tamborello, Note, *The Blood of the Workman: Allowing a Dual Recovery for an Employee Injured by Its Employer's Defective Product*, 23 HOUS. L. REV. 945, 952 (1986) (discussing Texas court of appeals refusal to adopt dual capacity theory).

Since 1971 the Texas workers' compensation legislation has made employers liable for firing or discriminating against workers in retaliation for the workers' having pursued their compensation rights.[99] This provision was retained in the 1989 legislative revision. In a recent court of appeals decisions it yielded one worker a recovery of $163,500 in actual damages and $900,000 in exemplary damages.[100] Note that the retaliatory discharge cause of action—like the action for exemplary damages for gross negligence leading to the death of an employee[101]—is not subject to the normal exemplary-damage ceiling.[102]

VII. CONCLUSION

The essentially voluntary nature of the Texas workers' compensation statute results in large numbers of employers choosing not to subscribe to the system. Consequently, tort actions against nonsubscribing employers constitute an important area of tort law in this state.

The two main areas of tort liability of subscribing employers are fascinating to lawyers but ultimately are probably not very important to anyone else. Quite properly, lawyers for injured employees and for the families of deceased employees keep bringing these suits when the facts warrant such an action, and the reported cases indicate that sometimes the plaintiff gets past the summary judgment stage. But at the end of the day it is very difficult to prove gross negligence and even harder to prove intent. Whether the prospect of liability for intentional injury and for gross negligence in causing a workplace fatality makes any significant contribution to workplace safety in Texas is unknown. Nor does there seem to be any information available as to whether the threat of such liability has any discernible effect on the settlement value of workers' compensation claims.

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99. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1993).

100. Ethicon, Inc. v. Martinez, 835 S.W.2d 826, 830 (Tex. App.—Austin 1992, n.w.h.).

101. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1993).

102. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.002(b)(3) (Vernon Supp. 1993) (making exemplary damages provisions inapplicable to actions brought under workers' compensation laws).