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Dual Personas: Treating an Employer as a Third Party Under the Texas Workers' Compensation Act

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COMMENT

DUAL PERSONAS: TREATING AN EMPLOYER AS A THIRD PARTY UNDER THE TEXAS WORKERS' COMPENSATION ACT

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I. INTRODUCTION

A. *The Texas Workers' Compensation Act*

The Texas Workers' Compensation Act,[1] like other workers' compensation acts across the United States, was created for the general purpose of shielding an otherwise negligent employer from liability to an employee in tort.[2] Simultaneously, the Act relieves the injured employee of the time, expense, and uncertainty of proving such negligence in court.[3] An employee injured within the scope of employment[4] is entitled to

1. *See generally* TEX. LAB. CODE ANN. § 408 (outlining the application of workers' compensation benefits).

2. Mary Quella Kelly, Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 5 ST. MARY'S L.J. 818, 818 (1974).

3. *See* Davis v. Sinclair Refin. Co., 704 S.W.2d 413, 415 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (stating the Workers' Compensation Act relieves the employee of the burden of proving his employer's negligence, establishes a recovery amount that would otherwise be uncertain, and relieves the subscribing employer of certain defenses).

4. *See* TEX. LAB. CODE ANN. § 401.011 (indicating "course and scope of employment," for purposes of the Texas Workers' Compensation Act, includes activity that (1) originates in the employer's business and (2) "is performed by an employee" engaged in the furtherance of the employer's business or affairs).

compensation benefits regardless of the employer's fault or the employee's contribution to fault.[5] However, as a consequence of receiving employment compensation benefits under the Act, an employee forfeits the common law right to sue their employer for any negligence that caused the work-related injury.[6]

B. *Suing Third Parties*

Notwithstanding the exclusive remedy as against employers, Texas and most other states[7] allow an employee receiving employment compensation benefits to sue a third party who caused or is otherwise liable for the work-related injury.[8] As noted by Professor Arthur Larson,[9] "it is elementary that if a stranger's negligence was the cause of injury to [the] claimant in the course of employment, the stranger should not be in any degree absolved of [their] normal obligation to pay damages for such an injury."[10] But what if the employee's work-related injury results from an employer's negligence in duties that are independent to those of an employer?[11]

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5. *See Davis*, 704 S.W.2d at 415 (noting abrogation of contributory negligence as an employer's defense to tort liability).

6. *See* TEX. LAB. CODE ANN. § 408.001(a) ("Recovery of workers' compensation benefits is the *exclusive remedy* of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.") (emphasis added); *see also* H. Michael Bagley et al., *Workers' Compensation*, 55 MERCER L. REV. 481, 487–88 (2003) (suggesting the exclusive remedy provision is the linchpin without which such statutory schemes would have no meaningful effect).

7. *See generally* J.T.W. & P.V.S., Annotation, *Workmen's Compensation: Rights and Remedies Where Employee Was Injured by a Third Person's Negligence*, 106 A.L.R. 1040 (1937) (showing in several states receipt of compensation benefits does not prohibit an injured employee from bringing a common law action against a liable third party).

8. *See* TEX. LAB. CODE ANN. § 417.001(a) ("An employee or legal beneficiary may seek damages from a third party who is or becomes liable to pay damages for an injury or death that is compensable under this subtitle and may also pursue a claim for workers' compensation benefits under this subtitle.").

9. Professor Arthur Larson (1910–1993) taught at Duke University School of Law and is best known for his treatise on the law of workmen's compensation. *Arthur Larson*, DUKELAW, https://web.law.duke.edu/history/faculty/larson/ [https://perma.cc/5EAD-CRHW]. Larson's treatise is the preeminent authority cited by many courts on the interplay between dual capacity theory and workers' compensation law. *See, e.g.*, Stayton v. Clariant Corp., 10 A.3d 597, 601 (Del. 2010) (referencing Professor Larson's treatise regarding the dual persona doctrine).

10. 10 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 110.01 (Matthew Bender rev. ed. 2020).

11. This is not to be confused with an employer's negligence in an unrelated transaction, such as when an employee comes into their employer's shop on their day off to make a private purchase. *See id.* § 113.08 (illustrating states' application of the dual capacity doctrine). The employee may bring a negligence action in that scenario since the employment relationship is not implicated in any way. *Cf.*

Imagine a hypothetical doctor who owns and operates a private practice, employing several nurses to assist in its operation.[12] One day, a nurse becomes ill on the job and the doctor gives her medication. Unfortunately, the medication causes the nurse to go into shock. She becomes hypoxic from oxygen deprivation and suffers lasting brain damage. Normally, the nurse could bring a claim against the doctor for medical malpractice since doctors have a duty of care in treating their patients.[13] However, this hypothetical jurisdiction has a statute that precludes an employee from recovering in tort against an employer where the employer is a subscriber under the state's workers' compensation scheme.

Should an employer who occupies capacities independent from that of the employer be allowed to circumvent their liability for such capacities via the exclusive remedy provision?[14] Effectively, the employee would be forced to choose between protracted litigation with a lesser chance of recovery,[15] or the receipt of potentially insufficient compensation benefits.[16] One could argue that the employee at least tacitly agreed to be subject to the exclusive remedy as it relates to her employment, but not as

Darensburg v. Tobey, 887 S.W.2d 84, 87 (Tex. App.—Dallas 1994, writ denied) (stating an employee must have been engaged in or acting pursuant to the employer's business or affairs when the injury occurred to fall within the scope of the Workers' Compensation Act).

12. *See* Kelly, *supra* note 2, at 821 (setting forth a hypothetical of a physician-employer treating his receptionist).

13. *See* RESTATEMENT (SECOND) OF TORTS § 299A (AM. L. INST. 1965) (stating a professional is required to render their professional services with the knowledge and skill normally possessed by others practicing in that profession in the community); Majzoub v. Appling, 95 S.W.3d 432, 436 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (stating a doctor's duty of care arises from the consensual nature of the physician-patient relationship); *cf.* 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 183 (2020) (describing a physician's duty of care towards her patients as both contractual in nature and as a consequence of public policy).

14. *Cf.* Kelly, *supra* note 2, at 821 ("Should any injured employee be denied his common law tort action when he is injured because of the negligence of his employer when the employer occupies another capacity?").

15. *See* Davis v. Sinclair Refin. Co., 704 S.W.2d 413, 415 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (noting the workers' compensation acts take uncertainty of recovery out of the equation).

16. *Cf.* Jason Kirkpatrick et al., *Texas Workplace Injury Compensation: Analysis, Options, Impact*, TEXANS FOR LAWSUIT REFORM FOUND. 25, 26, 28, https://www.tlrfoundation.com/wp-content/uploads/2019/02/TexasWorkplaceCompensation.pdf [https://perma.cc/Z894-GC8H] (suggesting, in some cases, a severely injured worker is able to achieve greater recovery through litigation against a third-party tortfeasor than they would through workers' compensation benefits).

to a third-party tortfeasor—even one who happens to be her employer.[17] The initial judicial response to this dilemma is known as the "dual capacity" doctrine.

C. *The Dual Capacity Doctrine*

Several states developed the dual capacity doctrine as an exception to the exclusive remedy provisions in state workers' compensation acts.[18] The dual capacity doctrine states,

> [A]n employer who is generally immune from tort liability to an employee injured in a work-related accident may become liable to his employee as a third-party tortfeasor if he occupies, in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer.[19]

The application of the dual capacity doctrine has been limited to special circumstances by different state courts. Texas courts have uniformly rejected the doctrine as an exception to the state's workers' compensation act, but the Texas Supreme Court has yet to finally lay it to rest or limit it to those circumstances where it can be appropriately applied.[20] This Comment explores the current landscape of the dual capacity doctrine in the United States, and whether the dual persona doctrine, a stricter version of dual capacity theory, could be appropriately applied to hold an employer liable as a third party under the Texas Workers' Compensation Act. But first, it will be instructive to consider the early development and application of the doctrine by various state and federal courts.

17. Kelly, *supra* note 2, at 832.

18. California, Illinois, and Ohio were the first states to extensively develop a dual capacity theory. Note, *Workers' Compensation: The Dual-Capacity Doctrine*, 6 WM. MITCHELL L. REV. 813, 819 (1980).

19. Kimzey v. Interpace Corp., 694 P.2d 907, 910 (Kan. Ct. App. 1985).

20. Payne v. Galen Hosp. Corp., 28 S.W.3d 15, 20–21 (Tex. 2000) (noting although the appellate courts have uniformly rejected the dual capacity doctrine, the Texas Supreme Court has not definitively disapproved of the it as an exception to the exclusive remedy provision under the TWCA).

II. HISTORICAL BACKGROUND

A. *Inception of the Dual Capacity Doctrine*

The dual capacity doctrine had its preeminence in the late 1970s to early 1980s.[21] However, the fundamental concepts behind the doctrine first emerged in the 1952 California Supreme Court case, *Duprey v. Shane*.[22]

Iva Duprey, a nurse employed by a chiropractor, suffered a neck injury while at work and was subsequently treated for that injury by her employer, Dr. Shane.[23] The treatment aggravated her injuries, resulting in further disability.[24] Because the original injury occurred while on the job, Duprey received workmen's compensation benefits.[25] The question before the court was whether Dr. Shane could be treated as a third party subject to liability for aggravating Duprey's injury notwithstanding the Act's exclusive remedy provision.[26]

In a per curiam opinion, the court likened Dr. Shane's status to that of the attending physician of an insurance carrier tasked with treating an employee's work-related injury, noting that such a physician, as a third party, would not be protected from liability for negligent aggravation of an employee's injuries.[27] "In treating the injury," the court stated, "Dr. Shane did not do so because of the employer-employee relationship, but . . . as an attending doctor . . . ."[28] Although California subsequently abrogated the

21. *See* Note, *Workers' Compensation: The Dual-Capacity Doctrine*, *supra* note 18, at 814 (describing the advent and early applications of the dual capacity doctrine); 10 LARSON, *supra* note 10, § 113.01 ("The dual capacity doctrine, in spite of widespread . . . attempts to invoke it as a way to defeat exclusiveness, flourished in only two states . . . for only a few years . . . .").

22. *See* Duprey v. Shane, 249 P.2d 8, 15 (Cal. 1952) (per curiam) (describing the dual nature of an employer's liability as a doctor).

23. *Id.* at 10.

24. *Id.*

25. *Id.* at 13.

26. *See id.* at 13–14 ("The claim of an employee [. . .] for compensation does not affect his [or her] claim or right of action for all damages proximately resulting from [such] injury or death against any person other than the employer." (quoting CAL. LAB. CODE § 3852 (West 1952) (current version at CAL. LAB. CODE § 3852))).

27. *Id.* at 15.

28. *Id.*

dual capacity doctrine by statute in 1982,[29] *Duprey's* impact on the courts of other jurisdictions is patent.[30]

B. *Expansion of the Dual Capacity Doctrine*

In the 1963 case, *Reed v. Steamship Yaka*,[31] the U.S. Supreme Court used a dual capacity concept to hold a stevedoring company[32] liable for an employee's injury notwithstanding the exclusive recovery of workers' compensation benefits mandated under the Federal Longshore and Harbor Workers' Compensation Act (LHWCA).[33] The defendant stevedoring company leased the SS *Yaka* from its owner under a bareboat charter.[34] Pursuant to then-existing admiralty law, the lessee was normally subject to liability for the vessel's unseaworthiness.[35] The employee-plaintiff sued the ship's owner after being injured while working on the vessel, and the ship's owner sought indemnification from the stevedoring company as lessee.[36] The Court determined that the LHWCA was not intended to preempt the stevedoring company's independent responsibility to render the vessel seaworthy during the term of the lease; therefore, the stevedoring company could be held liable as a third party.[37]

29. *See* CAL. LAB. CODE § 3602 (West 1982) (abolishing dual capacities as a basis for holding an employer or their employee liable in tort).

30. As of the writing of this Comment, a substantial minority of states have considered the dual capacity doctrine, including: Oklahoma; Arkansas; California; Alaska; Indiana; Kentucky; Louisiana; Mississippi; Missouri; New York; North Dakota; Pennsylvania; South Carolina; Tennessee; Texas; Illinois; Maine; Michigan; New Hampshire; and Ohio. *See generally* Michael A. DiSabatino, Annotation, *Modern Status: "Dual Capacity Doctrine" As Basis for Employee's Recovery from Employer in Tort*, 23 A.L.R. 4th 1151 (1983) (illustrating how state and federal courts contemplated the application of the dual capacity doctrine to cases involving workplace injuries).

31. Reed v. S.S. Yaka, 373 U.S. 410 (1963).

32. A stevedore refers to a person "who works at or is responsible for loading and unloading ships in port." *Stevedore*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/stevedore [https://perma.cc/75F5-G3FE].

33. *Reed*, 373 U.S. at 415–16; 33 U.S.C. § 905 (2018).

34. The lessee under a bareboat charter has full control and possession of the vessel during the term of the lease. *Id.* at 412.

35. *Id.* at 412–13.

36. *Id.* at 410–11.

37. *See id.* at 415 ("[We cannot] ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer . . . charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid."). The LHWCA was subsequently amended in 1972 to specifically eliminate a vessel owner's indemnity action for unseaworthiness against an employer, but no such prohibition was included as to an employee pursuing a claim against an employer who owns the vessel outright. Kenneth G. Engerrand & Jonathan A.

III. CURRENT APPLICATION OF DUAL CAPACITY THEORY

A. *General Disapproval*

Since the late 1980s, a majority of states have restricted or disapproved of the dual capacity doctrine.[38] Notwithstanding its logic, most courts argue that the dual capacity doctrine goes against state legislatures' intent to expressly limit the available exceptions to the exclusive remedy provision.[39] Some states, such as California,[40] Louisiana,[41] and Oklahoma,[42] have even attempted to abrogate the doctrine via statute. However, application of the dual capacity concept lives on in the fact intensive case law of a minority of jurisdictions, some of which may be instructive for its limited application to Texas law. The following section provides an analysis of the applications of the dual capacity doctrine under select theories of liability—(1) shareholder liability as owner or occupier of land and (2) corporate successor liability as manufacturer or designer of a defective product.

B. *Liability as Owner or Occupier of Land*

It is widely acknowledged that the dual capacity doctrine is generally inapplicable to hold an employer liable to an injured employee as the owner or occupier of land.[43] Even where courts are willing to consider the dual

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Tweedy, *A Tedious Balance: Third-Party Claims Under the Longshore and Harbor Workers' Compensation Act*, 10 LOY. MD. L.J. 1, 10 (2011).

38. *See* John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?*, 47 ARK. L. REV. 1, 42 (1994) (acknowledging the majority of jurisdictions have rejected the dual capacity doctrine).

39. *See, e.g.*, Maldonado v. Kiewit Louisiana Co., 152 So. 3d 909, 919 (La. Ct. App. 2014) (discussing the Louisiana legislature's intent for intentional torts to be the only exception to the exclusive remedy provision under 1976 amendment).

40. *See* CAL. LAB. CODE § 3602(a) (West 2013) ("[T]he right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer. The fact that either the employee or the *employer* also occupied *another or dual capacity* prior to, or at the time of, the employee's industrial injury *shall not* permit the employee [to sue the employer for damages].") (emphasis added).

41. *See* LA. STAT. ANN. § 23:1032 ("[T]he rights and remedies herein granted to an employee . . . shall be exclusive of all other rights, remedies, and claims for damages . . . . [I]ncluding any claims that might arise against his employer . . . under any dual capacity theory or doctrine.").

42. *See* OKLA. STAT. ANN. tit. 85A, § 5 (West 2019) ("The rights and remedies granted to an employee . . . shall be exclusive of all other rights and remedies of the employee . . . . [T]he remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.").

43. *See, e.g.*, Cassani v. City of Detroit, 402 N.W.2d 1, 2 (Mich. Ct. App. 1985) (per curiam) ("The great majority of American jurisdictions have held that an employer's status as a landowner does

capacity doctrine in the premises liability context, there still needs to be a showing that the employer clearly stepped outside of its role as employer and that the injury was work-related.[44] The doctrine's unsuitability in this context is evident after considering how the duties of a landowner or landlord to an invitee[45] are virtually indistinguishable from the duties of an employer to provide a safe work environment.[46] The 1982 California appellate case, *Royster v. Montanez*,[47] clearly illustrates this point.[48]

In *Royster*, Pronto Drilling, a business owned and operated by the defendant, Miguel Montanez, employed the plaintiff as a secretary.[49] Montanez had requested that the plaintiff, Betsy Royster, come to his home to assist him in paying a work bill.[50] She went to his residence to inquire about the bill and was injured after stepping into a hole of loose soil on the property.[51] Royster sought to hold Montanez liable not in his capacity as her employer, but as the property owner.[52] Montanez argued that the dual capacity doctrine was inapplicable to circumvent Royster's exclusive remedy mandated under the state's workers' compensation scheme.[53]

In its discussion, the court acknowledged that an employer has a duty to provide a safe work environment to employees, and that this duty is often

not endow the employer with a second legal persona where the injury to the employee occurs in the course of employment.").

44. *See* Weinstein v. St. Mary's Med. Ctr., 68 Cal. Rptr. 2d 461, 468 (Cal. Ct. App. 1997) (holding hospital-employer liable to employee for a slip-and-fall where employee came to seek treatment at hospital for prior injury without any contractual obligation to do so and was not on duty when the injury occurred); *cf.* Rivers v. Otis Elevator, 996 N.E.2d 1039, 1044 (Ohio Ct. App. 2013) (refusing to hold hospital-employer liable under dual capacity theory for injury employee sustained from elevator while at work even though elevator was accessible to the general public because her injuries were predominantly work-related).

45. *See* RESTATEMENT (SECOND) OF TORTS § 343A (AM. L. INST. 1965) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.").

46. *See* Freese v. Consol. Rail Corp., 445 N.E.2d 1110, 1114–15 (Ohio 1983) (stating the city's obligations to maintain safe conditions of city streets were not unrelated to or distinct from its obligation to provide safe work environment for city police officer); *see also* 10 LARSON, *supra* note 10, § 113.02 (acknowledging how an employer will usually own or occupy premises in connection with the business).

47. Royster v. Montanez, 184 Cal. Rptr. 560 (Cal. Ct. App. 1982).

48. *Id.* at 565–66.

49. *Id.* at 561.

50. *Id.*

51. *Id.*

52. *Id.* at 563.

53. *Id.* at 561.

more stringent than the duty a landowner owes to an invitee.[54] Accordingly, "creating dual capacity liability [under such circumstances] would not impose on employers a greater obligation to provide safe places of employment."[55] And as Professor Larson points out, "[i]f every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to nothingness."[56] Perhaps that is why so many courts are hesitant to apply dual capacity theory to hold city-employers liable for failing to maintain public streets and roadways.[57] However, there are certain scenarios where courts have been willing to hold an employer or co-employee liable under a dual capacity theory, notwithstanding the indistinct nature of the duties owed by employers and landowners.

1. Dual Personas of Corporate Shareholders

In *LaBelle v. Crepeau*,[58] the Supreme Court of Maine used the dual capacity doctrine to hold the shareholder of a corporate employer liable as the landowner of the premises leased to the corporate employer.[59] Crepeau Motors, Inc., a paint and body shop owned and operated by Raymond Crepeau, employed the plaintiff, Maurice LaBelle.[60] LaBelle was injured after inhaling paint fumes in the paint shop, which LaBelle argued was improperly ventilated.[61] Crepeau personally owned the building where the paint shop was located and leased it to the corporation.[62] The lower appellate court held that the state's workers' compensation act barred

54. *See id.* at 566 (emphasizing that violating a California statute requiring employers to provide a safe work environment may carry criminal penalties).

55. *Id.* at 565–66.

56. 10 LARSON, *supra* note 10, § 113.02.

57. *See* Jones v. Kaiser Indus. Corp., 737 P.2d 771, 777 (Cal. 1987) (explaining how survivors of the decedent police officer could not maintain their suit against the city because the city's obligation to maintain intersections for the benefit of the general public did not create a separate status as a landowner); Freese v. Consol. Rail Corp., 445 N.E.2d 1110, 1114–15 (Ohio 1983) (finding motorcycle policeman could not maintain action against city-employer under dual capacity doctrine where city's obligation to maintain safe condition of city streets was not unrelated to or distinct from an employer's responsibility to provide a safe work environment). *But see* Quintero v. N.M. Dep't of Transp., 242 P.3d 470, 474 (N.M. Ct. App. 2010) (finding exclusive remedy provision did not bar employee from bringing premises liability action against separate department of government employer for injuries sustained at a city-owned bus lot on her commute to work).

58. LaBelle v. Crepeau, 593 A.2d 653 (Me. 1991).

59. *Id.* at 655.

60. *Id.* at 654.

61. *Id.*

62. *Id.*

LaBelle from bringing the suit.[63] However, the Maine Supreme Court reversed on appeal, arguing that Crepeau was not sued based on his status as an employer, but rather as a landowner.[64]

The court distinguished *LaBelle* from other similar premises liability cases on the grounds that Crepeau Motors, Inc., as an incorporated business, had a separate legal status from its main shareholder, Raymond Crepeau.[65] "One of the principal benefits offered by the corporate form of organization," the court stated, "is limited liability for shareholders."[66] But maintaining limited liability for shareholders necessarily entails upholding the separate legal status of the corporation.[67] Therefore, it makes little sense to allow a shareholder to reverse pierce the corporate veil[68] to receive both the benefits of the exclusive remedy provision and the limited liability afforded to shareholders.[69]

This corporation-shareholder distinction is an example of what some courts and commentators refer to as the "dual persona" doctrine, a stricter version of dual capacity theory that only applies where (1) the relationship between the plaintiff's cause of action and their employment status is purely incidental; and (2) the employer has a separate legal personality that generates obligations unrelated to the employer's status as an employer.[70]

63. *See id.* (discussing the trial court's expansive view of the immunity afforded under Maine's workers' compensation act).

64. *See id.* at 655 (refusing to extend immunity afforded under the exclusive remedy provision to corporate shareholder in his capacity as landlord); *see also* Quinn v. DiPietro, 642 A.2d 1335, 1336–37 (Me. 1994) (declining to extend the dual capacity or persona doctrine solely based on employer's ownership of property and where no separate legal entity status is implicated).

65. *See LaBelle*, 593 A.2d at 655 (describing the power of a corporation to own property, defend and prosecute court actions, and hire employees in its own right).

66. *Id.*

67. *Id.*

68. Piercing the corporate veil is an equitable doctrine by which a court may disregard the corporation's separate legal status to hold its shareholders and officers personally liable for the corporation's obligations. Durham v. Accardi, 587 S.W.3d 179, 185 (Tex. App.—Houston [14th Dist.] 2019, no pet.). An example of when veil-piercing may occur is when none of the corporate formalities have been observed and the corporation is merely operating as a tool or "alter ego" for its shareholders. *Id.*

69. *See LaBelle*, 593 A.2d at 655 ("Incorporation carries benefits as well as burdens; one cannot claim the benefits without the burdens." (quoting Lyon v. Barrett, 445 A.2d 1153, 1158 (N.J. 1982))); 10 LARSON, *supra* note 10, § 113.01 (accepting dual legal personalities created by statute as appropriate where the statute makes it so).

70. *See, e.g.*, Herbolsheimer v. SMS Holding Co., 608 N.W.2d 487, 493 (Mich. Ct. App. 2000) (reinforcing the extent to which status and obligations as the employer must be distinct from recognized dual personality).

In fact, several state courts, such as Michigan,[71] Illinois,[72] California,[73] New Mexico,[74] and Oklahoma,[75] have similarly recognized a dual persona exception to hold an otherwise immune shareholder or co-employee negligently liable as possessor of land. Oklahoma's recent application of the dual persona concept is particularly instructive in the shareholder context, considering the recent overhaul to Oklahoma's exclusive remedy provision arguably abrogates any dual capacity or dual persona concept.

2. When Dual Personas Generate Shareholder Immunity

In *Odom v. Penske Truck Leasing Co.*,[76] Perry Odom brought a negligence action against Penske Truck Leasing Co (PTLC), the parent company of his employer, Penske Logistics, after Odom was injured at work by a trailer owned by PTLC.[77] PTLC argued that Oklahoma's workers' compensation act prohibited actions by employees for negligence against a stockholder of the corporate employer.[78] Oklahoma's exclusive remedy provision states,

> The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee

71. *See* Bitar v. Wakim, 572 N.W.2d 191, 193 (Mich. 1998) (applying dual capacity to hold the sole shareholder of a corporate employer liable as a possessor of property leased to the corporate employer where the employee's slip-and-fall occurred); *cf.* Clark v. United Tech. Auto., Inc., 594 N.W.2d 447, 452 (Mich. 1999) (distinguishing a vertical business entity relationship between a corporation and its wholly owned subsidiary, wherein a reverse-piercing analysis may be considered, from a horizontal business entity relationship, wherein a dual employer analysis ought to apply).

72. *See* Sobczak v. Flaska, 706 N.E.2d 990, 997 (Ill. App. Ct. 1998) (stating a co-employee and owner of the property where the employee's injury occurred was not immune from premises liability where he assumed a separate persona of general contractor by supervising employee work done on his residence).

73. *See* Miller v. King, 24 Cal. Rptr. 2d 284, 285 (Cal. Ct. App. 1993) (holding statutory abrogation of dual capacity doctrine did not extend immunity to shareholders of a corporate employer who were also owners of the property where employee was injured).

74. *See* Salswedel v. Enerpharm, Ltd., 764 P.2d 499, 503 (N.M. Ct. App. 1988) (acknowledging the dual persona doctrine and determining an injured employee had standing to bring premises liability against the corporation her employer had a partnership interest in).

75. *See* Lind v. Barnes Tag Agency, Inc., 418 P.3d 698, 705 (Okla. 2018) ("A corporation and its sole owner and shareholder are separate entities and the immunity of the workers' compensation laws that shields the corporation from tort liability to employees does not extend to the owner of the corporation as a third-party landowner.").

76. Odom v. Penske Truck Leasing Co., 415 P.3d 521 (Okla. 2018).

77. *Id.* at 524–25.

78. *Id.* at 524.

> against the employer, or any principal, officer, director, employee, stockholder, partner, or prime contractor of the employer on account of injury, illness, or death . . . .
>
> *No role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder* other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple *roles, capacities, or personas the employer* may be deemed to have . . . .[79]

The Oklahoma Supreme Court acknowledged that this language expressly abrogated any dual capacity concept with regard to employers.[80] As the court notes, however, the statute's language regarding stockholder liability is susceptible to multiple interpretations where the provision purports to exclude additional remedies against employers and stockholders alike, but then only abrogates the dual capacities of an *employer*.[81]

To further confuse matters, the Arkansas workers' compensation statute, which Oklahoma modeled its own exclusive remedy provision on, only limited stockholder liability when they are "acting in [their] capacity as an employer."[82] Although the Oklahoma Legislature may have intended to expand protections afforded to stockholders of the employer,[83] to give them complete immunity in every context would generate absurd outcomes.[84] For example, in the opinion certifying the questions raised in *Odom* to the Oklahoma Supreme Court, the U.S. Court of Appeals for the 10th Circuit set forth a hypothetical where a dog injures an employee of a publicly-traded cable company while the employee installs a customer's television cable service.[85] However, the client also happens to own a few shares of stock in the cable company.[86] Without any context, the Oklahoma statute could be read to completely bar the employee from bringing a claim

79. OKLA. STAT. ANN. tit. 85A, § 5 (emphasis added).

80. *Odom*, 415 P.3d at 527.

81. *Id.* at 528–29.

82. ARK. CODE ANN. § 11-9-105.

83. *Odom*, 415 P.3d at 529.

84. *Id.* at 532 ("[A]n interpretation that extends the protections of the exclusivity provision absolutely to potentially legally distinct non-employer entities such as stockholders, regardless of how passive their connection to the employment relationship is, goes far beyond that original purpose and conflicts with later portions of [the exclusive remedy provision].").

85. Odom v. Penske Truck Leasing Co., 704 F. App'x 780, 783 (10th Cir. 2017).

86. *Id.*

against the client.[87] Since it is doubtful the Oklahoma Legislature intended such a result, the court argued, the statute's only reasonable interpretation is that a stockholder may be shielded from liability as a third party under the exclusive remedy provision when the stockholder is "acting in the role of employer," and not "a mere passive stockholder."[88]

This same concept can also be interpreted to extend immunity to a stockholder acting as a co-employee or other corporate officer, since many state exclusive remedy provisions prohibit actions for negligence against both the employer and agents of the corporate employer.[89] Ultimately, the irony in this line of reasoning is that, while most states refuse to acknowledge the dual capacity doctrine to create employer liability, the doctrine is statutorily authorized and judicially extended to afford immunity to shareholders when they act in such dual (or even triple) capacities.[90] In theory, these concepts can be applied to the Texas Workers' Compensation Act without doing any significant harm to the purposes behind the exclusive remedy provision.[91]

3. Applications in Texas

The exclusive remedy provision in the Texas Workers' Compensation Act does not expressly prohibit application of any dual capacity or persona concept as to either an employer or a stockholder.[92] In fact, there is one Texas case which implicitly acknowledged the possibility of a dual persona scenario in the premises liability context between an employee and

87. *Id.*

88. *Odom*, 415 P.3d at 533.

89. *See, e.g.*, TEX. LAB. CODE ANN. § 408.001(a) (extending immunity to both employers, their agents, and co-employees); *cf.* Miller v. Massullo, 432 N.W.2d 429, 432 (Mich. Ct. App. 1988) (asserting co-employee could not maintain WCA immunity where his act of leasing a tractor-trailer to the company that employed him and injured the employee was outside the scope of his employment for company); Robards v. Kantzler's Estate, 296 N.W.2d 265, 267–68 (Mich. Ct. App. 1980) (explaining how the president of corporate employer could not invoke the WCA exclusive remedy because leasing machinery which injured the employee to the corporation wasn't within scope of employment).

90. *See, e.g.*, Jackson v. Gibson, 409 N.E.2d 1236, 1238–39 (Ind. Ct. App. 1980) (refusing to hold sole shareholder of corporate employer liable as owner of land where employee was injured because shareholder was also president of corporate employer).

91. *See* Cohn v. Spinks Indus., Inc. 602 S.W.2d 102, 104 (Tex. App.—Dallas 1980, writ ref'd n.r.e.) (arguing adoption of the dual capacity doctrine would do considerable violence to Texas' workers' compensation statute); *cf. supra* Part IV (explaining why the dual persona doctrine does not implicate the same concerns as the dual capacity doctrine).

92. *See* TEX. LAB. CODE ANN. § 408.001(a) (establishing immunity only for employers and their agents).

shareholder of the corporate employer,[93] so other appellate courts should find at least some merit in the doctrine's general applicability to Texas law. First, Texas courts can easily argue that the corporate form creates a legal distinction between the corporate employer and its shareholders that justifies maintaining the independent obligations such shareholders may have as the owners or possessors of land.[94] Absent compelling reasons otherwise, it makes little sense to allow a shareholder to double-dip in the trough of limited liability.[95] Assuming application of the dual persona concept under this scenario, the simplest ways shareholders can reduce their risk of exposure is to not lease property to corporations they have an interest in or to transfer their ownership in the leased property to the corporation—thereby consolidating such liability directly in the already-immune corporate employer. However, this application does not consider the managerial or co-employee status that some shareholders maintain within a corporate employer.

The Texas Workers' Compensation Act does create statutory immunity for agent and co-employee negligence within the scope of employment.[96] Therefore, Texas courts can readily follow the Oklahoma Supreme Court's analysis and give shareholders immunity under the Workers' Compensation Act, assuming they are acting as employers, officers, or co-employees, rather than as mere passive investors.[97] Both the expanded and limited methods have their merits, and additional Texas courts will undoubtedly illuminate the better approach as the facts of future cases dictate. But more importantly, the fact that a dual persona scenario in the shareholder context

93. *See* Burkett v. Welborn, 42 S.W.3d 282, 288–290 (Tex. App.—Texarkana 2001, no pet.) (acknowledging Texas precedent rejecting the dual capacity doctrine, but allowing employee's premises liability claim against a shareholder of the corporate employer to survive summary judgment where the shareholder owned property upon which the employee was injured and where it was unclear whether the shareholder had co-employee immunity under TWCA).

94. *See* LaBelle v. Crepeau, 593 A.2d 653, 655 (Me. 1991) ("[W]e do not ignore the corporate entity in order to allow a shareholder to avoid the burdens of incorporation.").

95. Even if there is such "unity between corporation and [an individual shareholder] that the separateness of the corporation has ceased," reverse-veil-piercing is not an appropriate remedy absent an injustice that would otherwise occur—such as fraud or circumvention of a statute. Richard Nugent & CAO, Inc. v. Estate of Ellickson, 543 S.W.3d 243, 266–67 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (quoting Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986)).

96. TEX. LAB. CODE ANN. § 408.001(a).

97. *Compare* Odom v. Penske Truck Leasing Co., 415 P.3d 521, 532 (Okla. 2018) (limiting shareholder liability when acting as employer), *and* Jackson v. Gibson, 409 N.E.2d 1236, 1238–39 (Ind. Ct. App. 1980) (limiting shareholder liability when acting as corporate officer), *with* LAB. § 408.001(a) (establishing immunity for co-employees).

has already been acknowledged by at least one Texas court should only bolster support for applying the next dual persona addressed in this Comment—the liability of employers as manufacturers and designers of defective products.

C. *Liability as Designer and Manufacturer of a Defective Product*

Any company or person that manufactures or produces a product sold to the public has the duty to make sure the product is safe for public use and consumption.[98] Generally, if an end-user is injured by an unreasonably dangerous product that was defectively designed or manufactured, the manufacturer, suppliers, and dealers may be held strictly liable.[99] But what if the defective product injures an employee of the manufacturer? Just as with premises liability theory, strict products liability cannot be applied without jettisoning the workers' compensation schemes' exclusive remedy provision.[100] So, a few state courts initially invoked the dual capacity doctrine to hold an employer liable to an injured employee as manufacturer of a defective product.[101] However, the doctrine's utility as a work-around quickly faded as courts and legal scholars acknowledged the same concerns

98. James C. Webber, *Dual Capacity in California: A Premature End to An Equitable Doctrine*, 59 S. CAL. L. REV. 205, 209 (1985).

99. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."); Gina Vaccaro Fulkerson, Comment, *Workers' Compensation: Dual Capacity in Texas—When the Employer "Wears Two Hats"*, 34 BAYLOR L. REV. 473, 476–77 (1982) (discussing different parties who may be held liable for a defective product under strict liability theory); Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 899–901 (Cal. Ct. App. 1963) (discussing the history of strict liability cases for unwholesome foods and express or implied warranties and extending strict liability to all defectively made products regardless of privity between the producer and end-user). Note that Texas law departs from the Second Restatement by limiting strict products liability for manufacturers to inherently unsafe products and design defects where a safer alternative existed. TEX. CIV. PRAC. & REM. CODE § 82.004 (2021) (inherently unsafe products); *id.* § 82.005(a) (safer alternative design).

100. *See* Fulkerson, *supra* note 99, at 477–78 (setting forth hypotheticals highlighting the inherent conflict between exclusive remedy provisions and strict products liability claims of employees).

101. *See id.* at 481–82 (discussing the history of invoking dual capacity theory in products liability cases).

that defeated the dual capacity theory in the case of owners and occupiers of land.[102]

Dual capacity theory is "not concerned with how separate or different the second function of the employer is from the first, but whether the second function generates obligations unrelated to those flowing from that of employer."[103] As noted previously, an employer may have both a duty to provide a safe work environment to employees and a similar duty to provide safe premises to invitees as a landowner.[104] Analogously, "[i]f an employer provides an employee with a defective machine or tool to use in his work, he has breached his duty as a manufacturer to make safe machinery, and his duty as an employer to provide a safe working environment."[105]

But providing the defective product to an employee does not thereby transform the employer's obligations to provide a safe workplace into something else simply because the danger came from a product manufactured by the employer, rather than some other danger on the business's premises.[106] Without something more, there is nothing material to distinguish these duties. Undeterred, a handful of courts found sufficient justification to distinguish these duties where manufacturers provided their defective products to employees and also sold those products to the general public.[107] The main thrust of this argument is that manufacturers and

102. *See* 10 LARSON, *supra* note 10, § 113.03 ("It is now held with virtual unanimity that an employer, who is also the manufacturer, modifier, installer, or distributor of a product used in the work, cannot be held liable in damages to its own employee on a theory of products liability.").

103. Schump v. Firestone Tire & Rubber Co., 541 N.E.2d 1040, 1044 (Ohio 1989) (quoting Weber v. Armco, Inc., 663 P.2d 1221, 1226–27 (Okla. 1983)).

104. *See* Hilgart v. 210 Mittel Drive P'ship, 978 N.E.2d 710, 717 (Ill. App. Ct. 2012) ("As president and vice president of Hilgart's employer, Leturno's and Lisowski's duty was to furnish Hilgart with a safe place to work, a duty related to the common-law duty of a landowner to provide safe premises.").

105. *Schump*, 541 N.E.2d at 1045.

106. *See id.* ("[These] two duties are so inextricably wound that they cannot be logically separated into two distinct legal [capacities or] personas.").

107. *See* Estep v. Rieter Auto. N. Am., Inc., 774 N.E.2d 323, 328 (Ohio Ct. App. 2002) (refusing to hold an employer liable where the employer did not manufacture the pinch roller machine for sale to the general public and employee's injury by the machine occurred within scope of employment); *see also* Mercer v. Uniroyal, Inc., 361 N.E.2d 492, 496 (Ohio Ct. App. 1976) (holding an employee could pursue a products liability action against the employer in its capacity as a manufacturer of defective tires on a vehicle, resulting in the employee's work-related injuries, where the employee's use of the employer's tires was merely a coincidence); Douglas v. E. & J. Gallo Winery, 137 Cal. Rptr. 797, 802–03 (Cal. Ct. App. 1977) (applying the dual capacity doctrine to hold an employer liable as manufacturer of scaffolding sold to the general public where the scaffolding was also used by injured employees on the job).

sellers take on special responsibilities when disseminating a product for general consumption, regardless of any employment relationship.[108] However, the Ohio Supreme Court case, *Schump v. Firestone Tire & Rubber Co.*,[109] explains why this line of reasoning is ultimately flawed.[110]

1. Does "Stream of Commerce" Really Matter?

Warren Schump was employed by Firestone Tire & Rubber Company (Firestone) as a truck driver.[111] Schump was injured on the job when one of the tires on his work truck—manufactured by Firestone—blew out.[112] Schump brought suit against Firestone, alleging several theories of products liability.[113] Firestone argued that Schump's sole remedy was mandatory employment compensation benefits under Ohio's workers' compensation statute.[114] Schump responded that the dual capacity doctrine applied to hold Firestone liable as the manufacturer of the tires, rather than as his employer, because Firestone manufactures its product for general consumption.[115] The Ohio Supreme Court, however, recognized the real issue in this case—whether or not the tires were provided to Schump within the scope of employment.[116]

In a similar Ohio case, *Mercer v. Uniroyal*,[117] the plaintiff was employed as a truck driver by American Stevedoring Corporation (ASC).[118] ASC had an agreement with a tire manufacturer, Uniroyal, whereby ASC would lease its truck drivers, including the plaintiff, to Uniroyal.[119] When the plaintiff was injured on the job, he and another employee were using a work truck leased by Uniroyal from a third-party vendor, which happened to be

108. *See* Fulkerson, *supra* note 99, at 478 (arguing manufacturers should not be entitled to assume the benefits of disseminating a product without the adjoining burden of liability simply because of their relationship to one of the end-users).

109. Schump v. Firestone Tire & Rubber Co., 541 N.E.2d 1040 (Ohio 1989).

110. *See id.* at 1045 (refusing to hold an employer liable as manufacturer of a defective product sold both to an employee and the general public).

111. *Id.* at 1041.

112. *Id.*

113. *Id.*

114. *Id.* at 1042.

115. *Id.*

116. *Id.* at 1045.

117. Mercer v. Uniroyal, Inc., 361 N.E.2d 492 (Ohio Ct. App. 1976).

118. *Id.* at 493.

119. *Id.* Although the plaintiff was still technically employed by ASC at the time of the accident, the court determined that the plaintiff was also an employee of Uniroyal for workers' compensation purposes. *Id.* at 494.

equipped with defective Uniroyal tires.[120] The *Mercer* court found that the employee could maintain a products liability action against Uniroyal as the manufacturer of the defective tires, notwithstanding the exclusive remedy provision, because "[i]t was only a matter of circumstance that the tire on the truck . . . was a Uniroyal tire rather than a Sears, Goodyear or Goodrich."[121] Even the California Legislature acknowledged this distinction, despite abolishing the dual capacity doctrine, when it made special license for employer liability where the employer manufactured the defective product and the product came into the employee's possession through a third-party vendor.[122]

In contrast, the plaintiff's work truck in *Schump* was equipped with Firestone tires per Firestone's company policy and solely as an incident of the employment relationship.[123] The fact that Firestone also sells tires to the general public does not change this fact and ultimately has no bearing on Firestone's obligations to its employees within the scope of employment.[124] No one would suggest that a manufacturer-employer's obligations to an employee magically change if the employer sold only 1% of its product to outside vendees, so why would it matter if the manufacturer sold 90% to outside vendees?[125] This analysis has not settled the issue, however, as some courts have found another justification to allow an employer to be held strictly liable for a defective product via the dual persona doctrine.

120. *Id.* at 493, 496.

121. *Id.* at 496.

122. CAL. LAB. CODE § 3602(b)(3) ("An employee . . . may bring an action at law for damages against the employer . . . [w]here the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.").

123. Schump v. Firestone Tire & Rubber Co., 541 N.E.2d 1040, 1045 (Ohio 1989).

124. *See id.* ("[W]hat matters is that . . . the product was manufactured as an adjunct of the business[] and furnished to [the plaintiff] solely as an employee, not as a member of the consuming public. What the employer does with the rest of his output could not change this central fact."); Bakonyi v. Ralston Purina Co., 478 N.E.2d 241, 244 (Ohio 1985) (holding employee of pesticide distributor could not maintain products liability action where the employee's injuries arose from "the employment use, not the public sale use"); *see also* Ocasek v. Krass, 505 N.E.2d 1258, 1260 (Ill. App. Ct. 1987) (finding a duty to the general public does not, by itself, create or justify separate personas or capacities).

125. *See* 10 LARSON, *supra* note 10, § 113.03 (providing a hypothetical of a scaffolding manufacturer selling products to the general public and having their employees use the same products).

2. Dual Personas of Corporate Successors in Interest

As previously discussed, the dual persona doctrine is a version of dual capacity theory that allows circumvention of the exclusive remedy provision mandated under state workers' compensation schemes when "the employer has a second identity which is completely distinct and removed from his status as employer."[126] Similar to the liability some shareholders of a corporate employer may owe to an employee as the owners or occupiers of land, the dual persona doctrine can also be utilized to hold an employer liable as the successor in interest to the manufacturer of a defective product that injures an employee of the corporate successor.[127]

There are several methods of one corporation acquiring ownership of another corporation, including: purchase of a majority of a company's stocks; purchase of a company's assets; and merger of the two companies.[128] These different forms of acquisition can have different effects on who ends up holding the selling company's bag of unknown liabilities.[129] When the selling corporation's stock is purchased, only the shareholders have changed, and the corporate form of the seller is preserved.[130] The liabilities remain with the selling company but simply under new ownership.[131] If another corporation purchases the selling company's assets, the parties will iron out a contract stipulating who will retain which liabilities.[132] Merger of the two corporations results in the termination of the selling corporation's existence,[133] leaving a single surviving corporation or the creation of a wholly new corporate entity.[134] Contrary to the other forms of acquisition, states statutorily require the surviving or new corporation to assume the pre-merger liabilities of the

126. Howard v. White, 523 N.W.2d 220, 222 (Mich. 1994) (quoting Wells v. Firestone Tire & Rubber Co., 364 N.W.2d 670, 675 (Mich. 1984)).

127. *See, e.g.*, Gurry v. Cumberland Farms, Inc., 550 N.E.2d 127, 131 (Mass. 1990) (holding corporate employer was not immune from tort liability to employee injured by predecessor corporation's manufacture of defective machine where predecessor would have been liable to employee as third party).

128. Byron F. Egan, *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 PENN ST. L. REV. 913, 914 (2012).

129. *Id.* at 932.

130. *Id.*

131. *Id.*

132. *Id.*

133. TEX. BUS. ORGS. CODE ANN. § 10.008(a)(1).

134. *Id.* (explaining termination of corporate existence applies to entities "other than a surviving or new domestic entity").

predecessor corporation.[135] There are different theories of corporate successor liability,[136] but this Comment focuses on statutorily mandated and contractually agreed assumptions of corporate liabilities based on these general forms of acquisition.

The principal case highlighting corporate successor liability under the dual persona doctrine is *Billy v. Consolidated Machine Tool Corporation*.[137] In 1976, Joseph Billy was killed on the job when a two-ton section of a vertical boring mill broke away and fell on him.[138] The boring mill was designed and manufactured in the 1950s by Consolidated Machine Tool Corporation (Consolidated) and installed by Farrel-Birmingham Company (Farrel).[139] In 1954, Consolidated merged into Farrel.[140] In 1968, Farrel was acquired by and merged into USM, decedent's employer.[141] The plaintiff, decedent's wife, brought suit against USM in its capacity as the owner of the property where the decedent's injury occurred, and as the successor in interest of Consolidated and Farrel—the companies that designed, manufactured, and installed the allegedly defective machinery resulting in Joseph Billy's death.[142] In the trial court, USM moved for summary judgment on the grounds that the plaintiff's suit was barred by New York's workers' compensation statute,[143] which limits an employee's remedy for work-related injuries to employment compensation benefits.[144]

On appeal, the New York Court of Appeals discussed the history of the dual capacity doctrine and reasserted New York's general rejection of the theory.[145] However, the court distinguished *Billy* on the grounds that the plaintiff would have been entitled to bring suit against both Consolidated and Farrel as third parties if they had not merged with the decedent's

135. *See, e.g.*, *id.* § 10.008(a)(3) ("When a merger takes effect . . . all liabilities and obligations of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger.").

136. *See* Egan, *supra* note 128, at 934 (discussing the nine different methods of holding a successor in interest liable for the predecessor's obligations).

137. Billy v. Consol. Mach. Tool Corp., 412 N.E.2d 934 (N.Y. 1980).

138. *Id.* at 937.

139. *Id.*

140. *Id.* at 937–38.

141. *Id.*

142. *Id.* at 938–39.

143. *Id.* at 937.

144. N.Y. WORKERS' COMP. Law § 11 (McKinney 2020).

145. *Billy*, 412 N.E.2d at 938–39.

employer.[146] USM conceded that it succeeded to the liabilities of Consolidated and Farrel via New York's state merger statute.[147] "That USM also happens to have been the injured party's employer," the court argued, "is not of controlling significance, since the obligation upon which it is being sued arose not out of the employment relation, but rather out of an independent business transaction between USM and Farrel."[148] This line of reasoning has been echoed by several other jurisdictions, including Kansas, Illinois, and Delaware.[149] There are, however, potential limitations to how far the dual persona doctrine can be stretched in this context.

3. Immunities of Corporate Successors in Interest

A few courts have determined that the acquisition of one company by another does not always mean the successor corporation will lose the employer immunity status generated by the exclusive remedy provision. In *Herbolsheimer v. SMS Holding Company*,[150] Royce Herbolsheimer was killed after a piece of metal on the turning machine[151] he operated as an employee for Saginaw Machine Systems (SMS) broke through a modified protective window and struck him in the head.[152] The defective window on the turning machine had been modified after it was sold to the Saginaw Machine and Tool Division of the Wickes Corporation (SMT).[153] Through a series of asset transfers and stock purchases, SMT was acquired by SMS Holding

146. *See id.* at 940 ("Conceptually, the [plaintiff] is suing not the decedent's former employer, but rather the successor to the liabilities of the two alleged tort-feasors."); 10 LARSON, *supra* note 10, § 113.01 (acknowledging corporate successor liability as a viable example of a dual legal personality, which emphasizes distinctions between dual capacity and dual persona doctrines).

147. *See Billy*, 412 N.E.2d at 940 ("USM has not seriously disputed that it had succeeded to the liabilities and obligations of Consolidated and Farrel-Birmingham as a result of the 1968 merger.").

148. *Id.*

149. *See* Kimzey v. Interpace Corp., 694 P.2d 907, 911–12 (Kan. Ct. App. 1985) (allowing an employee to proceed in an action against the employer as the successor in interest to the manufacturing corporation); Robinson v. KFC Nat'l Mgmt. Co., 525 N.E.2d 1028, 1029 (Ill. App. Ct. 1988) (concluding an exclusive remedy provision did not preclude a tort action by an employee against the employer when the employer merger with the negligent predecessor prior to employee's injuries); Stayton v. Clariant Corp., 10 A.3d 597, 601–603 (Del. 2010) (affirming exclusive remedy under workers' compensation act was not designed to preclude third-party tort liability of corporate successor to employee for defects in modifications made to machinery by the predecessor company).

150. Herbolsheimer v. SMS Holding Co., 608 N.W.2d 487 (Mich. Ct. App. 2000).

151. A turning machine spins pieces of metal at high rates of speed. *Id.* at 489.

152. *Id.* at 489–90.

153. *Id.* at 490.

Company, Inc. (the Holding Company) and had its name changed to SMS, the company that would later hire decedent.[154]

The plaintiff, as the representative of the decedent's estate, brought claims against the Holding Company and SMS as the purported successors in interest to SMT.[155] The Michigan appellate court acknowledged the dual persona doctrine's logic in the successor corporation context,[156] but it chose a narrower interpretation requiring further analysis.[157]

First, the court argued the injured employee needed to have an independently cognizable claim against the predecessor corporation, as this creates the basis for the successor corporation's liability.[158] Before SMT was acquired by the Holding Company, the turning machine was only used by SMT employees within the scope of employment.[159] Therefore, the court suggested, the only duties SMT could have had regarding the safety of the modified machine would have been to its own employees.[160]

Second, the court asserted that the dual persona analysis needs to account for the immunities the predecessor corporation would have if it was still in existence at the time of the decedent's injury.[161] If an employee of SMT had been injured by the defective machine in the same way the decedent was, SMT would have been entitled to immunity under the exclusive remedy provision.[162] "Thus, the decedent here could not have sued SMT had he been injured as an employee of SMT, and he was only in a position to be injured by the machine as an employee of SMS."[163] Although the dissent

154. *Id.*

155. *Id.*

156. *See id.* at 494–95 (asserting the plaintiff can look to a third party as tortfeasor which theoretically removes the obstacle of the exclusive remedy provision).

157. *See id.* at 495 (seeking a narrower interpretation of the dual persona doctrine since it is a judicial fiction which impedes on the will of the legislature); *id.* at 496 ("Although plaintiff argues that 'successor liability' may form the basis of a dual-persona suit, accepting this idea in theory does not end the inquiry.").

158. *Id.* at 496.

159. *Id.*

160. *Id.* Of course, as the dissent points out, it is entirely possible that someone other than an employee could have been injured by the defective window, such as a visitor to the factory. *Id.* at 501 n.6 (Hoekstra, J., dissenting).

161. *See Herbolsheimer*, 608 N.W.2d at 496 (emphasizing a successor corporation takes on not just the liabilities of the predecessor, but also its immunities and defenses).

162. *Id.*

163. *Id.* at 496–97.

points out that this argument rings of the previously discredited "stream of commerce" justification,[164] the majority notes that

> The idea of introducing goods into the "stream of commerce" is relevant only insofar as this provides an actual legal claim against the predecessor and therefore against the successor in liability under the facts in a specific case. Thus, in this case, there would be an identifiable legal obligation if SMT had sold or leased the machine to SMS, where the decedent was killed by it. In that case, although the decedent was employed by SMS, who was also the successor in liability to SMT, SMT would have had legal obligations to the buyers or lessors of its machine that could be separated from the obligations of SMS as the employer.[165]

Although the dissent cites this as a weak factual distinction,[166] it has found traction in a few other jurisdictions who have limited the dual persona doctrine under similar reasoning.[167] Therefore, there are ultimately two approaches to the dual persona version of dual capacity theory that can be applied to hold a successor corporation liable to an employee under Texas law.

4. Applications in Texas

When a Texas corporation assumes the liabilities of a predecessor corporation, either via statutory merger or agreement, it is clear that the successor's employee should not be barred from pursuing a cause of action against the employer in its persona as successor in interest to the predecessor for a defectively designed or manufactured product that injures

164. *See id.* at 498, 500 (Hoekstra, J., dissenting) ("[The majority essentially] argues that goods cannot be the source of [dual persona] liability unless the predecessor corporation manufactured them for resale.").

165. *Id.* at 497.

166. What meaningful distinction exists between sale of the defective product during the merger as opposed to a sale prior to it? *Id.* at 501 (Hoekstra, J., dissenting). The successor ends up holding the bag of liabilities nonetheless, and this factual distinction becomes potentially untenable. *See id.* at 500 (Hoekstra, J., dissenting) ("Unfortunately, ambiguity plagues the stream of commerce concept, and it eventually forces courts to draw meaningless distinctions.").

167. *See* Corr v. Willamette Indus., Inc., 713 P.2d 92, 95–96 (Wash. 1986) (refusing to apply dual capacity doctrine where negligent predecessor would have been protected by exclusivity rule); Braga v. Genlyte Grp., 420 F.3d 35, 44 (1st Cir. 2005) (refusing to use merger statute as tool to increase, rather than merely sustain continued existence, of corporate predecessor's liabilities); Griffin, Inc. v. Loomis, Fargo & Co., 979 So. 2d 416, 418 (Fla. Dist. Ct. App. 2008) (arguing dual persona doctrine is designed to prevent injustice, not create additional liabilities).

the successor's employee. If the two companies had never merged, the employee would have a cause of action against the negligent manufacturer.

There is, however, some authority to support the proposition that the predecessor's immunities as an employer can affect those of the successor via the "stream of commerce" argument. If the predecessor is a subscriber under the Texas workers' compensation scheme and only ever used the defectively manufactured product in-house, the successor's employee would have been in no different position than an employee of the predecessor *vis-à-vis* the exclusivity rule. Even though Texas courts could readily pursue either approach to establish a relatively limited application of the dual persona doctrine, the few Texas cases that have considered this scenario refused to apply either method.

In the 1985 Texas case, *Davis v. Sinclair Refining Co.*,[168] the Houston Court of Appeals considered and rejected the plaintiff's claim that his employer should be held liable as the successor in interest.[169] Sinclair Refining owned and operated a refinery and made several modifications to the crude oil distillation unit on site, including the installation of a carbon steel pipe connection to a hot asphalt pump.[170] However, the design called for a different alloy.[171] Sinclair Refining eventually merged into Arco in 1969.[172] Shortly thereafter, Davis was hired by Arco and was injured on the job when the carbon steel pipe connection to the asphalt pump broke free, covering Davis in hot asphalt.[173] Because the injury was work-related, Davis received employment compensation benefits.[174] Davis subsequently sued Arco as Sinclair Refining's successor in interest for the negligent installation of the incorrect pump pipe.[175]

In only three pages, the Houston Court of Appeals wholly rejected the argument that Arco should be responsible for Sinclair's negligence, despite assuming its liabilities under the Texas merger statute, summarily stating that "[Davis] should not be allowed to use his employee status for purposes of claiming benefits under the Workers' Compensation Act, then attempt to

168. Davis v. Sinclair Refin. Co., 704 S.W.2d 413 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

169. *Id.* at 414–16.

170. *Id.* at 414.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

distinguish that status for purposes of invoking the third-party tortfeasor exception to the Act."[176]

In a similar Texas case from 2009, *Union Carbide Corporation v. Smith*,[177] the plaintiff-employee, Oliver Smith, was diagnosed with lung cancer caused by repeated exposure to asbestos at his employer's facility.[178] Smith first worked at the facility that caused his exposure to asbestos as an employee for Smith-Douglas.[179] Smith-Douglas was subsequently purchased by Hexion.[180] Smith continued on as an employee of Hexion after the merger, and Hexion obtained workers' compensation insurance for its employees.[181]

The district court only allowed the plaintiff to proceed on his claims against Hexion as successor in interest to Smith-Douglas for asbestos exposure that occurred prior to the merger of the two companies.[182] The Houston Court of Appeals reversed, however, opining that the plaintiff's claims were barred because Hexion was a subscriber under the Texas Workers' Compensation Act, and the plaintiff had been an employee of both companies.[183] But a cursory examination of the facts shows that this does not paint the full picture.

Hexion may have been a subscriber under the workers' compensation statute—thus creating employer immunity—but Smith-Douglas was not.[184] This clearly implicates a dual persona scenario, because the plaintiff could have sued Smith-Douglas as a non-subscribing employer unprotected by the exclusive remedy provision.[185] Therefore, Hexion should not be allowed to retroactively apply its workers' compensation insurance to a time when it was not in force to circumvent its liabilities via the merger. However, the appellate court reiterated Texas's general rejection of any dual

176. *Id.* at 416.

177. Union Carbide Corp. v. Smith, 313 S.W.3d 370 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

178. *Id.* at 373. Although this case is based on premises liability theory rather than product defect theory, the employer's inchoate liabilities as the successor corporation are the main point in issue. *Id.* at 373, 378.

179. *Id.* at 379.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 381.

184. Brief for Appellee at 1, Union Carbide Corp. v. Smith, 313 S.W.3d 370 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (No. 01-08-00641-CV), 2009 WL 994623.

185. *Cf.* Herbolsheimer v. SMS Holding Co., 608 N.W.2d 487, 496 (Mich. Ct. App. 2000) (suggesting the predecessor's immunity essentially "transfers" to the successor).

capacity or dual persona theory, simply stating, "[t]he 'dual-persona' doctrine has never been adopted by a Texas court as a means for imposing liability on a subscribing employer and avoiding the exclusive remedy provision of the Act."[186] As the next section will show, this is a recurring theme in Texas cases that represents a simplistic response to a complex issue.[187]

IV. LOOKING AT THE LONE STAR STATE

A. *Judicial Precedent So Far*

In the Texas Supreme Court case, *Payne v. Galen Hospital Corporation*,[188] the plaintiff, formerly employed as a nurse at the defendant-hospital, sustained an adverse reaction to a medication prescribed to her by an outside physician for a work-related injury, and she thereafter sued the hospital as the vendor/distributor of medication.[189] Although the court ultimately ruled that the dual capacity doctrine was inapplicable under these facts, it made two notable points.[190] First, the court implicitly refused to foreclose future applications of dual capacity theory in different scenarios.[191] Second, the court acknowledged the possibility that compensability under the Workers' Compensation Act may not automatically equate to exclusivity of remedy.[192] In fact, by this point in time, the Texas Supreme Court had already decided another case which called into question the idea that dual capacities or personas could never be implicated under the Workers' Compensation Act.[193]

In the 1982 Texas Supreme Court case, *Harris v. Casualty Reciprocal Exchange*,[194] Paul Stone received a fatal gunshot wound while working as

186. Union Carbide Corp. v. Smith, 313 S.W.3d 370, 382 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

187. Kelly, *supra* note 2, at 833.

188. Payne v. Galen Hosp. Corp., 28 S.W.3d 15 (Tex. 2000).

189. *Id.* at 16–17.

190. *Id.* at 20–21.

191. *See id.* ("We have never decided whether an employee may use the dual-capacity doctrine to avoid the Act's exclusive-remedy provision. But even if we were inclined to recognize the doctrine, which we do not decide, it does not apply here.").

192. *See id.* at 19 ("Whether or not 'compensability' and 'exclusivity' are always and for all purposes coextensive, which we do not decide, we hold that they are coextensive here.").

193. *See* Harris v. Cas. Reciprocal Exch., 632 S.W.2d 714, 715 (Tex. 1982) (treating corporate officer as employee for employment compensation purposes).

194. Harris v. Cas. Reciprocal Exch., 632 S.W.2d 714 (Tex. 1982).

the interim night manager at the Green House, a club in Austin.[195] Marju Enterprises (Marju), for which Stone was also a corporate officer and director, was doing business as the Green House.[196] The executors of Stone's estate, the plaintiffs, brought suit against Marju's insurance carrier, Casualty Reciprocal Exchange (Casualty), claiming that Stone's estate was entitled to employment compensation benefits for the work-related injury.[197]

Casualty responded that Stone, as corporate officer, was not covered under Marju's employment compensation insurance,[198] and was thus not entitled to compensation benefits.[199] However, Stone was not acting in his capacity as a corporate officer when the fatal injury occurred, but rather as an employee—who would otherwise have been entitled to employment compensation benefits under Marju's insurance coverage.[200] Therefore, "[g]iven these facts," the court summarily stated, "we hold that Stone was an 'employee' at the time of his death and thereby came within the provisions of the workers' compensation act, and that the benefits sought by his survivors should have been awarded."[201]

Based on these two cases, it is clear that the Texas Supreme Court has not completely disavowed dual capacity theory. However, the Texas Appellate Courts are another matter. In *Cohn v. Spinks Industries, Inc.*,[202] the Dallas Court of Civil Appeals was unwilling to apply the dual capacity doctrine for two principal reasons: (1) it circumvents the state legislature's intent that workers' compensation benefits should exist in derogation of an employee's other common law remedies;[203] and (2) extending such judicial exceptions would all-but destroy the workers' compensation scheme in Texas.[204] Since *Cohn*, every other intermediate appellate court in Texas that has considered a dual capacity scenario used the same justifications for not

195. *Id.* at 714.

196. *Id.*

197. *Id.*

198. *Id.* at 715. The Texas Workers' Compensation Law was revised in 1967 to make workers' compensation insurance elective for corporate officers. TEX. REV. CIV. STAT. ANN. art. 8309, § 1(a) (1967).

199. *Harris*, 632 S.W.2d at 715.

200. *Id.*

201. *Id.* at 719.

202. Cohn v. Spinks Indus., Inc., 602 S.W.2d 102 (Tex. App.—Dallas 1980, writ ref'd n.r.e.).

203. *See id.* at 104 (suggesting legislative intent as primary reason why courts in other jurisdictions refuse to apply dual capacity theory).

204. *See id.* ("To adopt the dual capacity doctrine would do considerable violence to the statutory language.").

applying the doctrine.[205] Therefore, the next section will address why the reasons for declining to apply traditional dual capacity theory are not implicated in the dual persona context.

B. *Legislative Intent and Practical Implications*

1. Legislative Intent and Statutory Construction

There are two main starting points for statutory construction in Texas. First, the courts will look to the plain meaning of the statute, as the statute's words are the best indicator of what the legislature intended.[206] Second, Texas courts presume that the legislature enacts new laws with complete knowledge of other laws already in existence and force.[207] Section 401.011 of the Texas Labor Code clearly defines an employer as "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage."[208] And pursuant to Section 408.001 of the Texas Labor Code, subscribing employers are shielded from liability to an employee for any work-related negligence by the employer.[209] However, third parties may still be held liable under the Texas Workers' Compensation Act.[210]

The traditional version of the dual capacity doctrine is limited in that it does not separate the employer from the third party truly responsible for

205. *See* Holt v. Preload Tech., Inc., 774 S.W.2d 806, 807 (Tex. App.—El Paso 1989, no writ) (opining legislative intent and negative impact preclude dual capacity's use); Darensburg v. Tobey, 887 S.W.2d 84, 87 (Tex. App.—Dallas 1994, writ denied) (asserting compensation benefits are the only intended remedy under WCA); Gore v. Amoco Prod. Co., 616 S.W.2d 289, 290 (Tex. App.—Houston [1st Dist.] 1981, no writ) (explaining the intent of WCA is exclusiveness of remedy and adding exceptions would harm employment compensation system as a whole); *cf.* Davis v. Sinclair Refin. Co., 704 S.W.2d 413, 415 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (declining to apply dual persona doctrine where legislature intended compensation benefits to be exclusive remedy); Union Carbide Corp. v. Smith, 313 S.W.3d 370, 381 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (arguing public policy prohibits using corporate merger statutes to circumvent exclusivity rule). *But see* Burkett v. Welborn, 42 S.W.3d 282, 290 (Tex. App.—Texarkana 2001, no pet.) (holding shareholder of corporate employer could be sued in her capacity as landowner of premises where corporate employee was injured).

206. *In re* Huag, 175 S.W.3d 449, 451 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

207. Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 414–15 (2012).

208. TEX. LAB. CODE ANN. § 401.011(18).

209. *Id.* § 408.001(a).

210. *Id.* § 417.001(a).

the employee's injuries.[211] Although many persons or corporations occupy multiple differing obligations, there remains only one person or entity responsible for them.[212] And as Professor Larson suggests,

> When one considers how many such added relations an employer might have in the course of a day's work—as landowner, land occupier, products manufacturer, installer, modifier, vendor, bailor, repairman, vehicle owner, shipowner, doctor, hospital, health services provider, self-insurer, safety inspector—it is plain enough that this trend could go a long way toward demolishing the exclusive remedy principle.[213]

This ultimately is what distinguishes the dual persona doctrine from its predecessor. We are not required to resort to a judicially created fiction to generate a separate liability,[214] but can rather look to two—very real—third-party scenarios created via the Texas Business Organizations Code.

There is no statute expressly establishing the separate legal status of a corporation from its shareholders, but Texas courts presume this distinction exists;[215] otherwise the limited liability for shareholders generated by Section 21.223 of the Business Organizations Code[216] would be meaningless. A shareholder is not usually treated as the corporate employer,[217] and absent the shareholder acting in a role which might create immunity under the exclusive remedy provision,[218] there is no genuine conflict between these sections of the Texas Labor Code and Texas Business Organizations Code. When there is no genuine issue between laws

211. *See* 10 LARSON, *supra* note 10, § 113.01 ("[A] single legal person may be said to have many 'capacities,' since that term has no fixed legal meaning.").

212. *See* McAlister v. Methodist Hosp. of Memphis, 550 S.W.2d 240, 246 (Tenn. 1977) ("The employer is the employer; not some person other than the employer. It is that simple.").

213. 10 LARSON, *supra* note 10, § 113.01.

214. *See id.* ("[F]ictions have no place in the interpretation of detailed modern statutes, such as compensation acts.").

215. Richard Nugent & CAO, Inc. v. Estate of Ellickson, 543 S.W.3d 243, 266 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

216. *See* TEX. BUS. ORGS. CODE ANN. § 21.223(a) ("A holder of shares . . . may not be held liable to the corporation or its obligees . . . .").

217. Lind v. Barnes Tag Agency, Inc., 418 P.3d 698, 705 (Okla. 2018).

218. The doctrine of respondeat superior limits the extent to which an employer can be held responsible for a co-employee's negligence, but this also extends the limited immunity to a co-employee under the Texas Workers' Compensation Act. Arnold v. Gonzalez, No. 13-13-00440-CV, 2015 WL 5109757, at *2 (Tex. App.—Corpus Christi Aug. 28, 2015, pet. granted).

requiring further statutory construction, they should be read together to give full effect to their practical implications.[219]

In the case of corporate successor liability, there is an apparent conflict that requires further analysis. The merger requirements under Section 10.008 of the Business Organization Code are specifically designed to sustain the obligations and liabilities of merged corporations,[220] otherwise every negligent corporation would simply dissolve into another to offload any inchoate liabilities and deprive those injured of redress.[221] Even though the employee would be required to sue his employer, the employer would not be sued solely within the confines of the employment relationship, but rather as the successor in interest to the corporation liable for the employee's injuries under the Texas merger statute. This is where the dual persona doctrine can give effect to the purposes of both the state merger law and exclusive remedy provision.[222]

"A third-party action should be no less viable because the duty owed by the tortfeasor springs from an extra-relational [persona] of the employer rather than arising from another third party."[223] The successor corporation knew it could be susceptible to suit in tort for the inchoate liabilities of the predecessor.[224] When the Texas workers' compensation scheme was first enacted, the Legislature could hardly have anticipated the current level of corporate consolidation and conglomeration.[225] To allow an employer to extinguish an employee's statutorily afforded remedies against third parties, via corporate merger, could not have been contemplated by the Legislature

219. *See* Beal, *supra* note 207, at 415 ("In the absence of an express repeal by statute, where there is no positive repugnance between the provisions of the old and new statutes, the old and new statutes will each be construed so as to give effect, if possible, to both statutes.").

220. *See* Davis v. Sinclair Refin. Co., 704 S.W.2d 413, 419 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (Sears, J., dissenting) ("It is clear that Texas law does not intend to let an injured party be deprived of a cause of action merely because two corporations have merged.").

221. *See* Matt Acosta, Comment, *A Vanishing Remedy: Questioning the Constitutionality of the Current State of Sale of Assets, Post-Dissolution Tort Liability in Texas*, 60 BAYLOR L. REV. 655, 656 (2008) (discussing similar immunity for corporate asset purchases under Section 11.356 of the Texas Business Organizations Code).

222. Stayton v. Clariant Corp., 10 A.3d 597, 602 (Del. 2010).

223. Kelly, *supra* note 2, at 832.

224. *See Davis*, 704 S.W.2d at 419 (Sears, J., dissenting) (comparing successor corporations' voluntary indemnification to liability via merger).

225. *See* Note, *Workers' Compensation: The Dual-Capacity Doctrine*, *supra* note 18, at 838 (arguing rising conglomeration through corporate diversification should not automatically erase an employee's cause of action); *Stayton*, 10 A.3d at 602–3 (suggesting the voluntary merger of corporate entities is independent of the employment relationship contemplated by state's workers' compensation scheme).

in creating the Workers' Compensation Act,[226] and therefore should not be permitted.[227] Further still, the practical effect of extending such protections would "cloak the employer with absolute immunity from liability under any theory to an injured employee who is eligible for or has received workers' compensation[,] even though the liability asserted arises outside the employment relationship."[228] Since it is far from clear that either the Texas Legislature or the Texas Supreme Court would shut the courthouse doors on the dual persona doctrine, we can now turn to the second issue expressed by the *Cohn* court—the implications of the effects of a dual persona doctrine on the workers' compensation system in Texas.[229]

2. Implications of the Dual Persona Doctrine in Texas

It should come as no surprise that states which have applied the dual persona version of dual capacity theory still have working employment compensation programs. Neither have the courts in these states been bombarded with a surge of new lawsuits based on the dual persona doctrine. Similarly, we should not expect a substantial increase in Texas litigation for two reasons: first, application of the dual persona doctrine is inherently limited by the laws that create its existence; and second the effect of other provisions in the Texas Workers' Compensation Act prevent an employee's double recovery after receiving employment compensation benefits.

The dual persona doctrine is distinct from traditional dual capacity theory in that the state legislature or common law have "already clearly recognized duality of legal persons, so that it may be realistically assumed that a legislature would have intended that duality to be respected."[230] In reality, there are only so many personas which can claim such legal status.[231] To suggest, therefore, that this concept can be indiscriminately enlarged to

226. *See* Kelly, *supra* note 2, at 831–32 ("The plain intent of current compensation schemes is to protect the employee for injuries which occur in the course of his employment while also preserving his right to bring third-party actions.").

227. An ultra-strict interpretation of the law should be avoided when it leads to outcomes inconsistent with the true intent and purposes of the legislature in enacting it. Beal, *supra* note 207, at 426.

228. Kimzey v. Interpace Corp., 694 P.2d 907, 912 (Kan. Ct. App. 1985).

229. Cohn v. Spinks Indus., Inc., 602 S.W.2d 102, 104 (Tex. App.—Dallas 1980, writ ref'd n.r.e.).

230. 10 LARSON, *supra* note 10, § 113.01.

231. *See generally id.* § 113.01–.02 (listing different scenarios where dual legal personalities can reasonably be implicated, such as trustees, corporations, and shareholders).

encompass every aspect of an employer's existence—as was a main critique of the dual persona doctrine's predecessor—is mere unwarranted speculation.

Even if Texas employees tried to expand the dual persona doctrine beyond its reasonable applications, they would still have to contend with the limitations in Section 417.002 of the Texas Labor Code. Section 417.002 requires that a subscribing employer be subrogated to the rights of the employee for any amounts recovered from a third party up to the value of the employment compensation benefits the employer's insurance carrier already paid to the injured employee.[232] If the employer is treated as a third party for dual persona purposes, the employee's damages could simply be offset by the value of employment compensation benefits already paid out. Taking the Texas Business Organizations and Labor Codes to their logical conclusion completely negates the issues prior courts had with dual capacity theory and also protects the employee: (1) the employee is not deprived of his standing to bring suit; (2) the employee is prevented from receiving greater benefits than he would otherwise be entitled to if he were injured by a third party; and (3) the employer is nearly always in no worse a position than if the exclusive remedy provision was strictly construed.

V. CONCLUSION

A. *The Dual Capacity Doctrine is Rejected as Unworkable*

When an employer's negligence causes an employee's injury on the job, the employee can normally bring suit to recover damages for the work-related injury. But an employee who elects to receive employment compensation benefits under the Texas Workers' Compensation Act is barred from bringing suit against the negligent employer. However, there are situations where an employee may be injured by an employer's negligence in duties that arise independent of the employment relationship, such as a doctor's negligent treatment of a patient who also happens to be an employee. In such scenarios, it makes sense to hold the employer liable for their violation of those independent obligations, notwithstanding the exclusive remedy provision of the Act. Despite its logic, most states have rejected the dual capacity doctrine as unworkable and in direct conflict with

232. TEX. LAB. CODE ANN. § 417.002(a) ("The net amount recovered by a claimant in a third-party action shall be used to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury.").

the intent of most state legislatures that employment compensation benefits be the exclusive remedy for an injured employee, regardless of an employer's various capacities. Additionally, most courts and commentators argue that applying the dual capacity doctrine would completely destroy the workers' compensation scheme, as most employers occupy multiple capacities daily. However, its successor, the dual persona doctrine, is not saddled with the same concerns.

B. *The Dual Persona Doctrine is Possible and Practical*

As this Comment has demonstrated, there are at least two dual personas that can be used to circumvent the exclusive remedy provision of the Texas Workers' Compensation Act to hold an employer liable as a third party. The Business Organizations Code generates the dual personas a shareholder may hold, and there is no reason to believe the Texas Legislature intended for a shareholder to be allowed to reverse pierce the corporate form and receive both the benefits of limited liability as a shareholder and immunity as a subscribing employer. In fact, at least one Texas court has already applied the dual persona doctrine in this situation.

Similarly, there is no basis for the assertion that the Legislature intended for the exclusive remedy provision to wholly eliminate the liabilities a successor corporation readily takes on when it merges with a predecessor corporation. And the fact that at least one Texas court acknowledged an employer's dual personas—by holding a shareholder liable as the owner or occupier of land—should only increase support for application of other dual personas which share similar statutorily created existences, such as the liability of a successor corporation as the manufacturer or designer of a defective product. Further, a court can apply these dual personas without offending the general purposes behind the Texas Workers' Compensation Act.

C. *The Dual Persona Doctrine Will Not Harm the Texas Workers' Compensation Act*

The dual persona doctrine does not enlarge an employee's chances of recovery against an employer but simply preserves the employee's right to bring a tort cause of action. The dual persona doctrine is limited in that its existence is only justified by the statutes in the Business Organizations Code and in highly-entrenched common law distinctions that are, and have been, recognized under Texas law for a significant period of time. Unlike with the

dual capacity doctrine, there are only so many dual legal personalities that maintain such elevated status. Therefore, it is unlikely that accepting the dual persona doctrine in the limited instances addressed in this Comment would substantially increase litigation between employers and employees. And even if litigation were more aggressively pursued in expansion of the doctrine beyond its reasonable bounds, employees would not be able to obtain double recovery because of another provision in the Texas Labor Code.

The Texas Labor Code requires an employer to be subrogated to the compensation an employee recovers from a third party who caused the work-related injury up to the value of the employment compensation benefits already paid out by the employer's insurance carrier. If we treat an employer as a third party and allow the employee to bring suit under the dual persona doctrine, then the employee can only recover damages in excess of what they would have received in employment compensation benefits. If the maximum amount of recovery is insignificant, it is highly unlikely most employees would opt to take their chances in court rather than receive definite employment compensation benefits.