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Workers' Compensation—A Proposal To Protect Injured Workers From Employers' Shield Of Immunity

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I. INTRODUCTION

Workers' compensation legislation was a tremendous relief to injured workers in early industrial America because it was difficult to recover compensation through the judicial system.[1] Current workers' compensation statutes, however, present problems with greater concerns than providing minimal recovery for injured workers.[2] The following scenario is utilized to

1. *See* Johns-Manville Prod. Corp. v. Contra Costa Superior Court, 612 P.2d 948, 953 (Cal. 1980)(new system balances advantage of employer's immunity from liability with advantage of swift remuneration to injured employees). *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 4.50 (desk ed. 1988)(before workers' compensation legislation only small fraction of injured workers recovered compensation); W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 572-73 (5th ed. 1984)(no incentive for employers to improve inhumane working conditions).

2. *See, e.g.*, Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 694-96 (1983)(arguing that workers' compensation must be modified to avoid inequity of exclusive remedy rule); Duckworth, *Workers' Compensation; Expanding Areas*, 23 TORT & INS. L.J. 478, 478-80 (1988)(questioning whether law will preclude recovery for toxic exposure and mental stress);

illustrate two deficiencies in the Texas workers' compensation system: the inequity of remedies available to injured employees and the violation of the employer's common-law duty to provide a safe working environment.[3]

On November 8, 1974, Jeff Walls was working with his crew to pull wet tubing from an oil well.[4] A safety belt was strapped around his body to prevent him from falling into the well.[5] During the process of pulling up the tubing, pressurized gas escaped and spewed oil over Walls.[6] The gas subsequently ignited, sending flames upwards to Walls and igniting the oil which covered him.[7] Walls struggled to remove the safety belt, but was unsuccessful because his employer had failed to furnish him with a quick release belt in violation of the company's own safety standards.[8] The company's safety rules also required that oil rigs be equipped with fire extinguishers, yet no extinguishers were on the premises.[9] Because attempts to exhaust the flames with buckets of water were futile, crew members were forced to stand by helpless as Mr. Walls burned to death.[10] Mrs. Walls subsequently brought

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Comment, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 894-95 (1983)(little incentive to prevent employers from removing safety devices to speed production).

3. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(allows employee's heirs to recover exemplary damages from employer for gross negligence only where misconduct leads to employee's death). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 691 (1983)(describing exemplary damages provision as inequitable for distinguishing employees who survive from those who do not). *But see* McDonald v. Sabayrac Battery Assoc., Inc., 620 S.W.2d 850, 852 (Tex. App.—Houston [14th Dist.] 1981, no writ)(distinction based upon legitimate purpose of quickly compensating injured workers).

4. Burk Royalty Co. v. Walls, 616 S.W.2d 911, 914 (Tex. 1981). The purpose of this procedure was to drain fluid from the tubing to replace a pump at the bottom of the well and continue production. *Id.* Mr. Walls' supervisor had previously asked Mr. Swetnam, who was in charge of safety for that district, what methods would be appropriate for removing the fluid. Swetnam instructed the supervisor to pull the tubing out, rather than to use another method which allowed the fluid to drain from the bottom of the well. *Id.*

5. *Id.* Mr. Walls was working on a tubing board 25 feet above the well's floor. *Id.*

6. *Id.* Swetnam was aware that the fluid in the tubing contained flammable substances, yet did not warn the supervisor of that hazard. *Id.* at 923. Nor did he check the premises for safety violations or advise the supervisor of any safety precautions. *Id.*

7. *Id.* at 914.

8. *See id.* at 923 (jury entitled to believe Walls could have survived if quick-release belt had been provided). Burk Royalty Company safety rules state: "[w]hile operating a pulling unit . . . utilizing a derrick man, the driller will insure that he is wearing a quick release safety belt and that a geronimo line . . . is installed prior to the first trip." *Id.* at 923 n.9. No geronimo line was installed. *Id.* at 923.

9. *Id.* at 914. The company's safety notices stated: "[a]ll production rigs will be equipped with two (2) twenty-pound dry chemical extinguishers, or equivalent, in good working order." *Id.* at 915.

10. *Id.* at 914. One witness stated that Mr. Walls jumped around and kicked as his clothes burned and fell to the ground. *Id.*

suit to recover exemplary damages from the decedent's employer.[11]

The Texas Workers' Compensation Act awards compensation to employees for accidental injuries sustained in the course of employment.[12] An employee who accepts these benefits is barred by law from bringing a common-law suit for damages against the employer.[13] The exclusive nature of the workers' compensation remedy thus leaves employers immune from common-law negligence actions by employees who accept the plan.[14] Exceptions are made when an employer intentionally injures an employee,[15] or when the employer's intentional or grossly negligent conduct causes an employee's death.[16] The application of these exceptions, however, leaves large gaps in the law, thus allowing severe employer misconduct to continue without reprimand or penalty.[17] For example, if the above fact situation were repeated,

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11. *See id.* at 913 (suit was brought in addition to accepted workers' compensation benefits). The jury awarded the widow $150,000 in exemplary damages, but the court of civil appeals reduced the judgment to $100,000. Burk Royalty Co. v. Walls, 596 S.W.2d 932, 939 (Tex. Civ. App.—Fort Worth 1980), *aff'd*, 616 S.W.2d 911 (Tex. 1981).

12. *See* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 143 (Tex. Comm'n App. 1926, judgm't adopted)(purpose of act confined to accidental injuries). *See generally* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 51 (1980)(discussing four elements of accidental injury and historical development).

13. *See* Barrera v. Roscoe, Snyder and Pac. Ry. Co., 385 F. Supp. 455, 463 (N.D. Tex. 1973)(workers' compensation exclusive remedy for employee injured by employer's negligence); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967)(employees retain no right of action and shall look solely to association for compensation); TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967)(employee deemed to accept workers' compensation benefits unless he gives written notice when hired of intention to retain common-law rights).

14. *See* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981)(immunity applies even if gross negligence alleged by employee); Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980)(employers granted immunity from employees' common-law negligence action). *See generally* Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D.L. REV. 157, 157 (1985)(immunity enables employers to benefit from wilful misconduct).

15. *See, e.g.*, Blankenship v. Cincinnati Milacron Chem., 433 N.E.2d 572, 576 (Ohio 1982)(employers not immune from civil liability for intentional tort); *Castleberry*, 617 S.W.2d at 666 (workers' compensation exclusive remedy unless employer commits intentional tort); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916)(legislature without power to deny right of redress for intentional injuries).

16. *See* TEX. CONST. art. XVI, § 26 (providing exemplary damages when homicide committed through wilful act or gross negligence); TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(allowing recovery of exemplary damages when employer's intentional or grossly negligent acts lead to employee's death); *see also* Dudley v. Community Pub. Serv., 108 F.2d 119, 122 (5th Cir. 1939)(legislature cannot abolish constitutional right to exemplary damages for homicide caused by gross negligence).

17. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(neglects to provide exemplary damages where employer's gross negligence causes severe injuries and permanent disability). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 693 (1983)(law allows employers to exhibit callous disregard towards employees' safety).

but Mr. Walls survived, his sole remedy would be within the workers' compensation system, and a suit for exemplary damages would be barred because no death resulted from the incident.[18] In addition, Mr. Walls would be barred from initiating suit against his employer under the intentional injury exception because the violation of safety regulations is not currently considered intentional behavior.[19] Therefore, except for misconduct which results in the death of an employee,[20] the applicable law shields grossly negligent employers from liability and thus fails to encourage compliance with safety standards.[21]

This comment will provide a brief overview of the workers' compensation scheme in Texas.[22] A subsequent analysis will reveal the first hints of dissat-

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18. *See* Grove Mfg. Co. v. Cardinal Constr. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.)(Workers' Compensation Act makes no exception for gross negligence when employee survives injury); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(allows exemplary damages only where death occurs). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 691 (1983)(Texas statute makes irrational distinction by allowing exemplary damages for employee's death but not for permanent disability). *But see* TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967)(employee may elect when hired to retain common-law rights).

19. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406-07 (Tex. 1985)(failure to provide safe working environment not intentional conduct unless substantial certain injury will result); *accord* Griffin v. George's, Inc., 589 S.W.2d 24, 25-27 (Ark. 1979)(no intentional act occurs when employer allows dangerous condition to continue); Duncan v. Perry Packing Co., 174 P.2d 78, 84 (Kan. 1946)(negligence action based on violation of safety statute barred by exclusive remedy provision).

20. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(spouse and heirs of employee killed as result of employer's gross negligence may recover exemplary damages).

21. *See* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 693 (1983)(no incentive for employers to protect physical safety of employees); Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D.L. REV. 157, 162 (1985)(one unachieved goal of workers' compensation to promote safety). The vast numbers of employees injured and killed at work demonstrates the potential for employers to abuse their immunity. *See id.* (two million workers disabled each year and twelve thousand killed); *see also* Purcell, *Punitive Damages and the Injured Worker*, in STATE BAR OF TEXAS DEVELOPMENT PROGRAM — WORKERS' COMPENSATION E-1 (1986)(three-fourths of 645 construction worker deaths between 1979 and 1985 involved federal safety standard violations).

22. *See Reed*, 689 S.W.2d at 407 (workers' compensation quickly remunerates employees for accidental injuries in exchange for relinquishment of common-law rights against employers). Workers' compensation becomes the employee's exclusive remedy for injuries unless the injury is caused by the employer's intentional conduct. *See id.* at 406; *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(providing exception for exemplary damages to employee's beneficiaries when employee's death caused by employer's gross negligence or intentional conduct). *See generally* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 23 (1980)(workers' compensation does not cover intentional torts).

isfaction with the system and the inequity of barring suits for exemplary damages by injured employees.[23] This comment will further propose that deterrence of safety violations and failure to maintain a safe working environment can be accomplished through two alternatives.[24] First, the courts may take the initial step in solving this problem by broadening the judicial definition of intentional conduct to include wilful, wanton, and reckless behavior.[25] Second, the legislature should amend the workers' compensation statutes to reinstate a common-law negligence action for an employee injured by the grossly negligent conduct of his employer.[26] Either of these actions would promote compliance with safety statutes and deter employer misconduct, thus providing a safer working environment.[27]

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23. *See, e.g.*, Blankenship v. Cincinnati Milacron Chem., 433 N.E.2d 572, 578 (Ohio 1982)(Celebrezze, C.J., concurring)(classifying dissenting position as that of 19th century robber baron for belief that exposing employees to dangerous chemicals not intentional conduct); Rodriguez v. Naylor Indus., 751 S.W.2d 701, 703-05 (Tex. App.—Houston [1st Dist.] 1988)(Levy, J., dissenting) (disapproving immunity for employers guilty of gross misconduct), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 691 (1983)(irrational distinction to allow exemplary damages only if death occurs).

24. *See generally* Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D.L. REV. 157, 162 (1985)(no deterrence against gross negligence where employers insulated from tort liability).

25. *See, e.g.*, Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983)(courts possess common-law heritage that allows development of new principles in response to changing values); *Rodriguez*, 751 S.W.2d at 704 (Levy, J., dissenting) (equating gross misconduct with intentional injury); Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978)(injury resulting from wilful misconduct not accidental).

26. *See Rodriguez*, 751 S.W.2d at 704 (Levy, J., dissenting) (suggesting Workers' Compensation Act be modified to discourage employers' gross negligence and indifference to employees' safety). *See generally* Comment, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 908-10 (1983)(recommending exclusion of wilful misconduct from exclusive remedy bar); Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D.L. REV. 157, 166 (1985)(urging South Dakota legislature to deter wilful misconduct through statutory measures).

27. *See* Blankenship v. Cincinnati Milacron Chem., 433 N.E.2d 572, 577 (Ohio 1982)(employer immunity for intentional behavior does not promote safe working environment because employer knows only penalty is slightly increased insurance premiums); Rodriguez v. Naylor Indus., 751 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1988)(Levy, J., dissenting) (arguing state has compelling interest to protect workers from foreseeable injuries), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 82 (Jan. 25, 1989). Although one goal underlying workers compensation was to promote safety, that goal has not yet been attained. *See* Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D.L. REV. 157, 162 (1985)(shielding employers from tort actions impedes deterrence of safety violations).

II. THE PRE-WORKERS' COMPENSATION PERIOD

Workers' compensation statutes originated as a response to the societal needs of industrial America.[28] Although the number of work-related accidents was rapidly rising, injured employees were faced with two obstacles in suits brought against their employers: proving the employer's negligence, and overcoming common-law defenses available to the employer.[29] Although the common law imposed duties upon employers for the employees' protection,[30] these duties could be vitiated by the defenses of contributory negligence,[31] assumption of risk,[32] and the fellow-servant rule.[33] For

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28. *See* 1 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 4.50 (desk ed. 1988)(before workers' compensation legislation only small fraction of injured workers recovered compensation). When combined with funeral expenses, sizeable attorney fees of 25-33% reduced the amount of recovery to exiguous sums. *Id. See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 685 (1983)(new system recognized inequity of burdening workers and families with industrial injuries); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L. REV. 206, 209 (1952)(alternatives to workers' compensation system were to allow injured workers to starve or provide direct handouts).

29. *See* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 1 (1980)(harshness of common-law defenses made employee's case difficult). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 685 (1983)(employees unable to prove employer's negligence were left destitute); Appleby, *The Practical Labor Lawyer*, 12 EMPLOYEE REL. L.J. 528, 528 (1987)(defenses include contributory negligence and assumption of risk).

30. *See* Armour v. Golkowska, 66 N.E. 1037, 1038 (Ill. 1903)(duty of employer to provide reasonably safe work place); White v. Consolidated Freight Lines, 73 P.2d 358, 359 (Wash. 1937)(duty to furnish safe working environment is nondelegable). The employer's common-law duties were often classified as:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools and equipment for the work.
3. The duty to give warnings of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 569 (5th ed. 1984).

31. *See* San Antonio Brewing Ass'n v. Wolfshohl, 155 S.W. 644, 646-47 (Tex. Civ. App.—San Antonio 1913, writ ref'd)(employee's suit to recover damages for seriously injured hand barred by finding of employee's contributory negligence).

32. *See* Bonner v. Texas Co., 89 F.2d 291, 294 (5th Cir. 1937)(employer not liable for explosion despite defects in working conditions because employee assumed the risks of the job); *see also* Gulf, C. & S.F. Ry. Co. v. Cooper, 191 S.W. 579, 582 (Tex. Civ. App.—Austin 1917, writ ref'd)(distinguishing assumption of risk from contributory negligence). Assumption of risk involves dangers that are an ordinary incident of a particular job, while contributory negligence requires fault of the injured employee. *Id.*

example, the employer could defeat a suit brought by his employee on the basis that the employee consented to the hazards of the job, or that the employee was contributorily negligent, which would in effect bar the employee's recovery.[34] Thus, the burden of proving employer liability for industrial accidents fell upon workers who usually recovered little or nothing after lengthy litigation and large attorney fees.[35] This inequity led to the movement to pass workers' compensation legislation in the United States, patterned after similar systems in Europe.[36] Workers' compensation statutes protect employees by swiftly remunerating their injuries, regardless of whose fault causes the accident.[37] The no-fault system shifts the costs of workers'

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33. *See* Dallas v. Gulf, C. & S.F. Ry. Co., 61 Tex. 196, 201-03 (1844)(master not liable to servant for injuries caused by fellow-servant's negligence). *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 4.30 (desk ed. 1988)(describing origins of contributory negligence, assumption of risk, and fellow-servant doctrine); W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 569 (5th ed. 1984)(employer only liable for failure to exercise reasonable care).

34. *See* Schlemmer v. Buffalo, Rochester & Pittsburgh Ry., 220 U.S. 590, 598-99 (1911)(employee's recovery for accidental death barred by employee's contributory negligence); Cooper v. Mayes, 109 S.E.2d 12, 14 (S.C. 1959)(employee assumes risk incident to service and has no common-law right to recover for injury arising from those risks). The fact that employees were expected to bear the risks of employment reflects the economic theories of industrialized America; namely, that an unlimited supply of work existed and workers were free to choose among employers. *See* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 568 (5th ed. 1984)(defenses severely restricted recovery by employees).

35. *See generally* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 572 (5th ed. 1984)(litigation meant delay, heavy attorneys' fees, and small recovery to injured worker); Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 685 (1983)(inequitable to burden workers and families with industrial costs).

36. *See* Texas Employers' Ins. Ass'n v. United States, 558 F.2d 766, 768 (5th Cir. 1977)(underlying motivation of Texas Workmen's Compensation Act that industrial accidents should be industrial expense). *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 5.30 (desk ed. 1988)(forty states enacted compensation statutes by 1920 and all states passed workers' compensation by 1949). Germany was the first country to establish a workers' compensation system in 1884. *Id.* § 5.10. England soon followed with its own system in 1897. The author, however, traces the idea of workers' compensation to a Prussian Law requiring railroads to assume liability for injuries to their employees and passengers. *Id.*

37. *See, e.g.*, Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923)(employer's liability based upon employer-employee relationship rather than acts or omissions of employer); Reed Tool Co. v. Copelin, 689 S.W.2d 406, 407 (Tex. 1984)(workers' compensation allows workers to recover quickly without proving employer's negligence); Commercial Standard Ins. Co. v. King & Co., 96 S.W.2d 251, 252 (Tex. Civ. App.—Austin 1936, no writ)(objective of workers' compensation to provide compensation to employees in lieu of common-law rights). *See generally* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L. REV. 206, 208 (1952)(right to benefits depends only on work-related injury not fault).

injuries to consumers, which guarantees compensation for employees and minimal business costs.[38]

III. WORKERS' COMPENSATION IN TEXAS

A. *The General Scheme*

The Texas Employers' Liability Act was enacted in 1913.[39] The Act created an employers' insurance association, funded with premiums paid by subscribing employers, and prescribes specific compensation rates for injuries.[40] Employers who subscribe to the employers' insurance association gain immunity from common-law negligence actions by employees who accept the plan.[41] Eligible employers who do not subscribe lose common-law defenses, while retaining the risk of negligence suits by their own employees.[42] Each employee whose employer subscribes to the plan may elect at

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38. *See* Employers Mut. Liab. Ins. Co. of Wis. v. Konvicka, 197 F.2d 691, 693 (5th Cir. 1952)(purpose of workers' compensation legislation to transfer economic loss caused by industrial accidents to consumers); Johns-Manville Prod. Corp. v. Contra Costa Superior Court, 612 P.2d 948, 953 (Cal. 1980)(workers' compensation system balances advantage of employer's immunity with swift compensation to employees); Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 328 (1912)(cost of accidents borne by industry creating them).

39. *See* TEX. REV. CIV. STAT. ANN. arts. 8306-8309i (Vernon 1967 & Supp. 1989)(current codification of workers' compensation statutes); *see also* Texas Employers' Ins. Ass'n v. United States, 558 F.2d 766, 768 (5th Cir. 1977)(motivation of compensation law to charge costs of industrial accidents to industries as overhead expense); Middleton v. Texas Power & Light Co., 108 Tex. 96, 107-09, 185 S.W. 556, 558-61 (1916)(discussion of act's purpose and early constitutional challenges).

40. *See Middleton*, 108 Tex. at 107, 185 S.W. at 558 (workers' compensation substitutes damages available at common law); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Vernon 1967 & Supp. 1989)(prescribes compensation rates to which employee entitled for loss of various limbs). The Act mandated funding through private insurance rather than contributions from the state, and created the Texas Employer's Insurance Association to issue workers' compensation policies. *See* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 1-2 (1980)(Act intended to compensate employee's prior ability to secure employment not to place employee in position before accident).

41. *See* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981)(immunity applies even if gross negligence alleged by employee); Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980)(employers granted immunity from employees' common-law negligence actions); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967)(employees retain no cause of action against employers and shall look solely to association for compensation).

42. *See* Railway Express Agency v. Cox, 179 F.2d 593, 595 (5th Cir. 1950)(nonsubscribing employer deprived of common-law defenses in negligence suit by employee); TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (Vernon 1967)(eligible employer loses common-law defenses of contributory negligence, assumption of risk, and fellow-employee negligence for failure to submit to plan). *See generally* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 15 (1980)(non-subscribing employer loses defenses of contributory negligence, fellow-servant rules, and assumption of risk).

the time of employment to retain his common-law rights rather than accept workers' compensation benefits.[43] If an employee chooses to retain his common-law rights, the employer's common-law defenses are preserved, and recovery is limited to actual damages.[44] Therefore, while a few exceptions exist, once an employee accepts coverage, the Texas Workers' Compensation Act becomes the employee's exclusive remedy against his employer for work-related injuries.[45]

B. *Exceptions to the Exclusive Remedy Doctrine*

The most widely recognized exception to the exclusive remedy provision is the employee's right to bring suit against an employer for committing an intentional act which harms an employee.[46] Traditionally, for an employer to perpetrate an intentional injury, he must intend the specified conduct[47] or

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43. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967)(common-law rights waived unless employee elects to retain rights at time of employment or within five days of employer's subscription to workers' compensation). *See generally* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 7-8 (1980)(discussing employer's duty to give notice of coverage and employee's opportunity to elect common-law rights). The employee may withdraw his rejection of workers' compensation benefits at any time, but may not reject his acceptance of workers' compensation benefits. *Id.* at 9-10; Nations & Bennett, *Recovery of Exemplary Damages Under the Texas Workers' Compensation Act*, 19 S. TEX. L.J. 431, 432 (1978)(discussing election of remedies).

44. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (Vernon 1967)(action by employee who does not waive common-law rights is subject to common-law defenses); *see also* Castleberry v. Frost-Johnson Lumber Co., 283 S.W. 141, 142 (Tex. Comm'n App. 1926, judgm't adopted)(employee waives common-law rights if written notice of claim not given within five days from employer's subscription to workers' compensation).

45. *See* Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981)(exclusive remedy against employer unless employer commits intentional tort); Richardson v. The Fair, Inc., 124 S.W.2d 885, 886 (Tex. Civ. App.—Beaumont 1939, writ dism'd, judgm't cor.)(intentional injury includes direct assault upon employee by employer); *cf.* Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603, 605 (1985)(development of exceptions to exclusive remedy indicates dissatisfaction with rule).

46. *See* Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916)(court recognized exception and stated purpose of Act to encompass only accidental injuries); *see also* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 68.10 (desk ed. 1988)(workers' compensation excludes coverage of intentional torts). One theory supporting this exception is that allowing compensation for an employer's intentional acts would conflict with the purpose of workers' compensation. *Id. See generally* Comment, *Worker's Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 890 (1983)(intentional acts do not conform with philosophy of workers' compensation).

47. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406 (Tex. 1985)(difference between negligent and intentional injury is specific intent to injure); Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 377 (Tex. App.—Austin 1984, writ ref'd n.r.e.)(intent includes results which actor desires to occur); *see also* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 34 (5th ed. 1984)(discussing elements of intent).

know with substantial certainty that an injury will occur.[48] For example, if an employer hires someone to physically assault an employee, the employer clearly has committed an intentional tort and the exclusive remedy doctrine will not bar a common-law action by the employee.[49] If, however, the employer intentionally removed a safety guard from equipment,[50] allowed a dangerous working condition to persist,[51] or knowingly violated a safety statute,[52] then his actions would not rise to the level of intentional conduct.[53] Courts have labeled this behavior as grossly negligent or wilful misconduct because of the accidental nature of the injury resulting from these

48. *See* Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981)(defendant must be substantially certain that result would follow from his act); VerBouwens v. Hamm Wood Prod., 334 N.W.2d 874, 876 (S.D. 1983)(danger must be substantial certainty); *cf.* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 36 (5th ed. 1984)(mere knowledge of risk insufficient to form intent).

49. *See* Duncan v. Perry Packing Co., 174 P.2d 78, 84 (Kan. 1946)(injury inflicted through employer's assault upon employee not accidental); Richardson v. The Fair, Inc., 124 S.W.2d 885, 885-86 (Tex. Civ. App.—Beaumont 1939, writ dism'd judgm't cor.)(if employer intentionally assaults employee in course of employment employer cannot validly assert workers compensation exclusive remedy). *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 68.30-31 (desk ed. 1988)(exclusive remedy provision will not bar claims of false imprisonment, fraud, invasion of privacy, or intentional infliction of emotional distress).

50. *See* McAdams v. Black & Decker Mfg. Co., 395 So. 2d 411, 412 (La. App. 1981)(act of removing safety device resulting in injury not an intentional act); *see also* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.10 (1988)(intentionally removing safety device not intentional assault).

51. *See* Griffin v. George's, Inc., 589 S.W.2d 24, 25-27 (Ark. 1979)(when employer allowed dangerous condition to continue resulting in employee's permanent injury, conduct not intentional); Johns-Manville Prod. Corp. v. Contra Costa Superior Court, 612 P.2d 948, 954 (Cal. 1980)(workers' compensation only remedy for employee's claim employer knowingly ordered employee to work in proximity to asbestos); *see also* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.10 (1988)(allowing dangerous condition to continue falls short of intent required to surpass aggravated negligence).

52. *See* Duncan v. Perry Packing Co., 174 P.2d 78, 84 (Kan. 1946)(failure to comply with safety regulations does not affect exclusive remedy of workers' compensation in absence of contradictory statute); Evans v. Allentown Portland Cement Co., 252 A.2d 646, 646-47 (Pa. 1969)(negligence complaint of insufficient safety guards barred by exclusive remedy provision); *cf.* Kittell v. Vermont Weather Bd., Inc., 417 A.2d 926, 927 (Vt. 1980)(failure to train employee not intentional injury).

53. *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.20 (desk ed. 1988)(deliberate intent necessary for intentional conduct cannot be implied from aggravated negligence); King, *The Exclusiveness of an Employee's Workers' Compensation Remedy Against his Employer*, 55 TENN. L. REV. 405, 444-48 (1988)(discussing state of mind necessary to establish intent); Note, *Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision an Employer's Intentional Failure to Maintain a Safe Work Place is Not an Intentional Act Unless Employer is Substantially Certain That Such Conduct Would Cause Injury*, 17 ST. MARY'S L.J. 513, 517-18 (1986)(intentional exception satisfied only by genuine intentional misconduct).

examples, which restricts the employee's remedy to the workers' compensation system in the absence of death.[54]

The Texas Constitution and the Workers' Compensation Act prescribe the second exception to the exclusive remedy doctrine, which allows the employee's spouse and heirs to sue for exemplary damages when an employee's death occurs.[55] This exception applies only to circumstances where the employer's intentional or grossly negligent acts lead to the employee's death.[56] The definition of gross negligence promulgated in Texas is based upon the theory that there must be an "entire want of care" on the part of the defendant, resulting in a conscious indifference to the rights of others.[57] Courts

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54. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985)(whether employer's conduct intentional turns on intentional versus accidental nature of resulting injury); Rodriguez v. Naylor Indus., 751 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1988)(Levy, J., dissenting) (conduct labelled gross rather than intentional because lacked specific intent to injure), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 82 (Jan. 25, 1989). *See generally*, Note, *Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision—An Employer's Intentional Failure to Maintain a Safe Work Place is Not an Intentional Act Unless Employer is Substantially Certain That Such Conduct Would Cause Injury*, 17 ST. MARY'S L.J. 513, 518 (1986)(recovery limited to workers' compensation if intentional misconduct not proven).

55. *See* Bridges v. Phillips Petroleum Co., 733 F.2d 1153, 1155 (5th Cir. 1984)(parents and siblings not heirs for purpose of recovering exemplary damages for gross negligence); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916)(legislature without power to deny cause of action for redress of intentional injury). The Texas Constitution provides "[e]very person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body . . . ." TEX. CONST. art. XVI, § 26; *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(surviving spouse and heirs may sue to recover exemplary damages when employer's intentional or grossly negligent acts results in employee's death).

56. *See* Castleberry v. Frost-Johnson Lumber Co. 283 S.W. 141, 146 (Tex. Comm'n App. 1926, judgm't adopted)(legislature did not intend to provide exemplary damages to employees merely injured by gross negligence); Faulkner v. Kleinman, 158 S.W.2d 891, 892 (Tex. Civ. App.—Austin 1942, writ ref'd w.o.m.)(common-law action for gross negligence abolished except in cases where employee's death occurs); *see also* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967)(exemplary damages recoverable only if intentional or grossly negligent act results in employee's death). This statute has been challenged on the ground that it denies equal protection by allowing gross negligence suits only where an employee dies. McDonald v. Sabayrac Battery Assoc., 620 S.W.2d 850, 852 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). The court overruled this challenge, stating that the distinction between employees who died and those who survived furthered the state's legitimate purpose of quickly compensating injured workers through workers' compensation. *See id.* (allowing injured workers to recover exemplary damages would overburden system).

57. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981)(approving *Shuford* definition of gross negligence). The court in *Shuford* defined gross negligence as an "entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." Missouri Pac. Ry. v. Shuford, 72 Tex. 165, 170, 10 S.W. 408, 411 (1888). After *Shuford*, the

have placed an emphasis on an *entire* lack of care and *conscious* indifference because these are elements of the mental state necessary to lift ordinary negligence to the level of gross negligence.[58] The main obstacle, however, for plaintiffs who alleged employer gross negligence generally emerged upon appeal.[59]

IV. CURRENT TEXAS LAW REGARDING EMPLOYER'S MENTAL STATE

A. *Expansion of Gross Negligence*

For several years, a jury finding of gross negligence was impossible to sustain on appeal because of the "some care" standard of review used in workers' compensation cases.[60] Under this standard, if the employer could prove that some care was taken to prevent an accident, then his conduct could not be labeled as grossly negligent.[61] This restrictive standard of review was

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courts' treatment of gross negligence in workers' compensation cases may be divided into three periods: early, active/passive, and "some care." *See Burk*, 616 S.W.2d at 917-18. During the active/passive period, the *Shuford* definition included an additional element requiring gross negligence to be positive or affirmative, rather than passive. *Id.*; *see also* Texas Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 6-7, 79 S.W.2d 830, 831 (1935)(distinction between active and passive rested upon whether defendant was consciously indifferent to welfare of others). No plaintiff ever recovered exemplary damages under this test. *See Burk*, 616 S.W.2d at 918.

58. *See, e.g.*, Ballenger v. Mobil Oil Corp., 488 F.2d 707, 710 (5th Cir. 1974)(two inquiries regarding gross negligence are complete lack of care by defendant and conscious indifference); Wright v. Gifford-Hill & Co., Inc., 736 S.W.2d 828, 831 (Tex. App.—Waco 1987, no writ)(emphasis on conscious indifference to establish gross negligence); Stephens v. Dunn, 417 S.W.2d 608, 613 (Tex. Civ. App.—Tyler 1967, no writ)(mere inattention insufficient to reach level of conscious indifference). *See generally* Demarest, *The History of Punitive Damages in Texas*, 28 S. TEX. L. REV. 535, 543-50 (1987)(discussing history of gross negligence law in Texas).

59. *See* Purcell, *Punitive Damages and the Injured Worker*, in STATE BAR OF TEXAS PROFESSIONAL DEVELOPMENT PROGRAM—WORKERS' COMPENSATION E-1 to E-2 (1986)(findings of gross negligence reversed because evidence in record showed defendants exercised some care); *see also Ballenger*, 488 F.2d at 713 (existence of safety measure established some care); *Stephens*, 417 S.W.2d at 613 (court found exercise of some care although defendant failed to keep proper lookout and backed truck over deceased).

60. *See Burk*, 616 S.W.2d at 918-19 (some care analysis vitiated every claim of gross negligence against employers). The reasoning of the "some care" period was that the meaning of entire want of care was absolute. *Id.* at 918. If any degree of care could be shown, it prevented a finding that there was an entire want of care. *Id.*; *accord Ballenger*, 488 F.2d at 713 (existence of safety measures established some care); *Stephens*, 417 S.W.2d at 613 (court found exercise of some care although defendant failed to keep proper lookout and backed truck over deceased). *See generally* Nations & Bennett, *Recovery of Exemplary Damages Under the Texas Workers' Compensation Act*, 19 S. TEX. L.J. 431, 441-42 (1978)(describing difficulty of plaintiff's burden to prove gross negligence).

61. *See, e.g.*, *Ballenger*, 488 F.2d at 713 (existence of safety measures established some care); Sheffield Div. Armco Steel Corp. v. Jones, 376 S.W.2d 825, 832 (Tex. 1964)(employer not grossly negligent when safety precautions taken); Loyd Elec. Co. v. Dehoyos Deltoyos, 409

addressed, along with the definition of gross negligence, by the Texas Supreme Court in *Burk Royalty Co. v. Walls*.[62] The court overruled the "some care" standard of review and held that the "no evidence" standard used in other gross negligence cases should also be applied in workers' compensation cases.[63] Thus, a jury finding of gross negligence could be overturned on appeal only if "no evidence" supported that finding.[64] Additionally, the court clarified the definition of gross negligence by stating that "the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care."[65] Thus, the court implied[66] and subsequently held than an objective reasonable person standard could be used to determine whether gross negligence occurred.[67] These developments in Texas law have expanded the definition of gross negligence, thus easing the plaintiff's burden of proof and increasing the potential for recovery.[68]

S.W.2d 893, 896-97 (Tex. Civ. App.—San Antonio 1966, no writ)(evidence of safety precautions precluded gross negligence finding although safer methods existed).

62. 616 S.W.2d 911 (Tex. 1981). The court noted that in automobile cases a no evidence test is applied, and the exercise of some care by the defendant will not vitiate a jury finding of gross negligence. *Id.* at 921.

63. *See* id. at 922 (reasoning no argument justifies different standard of review in workers' compensation cases). Hence, to overturn a finding of gross negligence against an employer, the appellate court must now find that no evidence supports the jury's finding. *Id.* The court held that the no evidence test stated in *McPhearson v. Sullivan* is the correct standard of review for gross negligence. *Id.*; *see also* McPhearson v. Sullivan, 463 S.W.2d 174, 175 (Tex. 1971)(questioning whether any evidence supports jury finding of gross negligence).

64. *See, e.g.*, Williams v. Steves Indus., Inc., 699 S.W.2d 570, 574 (Tex. 1985)(on appeal court considers evidence and inferences that support gross negligence finding and disregards contrary evidence); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985)(gross negligence finding reversed only if so contrary to overwhelming weight of evidence that it is wrong and unjust); *McPhearson*, 463 S.W.2d at 175 (court may consider any favorable inference supporting gross negligence finding); Diamond Shamrock Corp. v. Ortiz, 753 S.W.2d 238, 241 (Tex. App.—Corpus Christi 1988, writ ref'd)(no evidence of gross negligence established when show complete absence or mere scintilla of evidence supporting gross negligence finding).

65. *See Burk*, 616 S.W.2d at 922 (stating gross negligence may be inferred from acts and omissions). The court emphasized that the defendant's mental state is the element lifting ordinary negligence into gross negligence, and disapproved the earlier active/passive distinction. *Id.*

66. *Id.* The courts suggested that gross negligence could be proven by showing that a reasonable person would realize that his conduct created an extreme risk to others. *Id.*

67. *See, e.g.*, Clifton v. Southern Pac. Transp. Co., 709 S.W.2d 636, 640 (Tex. 1986)(allowing objective proof that reasonable person would realize conduct created risk to others' safety); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981)(inferring mental state from acts and omissions); Wright v. Gifford-Hill & Co., Inc., 736 S.W.2d 828, 831 (Tex. App.—Waco 1987, no writ)(plaintiff may prove conduct created risk through subjective or objective knowledge).

68. *Compare* Ballenger v. Mobil Oil Corp., 488 F.2d 707, 710 (5th Cir. 1974)(evidence of slight care precludes recovery of exemplary damages) *with Burk*, 616 S.W.2d at 922 (some care

B. *Intentional Conduct—A Stagnant Definition*

Despite the progression in the law of gross negligence, the law in Texas regarding intentional conduct has remained stagnant.[69] The Texas Supreme Court held in *Reed Tool Co. v. Copelin*[70] that intentional failure to maintain a safe work place will not constitute an intentional act unless the employer is substantially certain that an injury will result.[71] Substantial certainty does not exist if the employer knows that equipment is defective and does not meet minimal safety standards, even when combined with elements such as inadequate training, prior injuries, and overextended working hours.[72] Rather, this conduct falls somewhere between negligence, gross negligence, and wilful misconduct, depending upon the circumstances.[73]

Although other jurisdictions have attempted to expand the definition of intentional conduct,[74] Texas continues to follow a narrow construction as

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standard disapproved). *See generally* Chapman, *Gross Negligence in the Work Place*, in STATE BAR OF TEXAS PROFESSIONAL DEVELOPMENT PROGRAM—WORKERS' COMPENSATION I-6 (1988)(analyzing recent cases which broaden definition of gross negligence in workers' compensation context).

69. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985)(allegation that severe brain damage caused by unsafe modification to equipment by employer insufficient to raise question whether employer's conduct substantially certain to cause injury). Texas courts remain unwilling to hold that an intentional injury occurs when an employer knowingly creates dangerous working conditions. *See id.* at 405 (plaintiff alleged employer made dangerous modification on equipment). *But see* Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 377-78 (Tex. App.—Austin 1984, writ ref'd n.r.e.)(because employer forced terrified employee to work in area infested with bats, intent to commit assault supplied requisite intent for injuries to allow recovery under intentional tort exception).

70. 689 S.W.2d 404 (Tex. 1985).

71. *See id.* at 407 (holding intentional failure to provide safe work place not intentional act unless employer substantially certain injury will result). *See generally* Note, *Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision—An Employer's Intentional Failure to Maintain a Safe Work Place is Not an Intentional Act Unless the Employer is Substantially Certain That Such Conduct Would Cause Injury*, 17 ST. MARY'S L.J. 513, 518-19 (1986)(describing requirements for intentional conduct).

72. *See Reed*, 689 S.W.2d at 405-07 (unsafe equipment, inadequate training, and prior injuries establish question of gross negligence, not intentional conduct). *See generally* Note, *Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision—An Employer's Intentional Failure to Maintain a Safe Work Place is Not an Intentional Act Unless Employer is Substantially Certain That Such Conduct Would Cause Injury*, 17 ST. MARY'S L.J. 513, 520-527 (1986)(analysis of *Reed*).

73. *See* Caline v. Maede, 396 P.2d 694, 694 (Or. 1964)(failure to remedy condition previously injuring employee not intentional conduct); Reed Tool Co. v. Copelin, 689 S.W.2d 404, 408 (Tex. 1985)(allegation that modification to lathe by employer was unsafe did not raise question of intentional conduct). *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.20 (desk ed. 1988)(gravity of employer misconduct ranges from intentional injury to wilful misconduct and gross negligence).

74. *See* Blankenship v. Cincinnati Milacron Chem., 433 N.E.2d 572, 578 (Ohio 1982)(judgment reversed to allow employees to prove under intentional conduct exception em-

stated in *Reed*.[75] In *Rodriguez v. Naylor Industries*,[76] an employee brought to his employer's attention the fact that several tires on a truck were in poor condition.[77] No precautions were exercised by the employer to cure the condition of the tires.[78] A tire exploded, causing the truck to flip and severely injure the employee.[79] Affirming the lower court's summary judgment for the employer, the court of appeals relied on the *Reed* definition of intentional conduct and held that the evidence did not raise a factual issue on intentional conduct.[80] The *Rodriguez* decision did, however, provide the first indication of dissatisfaction with this strict construction.[81]

C. *First Indication of Dissatisfaction*

In the dissenting opinion of *Rodriguez*, Justice Levy questioned the finding that an employer who deliberately exposes an employee to danger does not form specific intent to injure the employee.[82] Justice Levy reasoned that

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ployer knowingly used harmful chemicals and failed to warn employees); Mandolidis v. Elkins Indus., 246 S.E.2d 907, 915 (W. Va. 1978)(interpreted deliberate injury exception to allow suit for wilful misconduct because actor forms subjective realization of risk of bodily injury). *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 68.10 at n.31 (desk ed. 1988)(describing minority opinions which diverge from traditional definition of intentional conduct).

75. *Compare Reed*, 689 S.W.2d at 407 (intentional failure to maintain safe work place not intentional conduct) *with* Rodriguez v. Naylor Indus., 751 S.W.2d 701, 703 (Tex. App.— Houston [1st Dist.] 1988)(substantial certainty that tire would explode insufficient to establish intentional conduct), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989).

76. 751 S.W.2d 701 (Tex. App.— Houston [1st Dist.] 1988), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989). The Texas Supreme Court reversed the court of appeal's decision, which affirmed summary judgment for the employer. *See Rodriguez*, 32 Tex. Sup. Ct. J. at 184 (court held employer failed to establish as matter of law that it lacked requisite intent).

77. *Rodriguez*, 751 S.W.2d at 702 (employee brought condition of tires to supervisor's attention who responded by calling employee "damn Mexican"). Specifically, the tires lacked treads and were severely cracked and split. *Id.*

78. *Id.* (supervisor told employee to take truck or go home).

79. *See id.* (alleged injuries prevented marital relations). When the first explosion occurred, the employee called another supervisor and asked for a spare tire. *Id.* The supervisor advised him to rotate one of the rear tires forward. The employee testified that after the accident, the previously belligerent supervisor ordered him not to mention the accident or the condition of the tires to anyone. *Id.*

80. *See id.* at 703 (court analogized to general rule in *Reed* that failure to provide safe work place not intentional conduct unless employer substantially certain that conduct will cause injury). The court concluded that an intentional failure to provide safe transportation will not constitute intentional conduct unless the employer is substantially certain that an injury will follow. *Id.*

81. *See id.* at 703-05 (Levy, J., dissenting) (arguing employer's misconduct equivalent to intentional conduct and should be discouraged).

82. *See id.* at 704 (criticizing definitional technicality allowing employer to deliberately expose employee to risk without facing liability). Justice Levy criticized the distinction which

intent could be inferred from conduct leading to foreseeable injuries, and concluded that the behavior of the defendant was functionally equivalent to intentional behavior.[83] The remainder of Justice Levy's opinion focuses wholly on public policy, thus transcending a debate over the interpretation of intent.[84] Justice Levy criticized the workers' compensation system for assigning priority to employers' ability to spread the cost of accidents through insurance premiums rather than deterring employer gross negligence.[85] Justice Levy further argued that the value of human life surpasses the financial considerations involved in efficiently spreading the costs of business.[86] Disapproving the immunity provided to employers completely indifferent to employee safety, Justice Levy suggested that the Workers' Compensation Act be modified to discourage employer gross negligence.[87]

Justice Levy's opinion illustrates the beginning of dissatisfaction in Texas with the workers' compensation system in the area of employer misconduct.[88] Although intentional behavior is distinguished from grossly negli-

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exculpates employer liability based on the ground that the employer did not intend the *specific* injury, and stated that the distinction was flimsy. *Id.*

83. *Id.* at 705. Justice Levy reasoned that the employer's intent to injure could be reasonably inferred from the injuries which foreseeably flow from an employer's acts of indifference to employee safety. *Id.* at 704. *But see* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.20 (desk ed. 1988)(where statutes require intentional injury intent cannot be presumed from aggravated negligence).

84. *See* Rodriguez v. Naylor Indus., 751 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1988)(doubting difference in employer's intent whether acting intentionally or with gross misconduct), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989). The Justice argued that public policy does not support the immunity of employers from liability when an employee's injury is foreseeable and could be prevented. *See id.*

85. *See id.* (inhibition against employer misconduct yields to priority of spreading costs of accidents through insurance premiums); *see also* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985)(balance of workers' compensation system threatened by possibility of requiring employers to defend gross negligence suits).

86. *See Rodriguez*, 751 S.W.2d at 704-05 (state's interest in efficiently spreading business costs less important than preventing injury); *see also* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 573 (5th ed. 1984)(industrial accidents treated as cost of production).

87. *See* Rodriguez v. Naylor Indus., 741 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1988)(Levy, J., dissenting)(law should discourage gross negligence), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989). The Justice also noted that courts possess the power to change this area of law, based on language in *Sanchez v. Schindler*. *See id.* at 705; *see also* Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983)(courts possess common-law heritage allowing development of new principles in response to changing values).

88. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985)(gravity of employer's conduct does not affect accidental nature of injury); *Rodriguez*, 751 S.W.2d at 703 (intentional conduct requires substantial certainty injury will result). *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 68.10 (desk ed. 1988)(cannot stretch employer's common-law liability to include accidental injuries resulting from gross misconduct).

gent behavior based upon whether the defendant intended the consequences of his acts,[89] Justice Levy found this distinction meaningless when considering the obvious disregard of this employer for his employee's safety.[90] Justice Levy imputed intent from the employer's callous behavior, and equated "knowing . . . exposure of an employee to an unreasonable risk of harm" with "knowing with substantial certainty that the employee will be so harmed" by certain conduct.[91] Through his analysis, Justice Levy recategorized wilful misconduct as intentional conduct,[92] thereby enabling the employee to bring suit outside the workers' compensation statute.[93]

V. MODIFYING WORKERS' COMPENSATION

A. *Expanding the Definition of Intentional Conduct*

The spectrum of employer misconduct ranges through intentional, wilful, grossly negligent and ordinary negligent conduct.[94] Wilful misconduct is distinguishable from intentional conduct because a strong probability of in-

89. *See Reed*, 689 S.W.2d at 407 (mental state determined by intentional or accidental nature of injury).

90. *See Rodriguez*, 751 S.W.2d at 704-05 (Levy, J., dissenting)(inequitable to shield employer from liability on ground no specific injury intended); Bennight v. Western Auto Supply Co., 670 S.W.2d 373, 377 (Tex. App.—Austin 1984, writ ref'd n.r.e.)(intent refers to consequences of act rather than act itself). *See generally* Note, *Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision—An Employer's Intentional Failure to Maintain a Safe Work Place is Not an Intentional Act Unless Employer is Substantially Certain That Such Conduct Would Cause Injury*, 17 ST. MARY'S L.J. 513, 518-20 (1986)(discussing definition of intent in Texas).

91. *See Rodriguez*, 751 S.W.2d at 705 (Levy, J., dissenting) (concluding exposure of employees to known danger functionally equivalent to substantial certainty injury will occur). Thus, the defendant's conduct was equivalent to behavior which satisfies the definition of intent. *See id.*; *see also* Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981)(substantial certainty result will follow from action denotes intent); VerBouwens v. Hamm Wood Prod., 334 N.W.2d 874, 876 (S.D. 1983)(danger must be of substantial certainty to constitute intentional conduct).

92. *See Rodriguez*, 751 S.W.2d at 705 (Levy, J., dissenting) (employer's misconduct was functionally equivalent to behavior when substantially certain that injury would occur). *Compare id.* (employer substantially certain that injury would occur) *with Bazley*, 397 So. 2d at 482 (intentional conduct occurs when substantially certain that result will follow from act).

93. *See* Note, *Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision—An Employer's Intentional Failure to Maintain a Safe Work Place Is Not an Intentional Act Unless the Employer Is Substantially Certain That Such Conduct Would Cause the Injury*, 17 ST. MARY'S L.J. 513, 517-18 (1986)(discussing when intentional conduct operates to reinstate employer's common-law liability).

94. *See* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.20 (desk ed. 1988)(gravity of employer misconduct ranges from intentional injury through wilful misconduct and gross negligence). *See generally* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 208-14 (5th ed. 1984)(discussing various degrees of care).

jury is required, rather than substantial certainty of injury.[95] If the dissent's analysis in *Rodriguez* were adopted by courts, the definition of intentional conduct would be expanded to include wilful misconduct when the actor is consciously indifferent to the results of an obvious risk.[96] Wilful misconduct would then fall outside workers' compensation coverage, much like the intentional tort exception.[97] The injured worker could make an election at the time of injury and determine whether to bring a common-law action or simply accept the usual workers' compensation benefits.[98] This analysis appears logical because if an employer knows that his acts or omissions endanger employees' safety, he consciously disregards their safety and his conduct should be penalized by inferring intent from a conscious disregard of foreseeable danger.[99] Although it is currently cheaper for employers to forbear

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95. *See* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 213 (5th ed. 1984)(wilful misconduct present where highly probably that harm will result); Comment, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 901 (1983)(discussing three possible mental states for wilful misconduct). Wilful misconduct occurs where an act is committed "(1) deliberately for the purpose of injuring another; (2) intentionally with knowledge that serious injury will probably result; [or] (3) intentionally in disregard of the consequences." *Id.*

96. *See* Rodriguez v. Naylor Indus., 751 S.W.2d 701, 705 (Tex. App.—Houston [1st Dist.] 1988)(Levy, J., dissenting) (wilful misconduct construed by dissent as intentional behavior), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989); *see also* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 213 (5th ed. 1984)(wilful misconduct entails disregard of obvious risk).

97. *See* Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406 (Tex. 1983)(intentional injuries are exception to rule that workers' compensation is exclusive remedy); Middleton v. Texas Power & Light Co., 108 Tex. 96, 109, 185 S.W. 556, 560 (1916)(court recognized exception and stated purpose of Act to encompass only accidental injuries); *see also* Comment, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 908-09 (1983)(courts justified in interpreting wilful misconduct to fall outside workers' compensation as they did when creating intentional tort exception).

98. *See also* ARIZ. REV. STAT. § 23-1022 (1971 & Supp. 1982)(creating exception for wilful misconduct and allowing election between compensation and common-law action). *See generally* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 23, 23-24 (1980)(employer cannot be sued in addition to workers' compensation benefits); Comment, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 908 (1983)(offset of remedies prevents double recovery by employee).

99. *See Rodriguez*, 751 S.W.2d at 704 (Levy, J., dissenting) (inferring intent from behavior which disregards foreseeable consequences); Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 914 (W. Va. 1978)(wilful misconduct falls outside exclusive remedy provision thus allowing common law); *see also* Purcell, *Punitive Damages and the Injured Worker*, in STATE BAR OF TEXAS DEVELOPMENT PROGRAM—WORKERS' COMPENSATION E-1 (1986):

> Today the villain most in need of curbing is the respectable, exemplary trusted personage who, strategically placed at the focus of a spider-web of fiduciary relations, *is able from his*

taking preventative safety measures, the economic penalty accompanying this expansion of intentional conduct would encourage employers to comply with safety standards and thus make the work place safer.[100]

B. *Exemplary Damages for Injuries Resulting from Employer's Gross Negligence*

Another solution would be the enactment of a statutory exception allowing common-law suits for damages when an employee is injured as a result of his employer's gross negligence.[101] The basis for this action lies in the common-law duties which employers owe to employees: providing a safe working environment, warning employees of dangers which they may not perceive, and promulgating safety rules for employees' protection.[102] Because the current law has not effectively promoted safety, reinstating employee's common-law rights against grossly negligent employers may effectively deter employer misconduct and encourage compliance with safety

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office chair to pick a thousand pockets, poison a thousand minds, or *imperil a thousand lives*, it is the great-scale, high-voltage sinner that needs the shackle.

Id. (emphasis in original). *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.20 (desk ed. 1988)(stating statutes which do not penalize safety violations fail to bolster safety movement).

100. *See* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 686 (1983)(current law encourages corporations to forbear from preventative measures because costs of compensation insurance less than costs of accident prevention); Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31 S.D.L. REV. 157, 157 (1985)(employer benefits economically from wilful misconduct under current law). *But see* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.20 (desk ed. 1988)(some courts refuse to find serious misconduct reaches level of wilful misconduct when stiff penalty involved). If courts were adversely influenced by the gravity of a penalty for gross negligence, expanding intentional conduct to include wilful misconduct would fail to encourage compliance with safety standards. *See* Serna v. Statewide Contractors, Inc., 429 P.2d 504, 507-08 (Ariz. 1967)(where penalty for wilful misconduct is common-law action, no wilful misconduct found when employer failed to take safety precautions after warning that ditch might collapse).

101. *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 683 (1983)(workers' compensation inequitable where it bars suits for gross negligence). Other states provide statutory penalties when employers fail to obey safety regulations or provide safety devices. *See* 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 69.10 (desk ed. 1988)(citing statutes in Arkansas, Kentucky, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Utah, and Wisconsin).

102. *See, e.g.*, Armour v. Golkowska, 66 N.E. 1037, 1038 (Ill. 1903)(duty of employer to provide reasonably safe work place); White v. Consolidated Freight Lines, 73 P.2d 358, 359 (Wash. 1937)(duty to furnish safe working environment nondelegable). *See generally* Appleby, *The Practical Labor Lawyer*, 12 EMPLOYEE REL. L.J. 528, 528-30 (1987)(potential for negligence actions against union increasing due to emphasis on safety in work place).

standards.[103] Additionally, it is inequitable to disallow exemplary damages for gross negligence simply because the employee was permanently disabled rather than killed.[104] Historically, objections to the class distinction between injured and deceased employees evoked a response that the economic efficiency of the workers' compensation system would be disturbed by any change.[105] At the time of enactment, the workers' compensation statute was considerably more efficient for injured workers than was judicial action.[106] Today, however, the argument that injuries and death are a cost of business offends public policy.[107]

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103. *See* Purcell, *Punitive Damages and the Injured Worker*, in STATE BAR OF TEXAS DEVELOPMENT PROGRAM—WORKERS' COMPENSATION E-1 (1986)(three-fourths of 645 construction worker deaths involved federal safety standard violations). *See generally* Appleby, *The Practical Labor Lawyer*, 12 EMPLOYEE REL. L.J. 528, 531-32 (1987)(urging employers to promulgate safety standards to avoid liability as exceptions to exclusive remedy rule broaden); Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603, 610-11 (1985)(allowing tort actions providing incentive for due care because accident costs cannot be accurately predicted). For example, asbestos production has almost come to halt because of the asbestos-based tort litigation. *Id.* at 613.

104. *See* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 690-91 (1983)(distinction between injured and deceased employees irrational because purpose of exemplary damages to punish and deter); *see also* W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORT 9 (5th ed. 1984)(exemplary damages based upon purpose of punishing and deterring others from similar misconduct).

105. *See* Johns-Manville Prod. Corp. v. Contra Costa Superior Court, 612 P.2d 948, 953 (Cal. 1980)(balance between employer's immunity and employee's certain compensation would be significantly disturbed by expanding intentional conduct and allowing additional action at law for damages); McDonald v. Sabayrac Assoc., Inc., 620 S.W.2d 850, 852 (Tex. App.—Houston [14th Dist.] 1981, no writ)(recovery of exemplary damages would increase cost, overburden, and defeat workers' compensation).

106. *See* 1 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 4.50 (desk ed. 1988)(before workers' compensation legislation only small fraction of injured workers recovered compensation); *see also* T. KORIOTH & F. SOUTHERS, TEXAS WORKERS' COMPENSATION DESK BOOK 1 (1980)(harshness of common-law defenses made recovery difficult through courts).

107. *See* Blankenship v. Cincinnati Milacron Chem., 433 N.E.2d 572, 578-79 (Ohio 1982)(Celebrezze, C.J., concurring) (anyone believing employees' injuries from fumes should not be eliminated because of competitive disadvantage to manufacturers is enemy of workers); Rodriguez v. Naylor Indus., 751 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1988)(Levy, J., dissenting) (employee safety more important than traditional priority of financial considerations), *rev'd and remanded*, 32 Tex. Sup. Ct. J. 182 (Jan. 25, 1989). "The view expressed to support employer immunity is generated by greed to save a few dollars at the expense of chemically poisoned employees. It displays brutal lack of compassion." *Blankenship*, 433 N.E.2d at 580 (Brown, J., concurring). *See generally* Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 683 (1983)(inequitable and counterproductive to safety to bar gross negligence suits for injuries); Comment, *Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct*, 31

VI. CONCLUSION

> [I]t is, I think, fair to wonder where one may find the believer who will argue that God does not see into the executive suite; where it is written in the Bible that a sin is cleansed if committed for a corporation; where our ethical heritage instructs that for one to inflict injury and death knowingly is impermissible—unless one does it by remote control, via a paper entity. It is also fair and necessary to wonder why such questions are rarely raised and discussed.[108]

These words descriptively portray problems in the workers' compensation system. The law shields employers with immunity by mandating workers' compensation as the exclusive remedy to employees, leaving employers free to inflict serious injuries and even death under the guise of cost efficiency.

The law presumes to except intentional injuries from the exclusive remedy rule, but the courts apply this exception only if an intentional tort is committed. The question remains: should not the wilful exposure of employers to danger and obvious risks be penalized as well? The burden of recovering exemplary damages under the gross negligence exception has been relaxed since the adoption of the "some evidence" test coupled with an objective standard of proof. This second exception however, fails to adequately protect workers' safety because it provides exemplary damages only to families of workers who fail to survive their employers' gross negligence.

One satisfactory proposal lies in the dissent of *Rodriguez*. If courts follow this analysis and infer intent when the employer ignores obvious safety risks, employers could be properly sanctioned through the expansion of the definition of intentional conduct. Ultimately, employers would have to take preventative measures to stay in business because the actual costs recovered by employees for injuries in common-law suits would exceed the costs of insurance premiums designed to compensate workers for less than the full costs of injuries.

Another alternative is a statutory amendment allowing workers injured, rather than killed, by their employers' gross negligence to recover exemplary damages. This would eliminate an intrinsic inequity in the law, and make the work place safer. Regardless of the measures taken, immediate action is necessary to remove the shield of immunity currently protecting employers' balance sheets and to begin protecting the work force.

S.D.L. REV. 157, 169 (1985)(system allowing employers to kill rather than merely disable employees through wilful misconduct is manifestly unjust).

108. Purcell, *Punitive Damages and the Injured Worker*, in STATE BAR OF TEXAS DEVELOPMENT PROGRAM—WORKERS' COMPENSATION E-1 (1986).