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Personal Tort Law

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I. INTRODUCTION

THE following is a discussion of significant personal tort law cases decided in Texas during the Survey period, November 1, 2008, to October 31, 2009. This discussion covers a wide variety of important Texas tort law issues, including whether Texas is now willing to allow recovery for the loss of a chance at survival, whether the Texas government still enjoys a wide grant of sovereign immunity, and whether an employer may be liable for the torts of its sleepy, off-duty employees.

II. MEDICAL MALPRACTICE—STILL NO LOSS OF CHANCE IN TEXAS

In *Columbia Rio Grande Healthcare, L.P. v. Hawley*,[1] physicians practicing at the defendant hospital performed a colon resection on a woman who sought treatment complaining of stomach problems.[2] The pathology report, conducted by an independent pathologist practicing from an office located at the hospital, showed the presence of cancer.[3] However, due to an apparent mix-up and in violation of the hospital's policies, the treating physicians were not aware of the pathology findings prior to the patient's discharge from the hospital. The patient was discharged from the hospital having not been informed that she had cancer.[4] In fact, the

* University of Houston Law Center, George Butler Research Professor of Law. My thanks to the University of Houston Law Foundation for its support and to Christopher Dykes, University of Houston Law Center Law Reference/Research Librarian, for his terrific research assistance.

1. 284 S.W.3d 851 (Tex. 2009).
2. *See id.* at 854.
3. *See id.* at 854-55.
4. *See id.* at 855.

treating physicians did not inform her of the cancer until almost one year later, when the patient returned for a routine checkup and tests revealed that that she had elevated liver enzymes.[5] Sadly, by this time, the patient's diagnosis was terminal, and she had less than a twenty percent chance of surviving the cancer.[6]

The patient sued the treating physicians, the hospital, and the independent pathologist, claiming that their negligence prevented her from being properly diagnosed with cancer in a timely fashion.[7] At trial, the jury ruled in favor of the plaintiff.[8] The defendants appealed the jury's verdict, alleging that the trial court erred in refusing, among other things,[9] to instruct the jury properly on the issue of causation in fact as the defendant hospital had requested.[10] The appeal provided the Texas Supreme Court with an opportunity to reconsider the interesting issue of whether Texas recognizes recovery pursuant to loss of chance claims in the medical malpractice context.[11]

In medical malpractice, a lost chance of survival tort action (also known as the loss of chance doctrine) typically permits a plaintiff to recover from a defendant whose negligent treatment decreased the plaintiff's chance of avoiding death or other medical condition where the complained-of injury would probably have occurred anyway.[12] Allowing such a recovery in tort challenges the basic concept requiring proof of causation in fact in a negligence action.[13] The causation problem arises because the plaintiff's preexisting illness or injury makes the patient's chance of avoiding the ultimate harm improbable even before the defen-

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5. *See id.*

6. *See id.* at 855, 861.

7. *See id.* at 855. Prior to trial, the plaintiff nonsuited the treating physicians, choosing to pursue the negligence action against only the hospital and the independent pathologist. *See id.*

8. *See id.*

9. The hospital also complained that the trial court erred in its refusal to instruct the jury regarding the status of the pathologist as an independent contractor, and the point of error was granted. *See id.* at 855-856. The defendant hospital also wanted the court to instruct the jury that the independent pathologist's failure to notify the treating physicians of the pathology findings was an unforeseeable act of negligence, sufficient to destroy the causal link between the hospital's alleged negligent act and the plaintiff's injury. *See id.* at 856. On this issue, the supreme court ruled that the doctor's conduct was foreseeable, as evidenced by the hospital's duplicative policies requiring notification of the treating physicians. *See id.* at 858-59. Therefore, there was no new and independent cause, and the trial court did not err in refusing the instruction. *See id.* at 859.

10. *See id.* at 855. The hospital requested the following instruction: "You are instructed that [the plaintiff] must have had greater than a fifty percent (50%) chance of survival . . . for the negligence of [the hospital] to be a proximate cause of [her] injury . . . ." *See id.* at 859.

11. *See* Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 398 (Tex. 1993) (holding no recovery in Texas for lost chance of survival in medical malpractice cases).

12. *See id.*

13. *See id.* at 400 (explaining that causation in fact is established by proving by a preponderance of the evidence that defendant's negligent act was a substantial factor in bringing about harm and without which the harm would not have occurred). Establishing causation in a negligence action requires proof of both causation in fact and proximate causation. *See Columbia Rio Grande Healthcare*, 284 S.W.3d at 860.

dant's alleged negligence occurs.[14] For example, in *Columbia Rio Grande Healthcare*, the plaintiff's cancer (the preexisting illness) gave her only a twenty percent chance of survival absent the hospital's misdiagnosis (the defendant's alleged negligence), thereby making it impossible for her to prove that the defendant's negligence would more likely than not cause her death.[15] Because of this fundamental impediment to establishing causation in fact, many jurisdictions—including Texas[16]—that have considered whether to recognize an action for loss of chance have rejected it as a basis for recovery.[17]

In *Columbia Rio Grande Healthcare*, the defendant hospital complained that the trial court erred in not including the hospital's proposed jury instruction regarding the plaintiff's lost chance of survival.[18] Without the defendant hospital's requested instruction, the jury likely rendered an incorrect judgment, as it was free to conclude as the plaintiff argued at trial—that the defendant could be liable for its negligence even absent proof that the defendant's negligence more likely than not caused the complained-of injury.[19] The requested trial instruction would have been helpful in clarifying the causation in fact issue. Therefore, the supreme court decided that the trial court committed reversible error in not granting the request.[20]

The supreme court's decision in *Columbia Rio Grande Healthcare* correctly applies sound tort doctrine. As long as Texas is unwilling to recognize the loss of a chance of recovery as a distinct, compensable injury, a plaintiff's claim for recovery against a defendant should fail for lack of adequate proof of causation in fact in a negligence action. Well-established tort doctrine has long provided that causation in fact requires proof that the defendant's negligence more likely than not caused the plaintiff's injury. When a plaintiff has less than a fifty percent chance of surviving even without the defendant's negligence, it cannot be established that the defendant's conduct probably caused, more likely than not, the injury.

As some courts have recognized, non-recognition of an action for loss of chance may lead to perceived unjust results, as plaintiffs with less than a fifty percent chance of survival have no recourse against negligent defendants.[21] The best way to resolve any perceived unfairness would be

14. *See Kramer*, 858 S.W.2d at 400.

15. *See Columbia Rio Grande Healthcare*, 284 S.W.3d at 862.

16. *See Kramer*, 858 S.W.2d at 398.

17. *See id.* at 400-01 (citing cases rejecting the loss of chance doctrine). Others permitting recovery for loss of chance have been reluctant to do so outside of the medical malpractice context. *See, e.g.*, Grant v. Am. Nat'l Red Cross, 745 A.2d 316, 317 (D.C. Cir. 2000) (refusing to extend loss of chance against defendant who failed to use proper blood transfusion screening test); Hardy v. Sw. Bell Tel. Co., 910 P.2d 1024, 1025-26 (Okla. 1996) (refusing to extend loss of chance recovery to action against phone company for alleged flaw in 911 system).

18. *See Columbia Rio Grande Healthcare*, 284 S.W.3d at 855.

19. *See id.* at 862. As the supreme court recognized, this issue was further complicated in this case because the plaintiff was still alive at the time of trial. *See id.* at 860.

20. *See id.* at 865-66.

21. *See, e.g.*, Matsuyana v. Birnbaum, 890 N.E.2d 819, 831 (Mass. 2008).

for courts to recognize a "lost chance" as a distinct, compensable injury, which the supreme court was expressly unwilling to do in this case.[22]

III. COURTS' PROTECTION OF SOVEREIGN IMMUNITY UNDER THE TEXAS TORT CLAIMS ACT

Common law has long recognized a citizen's inability to sue the government in tort.[23] This concept—known as governmental or sovereign immunity—has its genesis in the notion that it is counterintuitive to allow the government to be sued in its own courts by its own citizens without its express permission.[24] Granting permission—or waiving its sovereign immunity—is done statutorily. The Texas Tort Claims Act (TTCA) is the means by which the state of Texas provides permission to be sued in tort.[25] The Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit decided cases during the Survey period which addressed the contours of Texas's express waiver of sovereign immunity pursuant to the TTCA.

A. *DALLAS COUNTY V. POSEY*[26]

When Bryan Posey was placed in a holding cell after being arrested for assaulting his mother, he used the cord on the non-working telephone in his cell to hang himself until he died.[27] Posey's parents sued Dallas County under the TTCA for his death, alleging that the County's negligence caused their son's suicide.[28] The supreme court upheld the government's immunity, ruling that the state of Texas had not waived its sovereign immunity in this case and denying the plaintiffs recovery.[29]

The provision of the TTCA at issue in *Posey* provides for waiver of governmental immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[30] The plaintiffs' allegation of government liability was twofold: (1) placing Bryan Posey in a cell with a corded telephone amounted to a condition or misuse of property, particularly because the County was aware that inmates would use cords on telephones to commit suicide (evi-

22. *See id.* at 861; *see also Kramer*, 858 S.W.2d 398 (also refusing to recognize loss of chance doctrine in Texas medical malpractice cases).

23. *See, e.g.*, Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

24. *See, e.g.*, Deuser v. Vecera, 139 F.3d 1190, 1192 (8th Cir. 1998) (explaining United States' waiver of sovereign immunity by enactment of Federal Tort Claims Act); Tex. Dep't of Transp. v. York, 284 S.W.3d 844, 846 (Tex. 2009) ("The State of Texas is protected from suits for damages by sovereign immunity, unless waived by statute.").

25. *See* TEX. CIV. PRAC. & REM. CODE § 101.021 (Vernon 2005).

26. 290 S.W.3d 869 (Tex. 2009).

27. *See id.* at 871.

28. *See id.*

29. *See id.* at 872.

30. *Id.* (quoting from TEX. CIV. PRAC. & REM. CODE § 101.021(2)).

denced by the County previously having ordered all corded telephones in cells be replaced with cordless telephones),[31] and (2) placing Bryan Posey in a cell with a corded telephone constituted negligence, because the County failed to assess properly his suicide risk.[32] The supreme court rejected both of these contentions.[33]

In addressing the plaintiffs' first contention, the supreme court explained that the County's failure to replace the corded phone did not amount to a condition or use of property, but rather constituted a misuse or non-use of property.[34] The supreme court explained that the TTCA does not waive governmental immunity for misuse or non-use of property.[35] Moreover, the supreme court explained that Posey's death was caused by *Posey's* use of the corded telephone, not by *the County's* use of it.[36] The supreme court explained that "[f]or a defective condition to be the basis for complaint, the defect must pose a hazard in the intended and ordinary use of the property."[37] Using a telephone cord to hang oneself is not the intended or ordinary use of such property.[38] The corded phone did not cause the injury, but was rather a condition of the property improperly used by the inmate to commit suicide.[39] The supreme court explained that this constituted an insufficient nexus between any condition of the telephone and the death of Bryan Posey, thereby defeating any determination of proximate causation.[40] The supreme court, therefore, held that immunity was not waived by the government under the facts of this case.[41]

The supreme court concluded by addressing whether the County had waived immunity because it was negligent in failing to properly assess Posey as a suicide risk. At Posey's intake, he failed to complete the mental disability/suicide screening form, which the plaintiffs claimed constituted proof of the County's negligence.[42] The supreme court concluded that, regardless of whether this amounted to negligence on the part of the County, the County did not waive its immunity status. Therefore, the plaintiffs' claim based on any alleged negligence of the County was denied as well.[43]

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31. *See id.*

32. *See id.* at 872.

33. *See id.* at 871-72.

34. *See id.* at 871.

35. *See id.* "Immunity is not waived when the governmental unit merely 'allow[s] someone else to use the property and nothing more.'" *Id.* (quoting San Antonio State Hosp. v. Cowan, 128 S.W.3d 244, 246 (Tex. 2004)).

36. *See id.*

37. *Id.* at 872.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.* at 871-72.

43. *See id.* at 872.

B. *GOODMAN V. HARRIS COUNTY*

In *Goodman v. Harris County*,[44] a bicyclist was shot and killed by a Harris County deputy constable officer after the bicyclist fled from the constable and then tried to drown the constable's canine partner.[45] The estate of the bicyclist sued both the County and the constable individually in federal court, claiming violations of the bicyclist's federal rights as well as tort violations pursuant to the TTCA. The district court denied the plaintiffs' TTCA claim.[46]

Regarding the part of the plaintiffs' lawsuit based on the TTCA, the plaintiff sought to hold the constable individually liable and claimed that the County's failure to train or supervise its employee supported a proper TTCA action.[47] In affirming the district court's grant of summary judgment in favor of the defendants, the Fifth Circuit applied Texas law and denied both theories of recovery.[48] First, the Fifth circuit ruled that the TTCA did not recognize tort actions against individual state employees.[49] Although the TTCA does provide a limited waiver of governmental immunity, the TTCA does not grant a waiver of governmental immunity for claims against individual employees of the state.[50]

Next, the Fifth Circuit ruled that claims for negligent failure to train or supervise a state employee do not fall within the grant of the TTCA's waiver of sovereign immunity. Like the Texas Supreme Court in its decision in *Posey*,[51] the Fifth Circuit, in applying Texas law in this diversity lawsuit, was called upon to interpret the section of the TTCA providing for the government's waiver of immunity where an individual was injured by the "condition or use of tangible personal or real property."[52] The Fifth Circuit ruled that information provided as training or supervision is not tangible personal property within the meaning of the TTCA. Therefore, the government retained its immune status, as it had not expressly waived immunity.[53]

While acknowledging the tragic facts in *Posey*, yet denying the plaintiffs' claim, the supreme court concluded with the reminder that "the circumstances under which governmental immunity is waived under the

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44. 571 F.3d 388 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1146 (2010).

45. *See id.* at 392.

46. The plaintiffs also sued under 42 U.S.C. § 1983, discussion of which is beyond the scope of this Survey. *See id.* Section 1983 is the federal statute permitting an individual a private right of action against the federal government for deprivation of his or her rights, privileges, or immunities under color of law. In this case, the jury awarded the plaintiffs $5 million on the federal claims, and the verdict was affirmed on appeal. *See id.* at 393-95, 401.

47. *See id.* at 394.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See supra* notes 26-43 and accompanying text.

52. *Goodman*, 571 F.3d at 394 (citing Tex. Dep't of Pub. Safety v. Petta, 44 S.W.3d 575, 580 (Tex. 2001)).

53. *See id.* (citing *Petta*, 44 S.W.3d at 580).

[Texas Tort Claims] Act are very narrow."[54] In applying Texas law in *Goodman*, the Fifth Circuit did the same.[55] Not surprisingly, a similar result was reached in two additional cases this term—*Denton County v. Beynon*[56] and *Texas Department of Transportation v. York*.[57]

C. *Texas Department of Transportation v. York*

In *Texas Department of Transportation v. York*, a motorist was killed when the car she was driving hit a patch of loose gravel in the road, causing her to lose control of her car.[58] The loose gravel was the result of a recent repair to the road performed by the Texas Department of Transportation.[59] The motorist's husband filed a wrongful death action against the Texas Department of Transportation, which asserted the defense of sovereign immunity.[60]

Plaintiff's claim was based on a portion of the TTCA waiving the government's immunity status for personal injuries arising from either a premise defect or a special defect.[61] The standard of care owed by the government for a premise defect is similar to a landowner's duty of care owed to a licensee.[62] The government, therefore, has a duty to warn of premise defects about which it is actually aware, about which the plaintiff is unaware, and which creates an unreasonable risk of harm.[63] This is contrasted with the duty owed in a claim involving a special defect, which is most similar to a landowner's duty to an invitee.[64] For a special defect, the government owes a duty to warn of unreasonable risks of harm that are actually or constructively known to it.[65]

The determination of "whether a condition is a premise defect or a special defect is a question of law."[66] The supreme court concluded that the loose gravel at issue was, at most, a premise defect.[67] The supreme court first explained that the statute does not define either term—pre-

54. Dallas County v. Posey, 290 S.W.3d 869, 872 (Tex. 2009).
55. *Goodman*, 571 F.3d at 394.
56. 283 S.W.3d 329 (Tex. 2009); *see infra* Part III.D.
57. 284 S.W.3d 844 (Tex. 2009); *see infra* Part III.C.
58. *York*, 284 S.W.3d at 845.
59. *See id.* at 845-46.
60. *See id.* at 846. At trial, the jury ruled in favor of the plaintiff and awarded him in excess of $1 million, which, "[p]ursuant to statutory limitations . . . was reduced to $250,000." *Id.* at 845.
61. *See id.* at 846 (analyzing Tex. Civ. Prac. & Rem. Code § 101.022(a) & (b) (Vernon 2005)).
62. *See id.* A licensee is a person who enters a landowner's property for the licensee's own purpose and not for the landowner's benefit. *See* Black's Law Dictionary 1004 (9th ed. 2009).
63. *See York*, 284 S.W.3d at 847.
64. *See id.* An invitee is a person who enters the land of another for the benefit of the landowner. *See* Black's Law Dictionary, *supra* note 62, at 904.
65. *See York*, 284 S.W.3d at 847 (explaining that for the more lenient invitee standard, "a plaintiff need only prove that the governmental unit should have known of a condition that created an unreasonable risk of harm").
66. *Id.* at 847.
67. *See id.* at 847-48.

mise defect or special defect.[68] However, prior court decisions have concluded that a special defect is an excavation, obstruction, or other very similar condition on a roadway.[69] Because the loose gravel at issue here did not rise to the level of an excavation or obstruction, the condition of the road did not amount to a special defect.[70]

Regarding the premise defect claim, the supreme court explained that the plaintiff failed to obtain a jury finding applying the proper standard of care for a premise defect.[71] Further, because the plaintiff failed to have the jury determine whether the Texas Department of Transportation had actual knowledge of the loose gravel or whether the driver lacked actual knowledge, the plaintiffs' claim based on premise defect could not be sustained.[72] The government's sovereign immunity was not waived as to any of the plaintiffs' claims.[73]

D. *DENTON COUNTY V. BEYNON*

Similarly, *Denton County v. Beynon*[74] involved a plaintiff seeking to hold the government responsible in tort for injuries caused by a special defect of a roadway.[75] In *Beynon*, a minor traveling in the backseat of a car was injured when the car in which she was riding veered off the road to avoid a head-on collision with an approaching vehicle.[76] In avoiding the collision, the car momentarily drove off the side of the road onto the shoulder, which was covered with loose gravel, causing the driver to lose control of the vehicle.[77] A floodgate arm, allegedly improperly maintained by Denton County, pierced the driver's side of the car, where it entered the backseat and pierced the minor's leg "before travelling through the floorboard beneath her seat."[78] As a result of the injury, her leg had to be amputated.[79]

The plaintiffs sued the County based on the government's waiver of immunity for injuries caused by a special defect.[80] Over strong dissent, a majority of the supreme court held that the government was immune from liability.[81] The majority first confirmed that the government did indeed waive its immunity in the case of a special defect: "Where a special defect exists, the State owes the same duty to warn as a private landowner owes an invitee, one that requires the State 'to use ordinary care to

68. *See id.* at 847.
69. *See id.*
70. *See id.* at 847-48.
71. *See id.* at 848.
72. *See id.*
73. *See id.*
74. 283 S.W.3d 329 (Tex. 2009).
75. *See id.* at 330-31.
76. *See id.*
77. *See id.* at 330.
78. *Id.* at 330-31.
79. *See id.* at 334 (O'Neill, J., dissenting).
80. *See id.* at 331.
81. *See id.* at 333.

protect an invitee from a dangerous condition of which the owner is or reasonably should be aware.'"[82] A special defect includes an excavation or obstruction, which the floodgate arm may have been in this case.[83] However, the supreme court went on to explain that special defects are actionable "only if they pose a threat to the ordinary users of a particular roadway."[84] It concluded, as a matter of law, that running one's car onto the shoulder of a roadway to avoid a head-on collision does not constitute an ordinary use of a roadway.[85] Therefore, the plaintiff's cause of action fell outside of the waiver of governmental immunity for special defects.[86]

Justice O'Neill dissented from the majority's opinion, joined by Chief Justice Jefferson and Justice Medina: "[A]n unsecured floodgate arm pointing directly at oncoming traffic a mere three feet from the road's edge is out of the ordinary, unexpected, and extremely dangerous to ordinary users of the roadway."[87] Justice O'Neill explained that "ordinary users" of roadways are sometimes understandably required to "stray outside of the road lines."[88]

The majority has gone through great lengths to shield the state from liability, almost to the point of being disingenuous. The condition of the floodgate arm clearly seems to be a special defect, which caused an injury to the plaintiff while using a roadway in an ordinary manner. To rule as a matter of law, as the majority did, that a careful driver who leaves the road to drive on the shoulder momentarily to avoid a head-on collision is not an ordinary user of the roadway seems uninformed and misguided. It is incredible that this situation is not the very type of situation for which the legislature approved for waiver of the state's sovereign immunity by enacting the TTCA.

IV. NO EMPLOYER RESPONSIBILITY FOR OFF-DUTY EMPLOYEES DRIVING WHILE DROWSY

A final interesting and noteworthy case decided by the supreme court during the Survey period is *Nabors Drilling, U.S.A., Inc. v. Escoto*.[89] *Nabors Drilling* is a wrongful death action brought by the estates of three people who were killed when the vehicle in which they were riding collided head-on with a truck driven by Robert Ambriz, an employee of Nabors Drilling, U.S.A., Inc. (Nabors).[90] Ambriz was also killed in the

82. *See id.* at 331 (quoting State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992)).

83. *See id.* at 331-32 (citing State v. Rodriguez, 985 S.W.2d 83 (Tex. 1999); *Payne*, 838 S.W.2d 235 (Tex. 1992)).

84. *Id.* (internal quotations omitted).

85. "[A]n 'ordinary user,' . . . would not be expected to careen uncontrollably off the paved roadway . . . ." *Id.* at 332 (quoting *Payne*, 838 S.W.2d at 233 n. 3).

86. *See id.*

87. *Id.* at 335 (O'Neill, J., dissenting).

88. *Id.* at 334.

89. 288 S.W.3d 401 (Tex. 2009).

90. *See id.* at 404.

accident.[91] Moments before the collision, Ambriz had finished a twelve-hour-long shift for Nabors, his employer.[92] The plaintiffs sued Nabors,[93] alleging that it owed the plaintiffs a duty of care because Nabors was aware or should have been aware of its employee's fatigued condition.[94] The supreme court disagreed.[95]

Nabors provided work-site trailers for employees to use when they were too tired to travel home.[96] The day of the accident, Ambriz was awake for over twelve hours prior to his shift. Apparently realizing that he would be very tired after his upcoming twelve-hour shift, he brought a change of clothes and some toiletries to work, apparently planning to sleep in the provided trailer when he finished his shift.[97] Instead, he chose to drive home.[98]

The law generally provides that an employer is not responsible for the torts of its off-duty employees.[99] Stated differently, in Texas, an employer does not owe the general public a duty of care to prevent the wrongful acts of its off-duty employees.[100] In *Nabors Drilling*, the supreme court explained that Texas has previously recognized limited exceptions to this general no-duty rule, for example, when an employer exercises control over its employee due to the employee's incapacity[101] or "when an employer requires its employee to consume alcohol."[102] The plaintiffs in *Nabors Drilling* urged for the recognition of an additional exception to the general rule when an employee is fatigued and the employer knows or should know of the employee's condition.[103] The supreme court refused to add such an exception.[104]

Nabors Drilling is an interesting case, as the plaintiffs sought to impose *direct* responsibility upon the employer for the employee's conduct rather than imposing *vicarious* responsibility.[105] Typically, employer liability cases involve the imposition of vicarious liability, which is a determination that is not dependent upon a showing that the employer did anything wrong.[106] Rather, imposition of vicarious liability upon an employer is based upon the relationship between the employer and employee.[107]

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91. *See id.*
92. *See id.*
93. The plaintiffs also sued Ambriz's estate. *See id.*
94. *See id.*
95. *See id.* at 413.
96. *See id.* at 404.
97. *See id.* at 413.
98. *See id.*
99. *See id.* at 403.
100. *See id.*
101. *See id.* (citing Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983)).
102. *Id.* (citing D. Houston, Inc. v. Love, 92 S.W.3d 450 (Tex. 2002)).
103. *See id.* at 404-05, 410.
104. *See id.* at 408.
105. *See id.* at 403-04.
106. Vicarious responsibility of employers is also known as *respondeat superior*, which is Latin for "let the superior make answer." *See* BLACK'S LAW DICTIONARY, *supra* note 62, at 1426.
107. *See Love*, 92 S.W.3d at 457.

Thus, as long as the employee was acting within the scope of employment, the employer may be vicariously liable for the employee's torts. As a result, vicarious liability of an employee is generally not imposed upon the employer for the tortious conduct of an off-duty employee.[108]

The *Nabors Drilling* plaintiffs sought to impose direct—not vicarious—liability upon the employer, Nabors.[109] All things considered, the supreme court's refusal to impose direct liability was practical under these facts. As the supreme court explained, imposition of a new common-law duty for employee fatigue would be a decision fraught with complex policy considerations.[110] The risks associated with fatigue and driving are well known throughout society.[111] The social or economic utility of requiring employers to prevent employee fatigue would present "a substantial burden on employers"—a burden that outweighs its benefits to employers—as well as society in requiring employees to put in a productive day's work.[112]

V. CONCLUSION

These recent decisions decided by the supreme court, as well as the Court of Appeals for the Fifth Circuit applying Texas law, certainly impact the practice of tort law in Texas. *Columbia Rio Grande Healthcare* provides yet another affirmation, even in the face of compelling facts, that Texas does not recognize a cause of action for loss of chance of survival. The recent decisions interpreting Texas's waiver of sovereign immunity—particularly the majority's opinion in *Beynon*—make clear that the TTCA's waiver of sovereign immunity is to be narrowly construed by the courts. Finally, *Nabors Drilling* impacts Texas tort law going forward, as it indicates the supreme court's unwillingness to impose direct liability on employers for the torts of off-duty employees.

108. *See* Loram Maint. of Way, Inc. v. Ianni, 210 S.W.3d 593, 594 (Tex. 2006).
109. *See Nabors Drilling*, 288 S.W.3d at 404.
110. *See id.* at 410-13.
111. *See id.* at 411-12.
112. *See id.* at 410-11.