IN THE SUPREME COURT OF TEXAS

No. 18-0852

MO-VAC SERVICE COMPANY, INC., PETITIONER

v.

PRIMITIVO ESCOBEDO, INDIVIDUALLY, SAN JUANITA ESCOBEDO, INDIVIDUALLY, AND MARTHA ESCOBEDO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF FABIAN ESCOBEDO, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE GUZMAN, concurring.

A hardworking Texan died alone on the side of a highway in a foreseeable accident that likely would not have occurred but for his employer's intentional disregard of laws enacted to protect workers and the public. Though precedent compels me to concur in the Court's conclusion that the Texas Workers' Compensation Act provides the exclusive remedy for the Escobedo family's heart-wrenching loss, I write separately to urge the Legislature to align the Act with Texas's wrongful-death statute by extending the Act's exemplary-damages exception to parents who have lost a child, like the Escobedo family.[1]

[1] *See* TEX. CIV. PRAC. & REM. CODE § 71.004 (Wrongful Death Act's exemplary-damages provision); TEX. LABOR CODE § 408.001(b) (Workers' Compensation Act's exemplary-damages provision).

When an employee dies because of an employer's gross negligence or intentional acts or omissions, section 408.001(b) of the Workers' Compensation Act authorizes certain family members to recover exemplary damages.[2] If Fabian Escobedo had been a husband or father when he died on the job, his employer, Mo-Vac Service Company, would be accountable under section 408.001(b) for the conduct that likely resulted in his untimely death. But the exemplary-damages remedy in section 408.001(b) is unavailable not because the alleged conduct does not rise to the level of gross negligence but because Fabian had no wife or child to grieve him. By treating some employees as more expendable than others—even when the workplace conditions are the same—section 408.001(b)'s deterrent effect is weakened, and public safety is imperiled. Employers who intentionally, willfully, and repeatedly ignore, thwart, and evade workplace laws should not escape responsibility when the foreseeable consequences of doing so materialize. Section 408.001(b) of the Act imposes consequences for such conduct but leaves a gap that endangers workers and the public. Only the Legislature is empowered to rectify the disparity section 408.001(b) creates.

I.

The Texas Workers' Compensation Act "provides reciprocal benefits to subscribing employers and their employees."[3] The Act's overarching purpose is "to provide employees with certainty that their medical bills and lost wages will be covered if they are injured."[4] The Act's no-fault guarantee offers peace of mind to employees, but in exchange, subscribing employers reap a substantial benefit: the Act bars employees from seeking tort remedies by making workers'

[2] *See* TEX. LABOR CODE § 408.001(b) ("This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.").

[3] *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 72 (Tex. 2016).

[4] *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009).

compensation benefits the exclusive remedy for death or injury sustained in the course and scope of employment.[5]

When an employer is at fault in bringing about an employee's injury, the exclusive-remedy bar may seem harsh, but it is an integral part of a comprehensive legislative scheme.[6] By limiting an injured employee's right to bring a cause of action against an employer in exchange for guaranteed benefits, the Legislature struck a carefully considered balance: assured compensation for workplace injuries without the uncertainty and expense of litigating responsibility.[7] But because the Act focuses on injuries that are broadly categorized as "accidental," we have long recognized that the Texas Constitution prohibits application of the exclusive-remedy bar to intentional injuries.[8]

In 1916, just three years after the Legislature enacted the Workers' Compensation Act, we held "the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another."[9] Because "[t]his cause of action is guaranteed to the employee by the Texas Constitution and cannot be taken away by the

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[5] TEX. LABOR CODE § 408.001(a); *Martin*, 498 S.W.3d at 72-73; *see Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981).

[6] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 521 (Tex. 1995) ("In comparison, the Act—carrying forward the general scheme of the former act—provides benefits to injured workers without the necessity of proving negligence and without regard to the employer's potential defenses. In exchange, the benefits are more limited than the actual damages recoverable at common law.").

[7] *Id*. at 511 ("Employees injured in the course and scope of employment could recover compensation without proving fault by the employer and without regard to their or their coworkers' negligence."); *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 407 (Tex. 1985) ("The system balances the advantage to employers of immunity from negligence and potentially larger recovery in common law actions against the advantage to employees of relatively swift and certain compensation without proof of fault.").

[8] *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916); *see* TEX. CONST. ART I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

[9] *Middleton*, 185 S.W. at 560.

Legislature,"[10] the Workers' Compensation Act's exclusive-remedy provision does not bar a suit for intentional injuries.[11] Correspondingly, when an employee dies from an intentionally inflicted on-the-job injury, the Act does not bar the decedent's estate from pursuing a cause of action against the employer.[12] As the Court observes, the intentional-injury exception is exceptionally narrow and has never been codified.[13]

Over the years, the exception's contours have been shaded through its application to specific facts. For example, we have explained that even when an employee's injury is "caused by [the] willful negligence or willful gross negligence" of her employer, the employer's actions do not give rise to an intentional-injury claim for purposes of the exception.[14] We have also held that "the intentional failure to furnish a safe place to work does not rise to the level of intentional injury except when the employer believes his conduct is substantially certain to cause the injury."[15] Adding to that, we have recognized myriad other scenarios that would not support a claim under the intentional-injury exception: (1) "the intentional modification or removal of safety controls or guards"; (2) "[t]he intentional violation of a safety regulation"; (3) "the intentional failure to train an employee to perform a dangerous task"; or (4) "[r]equiring an employee to work long hours."[16] Though any of this conduct could properly be categorized as "gross, wanton, willful, deliberate,

[10] *Castleberry*, 617 S.W.2d at 666.

[11] *Middleton*, 185 S.W. at 560.

[12] *Castleberry*, 617 S.W.2d at 666.

[13] *Ante* at 9, 15-16, 19-20.

[14] *Castleberry*, 617 S.W.2d at 666.

[15] *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 407 (Tex. 1985).

[16] *Id*. at 406-07.

intentional, reckless, culpable, or malicious negligence," it is not the equivalent of an intentionally inflicted injury protected by the Texas Constitution.[17]

In keeping with a constrained view of the intentional-injury exception, the Court's opinion today refines the standard and holds that the exception applies only when the employer "believe[s] that its actions are substantially certain to result in a particular injury to a particular employee, not merely highly likely to increase overall risks to employees in the workplace."[18] To my mind, the "particular employee" addition to the intentional-injury standard is an unduly rigid gloss that is unnecessary to resolve the dispute in this case, and I cannot join the Court in adopting it. I nonetheless agree the standard of proof in intentional-injury cases must remain high "to prevent the intentional-injury exception from devolving into a standard of exceptionally egregious gross negligence."[19] Consistent with a standard that requires more than egregious gross negligence, I agree with the Court that the record bears no evidence that "Mo-Vac intended a driver be killed on the job or that Escobedo's crash due to his grueling schedule was substantially certain."[20]

However, denying the Escobedo family the opportunity to pursue a cause of action against Mo-Vac reveals an inequity in the workers' compensation scheme that imperils workers and threatens the welfare of the public at large. Mo-Vac's alleged behavior in causing or contributing to Fabian's death shocks the conscience by demonstrating willful disregard for public and employee safety. Mo-Vac, however, will not be held to answer for its intentional conduct because of an incongruity between the beneficiaries who may recover exemplary damages for intentional

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[17] *Id*. at 406.

[18] *Ante* at 18.

[19] *Id*. at 20.

[20] *Id*.

and grossly negligent conduct under the wrongful-death statute and those who may recover such damages for the same conduct under the workers' compensation statute.

II.

A.

The Workers' Compensation Act, from its inception, has included an exception to the exclusive-remedy bar that is both broader and narrower than the intentional-injury exception under the Texas Constitution.[21] What is now codified as section 408.001(b) makes the Act's exclusive-remedy provision in section 408.001(a) inapplicable to intentional and grossly negligent conduct that results in an employee's death. But even though Fabian's parents, San Juanita and Primitivo Escobedo, are entitled to seek exemplary damages as statutory beneficiaries under the Texas Wrongful Death Act, their claims for the same outrageous conduct are not covered by the exclusive-remedy exception in section 408.001(b) of the Workers' Compensation Act and are therefore barred by section 408.001(a).[22]

After Fabian passed away, his parents filed a wrongful-death suit against Mo-Vac.[23] Under the Wrongful Death Act, parents of a decedent are authorized to recover exemplary damages "[w]hen the death is caused by the wilful act or omission or gross negligence of the defendant[.]"[24] The Workers' Compensation Act similarly permits recovery of exemplary damages when death is

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[21] *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 558 (Tex. 1916) (noting the Act's exception for "exemplary damages [that] may be recovered in an ordinary suit by the surviving husband, wife and heirs of any deceased employee whose death is caused by homicide through the wilful act or omission or gross negligence of his employer").

[22] *Compare* TEX. CIV. PRAC. & REM. CODE § 71.004 (parents of the deceased may bring a wrongful-death action), *with* TEX. LABOR CODE § 408.001(b) (only the decedent's surviving spouse and heirs may recover exemplary damages).

[23] TEX. CIV. PRAC. & REM. CODE §§ 71.001–.012.

[24] *Id*. at §§ 71.004 ("An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased."), .009 (exemplary damages authorized for intentional or grossly negligent conduct).

"caused by an intentional act or omission of the employer or by the employer's gross negligence," but unlike the wrongful-death statute, only "the surviving spouse or heirs of the [decedent's] body" may invoke the exemplary-damages exception to the exclusive-remedy provision.[25] Because the Escobedos do not satisfy section 408.001(b)'s familial-relationship requirement, their wrongful-death claims were dismissed.

As currently enacted, the Workers' Compensation Act relieves employers of accountability for grossly negligent conduct simply because an employee's survivors do not fit into the narrow category of familial relationships authorized to pursue an exemplary-damages claim under section 408.001(b).[26] Employers should not avoid the consequences of patently dangerous conduct merely because the deceased employee was unmarried and childless. Categorizing employees based on marital and parental status neuters the effectiveness of exemplary damages as a deterrent. No one is safe if strong disincentives for gross indifference to safety standards are lacking. Section 408.001(b)'s spouse-or-child limitation highlights where the statutory scheme falls short in deterring wrongful conduct.[27]

B.

If the Escobedos had been empowered to pursue exemplary damages based on Mo-Vac's gross negligence, the record bears evidence to support that claim. For purposes of section 408.001(b), gross negligence involves objective and subjective elements: (1) the employer's conduct "when viewed objectively from the standpoint of the actor at the time of its occurrence involve[d] an extreme degree of risk, considering the probability and magnitude of the

[25] TEX. LABOR CODE § 408.001(b).

[26] *Id*.

[27] *See id*.

potential harm to" its employees; and (2) the employer "ha[d] actual, subjective awareness of the risk involved, but nevertheless proceed[ed] with conscious indifference to the rights, safety, or welfare of" its employees.[28]

With regard to the first element, Urbano Garza's affidavit testimony paints a disturbing picture that Mo-Vac was objectively aware that forcing its drivers to work long, grueling hours created an "extreme risk" that one of its drivers would suffer severe injury or even death in the course and scope of employment.[29] Mr. Garza provided uncontroverted testimony that Mo-Vac instructed its drivers to falsify their driving records. In other words, Mo-Vac coerced workers who were under economic duress to flat-out lie. The falsified records allowed Mo-Vac's drivers to work longer hours in direct violation of government-imposed safety rules enacted to protect not only Mo-Vac's drivers, but everyone using a public roadway. And even more alarming, Mo-Vac specifically trained its drivers to alter their driving logs to create the appearance of compliance with legally mandated safety standards. Mr. Garza estimated that falsification of Mo-Vac's driving logs resulted in drivers working "19 to 24 hours straight–day after day." And strikingly, the record indicates that in the eight days leading up to his death, Fabian Escobedo worked a total of 137 hours, averaging more than 17 hours of work per day. Cumulatively, this evidence objectively establishes Mo-Vac knew that requiring its drivers to operate semi-trucks with limited sleep—and in direct violation of safety standards—created "an extreme degree of risk."[30]

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[28] TEX. CIV. PRAC. & REM. CODE § 41.001(11); *see* TEX. LABOR CODE § 408.001(c) ("In this section, 'gross negligence' has the meaning assigned by Section 41.001, Civil Practice and Remedies Code.").

[29] *See U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012) ("Under the objective component, 'extreme risk' is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury.").

[30] TEX. CIV. PRAC. & REM. CODE § 41.001(11)(A).

Similarly, Mr. Garza's testimony shows Mo-Vac subjectively "knew about the risk," yet its actions "demonstrated indifference to the consequences."[31] Mr. Garza repeatedly confronted Mo-Vac management about the excessive hours Mo-Vac drivers spent on the road, noting such practices were dangerous and violated driving regulations. And when such conversations took place, Garza "would get an 'ear full' or a verbal reprimand from [his] supervisors about keeping production up at all costs." Mr. Garza also recounted that he was instructed by Mo-Vac management "to get the numbers up" and "to simply tell the drivers 'don't get killed out there.'" Notably, when Mr. Garza expressed his fear to Mo-Vac management "that one of [Mo-Vac's] drivers was going to get killed because of [the company's] insistence on unreasonable driving hours," management responded: "[W]e will cross that bridge when we come to it." Garza's affidavit leaves little doubt that management had "actual, subjective awareness of the risk" flowing from its conduct "but nevertheless proceed[ed] with conscious indifference to the rights, safety, or welfare of" its employees.[32]

While the record bears no evidence of "intent" as we have narrowly defined the intentional-injury exception under the Texas Constitution,[33] at a minimum, there is some evidence of extreme gross negligence. Even so, Fabian's parents have no recourse against Mo-Vac for their loss because, unlike the wrongful-death statute, the workers' compensation scheme treats similarly situated workers differently and values their lives differently based on who survives them. If the statutes were parallel, San Juanita and Primitivo's claims against Mo-Vac would be viable, and

[31] *Waldrip*, 380 S.W.3d at 137.

[32] TEX. CIV. PRAC. & REM. CODE § 41.001(11)(B).

[33] *Ante* at 12-13, 19.

the exemplary-damages provision in the Workers' Compensation Act would have more force in deterring the dangerous conduct that resulted in their son's death.

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In a perfect world, employers would do the right thing simply because it is the right thing to do. But we don't live in a perfect world. We live in a world that requires laws, regulations, and disincentives to help ensure employers don't do the wrong thing. Without meaningful consequences for engaging in prohibited conduct, laws are not effective. On that score, the Workers' Compensation Act has a loophole that unwittingly permits employers to engage, with impunity, in unsafe practices. I believe the tragic circumstances presented here make a strong case for aligning the Workers' Compensation Act with the Wrongful Death Act, and I call on the Legislature to do so.

Eva M. Guzman
Justice

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