PUNITIVE DAMAGES

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CHAPTER 28

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I. INTRODUCTION.

Punitive damages are difficult to obtain and even more difficult to hold onto on appeal. Since 2003, when the Texas Legislature imposed a "clear and convincing evidence" standard to a claim for punitive damages, and then in 2005, when the Texas Legislature added the unanimity hurdle to such claims, punitive damage awards are frequently reversed, either because the evidence of punitive liability is not sufficient to support the claim, or because the damages awarded are excessive, in violation of the Texas statutory cap or the due process clause of the Texas and U.S. Constitutions. And, as hard as such claims are to hold onto on appeal, they can be equally difficult to get to the jury given the unanimity requirement and "clear and convincing" evidentiary standard. In the process of doing so, there are a number of potential issues that one should be aware of, whether pursuing or defending such a claim. This paper will attempt to summarize some of the more unsettled areas, as well as some interesting situations that can arise on the way to recovering such damages.

II. PLEADING FOR PUNITIVE DAMAGES.

Everything starts with the pleadings. Aside from the most basic requirement that a plaintiff give a defendant fair notice that the plaintiff will claim, attempt to prove, and ultimately recover punitive damages from a defendant, there are a few other benefits to pleading a claim for punitive damages.

A. Pleading a Claim for Punitive Damages.

A pleading for punitive damages under the common law requires that the harm result from (1) fraud; (2) malice; or (3) gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a). If the claim relies on a statute authorizing punitive damages, "in specified circumstances or in conjunction with a specified culpable mental state," then the conduct must satisfy that statutory standard and requirement. TEX. CIV. PRAC. & REM. CODE § 41.003(c).

B. Pleading the Statutory Cap on Punitive Damages.

Chapter 41 of the Texas Civil Practice and Remedies Code provides a limit on the amount of punitive damages that can be awarded against a defendant:

> Exemplary damages against a defendant may not exceed an amount equal to the greater of:
>
> 1) (A) two times the amount of economic damages; plus
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
> 2) $200,000.

TEX. CIV. PRAC. & REM. CODE § 41.008(b).

Prior to 2015, Texas appellate courts were split as to whether defendants were required to plead the statutory cap in order for it to apply. The majority held that the statutory cap was an affirmative defense that had to be specifically pled or it was waived. *See Wackenhut Corrs. Corp. v. de la Rosa*, 305 S.W.3d 594, 653-55 (Tex. App.—Corpus Christi 2009, no pet.). The Texas Supreme Court rejected this position in *Zorrilla v. Aypco Constr. II, LLC*, when it decided that the exemplary damages cap "does not bear the characteristics of an affirmative defense or avoidance" in that it "does not require proof of any additional facts to establish its applicability" and "there is no defense to it." According to the supreme court "the statutory cap automatically to claims not expressly excepted" -- "[t]he cap is therefore the rule, not the exception." *Id.* In short, the cap need not be pled.

C. Pleading a Due Process Challenge to Punitive Damages.

A party may also challenge the amount of punitive damages as violating its due process rights under the Texas and U.S. Constitutions. *See* Section VI(D), *infra*. It is unclear, however, whether such a challenge must be pled because there are no cases specifically addressing the issue.

The safest course, therefore is to view the constitutional challenge as an affirmative defense to the punitive damage claim–*i.e.*, a "matter constituting an avoidance" as envisioned by Texas Rule of Civil Procedure 94. As such, defendants should plead this issue.

On the other hand, it is largely the actual amount of the punitive damage award, in relation to the award of actual damages, that triggers the claim of a due process violation. *See Bennett v. Reynolds*, 315 S.W.3d 867, 873 (Tex. 2010). So, it would also seem reasonable to conclude that a due process violation cannot arise until after verdict. Moreover, the author has not found any authority that supports the waiver of a due process violation claim under the circumstances based solely on a failure to plead. But, again, until resolved, the safer course is to plead even a potential violation of the defendant's due process rights.

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D. Pleading Cap-Busting Theories.

Section 41.008(c) provides certain "cap-busting" theories that, if alleged and proven, exempt a punitive damage award from subsection (b)'s limitations. Specifically, § 41.008(c) "does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in [certain enumerated] sections of the Penal Code if, except for §§ 49.07 [intoxication assault] and 49.08 [intoxication manslaughter], the conduct was committed knowingly or intentionally." TEX. CIV. PRAC. & REM. CODE § 41.008(c); *see also* Section IV(G), below.

E. Pleading for Bifurcation.

To protect defendants from having net-worth evidence adversely impact the jury's determination of punitive liability, the Texas supreme court, in *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, (Tex. 1994), determined that–if presented with a timely motion–a trial court should bifurcate the determination of the amount of punitive damages from the liability phase of the trial. *Id.* at 30.

Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g., gross negligence), and then returns findings on these issues. If the jury answers the punitive-damage-liability question in the plaintiff's favor, the same jury is then presented with evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial. *Id.* This approach was subsequently codified in Texas Civil Practice and Remedies Code § 41.009, which requires bifurcation on motion filed by a defendant "prior to voir dire examination of the jury or at a time specified by pretrial court order issued under Rule 166, Texas Rules of Civil Procedure." TEX. CIV. PRAC. & REM. CODE § 41.009(a).

> If liability for exemplary damages is established in the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.

TEX. CIV. PRAC. & REM. CODE § 41.009(c). The same jury must hear both phases of the bifurcated trial. *Moriel,* 879 S.W.2d at 30; *In re Bradle,* 83 S.W.3d 923, 928-29 (Tex. App.—Austin 2002, orig. proceeding) ("A jury assessing the amount of punitive damages must necessarily know of and consider the severity of the wrongdoing and the extent of actual damages.").[2]

In a federal, diversity case, courts treat Chapter 41's bifurcation procedure as just that–procedural, not substantive–and do not give it the automatic recognition given in state court. *See Rosales v. Honda Motor Co.,* 726 F.2d 259, 260 (5th Cir. 1984) (interpreting Texas law); *but see State Farm Fir & Cas. Co.,* 896 F. Supp. 658, 659-660 (E.D. Tex. 1995) (acknowledges, but does not decide, whether Texas law and statute mandating bifurcation if requested is procedural or substantive law). In federal court–even in diversity cases–it appears that bifurcation is controlled by Federal Rule of Civil Procedure 42 and is discretionary with the court. *See First Texas Sav. Ass'n v. Reliance Ins. Co.,* 950 F.2d 1171, 1174 (5th Cir. 1992) (motion to bifurcate is a matter within the sole discretion of the court); *Mahoney v. Ernst & Young,* 487 F. Supp. 2d 780 (S.D. Tex. 2006) (denying motion to bifurcate under Rule 42); *see also Home Pro Constr. Co., Inc. v. Hoelscher Weatherstrip Mfg. Co. Inc.,* No. H-11-4440, 2013 WL 6491189 *13 (S.D. Tex. Dec. 10, 2013) (denying bifurcation); *In re Voluntary Purchasing,* No. Civ. 3:96-CV-1929-H, 2004 WL 86292 *1-2 (N.D. Tex. Jan. 15, 2004) (decision to bifurcate within sole discretion of judge).

III. NET WORTH DISCOVERY.

A. Relevance.

Pleading for punitive damages also entitles the plaintiff to discover the defendant's net worth. *Lunsford v. Morris,* 746 S.W.2d 471 (Tex. 1988). Evidence of net worth is relevant to determining the amount of punitive damages because "the amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the defendant. "'That which could be an enormous penalty to one may be but a mere annoyance to another.'" *Soon Phat, L.P. v. Alvarado,* 396 S.W.3d 78, 109 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).[3]

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[2]Bifurcation seems to be a less frequently utilized option, presumably because any benefit of avoiding net worth evidence during the first, liability phase, may be outweighed by the risk that a jury finds liability for punitive damages and then looks to punish the defendant in the only way it can, with actual damages, not knowing there is to be a subsequent phase of the trial specifically designed to dole out punishment.

[3]Net worth is not a necessary element of punitive damages–*i.e.,* the absence of evidence of net worth is not fatal to an award of punitive damages. *See Soon Phat, L.P.,* 396 S.W.3d at 109. Rather, net worth is merely a relevant issue to such a claim–"as relevant to the defendant to prove a low net worth as it is to the plaintiff to prove the defendant's high net worth." *Id.*; *see also City of Fort Worth v. Zimlich,* 975 S.W.2d 399, 411 (Tex. App.—Austin 1998), *rev'd on other grounds,* 29 S.W.3d 62 (Tex. 2000).

B. Threshold burden.

Historically, there was no threshold evidentiary showing necessary before a plaintiff was entitled to the discovery of defendant's net worth. For actions filed before September 1, 2015, that remains the case—plaintiffs do not have to satisfy any evidentiary prerequisite before discovery of defendant's net worth. *In re Michelin North America, Inc.*, No. 05-15-01480, 2016 WL 890970 (Tex. App.—Dallas Mar. 9, 2016, orig. proceeding). However, for cases filed after September 1, 2015, net worth discovery is now governed by Chapter 41, which expressly requires that an evidentiary threshold be met before a plaintiff can discover such information.

In short, a plaintiff must ask for permission from the trial court before he or she can discover the defendants' net worth.

> On the motion of a party and after notice and a hearing, a trial court may authorize discovery of evidence of a defendant's net worth if the court finds in a written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages.

TEX. CIV. PRAC. & REM. CODE § 41.0115(a). Assuming this standard is met, the court may only authorize use of the "least burdensome method" available to obtain net worth evidence. TEX. CIV. PRAC. & REM. CODE § 41.0115 (b). Beware that once the request is made for such discovery, the statute invokes a presumption that the requesting party (*i.e.*, the plaintiff) has had adequate time for discovery of facts relating to exemplary damages" and expressly authorizes the defendant to move for summary judgment on the exemplary damages claim. TEX. CIV. PRAC. & REM. CODE § 41.0115 (d).

1. "Substantial likelihood of success on the merits."

"Substantial likelihood of success on the merits" is not defined in the statute. However, as part of the statute's legislative history, Representatives Clardy and King put a "statement of legislative intent" into the record. H.J. of Tex., 84th Leg., R.S. 3951-52 (2015) (*see also* http://www.journals.house.state.tx.us/HJRNL/84R/HTML/84RDAY75FINAL.HTM). In that exchange, Representative King affirms that the "substantial likelihood" standard, for purposes of being entitled to conduct discovery:

- is not "as high as the ultimate burden of clear and convincing;"
- "is less than a likelihood standard, which means that it will be more likely than not---or a preponderant standard;"
- "it's only necessary that the claimant present a prima facie case, but not to demonstrate that he is certain to win;" and
- "it's enough if the claimant has raised questions on the merits to make them fair ground for more deliberative investigation."

Id.

2. "Least burdensome method."

Section 41.0115 authorizes only the "least burdensome method" to obtain evidence in discovering defendant's net worth. This language seems to envision prior practice, in which courts held that not all financial evidence is discoverable.

"Discovery of certain types of financial information raises privacy concerns." *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 331 (Tex. 1993). Tax returns are treated differently because they "are considered private and the protection of that privacy is of constitutional importance." *In re Beeson*, 378 S.W.3d 8, 12 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding). The Texas Supreme Court has expressed reluctance to allow uncontrolled and unnecessary discovery of federal income tax returns. *See Hall v. Lawlis*, 907 S.W.2d 493, 494-95 (Tex. 1995); *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558, 559 (Tex. 1992) (mandamus issued to protect tax returns from discovery where corporation had already provided certified and annual reports); *see also Wal-Mart Stores, Inc.*, 868 S.W.2d at 331 ("this Court has recognized that there should not be uncontrolled and unnecessary discovery of federal income tax returns."). So, tax returns are generally not discoverable where the same information can be obtained from another source–*e.g.*, sworn (maybe audited) financial statements–or is duplicative of information already provided. *See In re Beeson*, 378 S.W.3d at 12.

Also, a defendant has not previously been required to create evidence demonstrating its net worth. *In re Jacobs*, 300 S.W.3d at 46-47 (noting as "well-settled that a party cannot be forced to create documents that do not exist for the sole purpose of complying with a request for production."). In *In re Jacobs*, for instance, the court of appeals refused to require that defendants comply with a discovery order mandating that they create an affidavit in the form of what would have been provided to a lender to demonstrate the defendant's net worth. *Id.* at 47.

C. "Net Worth" Defined.

Chapter 41 now defines "net worth" as "the total assets of a person minus the total liabilities of the person on a date determined appropriate by the court." This mirrors Justice Gonzalez's definition from his concurrence in *Wal-Mart Stores, Inc. v. Alexander*. 868 S.W.2d 322, 330 (Tex. 1993).

D. Relevant Time Period –Current Net Worth?

The "net worth" definition also allows the trial court to determine the particular date on which net worth is to be determined. While this suggests some flexibility, it is likely that trial courts will continue to follow prior case law that limited "net worth" discovery to "current net worth." *In re Jacobs*, 300 S.W.3d at 44-45; *see also In re Arnold*, No. 13-12-00619-CV, 2012 WL 6085320 (Tex. App.—Corpus Christi Nov. 30, 2012, orig. proceeding) (mem. op.) (net worth at time of injury not discoverable); *In re House of Yahweh*, 266 S.W.3d 668, 673 (Tex. App.—Eastland 2003, orig. proceeding); *In re Brewer Leasing, Inc.*, 255 S.W.3d 708, 712 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding); *In re Garth*, 214 S.W.3d 190, 194 (Tex. App.—Beaumont 2007, orig. proceeding). As the court in *In re Jacobs* explained,

> By "current," we mean as of the time the discovery is responded to, though net-worth information should be updated through supplementation—as should the information in any discovery response—if it changes materially between the service of the discovery response and the time of trial.

In re Jacobs, 300 S.W.3d at 45, n. 9 (where plaintiff sought five years' worth of the defendant's net worth information, and the trial court limited the discovery to two years, the court of appeals implied that even two years was too broad, since only current net worth was relevant); *In re Ameriplan Corp.*, No. 05-09-01407-CV, 2010 WL 22825 *1 (Tex. App.—Dallas Jan. 6, 2010, orig. proceeding) (mem. op.).

IV. PROVING PUNITIVE LIABILITY.

A. Gross Negligence.

To support an allegation of "gross negligence," a plaintiff must prove, by clear and convincing evidence, an act or omission:

> 1) which when viewed objectively from the standpoint of the defendant at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> 2) of which the defendant has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE § 41.001(7)(B). Evidence of ordinary negligence is not sufficient to satisfy either the subjective or objective prong of this definition. TEX. CIV. PRAC. & REM. CODE § 41.003(b); *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998).

Gross negligence is made up of two components– an objective component and a subjective one. The objective, "extreme risk" component means that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993). As one example, the Texas Supreme Court implied that a high speed car chase over unlit roads would be conduct that would, objectively create an extreme risk of harm to the decedent. *See Boerjan v. Rodriguez*, 436 S.W.3d 307 (Tex. 2014). The summary judgment evidence, the court held, did not permit such an inference, leaving the court with nothing more than evidence that the defendant simply followed a trespasser's truck in his own vehicle, conduct the court concluded was "a far cry from the sort of objective risk that would give rise to gross negligence." *Id.* at 312.

The subjective component must be accompanied by a conscious indifference to the consequences. *See id.* Thus, "[t]he subjective element requires proof that the defendant knew about the danger, but its acts or omissions demonstrate that it did not care." *Sanchez*, 997 S.W.2d at 596. Because of this conscious indifference component, gross negligence should not be the result of momentary thoughtlessness, inadvertence, or error of judgment. *Alexander*, 868 S.W.2d at 326. There must be something in the nature of a continued or persistent course of action. *Rogers v. Blake*, 240 S.W.2d 1001, 1004 (Tex. 1951).

For instance, a conscious violation of the law requiring one to stop at a stop sign does not, without more, constitute gross negligence. *Id.*; *see also Bryant v. Adair*, 490 S.W.2d 950, 952 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.) (instructed verdict on gross negligence proper where there was no probative evidence that driver consciously drove his vehicle through stop sign, realized danger in what he was doing, or even knew he was approaching a stop sign).

In *Rogers*, the Texas supreme court refused to find that the defendant's failure to stop at a stop sign, even though the evidence showed that he knew of the stop sign, did not rise to the level of gross negligence. *Rogers*, 240 S.W.2d at 376, 378-79. The court noted that "it is now settled law of this state that momentary thoughtlessness, inadvertence, or error of judgment do not constitute 'heedlessness or reckless disregard of the rights of others' within the meaning of this statute; there must be something in the nature of a continued or persistent course of action; such acts as to constitute wanton misconduct or gross negligence." *Id.* at 377-78.

> We think the fallacy of petitioner's reasoning is that she contends a conscious failure to stop at the stop sign; i.e., a conscious violation of the law requiring one to stop at the stop sign, constitutes gross negligence on the part of the respondent, whereas the law is that there must be a 'heedless and reckless disregard of the rights of others', which a conscious failure to stop, standing alone, does not show.

Id. at 378.

B. Evidence of "Some Care" Will Not Preclude a Finding of Gross Negligence.

Burk Royalty addressed the "some care" test, which actually shifted the burden, in a gross negligence case, to the plaintiff to negate the existence of "some care" in order to prevail on its gross negligence. *See Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 921 (Tex. 1981). The court rejected the "some care" test because it did not comport with the general "no evidence" or "legal insufficiency" review on appeal. Instead, the court held that where there is some evidence of "some care" and some evidence of "an entire want of care," a jury finding of gross negligence will not be set aside on legal sufficiency grounds. *Id.* The court looks to all of the surrounding facts and circumstances, not just individual elements or facts. *See id.*; *Broussard v. S. Pacific Transp. Co.*, 625 F.2d 1242 (5th Cir. 1980);*City of Waco v. Kirwan*, 298 S.W.3d 618, 627-28 (Tex. 2009) (reaffirming that "some evidence of care does not defeat a gross-negligence finding," citing *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001); *Sanchez*, 997 S.W.2d at 595).

C. Malice.

The legislative definition of malice, for exemplary damage purposes, has evolved over the past two decades. The present definition, and the one that has existed since 2003, defines malice simply as a "specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. & REM. CODE § 41.001(7).

The specific intent required to prove actual malice means that the actor desires to cause the consequences of his act, or that he believes the consequences are substantially certain to result from it. *Seber v. Union Pac. R. Co.*, 350 S.W.3d 640, 654 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985)). Exemplary damages are not permitted for implied malice. *Myriad Dev., Inc. v. Alltech, Inc.*, 817 F. Supp. 2d 946, 980 (W.D. Tex. 2011).

One issue that can arise with regard to malice is in cases in which malice is part of the underlying liability theory. So, for instance, in the context of retaliatory discharge, or a "*Sabine Pilot"* case, a malice finding requires more than the defendant's mere intent to fire the plaintiff, or else every retaliatory discharge case would warrant punitive damages. *See Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 662 (Tex. 2012) ("when a tort requires willful harm as a necessary element of liability, that willfulness alone cannot also justify a punitive damage award" and "more is required"). Thus, in evaluating whether the defendant specifically intended to cause substantial injury to its employee, the "substantial injury" referred to the in charge must be something "independent and qualitatively different from the … compensable harms associated with the 'cause of action'." *Id.* (quoting *Moriel*, 878 S.W.2d at 19). By way of example, the court explained:

> … this type of malice might exist "'where the employer circulates false or malicious rumors about the employee before or after the discharge ... or actively interferes with the employee's ability to find other employment.'" *Garza*, 164 S.W.3d at 636 (O'Neill, J., concurring) (quoting *Harless v. First Nat'l Bank*, 169 W.Va. 673, 289 S.E.2d 692, 703 n. 19 (1982)); *see also Town Hall Estates–Whitney, Inc. v. Winters*, 220 S.W.3d 71, 89 (Tex. App.—Waco 2007, no pet.) (finding sufficient evidence of malice where nursing home made employee's conduct look worse than it was before state nursing board, resulting in plaintiff's two-year probation). Damage to the employee's reputation or future employment prospects is a qualitatively different injury from the firing itself, and conscious indifference to a risk of that injury might warrant punitive damages.

Id. at 662-63. So, in a *Sabine Pilot* case, at least, the employer's illegal directive to the employee cannot form the basis for the punitive damage award. *Id.* at 663. "Allowing punitive damages premised not on the actionable firing itself, but on the illegal conduct that might have occurred while the employment relationship was ongoing, would be an improper expansion of the cause of action." *Id.* at 664.

D. Fraud.

"Fraud" is simply defined as "fraud other than constructive fraud." TEX. CIV. PRAC. & REM. CODE §41.001(6). "Actual fraud" typically involves dishonesty of purposes or intent to deceive. *Flanary v. Mills*, 150 S.W.3d 785, 795 (Tex. App.—Austin 2004, pet. denied) (citing *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). In the case of actual fraud, there must be fraudulent intent. *Barnett v. Barnett*, 67 S.W.3d 107, 126 (Tex. 2001).

In cases of "constructive fraud," on the other hand, the actor's intent is irrelevant as "constructive fraud" encompasses those breaches that the law condemns as fraudulent merely because they tend to deceive others, violate confidences, or cause injury to public interests. *Texas Integrated Conveyor Sys. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366 (Tex. App.—Dallas 2009, pet. denied). "Constructive fraud" is the breach of a legal or equitable duty which the law declares fraudulent because it violates a fiduciary relationship. *Id.*

So, actual fraud is required to recover punitive damages. But, how is that submitted, particularly in cases in which your underlying theory of liability is fraud? And, frankly, can it?

Given the differing burdens of proof–"preponderance of the evidence" for ordinary liability versus "clear and convincing evidence" for punitive liability–a finding of common law fraud, in and of itself, will not support an award of exemplary damages. Rather, there must be a finding, by clear and convincing evidence, that fraud occurred. *See Foley v. Parlier*, 68 S.W.3d 870, 879-81 (Tex. App.—Fort Worth 2002 no pet.). This requires two separate submissions. *See, e.g.*, *Alahmad v. Abukhdair*, No. 02-12-00084-CV, 2014 WL 2538740, at *1 (Tex. App.—Fort Worth June 5, 2014, pet. denied) (mem. op.) (noting that after finding fraud by material misrepresentation and by material omission, jury found separately by clear and convincing evidence that harm resulted from intentional fraud, but also noting that there was no objection to the charge).

But, is simply asking the jury again–this time under a heightened burden of proof–if the defendant committed actual fraud enough? On the face of the statute, the answer would seem to be "yes**."** The Supreme Court of Texas recently found no issue with this approach**.** *Horizon Health Corp. v. Acadia Healthcare Co.*, No. 15-0819, ____S.W.3d____, 2017 WL 2323106, at *9 (Tex. May 26, 2017); *see also Davis v. White*, No. 02-13-00191-CV, 2014 WL 7387045, at *5 (Tex. App.—Fort Worth Dec. 29, 2014) (mem. op.), *review granted, judgment vacated on other grounds*, 475 S.W.3d 783 (Tex. 2015). In these cases, the jury is simply asked whether it finds, by clear and convincing evidence, the same fraud found earlier under the preponderance standard. *See Horizon Health Corp.*, 2017 WL 7387045, at *9; *Davis*, 2014 WL 7387045, at *5.

E. Clear and Convincing Evidence Standard.

1. Punitive liability.

To be entitled to exemplary damages, a claimant must first establish "by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from … malice; or … gross negligence." TEX. CIV. PRAC. & REM. CODE § 41.003(a)(2), (3). This intermediate standard falls between the preponderance standard applicable to most civil proceedings and the reasonable doubt standard in criminal proceedings. *See Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 483 (Tex. App.—Fort Worth 2004, no pet.). The proof must, therefore, weigh heavier than merely the greater weight of the credible evidence, but is not required to rise to the level of unequivocal or undisputed proof. *Id.*

2. Punitive damages.

An additional issue to consider with the clear and convincing evidence standard is its effect in a bifurcated trial. Specifically, whether the burden of proof for the amount of exemplary damages is clear and convincing or a preponderance of the evidence.

A plain reading of Texas Civil Practice and Remedies Code Section 41.003 only requires a plaintiff to establish the underlying harm by clear and convincing evidence, not the numerical award of damages. Section 41.003(a) allows for the award of exemplary damages "if the claimant *proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery* of exemplary damages results from…gross negligence." TEX. CIV. PRAC. & REM. CODE § 41.003(a). Section 41.003(b) simply seems to refer back to the liability standard imposed by subsection (a):

> The claimant must prove by clear and convincing evidence the elements of exemplary damages *as provided by this section*. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

TEX. CIV. PRAC. & REM. CODE § 41.003(b) (emphasis added).

However, the amount of damages, as opposed to the liability for such damages, is addressed in an entirely different section which identifies the factors the jury may consider in awarding exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.011. Section 41.011 does not, on its face, impose a "clear and convincing evidence" burden.

Furthermore, the legislature has shown that when it intends for a standard to apply to both the underlying harm and to the amount of punitive damages, it will explicitly do so, as it has done with the unanimity requirement. *See* § 41.003(d). By contrast, the clear and convincing evidence standard references only the underlying harm, not the amount in awarding exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.003(a)

One case, *Bank of America, N.A. v. Barth*, seems to indicate that the exemplary damages question must also include a clear and convincing evidence instruction. *See Bank of Am., N.A. v. Barth*, 13-08-00612-CV, 2013 WL 5676024, at *14 (Tex. App.—Corpus Christi Oct. 17,

2013, no pet.) (mem. op.). In *Barth*, the defendant raised the issue, but the plaintiff agreed, conceding that the exemplary damages question required a clear and convincing burden of proof. So, the question of whether the statute actually imposes such a burden of proof was never analyzed and, absent such analysis, *Barth* is not helpful.

Ultimately, a clear and convincing burden of proof of exemplary damages does not make sense. Exemplary damages are not reviewed on appeal in the same manner as punitive liability. Rather, as discussed earlier in this paper, exemplary damage are subject to statutory caps and constitutional limitations. Exemplary damages are not subject to traditional factual or legal sufficiency review.

F. Unanimity.

After imposing a heightened burden of proof in 2003, the Texas Legislature also imposed a unanimous-jury-verdict requirement to support an award of punitive damages. Specifically, "[e]xemplary damages *may be awarded* ***only*** if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." TEX. CIV. PRAC. & REM. CODE §41.003(d) (emphasis added).

Texas Rule of Civil Procedure 226a makes it a little clearer that the jury must be unanimous on:

1) underlying liability;
2) punitive liability; and
3) the amount of punitive damages.

If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages; (ii) any additional conduct, such as malice or gross negligence … and (iii) the amount of exemplary damages to be awarded. *See also Kia Motors Corp. v. Ruiz,* 348 S.W.3d 465, 491 (Tex. App.—Dallas 2011), *rev'd on other grounds*, 432 S.W.3d 865 (Tex. 2014); *Deatley v. Rodgriguez,* 246 S.W.3d 848, 849 (Tex. App.—Dallas 2008, no pet.) (affirming take-nothing judgment on exemplary damages where jury finding on underlying theory of punitive liability was not unanimous); *Cullum v. White*, 399 S.W.3d 173, 187-88 (Tex. App.—San Antonio 2011, pet. denied) (where there was no unanimous verdict on defamation claim, party was not entitled to exemplary damages).

In federal court, unanimity should not be a concern since "[u]nless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least six members." FED. R. CIV. P. 48(b).

G. Cap-Busting Theories.

Before a court will apply the exception to the statutory damages cap in section 41.008(c), the plaintiff must obtain jury findings that the defendant violated one of the criminal code provisions listed in the statute, and that the violation was committed knowingly or intentionally. *See Madison v. Williamson,* 241 S.W.3d 145, 161 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see also Zorrilla*, 469 S.W.3d at 157 (noting that "a plaintiff can avoid the cap by **pleading *and*** proving the defendant intentionally or knowingly engaged in felonious conduct under criminal statutes expressly excluded from the cap under section 41.008(c).") (emphasis added).

The fraud, malice, or gross negligence necessary to obtain exemplary damages in the first place is not sufficient, in and of itself, to evoke the exception. *Madison,* 241 S.W.3d at 161. To do so would be inconsistent with the statutory scheme which expressly limits exemplary damages even when fraud, malice, or gross negligence has been proven by clear and convincing evidence. *Id.; see also Signal Peak Enters. of Texas, Inc. v. Bettina Invs., Inc.,* 138 S.W.3d 915, 927 (Tex. App.—Dallas 2004, no pet.).

H. Corporate Liability for Punitive Damages.

Unlike ordinary negligence, a corporation is not vicariously liable for intentional acts that might give rise to punitive damages. So, a pleading of vicarious liability against a corporate defendant is not sufficient to plead a punitive damages claim against that entity. Rather, there must be a direct act of negligence against the corporation (*i.e.*, negligent hiring, supervision, training, retention, etc.), or there must be proof that:

1) the principal authorized the doing and the manner of the act;
2) the agent was unfit and the principal was reckless in employing him;
3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
4) the employer or a manager of the employer ratified or approved the act.

Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967); *King v. McGruff,* 234 S.W.2d 403, 434-35 (Tex. 1950) (adopting RESTATEMENT (SECOND) OF TORTS § 909); *see also Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997); *Ramos v. Frito-Lay, Inc.,* 784 S.W.2d 667, 668-69 (Tex. 1990); *Fort Worth Elevators Co. v. Russell,* 70 S.W.2d 397, 406 (Tex. 1934), *disapproved on other grounds by Wright v. Gafford-Hill & Co.,* 725 S.W.2d 712, 714 (Tex. 1987).

A corporation can also liable for the conduct of its "vice-principal." *Fort Worth Elevators*, 70 S.W.2d at 406. A "vice-principal" is:

a) a corporate officer;
b) a person who has authority to employ, direct, and discharge an employee of the corporation;
c) a person engaged in the performance of nondelegable or absolute duties of the corporation; or
d) a person to whom the corporation has confided the management of the whole or a department or division of the business of the corporation.

Id. at 406. Acts of a "vice principal" are deemed to be the acts of the corporation for purposes of punitive damages since the vice-principal "represents the corporation in its corporate capacity" and "inarguably authorize[s] and approve[s] his own" conduct. *Bennett v. Reynolds*, 315 S.W.3d 867, 885 (Tex. 2010).

And, finally, as referenced by the definition, a corporation remains independently liable for the performance of its "absolute or nondelegable duties," which include:

1) the duty to provide rules and regulations for the safety of employees and to warn them as to the hazards of their positions or employment;
2) the duty to furnish reasonably safe machinery or instrumentalities with which its employees are to labor;
3) the duty to furnish its employees with a reasonably safe place to work; and
4) the duty to exercise ordinary care to select careful and competent co-employees.

Id. at 401; *see also Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 186 n.45 (Tex. 2004).

I. A Corporation is Not Liable for the Criminal Act of Another in Certain Cases.

As a general rule, in cases where the alleged harm results from "an assault, theft, or other criminal act," a corporation is not responsible for punitive damages based on the criminal act of a third party. TEX. CIV. PRAC. & REM. CODE § 41.005(a). Some courts hold that this rule applies to prohibit exemplary damages even where the criminal conduct acts concurrently with that of the non-criminal defendant. *See Miles v. Jerry Kidd Oil Co.*, 363 S.W.3d 823, 826-27 (Tex. App.—Tyler 2012, no pet.) (harm resulting from intoxication manslaughter); *Healthcare Centers of Texas, Inc. v. Rigby*, 97 S.W.3d 610, 618-19 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), *disapproved of on other grounds by Diversified Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005) (harm resulting from sexual assault by nursing home employee); *see also In re Islamorada Fish Co. Texas, L.L.C.*, 319 S.W.3d 908, 912 (Tex. App.—Dallas 2010, orig. proceeding) (refusing to allow discovery of net worth because statute prohibited an award of punitive damages in Dram Shop Act case). This general prohibition, according to at least two courts, need not be pled to be applied. *In re Islamorada Fish Co.*, 319 S.W.3d at 912-13 (because § 41.005 provides that, under certain circumstances, there is not valid claim for punitive damages in the first place, it is not an affirmative defense that must be pled); *see also Wilson v. K.W.G., Inc.*, No. 11-03-00084-CV, 2004 WL 1925599 *2 (Tex. App.—Eastland Aug. 31, 2004, no pet.) (mem. op.) (issue involving § 41.005 sufficiently raised by motion for judgment notwithstanding the verdict).

But, as with most rules, there are exceptions. These exceptions probably need to be pled. These exceptions apply where:

1) the criminal act was committed by an employee of the defendant;[4]
2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7 of the Texas Penal Code;[5]
3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code,[6] and had not made reasonable attempts to abate the nuisance; or
4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code,[7] and the criminal act occurred

[4]Under this exception, the employer is still only liable from its criminal employee if: (1) the principal authorized the doing and manner of the act; (2) the agent was unfit and the principal acted with malice in employing or retaining him; (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or (4) the employer or a manager of the employer ratified or approved the act. TEX. CIV. PRAC. & REM. CODE § 41.005(c). Sound familiar? *See* Section IV(H), above.

[5]Of particular interest, § 7.22 of the Texas Penal Code addresses circumstances in which a corporation or association may be criminally responsible and § 7.23 addresses individual criminal responsibility for conduct performed in the name of or on behalf of a corporation or association.

[6]TEX. CIV. PRAC. & REM. CODE §125.0015 (defining "common nuisance").

[7]Chapter 92 of the Texas Property Code addresses the landlord-tenant relationship.

> after the statutory deadline for compliance with that duty.

TEX. CIV. PRAC. & REM. CODE § 41.005(b).

J. Compliance With Federal Regulations Does Not Preclude Punitive Liability.

For some time now, commentators have seriously questioned the legal logic of holding a party to be grossly negligent under the Texas definition of that term, when that party is in full compliance with federal regulations. *See* Ashley W. Warren, *Compliance with Governmental Regulatory Standards: Is It Enough to Immunize a Defendant from Tort Liability?*, 49 BAYLOR LAW REV. 763, 809-14 (1997) ("At the very minimum, compliance with the applicable safety requirements should bar the imposition of punitive damages against a defendant manufacturer."); Christopher Scott D'Angelo, *Effect of Compliance or Noncompliance with Applicable Governmental Product Safety Regulations on a Determination of Product Defect*, 36 SO. TEX. LAW REV. 453, 467-68 (1995). In fact, a 1991 ALI study concluded:

> [t]he strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with regulatory requirements and fully disclosed all material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages.

D'Angelo, *Effect of Compliance or Noncompliance*, 36 SO. TEX. L. REV. at 467 (quoting 2 American Law Institute, *Enterprise Responsibility for Personal Injury* 101 (1991)).

Nonetheless, in Texas, compliance with governmental regulations ***does not*** foreclose, as a matter of law, a claim for punitive damages. *See Gen. Motors Corp. v. Iracheta*, 90 S.W.3d 725, 741 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 161 S.W.3d 462 (Tex. 2005) (compliance with federal guidelines is but one factor courts should consider in determining whether a defendant was grossly negligent*)*; *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 588-89 & n.7 (Tex. App.—Texarkana 1996) (declining to decide issue; held evidence factually insufficient to support jury's finding of malice), *rev'd on other grounds*, 967 S.W.2d 377 (Tex. 1998); *Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622, 641 (N.D. Tex. 2011).

K. Statutory Liability for Punitive Damages.

To the extent another statute allows for the recovery of punitive damages, the provisions of Chapter 41 can still control. Specifically, the cap on damages will still apply, even where the "damages are awarded under another law of this state." TEX. CIV. PRAC. & REM. CODE § 41.002(b). In fact, to the extent of any conflict between Chapter 41 and all other laws, Chapter 41, controls. *Id.* at § 41.002(c). But, if the "other law" establishes a "lower maximum amount of damages for a particular claim," then that other law will apply. *Id.* at § 41.002(b). Also, a party may not recover exemplary damages under Chapter 41 if that party elects to have its recovery multiplied under another statute. *Id.* at § 41.004(b).

At the same time, there are certain statutory causes of action that are expressly excluded from Chapter 41:

- Texas Business & Commerce Code § 15.21 (establishing damages recoverable for a violation of Texas Business & Commerce Code § 15.05, or the "Texas Free Enterprise and Antitrust Act of 1983");
- Texas Deceptive Trade Practices Act Claim (except as specifically provided by § 17.50 of that Act, which also provides that "Chapter 41, Civil Practice and Remedies Code, does not apply to a cause of action brought under this subchapter.");
- Actions to prevent Medicaid fraud under Chapter 36 of the Human Resources Code; or
- a claim under Chapter 21 of the Texas Insurance Code (which no longer exists, having been re-codified throughout many different chapters of the Insurance Code including, presumably, Chapter 541 which now deals with the regulation of unfair competition and deceptive acts and practices in the business of insurance).

V. UNIQUE CIRCUMSTANCES AND PUNITIVE DAMAGES.

A. Negligent Hiring/Entrustment.

1. The Benefits of Pleading for Punitive Damages.

A pleading and submission of a punitive damage claim can also affect whether claims of direct negligence against a corporation are submitted. In cases where only ordinary negligence is alleged, negligent entrustment and respondeat superior are mutually exclusive theories of recovery. *See Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 654 (Tex. App.–-Dallas 2002, pet. denied); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) ("In cases where the plaintiff was relying upon the theory of negligent entrustment of a motor vehicle, the courts have refused to permit the plaintiff to proceed with this separate ground of recovery against the owner where the derivative liability of the owner has already been established by an admission or stipulation of agency or course and scope of employment."). Thus, where respondeat superior is admitted or stipulated to, a plaintiff is precluded from proceeding on a negligent-entrustment or hiring theory.

Fields, 578 S.W.2d at 178. Once respondeat superior is established, the entrustment or employment issues are immaterial–the master is liable for the acts of his servant whether that servant is competent or not. *Id.*

However, where gross negligence is alleged against the employer, the entrustment, training, or supervision theories are no longer immaterial. These theories become separate and independent grounds to recover exemplary damages against the employer. *Rosell*, 89 S.W.3d at 654; *Fields*, 578 S.W.2d at 178-79. So, even if the employer stipulates to vicarious liability for its employee's conduct, where gross negligence has been alleged, the derivative liability theories – entrustment, hiring, training, supervision, etc. – will still need to be submitted. Because of the gross negligence claim, the derivative theories only become necessary for establishing the employer's threshold, independent negligence that then could give rise to exemplary damage liability. Since respondeat superior is undisputed, there would arguably be no need to include the employer in the ordinary negligence or apportionment questions. *See Rosell*, 89 S.W.3d at 656 (approving similar submission).

2. Proving Punitive Liability for Negligent Hiring/Entrustment.

An employer may be grossly negligent in hiring an employee if the employee was unfit and the employer was reckless in hiring him. *McDorman v. Texas-Cola Leasing Co.*, 288 F.Supp.2d 796, 809 (N.D. Tex. 2003) (applying Texas law). To impose punitive damages for negligent entrustment, Texas courts require more evidence than an employer simply failing to inquire into or check the driver's driving record. *McDorman*, 288 F. Supp. 2d at 809 (citing *Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 575 (Tex. 1985); *Webster v. Carson*, 609 S.W.2d 850, 851-52 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *Sw. Bell Tel. Co. v. Davis*, 852 S.W.2d 191, 195-96 (Tex. Civ. App.—Waco 1979, no writ)). Texas courts will, however, uphold punitive damages where the employer makes no effort to obtain the employer's driving record and has actual knowledge that the employee is an incompetent driver. *Id.* (citing *Montgomery Ward & Co. v. Marvin Riggs Co.*, 584 S.W.2d 863, 866-67 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.)).

B. Breach of Fiduciary Duty.

Historically, punitive damages were available in breach of fiduciary duty cases where the breach of fiduciary duty was intentional. *See, e.g., Brosseau v. Ranzau*, 81 S.W.3d 381, 396 (Tex. App.—Beaumont 2002, pet. denied); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied); *see also Joe N. Pratt Ins. v. Doane*, No. V-07-07, 2010 WL 697285 *3 (S.D. Tex. Feb. 19, 2010). Some courts, however, in light of Chapter 41, question whether punitive damages can be supported absent compliance with the express terms of Chapter 41, which requires – at the very least – a finding of gross negligence, fraud, or malice. In *Yeckel v. Abbott*, No. 03-04-00713, 2009 WL 1563587 *10 (Tex. App.—Austin June 4, 2009, pet. denied) (mem. op.), the court held that trial courts no longer have "broad-ranging equitable discretion to impose punitive damages regardless [of] whether the plaintiff has obtained the jury findings required by Chapter 41." *See id.; see also Joe N. Pratt Ins.*, 2010 WL 697285 at *3 (agreeing with *Yeckel* and requiring compliance with section 41.003(a) to support award of exemplary damages in breach of fiduciary duty case).

C. Breach of Contract.

Exemplary damages are not recoverable on a pure breach of contract claim. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) ("[Where a contract exists between the parties] to support an award of exemplary damages… the plaintiff must prove a distinct tortious injury with actual damages."). Since an intentional breach of a contract cannot support an award of punitive damages, gross negligence in the breach of a contract, which involves a mental state lower in culpability than intentional or willful acts, will not support such an award either. *Id.*

However, there is a grey area where "contorts" (claims that arguably sound in tort and contract) are concerned. The Texas Supreme Court has not provided a clear test to determine when exactly a breach-of-contract claim also gives rise to a tort claim, but it has been somewhat instructive in terms of the kinds of facts that may also give rise to tort liability. *Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 494 (Tex. 1991) ("Tort obligations are in general obligations that are imposed by law – apart from and independent of promises made to avoid injury to others. The **nature of the injury** most often determines which duty or duties are breached."). For example, a fraudulent inducement claim can support a tort claim for punitives damages even though the case also involves a contractual relationship between the parties. *See Formosa Plastics Corp., USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998); *see also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 306 (Tex. 2006). There are also cases where malfeasance in performance under a contract may support a negligence claim. *See Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716 (Tex. 2014); *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508 (Tex. 1947). It would thus follow that if the level of negligence in similar cases rose to gross negligence, punitive damages may also be available.

D. Punitive Damages by Default?

In the default judgment context, one must be careful not to get too greedy. "Punitive damages are not

regarded as admitted by the default." *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530, 534 (Tex. App.—San Antonio 1988, writ denied); *see also Acosta v. Campos*, EP-14-CV-160-PRM, 2015 WL 1758125, at *8 (W.D. Tex. Apr. 17, 2015). "Although a default has the effect of admitting all matters properly alleged, if damages are unliquidated or not proved by an instrument in writing, the prevailing party must present evidence on damages." *Herbert v. Greater Gulf Coast Enters., Inc.*, 915 S.W.2d 866, 872 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (citing TEX. R. CIV. P. 243 and *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992)). Unliquidated claims include exemplary damages, and to sustain an award of exemplary damages in a default judgment, there must be pleadings of knowing conduct and then the presentation of evidence that the extent of the defendant's knowledge warrants punitive damages. *Id.* The trial court must still be in a position to consider the *Kraus*[8] factors to determine whether an award of exemplary damages is reasonable. *Id.* In other words, one must be prepared to put on evidence of the grossly negligent, malicious, or fraudulent conduct, and damages, so that the court is in a position to properly measure the award of exemplary damages. Otherwise, such damages–in the default context–are subject to being set aside.

E. Gross Negligence in Workers' Compensation Subscriber Cases.

In cases in where injured employees are covered by the employer's workers' compensation insurance, workers' compensation benefits are the employee's exclusive remedy. TEX. LABOR CODE § 408.001(a). However, the Workers' Compensation Act does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence. *Id.* at § 408.001(b). In those cases, then, issues of ordinary negligence are not at issue and the estate's and wrongful death beneficiaries actual damages are not recoverable. Accordingly, there is some confusion as to how such a case is to be submitted in light of the requirements of Chapter 41.

According to *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987), and *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1988, no writ), issues inquiring about the employer's ordinary negligence are not to be submitted to the jury in these cases. *Joseph* takes it one step further, holding that a comparative responsibility finding is unnecessary because Texas Civil Practice and Remedies Code § 33.001, which provides the 50% bar to recovery, does not apply to workers' compensation actions.

But, the Texas Civil Practice and Remedies Code says that for an exemplary damages claim, there must be underlying liability, actual damages, and punitive liability. So, how does this occur in light of *Wright* and *Otis Elevator*?

At the very least, there should be a submission of the plaintiff's actual damages. Texas Civil Practice and Remedies Code § 41.008 requires separate answers for economic and noneconomic damages to take advantage of the limits placed on the recovery of exemplary damages. So, a plaintiff should be entitled to, and a defendant should welcome, the introduction of evidence of actual damage amounts and the submission of those elements to the jury. In *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005), the San Antonio Court of Appeals found that it was error <u>not</u> to allow the plaintiff to introduce evidence of actual damages. *See id*. at 24.[9] Finding that evidence of actual damages was relevant based on section 41.008(a)'s requirement that damages be segregated for purposes of applying the limitation formula, the court stated that the Plaintiff "should be permitted to introduce evidence and obtain jury findings as to the amount of economic and noneconomic damages." *See id*.

This holding never addressed, and certainly conflicts with, the Texas Supreme Court's holding in *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). In *Wright*, the court held that questions of ordinary negligence and actual damages are not involved in an action to recover exemplary damages for the death of an employee and, therefore, should not be submitted. The court found that because the plaintiff was precluded from recovering such damages by the Act, it was a waste of the jury's time to require a finding of actual damages. Thus, as a matter of judicial economy, the court found that a jury finding on actual damages was not required.

But, *Wright*'s "judicial economy" holding should no longer apply under the amendments to the exemplary damage statute. Obviously, the *Wright* decision came well before the amendments to the Civil Practice and Remedies Code. And, the workers' compensation act used to be expressly exempted from any limitations on exemplary damages provided by the Civil Practice and Remedies Code. But, that is no longer the case. In fact, the limitation now applicable to workers' compensation claims is specifically tied to the claimant's actual damages. Thus, as the San Antonio Court of Appeals

[8] *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

[9] Unfortunately, the Texas Supreme Court did not reach this issue, instead reversing the case based on a finding of no evidence of gross negligence.

found in *Hall*, these elements should be submitted to the jury.

F. Punitive Damages in Family Law Cases.

In *Schlueter*, the Texas Supreme Court held that that there is no independent tort for fraud on the community against a spouse, and thus there cannot be punitive damages awarded for fraud on the community. *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998) ("Because of our holding in the present case that there is no independent tort cause of action for wrongful disposition by a spouse of community assets, the wronged spouse may not recover punitive damages from the other spouse."); *see also In re Marriage of Notash*, 118 S.W.3d 868, 873-74 (Tex. App.—Texarkana 2003, no pet.).

G. Punitive Damages Not Available in Some Statutory Causes of Action.

In the process of pleading for punitive damages, be aware of certain statutory causes of action that do not expressly provide for exemplary damages. For example, the Texas Dram Shop Act "provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older." TEX. ALCO. BEV. CODE § 2.03(c). The Act further states that "[the] liability of providers under this chapter for the actions of their employees, customers, members, or guests who are or become intoxicated is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages." *Id.* at § 2.03(a).

The Dram Shop Act makes no provision for exemplary or punitive damages. Rather, the Act provides only that a statutory cause of action exists under the Act if the claimant can prove, among other things, that the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered. TEX. ALCO. BEV. CODE § 2.02(b)(2). Inclusion only of the term "damages suffered" has been interpreted to demonstrate a legislative intent that dram shop liability only extend to compensatory damages. *See Steak & Ale of Texas, Inc. v. Borneman*, 62 S.W.3d 898, 907 (Tex. App.—Fort Worth 2001, no pet.). "Considering and giving effect to the plain meaning of the words used, the Dram Shop Act's silence on the issue of exemplary damages, and construing the Act and the code into which it was enacted as a whole and the relevant policy considerations, we conclude that the legislature did not intend for punitive damages to be available for a violation of the Dram Shop Act." *Id.* at 910-11.

The Texas Tort Claims Act makes it crystal clear - punitive damages are expressly not authorized. *See* TEX. CIV. PRAC. & REM. CODE §101.024.

VI. PROVING EXEMPLARY DAMAGES.

A. Compensatory Damages as a Prerequisite.

Proof of actual damages is a prerequisite to the recovery of exemplary damages under Chapter 41 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 41.004(a) (requiring more than award of nominal damages to support exemplary damages); *Juliette Fowler Homes v. Welch Associates*, 793 S.W.2d 660, 667 (Tex. 1990).

This requirement that actual damages be awarded as a prerequisite to exemplary damages does not also require that those damages be recoverable. *See Nabours v. Longview Savings & Loan Ass'n*, 700 S.W.2d 901, 904 (Tex. 1985); *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915, 925 (Tex. App.—Dallas 2013, no pet.).

B. Chapter 41/*Kraus* Factors.

Chapter 41 identifies the evidence the trier of fact is to consider in determining the amount of exemplary damages. These factors, also known as the *Kraus* factors, after *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), are as follows:

1) Nature of the wrong;
2) Character of the conduct involved;
3) Degree of culpability of the wrongdoer;
4) Situation and sensibilities of the parties concerned;[10]
5) Extent to which such conduct offends a public sense of justice and propriety; and
6) Net worth of the defendant.

With the exception of the defendant's net worth, all of these factors make up the original *Kraus* factors. Can other factors, outside of the *Kraus* factors be considered?

1. Attorney's fees? Yes.

At least two cases have allowed a jury to consider legal fees in awarding exemplary damages. *See R.J. Suarez Enterprises, Inc. v. Pnyx L.P.*, 380 S.W.3d 238 (Tex. App.—Dallas 2012, no pet.); *Techcraft, Inc. v. Van Houten*, 709 S.W.2d 688 (Tex. App.—San Antonio 1986, no writ).

[10]This factor refers to evidence of remorse, remedial measures, and ability to pay punitive damages. *Atchison, Topeka & Santa Fe Ry. v. Cruz*, 9 S.W.3d 173, 188 (Tex. App.—El Paso 1999), *pet. granted, judgm't vacated, and remanded by agr.*, 44 Tex. Sup. Ct. J. 196 (Dec. 21, 2000) (citing *Ellis County State Bank v. Keever*, 936 S.W.2d 683, 686 (Tex. App.—Dallas 1996, no writ)).

2. Intended Use of the Punitive Damage Award? No.

In *Service Corp. Int'l v. Guerra*, 348 S.W.3d 221 (Tex. 2011), the Texas Supreme Court advised that testimony regarding what the plaintiff planned to do with any award was not relevant and was not admissible. *Id.*, 348 S.W.2d at 238.

C. The Statutory Cap and Cap-Busting Theories.

Under certain circumstances, the statutory cap on punitive damages can be avoided. Where the defendant's conduct amounts to conduct described as a felony in certain sections of the Penal Code, and that conduct is committed knowingly or intentionally, then recovery is not limited.[11] *See* TEX. CIV. PRAC. & REM. CODE § 41.008(c).

1. Burden of Proof?

Chapter 41 is rather clear on the burden of proof applicable to proving punitive liability and punitive damages. But, Chapter 41 is silent with regard to the burden of proof applicable to any of the cap-busting theories.

a. Beyond a Reasonable Doubt?

In *Mission Resources, Inc. v. Garza Energy Trust*, Corpus Christi Court of Appeals declared, without any real analysis of the issue, the plaintiff's felony theft cap-busting theory had to be proven "beyond a reasonable doubt." *Mission Resources, Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 315 (Tex. App.—Corpus Christi 2005), *aff'd in part, rev'd in part on other grounds, Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008). *Mission Resources* has been cited for its "beyond a reasonable doubt" burden of proof by one case, but that case never reached the issue, finding legally insufficient evidence of malice. *See HCRA of Texas, Inc. v. Johnson*, 178 S.W.3d 861, 874 n. 13 (Tex. App.—Fort Worth 2005, no pet.). The "beyond a reasonable doubt" burden was also referenced parenthetically in one other case that cited *Mission Resources* only for the proposition that "[b]efore a court will apply the exception to the statutory damage caps in section 41.008(c), a plaintiff must obtain jury findings that the defendant violated one of the criminal code provisions listed in the statute, and that the violation was committed knowingly or intentionally." *Madison v. Williamson*, 241 S.W.3d 145, 161 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Like *HCRA of Texas, Inc.*, *Madison* did not reach the burden of proof issue because the plaintiff never submitted any cap-busting theory to the jury. *See id.*

b. Clear and convincing evidence?

In *Marin v. IESI TX Corp.*, 317 S.W.3d 314 (Tex. App.—Houston [1st Dist.] 2010, pet. denied), a cap-busting theory of forgery was submitted under a clear and convincing evidence standard. *See id.* at 326. However, it appears no issue was ever raised regarding the appropriate burden of proof.

c. Preponderance of the evidence?

In *Service Corp., Int'l v. Guerra*, 348 S.W.3d 239 (Tex. App.—Corpus Christi 2009), *rev'd*, 348 S.W.3d 221 (Tex. 2011), the court addressed whether the jury submission was proper when it failed to tie the felonious conduct to the plaintiff's injuries. *See id.* at 251-52. In the process, however, the opinion quotes the jury question, which does not mention any burden of proof, presumably meaning the court simply applied a preponderance of the evidence standard. *See id.* at 251.

So, cap-busting theories have been submitted under three different standards of review, and there appears to be no clear guidance as to which one is appropriate. Certainly, the argument goes, had the legislature wanted to impose a higher, clear and convincing evidence or "beyond a reasonable doubt" burden a cap-busting theory, it could have, as it did with regarding to punitive liability and punitive damages in § 41.003. Since it did not, an argument can be made that the standard "preponderance of the evidence" standard applies. On the other hand, since liability for exemplary damages requires proof by "clear and convincing evidence," an argument could also be made that this same standard applies to a cap-busting theory, which also establishes liability, albeit unlimited liability, for punitive damages.

2. Unanimity?

The same questions arise with regard to Chapter 41's unanimity requirement. Must a jury's finding of felonious, cap-busting conduct be unanimous? Again, there is no reference to unanimity in section 41.008. One case mentions the argument–that unanimity is required for purposes of busting the punitive damages cap–but does so in a case governed by old law, which did not require unanimity. *See Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 WL 766016 *21 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.). In the process, however, the court of appeals did note that, aside from the absence of a unanimity requirement in the statute, no case law was cited, nor could the court find any, "requiring that, in a *civil* case (as opposed to a *criminal* case), … a jury's findings that a criminal offense was committed must be unanimous." *Id.*

[11] Intentional or knowing conduct is not required for intoxication assault (TEX. PENAL CODE §49.07) or intoxication manslaughter (TEX. PENAL CODE §49.08), because no culpable mental state is required for those offenses.

D. Constitutional Due Process Limitations on Punitive Damages.

Aside from any statutory limitations, the United States Supreme Court and the Texas Supreme Court have recognized due process concerns involving excessive punitive damage awards.

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) (citations omitted). In cases where there are multiple tortfeasors or defendants the assignment of punitive damages must be individually tailored to each defendant. *Horizon Health Corp. v. Acadia Healthcare Co.*, No. 15-0819, ____S.W.3d____, 2017 WL 2323106, at *15 (Tex. May 26, 2017). Constitutional rights are personal in nature, and, therefore, inquiries about the constitutional excessiveness of an exemplary damages award must be defendant-specific. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). To protect parties against potentially excessive awards, the U.S. Supreme Court instructs that courts reviewing punitive damage awards under the due process clause consider the following "guideposts" to "ensure[] that that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's caprice.'" *See id.* at 418.

These *Gore* guideposts, named for *BMW of N. Am., Inc. v. Gore*, are:

1) the degree of reprehensibility of the defendant's conduct;
2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Bennett v. Reynolds, 315 S.W.3d 867, 873 (Tex. 2010) (quoting *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 418 (2003)). Typically, in making the due process argument, parties focus only on the ratio between actual and punitive damages. The ratio, however, is simply one consideration.

1. Degree of Reprehensibility.

In fact, the most important consideration is not the ratio, but rather the reprehensibility of the defendant's conduct, which consists of five nonexclusive factors which take into account whether:

a) the harm inflicted was physical rather than economic;
b) the tortious conduct showed "an indifference to or a reckless disregard for the health or safety of others";
c) "the target of the conduct had financial vulnerability";
d) "the conduct involved repeated actions," not just "an isolated incident"; and
e) the harm resulted from "intentional malice, trickery, or deceit," as opposed to "mere accident."

Bennett, 315 S.W.3d at 874 (quoting *Campbell*, 538 U.S. at 419). This analysis focuses on the "enormity" of the misconduct. *Id.* This analysis also allows a court to consider related conduct that demonstrates the "deliberateness and culpability of the defendant's action" where the conduct has a nexus to the specific harm suffered, and also allows consideration of surrounding circumstances, even ones beyond the underlying tort. *Id.* at 875. "Obviously, a tortfeasor's attempts to cover his tracks and escape responsibility can imply willfulness." *Id.* (noting *Gore*'s suggestion that a court consider such conduct as deliberately false statements, affirmative misconduct, and concealment of evidence or improper motive); *Wackenhut Corrs. Corp.*, 305 S.W.3d at 656-57 (post-act attempts by tortfeasors to cover up or avoid responsibility for their acts may imply a consciousness that their acts were intentional or willful, and not a mere mistake or accident).

2. Ratio Between the Actual or Potential Harm and Punitive Damages.

This guidepost focuses not just on the ratio between the exemplary damages and the actual harm, but also the potential harm. *Bennett*, 315 S.W.3d at 873. The proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and the harm *likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *Wackenhut*, 305 S.W.3d at 657-58 (quoting *Gore*, 517 U.S. at 581).

There is also no bright line ratio that exceeds constitutional limits. A rigid application of a 4:1 ratio is not universally required. *Bennett*, 315 S.W.3d at 879. "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Wackenhut*, 305 S.W.3d at 658 (quoting *Gore*, 517 U.S. at 582). For example, "[a] higher ratio may ... be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* The Texas Supreme

Court in *Chapa* found a 4.33 to 1 ratio excessive where only one of the five reprehensibility factors favored exemplary damages. *See Tony Gullo Motors I, LP v. Chapa,* 212 S.W.3d 299, 310 (Tex. 2006); *see also Safeshred, Inc. v. Martinez,* 310 S.W.3d 649, 665 (Tex. App.—Austin 2010), *aff'd in part, rev'd in part on other grounds,* 365 S.W.3d 655 (Tex. 2012) (ratios of 11 to 1 and 26 to 1 not excessive where relatively low damages are accompanied by egregious conduct by defendant); *Wackenhut,* 305 S.W.3d at 657-58.

In cases involving multiple, jointly and severally liable defendants, the Texas Supreme Court holds:

> … in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant's misconduct.

Horizon Health Corp., 2017 WL 2323106, at *19. In these cases, the denominator for determining the ratio is the harm caused by each individual defendant, even if the defendants are jointly and severally liable. *Id.* The Court explained that the punishment should fit the misconduct rather than a state's joint and several liability regime. *Id.* Courts must therefore consider the harm each defendant actually caused and assess the punishment based on that harm, rather than the overall harm for which a particular defendant may be jointly and severally liability. *Id.*

3. Comparable Penalties.

Finally, the court can compare exemplary damages with legislatively authorized civil sanctions. *Bennett,* 315 S.W.3d at 880. Criminal penalties have less utility when used to determine the dollar amount of the award because incarceration does not translate meaningfully to a dollar-figure fine. *Id.* at 880-82. Therefore, this factor simply means that, given the "notion that legislatures make policy and are well positioned to define and deter undesired behavior," substantial deference should be given to "legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 880-81 (quoting *Gore,* 517 U.S. at 583). So, where applicable civil penalties exist, this guidepost gives bad actors fair notice of what is forbidden and of potential penalties. *Id.* at 881. *Bennett* also explains, however, that courts need not analyze the "comparable sanctions" guidepost where the excessiveness of an exemplary damages award is established under the first two guideposts. *Id.* at 880.

VII. THE JURY CHARGE.

A. Jury Instructions.

Texas Civil Practice and Remedies Code § 41.012 mandates that in exemplary damage cases certain instructions be given to the jury:

- Section 41.001 – Definitions. Section 41.001 includes 13 different definitions. Presumably, § 41.012 means that jury should be given the definitions provided for gross negligence (11), malice (7), or fraud (6), as well as an instruction on the "clear and convincing" evidence burden of proof (2). *See, e.g.,* State Bar of Texas, *Texas Pattern Jury Charges – General Negligence, Intentional Personal Torts & Workers' Compensation,* PJC 4.2 (2016 ed.); State Bar of Texas, *Texas Pattern Jury Charges – Business, Consumer, Insurance & Employment* PJC 115.36 comment (2016 ed.).
- Section 41.003 – Standards for Recovery of Exemplary Damages. Section 41.003(e) specifically requires that, in all cases where the issue of exemplary damages is submitted to the jury, the jury is to be instructed "… that in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous." *See, e.g.,* PJC – Negligence 15.7C.
- Section 41.010 – Considerations in Making Award. Section (a) requires that, before making an award of exemplary damages, the trier of fact "consider the definition and purposes of exemplary damages as provided by Section 41.001." Presumably, this section refers to § 41.001(5) which defines "exemplary damages" as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages." *See, e.g.,* PJC – Negligence 15.7C.
- Section 41.011 – Evidence Relating to Amount of Exemplary Damages. Section 41.011 is the section that mandates that, in determining the amount of exemplary damages, the trier of fact consider the *Kraus* factors. *See* Section VI(B), above; *see also, e.g.,* PJC – Negligence 15.7C.

Notwithstanding the instruction mandated by Chapter 41, the United State Supreme Court has indicated that additional instructions may be necessary. In *State Farm*

Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003), the Court noted its concern with the manner in which juries are typically instructed regarding punitive damages:

> … Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

Campbell, 538 U.S. at 417-18 (citations omitted). In *Campbell*, the concern centered on evidence of State Farm's nationwide operations and policies regarding claims adjusting. However, State Farm's operations and policies, at least in these other states, was lawful. *See id.* at 422. Noting that such out-of-state conduct, even if lawful, "may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious," such "conduct must have a nexus to the specific harm suffered by the plaintiff." So, where such evidence is involved, the Court stated:

> A jury must be instructed[] that it may not use evidence of out-of-state conduct to punish a defendant for conduct that was lawful in the jurisdiction where it occurred.

Id. at 422.

Phillip Morris USA v. Williams, 549 U.S. 346 (2007), also seems to support the need to instruct the jury so as to avoid punishment of a defendant for injuries to nonparties. In *Phillip Morris*, the Court held that Oregon violated Phillip Morris's due process rights by refusing to instruct the jury not to punish Phillip Morris for injuries to other persons not before the court. "In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353.

Phillip Morris was denied the following instruction (as paraphrased by the Court) in an effort to distinguish between using harm to others as part of the "reasonable relationship" equation, which is permissible, and using it as a basis for punishment:

> "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between Phillip Morris' punishable misconduct and harm to Jesse Williams, "[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims…."

Id. at 356. Although the Court did not expressly approve the form of the instruction submitted, the Court did mandate some form of protection:

> How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

Id. at 357.

B. Unanimity and the Clear and Convincing Evidence Standard.

Chapter 41 unmistakable imposes a unanimity requirement on a finding of liability for and the amount of exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.003(d). But, assume that the unanimity requirement – which section 41.003(d) requires be included in the charge of the court – is left out of the charge. Whose burden–if anyone's–is it to object to its omission and request its inclusion?

In *Cullum v. White*, 399 S.W.3d 173 (Tex. App.—San Antonio 2011, pet. denied), the San Antonio court of appeals held that a complaint regarding the lack of unanimous verdict was not charge error that the defendant had to preserve by objection. *Id.* at 187. Rather, the court held that, as a matter of law, a party cannot recovery exemplary damages without a

unanimous verdict; therefore, no objection to the charge or the verdict was necessary. *See id.* at 187-88.

In *Cullum*, however, the verdict was not unanimous. It is unclear whether the instruction–imposed by section 41.003(e) and Texas Rule of Civil Procedure 226a–was also given. Nonetheless, this opinion indicates that the absence of unanimity –from the defendant's perspective–is not charge error. So, if that instruction is missing from the charge, this case may provide an argument that its absence is not charge error that requires an objection.

That does not appear to present a prudent course for the practitioner, however. The plaintiff has the burden of proof to obtain all findings necessary to support his or her exemplary damage judgment. If one of those elements is missing, the plaintiff risks waiving the right to recover on that claim.

As a defendant, by not objecting, the defendant risks waiving its right to complain about the issue later, especially if the jury's certificate indicates that the verdict was unanimous. And, strategically, the defendant will want to instruct the jury of the ominous burden to get all 6 or 12 jurors to agree on the punitive liability and damage questions.

This seems to be the treatment given the absence of a "clear and convincing" evidence instruction. In *Lee v. Lee*, 411 S.W.3d 95 (Tex. App.—Houston [1st Dist.] 2013, no pet.), the jury awarded exemplary damages, but the trial court's judgment did not award them because the instruction to the jury failed to reference the proper legal standard–clear and convincing-for the award. *Id.* at 114. On appeal, the plaintiff complained about the court's failure to award the exemplary damages. The court of appeals, however, rejected that complaint, finding that it was the plaintiff's obligation to obtain the finding necessary to support the exemplary damage claim–*i.e.*, a finding that the harm to the tenant was proven by clear and convincing evidence to be the result of fraud, malice, or gross negligence. *Id.* at 115.

The tenant also argued, however, that the landlord failed to preserve the issue by objecting to the tenant's proposed exemplary damage question. *Id.* The court of appeals found that it was not the landlord's obligation to object since he was not complaining of the issue on appeal. *See id.*

This, of course, begs the question–had the trial court entered judgment on the jury verdict, even without an instruction on clear and convincing evidence standard, could the defendant complain absent an objection? *Bank of America, N.A. v. Barth*, No. 13-08-00612-CV, 2013 WL 5676024 (Tex. App.—Corpus Christi Oct. 17, 2013, no pet.) (mem. op. on remand), answers that question a resounding "no." Although not the defendant's burden of proof to submit correct exemplary damage questions, it is the defendant's burden to object if those questions are submitted incorrectly.[12] In *Barth*, the Bank properly objected to the failure to include the proper "clear and convincing" evidence standard in the charge. *Id.* at *15. The trial court submitted the charge anyway, and on appeal, the court of appeals found that the plaintiff, by submitting the incorrect question even in the face of the Bank's objection, the plaintiff waived his right to the relief. *Id.*

VIII. REVIEW OF PUNITIVE LIABILITY/DAMAGE AWARDS ON APPEAL.

A. Section 41.013 Requires a Detailed Review of the Evidence.

Chapter 41 even imposes burdens on appeal of an exemplary damage award.

> … an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.

TEX. CIV. PRAC. & REM. CODE § 41.013. This is a codification of the obligation already imposed on courts of appeals in *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994). Conveniently, this obligation does not apply to the supreme court. But, at least it applies equally, whether the court of appeals is reversing or affirming the liability finding or the damage award.

[12] Absent an objection, the defendant would be stuck with the question, even as incorrectly submitted, on appeal. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (assessment of evidence on appeal "must be made in light of the jury charge that the district court gave without objection"); *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) ("Since neither party objected to this instruction [regarding malice], we are bound to review the evidence in light of this definition."); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge."). Thus, the safer course is to always object if the questions and instructions are incorrectly submitted, no matter who has the burden of proof.

B. Clear and Convincing Evidence Standard on Appeal.

To be entitled to exemplary damages, a claimant must first establish "by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from … malice; or … gross negligence." TEX. CIV. PRAC. & REM. CODE § 41.003(a)(2), (3). But, how is that standard addressed on appeal?

1. Legal Sufficiency.

> [W]henever the standard of proof at trial is elevated, the standard of appellate review must likewise be elevated.

Sw. Bell Telephone v. Garza, 164 S.W.3d 607, 627 (Tex. 2004). In evaluating the evidence for legal sufficiency, the reviewing court is to consider whether there is enough evidence from which the factfinder could reasonably form a firm belief or conviction that its finding was true. *See State v. K.E.W.*, 315 S.W.3d 16, 20 (Tex. 2010); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 248 (Tex. 2008); *Diamond Shamrock Refining Co. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Borrowing, as the Texas Supreme Court has, from parental termination cases, "a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *see also K.E.W.*, 315 S.W.3d at 20; *Hogue*, 271 S.W.3d at 248. At the same time, "a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *In re J.F.C.*, 96 S.W.3d at 266. Said another way, a court should disregard evidence contrary to the finding, unless a reasonable factfinder could not. *See K.E.W.*, 315 S.W.3d at 20; *Hogue*, 271 S.W.3d at 248. Along the way, however, the court must remember that the factfinder remains the sole judge of the credibility and demeanor of the witnesses. *See In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009).

2. Factual Sufficiency.

But, in reviewing the factual sufficiency of the evidence, the standard is slightly different. The court of appeals is to give due deference to the jury's fact findings, and should not supplant the jury's judgment with its own. *See In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). More specifically, the reviewing court is to "give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *Id.; Ocean Carriers, Inc. v. Team Ocean Servs., Inc.*, No. 12-13-00228-CV, 2014 WL 2505586 *2 (Tex. App.—Tyler May 30, 2014, no pet. h.). In other words, the court is to inquire "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the allegations." *In re H.R.M.*, 209 S.W.3d at 108 (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). "If, in light of the entire record, the disputed evidence that a factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re J.F.C.*, 96 S.W.3d at 266. In applying this standard, "an appellate court's review must not be so rigorous that the only factfindings that could withstand review are those established beyond a reasonable doubt." *In re H.R.M.*, 209 S.W.3d at 108 (quoting *In re C.H.*, 89 S.W.3d at 26).

3. Summary Judgment Standard.

This heightened burden of proof should not, however, give rise to heightened review in the summary judgment context. In the defamation context, at least, the Texas Supreme Court has declined to adopt the clear-and-convincing evidence standard for summary judgment purposes, because its application would require that the trial court weigh the evidence. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003); *Huckabee v. Time Warner*, 19 S.W.3d 413, 421-22 (Tex. 2000); *see also Hardy v. Bennefield*, 368 S.W.3d 643, 648 (Tex. App.—Tyler 2012, no pet.) (refusing to apply heightened burden in summary judgment context to reformation of deed claim, which requires "clear and convincing evidence" at trial).

C. A Successful Constitutional Challenge Can Only be Remedied by Remittitur.

Under the statutory cap on punitive damages, the court can reduce a judgment to comply with the formula provided by the cap. *See, e.g., In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246, 248 (Tex. 2010); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 920 (Tex. 1998). Section 41.008 provides a relatively straightforward method of determining the maximum of punitive damages to which a plaintiff is entitled, based on the amount of economic and noneconomic damages awarded by the jury.

But, no such simply formula exists in the case of a constitutional challenge to punitive damages. In those cases, the courts to have addressed the issue uniformly deal with an excessive award by remittitur. *See, e.g., Chapa*, 212 S.W.3d at 310; *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 769 (Tex. App.—Dallas 2008, no pet.); *SAS Assocs., Inc. v. Home Marketing Serv., Inc.*, 168 S.W.3d 296, 304-5 (Tex. App.—Dallas 2005, pet. denied); *see also Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 390 (Tex. 2008) (neither trial court nor appellate courts can order remittitur; they can only suggest remittitur on condition that a new trial will be granted if it is refused). The

nature of the constitutional challenge is simply not one that lends itself to the imposition of a certain award of punitive damages.

It is true that a challenge to the constitutionality of an exemplary damage award is a legal question for the court. *See Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 307 (Tex. 2006). But, the amount to be awarded is not something that can be decided or imposed upon a party as a matter of law. Even though a court determines that exemplary damages are constitutionally excessive, the court will not impose a specific amount of damages on the plaintiff. Rather, the courts suggest a reduction of damages by remittitur. *See, e.g., Chapa*, 212 S.W.3d at 310; *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 769 (Tex. App.—Dallas 2008, no pet.); *SAS Assocs., Inc. v. Home Marketing Serv., Inc.*, 168 S.W.3d 296, 304-5 (Tex. App.—Dallas 2005, pet. denied).

For example, in *Elete v. SEJ Properties, L.P.*, the Dallas Court of Appeals determined that the exemplary damage award was grossly excessive and that an award of 1.3847 times the actual damages awarded was more appropriate. *See Elete v. SEJ Properties, L.P.*, No. 05-08-00445-CV, 2009 WL 2452942 *7 (Tex. App.—Dallas Aug. 12, 2009, no pet.) (mem. op.). The court of appeals did not, however, simply render a judgment for that amount. Rather, the court suggested a remittitur under the following terms:

> In accordance with rule 46.3 of the Texas Rules of Appellate Procedure, if SEJ files with this Court, within fifteen days of the date of this opinion, a remittitur of $90,965 with respect to exemplary damages, the trial court's judgment will be reformed to reflect exemplary damages of $6535 and the judgment will be affirmed as reformed. If the suggested remittitur is not timely filed, the trial court's judgment will be reversed and this case will be remanded to the trial court for ***a new trial on all issues***.

Id. (emphasis added).[13] Similarly, in *Duncan v. Prescott*, the Amarillo Court of Appeals determined that the punitive damage award of $85,000 was constitutionally excessive, and should be reduced to $10,000. *See Duncan v. Prescott*, No. 07-12-00330-CV, 2013 WL 5614314 *6 (Tex. App.—Amarillo Oct. 11, 2013, no pet.) (mem. op.). But, the court of appeals did not render a judgment for that amount. Like the Dallas Court of Appeals, the Amarillo court suggested a remittitur under nearly identical terms. *See id.*

Thus, while it may be true that the threshold issue–whether the jury's punitive damage award is excessive–is one that is a legal question for the court to decide, the ultimate issue–the constitutionally permissible amount of punitive damages–is not one that the trial court or the court of appeals can also determine as a matter of law. Implicit in any constitutional challenge is that the evidence supports some amount of punitive damages, just not the amount the jury awarded. *See Hernandez v. Sovereign Cherokee Nation Tejas*, 343 S.W.3d 162, 178 (Tex. App.—Dallas 2011, pet. denied) (noting that evidence supported some amount of exemplary damages, even though jury award was excessive, and suggesting remittitur); *see also Chapa*, 212 S.W.3d at 310 ("On this record, Gullo Motors' conduct merited exemplary damages, but the amount assessed by the court of appeals exceeds constitutional limits."). But, the law simply does not allow a trial court or court of appeals to impose upon a party the amount of punitive damages it believes the jury *should have* awarded. That should remain for the jury to decide. TEX. CIV. PRAC. & REM. CODE § 41.010(b) ("the determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.").

IX. MISCELLANEOUS ISSUES.

A. Insurability of Punitive Damages.

In the context of an employer's workers' compensation policy at least, the Texas Supreme Court has held that Texas public policy does not prohibit coverage for exemplary damages for the employer's gross negligence which causes the employee's death. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008). The argument against insuring exemplary damages is that it removes the sole purpose of exemplary damages–to punish the wrongdoer. *See id.* at 662-63. A wrongdoer should not be allowed "to insure himself against punishment." *See id.* at 662.

The Texas Supreme Court, however, leaned heavily on Texas's strong public policy in favor of freedom of contract, and if an insurer and insured agree to cover such damages, this policy would allow them to do so. *See id.* at 665. But, ultimately, the decision to allow coverage was limited to the factual context presented–liability for the conduct of one or more of its employees. "Where other employees and management are not involved in or aware of an employee's wrongful act, the purpose of exemplary damages may be achieved by permitting coverage so as not to penalize many for the wrongful act of one. When a party seeks damages in these circumstances, courts should consider valid

[13] When SEJ did not file a remittitur within the time allotted, the court of appeals, as it predicted, "reverse[d] the trial court's judgment and remand[ed] this cause for a new trial on all issues." *Elete v. SEJ Properties, L.P.*, No. 05-08-00445-CV, 2009 WL 3087256 *1 (Tex. App.—Dallas Sept. 29, 2009, no pet.) (supp'l mem. op.).

arguments that businesses be permitted to insure against them." *Id.* at 670.

In that light, the court concluded that:

> …the public policy of Texas does not prohibit insurance coverage of exemplary damages for gross negligence in the workers' compensation context. However, without clear legislative intent to generally prohibit or allow the insurance of exemplary damages arising from gross negligence, we decline to make a broad proclamation of public policy here but instead offer some considerations applicable to the analysis in other cases.

Id. The court did, however, recognize that "[e]xtreme circumstances may prompt a different analysis" and, accordingly, "decline[d] to make a broad proclamation of public policy." *Id.*

The Fifth Circuit found one of the "extreme circumstances" to exist in *American Int'l Specialty Ins. Co. v. Res-Care Inc.*, 529 F.3d 649 (5th Cir. 2008), and in a horrific case of group home abuse found that the $5 million punitive damage award should be paid by the insured, not the insurer.

> We conclude that the circumstances of Wright's injury and death, occurring while living in a facility with documented systemic problems of care, were so extreme that the purposes of punishment and deterrence of conscious indifference outweigh the normally strong public policy of permitting the right to contract between insurer and insured. This case demonstrates the kind of "avoidable conduct that causes injury" where public policy is best served by requiring the insured to bear the costs of punitive damages. The district court did not err by failing to apportion any of the punitive damages to the primary policy.

Id. at 664.

B. Release of Liability.

Some Texas cases recognize that a release of claims of ordinary negligence does not also releases gross negligence claims. *Van Voris v. Team Chop Shop, LLC,* 402 S.W.3d 915, 925-26 (Tex. App.—Dallas 2013, no pet.); *see also Del Carmen Canas v. Centerpoint Energy Res. Corp.*, 418 S.W.3d 312, 326-27 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 336 (Tex. App.—Houston [14th Dist.] 2006, no writ); *Akin v. Bally Total Fitness Corp.*, No. 10-05-00280-CV, 2007 WL 475406, at *3 (Tex. App.—Waco Feb. 14, 2007, pet. denied); *Rosen v. Nat'l Hot Rod Ass'n,* No. 14-94-00775-CV, 1995 WL 755712, at *7 n.1 (Tex. App.—Houston [14th Dist.] Dec. 21, 1995, writ denied); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ). Some Texas cases hold to the contrary. *See Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 722 (Tex. App.—San Antonio 1994, writ denied); *see also Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 127 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (citing *Newman*). And, while the Texas Supreme Court has yet to rule on the issues, at least one federal district court case, *McClure v. Life Time Fitness, Inc.*, No. H-13-1794, 2014 WL 6851942, at *4-5 (S.D. Tex. Dec. 3, 2014) (Rosenthal, J.), has made an "*Erie*-guess" and decided that a pre-injury release *does not* release a defendant from liability for gross negligence.

Van Voris is perhaps the most instructive. *Van Voris* involved a pre-injury release that released potential claims of negligence, but did not mention gross negligence. In considering whether the release of negligence claims necessarily included gross negligence claims, the Dallas court of appeals first acknowledged that the same public policy that applies to pre-injury releases of negligence claims also applies to gross negligence claims, meaning that a a valid release of those claims requires that the release satisfy the same fair notice requirements applicable to a release of negligence claims. *Id.* at 924 ("we conclude the State's public policy against pre-injury releases of liability for one's own negligence applies, at a minimum, equally to gross negligence, and the release signed by Van Voris does not meet that standard.").

The court then went on to address whether gross negligence was so dependent on the viability of the negligence claim as to nonetheless be effectively waived by the release. *Id.* at 924-25. In the process, the court concluded that the release, while releasing a claim of negligence, did not also release Van Voris's right to prove the elements of a negligence claim or actual damages, both of which would be prerequisites to the recovery of actual damages. *Id.* at 925. And, Van Voris need only prove negligence and actual damages–he need not also recover those damages in order to be entitled to exemplary damages. *Id.* (citing *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 903 (Tex. 1985)).

Based on Texas's strong public policy prohibiting pre-injury releases of negligence, heightened concerns (both statutory and common law) involving gross negligence and exemplary damages, distinct elements for proving negligence and gross negligence, and the supreme court's acknowledgment it is a finding of actual damages (as opposed to entitlement) that is a prerequisite to exemplary damages, we conclude Van Voris did not release his gross negligence claims. *Id.* at 926; *see also Del Carmen Canas*, 418 S.W.3d at 326-27 (limitation of liability provision in utility's tariff did not, alone, also bar gross negligence claims).

C. Choice of Law and Punitive Damages

Choice of law issues may arise in situations where a state's substantive law does not allow for punitive damages. For example, some states, such as Illinois, do not allow a plaintiff to recover punitive damages in a wrongful death action. *Tobin v. AMR Corp*, 637 F. Supp. 2d 406, 422 (N.D. Tex. 2009). There are also states, such as Michigan, where punitive damages generally do not apply at all. A defendant who is headquartered or has its principal place of business in such a venue, but is sued here, may seek to take advantage of its home state's law.

In situations like these, Texas applies the "most significant relationship" test, stated in Sections 6 and 145 of the Restatement (Second) of Conflict of Laws which, generally, involves consideration of the following factors: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *See Tobin*, 637 F. Supp. 2d at 412. In tort cases, the applicable law will usually be the local law of the state where the injury occurred. *Id.* Thus, where the injury takes place in Texas, Texas punitive damage law will usually apply regardless of the defendant's headquarters or principle place of business.

A somewhat different analysis may arise in the products-liability context in which Texas companies are sued in another state, like the ones mentioned above, that do not provide for punitive damages. In those instances, the law of the state where the injury occurred often yields to Texas public policy. Courts have found that the Texas legislature and courts have developed an almost paternalistic interest in the protection of consumers and the regulation of the conduct of manufacturers that have business operations in the state. *See Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990). Thus, Texas punitive-damage law may apply in a case involving a company headquartered in Texas that allegedly placed a defective product in the stream of commerce in Texas, even where the injury occurred elsewhere. *See, e.g., Washington v. Trinity Indus.*, No. 1:15-cv-517, 2017 WL 752166 at *6 (M.D.N.C. 2017) (applying Texas choice of law analysis); *Tobin*, 637 F. Supp. 2d at 422 ("The Court finds that Texas law should apply, because Texas has an interest in whether allegedly wrongful acts committed by Texas corporations should be punished, Illinois has no interest in shielding a foreign company from such liability"). In doing so, courts seem to give more significance, for purposes of the "most significant relationship" test, to the place where the product was designed or manufactured than the location of the ultimate injury. *See Perry v. Aggregate Plaints Prods. Co.*, 786 S.W.2d 21, 25 (Tex. App—San Antonio 1990, writ ref'd) ("[S]ince the silo was designed and manufactured in Texas, the cause of action is directed at the design and manufacture of the silo, and…it seems that Texas is the place where the conduct causing the injury occurred.").