

Risky Business: How an Employee's Awareness of a Risk Can Destroy an Employer's Duty in Non-Subscriber Litigation

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Recently, Tennessee and South Carolina made national headlines as state officials introduced legislation to remove workers' compensation mandates and allow businesses to opt out of the states' workers' compensation systems.¹ Citing free-market doctrines and high insurance premiums, the proposed laws would allow employers to assess the risks and benefits of state-regulated workers' compensation systems and create alternative benefit plans if the businesses deem it appropriate.² For nearly a century, Texas was the only state in the country with a truly optional workers' compensation infrastructure—approximately 33% of Texas employers currently take advantage of the cost-saving option.³ These employers opting out of the system are referred to as “non-subscribers.”⁴

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¹See generally Amy O'Connor, *Tennessee Workers Comp Opt-Out Legislation Revised, Ready for Next Session*, INSURANCE JOURNAL (May 4, 2015), www.insurancejournal.com/magazines/features/2015/05/04/365980.htm; Stephanie Goldberg, *South Carolina considers Workers Comp Opt-Out System*, BUSINESS INSURANCE (May 20, 2015), <http://www.businessinsurance.com/article/20150520/NEWS08/150529987/south-carolina-considers-workers-comp-opt-out-system?tags=%7C62%7C92%7C329%7C304>.

²See generally O'Connor, *supra* note 1; Goldberg, *supra* note 1.

³W. Ryan Brannan, Texas Department of Insurance, Division of Worker's Compensation, Biennial Report to the 84th Legislature, 12 (2014) (Instead of using the state-regulated compensation system, one-third of Texas employers opting out of the state-regulated system choose to provide their own workplace injury benefits, and the remaining employers provide no structured occupational injury coverage at all.).

⁴See, e.g., *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 202 (Tex. 2015) (referring to employers that opt out as “nonsubscribers”).

When an employer opts out of the Texas Workers' Compensation system, the employer becomes more susceptible to litigation,⁵ and for over 100 years, Texas courts have entertained legal disputes between these employers and injured employees.⁶ With such a lengthy history, one would think non-subscriber jurisprudence has had plenty of time to iron out the legal wrinkles. However, such is not the case.

One area of the law that has been the subject of quizzical and complex litigation involves an employee's voluntary encounter with a known risk or hazard.⁷ Typically, an invitee's awareness of a risk vitiates a landowner's duty to protect or warn the invitee of premises defects.⁸ However, the Texas Workers' Compensation Act prohibits non-subscribing employers from arguing assumption of the risk as a defense, and until recently, the Texas Supreme Court offered multiple and contradictory opinions on the topic—prohibiting and allowing non-subscribers to use an employee's awareness to negate duty.⁹ Recently, the Texas Supreme Court attempted to clarify the issue by answering a certified question from the Fifth Circuit: Does an employee's awareness of a premises defect eliminate the non-subscriber's

⁵ See Tex. Lab. Code Ann. § 408.001(a) (West 2015). Subscribers to Workers' Compensation are protected from litigation by the statute's exclusive-remedy provision. *Id.* Non-subscribers lose that protection and are also statutorily prohibited from asserting certain common law defenses. *Id.* § 406.033(a).

⁶ *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 439 (Tex. 2012) (dating the origins of the Texas workers' compensation system to the Employers' Liability Act that was enacted in 1913). For more information about the origins and history of the Texas workers' compensation system, see *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 511 (Tex. 1995).

⁷ See *infra* Part III.

⁸ *Austin*, 465 S.W.3d at 203.

⁹ Compare *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 239 (Tex. 1955), *overruled* by *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015) (holding that an employer cannot argue that an employee's awareness of a risk relieves the employer of its duty), and *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520 (Tex. 1978) (debatably abolishing that the open and obvious doctrine under premises liability law), with *Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793, 794 (Tex. 2008) (holding employer owed no duty to warn employee of hazards that are commonly known or already appreciated by the employee) and *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568–69 (Tex. 2007) (holding employer owed no duty to warn employee of hazards that are commonly known or already appreciated by the employee); *Kroger Co. v. Elwood*, 197 S.W.3d 793, 795 (Tex. 2006) (holding employer owed no duty to warn employee of hazards that are commonly known or already appreciated by the employee).

duty to maintain a safe workplace?¹⁰ The court succinctly answered, “No,” but the analysis that followed demonstrated the one-word answer was not so straightforward and was, in fact, much more nuanced.¹¹ With this opinion, the court provided clarity in some areas of the law but raised many more questions.

This comment addresses the effect of an employee’s awareness of a risk on the employer’s duties owed to the employee. In doing so, the comment also attempts to reconcile the most recent Texas Supreme Court opinion with other non-subscriber and premises liability jurisprudence. In addition, this comment highlights inconsistencies and points of advocacy that may be used by employers and employees during non-subscriber litigation. Part I of the comment provides a brief introduction to the relevant portions of the Texas Workers’ Compensation Act. Part II details the current state of duties owed by an employer in ordinary non-subscriber negligence claims and premises liability claims. Because the case law governing workers’ compensation has evolved over the past 100 years, Part III of this comment details the most recent evolution of non-subscriber jurisprudence. This section provides the appropriate context for litigators reviewing or depending on older non-subscriber authorities.

I. THE TEXAS WORKERS’ COMPENSATION ACT

Workers’ compensation is a state-regulated insurance program providing covered employees with income and medical benefits if they sustain a work-related injury or illness.¹² Generally, Texas employers can choose whether or not to provide workers’ compensation insurance coverage for their employees.¹³ While employers may choose to opt out of

¹⁰ *Austin*, 465 S.W.3d at 201 (“We begin by noting that the Fifth Circuit’s alternative iteration of its certified question asks, ‘[D]oes the employee’s awareness of the defect eliminate[s] the employer’s duty to maintain a safe workplace?’ The answer to that question is ‘no.’”).

¹¹ *Id.* (“We begin by noting that the Fifth Circuit’s alternative iteration of its certified question asks, ‘[D]oes the employee’s awareness of the defect eliminate[s] the employer’s duty to maintain a safe workplace?’ The answer to that question is ‘no.’”).

¹² *About Workers’ Compensation*, TEX. DEP’T OF INS., www.tdi.texas.gov/wc/dwc (last visited Sept. 18, 2015).

¹³ Tex. Lab. Code Ann. § 406.002(a) (West 2015). There are four types of employers that cannot opt out of the workers’ compensation system: (1) contractors and subcontractors under contract with the state, (2) motor carriers under the authority of the Texas Railroad Commission, (3) liquefied gas dealers, and (4) most state and government employers. JOE F. CANTERBURY, JR. & ROBERT J. SHAPIRO, *TEXAS CONSTRUCTION LAW MANUAL* § 3:20 (2014–15 ed.).

the workers' compensation system, the Texas Workers' Compensation Act attempts to penalize employers exercising that option—though the penalty is not particularly cumbersome.¹⁴

Specifically, employers subscribing to workers' compensation are statutorily protected from lawsuits arising out of a workers' injury.¹⁵ However, the employees of non-subscribers have the right to sue their employers for work-related injuries or death.¹⁶ To prevail on a claim against a non-subscriber, the employee must prove the elements of the claim just as any other litigant.¹⁷ Yet, in defending against a claim, the non-subscribing employer is limited by the Workers' Compensation Act which prohibits a non-subscriber from raising the common law defenses of assumption of the risk, contributory negligence, and the negligence of another employee.¹⁸ The Texas Supreme Court has also held employers are prohibited from asserting proportionate or comparative responsibility.¹⁹

As a matter of policy, the Texas workers' compensation system was designed to shift the economic loss due to work place injury from the employee and onto the employer.²⁰ In addition, the system aimed to protect

¹⁴Lab. §§ 406.002(a) (allowing employers to elect not to participate in the workers' compensation system), 406.033(a) (prohibiting a non-subscriber from arguing certain common law defenses), 408.001(a) (protecting subscribers from litigation). *But see* *Austin v. Kroger Tex. L.P.*, 746 F.3d 191, 198 (5th Cir. 2014), *certified question answered*, 465 S.W.3d 193 (Tex. 2015) (“While there is a bias in favor of workers' compensation coverage, the [Texas Workers' Compensation Act] does not create an especially punitive litigation regime for non-subscribing employers.”).

¹⁵Lab. § 408.001(a).

¹⁶*Id.* § 406.033(a); *Austin*, 746 F.3d at 197–98 (“The [Texas Workers' Compensation Act] vests employees of non-subscribing employers with the right to sue their employers for work-related injuries or death.”).

¹⁷*Austin*, 746 F.3d at 198 (“An employee must prove the elements of his negligence or other claim just as any other litigant, subject to the parameters of section 406.033(d) of the Texas Labor Code.”).

¹⁸*Id.*; *see also* Lab. § 406.033(a).

¹⁹*Kroger Co. v. Keng*, 23 S.W.3d 347, 352 (Tex. 2000). While *Kroger v. Keng* prohibits an employer from arguing comparative responsibility, it does not prohibit an employer from arguing that the employee was the sole proximate cause of his or her own injury. *See generally id.* It also does not address whether a co-defendant can argue comparative responsibility or contributory negligence. *See generally id.*

²⁰*Emp'rs Mut. Liab. Ins. Co. of Wis. v. Konvicka*, 197 F.2d 691, 693 (5th Cir. 1952) (“One of the general purposes of workmen's compensation legislation is to transfer from the worker to the industry in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to industrial accidents and injuries.”).

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employees against risks or hazards taken, or imposed on them, in order to perform the employer's work or business.²¹ Furthermore, the legislature "obvious[ly] and clearly" expressed its intention to make an employer liable when the employer created an unsafe condition or failed to correct an unsafe condition on the premises on which the employee was compelled to work.²²

While this framework for claims against non-subscribers may seem relatively straight forward, non-subscriber litigation has become increasingly more complex. Recently, the Texas Supreme Court attempted to simplify non-subscriber jurisprudence through its holding in *Austin v. Kroger*.²³ As discussed in Part III, the court has clarified that although the Texas Workers' Compensation Act prohibits employers from arguing an assumption of the risk defense, the Act does not prohibit employers from using an employee's awareness of a risk to eliminate the duty owed to the employee.²⁴

II. AN OVERVIEW OF NEGLIGENCE CLAIMS AGAINST NON-SUBSCRIBERS

To recover for an injury, an employee can bring several distinct types of negligence-based claims or theories.²⁵ For example, in *Austin v. Kroger*, the employee sought to recover on the basis of gross negligence and ordinary negligence.²⁶ Under his ordinary negligence theory, the employee brought claims for negligent activity, premises liability, and necessary instrumentality.²⁷ Although distinct, the three theories overlap and the

²¹ *Id.*

²² *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 240 (Tex. 1955), *overruled by Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015).

²³ *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 201 (Tex. 2015).

²⁴ *Id.* at 212.

²⁵ *See, e.g., Austin v. Kroger Tex. L.P.*, 746 F.3d 191, 196 (5th Cir. 2014), *certified question answered*, 465 S.W.3d 193 (Tex. 2015) (demonstrating the number of claims brought by an employee against an employer).

²⁶ *Id.*

²⁷ *Id.* at 196–98.

differences between the theories can be “sometimes unclear.”²⁸ Thus, determining which types of claims to bring can be “tricky.”²⁹

Whether a duty exists is a threshold inquiry and a question of law.³⁰ The existence and scope of the duty turns on a number of factors—including the degree of the risk at issue, the foreseeability of the harm, the likelihood of injury, and the consequences of placing the duty on the defendant employer.³¹ Until recently, employers did not typically challenge the existence and scope of their duties to employees.³² However, a series of three cases in 2010 demonstrates the court’s willingness to re-evaluate duties owed by employers and re-shape non-subscriber litigation.³³

At the onset, litigators, whether plaintiff or defense, should note an interesting peculiarity in the area of non-subscriber litigation. Although the existence and scope of the duty is a question of law, the analyses conducted by the courts are heavily dependent on the facts.³⁴ As such, employers can reasonably argue the facts of the case to the judge under the duty element and dismiss the case based on the facts (couched as questions of law) without resorting to a jury trial.³⁵ In light of this peculiarity, the employee will want to separate the factual issues from the legal questions in order to narrow the duty analysis—essentially arguing the facts are part of the

²⁸ *Id.* at 196 (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010)). Specifically, the court was referring to the differences between negligent activity and premises liability claims. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 198; *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006).

³¹ *See, e.g., Austin*, 746 F.3d at 198; *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010); *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 218 (Tex. 2008).

³² David F. Johnson & Peyton N. Smith, *The First Step in Nonsubscriber Employee Injury Suits Is Defining the Scope of the Employers’ Duty - It Affects Everything*, 59 BAYLOR L. REV. 381, 383 (2007).

³³ *See Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793, 794 (Tex. 2008) (holding employer owed no duty to employee injured while stepping over cart in store’s cooler); *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 567 (Tex. 2007) (holding employer owed no duty to employee injured while climbing over broken lift gate to unload truck); *Elwood*, 197 S.W.3d at 795 (holding employer owed no duty to employee injured when he placed his hand in car doorjamb while loading customer’s groceries into car in sloped parking lot).

³⁴ *See, e.g., Austin*, 746 F.3d at 198; *Del Lago, Inc.*, 307 S.W.3d at 767; *Moritz*, 257 S.W.3d at 218.

³⁵ *See, e.g., Goss*, 262 S.W.3d at 794 (resolving the case based on questions of law); *Skiles*, 221 S.W.3d at 567 (same); *Elwood*, 197 S.W.3d at 795 (same).

breach analysis and not the duty analysis.³⁶ At the trial court level, each strategy may have varying degrees of success, but the Texas Supreme Court has clearly expressed its willingness to decide fact questions during the duty element analysis.³⁷

A. Duties Under an Ordinary Negligence Claim

For an ordinary negligence claim, the employee must establish a duty, a breach of that duty, and damages proximately caused by the breach.³⁸ By virtue of the employment relationship, an employer automatically owes its employees certain duties.³⁹ Although an employer is not an insurer of an employee's safety, an employer has a duty to use ordinary care in providing a safe workplace.⁴⁰ This duty is non-delegable and continuous.⁴¹

Over the years, the Texas Supreme Court has explained the duty to furnish a safe workplace requires employers to furnish and maintain safe machinery and instrumentalities, warn employees of hazards associated with employment, provide safety equipment or assistance, inspect the equipment for defects, instruct employees in the safe use and handling of products and equipment, and adequately hire, train, and supervise employees.⁴²

Prior to 2006, an employee's awareness of a risk or danger appeared to play no role in the duty analysis.⁴³ Then, the court issued a series of opinions opening the door for employers to argue that an employee's

³⁶ See *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 202–212 (Tex. 2015) (resolving the premises liability issue as a question of law but allowing the case to go forward on the negligent instrumentality claim).

³⁷ See *Goss*, 262 S.W.3d at 794 (resolving the case based on questions of law); *Skiles*, 221 S.W.3d at 567 (same); *Elwood*, 197 S.W.3d at 795 (same).

³⁸ *Elwood*, 197 S.W.3d at 794; *Del Lago, Inc.*, 307 S.W.3d at 767.

³⁹ *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996) (“For decades, this Court has recognized that this duty is an implied part of the employer-employee relationship.”).

⁴⁰ *Id.*; see also *Elwood*, 197 S.W.3d at 794.

⁴¹ *Leitch*, 935 S.W.2d at 117; *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975).

⁴² Brief of Amicus Curiae Texas Trial Lawyers Association at 9–10, *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216) (providing a list of cases and associated duties).

⁴³ See *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 201 (Tex. 2015) (“In the sixty years since *Robinson*, however, this Court has never held that an employer has a duty to warn employees of open and obvious dangers or relied on *Robinson* for that proposition.”); see also *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 240 (1955), *overruled by Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015) (holding an employee's awareness of a risk cannot be considered in a premises liability claim against a non-subscriber).

awareness of a risk negated the employer's duties.⁴⁴ Not only were lower courts confused about the Texas Supreme Court's intentions, but employers and employees were also unsure of whether an employee's awareness of a risk had any effect on the employee's claim.⁴⁵ Now, however, an employer can eliminate certain aspects of its duty to an employee if the employer can prove that the risk or hazard was commonly known or already appreciated by the employee.⁴⁶ As discussed further in Part III, the question remains as to whether an employee's awareness of a risk completely negates the employer's duties under ordinary negligence claims.

B. Duties Under a Premises Liability Theory

Premises Liability is a specific type of negligence claim, and the elements are essentially the same as general negligence—although articulated in a slightly different manner.⁴⁷ Essentially, a plaintiff may bring a premises liability claim against a landowner or occupier when the plaintiff is injured by a defect or condition on the premises.⁴⁸

The real difference between premises liability and negligence lies in the duty analysis—the first step in evaluating a premises liability claim.⁴⁹ Unlike general negligence claims, the duty owed to the plaintiff under

⁴⁴ *Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793, 794 (Tex. 2008) (resolving the case based on questions of law); *see also* *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568–69 (Tex. 2007); *Elwood*, 197 S.W.3d at 795.

⁴⁵ *See* *Austin v. Kroger Tex. L.P.*, 746 F.3d 191, 199 (5th Cir. 2014), *certified question answered*, *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015) (discussing the conflicting case law while withdrawing a prior opinion and submitting a certified question); *see also* *Duncan v. First Texas Homes*, 464 S.W.3d 8, 15 (Tex. App.—Fort Worth 2015, pet. filed) (discussing conflicting case law and the pending certified question).

⁴⁶ *Elwood*, 197 S.W.3d at 795.

⁴⁷ *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992) (“The elements are: (1) Actual or constructive knowledge of some condition on the premises by the owner/operator; (2) That the condition posed an unreasonable risk of harm; (3) That the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) That the owner/operator's failure to use such care proximately caused the plaintiff's injuries.”).

⁴⁸ *See Austin*, 465 S.W.3d at 199.

⁴⁹ *Austin v. Kroger Tex. L.P.*, 731 F.3d 418, 424 (5th Cir. 2013), *withdrawn and superseded*, 746 F.3d 191 (5th Cir. 2014), *certified question answered*, 465 S.W.3d 193 (Tex. 2015) (“Under Texas law, the first step in evaluating Austin's premises liability claim is determining the nature and scope of Kroger's duty.”); *see also* *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008) (“Like any other negligence action, a defendant in a premises case is liable only to the extent it owes the plaintiff a legal duty.”).

premises liability depends upon the status of the plaintiff at the time the incident occurred.⁵⁰ It is well-established an employee is an invitee of the employer.⁵¹ Landowners (including landowners that are employers) owe a duty to invitees “to either make safe or warn invitees of concealed dangers of which the landowner is or should be aware but the invitee is not.”⁵² However, the duty does not require that the employer protect or warn employees of risks which are commonly known or appreciated by the employee.⁵³ This is because the duty is discharged by performing either one of the two acts (making a condition safe or warning an invitee about the condition).⁵⁴ When the condition is open and obvious to the invitee, the condition no longer poses an unreasonable risk, and the invitee should take reasonable measures to protect him or herself against the risks.⁵⁵

Notably, there are two exceptions to the general rule that a landowner owes invitees a duty to either make safe or warn invitees of concealed dangers.⁵⁶ If either of the two exceptions apply, then the employee’s awareness of the risk does not eliminate the employer’s duty, and the

⁵⁰ *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

⁵¹ *See, e.g., Austin*, 746 F.3d at 198; *see also Austin*, 465 S.W.3d at 202 (consistently referring to an employee as an invitee). Note, the status of an employee as an invitee can change depending on the circumstances. *Wong v. Tenet Hosps. Ltd.*, 181 S.W.3d 532, 537 (Tex. App.—El Paso 2005, no pet.) (“A person can enter property as an invitee or licensee and become a trespasser as to another part of the property . . . The status of an invitee or licensee, who has permission to be on part of the premises, decreases to that of a trespasser when she makes an unforeseen departure to another part of the premises uninvited.”).

⁵² *Austin*, 465 S.W.3d at 202. Additionally, the court has re-affirmed that under premises liability, the landowner-employer’s duties to employees is the same as any landowner and invitee. *Id.* (“Employees working at their employers’ premises fit this description, and this Court has stated that an employer’s duty to make its premises reasonably safe for employees is ‘in all material respects . . . identical’ to a landowner’s duty to make its premises reasonably safe for invitees.”) (quoting *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 240 (Tex. 1955), *overruled by Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015)). In *Del Lago*, the Texas Supreme Court stated the rule as “a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.” *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010). Regardless, courts are likely to be more receptive to the rule as articulated in *Austin v. Kroger* when discussing non-subscriber premises liability claims. *See* 465 S.W.3d at 202.

⁵³ *Austin*, 465 S.W.3d at 200.

⁵⁴ *Id.* at 202.

⁵⁵ *Id.* at 203.

⁵⁶ *Id.* at 204.

employer cannot discharge its duty by merely warning the employee of a hazard of which the employee is already aware.⁵⁷ Because neither of the exceptions pertains specifically to claims against non-subscribers, and because neither of the exceptions have been heavily litigated in the context of non-subscribers, this comment provides only a general overview of the exceptions.⁵⁸

First, a landowner may still owe a duty to an invitee to protect against a third parties' criminal activities.⁵⁹ As a rule, a person has no legal duty to protect another from the criminal acts of a third party, but a person who controls the premises has a duty to use ordinary care to protect invitees from criminal acts of third parties if the premises owner knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee.⁶⁰ When the risk of criminal conduct is so great it is both an unreasonable risk and foreseeable, a simple warning will not discharge the employer's duty.⁶¹ In such cases, the invitee's knowledge or awareness of the risk is only relevant in the context of a proportionate responsibility or contributory negligence defense.⁶² Since non-subscriber employers are prohibited from arguing proportionate responsibility and contributory negligence, the employee's awareness of a risk is irrelevant under the criminal-activity exception.⁶³

The Texas Supreme Court recently reaffirmed the "criminal-activity exception" to the general premises liability rules.⁶⁴ However, the court has

⁵⁷ *Id.*

⁵⁸ For more information on how the exceptions may apply to a claim against a non-subscriber, see *Austin*, 465 S.W.3d at 204–07. The case law governing the two exceptions does not involve claims against non-subscribers. See generally *id.* at 204–08. However, as explained throughout this article, establishing a landowner-employer's duty under premises-liability is the same analysis as any other landowner. *Id.* at 202.

⁵⁹ *Id.* at 204.

⁶⁰ See *id.* (quoting *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex.1998)). *Timberwalk* is the seminal case establishing a landowner's duty to protect invitees from criminal activities. *Id.* The Texas Supreme Court also reaffirmed *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 769 (Tex. 2010)—which reiterates the criminal activity exception. *Id.* at 205.

⁶¹ *Austin*, 465 S.W.3d at 204.

⁶² *Id.* at 205.

⁶³ *Id.* at 210; see also *Kroger v. Keng*, 23 S.W.3d 347, 352 (Tex. 2000); Tex. Lab. Code Ann. § 406.033(b) (West 2015).

⁶⁴ *Austin*, 465 S.W.3d at 205.

not explained why foreseeable harm from foreseeable criminal activity is any different than foreseeable harm from any other foreseeable risk.⁶⁵

Second, a warning regarding a premises defect will not discharge the landowner's duty if the invitee must necessarily use the unreasonably dangerous premises.⁶⁶ Accordingly, this "necessary-use exception" applies when the invitee can demonstrate (1) it was necessary that the invitee use the unreasonably dangerous premises, and (2) the landowner should have anticipated the invitee was unable to avoid the unreasonable risk despite the invitee's awareness of it.⁶⁷ When evaluating whether the duty exists, courts consider:

"such things as the plaintiff's status, the nature of the structure, the urgency or lack of it for attempting to reach a destination, the availability of an alternative, one's familiarity or lack of it with the way, the degree and seriousness of the danger, the availability of aid from others, the nature and degree of the darkness, the kind and extent of a warning, and the precautions taken under the circumstances by a plaintiff in walking down the passageway."⁶⁸

Like the criminal-activity exception, the necessary-use exception also presents more questions than it answers because the court has not provided clear guidance to determine when premises are necessarily used or to what extent the exception applies.⁶⁹ However, the purpose of the necessary-use exception seems more intuitive than the criminal-activity exception. The general rule eliminates a landowner's duty when an invitee is aware of a risk because the law presumes that invitees will take reasonable measures to protect themselves by either acting reasonably or not entering the premises.⁷⁰ The necessary-use exception applies when the circumstances no longer provide the invitee with the option to avoid the risk.⁷¹

Understandably, an employee would assume being tasked with an activity that requires the employee to necessarily use the unreasonably

⁶⁵ See generally *Timberwalk*, 972 S.W.2d at 749–60; *Del Lago Inc.*, 307 S.W.3d at 769.

⁶⁶ *Austin*, 465 S.W.3d at 206–07.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520 (Tex. 1978)).

⁶⁹ *Id.* at 207.

⁷⁰ *Id.* at 204.

⁷¹ See *id.* at 207–08; see also *Parker*, 565 S.W.2d at 520.

dangerous premises would fall under the necessary-use exception, but the court has foreclosed that argument by refusing to recognize a separate exception that establishes a distinct duty in cases where any employee is injured while performing a task the employer specifically assigned to the employee.⁷² The duty was rejected because an employee's encounter with a workplace hazard is considered voluntary—even if the encounter was part of the work duties.⁷³ An action is not considered involuntary by the mere fact that an employee exposed him or herself to the risk out of fear of termination.⁷⁴ The court expressed its concerns that if this exception was allowed, then the exception would swallow the rule since many workplace injuries are encountered as a condition of work duties.⁷⁵ Furthermore, public policy encourages landowners to remedy potentially dangerous conditions on their property, and imposing liability on employers for injuries “caused by open and obvious dangers knowingly encountered by the employee in the ordinary course of employment” would discourage employers from remedying unsafe conditions.⁷⁶

The question remains regarding how far the court is willing to extend the necessary-use exception, but performing a hazardous task during the scope of employment (and under threat of termination) does not trigger the exception. Although the court has not provided a clear answer or definitive guidance on the application of the necessary-use exception in the employment context, the court's language in *Austin v. Kroger* is likely to lead to greater litigation of the duty element in non-subscriber premises liability claims. As such, the courts can expect more employees to rely on and argue the applicability of the two exceptions.

III. THE EVOLVING CASE LAW

Over the past fifty years, the Texas Supreme Court has handed down conflicting opinions regarding the role of an employee's awareness of a risk and its impact on the employer's duty.⁷⁷ Prior to this year, the case law was

⁷² See *Austin*, 465 S.W.3d at 213.

⁷³ *Id.*

⁷⁴ *Id.* (citing *Robert E. McKee, Gen. Contractor, Inc. v. Patterson*, 271 S.W.2d 391, 396 (Tex. 1954), *abrogated by Parker*, 565 S.W.2d 512 (Tex. 1978)).

⁷⁵ *Id.* at 213–14.

⁷⁶ *Id.* at 214.

⁷⁷ See *Austin v. Kroger Tex. L.P.*, 746 F.3d 191, 197–200 (5th Cir. 2014), *certified question answered*, 465 S.W.3d 193 (Tex. 2015).

confusing and irreconcilable.⁷⁸ However, in a single thirty-page opinion, the court provided clarity on an issue that had often been the topic of confusion.⁷⁹

A. Sears, Roebuck & Co. v. Robinson

In a 1955 decision, the Texas Supreme Court addressed the role of an employee's awareness in a non-subscription premises liability claim.⁸⁰ In that case, an employee of Sears was injured when he slipped in oil on the premises.⁸¹ The day before he was injured, the employee helped stack a few cans of oil in the company's warehouse.⁸² The next day, the employee saw a large pool of oil on the floor of the warehouse which appeared to have seeped out of the cans that he had helped to stack.⁸³ He made no complaint or report of the oil spill to his foreman or anybody in authority at the warehouse even though he knew the oil was slippery.⁸⁴ Around noon, he was helping other employees move a motor in the warehouse and slipped on the oil.⁸⁵

Sears opted out of the Texas Workers' Compensation system.⁸⁶ As such, the company was prohibited by Texas Labor Code § 406.033(b) from arguing assumption of the risk and contributory negligence.⁸⁷ However, Sears argued it owed no duty to warn the employee of the conditions or to take precautions to protect the employee from the dangers because: (1) the dangerous condition was open and obvious, and (2) the employee knew or should have known of the dangerous condition and realized or should have realized the dangers thereof.⁸⁸ Sears argued the employee's awareness was

⁷⁸ Compare *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238 (Tex. 1955), *overruled by* *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015), *with* *Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793, 794 (Tex. 2008), *and* *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568–69 (Tex. 2007), *and* *Kroger Co. v. Elwood*, 197 S.W.3d 793, 795 (Tex. 2006).

⁷⁹ See *Austin*, 465 S.W.3d at 202; *Austin*, 746 F.3d at 197; *Robinson*, 280 S.W.2d at 240.

⁸⁰ See *Robinson*, 280 S.W.2d at 239–40.

⁸¹ *Id.* at 239.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*; see also Tex. Lab. Code Ann. § 406.033(b) (West 2015).

⁸⁸ *Robinson*, 280 S.W.2d at 239; see also Lab. § 406.033(b).

not an assumption of the risk defense but that the employee's awareness affected whether Sears owed a duty in the first place.⁸⁹

The Texas Supreme Court explicitly rejected Sears's argument stating that the concept

“would serve to defeat and nullify the obvious and clearly expressed intention of the Legislature to take away from the nonsubscribing employer the defense of assumed risk and to make him liable where he created or failed to correct an unsafe condition of the premises on which his servant was compelled to work.”⁹⁰

In the fifty years since *Robinson*, the Texas Supreme Court cited to *Robinson* seven times before finally overruling it,⁹¹ but the court never explicitly relied on *Robinson* in reference to an employee's awareness of a risk.⁹² However, in 2001, the court cited to *Robinson* as an example of a case where an employer's defense was prohibited by statute.⁹³ Likewise, other Texas courts have cited to *Robinson* for support in order to limit an employer's defenses or bar an employer from using an employee's awareness of a risk in a negligence suit.⁹⁴

⁸⁹ *Robinson*, 280 S.W.2d at 239; see also Lab. § 406.033(b).

⁹⁰ *Robinson*, 280 S.W.2d at 240; see also Lab. § 406.033(b).

⁹¹ See *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 210 (Tex. 2015); *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 549 (Tex. 2001); *Werner v. Colwell*, 909 S.W.2d 866, 868 (Tex. 1995); *Hernandez v. City of Fort Worth*, 617 S.W.2d 923, 925 (Tex. 1981); *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 568–69 (Tex. 1972); *Royal Indem. Co. v. Dennis*, 410 S.W.2d 185, 187 (Tex. 1966); *Tarver v. Tarver*, 394 S.W.2d 780, 782 (Tex. 1965); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 377 (Tex. 1963), *abrogated by Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978).

⁹² See *Austin*, 465 S.W.3d at 210; see also *Lawrence*, 44 S.W.3d at 549; *Werner*, 909 S.W.2d at 868; *Hernandez*, 617 S.W.2d at 925; *Leadon*, 484 S.W.2d at 568; *Dennis*, 410 S.W.2d at 187; *Tarver*, 394 S.W.2d at 782; *Halepeska*, 371 S.W.2d at 377.

⁹³ *Lawrence*, 44 S.W.3d at 549 (“While the petitioners cite several courts of appeals decisions also broadly stating that a nonsubscribing employer's only defense is to show that the employer was not negligent, those decisions generally involve attempts to submit defensive legal theories that were necessarily foreclosed as a result of the Act's express prohibitions, like the comparative-fault defense in *Kroger*.” (citations omitted)).

⁹⁴ See, e.g., *Forrest v. Vital Earth Res.*, 120 S.W.3d 480, 489 (Tex. App.—Texarkana 2003, pet. denied) (citing to *Robinson*'s discussion of assumed risks when discussing the limited defenses available to an employer); *Thirsty's Inc. v. Edmonds*, No. 01-96-00820-CV, 1997 WL 212276, at *2 (Tex. App.—Houston [1st Dist.] May 1, 1997, no writ) (not designated for publication) (barring an employer from arguing an injured employee noticed the spill before

B. *The Trilogy*

By early 2000, the Texas courts had used such broad language to describe employers' duties to employees that employers were dissuaded from challenging the duty element in non-subscriber litigation.⁹⁵ By then, it was well-established employers owed certain non-delegable and continuous duties to employees—including the duty to warn employees of hazards of employment, provide needed safety equipment or assistance, and furnish a reasonably safe place to work.⁹⁶

But, in 2006, the Texas Supreme Court issued three per curiam opinions which both reshaped and refined the scope of employers' duties.⁹⁷ This trilogy of cases stands for the proposition that an employer does not owe a duty to warn employees of dangers which are commonly known or appreciated by the employee.⁹⁸ Curiously, the court made no mention of *Robinson* in any of the three cases⁹⁹ despite the fact the *Robinson* holding was relied on by the lower court and briefed by the employees in *Goss*.¹⁰⁰ Without hearing oral arguments and without reconciling *Robinson*, the

slipping in it); *Potter v. Garner*, 407 S.W.2d 537, 541 (Tex. Civ. App.—Tyler 1966 writ ref'd n.r.e.) (citing to *Robinson* when discussing the limited defenses available to an employer).

⁹⁵ See, e.g., *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975), *abrogated by* *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) (“It is well established that an employer has certain nondelegable and continuous duties to his employees. Among these are the duty to warn employees as to the hazards of their employment and to supervise their activities, the duty to furnish a reasonably safe place in which to labor and the duty to furnish reasonably safe instrumentalities with which employees are to work.”); see also *Johnson*, *supra* note 32, at 387.

⁹⁶ See *Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793, 794 (Tex. 2008); *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568–69 (Tex. 2007); *Kroger Co. v. Elwood*, 197 S.W.3d 793, 795 (Tex. 2006); see also *Farley*, 529 S.W.2d at 754.

⁹⁷ See *Goss*, 262 S.W.3d at 794 (holding employer owed no duty to employee injured while stepping over cart in store's cooler); *Skiles*, 221 S.W.3d at 568–69 (holding employer owed no duty to employee injured while climbing over broken lift gate to unload truck); *Elwood*, 197 S.W.3d at 795 (holding employer owed no duty to employee injured when he placed his hand in car doorjamb while loading customer's groceries into car in sloped parking lot).

⁹⁸ See *Goss*, 262 S.W.3d at 795; *Skiles*, 221 S.W.3d at 568; *Elwood*, 197 S.W.3d at 795.

⁹⁹ See *Goss*, 262 S.W.3d at 795; *Skiles*, 221 S.W.3d at 568; *Elwood*, 197 S.W.3d at 795.

¹⁰⁰ See *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706, 715 (Tex. App.—Texarkana 2006), *review granted, judgment rev'd*, 262 S.W.3d 793 (Tex. 2008) (“Brookshire argues *Goss* noticed the cart on entering the cooler and should have known not to bump into it. Brookshire's argument is very close to sounding in terms of open and obvious risk, a defense flatly rejected by the Texas Supreme Court in [*Robinson*].”); Wade Skiles's Brief on the Merits, *Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793 (Tex. 2008) (No. 07-0085).

court reversed the lower courts' decisions and rendered judgment for the employers.¹⁰¹

While technically the holdings in *Goss*, *Skiles*, and *Elwood* may be limited to the duty to warn, the cases may be interpreted more broadly.¹⁰² When the court rendered judgments for the employers in *Goss* and *Skiles*, the court effectively terminated the legal proceedings despite the fact that the employees presented other theories of negligence beyond the duty to warn.¹⁰³ Thus, the trilogy of cases may support an argument that an employee's awareness completely vitiates an employer's duty.¹⁰⁴ For example, the appellate court in *Goss* had also held the employer had a duty to enact policies and procedures regarding the use of certain equipment.¹⁰⁵ Similarly, in *Elwood*, the employee argued at trial that the employer should have also provided safer equipment or additional assistance.¹⁰⁶ In fact, when briefing the Texas Supreme Court on the duty element, the employer in *Elwood* attempted to eliminate its duty by relying on the fact that the task at issue was not unusually dangerous—not that the employer did not owe a duty to warn based on the employee's awareness of the risk.¹⁰⁷ Additionally, Kroger capitalized on this incongruity during oral arguments in *Austin v. Kroger* by arguing that if a risk was commonly known, then the employer owes no duties to an employee whatsoever.¹⁰⁸

This incongruity between the parties' arguments and the court's opinions create an opportunity to use creative strategies during litigation. Like Kroger, employers will want to couch all of the employee's claims

¹⁰¹ See *Goss*, 262 S.W.3d at 795; *Skiles*, 221 S.W.3d at 569; *Elwood*, 197 S.W.3d at 795.

¹⁰² *Goss*, 262 S.W.3d at 795; *Skiles*, 221 S.W.3d at 569; *Elwood*, 197 S.W.3d at 795.

¹⁰³ *Goss*, 208 S.W.3d at 716 (“*Goss* presented legally sufficient evidence that Brookshire had a duty to enact policies and procedures regarding the location and use of the lowboy cart, and a duty to warn her of the dangers associated with these carts.”).

¹⁰⁴ See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. k (AM. LAW INST. 2012) (“For a court that appears to conflate the rule that no liability arises from a *failure to warn* of an open and obvious danger with a rule that a land possessor has *no duty whatsoever* with regard to open and obvious dangers, see *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211 (Tex. 2008).” (emphasis added)).

¹⁰⁵ *Goss*, 208 S.W.3d at 716.

¹⁰⁶ Respondent's Brief on the Merits at 13, *Kroger v. Elwood*, 197 S.W.3d 793 (Tex. 2006) (No. 04-1133).

¹⁰⁷ Petitioner's Brief on the Merits at 8, *Kroger*, 197 S.W.3d 793 (No. 04-1133).

¹⁰⁸ Oral Argument at 26:30-28:00, *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015) (14-0216), <http://texasupremecourt.mediasite.com/mediasite/Play/1bbca571a3b0436cbcefdc655814bf471d>.

arising out of the same injury as one large negligence claim which relies upon multiple theories but is rooted in a single duty—a duty that may be eliminated by the employee’s awareness of a risk.¹⁰⁹ Employees, on the other hand, will want to painstakingly separate each theory of liability in the pleadings and arguments so each theory appears to be a standalone claim which does not rely in any way on any other theory of liability. By doing so, the employee may be able to convince a court other negligence claims or theories survive in the event a court finds an employee’s awareness of a risk eliminates the employer’s duties. Alternatively, an employee may choose to completely omit the duty to warn from the pleadings so the other duties, claims, and theories are not tainted by the employee’s awareness of a risk.

C. *Austin v. Kroger*

In *Austin v. Kroger*, the laws of premises liability and non-subscribers collided. Under premises liability jurisprudence, a landowner does not owe an invitee a duty to make premises safe or warn an invitee of an open and obvious condition or a condition that is otherwise known to the invitee.¹¹⁰ However, a non-subscribing employer may not argue “assumption of the risk” as either a complete defense or to vitiate the employer’s duty.¹¹¹

In *Austin*, the employee was tasked with cleaning large oily spills in the restrooms of the store.¹¹² The employee was careful as he cleaned the floors but eventually slipped in the liquid and fell.¹¹³ The employee sued under various negligence theories, including premises liability.¹¹⁴ Like Sears argued in *Robinson*, the employer argued that it owed no duty to the employee because the hazard was commonly known and appreciated.¹¹⁵ Based on this argument, the trial court granted the employer’s summary judgment, and the employee appealed.¹¹⁶ Initially, the Fifth Circuit relied on

¹⁰⁹ *Id.*

¹¹⁰ *Austin v. Kroger Tex. L.P.*, 465 S.W.3d 193, 201 (Tex. 2015).

¹¹¹ Tex. Lab. Code Ann. § 406.033 (West 2015); *Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238, 240 (Tex. 1955), *overruled by* 465 S.W.3d 193 (Tex. 2015).

¹¹² *Austin v. Kroger Tex., L.P.*, 746 F.3d 191, 195 (5th Cir. 2014), *certified question answered*, 465 S.W.3d 193 (Tex. 2015).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Kroger Tex. L.P.’s Brief on the Merits at 12-23, Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216).

¹¹⁶ *Austin*, 746 F.3d at 194.

Robinson and reversed the trial court's grant of summary judgment.¹¹⁷ However, the Fifth Circuit later withdrew the decision, citing conflicting case law, and certified the question to the Texas Supreme Court.¹¹⁸ The Texas Supreme Court attempted to resolve the conflicting case law and in the process, narrowed the employer's duties even further.¹¹⁹

Because of *Robinson*, Kroger avoided arguing that the employee's awareness of a risk completely destroyed the employer's duty stating, "For our purposes of no duty, the plaintiff's subjective awareness of the risk on that day is completely irrelevant."¹²⁰ Furthermore, "the fact that [the employee] knew of the risk [did] not define the [employer's] duty on that day."¹²¹ Instead, Kroger argued that an employee's awareness of a risk is a factor to consider when determining whether a condition is open and obvious.¹²² Despite Kroger's parsing of words, the court held Kroger, as a landowner, did not have a duty to warn or protect the employee from an unreasonably dangerous premises condition that is open and obvious or "already known to the employee."¹²³ Furthermore, negating duty through an employee's awareness does not violate Texas Labor Code 406.033 because it is "this Court's role to determine when a party owes a legal duty to begin with."¹²⁴

The court spent several pages attempting to reconcile the new rules regarding an employee's awareness with prior case law and the Texas Workers' Compensation Act before overruling *Robinson* "to the extent that it conflicts" with the court's "more recent holdings"—presumably meaning

¹¹⁷*Austin v. Kroger Tex., L.P.*, 731 F.3d 418, 425–28 (5th Cir. 2013), *withdrawn and superseded*, 746 F.3d 191 (5th Cir. 2014), *certified question answered*, 465 S.W.3d 193 (Tex. 2015).

¹¹⁸*Austin*, 746 F.3d at 194.

¹¹⁹*Austin v. Kroger Tex. L.P.*, 465 S.W.3d 193, 201 (Tex. 2015).

¹²⁰Oral Argument at 33:45-35:15, *Austin v. Kroger Tex., Co.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216), <http://texasupremecourt.mediasite.com/mediasite/Play/1bbca571a3b0436cbcefdc655814bf471d>; *see also* Kroger Tex. L.P.'s Brief on the Merits at 30-32, *Austin v. Kroger Tex., Co.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216).

¹²¹Oral Argument at 33:45-35:15, *Austin v. Kroger Tex., Co.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216), <http://texasupremecourt.mediasite.com/mediasite/Play/1bbca571a3b0436cbcefdc655814bf471d>; *see also* Kroger Tex. L.P.'s Brief on the Merits at 30-32, *Austin v. Kroger Tex., Co.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216).

¹²²Kroger Tex. L.P.'s Brief on the Merits at 30-32, *Austin v. Kroger Tex., Co.*, 465 S.W.3d 193 (Tex. 2015) (No. 14-0216).

¹²³*Austin*, 465 S.W.3d at 212.

¹²⁴*Id.* at 211–12.

the *Goss*, *Skiles*, and *Elwood* holdings, although those cases are not specifically cited.¹²⁵ In the end, the employee's awareness of a risk may be used by the employer to disprove the existence of a duty and bar the plaintiff's claim.¹²⁶ Accordingly, analyzing awareness under the duty element does not violate the assumption of the risk prohibition in the Texas Workers' Compensation Act.¹²⁷

Because *Austin v. Kroger* establishes the law as it stands today, and the holding devotes several pages to reconciling and explaining the prior case law, it should be the first case a litigator reviews when pursuing or defending against a non-subscription negligence claim.

D. The Second and Third Restatements

Historically, a landowner did not owe a duty to protect entrants from dangerous conditions that are open, obvious, or known to the visitor.¹²⁸ In 1965, the Second Restatement altered the historical trend to preclude liability for open and obvious dangers unless the landowner anticipated that harm could occur despite a person's knowledge or obviousness of the risk.¹²⁹ Then in 2012, the Third Restatement altogether abandoned the open and obvious doctrine.¹³⁰ Accordingly, a visitor who encounters an obviously dangerous condition and fails to exercise reasonable self-care is considered contributorily negligent.¹³¹ The visitor's conduct with respect to that risk is an entirely separate question from whether the landowner owed a duty and breached it.¹³² In sharp contrast to the Texas approach, the Third Restatement model limits no-duty rulings to exceptional cases when an articulated countervailing principle or policy warrants denying or limiting liability.¹³³ Reportedly, the aim is to improve transparency in cases where a

¹²⁵ *See id.*

¹²⁶ *Id.* at 212.

¹²⁷ *Id.*

¹²⁸ RESTATEMENT (FIRST) OF TORTS: NEGLIGENCE § 343 (AM. LAW INST. 1934).

¹²⁹ RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 343A (AM. LAW INST. 1965).

¹³⁰ RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. k (AM. LAW INST. 2012).

¹³¹ *Id.*

¹³² *Id.* (“An entrant who encounters an obviously dangerous condition and who fails to exercise reasonable self-protective care is contributorily negligent. Because of comparative fault, however, the issue of the defendant's duty and breach must be kept distinct from the question of the plaintiff's negligence.”).

¹³³ *Id.* § 7(b).

judge pre-empts the jury by using the facts of a case to negate duty.¹³⁴ Other than those exceptional cases, the Restatement would treat the obviousness of a risk or a person's awareness as a "breach" or "contributory negligence" issue but likely not a "duty" issue.¹³⁵

Prior to 2006, Texas premises liability and non-subscription law was more consistent with the Third Restatement and treated an employee's awareness of a risk (and an invitee's awareness of a risk) as a contributory negligence issue—which a non-subscriber is barred from using as a defense.¹³⁶ However, the current Texas approach is similar to the Second Restatement but much more narrow—creating exceptions only in the event of foreseeable criminal activity or necessary use.¹³⁷ Unlike the Third Restatement, the current Texas approach (and the approach of the Second Restatement) considers the open and obvious nature of the condition under the "duty" element.¹³⁸

¹³⁴John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will It Trip and Fall over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 TEX. TECH L. REV. 1, 49 n.75 (2005).

¹³⁵See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. k (AM. LAW INST. 2012).

¹³⁶See *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 772–73 (Tex. 2010) ("Instead, a plaintiff's knowledge of a dangerous condition is relevant to determining his comparative negligence but does not operate as a complete bar to recovery as a matter of law by relieving the defendant of its duty to reduce or eliminate the unreasonable risk of harm."); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520 (Tex. 1978) ("There are many instances in which a person of ordinary prudence may prudently take a risk which he knows, or has been warned about, or that is open and obvious to him. His conduct under those circumstances is a matter which bears upon his own contributory negligence.").

¹³⁷See *supra* Part III.B.

¹³⁸See *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 771 (Tex. 2009); RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 343A (AM. LAW INST. 1965); see also *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 226 (Tex. 2008) (referring to the Second Restatement rule as a "duty rule."). Paradoxically, using an employee's awareness to negate an employer's duty acts as an absolute bar to recovery in the same manner as the "assumption of the risk" defense did when § 406.033 was passed. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. k (AM. LAW INST. 2012) ("The rule that land possessors owe no duty with regard to open and obvious dangers sits more comfortably—if not entirely congruently—with the older rule of contributory negligence as a bar to recovery."); *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 210 (Tex. 2015) ("In other words, although these are no longer affirmative defenses that act as an absolute bar to recovery, they remain defensive issues on which defendants, not plaintiffs, bear the burden of proof."). Even more concerning, using an employee's awareness to bar recovery is an easier task than proving common law "assumption of the risk." Under common law, the elements for "assumption of the risk" are (1) knowledge of the risk, (2) appreciation of the risk, and (3)

On the other hand, and consistent with the Third Restatement, the Texas Supreme Court articulated its countervailing policies in *Austin v. Kroger* when it held that an employer generally had no duty to warn or protect employees from known hazards.¹³⁹ Specifically, the court noted that a landowner's duty to invitees is not absolute, and a landowner is not an insurer of a visitor's safety.¹⁴⁰ However, the court's most compelling policy is buried towards the end of its opinion.¹⁴¹ It is the public policy of Texas to encourage employers to eliminate dangerous conditions, and the most efficient way for employers to eliminate the conditions is through the use of a trained employee.¹⁴²

“Imposing liability on employers for injuries to employees caused by open and obvious dangers knowingly encountered by the employee in the ordinary course of employment would discourage employers from retaining employees to perform the kinds of repairs and janitorial work necessary to maintain their premises in a reasonably safe conditions.”¹⁴³

Thus, making landowners liable to employees for such conditions directly disincentivizes employers from hiring employees to remedy such conditions.¹⁴⁴

Undeniably, the court's willingness to decide the facts of a case through a duty analysis is inconsistent with the preferred method of the Third Restatement. However, the court's articulation of its policy concerns provided much-needed transparency into the judicial decision-making process for an area of law that was previously unclear.

plaintiff proceeds to encounter the risk as a voluntary and informed choice. *See, e.g.*, *Ellis v. Moore*, 401 S.W.2d 789, 793 (Tex. 1966), *abrogated by* *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978).

¹³⁹ *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 213–14 (Tex. 2015). Notably, the court did not provide policy explanations for *Goss*, *Skiles*, or *Elwood*.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* This comment does not attempt to address, dispute, or support the substantive merits of the court's policy statements.

VI. CONCLUSION

The Texas Supreme Court has stated that an employer does not owe certain duties to employees when an employee is aware of a risk or hazard. However, the scope of the duties owed and whether the employee's awareness completely bars recovery has yet to be determined. As it stands today, an injured employee who was aware of a risk is faced with uncertainty in litigation. In an ordinary negligence claim, the employee's awareness may, at worst, completely vitiate the employer's duty or, at best, only eliminate the employer's duty to warn. Under a premises liability theory, the employee's awareness completely eliminates the employer's duties to the employee unless either the criminal-activity or the necessary-use exception applies. However, the court has not delineated the circumstances under which the necessary-use exception applies.

As more employers transition out of the Texas Workers' Compensation system, the likelihood of workplace injury disputes increase. Not surprisingly, the Texas Supreme Court has a reputation amongst the general public as pro-business, and with 74% of the court's decisions resulting in a win for defendants, non-subscribers have the added advantage of accruing beneficial case law.¹⁴⁵ While the debate continues regarding judicial campaign contributions and pro-business leanings, the fact remains that employers are in a much better position than employees in non-subscriber litigation.

¹⁴⁵ *Thumbs on the Scale: A Retrospective of the Texas Supreme Court 2000-2010*, TEXAS WATCH FOUNDATION (2010), http://www.texaswatch.org/wordpress/wp-content/uploads/2012/01/Thumbs-on-the-Scale_CtWatch_Jan2012_Final.pdf.