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*1253 ASSERTING CLAIMS FOR INTENTIONALLY OR RECKLESSLY CAUSING SEVERE EMOTIONAL DISTRESS IN CONNECTION WITH DIVORCE

Richard R. **Orsinger** [FNa]

***1254** I. Introduction

On May 5, 1993, in the case of Twyman v. Twyman, [FN1] the Texas Supreme Court adopted the tort of ‘intentional infliction of emotional distress‘ in Texas. [FN2] In particular, the court ruled that one ***1255** spouse could, in a divorce proceeding, sue the other spouse for intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct. [FN3] This Article evaluates the Texas Supreme Court's decision in Twyman and its ramifications in Texas divorce cases.

II. Precedential Weight of the Twyman Case

There is no majority opinion in Twyman. [FN4] Accordingly, none of the opinions represents the doctrine of stare

decisis. [FN5] The holding in Twyman has precedential weight, however, and the basic law can be construed from the holding alone. The court held that one spouse can sue the other spouse in a divorce proceeding for intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct. [FN6] Because only one other justice joined in the plurality opinion written by Justice Cornyn, most of the wide-ranging discussion in that opinion of the ramifications of the court's holding is not established law. Nevertheless, it is likely that Justice Cornyn's statements regarding the decision's effects on divorce***1256** proceedings have the tacit support of the other justices to the extent they did not join in opinions specifically disagreeing with Justice Cornyn's statements.

III. Effect of Abrogating Interspousal Immunity Doctrine

The Texas Supreme Court abolished the affirmative defense of interspousal immunity as to intentional torts in 1977 [FN7] and as to all other torts in 1987. [FN8] For Justice Cornyn, [FN9] and probably a majority of the court, [FN10] once the court had determined that Texas would adopt the tort of intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct, [FN11] it necessarily followed that one spouse could sue the other for that tort.

While accepting the tort generally, the Chief Justice opposed recognizing the tort as a valid claim between spouses. [FN12] Chief Justice Phillips said that it does not necessarily follow from the abolition of interspousal immunity that all conduct actionable ‘between strangers is automatically actionable between spouses.‘ [FN13] He argued ***1257** that ‘only two state supreme courts‘ have permitted intentional infliction claims to be applied between spouses, [FN14] while two state supreme courts have rejected the use of the tort between spouses. [FN15]

Justice Hecht, joined by Justice Enoch, also observed that two supreme courts have recognized and two have rejected the claim between spouses. This split of authority suggested to him that the claim should not be recognized between spouses in Texas. [FN16] Justice Hecht further argued that the tort should not be recognized in Texas at all. [FN17]

IV. The Elements of the Cause of Action

Justice Cornyn's plurality opinion adopts the tort described in Section 46(1) of the Restatement (Second) of Torts (the ‘Restatement ‘). [FN18] The Restatement describes the cause of action as follows: ‘One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.‘ [FN19]

Justice Cornyn described the elements of Section 46(1) as: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused ***1258** the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. [FN20] These elements are considered below.

V. ‘Intentionally‘ or ‘Recklessly‘

The tort requires that the actor act intentionally or recklessly. Comment (i) to Restatement Section 46 notes:

The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain to result from his conduct. It applies also where he acts recklessly, . . . in deliberate disregard of a high degree of probability that the emotional distress will follow. [FN21]

The Restatement considers intentional, reckless, and negligent behavior to be on a continuum of probability, with in-

tentional conduct involving certainty or substantial certainty of injury, reckless conduct involving less than substantial certainty, and negligent conduct involving only a risk of injury that is unreasonable. [FN22] These concepts from the Restatement and their analogues in Texas law are discussed below.

***1259** A. 'Intent'

The Restatement defines 'intent' as follows: 'The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.' [FN23] The Comment to Section 8A explains that 'intent,' as used in the Restatement, refers 'to the consequences of an act rather than the act itself.' [FN24] As an example, the Restatement explains that when an actor fires a gun in the desert, 'he intends to pull the trigger,' but if the 'bullet hits a person who is present' without the actor's knowledge, the actor did not intend the result. Thus, it is not the intent to do the act, but the intent to cause the consequences of the act, that counts.

The Comment to Section 8A explains that while 'intent' includes all consequences which the actor desires to bring about, 'if the actor knows that the consequences are certain, or substantially certain, to result from his act, ' and he still proceeds, 'then the law treats the actor as if he desired to produce the result.' [FN25] The Comment to Section 8A distinguishes intent from other types of fault. As noted above, as the probability that the consequences will follow from the act decreases, the actor's conduct ceases to be intentional and becomes reckless. [FN26] As the probability decreases further and amounts only to a risk that the result will follow, the actor's conduct becomes ordinary negligence. [FN27]

The Texas Supreme Court has adopted the Restatement's definition of 'intent.' In Reed Tool Co. v. Copelin, [FN28] the court stated:

The fundamental difference between negligent injury, or even grossly negligent injury, and intentional injury is the specific intent to inflict injury. The Restatement Second of Torts defines intent to mean that 'the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.' [FN29]

***1260** Furthermore, 'to establish intentional conduct, more than the knowledge and appreciation of risk is necessary; the known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence), and become a substantial certainty. ' [FN30]

The Texas Supreme Court recently examined the issue of intent in State Farm Fire & Casualty Co. v. S.S. & G.W., [FN31] in which the court considered whether the transmission of genital herpes through sexual relations was an intentional injury that came within the 'intentional injury exclusion' of a Texas Standard Homeowners Insurance Policy. [FN32] The court relied upon the Restatement's definition of intent, saying that 'an insured intends to injure or harm another if he intends the consequences of his act, or believes that they are substantially certain to follow.' [FN33] Although the summary judgment record in the case established that the insured intentionally engaged in sexual intercourse, the record did not establish that the insured intended to cause bodily harm to his sexual partner. As a consequence, the record did not establish as a matter of law that the policy exclusion for bodily injury caused intentionally by the insured applied, so the summary judgment in favor of the insurance company was reversed. [FN34] The supreme court thus reaffirmed the concept of Restatement Section 8A, Comment (a), that 'intent' refers to the consequences of the action rather than the action itself. [FN35]

***1261** B. ‘Recklessness‘ Under the Restatement

The Restatement defines recklessness by reference to the definition of negligence:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. [FN36]

The Comment to Section 500 explains that recklessness can consist of two different kinds of conduct. In one, the actor ‘knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk.‘ [FN37] In the other kind of conduct, the actor ‘has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.‘ [FN38] In the latter situation, an objective standard is applied to the actor, who is held to have realized the ‘aggravated risk‘ to the same extent as a reasonable person in those circumstances. [FN39] For a finding of recklessness, the actor must have ***1262** known, or had reason to know, the facts which create the risk. According to the Comment, the risk must not be just an unreasonable one, as would be true with negligence. [FN40] For recklessness, the risk must ‘involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.‘ [FN41] ‘It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.‘ [FN42] Also, to be reckless, the act or omission which causes the harm must be intended. [FN43] Under the Restatement, recklessness has certain consequences: contributory negligence is not a bar, and punitive damages may be imposed. [FN44]

The Restatement's concept of recklessness has not been adopted expressly by the Texas Supreme Court. [FN45] The extent to which the Texas concept of ‘gross negligence‘ is the equivalent of recklessness under the Restatement is explored below. [FN46]

***1263** 1. Contrast ‘Recklessness‘ with ‘Intent‘

Comment (f) to Section 500 of the Restatement explains the difference between intent and recklessness:

Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes, or from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results. [FN47]

2. Contrast ‘Recklessness‘ with ‘Negligence‘

The Restatement has a simple definition for negligence: ‘In the Restatement of this Subject, negligence is conduct

which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others. ' [FN48] Except for children and disabled persons, the standard established by law is the reasonable person standard -- the standard 'of a reasonable person under like circumstances.' [FN49]

The Texas definition of negligence comports with the Restatement concept. In Texas, 'negligence' means 'failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.' [FN50]

***1264** Comment (g) to Section 500 of the Restatement explains the difference between recklessness and negligence:

Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind. [FN51]

Comment (e) to Section 282 sheds further light on the distinction:

As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from that which is shown by conduct intended to invade similar interests. Therefore, where this disproportion is great, there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct which is intended to cause the resulting harm. [FN52]

3. Is Recklessness Equivalent to Gross Negligence?

The question arises of whether recklessness, for purposes of a Section 46 claim, is the same as 'gross negligence' under Texas law. This contention was raised in Boyles v. Kerr, [FN53] but was not addressed by the supreme court's plurality opinion. [FN54] Justice Doggett***1265** suggested, however, in his dissenting opinions in Boyles v. Kerr, that the supreme court had previously held that 'reckless disregard' is synonymous with 'gross negligence.' [FN55] The case relied upon by Justice Doggett, Burke Royalty Co. v. Walls, [FN56] equated 'gross negligence' with 'heedless and reckless disregard,' [FN57] a concept synthesized from automobile negligence cases by the State Bar of Texas Pattern Jury Charges Committee. [FN58] Since that time, the Texas Legislature has provided a definition of 'gross negligence' [FN59] that carries forward the terminology of the Pattern Jury Charges Committee, but omits the term 'heedless and reckless disregard.' [FN60]

Thus, a parallel historically has existed in Texas practice between the terms 'gross negligence' and 'heedless and reckless disregard.' That parallel does not by itself, however, establish that 'gross negligence' as used in Texas practice equates to 'recklessness' under the Restatement. [FN61]

In Burke Royalty, the Texas Supreme Court said that the essential feature of gross negligence is the mental attitude of the defendant***1266** -- the defendant must know about the peril, while his acts or omissions show that he did not care. [FN62] This suggests a subjective standard. In contrast, Restatement Section 500, dealing with recklessness, includes both a subjective and an objective standard. [FN63] In the case of Williams v. Steves Industries, Inc., [FN64] the supreme court interpreted certain language in Burke Royalty to suggest that an objective standard could be used to establish gross negligence. [FN65] ***1267** Then, in Transportation Insurance Co. v. Moriel, [FN66] a seven-to-two majority of the supreme court backed away from the Williams case's extension of the gross negligence concept, rejecting the objective standard and leaving the subjective standard as the sole basis for a determination of gross negligence. [FN67]

Because Texas currently recognizes only a subjective test for gross negligence and not the objective test that is part of the Restatement's concept of recklessness, the Texas concept of gross negligence deviates significantly from the concept of ‘recklessness‘ under Restatement Section 500. [FN68]

C. ‘ Extreme and Outrageous‘

In order for behavior to be actionable under Restatement Section 46, the behavior must be extreme and outrageous. [FN69] Extreme and ***1268** outrageous behavior is really the crux of the tort. [FN70] Comment (d) to Restatement Second 46 gives the following analysis:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It is has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,‘ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!‘
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's sic feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam . . . . [FN71]

***1269** The Restatement 44ves several examples of extreme and outrageous behavior. In one example, person A, as a practical joke, falsely tells person B that her husband has been badly injured in an accident, causing severe emotional distress. [FN72] In another example, businessperson A summons businessperson B to appear before an intimidating group of associates and tells B that he has been working in territory which the association regards as exclusively allocated to one of its members and demands that B turn over his revenues, failing which the association will beat him up, destroy his truck, and put him out of business. [FN73] In another example, person A invites person B to a swimming party at an exclusive resort and gives her a bathing suit that he knows will dissolve in the water, and this in fact happens, leaving B naked in the presence of persons she has just met. [FN74] In contrast, the Restatement says it is not actionable when person A, who cannot reach a telephone number, curses the telephone operator and says he would break her neck if he could. [FN75] The Restatement also suggests that the extreme and outrageous character of the conduct can arise from the abuse of a position or relation giving the actor actual or apparent authority over the victim, or the power to affect the victim's

interests. [FN76] And the Restatement suggests that

the extreme and outrageous character of the conduct may arise from the actor's knowledge that the victim is peculiarly susceptible to emotional distress by reason of some physical or mental condition . . . although . . . major outrage is essential to the tort; and the mere fact that the actor knows that the victim will regard the conduct as insulting, or will suffer hurt feelings, is not enough to support liability. [FN77]

The Restatement observes that even extreme and outrageous behavior may be privileged under certain circumstances and that extreme***1270** provocation may minimize or eliminate the element of outrage. [FN78]

The Restatement notes that, initially, the court must determine as a matter of law whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. [FN79] If so, then it is for the jury to determine whether the conduct has been sufficiently outrageous to result in liability. [FN80]

D. Causation

The Restatement's description of causation is not altogether satisfactory when applied to Section 46. [FN81] The Restatement uses one concept of causation for intentional torts and a different one for torts based on recklessness or negligence. [FN82] Therefore, two different concepts of causation must be used to determine whether liability exists under Section 46.

Causation exists under the Restatement for an intentional tort if the actor acts with intent to cause the harm and the intended harm results from the individual's acts. [FN83] However, causation does not exist if the harm results from an independent cause. [FN84] And if the ***1271** intentional wrong causes unintended harm, liability depends on the actor's ‘degree of moral wrong in acting, and the seriousness of the intended harm.‘ [FN85] In either instance, there must be an actual causal connection between the act and the result. [FN86]

Under the Restatement, causation for torts involving recklessness is the same as causation for negligent torts. [FN87] The basic Restatement rule of causation for negligence requires that the actor's negligent conduct be a substantial factor in bringing about the harm. [FN88] The court must also determine that no rule of law relieves the actor of liability because of the way in which the actor's negligence resulted in the harm. [FN89] This determination requires consideration of whether any one of a number of exceptions to liability applies to the case. [FN90] Furthermore, causation for negligence under the Restatement does not involve foreseeability. [FN91]

Under Texas law, the causation required to recover damages for an intentional tort is ‘cause in fact‘ or ‘producing cause,‘ [FN92] and ***1272** the causation required for negligent torts is ‘proximate cause.‘ [FN93] In Texas practice, proximate cause involves both cause in fact and foreseeability. [FN94]

It thus appears that the Restatement's concept of causation does not comport with that of Texas, at least as to the reckless portion of Section 46. Texas courts no doubt will use proximate cause for Section 46 claims premised on recklessness.

E. Severe Emotional Distress

Restatement Section 46 imposes liability only when the emotional distress is severe. [FN95] Comment (j) to Section 46 discusses the requirement of severity as follows:

***1273** The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. . . . It is only where it is extreme that liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only when the distress inflicted is so severe that no reasonable person could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress existed . . . .

The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge. [FN96]

Thus, the severity of the emotional distress affects not only the amount of recovery, but also whether any recovery is available. [FN97]

F. Resulting Bodily Harm

It is not necessary that the plaintiff prove bodily harm in order to recover under Restatement Section 46. [FN98] If bodily harm results from the wrongful behavior, however, it is compensable. [FN99]

***1274** G. Conduct Directed at Third Person

Restatement Section 46(2) permits a plaintiff to recover from a person who, through extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to a member of the plaintiff's immediate family who is present at the time of the act. [FN100] In this instance, recovery is permitted even absent bodily harm to the plaintiff. Recovery is permitted for such behavior directed at nonfamily members who are present at the time only if the plaintiff's distress results in bodily harm. [FN101]

H. Exemplary Damages

As a general rule in Texas, exemplary damages are recoverable when it is shown that the defendant has committed a willful, malicious, or fraudulent wrong. [FN102] It is widely accepted that a party seeking to recover exemplary damages must secure a finding of ***1275** fraud, malice, or gross negligence. [FN103] To what extent is that true of a Restatement Section 46 claim?

Section 41.003 of the Texas Civil Practice and Remedies Code provides that exemplary damages may be awarded only if the claimant proves that the injuries suffered result from fraud, malice, or gross negligence. [FN104] However, Section 41.003 is contained in a chapter of the Code that applies only to an action in which a claimant seeks exemplary damages relating to a cause of action as defined in Section 33.001 of the Civil Practice and Remedies Code. [FN105] Code Section 33.001, entitled ‘Comparative Responsibility,‘ refers to claims of negligence, products liability grounded on negligence, strict liability in tort, strict products liability, and breach of warranty under Chapter 2 of the Business and Commerce Code. [FN106] Because a tort claim under the intentional portion of Restatement Section 46 does not fit within the scope of Section 33.001, it would seem that the Code Section 41.003 requirement of fraud, malice, or gross negli-

gence does not apply to a Restatement Section 46 claim of intentional harm. A Restatement Section 46 claim premised on recklessness would, however, seem to fit within code Sections 41.003 and 33.001. Nevertheless, a finding of recklessness should suffice to support exemplary damages. [FN107]

Section 41.007 of the Civil Practice and Remedies Code imposes a cap on exemplary damages 'at four times the amount of actual damages or $200,000, whichever is greater.' [FN108] Section 41.008 ***1276** states, however, that the cap does not apply to intentional torts. [FN109] Thus, the cap does not apply to the intentional portion of Restatement Section 46. The cap would, however, apply to liability under Restatement Section 46 that is premised on recklessness, which is akin to negligence. [FN110]

Severe emotional distress or bodily injury intentionally caused by extreme and outrageous behavior would seem to be sufficient grounds for exemplary damages. Furthermore, liability premised on reckless infliction of severe emotional distress would seem to subsume gross negligence, which is also a basis for awarding exemplary damages. [FN111] Still, many litigants in Restatement Section 46 cases submit a malice jury question as a predicate to seeking exemplary damages, and it is prudent to continue to do so until the issue is settled. [FN112] Several courts in other states have held that exemplary damages are not available in a Restatement Section 46 suit, because outrageous conduct is the basis for compensatory damages, which is punishment enough. [FN113]

***1277** VI. Summary Judgment, Directed Verdict, and Judgment N.O.V.

The question will arise on a case-by-case basis of whether the facts alleged or proved establish intentional or reckless infliction of severe emotional distress caused by extreme and outrageous conduct. While it might at first seem that the determination is fact intensive [FN114] and not subject to disposition by summary judgment or directed verdict, in practice the courts have stepped in and rejected claims as a matter of law when, in the opinion of the court, the behavior was not extreme and outrageous, or the emotional distress was not severe.

Comment (h) to Restatement Section 46 discusses the roles of the court and jury in determining whether the defendant's behavior was extreme and outrageous as follows:

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. [FN115]

Comment (j) to Restatement Section 46 discusses the roles of the court and jury in determining whether the plaintiff suffered emotional distress that was severe. It is for the court to determine whether, on the evidence, severe emotional distress can be found; ***1278** it is for the jury to determine whether, on the evidence, it has in fact existed. [FN116]

A review of the cases indicates that courts have many times rejected claims on the ground that the alleged or proven behavior was, as a matter of law, not extreme and outrageous, or that the emotional distress suffered by the plaintiff was not severe. [FN117] In other cases, Section 46 claims have withstood 'as a matter of law' attacks. [FN118] A number of appellate courts in other jurisdictions have ***1279** considered whether Section 46 claims could be resolved as a matter of law on the grounds that the alleged or proven facts do not show extreme and outrageous behavior [FN119] or that the resulting emotional distress was severe. [FN120]

***1280** VII. The Charge to the Jury

There is no pattern jury charge devised by the State Bar of Texas's Pattern Jury Charges Committee for use with the tort of intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct. [FN121] The author suggests the following charge: [FN122]

Sample Pattern Jury Charge for Intentionally or Recklessly Causing Severe Emotional Distress by Extreme and Outrageous Conduct A person acts with intent, or intentionally, when she desires to inflict harm, or she believes that the harm is substantially certain ***1281** to result from the act. [FN123] Even if the person acting did not desire to inflict the harm, intent exists if the known danger goes beyond a foreseeable risk which an ordinary, reasonable, prudent person would avoid, and becomes a substantial certainty. [FN124] An intentional act or omission is the cause of harm if the act or omission involved was a substantial factor in bringing about the injury and without which no harm would have occurred. [FN125]

A person is reckless, or acts recklessly, if she knows or has reason to know of facts which create an extreme risk [FN126] of harm to another, and she deliberately proceeds to act, or fails to act, in ***1282** conscious disregard of or indifference to that high degree of risk. [FN127] To be reckless the person must know, or have reason to know, the facts which create the risk. A reckless act or omission is the cause of harm only if it is a proximate cause.

'Proximate cause' means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event. [FN128]

'Ordinary care' means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. [FN129]

Conduct is extreme and outrageous if it is so outrageous in character, and so extreme in degree, as to go beyond all possible ***1283** bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. [FN130] Even outrageous conduct is permissible, however, if the actor does no more than insist upon his her legal rights in a permissible way. [FN131]

Emotional distress includes any highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea, [FN132] that are reasonable and justified under the circumstances. [FN133] Emotional distress is severe when no reasonable person could be expected to endure it. [FN134]

Question One Did Defendant, acting either intentionally or recklessly, since limitations cut-off date, engage in extreme and outrageous conduct that caused Plaintiff to suffer severe emotional distress or bodily harm? [FN135]

***1284** Answer 'Yes' or 'No.'

Answer: _____

Answer Question Two only if you have answered 'Yes' to Question One.

Question Two What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for his her damages, if any, caused by such conduct of Defendant?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include interest on any amount of damages you find.

Element a. Severe emotional distress.

Element b. Bodily harm.

Element c. Loss of earning capacity.

Element d. Reasonable expenses of necessary medical care. [FN136]

Answer in dollars and cents for damages, if any, that --

were sustained in the past;

Answer: _____

in reasonable probability will be sustained in the future. [FN137]

Answer: _____

***1285** Answer Question Three only if you have answered Question Two. [FN138]

Question Three Did the Defendant engage in any such conduct with malice or gross negligence? [FN139]

'Malice' means ill will, spite, evil motive, or purpose to injure another. [FN140] Malice also exists when wrongful conduct is intentional and without just cause or excuse. [FN141] Gross negligence is more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish ***1286** that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. [FN142]

Answer 'Yes' or 'No.'

Answer: _____

Question Four [FN143] What sum of money, if any, should be awarded to Plaintiff against Defendant as exemplary damages?

'Exemplary damages' means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Answer in dollars and cents for damages, if any.

Answer: _____ [FN144]

VIII. Comparative Responsibility

To the extent that a Restatement Section 46 claim is founded on recklessness [FN145] and to the extent that recklessness equates to gross negligence under Texas law, the tort claim may fall within the operation***1287** of the comparative responsibility provisions of Texas law. [FN146] Chapter 33 of the Texas Civil Practice and Remedies Code, entitled 'Comparative Responsibility,' applies to negligence claims in which the negligence of more than one person proximately causes the claimant's damages. [FN147] Under code Section 33.001, a claimant cannot recover damages for negligence resulting in personal injury if the claimant's percentage of responsibility exceeds 50 percent. [FN148] If the claimant is not barred under code Section 33.001, but is nonetheless found to be partially responsible for his own injuries, the claimant's recovery must be reduced by a percentage equal to the claimant's percentage of responsibility. [FN149] The reduction does not apply to punitive damages. [FN150] Chapter 33 also contains provisions governing joint and several liability and rights of contribution. [FN151] If Chapter 33 applies to the claim, then the cap on punitive damages contained in Texas Civil Practice and Remedies Code Section 41.007 will apply. [FN152]

The question arises of whether, if comparative responsibility is required for the reckless component of a Restatement Section 46 claim, the court should compare only gross negligence of the claimant to the recklessness or gross negligence of the defendant, or whether ordinary negligence of the claimant may be compared to the defendant's reckless or grossly negligent behavior. Case law involving other types of tort claims suggests that a claimant's ordinary negligence is compared to the defendant's gross negligence. [FN153]

Texas courts have considered whether a claim for gross negligence (such as the reckless component of a Restatement Section 46 claim) can be compared under the comparative responsibility statute***1288** with ordinary negligence by the claimant, and they have held that this is proper. [FN154] The comparative responsibility scheme applies even when there is no cause of action for plain negligence, but a cause of action for gross negligence exists. [FN155]

If a party's Restatement Section 46 claim includes the reckless component of the tort, the opposing party pleads contributory negligence, and the evidence shows negligence on the part of the claimant proximately causing the claimant's injuries, then the trial court should submit the intentional component of the Restatement Section 46 claim to the jury separately from the reckless component of the claim. Then the reckless component of the claim should be submitted as a comparative negligence issue. [FN156]

IX. Texas Courts of Appeals Cases

Prior to the Texas Supreme Court's decision in Twyman, a number of courts of appeals had recognized a claim for intentional or reckless infliction of severe emotional distress caused by extreme and outrageous conduct. [FN157] One court of appeals had rejected***1289** the right of a spouse to bring such a claim in connection with a divorce proceeding, [FN158] while another had permitted it. [FN159]

The opinions of the Justices in Twyman appear to join issue on the public policy questions without giving much weight to the decisions of the Texas courts of appeals on the subject. The fact that forty-six other states have recognized the tort appears to have greater weight than the emerging consensus among Texas courts of appeals that the tort should be recognized. [FN160]

X. Criminal Conversation and Alienation of Affection

At one time, Texas recognized causes of action for criminal conversation and alienation of affections. Criminal conversation was an intentional tort brought against a third party for having had sexual relations with the plaintiff's spouse.

[FN161] Alienation of affection was an intentional tort brought against a third party for impairing the consortium between spouses, typically as a result of an extramarital affair. [FN162] The Texas Legislature abolished the tort of criminal conversation in 1975 [FN163] and the tort of alienation of affections in 1987. [FN164] Claimants cannot recover for these outlawed torts ***1290** under the guise of a claim for intentional or reckless infliction of severe emotional distress. [FN165]

XI. Effect of Privileges and Immunities

When a privilege or an immunity historically has been recognized for certain actions, those same privileges and immunities are recognized when the claim is restated as a Restatement Section 46 claim. For example, official immunity has been recognized as a defense to Restatement Section 46 claims brought against governmental***1291** employees who meet the terms of the immunity. [FN166] The qualified privilege for giving information to persons interested in the trade or commercial standing of a person, recognized in defamation cases, has been applied to Restatement Section 46 claims as well. [FN167] The immunity for communications made in connection with a court proceeding has been applied to Restatement Section 46 claims. [FN168] Validly pursuing discovery or bringing a court proceeding has been held not actionable as a Restatement Section 46 claim. [FN169] The parent-child immunity doctrine has been applied to a ***1292** Restatement Section 46 claim based on the objective portion of the tort -- that a reasonable person under the circumstances would conclude that emotional harm was almost certain to result. [FN170] When Restatement Section 46 claims have been brought in connection with qualified plans governed by ERISA, [FN171] federal preemption has been recognized. [FN172]

XII. First Amendment Freedom of Speech

The same protections afforded by the First Amendment to the United States Constitution to defendants in a libel case extend to claims for intentional infliction of emotional distress premised on the same facts. [FN173] One Texas court, in dealing with a defamation***1293** -Restatement Section 46 claim, concluded that the intentional or reckless component of the tort requires a showing of ‘malice‘ as that term is understood in First Amendment litigation, meaning that the defendant acted with knowledge of, or in reckless disregard to, the falsity of the publicized matter. [FN174]

XIII. Constitutional Right to Privacy

The marriage relationship carries with it certain constitutional protections that act as barriers to governmental interference. These constitutional limits apply not only to legislation, but also to state-sanctioned litigation. [FN175] Some aspects of marital relations exist that are beyond governmental control. As stated by Justice Douglas in his plurality opinion in Griswold v. Connecticut: [FN176]

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. ***1294** Yet it is an association for as noble a purpose as any involved in our prior decisions. [FN177]

Justice Goldberg in his concurring opinion stated that ‘the right of privacy in the marital relation is fundamental and basic -- a personal right ‘retained by the people’ within the meaning of the Ninth Amendment. Connecticut cannot consti-

tutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. ‘ [FN178] Justice White, in his concurring opinion, cited prior Supreme Court cases acknowledging a right ‘to marry, establish a home and bring up children, . . . and the liberty . . . to direct the upbringing and education of children, and these are among ‘the basic rights of man.’ ‘ [FN179] Justice White saw these cases as affirming ‘that there is a ‘realm of family life which the state cannot enter’ without substantial justification.‘ [FN180]

There may be constitutional limits on how far a state's tort system can intrude into interspousal matters. [FN181] For example, when the law permits a woman to decide to terminate a pregnancy, terminating the pregnancy, even without her husband's consent, does not give rise to a tort claim for intentionally or recklessly causing severe emotional distress. [FN182]

XIV. Retroactive Application

As a general rule, judicial decisions of the Texas Supreme Court apply retroactively. [FN183] The Twyman decision does not expressly ***1295** state to what extent its change in the law is retroactive. [FN184] The disposition of the case in Twyman and the supreme court's subsequent ruling in Massey v. Massey [FN185] reflect that the change of law occurring in Twyman applies to the parties in Twyman as well as to other persons whose claims for intentional infliction of emotional distress are on appeal. It seems safe to assume that the change of law will also apply to all persons whose claims have not become barred by operation of the doctrine of res judicata, the running of time limitations, or similar defenses. [FN186]

XV. Res Judicata, Collateral Estoppel, Compulsory Counterclaim, and Judicial Estoppel

A question arises as to whether a final decree of divorce that did not expressly adjudicate a claim for intentional infliction of emotional distress operates as a res judicata bar against a spouse now bringing such a claim. [FN187] Texas follows the ‘transactional‘ approach to res judicata. [FN188] Under this approach, a judgment in an earlier suit ‘precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and ***1296** which might have been litigated in the first suit. ‘ [FN189] Thus, a final decree of divorce could have preclusive effect on a later claim for intentional infliction of emotional distress even if that claim was not raised or expressly adjudicated in the divorce. [FN190] The deciding factor is whether the claim for infliction of emotional distress ‘arises out of the same subject matter‘ as the divorce.

Texas also recognizes a ‘compulsory counterclaim‘ rule, whereby a party is required to assert a counterclaim for any cause of action against the opposing party that arises out of the transaction or occurrence that is made the basis of the opposing party's claim. [FN191] A Restatement Section 46 claim might be considered a compulsory counterclaim to a suit seeking a divorce based on cruel treatment or a claim for a larger share of the property based on cruel treatment. [FN192]

Courts in several other states have concluded that a final decree of divorce that does not expressly adjudicate a claim for intentional infliction of emotional distress does not preclude a later tort suit on that claim. [FN193] A number of these states, however, have separate ***1297** court systems for law and equity proceedings, divorce being considered an equity proceeding and a tort suit being considered a legal proceeding. [FN194] In some states a jury trial is available in a legal proceeding but not in an equity proceeding. [FN195] Additionally, in some states fault cannot be considered in dividing the property on divorce. [FN196]

***1298** The question about whether a claim for infliction of emotional distress ‘arises out of the same subject matter‘

as the divorce may be influenced by the fact that in a Texas divorce the trial court can consider fault in the break up of the marriage as a factor in dividing the estate of the parties. [FN197] This presents the possibility that the facts supporting a Restatement Section 46 claim may have been considered in dividing the property in the divorce, whether by agreement or judicial decision. Justice Cornyn addressed this possibility in his discussion in Twyman of whether the tort claim should be joined with the divorce and how the trial court can avoid 'double recovery' for the same wrongful acts of a spouse. [FN198] In obiter dicta, Justice Cornyn, joined by Justice Hightower, plainly intimated that the doctrine of res judicata would preclude later assertion of the tort after a divorce has been granted. [FN199] None of the other opinions in Twyman addressed res judicata. Because only two justices have expressly spoken on the subject, practitioners should consider the possibility of filing such tort claims after divorce, if the claims were not released or expressly adjudicated in the divorce, until the law is developed in this regard. Conversely, attorneys representing a spouse who could potentially be a defendant in such a claim should extract a release or adjudication of the potential Restatement Section 46 claim at the time of divorce.

A question also arises of whether a divorce decree can have collateral estoppel effect on a later tort claim and vice versa. Collateral estoppel occurs when an issue of fact or law is actually litigated [FN200] in a lawsuit and is essential to the issue determined in the case. Once the issue is litigated, it is conclusively determined ***1299** for purposes of any subsequent litigation between those same parties. [FN201] Thus, when a trial court finds in a divorce that one spouse engaged in cruel treatment of the other spouse, and it is apparent that the cruel treatment was behavior that would support liability for a Restatement Section 46 claim, the finding of cruel treatment in the divorce proceeding would create collateral estoppel against the party denying such behavior in a later tort case. [FN202] Estoppel to deny the cruel treatment does not, in and of itself, establish liability under Restatement Section 46. Similarly, a tort suit resolving that behavior constituting a Restatement Section 46 claim did occur would create a collateral estoppel argument that the behavior occurred, but it would still be for the finder of fact in the divorce to determine whether that behavior constituted cruel treatment as a ground for divorce or fault in the break-up of the marriage for purposes of the property division. A finding in a separate tort suit that certain behavior was not actionable under Restatement Section 46 would not necessarily preclude a finding that the alleged behavior was cruel treatment, because the standard for cruel treatment is not the same as the standard in Restatement Section 46. [FN203]

The doctrine of judicial estoppel is somewhat different because it bars a party who has successfully maintained a position in a prior proceeding from afterward adopting an inconsistent position. [FN204]

The elements required to trigger the estoppel are: (1) the prior inconsistent statement must have been made in a judicial proceeding; (2) the party now sought to be estopped must have successfully maintained the prior position; and (3) the prior inconsistent statement***1300** must not have been made inadvertently or by mistake, fraud, or duress. [FN205]

Judicial estoppel requires a party to take consistent positions in successive lawsuits. Several courts have held that the statement in the former proceeding must have been made under oath. [FN206]

XVI. Joinder, Severance, and Separate Trials

Justice Cornyn's plurality opinion in Twyman addressed the issue of whether a Restatement Section 46 tort claim should be brought together with a divorce proceeding, or should be filed separately or severed. [FN207] Justice Cornyn indicated that joinder of tort claims with the divorce is 'encouraged,' since resolving both tort and divorce claims in the same proceeding avoids two trials based at least in part on the same facts. [FN208] The question of whether to try the claims together, however, rests within the sound discretion of the trial court. [FN209] The trial court also can order separate trials of any claim, cross-claim, or counterclaim, or any separate issue of any such claims. [FN210]

***1301** XVII. No Double Recovery/One Satisfaction Rule

Texas recognizes the ‘one satisfaction rule.‘ [FN211] Under this rule, a party who suffers but one injury can recover only one satisfaction for damages arising from that injury. [FN212] If a tort claim is brought for the same acts or omissions that the trial court considers in dividing the community estate in the parties' divorce, there is a danger of double recovery for the wrongful behavior, [FN213] as Justice Cornyn commented in his plurality opinion in Twyman. [FN214] He stated that ‘a spouse should not be allowed to recover tort damages and a disproportionate division of the community estate based on the same conduct.‘ [FN215] He suggested that the trial court could still award a disproportionate division based on other factors. [FN216] Justice Cornyn suggested that to avoid double recovery ‘the factfinder should consider the damages awarded in the tort action when dividing the parties' property.‘ [FN217] If the property division is tried to a jury and an advisory opinion is sought on the division of the estate, he suggested that the jury be instructed to disregard the alleged tortious acts. [FN218] When the tort claim is litigated after the ***1302** divorce, the defendant should plead payment as a defense. [FN219] In that instance, the divorce court should be requested to give findings reflecting the extent to which the tortious behavior has been ‘compensated‘ in the division of the property. [FN220]

XVIII. Alternative Claims and Election of Remedies

In Texas, a litigant may assert alternative theories, causes of action, or defenses in the same lawsuit. [FN221] Thus, it is not necessary for a claimant or defendant to favor one fact pattern, one cause of action or remedy, or one defense over another in the pleadings or presentation of evidence. [FN222] The litigant may maintain more than one parallel or inconsistent claim or defense and decide which one ultimately to rely on at the end of the legal proceeding. A litigant must, however, when moving for rendition of judgment, decide which ground of recovery or defense to rely upon in rendering judgment [FN223] because a claimant is not entitled to recover more than ***1303** full satisfaction for injuries. [FN224] This principle would apply when a Restatement Section 46 claim is tried together with the divorce, and the claimant is successful both as to damages and a disproportionate property division.

The doctrine of election differs from the assertion of alternative claims in one lawsuit. [FN225] In the leading modern Texas case on the doctrine of election, Bocanegra v. Aetna Life Insurance Co., [FN226] the Texas Supreme Court stated: ‘An election will bar recovery when the inconsistency in the assertion of a remedy, right, or state of facts is so unconscionable, dishonest, contrary to fair dealing, or so stultifies the legal process or trifles with justice or the courts as to be manifestly unjust.‘ [FN227] ‘The doctrine is designed to prevent a party who has obtained a specific form of remedy from obtaining a different and inconsistent remedy for the same wrong.‘ [FN228] It is also used to ‘make sure that judgments are rendered upon an accurate determination of the facts.‘ [FN229] The doctrine of election extends to situations that good conscience and equity should reach and that cannot be reached [FN230] through the doctrines of judicial estoppel, [FN231] ***1304** equitable estoppel, [FN232] ratification, [FN233] waiver, [FN234] satisfaction, [FN235] res judicata or collateral estoppel. [FN236] The mere filing of a lawsuit asserting a claim does not constitute an election of remedies. Pursuing a claim through judgment or settlement, however, can constitute an election. [FN237] But, the election must result from an ‘informed choice.‘ [FN238]

***1305** The doctrine of election is an affirmative defense which must be pleaded. [FN239] A general denial is not sufficient to raise the defense of ‘election of remedies.‘ [FN240]

XIX. Statute of Limitations

The two-year statute of limitations applies to a claim for intentionally or recklessly causing severe emotional distress as a result of extreme and outrageous conduct. [FN241] There is no recognized tolling of the statute of limitations during marriage. [FN242] Consequently, interspousal tort claims normally would be barred for conduct occurring more than two years prior to the filing of the suit. The court of appeals in Twyman, however, applied the ‘tolling‘ concept of ‘continuing tort‘ to permit the claimant recovery of damages resulting from negligent infliction of emotional distress, based in part from acts occurring more than two years before suit was filed. [FN243] The court described a continuing tort as ‘one inflicted over a period of time, ‘ and one which does not involve acts that are complete in themselves. [FN244] Rather, a continuing course of conduct***1306** over a period of years causes injury. [FN245] In applying the continuing tort concept, the court of appeals in Twyman relied upon a federal case that applied the continuing tort concept in a suit brought against the U.S. government for wrongfully prescribing medication to an Army veteran over a period of nineteen years [FN246] and a federal case in which the alleged tortious activity continued up to the time suit was filed. [FN247] The supreme court, in its analysis of the Twyman case, did not comment on the court of appeals's reliance upon the continuing tort concept.

The Supreme Court of Oregon expressed some concerns about the continuing tort basis for tolling the statute of limitations on interspousal tort claims in Davis v. Bostick. [FN248] The court observed that a series of discrete acts, even when connected by design or intent, should not be designated as a ‘continuing tort‘ in order to escape the public policy behind statutes of limitations: to avoid stale claims. [FN249]

XX. The Characterization of the Recovery as Separate or Community Property

A cause of action that accrues during the marriage is presumptively community property. [FN250] A recovery for personal injury sustained by a spouse during marriage is separate property, [FN251] ***1307** however, except for any recovery for loss of earning capacity during marriage [FN252] and for recovery for medical expenses that are a community obligation. [FN253] It appears that an award of exemplary damages is community property. [FN254]

A spouse is personally liable for a tort judgment awarded against that spouse, and the judgment can be collected from nonexempt community or separate property, including property acquired by the judgment debtor-spouse after divorce. [FN255] The trial court can determine, as it deems just and equitable, the order in which particular separate or community property will be subject to execution and sale in order to satisfy a judgment. [FN256]

XXI. Insurance Coverage

A question arises as to whether claims for intentional or reckless infliction of severe emotional distress give rise to a duty to defend under liability insurance policies and whether the insurer must indemnify the insured if liability is imposed. [FN257] This Article considers this question in connection with the Texas Standard Homeowners Policy. [FN258]

***1308** A. Texas Standard Homeowners Policy

Persons who own a residence in Texas ordinarily will be insured under a Texas Standard Homeowners Policy. The terms of this standard policy, which are uniform throughout Texas, are subject to approval by the Commissioner of the

Texas Department of Insurance. [FN259] A claim for intentional or reckless infliction of severe emotional distress might come under Coverage C and Coverage D of the Standard Homeowners Policy. Under Coverage C, pertaining to personal liability, the Standard Homeowners Policy provides liability coverage for a claim made or suit brought during the policy period [FN260] against an insured [FN261] for damages because of bodily injury [FN262] caused by an occurrence [FN263] to which coverage applies. [FN264] Under Coverage D, pertaining to medical payments to others, the insurer promises to pay the necessary medical expenses incurred or medically determined within three years from the date of an accident [FN265] ***1309** causing bodily injury. The policy contains certain 'exclusions' from coverage, as discussed below. [FN266]

1. Is There Coverage?

Coverage under the Texas Standard Homeowners Policy extends to bodily injury caused by an occurrence. [FN267] A question exists of whether severe emotional distress, arising in the absence of an offensive or injurious touching of the body, falls within the scope of 'bodily injury' as that term is used in the Policy. [FN268] If 'bodily injury'CITE, 25 St. Mary's L.J. 1310>>injury' does include severe emotional distress, then coverage turns on whether the bodily injury was caused by an 'occurrence,' meaning an accident that resulted in bodily injury during the policy period. [FN269]

2. Exclusions from Coverage Under the Standard Homeowners Policy

The Standard Homwowners Policy contains a number of exclusions from coverage. [FN270] Neither Coverage C nor Coverage D applies to bodily injury that is caused intentionally by or at the direction of an insured. [FN271] Coverage C does not apply to bodily ***1311** injury to an insured under the policy. [FN272] A separate exclusion eliminates coverage for bodily injury to 'residents of your household who are . . . your relatives. ' [FN273] Coverage D does not apply to any person regularly residing on any part of the insured location, other than a 'residence employee.' [FN274] Consequently, no coverage exists under the Texas Standard Homeowners Policy for the medical expenses of a spouse caused by the other spouse, unless the injured spouse moves out of the home before the occurrence giving rise to the injury.

3. Policy Period

In order for a claim to come within coverage under a particular policy, the claim must arise during the policy period. The 'policy period'CITE, 25 St. Mary's L.J. 1312>>period' is set out on the Declarations Page, beginning with an effective date and ending with an expiration date. When the tortious activity occurs incrementally over a period of time extending beyond one policy period, an issue arises as to which of several policies might apply to the claim. [FN275] Under the 'continuing tort' theory espoused by Justice Gammage in the court of appeals's opinion in Twyman, [FN276] the right to sue for an injury that occurs in nonactionable increments over a period of time arises when the tortious acts have ceased. [FN277] This concept suggests that in order to determine coverage one would look to the policy in effect when the continuing tortious activity ceases.

The idea of continuing tort may also have an impact when one considers the policy exclusion for bodily injury to a relative who resides at the insured location. If the behavior of the insured that is the basis of a Restatement Section 46 claim occurs over time and fits the definition of a continuing tort, then the cause of action arises when the last act of the continuing course of conduct occurs. If this ending occurs when the relative-claimant is a resident of the insured location, then the exclusion from coverage applies. If this ending occurs after the relative has ceased to reside at the insured location, then this exclusion will not apply. [FN278]

***1313** 4. Notice to Insurer

The Texas Standard Homeowners Policy requires the insured person, ‘in case of a loss,‘ to give ‘prompt written notice‘ to the insurance company of the facts relating to the claim. [FN279] The insurance company may deny coverage for failure to give such notice. For some types of insurance policies in Texas, however, failure to give notice will bar coverage only if the insurance company has been prejudiced by the delay. [FN280] The Texas Standard Homeowners Policy refers to notice of a loss, not notice of a claim, and the ‘loss‘ frequently will occur before a claim is made. Because a spouse ordinarily will not realize that a loss may have occurred in connection with intentional or reckless infliction of severe emotional distress, it may be difficult to pinpoint the time when the duty to notify the insurer arises. Once the insured receives notice of a claim, however, he should promptly give notice to the insurance company.

5. Company's Duty to Respond

Under the Texas Standard Homeowners Policy, the insurance company must, within fifteen days of receiving written notice of a claim, acknowledge the claim, begin an investigation, and specify what further information the company wishes to receive. [FN281] After receiving the information it has requested, the company must, within fifteen business days, notify the insured in writing whether it will pay the claim or deny it. [FN282] When a claim has been asserted against the insured, the insurance company must either acknowledge or deny the duty to defend the insured against the claim. The ***1314** company may indicate that it will indemnify the insured from liability to the third party or it may tender a defense under a ‘reservation of rights,‘ in which it reserves the right to determine at a later time whether it has a duty to indemnify the insured for any liability. [FN283]

6. If the Insurer Refuses to Defend

If the insurer declines to provide a defense, the insured must defend himself. The insurer's wrongful failure to defend is a breach of contract, which liberates the insured from any duty to protect the insurer's interests. [FN284] The insured is then free to enter into an agreed judgment with the claimant and to assign some or all of the insured's claims against the insurance company [FN285] in exchange for a promise that the claimant will not execute upon the insured's assets, other than the right to recover under the insurance policy. [FN286] Some cases suggest that the insurance company is then precluded ***1315** from collaterally attacking the consent judgment, at least as to liability and damages. [FN287]

7. If a Defense Is Tendered, Subject to a Reservation of Rights

If the insurance company agrees to provide a defense but reserves the right to refuse to indemnify in the event the insured is found liable, the insured has a choice. The insured may accept the defense, subject to the reservation of rights; or the insured can refuse to accept the defense tendered subject to a reservation of rights, in which event the insured must defend himself. If, however, the insurance company turns out to be wrong on the question of liability coverage, then the insured can sue the insurer for the cost of defense, [FN288] for indemnification, and possibly for bad-faith claims practices and violations of the Deceptive Trade Practices Act or the Insurance Code. [FN289]

XXII. Conclusion

When the Texas Supreme Court recognized in Twyman v. Twyman a right to recover for behavior described in the Restatement (Second) of Section 46, it significantly expanded the scope of tort liability in Texas, both as to the types of actions that can create liability and the types of injuries that can be compensated. Liability***1316** can be imposed when the actor intentionally or recklessly causes severe emotional distress by engaging in extreme and outrageous behavior. The point at which actions are extreme and outrageous and when emotional distress is severe cannot be clearly described. There are no external standards for the tort system to borrow, as it could in a negligence case, from other parts of the law (e.g., traffic laws and safety laws) or commerce (e.g., prevailing practices in a profession or industry) to gauge acts and injuries under this tort.

Appellate courts have reacted to these uncertain limits on liability by requiring claimants to demonstrate to the satisfaction of the court that they suffered severe emotional harm due to particularly egregious conduct. Many Restatement Section 46 claims around the country have been dismissed, as a matter of law, on the grounds that the defendant's behavior was not extreme and outrageous or because the plaintiff's emotional distress was not severe. In assessing these same factors in suits arising from termination of employment, Texas appellate courts have been particularly stringent, undoubtedly due to Texas's employment-at-will doctrine.

While it is true that determinations of whether, as a matter of law, behavior is extreme and outrageous or emotional distress is severe are highly subjective, the questions are equally subjective when submitted to a jury. The practical effect of the tort is that judges decide whether the wrong and the harm are sufficiently extreme to warrant a jury trial or, after the verdict is returned, to warrant a recovery. In a sense, the tort gives juries more freedom to find liability, while at the same time it gives judges more power to circumvent the jury process or override its result.

The Texas Supreme Court's decision to recognize a Restatement Section 46 claim was in no sense pioneering because the tort is widely recognized throughout America. In permitting such claims between spouses, especially in the context of a divorce, however, the supreme court has put Texas in the vanguard of states that have augmented or even supplanted traditional family-law remedies with claims for money damages for purely emotional injuries.

The Restatement Section 46 tort is commonly called ‘intentional infliction of emotional distress.‘ The name is misleading. The focus of the tort is extreme and outrageous behavior, which is actionable only if it causes emotional distress that is severe. Liability can be imposed if the actor intended to cause severe emotional distress. ***1317** But it can also be imposed if the actor was reckless -- and recklessness is a form of negligence. Just how recklessness varies from negligence under Texas law remains to be seen. Until recently, recklessness was akin to the Texas concept of gross negligence, but what constitutes gross negligence in Texas is in a state of flux. The Restatement imposes liability for recklessness both when the actor consciously disregards a high risk of harm (the subjective test) and when the actor does not realize the high degree of risk although a reasonable person would do so (the objective test).

Texas courts have yet to draw the line between an ordinary negligence claim for emotional distress, rejected in Boyles v. Kerr, and a claim for reckless infliction of severe emotional distress under Restatement Section 46. Texas courts also have yet to determine whether the causal link between the wrong and the harm in a Restatement Section 46 tort is based on cause-in-fact or proximate cause. Some Texas courts have used proximate cause, but apparently out of habit rather than design.

Complications exist regarding exemplary damages under a Restatement Section 46 claim. Some jurisdictions have held that exemplary damages are not available, because the extreme and outrageous conduct is punished by affording actual damages. If exemplary damages are available in Texas, must they be premised on a finding of willful injury or malice? Or is the intentional component of tort, by definition willful and malicious?

When recovery is under the reckless component of the tort (given that recklessness is a form of negligence), the issue arises whether the claim is governed by ‘tort reform‘ limitations, such as the statutory cap on exemplary damages and the requirement of a finding of malice or gross negligence. Even more fundamental is whether Texas's doctrine of comparative fault applies, in which case contributory negligence could reduce or even preclude recovery for recklessly inflicted severe emotional distress.

When a Restatement Section 46 claim invades the defamation arena, recognized privileges and constitutional free speech standards that have developed under defamation law apply as well. In the family-law context, it seems clear that Restatement (Second) Section 46 does not reinvigorate claims for criminal conversation and alienation of affections, which have been outlawed by the Texas Family Code. Nevertheless, some cases from around the country suggest that when the claim is for severe emotional distress ***1318** and not for loss of the spouse's consortium, a cause of action may exist even for behavior that could have been actionable under those two former torts. Furthermore, some court decisions from other jurisdictions suggest that Restatement Section 46 may protect severe emotional distress resulting from impairment of parent-child relations.

In a divorce situation, because money damages under a Restatement Section 46 claim may compensate for harms that are also compensable though traditional family-law remedies, the courts must take care to be sure that a spouse does not receive double recovery for the same injury. This concern raises questions of severance and joinder, compulsory counterclaim, res judicata and collateral estoppel, election between alternative claims, election of remedies, and pleas of payment. While some of these issues were acknowledged in the plurality opinion in Twyman, they did not arise specifically in the case and therefore were not resolved.

A two-year statute limitations applies to a Restatement Section 46 claim. The types of behavior giving rise to such liability between spouses may well constitute a continuing tort, however, for which the statute of limitations does not begin to run until the last act in the continuing course of harm.

Actual damages recovered for severe emotional distress would be owned by the claimant as separate property, but recovery for past medical bills and lost earning capacity during marriage would be community property, to be divided on divorce. The tort judgment would be collectible out of the tortfeasing spouse's nonexempt share of the community property and nonexempt separate property on hand at the time of divorce or even acquired after divorce. Caselaw suggests that a recovery for punitive damages is community property, meaning that recovery must be divided in the divorce.

Insurance may be a concern in the Restatement Section 46 claim, both for the plaintiff and the defendant. While Texas Standard Homeowner's Policies insure only accidents, exclude intentional harm, and contain exclusions for spouses who are named insureds or who are living together in the parties' home, it appears that the duty to defend, and even the more restricted duty to indemnify, may well be triggered by interspousal claims under Restatement Section 46 in certain circumstances. The defending spouse has an obligation to notify the insurance company of the claim. The insurance***1319** company's refusal to defend or indemnify may give rise to claims against the insurance company. In some instances, both spouses could turn against the insurer and agree to split any recovery in a suit against the insurance company.

In sum, after Twyman there are many issues that remain to be explored. The availability of Restatement Section 46 claims in a divorce presents both opportunities and dangers for the practicing lawyer, as well as difficulties for the courts.

[FNa]. B.A., J.D., University of Texas; sole practitioner, San Antonio, Texas; Board Certified in Family Law and Civil Appellate Law, Texas Board of Legal Specialization.

[FN1]. 855 S.W.2d 619 (Tex. 1993).

[FN2]. Although Mrs. Twyman actually recovered judgment for negligent infliction of emotional distress, Twyman, 855 S.W.2d at 621, 622, the supreme court had previously rejected that cause of action in another case, Boyles v. Kerr, 855 S.W.2d 593, 597 (Tex. 1993). The judgment in Twyman was therefore reversed and the case remanded for retrial of a claim for intentional infliction of emotional distress. The claim for intentional infliction of emotional distress is described in Section 46 of the Restatement (Second) of Torts and hereinafter is referred to as a ‘ Restatement Section 46 claim.‘ For a discussion of the court's rejection of the claim for negligent infliction of emotional distress in Boyles see Richard A. Ginsburg, Note, The Supreme Court Giveth, and the Supreme Court Taketh Away: Negligent Infliction of Emotional Distress Is Not an Independent Cause of Action in Texas, 24 Tex. Tech. L. Rev. 1247, 1248 (1993).

[FN3]. Twyman, 855 S.W.2d at 624.

[FN4]. Justice Cornyn, joined by Justice Hightower, wrote the court's plurality opinion. Id. at 620. Justice Gonzalez wrote a solitary concurring opinion. Id. at 626. Justice Phillips wrote an opinion, concurring and dissenting, in which no one joined. Id. at 626. Justice Hecht wrote an opinion, concurring and dissenting, in which Justice Enoch joined. Id. at 629. Justice Spector wrote a dissenting opinion in which Justice Doggett joined. Id. at 640. Justice Gammage, who authored the court of appeals opinion under review in the supreme court, did not participate in the case. Id. at 626.

[FN5]. See Langford v. State, 578 S.W.2d 737, 738 (Tex. Crim. App. 1979, no writ) (stating that court as whole will not be bound by prior opinion in case written by one judge of panel, with one judge concurring in result); 20 Am. Jur. 2d Courts s195 (1965) (suggesting that decision lacking unanimity has precedential value as long as majority of court concurred in decision).

[FN6]. Twyman, 855 S.W.2d at 621-22. Five justices concurred in the holding: Justices Hightower, Phillips, Gonzalez, Spector, and Doggett. Id. at 626. By the time the court decided Massey v. Massey one month later, all but two Justices either supported this legal principle or acquiesced in it. Massey v. Massey, 36 Tex. Sup. Ct. J. 1221, 1221 (June 30, 1993).

[FN7]. Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977).

[FN8]. Price v. Price, 732 S.W.2d 316, 319 (Tex. 1987).

[FN9]. Twyman v. Twyman, 855 S.W.2d 619, 624 (Tex. 1993).

[FN10]. Justice Hightower joined in Justice Cornyn's opinion. Twyman, 855 S.W.2d at 626. Justice Gonzalez concurred without explicitly commenting on his view of the import of abolishing interspousal immunity. Id. at 626 (Gonzalez, J., concurring). Justice Spector, joined by Justice Doggett, agreed with Justice Cornyn's conclusion regarding the abolition of interspousal immunity, stating that the abolition of interspousal immunity meant the claim was available to spouses and nonspouses alike. Id. at 644 (Spector, J., dissenting).

[FN11]. Recognition of the tort of intentionally or recklessly causing severe emotional distress by extreme and outrageous conduct was supported by Chief Justice Phillips and Justices Cornyn, Hightower, Gonzalez, Spector, and Doggett. Twyman, 855 S.W.2d at 626. Chief Justice Phillips, however, did not believe the tort should be actionable between spouses. Id. at 627 (Phillips, C.J., concurring and dissenting). Justices Hecht and Enoch opposed recognition of the tort

under any circumstances. Id. at 629 (Hecht, J., concurring and dissenting).

[FN12]. Twyman, 855 S.W.2d at 628 (Phillips, C.J., concurring and dissenting).

[FN13]. Id. at 627. The supreme court will face an analogous policy question when it reviews a case in which a noncustodial parent sues a custodial parent under Restatement (Second) s46 for interfering with visitation or impairing the noncustodial parent's relationship with a child. Compare Gleiss v. Newman, 415 N.W.2d 845, 846-47 (Wis. Ct. App. 1987) (holding that noncustodial parent cannot sue under Restatement (Second) s46 for impairment of visitation) with Raftery v. Scott, 756 F.2d 335, 339-40 (4th Cir. 1985) (applying Virginia law in diversity case and permitting father to sue mother under Restatement (Second) s 46 for secreting son and so alienating son that he refused to visit his father); see also Bartanus v. Lis, 480 A.2d 1178, 1185 (Pa. Super. Ct. 1984) (permitting father to bring Restatement (Second) s 46 claim against sister and brother-in-law for persuading son to stay away from father); Sheltra v. Smith, 392 A.2d 431, 433 (Va. 1978) (allowing mother to sue under Restatement (Second) s46 for preventing contact between mother and daughter for approximately one month). But see Kanetzky v. Murphy, 862 S.W.2d 653, 657 (Tex. App. -- Austin 1993, no writ) (holding that Restatement (Second) s 46 claim was not available to father suing maternal grandparents for interfering with relationship with children, because grandparents owed no duty to father).

[FN14]. Twyman, 855 S.W.2d at 628 (Phillips, C.J., concurring and dissenting). Chief Justice Phillips cited Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993) and Davis v. Bostik, 580 P.2d 544 (Or. 1978). Id. Chief Justice Phillips noted that four intermediate appellate courts of other states have ruled such claims permissible between spouses and cited Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988), cert. denied, 112 S. Ct. 1688 (1992); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988); Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989); Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991), appeal denied, 811 P.2d 575 (N.M. 1991).

[FN15]. Twyman, 855 S.W.2d at 628 (Phillips, C.J., concurring and dissenting). The Chief Justice cited Weicker v. Weicker, 237 N.E.2d 876, 877 (N.Y. 1968) and Pickering v. Pickering, 434 N.W.2d 758 (S.D. 1989).

[FN16]. Id. at 634-35 (Hecht, J. and Enoch, J., concurring and dissenting).

[FN17]. Id. at 635.

[FN18]. Restatement (Second) of Torts (1965).

[FN19]. Id. s 46(1).

[FN20]. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993) (Cornyn, J.); accord Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993). Many other courts have given a similar description of the elements of the tort. See Dick v. Mercantile-Safe Deposit & Trust, 492 A.2d 674, 676 (Md. App. 1985) (stating that '(1) The conduct must be intentional and reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; (4) The emotional distress must be severe'); Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 942 (Tex. App. -- Beaumont 1985, writ ref'd n.r.e.) (adopting Restatement (Second) of Torts elements for tort of intentional infliction of emotional distress). Cf. Restatement (Second) of Torts s 312 (1965). Section 312 permits recovery for physical illness or bodily harm resulting from behavior which, although intended to inflict emotional distress, does not amount to extreme and outrageous conduct, but nonetheless involves an unreasonable risk of bodily harm. This recovery is a negligence claim. Id.

[FN21]. Restatement (Second) of Torts s 46 cmt. i (1965); see Nancy P. v. D'Amato, 517 N.E.2d 824, 828 n.8 (Mass.

1988) (declaring that in some sexual abuse cases, defendant may recklessly cause severe emotional distress even though defendant did not intend to do so and, in fact, hoped that wrong would never be discovered by third party).

[FN22]. Restatement (Second) of Torts s 8A cmt. b (1965); see id. s 500 cmt. g (detailing difference between reckless and negligent conduct); id s 282 (indicating that negligence involves unreasonable risk of harm).

[FN23]. Restatement (Second) of Torts s 8A (1965).

[FN24]. Id. s 8A cmt. a.

[FN25]. Id. s 8A cmt. b.

[FN26]. Id. s 500 cmt. f.

[FN27]. Restatement (Second) of Torts s 500 cmt. g (1965).

[FN28]. 689 S.W.2d 404 (Tex. 1985).

[FN29]. See Copelin, 689 S.W.2d at 406 (quoting Restatement (Second) of Torts).

[FN30]. See id. (citing VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983)).

[FN31]. 858 S.W.2d 374 (Tex. 1993).

[FN32]. State Farm, 858 S.W.2d at 375. The court's opinion is a plurality opinion, written by Justice Hightower and joined in by Justices Doggett, Spector, and Gammage. Justice Cornyn concurred, joining in the portion of Justice Hightower's opinion relating to ‘intent.‘ Id. at 382. Three other Justices concurred without stating their views on the question of intent. Id. at 382 (Phillips, C.J., concurring); id. at 383 (Gonzales, J., joined by Enoch, J., dissenting). Justice Hightower's expressions regarding ‘intent‘ are supported by a majority of the court and therefore constitute stare decisis.

[FN33]. Id. at 378.

[FN34]. Id. at 375.

[FN35]. Compare State Farm, 858 S.W.2d at 378-79 (finding that intent extends to consequences party knew with substantial certainty would occur) with Restatement (Second) of Torts s 8A cmt. a (1965) (stating that intent is limited to consequences of act).

[FN36]. Restatement (Second) of Torts s 500 (1965). As a general rule, the Restatement permits recovery for negligently or recklessly caused emotional distress only when accompanied by bodily harm. Id. s 436. Restatement (Second) s 46 deviates from that principle by permitting recovery for purely emotional distress, if the distress is severe, and if it is recklessly caused by extreme and outrageous conduct. Id. s 46. Thus, the use of ‘physical harm‘ in the definition of ‘recklessness‘ is not consistent with s 46. The Restatement does not recognize a right to recover for emotional distress, unaccompanied by bodily harm, resulting from negligence. Id. s 436A.

[FN37]. Id. s 500 cmt. a.

[FN38]. Id. Comment (c) explains:
In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dan-

gerous. His inability to realize the danger may be due to his own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct. Id. s 500 cmt. c.

[FN39]. Id. 'In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. . . . It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.' Id. The objective portion of the test for recklessness would allay Justice Spector's stated concern that liability for inflicting severe emotional distress 'should not depend upon proof of the actor's sensitivity,' Twyman v. Twyman, 855 S.W.2d 619, 644 (Tex. 1993) (Spector, J., dissenting), for liability can be imposed for reckless behavior under s 46, even upon an insensitive person, if the reasonable person test is met. Restatement (Second) of Torts s 46 (1965). If the Texas concept of gross negligence is substituted for the Restatement concept of recklessness, however, then the objective test may not apply in Texas. See infra notes 62-68 and accompanying text.

[FN40]. Restatement (Second) of Torts s 500 cmt. a (1965).

[FN41]. Id.

[FN42]. Id. The use of the term 'physical harm' is generally appropriate under the Restatement, but not in connection with Restatement (Second) s 46, which does not require physical harm.

[FN43]. Id. s 500 cmt. b. For example, it may be reckless for a driver to run a red light, but if he runs the red light because his brakes failed, his act was not reckless. He may, however, be negligent, if the brakes failed due to his failure to properly maintain them.

[FN44]. Restatement (Second) of Torts s 282 cmt. e (1965).

[FN45]. Justice Cornyn's plurality opinion in Twyman, 855 S.W.2d at 624, specifically endorses the subjective part of the test for recklessness without mentioning the objective part of the test. Justice Hecht's concurring and dissenting opinion recognizes that Restatement (Second) s 46 includes both the subjective and the objective tests for recklessness. Twyman, 855 S.W.2d at 630. The Restatement concept of recklessness was adopted in Connell v. Payne, 814 S.W.2d 486, 489 (Tex. App. -- Dallas 1991, writ denied), a case involving injury in competitive sports.

[FN46]. See infra notes 53-68 and accompanying text; see also Restatement (Second) of Torts s 282 cmt. e n.5 (1965) (stating that 'in the construction of statutes which specifically refer to gross negligence, that phrase is sometimes construed as equivalent to reckless disregard').

[FN47]. Restatement (Second) of Torts s 500 cmt. f (1965); see Vance v. Vance, 396 A.2d 296, 298-99, 302-03 (Md. Ct. Spec. App. 1979) (finding that husband's engaging in wedding ceremony with second wife while knowing he was not yet divorced from first wife was actionable under Restatement (Second) s 46 as reckless behavior, even though husband kept fact secret for twenty years so that infliction of emotional distress was not intended).

[FN48]. Restatement (Second) of Torts s 282 (1965).

[FN49]. Id. s 283.

[FN50]. Colvin v. Red Steel Co., 682 S.W.2d 243, 245 (Tex. 1984); 1 State Bar of Texas, Texas Pattern Jury Charges

PJC 2.01 (1989) (defining ‘ordinary care‘ as ‘that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances‘).

[FN51]. Restatement (Second) of Torts s 500 cmt. g (1965).

[FN52]. Id. s 282 cmt. e (1965).

[FN53]. 855 S.W.2d 593 (Tex. 1993).

[FN54]. See Boyles, 855 S.W.2d at 600 n.6 (Tex. 1993) (Phillips, C.J., plurality opinion) (stating that no opinion was expressed as to plaintiff's contention that terms ‘gross negligence‘ and ‘recklessness‘ refer to same mental state in Texas).

[FN55]. See id. at 609 n.12, 616 (Doggett, J., supplemental dissenting opinion on rehearing and dissenting opinion) (explaining why gross negligence is sufficient under current Texas law to recover for severe emotional distress and citing Burke Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981)).

[FN56]. 616 S.W.2d 911 (Tex. 1981).

[FN57]. Id. at 920.

[FN58]. The Pattern Jury Charges Committee has since abandoned use of the ‘heedless and reckless disregard‘ language, opting instead to use ‘gross negligence.‘ 1 State Bar of Texas, Texas Pattern Jury Charges PJC 4.02A, 4.02B (1989).

[FN59]. The statutory definition of ‘gross negligence‘ contained in Texas Civil Practice and Remedies Code s41.001(5) is really more like a jury instruction. See Tex. Civ. Prac. & Rem. Code Ann. s 41.001(5) (Vernon Supp. 1994) (using syntax similar to jury charge). The Code provision states: “(G)ross negligence’ means more than momentary thoughtlessness .... It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.‘ Id. This provision ‘applies to an action in which a claimant seeks exemplary damages relating to a cause of action as defined in Tex. Civ. Prac. & Rem. Code Ann. s 33.001 .‘ Id. s 41.002(a). Section 33.001, entitled ‘Comparative Responsibility,‘ refers to claims of negligence, products liability grounded on negligence, strict liability in tort, strict products liability, and breach of warranty under Chapter 2 of the Business and Commerce Code. Id. s 33.001.

[FN60]. See id. s 41.001(5) (following pattern found in PJC 4.01B while omitting ‘needless and reckless‘); 1 State Bar of Texas, Texas Pattern Jury Charges PJC 4.01B (1989) (establishing basis for s 41.001(5)).

[FN61]. See generally Sylvia M. Demarest, The History of Punitive Damages in Texas, 28 S. Tex. L. Rev. 535, 542-43 (1987) (providing overview of exemplary damages in Texas).

[FN62]. Burke Royalty, 616 S.W.2d at 922. The court stated:
The essence of gross negligence is not the neglect which must, of course, exist. What lifts ordinary negligence into gross negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care. Id.

[FN63]. See supra notes 36-42 and accompanying text.

[FN64]. 699 S.W.2d 570 (Tex. 1985).

[FN65]. Williams, 699 S.W.2d at 573. In Williams, the Texas Supreme Court evaluated the following language in Burke Royalty: 'A mental state may be inferred from actions. All actions or circumstances indicating a state of mind amounting to a conscious indifference must be examined in deciding if there is some evidence of gross negligence.' See id. (citing Burke Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981)). According to the court, this language indicated that the plaintiff is not required to prove the defendant's subjective state of mind by direct evidence. Id. The court then added:
Thus, the test for gross negligence is both an objective and a subjective test. A plaintiff may prove a defendant's gross negligence by proving that the defendant had actual subjective knowledge that his conduct created an extreme degree of risk. In addition, a plaintiff may objectively prove a defendant's gross negligence by proving that under the surrounding circumstances a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others. Id. at 573. While one might question whether Williams was interpreting Burke Royalty or extending it, this formulation of an objective standard for gross negligence was confirmed in a later Texas Supreme Court case. See Estate of Clifton v. Southern Pac. Transp., 709 S.W.2d 636, 640 (Tex. 1986) (stating that plaintiff can prove defendant's gross negligence objectively, considering all circumstances); see also Harris County v. Dillard, 841 S.W.2d 552, 561 (Tex. App. -- Houston 1st Dist. 1992), rev'd on other grounds, 37 Tex. Sup. Ct. J. 324 (Jan. 5, 1994) (claiming that gross negligence can be proven objectively); Guilbeau v. Anderson, 841 S.W.2d 517, 520 (Tex. App. -- Houston 14th Dist. 1992, no writ) (citing Williams for proposition that entire circumstances are considered to prove gross negligence). Some uncertainty regarding the existence of the objective test was introduced by the supreme court's opinion in a recent case. See Wal-Mart Stores, Inc. v. Alexander, 37 Tex. Sup. Ct. J. 252, 253-55 (Dec. 8, 1993) (discussing case history of subjective and objective test of gross negligence). The Alexander opinion appeared to suggest that the objective test is nothing more than a requirement of a higher degree of risk of harm than ordinary negligence. The majority opinion stated that gross negligence requires a showing that '(a) the defendant's conduct created an extreme risk of harm, and (b) the defendant was aware of the extreme risk.' Id. at 255. Justice Doggett, dissenting, defended the objective test as described in Williams, under which gross negligence can be established by showing that a reasonable person in similar circumstances would have realized that his conduct created an extreme degree of risk. Id. at 261 n.2 (Doggett, J., dissenting). It was not clear from the majority opinion in Alexander whether a majority of the court was retreating from the expansion of liability announced in Williams. This retreat became clear, however, with the majority's opinion in Transportation Ins. Co. v. Moriel, 37 Tex. Sup. Ct. J. 450, 457-62 (Feb. 2, 1994). See infra note 67.

[FN66]. Moriel, 37 Tex. Sup. Ct. J. at 457-62.

[FN67]. Id. at 459. In Moriel, the majority opinion noted that the language in Williams allowed gross negligence to be proved if 'under the surrounding circumstances a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of other.' See id. (citing Williams, 699 S.W.2d at 573). The majority opinion described this language as 'potentially misleading.' Id. The majority further noted that the relative riskiness of the behavior could be determined by an objective standard, but that a finding of gross negligence must be premised upon a finding not only that the act was likely to result in serious harm, but also that 'the defendant was consciously indifferent to the risk of harm.' Id.

[FN68]. See supra notes 36-46 and accompanying text.

[FN69]. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993); see LaCoure v. Lacoure, 820 S.W.2d 228, 232-33 (Tex. App. -- El Paso 1991, writ denied) (detailing evidence supporting jury finding of Restatement (Second) s 46 claim in intrafamily situation); Massey v. Massey, 807 S.W.2d 391, 399-401 (Tex. App. -- Houston 1st Dist. 1991) (discussing facts held to be sufficient to support jury finding of Restatement (Second) s 46 claim between spouses), writ denied per curi-

am, 867 S.W.2d 766 (Tex. 1993); see also Raftery v. Scott, 756 F.2d 335, 339 (4th Cir. 1985) (allowing father to sue mother under Restatement (Second) s 46 for hiding son and so alienating son that son refused to visit with father); Pankratz v. Willis, 744 P.2d 1182, 1189 (Ariz. Ct. App. 1987) (holding that assisting parent in permanently secreting child from its other parent was outrageous conduct); Whelan v. Whelan, 588 A.2d 251, 252 (Conn. Super. Ct. 1991) (permitting former wife to sue former husband for falsely telling her, during marriage, that he had tested positive for AIDS); Miller v. Linden, 527 N.E.2d 47, 49 (Ill. App. Ct. 1988) (allowing claim under Restatement (Second) s 46 when defendant went to plaintiff's residence, shouted obscenities, rang doorbell, beat on door, and honked horn on numerous occasions); M.H., D.H., and P.T., and Through Callahan v. State, 385 N.W.2d 533, 538 (Iowa 1986) (allowing children to state claim under Restatement (Second) s 46 when employee of Department of Human Services received information of mother actively participating in sexual abuse of children, but did not timely reveal information to authorities, to professionals evaluating mother, or to juvenile court); Bartanus v. Lis, 480 A.2d 1178, 1186 (Pa. Super. Ct. 1984) (permitting father to bring Restatement (Second) s 46 claim against relatives for persuading son to stay away from him); Sheltra v. Smith, 392 A.2d 431, 433 (Vt. 1978) (permitting mother to sue under Restatement (Second) s 46 for preventing contact between mother and daughter for approximately one month).

[FN70]. Justice Hecht, joined by Justice Enoch, described extreme and outrageous conduct as ‘the central element of the tort.‘ See Twyman, 855 S.W.2d at 630 (Hecht, J., concurring and dissenting). The cause of action is sometimes referred to as the tort of ‘outrage.‘ See Perkins v. Dean, 570 So. 2d 1217, 1219 (Ala. 1990) (listing elements necessary to establish tort of outrage); Hakkila v. Hakkila, 812 P.2d 1320, 1326 (N.M. Ct. App. 1991) (explaining appropriate application of tort of outrage in marital setting), appeal denied, 811 P.2d 575 (N.M. 1991).

[FN71]. Restatement (Second) of Torts s 46 cmt. d (1965).

[FN72]. Id.

[FN73]. Id.

[FN74]. Id.

[FN75]. Restatement (Second) of Torts s 46 cmt. d (1965).

[FN76]. Id. s 46 cmt. e. The Restatement mentions, as examples, that police officers, school authorities, landlords, and collecting creditors have been held liable for extreme abuse of their positions. Id.

[FN77]. Id. s 46 cmt. f (1965); see Motsenbocker v. Potts, 863 S.W.2d 126, 132 (Tex. App. -- Dallas 1993, no writ) (reiterating Restatement principle that actor's awareness of another's susceptibility to emotional distress may contribute to conduct's extremeness or outrageousness).

[FN78]. See Restatement (Second) of Torts s 46 cmt. g (1965) (defining outrageous conduct as privileged when actor insists upon legal rights in permissible way, even though actor is aware that this conduct will cause emotional distress); Motsenbocker, 863 S.W.2d at 132 (citing Restatement's definition of outrageous conduct classified as privileged); see also Towne v. Cole, 478 N.E.2d 895, 901 (Ill. App. Ct. 1985) (refusing to allow grandmother to assert Restatement (Second) s 46 claim when parents denied access to grandchild because parents were acting within their legal rights to regulate life of child).

[FN79]. Restatement (Second) of Torts s 46 cmt. h (1965); see Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (citing Comment (h)); Motsenbocker, 863 S.W.2d at 132-33 (stating that ‘verdict should be set aside only if it is so con-

trary to the overwhelming weight of the evidence as to be clearly wrong and unjust‘). In Texas, this legal determination can be sought by filing special exceptions, motions for summary judgment, directed verdict, or judgment n.o.v., or, on appeal, by challenge to the legal sufficiency of the evidence. See infra notes 114-20 and accompanying text.

[FN80]. Restatement (Second) of Torts s 46 cmt. h (1965).

[FN81]. See id. ss 9, 430, 431, 435A, 435B, 501 (discussing causation in various torts). These descriptions of causation are somewhat circular and sometimes mix the concept of legal liability with causation in fact.

[FN82]. Causation for intentional torts is discussed in Section 435A of the Restatement (Second) of Torts. Causation for torts involving recklessness is discussed in Section 501 of the Restatement (Second) of Torts.

[FN83]. Restatement (Second) of Torts s 435A (1965).

[FN84]. Id. Under the Restatement, if there is an independent cause, then the defendant's actions are not a legal cause unless the defendant's actions increased the risk of harm from the independent cause. Id. cmt. a.

[FN85]. Restatement (Second) of Torts s 435B (1965). This section of the Restatement may find its counterpart in the Texas theory of consequential or special damages recoverable upon a showing of proximate cause. See id. s 435 (stating that if conduct of actor is substantial factor in causing harm, actor may be liable).

[FN86]. Id. s 435A cmt. a (1965).

[FN87]. Id. s 501.

[FN88]. Id. ss 430, 431. This determination requires more than the ‘but for‘ test of causation. To be a substantial cause, the actor's conduct must have had such an effect in generating the harm that reasonable persons would regard the act as a cause or would assign responsibility to the actor. Id. s 431(a) cmt. a.

[FN89]. Restatement (Second) of Torts s 431(b) (1965).

[FN90]. ‘There are certain rules which operate to relieve a negligent actor from liability because of the manner in which his negligence produces it, even though his negligent conduct is a substantial factor in bringing it about. These rules are stated in ss 435-461.‘ Id. s 431 cmt. d.

[FN91]. Id. s 435 (1965).

[FN92]. See Riojas v. Lone Star Gas Co., 637 S.W.2d 956, 959 (Tex. App. -- Fort Worth 1982, writ ref'd n.r.e.) (stating that ‘factual causation‘ and ‘producing cause‘ are same and mean ‘an efficient, exciting, or contributing cause‘). The Texas Supreme Court has stated that ‘cause in fact means that the omission or act involved was a substantial factor in bringing about the injury and without which no harm would have occurred.‘ City of Gladewater v. Pike, 727 S.W.2d 514, 517 (Tex. 1987). The act or omission need not be the sole cause. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992). Note that the element of foreseeability is absent from the concept of factual causation. See General Motors Corp. v. Saenz, 37 Tex. Sup. Ct. J. 176, 179 (Nov. 24, 1993) (declaring that ‘proof of proximate cause entails a showing that the accident was foreseeable, while proof of producing cause does not‘). The perpetrator of a willful wrong, however, cannot be held liable for ‘remote consequential injuries that could not have been reasonably anticipated as a probable result of his act.‘ Sitton v. American Title Co., 396 S.W.2d 899, 904 (Tex. Civ. App. -- Dallas 1965, writ ref'd n.r.e.), cert. denied, 385 U.S. 975 (1967). Consequently, the Pattern Jury Charges Committee permits a victim of fraud to

recover for consequential or special damages resulting from that fraud only upon a showing of ‘proximate cause.‘ 4 State Bar of Texas, Texas Pattern Jury Charges PJC 110.20 cmt. (1993). In LaCoure v. LaCoure, 820 S.W.2d 228, 234 (Tex. App. -- El Paso 1992, writ denied) and again in Campos v. Ysleta Gen. Hosp., Inc., 836 S.W.2d 791, 795 (Tex. App. -- El Paso 1992, writ denied), the El Paso Court of Appeals indicated that the tort of intentional infliction of emotional distress requires proof of proximate cause. ‘Proximate cause‘ was also used in Borden, Inc. v. Rios, 850 S.W.2d 821, 832 (Tex. App. -- Corpus Christi 1993), judgm't set aside without reference to merits, 859 S.W.2d 70 (Tex. 1993), and in Bulgerin v. Bulgerin, 724 S.W.2d 943, 944 (Tex. App. -- San Antonio 1987, no writ), although no issue was raised regarding the correctness of using ‘proximate cause.‘ The author believes that proximate cause is not properly applied to the intentional component of Restatement (Second) s 46, except as to remote consequential injuries.

[FN93]. Rudes v. Gottschalk, 324 S.W.2d 201, 206-07 (Tex. 1959); 1 State Bar of Texas, Texas Pattern Jury Charges PJC 2.04 (1987); 4 id. s 100.08 (1992).

[FN94]. Williams v. Steves Indus. Inc., 699 S.W.2d 570, 575 (Tex. 1985); McClure v. Allied Stores of Tex., Inc., 608 S.W.2d 901, 903 (Tex. 1980); 1 State Bar of Texas, Texas Pattern Jury Charges PJC 2.04, (1987); 4 id. s 100.08 (1992). “Foreseeability' means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others.‘ Travis v. City of Mesquite, 830 S.W.2d 94, 98 (Tex. 1992).
Foreseeability does not require that the actor foresee the particular accident or injury which in fact occurs. Nor does foreseeability require that the actor anticipate just how the injury will grow out of a particular dangerous situation. . . . All that is required is that the injury be of such a general character as might reasonably have been anticipated and that the injured party be so situated with relation to the wrongful act that injury might reasonably have been foreseen. Brown v. Edwards Transfer Co., 764 S.W.2d 220, 223 (Tex. 1989) (citations omitted); see W. Page Keeton, Causation, 28 S. Tex. L. Rev. 231, 236-39 (1986) (discussing elements of legal causation). See generally Morgan v. Compugraphic Corp., 675 S.W.2d 729, 732 (Tex. 1984) (distinguishing causal nexus between defendant's conduct and event from causal nexus between event and plaintiff's injuries).

[FN95]. See Campos v. Ysleta Gen. Hosp., Inc., 836 S.W.2d 791, 795 (Tex. App. -- El Paso 1992, writ denied) (recognizing that severe emotional distress must be proved in order to recover); American Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 342-43 (Tex. App. -- Houston 14th Dist. 1991, no writ) (acknowledging necessity of proving severe emotional distress and providing evidence of its existence); see also infra notes 117, 120 (listing cases that specify necessity of proving emotional distress was severe).

[FN96]. Restatement (Second) of Torts s 46 cmt. j (1965). Because the standard refers to what a reasonable person could endure, it has been described as an objective standard. See Borden, Inc. v. Rios, 850 S.W.2d 821, 832 (Tex. App. -- Corpus Christi 1993), judgm't set aside without reference to merits, 859 S.W.2d 70 (Tex. 1993) (describing test for severe emotional distress as objective standard); cf. Pankratz v. Willis, 744 P.2d 1182, 1191 (Ariz. Ct. App. 1987) (declaring that ‘rule does not require that a disabling response be actually suffered, but only that the conduct be of such a nature as to be apt to cause such a result‘).

[FN97]. See K.B. v. N.B., 811 S.W.2d 634, 640 (Tex. App. -- San Antonio 1991, writ denied) (stating that ‘severity of distress is an element of the cause of action, not simply a matter of damages‘); Wright v. Hasley, 273 N.W.2d 319, 321 (Wis. 1979) (quoting Alsteen v. Gehl, 124 N.W.2d 312, 318 (Wis. 1963) and explaining that ‘the severity of the injury is not only relevant to the amount of recovery, but is a necessary element to any recovery‘).

[FN98]. Restatement (Second) of Torts s 46 cmt. k (1965). Section 46 ‘does not require that a disabling response be actually suffered .... ‘ Pankratz v. Willis, 744 P.2d 1182, 1191 (Ariz. Ct. App. 1987).

[FN99]. Restatement (Second) of Torts s 46(1) (1965).

[FN100]. Id. s 46(2) cmt. l; see M.M. v. M.P.S., 556 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 1989), appeal denied, 569 So. 2d 1279, 1279 (Fla. 1990) (disallowing parents' recovery under Restatement (Second) s 46 for sexual abuse of daughter because they were not present at time mistreatment occurred, and perpetrator's subsequent disclosure was not actionable due to lack of intent or recklessness in making statement); H.L.O. v. Hossle, 381 N.W.2d 641, 644-45 (Iowa 1986) (holding that parents could not recover under Restatement (Second) s 46 for sexual abuse of their children, because they were not present when events occurred; court analogized to 'bystanders rule' in negligence cases); Nancy P. v. D'Amato, 517 N.E.2d 824, 827-28 (Mass. 1988) (finding that mother and brother of girls subjected to sexual molestation could not recover under Restatement (Second) s 46 because neither family member was present at time of molestation nor was their awareness of conduct contemporaneous with it); Maguire v. State, 835 P.2d 755, 761-63 (Mont. 1992) (holding that mother of institutionalized child could not recover under Restatement (Second) s 46 for rape of child by employee of institution because mother was not present at time of event); Lund v. Caple, 675 P.2d 226, 230-31 (Wash. 1984) (en banc) (denying husband recovery against pastor for sexual contact with wife under Restatement (Second) s 46, because husband was not present during contact, and presence is necessary when conduct is directed at third person). But see Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (declaring that mother need not be present to witness abuse of child as prerequisite to Restatement (Second) s 46 claim).

[FN101]. Restatement (Second) of Torts s 46(2) cmt. l (1965).

[FN102]. Ogle v. Craig, 464 S.W.2d 95, 97-98 (Tex. 1971); LaCoure v. LaCoure, 820 S.W.2d 228, 235 (Tex. App. -- El Paso 1992, writ denied); Horton v. Robinson, 776 S.W.2d 260, 265 (Tex. App. -- El Paso 1989, no writ); see Sylvia M. Demarest, The History of Punitive Damages in Texas, 28 S. Tex. L. Rev. 535, 542-43 (1987) (discussing punitive damages available for claims based on willful or malicious conduct).

[FN103]. See infra note 112 (citing cases that condition punitive damages under Restatement (Second) s 46 claim upon finding of malice).

[FN104]. Tex. Civ. Prac. & Rem. Code Ann. s 41.003(a)(1)-(3) (Vernon Supp. 1994). All three terms are defined in s 41.001. 'Fraud' is defined to mean 'fraud other than constructive fraud.' Id. s41.001(4). 'Malice' is defined as
(A) conduct that is specifically intended by the defendant to cause substantial injury to the claimant; or (B) an act that is carried out by the defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defendant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage. Id. s 41.001(6). The statutory definition of 'gross negligence' is provided supra note 59.

[FN105]. Tex. Civ. Prac. & Rem. Code Ann. s 41.002(a) (Vernon Supp. 1994).

[FN106]. See id. s 33.001 (stating applicability of comparative responsibility statute).

[FN107]. See supra notes 53-68 and accompanying text (describing similarity between recklessness and gross negligence).

[FN108]. Tex. Civ. Prac. & Rem. Code Ann. s 41.007 (Vernon Supp. 1994).

[FN109]. Id. s 41.008 (Vernon Supp. 1994); see Transmission Exch., Inc. v. Long, 821 S.W.2d 265, 272 (Tex. App. -- Houston 1st Dist. 1991, writ denied) (finding that fraud claim is not subject to exemplary damages cap because fraud is intentional tort).

[FN110]. See supra notes 53-68 and accompanying text.

[FN111]. See supra notes 53-68 and accompanying text.

[FN112]. See Motsenbocker v. Potts, 863 S.W.2d 126, 137 (Tex. App. -- Dallas 1993, no writ) (submitting malice question as predicate for exemplary damages on Restatement (Second) s 46 claim; however, court did not discuss whether malice finding was necessary); LaCoure v. LaCoure, 820 S.W.2d 228, 234-35 (Tex. App. -- El Paso 1992, writ denied) (permitting court in intra-family Restatement (Second) s 46 claim to submit, without objection, instruction and question on malice as predicate to exemplary damages); Massey v. Massey, 807 S.W.2d 391, 400 (Tex. App. -- Houston 1st Dist. 1991) (finding that intentional infliction of severe emotional distress without malice was insufficient to award exemplary damages), writ denied per curiam, 35 Tex. Sup. Ct. J. 1221 (June 30, 1993). A plaintiff can preserve the issue for appeal by submitting a malice question and not conditioning the exemplary damage finding on a 'yes' answer to the malice question. Then, if the jury finds no malice, the plaintiff can move to disregard that answer as immaterial. Failing that, if it turns out that a malice finding is not required, the appellate court can modify the trial court's judgment to include the exemplary damages found by the jury. See infra note 144.

[FN113]. See Whelan v. Whelan, 588 A.2d 251, 253-54 (Conn. Super. Ct. 1991) (stating that punitive damages are not available under Restatement (Second) s 46 claim, because outrageous quality of conduct forms basis for recovery of compensatory damages); Knierim v. Izzo, 174 N.E.2d 157, 165 (Ill. 1961) (concluding that punitive damages are not available for Restatement (Second) s 46 claim because outrageous nature of defendant's actions is basis for awarding compensatory damages that are sufficiently punitive).

[FN114]. The lack of a clear delineation between what is and is not extreme and outrageous conduct has been a recurrent complaint by two justices on the Texas Supreme Court. See Wornick Co. v. Casas, 856 S.W.2d 732, 736-37 (Tex. 1993) (Hecht, J., concurring, joined by Enoch, J.) (discussing lack of legal standards available to judges and juries to determine whether conduct is outrageous and extreme); Twyman v. Twyman, 855 S.W.2d 619, 631-32 (Tex. 1993) (Hecht, J., concurring and dissenting, joined by Enoch, J.) (asserting that outrageousness is subjective, if not personal, question).

[FN115]. Restatement (Second) of Torts s 46 cmt. h (1965); see Twyman v. Twyman, 855 S.W.2d 619, 625 n.21 (Tex. 1993) (noting that Restatement requires court to determine first if 'conduct may be reasonably regarded as so extreme and outrageous to allow recovery and whether severe emotional distress can be found'). If the behavior is not extreme and outrageous, Section 312 would permit recovery for illness and bodily injury resulting from intentionally inflicted emotional distress if the actor were negligent in causing the illness or bodily injury. Restatement (Second) of Torts s 312 (1965).

[FN116]. Restatement (Second) of Torts s 46 cmt. j (1965).

[FN117]. See Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (reversing appeals court because summary judgment evidence conclusively established that employer's behavior was not outrageous); Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992) (finding that, as matter of law, manner of termination of employment was not outrageous conduct); Farrington v. Sysco Food Services, Inc., 865 S.W.2d 247, 254 (Tex. App. -- Houston 1st Dist. 1993, writ denied) (holding that termination of employment itself is not actionable as Restatement (Second) s 46 claim and, because no evidence existed that termination was effected in extreme and outrageous manner, summary judgment dismissal was appropriate); Schauer v. Memorial Care Systems, 856 S.W.2d 437, 451 (Tex. App. -- Houston 1st Dist. 1993, no writ) (affirming summary judgment dismissing employee's suit against employer because facts did not demonstrate that emotional distress was 'severe '); Amador v. Tan, 855 S.W.2d 131, 134-35 (Tex. App. -- El Paso 1993, writ denied) (holding that retaliatory termination of employee was not extreme and outrageous); Hennigan v. I.P. Petro-

leum Co., 848 S.W.2d 276, 279 (Tex. App. -- Beaumont) (finding that summary judgment rejecting Restatement (Second) s 46 claim was proper when there was no conduct as to the manner of termination shown independent of job termination, and termination was not effected in extreme and outrageous manner), aff'd in part and rev'd in part on other grounds, 858 S.W.2d 371 (Tex. 1993); Benavides v. Moore, 848 S.W.2d 190, 195-96 (Tex. App. -- Corpus Christi 1992, writ denied) (holding that in employment-related case summary judgment was proper when emotional distress did not rise to level that reasonable person could not be expected to endure); McAlister v. Medina Elec. Coop., Inc., 830 S.W.2d 659, 665 (Tex. App. -- San Antonio 1992, writ denied) (granting summary judgment because defendant's conduct was not extreme and outrageous, and plaintiff's emotional distress was not severe); Horton v. Montgomery Ward & Co., Inc., 827 S.W.2d 361, 369-70 (Tex. App. -- San Antonio 1992, writ denied) (affirming summary judgment against ex-employee and observing that 'incidents in which a Texas court has determined the conduct to be extreme and outrageous in the employer/employee setting are few'); State Nat. Bank v. Academia, Inc., 802 S.W.2d 282, 298 (Tex. App. -- Corpus Christi 1991, writ denied) (holding that putting debtor on notice that bank sought payment of incorrect debt could not have caused severe emotional distress); McLendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 820 (Tex. App. -- Houston 14th Dist. 1988) (affirming summary judgment because discharge of employee was neither extreme nor outrageous), rev'd in part and aff'd in part, 779 S.W.2d 69 (Tex. 1989), rev'd, 498 U.S. 133, op. withdrawn, 807 S.W.2d 577 (Tex. 1991).

[FN118]. See Mitre v. La Plaza Mall, 857 S.W.2d 752, 755-56 (Tex. App. -- Corpus Christi 1993, writ denied) (reversing trial court decision that improperly granted summary judgment against Restatement (Second) s 46 claims); Havens v. Tomball Community Hosp., 793 S.W.2d 690, 692 (Tex. App. -- Houston 1st Dist. 1990, writ denied) (refusing to affirm summary judgment for defendant in employment termination case); Hinote v. Oil, Chem. and Atomic Workers Int'l Union, 777 S.W.2d 134, 142 (Tex. App. -- Houston 14th Dist. 1989, writ denied) (supporting jury finding of intentional infliction of emotional distress and holding it was error to grant judgment n.o.v.); Spillman v. Simkins, 757 S.W.2d 166, 169 (Tex. App. -- San Antonio 1988, no writ) (finding error to dismiss Restatement (Second) s 46 claim on special exceptions).

[FN119]. Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 428 (Fla. Dist. Ct. App. 1982) (holding that publishing story and photograph in newspaper of unclad victim of abduction did not meet test of outrageousness); Engstrom v. State, 461 N.W.2d 309, 320 (Iowa 1990) (denying prospective adoptive parents' Restatement (Second) s 46 claim against Department of Human Resources for failure to terminate biological father of child because Department's behavior was mere negligence, not outrageous conduct); Roalson v. Chaney, 334 N.W.2d 754, 756 (Iowa 1983) (affirming summary judgment on grounds that man's actions in pursuing prospect of marriage with woman in process of becoming divorced was, as matter of law, not extreme and outrageous); Whittington v. Whittington, 766 S.W.2d 73, 73-74 (Ky. Ct. App. 1989) (finding conduct of husband during divorce proceedings whereby husband forged wife's signature on checks and attempted to convert various funds belonging to wife was not sufficiently extreme and outrageous to state cause of action under Restatement (Second) s 46); Dick v. Mercantile-Safe Deposit & Trust Co., 492 A.2d 674, 677 (Md. Ct. Spec. App. 1985) (concluding actions of debt collector, as matter of law, not outrageous); Fry v. Ionia Sentinel-Standard, 300 N.W.2d 687, 691 (Mich. Ct. App. 1980) (declaring wife could not recover for newspaper story that husband and another woman had burned to death in cabin fire because publication of story was not extreme and outrageous); Henderson v. Morristown Memorial Hosp., 487 A.2d 742, 749 (N.J. Super. Ct. App. Div. 1985) (holding that parochial school's alleged failure to give supplemental programs to man's children was not so extreme and outrageous as to support Restatement (Second) s 46 claim); Freihofer v. Hearst Corp., 480 N.E.2d 349, 355 (N.Y. 1985) (affirming summary judgment in which newspaper's publication of information taken from court file in divorce proceeding did not meet requirements for Restatement (Second) s 46 tort); Pyle v. Pyle, 463 N.E.2d 98, 102-04 (Ohio Ct. App. 1983) (noting that custodial parent's moving of child to another town, interfering with visitation, and causing consternation over Christmas present did not prove intent, outrageous behavior, or serious emotional distress); Christofferson v. Church of Scientology, 644 P.2d 577,

593 (Or. Ct. App. 1982) (noting that evidence did not support jury finding that actions of church constituted outrageous conduct). See supra note 69 (providing examples of behavior held to be actionable under Restatement (Second) s 46).

[FN120]. See, e.g., Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 90 (1970) (holding that emotional distress was sufficiently severe to support judgment); Towne v. Cole, 478 N.E.2d 895, 900-01 (Ill. App. Ct. 1985) (denying grandmother's distress claim at being denied access to grandchild as not being so severe that no reasonable person would be expected to endure it); Roberts v. Saylor, 637 P.2d 1175, 1180 (Kan. 1981) (holding summary judgment proper when plaintiff's emotional distress was not so severe that no reasonable person should be expected to endure it); Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 155 (Me. 1979) (concluding that it was proper to disregard jury finding of damages when there was no evidence that emotional distress was severe); Harris v. Jones, 380 A.2d 611, 617 (Md. 1977) (holding emotional distress suffered by plaintiff not sufficiently severe to permit recovery); Nancy P. v. D'Amato, 517 N.E.2d 824, 828 (Mass. 1988) (finding no evidence that mother and brother of girl who was sexually molested suffered severe emotional distress); Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 813-14 (Minn. Ct. App. 1992) (dismissing Restatement (Second) s 46 claim asserted by parents of boy who was sexually molested by priest because parents' emotional distress was not sufficiently severe); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 439-40 (Minn. 1983) (reversing judgment in favor of plaintiff because distress not so severe that no reasonable person could be expected to endure it); Hassing v. Wortman, 333 N.W.2d 765, 771 (Neb. 1983) (reversing judgment on appeal because evidence did not support finding that plaintiff's emotional distress was so severe that no reasonable person could be expected to endure it); Buckley v. Trenton Sav. Fund Soc'y, 544 A.2d 857, 864-65 (N.J. 1988) (finding that claimant failed to show that emotional distress arising from wrongful dishonor of child support checks was severe and listing courts of other states holding that similar distress was not severe); Wright v. Hasley, 273 N.W. 319, 323 (Wis. 1979) (holding that plaintiff's conflicting testimony on deposition regarding whether she suffered severe emotional distress precluded dismissal by summary judgment).

[FN121]. A jury charge is set out in Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 940-41 (Tex. App. -- Beaumont 1985, writ ref'd n.r.e.). It consists of special issues which are not appropriate to the ‘broad form‘ jury practice that now prevails in Texas. See Tex. R. Civ. P. 277 (requiring cause to be submitted upon broad-form questions when feasible). Various instructions in a Restatement (Second) s 46 jury charge are discussed in Pankratz v. Willis, 744 P.2d 1182, 1192-93 (Ariz. Ct. App. 1987).

[FN122]. In this proposed jury charge, liability based on intentional behavior and liability based on reckless behavior are combined into one liability question. If recklessness is recognized as a species of negligence, however, then the comparative negligence statute contained in Chapter 33 of the Civil Practice and Remedies Code might apply, necessitating the differentiation of liability and damages based on intent from liability based on recklessness. See Tex. Civ. Prac. & Rem. Code Ann. s 33.001 (Vernon Supp. 1994) (establishing comparative negligence as independent cause of action). The proposed charge follows the Restatement in most respects, but ‘the Restatements are written by the legal community largely for the legal community and do not always make the clearest and most understandable jury instructions. ‘ Pankratz, 744 P.2d at 1192.

[FN123]. See Restatement (Second) of Torts s 8A (1965) (providing definition of ‘intent‘); see also State Farm Fire & Casualty Co. v. S.S. & G.W., 858 S.W.2d 374, 378 (Tex. 1993) (citing Restatement (Second) of Torts's definition of ‘intent‘); Reed Tool Co. v. Copelin, 689 S.W.2d 404, 406 (Tex. 1985) (applying definition of ‘intent‘ established in Restatement (Second) of Torts). ‘Harm‘ is substituted for the Restatement term ‘consequences‘ because the focus in trial is on damages, not consequences.

[FN124]. See Restatement (Second) of Torts s 8A cmt. b (1965) (commenting on concept of ‘intent‘); see also Reed Tool

Co., 689 S.W.2d at 406 (adopting definition of intent in Restatement (Second) of Torts).

[FN125]. See City of Gladewater v. Pike, 727 S.W.2d 514, 517 (Tex. 1987) (outlining elements of causation). This formulation differs from the Restatement, which finds causation when the actor intends the harm and the intended harm results. Restatement (Second) of Torts s 435A (1965). If the actor intends certain harm and unintended harm occurs, whether causation exists depends on the actor's 'degree of moral wrong in acting' and the seriousness of the intended harm. See id. s 435B (discussing existence of liability when unintended consequences result from tort). In either situation, there must be an actual causal link between the act and the harm. Id. s 435A, cmt. a. Several Texas cases indicate the causation for the intentional component of a Restatement (Second) s 46 claim is 'proximate cause.' See supra note 92. This author believes that this view is wrong, so 'proximate cause' is not used at this point in the proposed charge. To recover consequential damages, however, it may be necessary to use 'proximate cause.' See supra note 92 (citing authorities discussing causation requirement to recover for remote consequential injuries). If the defense attorney objects to the omission of 'proximate cause' from the intentional component of the tort, the plaintiff's attorney could tender an instruction that permits a 'yes' finding based on either 'proximate cause' or 'cause-in-fact.' In that situation, a 'yes' answer would support a judgment for the plaintiff, but would risk a remand if the appellate court determines that only proximate causation is actionable. On the other hand, submitting proximate cause and not cause-in-fact risks a negative jury finding based on lack of foreseeability. It is hoped the appellate courts will address this question frontally to eliminate this uncertainty.

[FN126]. The Restatement uses the term 'high degree of risk.' Restatement (Second) of Torts s 500, cmt. a (1965). But see Transportation Ins. Co. v. Moriel, 37 Tex. Sup. Ct. J. 450, 458 (Feb. 2, 1994) (illustrating that Texas Supreme Court uses term 'extreme risk).' In this proposed instruction, the Texas phraseology is used instead of the Restatement's language.

[FN127]. Again, 'extreme risk' is substituted for 'high degree of risk.' See supra note 126; see also Twyman v. Twyman, 855 S.W.2d 619, 624 (Tex. 1993) (quoting Restatement (Second) of Torts s 500, cmt. d (1965)); Motsenbocker v. Potts, 863 S.W.2d 126, 135 (Tex. App. -- Dallas 1993, no writ) (citing Restatement (Second) of Torts s 500, cmt. d (1965)). At this point in the charge, the Restatement and Texas law appear to diverge. The Restatement recognizes an objective test for recklessness. See supra notes 38-39 and accompanying text. Texas law does not recognize an objective test for recklessness. Moriel, 37 Tex. S. Ct. J. at 457-62 (Tex. 1994). See supra notes 62-68 and accompanying text. Consequently, the proposed charge omits language referring to the Restatement's objective test for recklessness. If a party wishes to include a request for the objective test in order to preserve the complaint for appeal, or if a court wishes to include the objective test in the charge to bring the issue to a head at the appellate level, the following language is proposed:
Additionally, a person is reckless, or acts recklessly, even if she does not realize or appreciate the high degree of risk involved, if a reasonable person in the same or similar circumstances would recognize that high degree of risk. Restatement (Second) of Torts s 500, cmt. a (1965). An instruction patterned more closely after Restatement (Second) s 500 might read:
A person is reckless, or acts recklessly, when she does an act or intentionally fails to do an act when under a duty to act knowing, or having reason to know, of facts which would lead a reasonable person to realize that individual conduct creates an unreasonable risk of harm to another. However, that prescription is confused by the use of 'intentionally' and the terms 'reasonable' and 'unreasonable,' making the instruction circular. The author believes that an instruction based on Comment (a) to s 500 of the Restatement is more intelligible.

[FN128]. Rudes v. Gottschalk, 324 S.W.2d 201, 207 (Tex. 1959); 1 State Bar of Texas, Texas Pattern Jury Charges PJC 100.08 (1992); 1 State Bar of Texas, Texas Pattern Jury Charges PJC 2.04 (1987).

[FN129]. 1 State Bar of Texas, Texas Pattern Jury Charges PJC 2.01 (1989).

[FN130]. Restatement (Second) of Torts s 46, cmt. d (1965); Twyman v. Twyman, 855 S.W.2d 616, 621 (Tex. 1993); see Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (referencing Restatement's requirement for outrageous conduct). An interesting jury instruction regarding behavior between spouses is contained in Massey v. Massey, 807 S.W.2d 391, 400 (Tex. App. -- Houston 1st Dist. 1991, writ denied). No objection was made to the instruction, and the court of appeals took no position on its validity. Id.

[FN131]. See Restatement (Second) of Torts s 46 cmt. g (1965) (stating that outrageous conduct is privileged when actor does 'no more than to insist upon his legal rights in a permissible way, even though he may be aware that this conduct will cause emotional distress'); see also Motsenbocker v. Potts, 863 S.W.2d 126, 132 (Tex. App. -- Dallas 1993, no writ) (repeating Restatement's provision allowing for privileged outrageous conduct).

[FN132]. Restatement (Second) of Torts s 46 cmt. j. (1965).

[FN133]. Id.

[FN134]. Id.; see American Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 340 (Tex. App. -- Houston 14th Dist. 1991, no writ) (defining emotional distress as 'any highly unpleasant mental reaction'); Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 941 (Tex. App. -- Beaumont 1985, writ ref'd n.r.e.) (adopting Restatement's definition of intentional infliction of emotional distress). In Campos v. Ysleta General Hosp., Inc., 836 S.W.2d 791, 795 (Tex. App. -- El Paso 1992, writ denied), the court stated that 'severe emotional distress is generally defined as painful emotions such as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation'). One court held that the term 'severe' must be defined for the jury, and that the accepted definition is 'distress so severe that no reasonable person could be expected to endure without undergoing unreasonable suffering.' Borden, Inc. v. Rios, 850 S.W.2d 821, 832 (Tex. App. -- Corpus Christi 1993), judgm't set aside without reference to merits, 859 S.W.2d 70 (Tex. 1993).

[FN135]. Restatement (Second) of Torts s 46(1). In Rios, 850 S.W.2d at 832, the trial court asked: 'Did any of the below named Defendants, incident to or within the course and scope of their employment with Borden, intentionally inflict emotional distress upon Plaintiff, which conduct, if any, proximately caused damages, if any, to David Rios?' In Giurintano, 821 S.W.2d at 340, the trial court asked: 'Did any of the listed defendants intentionally inflict severe emotional distress upon Mr. Giurintano?' In Bulgerin v. Bulgerin, 724 S.W.2d 943, 944 (Tex. App. -- San Antonio 1987, no writ), the trial court asked: 'Do you find that appellants willfully, consciously, or knowingly inflicted emotional distress on Cindy proximately causing her injury on the occasions made the basis of her counterclaim?' The idea of malice must be included if the Restatement (Second) s 46 claim involves the qualified privilege discussed infra note 167 or the First Amendment considerations discussed infra in the text accompanying notes 173-74.

[FN136]. These elements of damage are presented in the format suggested in 1 State Bar of Texas, Texas Pattern Jury Charges PJC 7.02A (1991). The suggested warning against including damages for one element in another element is dropped, because the damage finding for all elements is combined.

[FN137]. This question was adapted from the damage question suggested by the Pattern Jury Charges Committee in connection with a fraud claim. See 1 State Bar of Texas, Texas Pattern Jury Charges PJC 110.19 (1992) (pertaining to direct damages caused by fraud). This question would be used for direct damages or damages that are the necessary and usual result of the wrong of which plaintiff complains. See Success Motivation Inst. v. Lawlis, 503 S.W.2d 864, 867 (Tex. Civ. App. -- Houston 1st Dist. 1973, writ ref'd n.r.e.) (discussing recoverability of direct damages); El Paso Dev. Co. v. Ravel, 339 S.W.2d 360, 363 (Tex. Civ. App. -- El Paso 1960, writ ref'd n.r.e.) (describing direct damages as general damages stemming from wrong). If consequential damages are sought, then 'proximate cause' should be used for those damages. See 1 State Bar of Texas, Texas Pattern Jury Charges PJC 110.20 (1993) (pertaining to consequential damages caused by

fraud).

[FN138]. The exemplary damage questions are predicated on a finding of actual damages, which is in turn predicated on a finding of liability. There can be no exemplary damages unless there are actual damages. Wright v. Gifford-Hill & Co., Inc., 725 S.W.2d 712, 714 (Tex. 1987); City Prods. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980); see Sylvia M. Demarest, The History of Punitive Damages in Texas, 28 S. Tex. L. Rev. 535, 557-58 (1987) (discussing predicates for finding of punitive damages).

[FN139]. 1 State Bar of Texas, Texas Pattern Jury Charges PJC 102.21 (1993). Although a question regarding malice is provided as a predicate for awarding exemplary damages in this proposed charge, it is not clear that such a finding is necessary. See supra notes 102-13.

[FN140]. 1 State Bar of Texas, Texas Pattern Jury Charges PJC 110.25 (1993) (suggesting instruction for use in connection with claim for interference with existing contract). The Comment to PJC 110.25 warns that a different definition of ‘malice‘ is needed for defamation cases. Id.

[FN141]. Horton v. Robinson, 776 S.W.2d 260, 265 (Tex. App. -- El Paso 1989, no writ). This definition is different from the definition of malice contained in Texas Civil Practice and Remedies Code s41.001(6). See supra note 104. The Code's definition of malice is more stringent than the definition developed by the courts. Tex. Civ. Prac. & Rem. Code Ann. s 41.001 (Vernon Supp. 1994). The chapter containing this statutory definition indicates, however, that it applies only to actions in which a claimant seeks exemplary damages relating to a cause of action involving negligence, products liability grounded on negligence, strict liability in tort, strict products liability, and breach of warranty under Chapter 2 of the Business and Commerce Code. See id. ss 41.002 & 33.001 (describing applicability of statutory rules regarding exemplary damages). Since a tort claim brought under the intentional portion of Restatement (Second) s 46 does not fit within any of these categories, the s 41.001 definition of malice would not apply to such an intentional tort claim. See Transfer Prods., Inc. v. Texpar Energy, Inc., 788 S.W.2d 713, 717 (Tex. App. -- Corpus Christi 1990, no writ) (holding that definition of malice in s 41.003(a) did not apply to suit for conversion); Nationwide Mut. Ins. Co. v. Crowe, 857 S.W.2d 644, 653 (Tex. App. -- Houston 14th Dist.), judgm't set aside without reference to merits, 863 S.W.2d 462 (Tex. 1993) (finding that cap on exemplary damages contained in s 41.007 does not apply to bad-faith claim against insurer, because claim was not one listed in s 33.001). The cap would apply to a reckless-based Restatement (Second) s 46 claim, however, because recklessness is a form of negligence, and therefore the claim would come within s 33.001.

[FN142]. Tex. Civ. Prac. & Rem. Code Ann. s 41.001(5) (Vernon Supp. 1994); 1 State Bar of Texas, Texas Pattern Jury Charges PJC 4.02B, 51.05B (1990).

[FN143]. Question Four is not predicated on a ‘yes‘ answer to the malice or gross negligence question, on the theory that a malice or gross negligence finding is not necessary. See supra note 112. The malice or gross negligence question is included as a precaution, however, in case this theory is wrong.

[FN144]. 1 State Bar of Texas, Texas Pattern Jury Charges PJC 7.06 (1991). Civil Practice & Remedies Code s 41.007 imposes a cap on exemplary damages at $200,000 or four times actual damages, whichever is greater. Tex. Civ. Prac. & Rem. Code Ann. s 41.007 (Vernon Supp. 1994). As explained in the text accompanying notes 108-10, there are reasons to believe that this cap does not apply to Restatement (Second) s 46 claims based on intentional acts. See Crowe, 857 S.W.2d at 653 (holding that cap on exemplary damages contained in s 41.007 does not apply to bad-faith claim against insurer, because claim was not one listed in s 33.001). If the cap indeed would otherwise apply, then s 41.008 exempts from the cap exemplary damages resulting from conduct specifically intended to cause substantial injury to the claimant or resulting from an intentional tort. Tex. Civ. Prac. & Rem. Code Ann. s 41.008 (Vernon Supp. 1994). Thus, the exemp-

tion from the cap would apply to the intentional component of Restatement (Second) s 46(a), but not the reckless component.

[FN145]. The component of a Restatement (Second) s 46 claim based on intent should not be affected by the claimant's contributory negligence, since contributory negligence is not a defense to an intentional tort. See McCrary v. Taylor, 579 S.W.2d 347, 349 (Tex. Civ. App. -- Eastland 1979, writ ref'd n.r.e.) (stating 'contributory negligence is not a defense to an action based on fraud').

[FN146]. By its own terms, the chapter relating to comparative responsibility does not apply to a claim based on an intentional tort. Tex. Civ. Prac. & Rem. Code Ann. s33.002(a) (Vernon Supp. 1994).

[FN147]. Id. ch. 33.

[FN148]. Id. s 33.001.

[FN149]. Id. s33.012(a).

[FN150]. Tex. Civ. Prac. & Rem. Code Ann. s33.002(a) (Vernon Supp. 1994).

[FN151]. Id. ss 33.013, 33.015, 33.016.

[FN152]. See supra notes 104-10 and accompanying text.

[FN153]. See Janette v. Deprez, 701 S.W.2d 56, 59 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.) (noting that 'Texas courts have traditionally allowed a contributory negligence defense in cases involving a gross negligence threshold of recovery' and that 'plaintiff's ordinary contributory negligence bars recovery of actual damages when the plaintiff's negligence exceeds that of the defendant, even when the defendant is liable for gross negligence').

[FN154]. See Trevino v. Lightning Laydown, Inc., 782 S.W.2d 946, 949 (Tex. App. -- Austin 1990, writ denied) (interpreting forerunner comparative responsibility statute in context of Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)); Janette v. Deprez, 701 S.W.2d 56, 58 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.) (determining that 'in a premises-liability case, a defendant's gross negligence may be compared with a plaintiff's ordinary negligence to determine the plaintiff's recovery of actual damages').

[FN155]. See Trevino, 782 S.W.2d at 950 (holding that gross negligence can be tried separately from negligence, as in suit for exemplary damages under worker's compensation statute); see generally Metromedia Long Distance, Inc. v. Hughes, 810 S.W.2d 494, 497 n.10 (Tex. App. -- San Antonio 1991, writ denied) (noting split of authority on whether gross negligence is separate cause of action from simple negligence).

[FN156]. To submit a claim as a comparative negligence issue, see 1 State Bar of Texas, Texas Pattern Jury Charges PJC 4.03 (1989).

[FN157]. See, e.g., Campos v. Ysleta Gen. Hosp., Inc., 836 S.W.2d 791, 795 (Tex. App. -- El Paso 1992, writ denied) (finding no evidence that conduct of hospital proximately caused parents' painful emotions over death of son); American Medical Int'l v. Giurintano, 821 S.W.2d 331, 340 (Tex. App. -- Houston 14th Dist. 1991, no writ) (discussing Texas's adoption of Restatement (Second) s 46); K.B. v. N.B., 811 S.W.2d 634, 640 (Tex. App. -- San Antonio 1991, no writ) (refusing to recognize tort for threatening to act in way that would cause emotional distress); Havens v. Tomball Community Hosp., 793 S.W.2d 690, 692 (Tex. App. -- Houston 1st Dist. 1990, writ denied) (discussing elements of intention-

al infliction of emotional distress); Bushell v. Dean, 781 S.W.2d 652, 657 (Tex. App. -- Austin 1989) (holding that employer violated s 46 after making sexual advances to employee), rev'd on other grounds, 803 S.W.2d 711 (Tex. 1991); Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 942 (Tex. App. -- Beaumont 1985, writ ref'd n.r.e.) (listing all Texas appellate cases recognizing this tort); see also Twyman v. Twyman, 855 S.W.2d 619, 622-23 nn.7-11 (Tex. 1993) (discussing various parties alleging claims for negligent infliction of emotional distress). Because of the many appellate decisions on this issue, a significant body of Texas case law on Restatement (Second) s 46 already existed when the Texas Supreme Court adopted the tort.

[FN158]. See Chiles v. Chiles, 779 S.W.2d 127, 131 (Tex. App. -- Houston 14th Dist. 1989, writ denied) (refusing to recognize tort of intentional infliction of emotional distress in divorce action).

[FN159]. See Massey v. Massey, 807 S.W.2d 391, 397 (Tex. App. -- Houston 1st Dist. 1991) (reasoning that courts favor resolution of all matters in one suit), writ denied per curiam, 867 S.W.2d 766 (Tex. 1993).

[FN160]. See Twyman, 855 S.W.2d at 621-22 (noting that Beaumont Court of Appeals adopted tort, and recognizing that forty-six other states that have adopted tort based on Restatement (Second) s 46).

[FN161]. See Truitt v. Carnley, 836 S.W.2d 786, 787 (Tex. App. -- Fort Worth 1992, writ denied) (noting abolition of criminal conversation and alienation of affections causes of action against third parties).

[FN162]. Turner v. PV Int'l Corp., 765 S.W.2d 455, 467 (Tex. App. -- Dallas 1988), writ denied per curiam, 778 S.W.2d 865 (Tex 1989); Cluett v. Medical Protective Co., 829 S.W.2d 822, 830 (Tex. App. -- Dallas 1992, writ denied). A claim involving alienation of affections must be against a stranger to the marriage and not the errant spouse. Cluck v. Cluck, 712 S.W.2d 599, 601 (Tex. App. -- Corpus Christi 1986, no writ).

[FN163]. See Tex. Fam. Code Ann. s 4.05 (Vernon 1993) (stating that one spouse cannot sue third party for criminal conversation).

[FN164]. See id. s 4.06 (mandating that one spouse does not have claim against third party for alienation of affection). The abolition does not apply to claims filed before September 1, 1987. Id.; cf. Destefano v. Grabrian, 763 P.2d 275, 288-89 (Colo. 1988) (dismissing husband's Restatement (Second) s 46 claim that priest's sexual relationship with wife during marital counseling destroyed marriage and constituted alienation of affections and criminal conversation, because claims were not recognized in Colorado). But cf. Spiess v. Johnson, 748 P.2d 1020, 1023-24 (Or. Ct. App. 1988) (upholding husband's suit against wife's psychiatrist for inflicting emotional distress by having sexual relations with wife during marital counseling, but rejecting recovery for loss of wife's society and companionship (alienation of affections), because tort outlawed in Oregon).

[FN165]. Truitt v. Carnley, 836 S.W.2d 786, 787 (Tex. App. -- Fort Worth 1992, writ denied); see Perkins v. Dean, 570 So. 2d 1217, 1219 (Ala. 1990) (stating that extramarital affair may be morally or socially repugnant, but does not constitute outrageous conduct, absent professional relationship or duty, and absent malicious intent to inflict harm); Browning v. Browning, 584 S.W.2d 406, 407-08 (Ky. Ct. App. 1979) (refusing to recognize husband's claim against wife for intentional infliction of emotional distress for ‘intentionally, wrongfully, openly, and notoriously‘ consorting with another man, and bestowing affections upon him); Homer v. Long, 599 A.2d 1193, 1200 (Md. Ct. Spec. App. 1992) (denying husband's claim against wife's therapist under Restatement (Second) s 46 for having affair with wife, because injuries arose from adultery and ensuing break-up of marriage, and thus fell within ban against alienation of affections and criminal conversation), cert. denied, 326 Md. 177, 604 A.2d 444 (Md. 1992); Gasper v. Lighthouse, Inc., 533 A.2d 1358, 1360-61 (Md. Ct. Spec. App. 1987) (holding that husband's Restatement (Second) s 46 claim against marriage counselor

for having affair with wife could not be maintained); Meikle v. Van Biber, 745 S.W.2d 714, 717 (Mo. Ct. App. 1987) (holding that intentional infliction of emotional distress claim could not be maintained in Missouri when distress derived from acts amounting to alienation of affections of child); Wiener v. Wiener, 444 N.Y.S.2d 130, 131 (N.Y. App. Div. 1981) (stating that claim for intentional infliction is circumscribed by availability of matrimonial action and abolition of causes for alienation of affections and criminal conversation); Strock v. Pressnell, 527 N.E.2d 1235, 1242-43 (Ohio 1988) (finding Restatement (Second) s 46 claim by ex-husband against minister for having affair with ex-wife during marital counseling not viable, owing to legislature's abolition of claims for alienation of affection and criminal conversation); Alexander v. Inman, 825 S.W.2d 102, 105 (Tenn. Ct. App. 1991) (holding that extramarital affair is not sufficiently extreme or outrageous to support Restatement (Second) s 46 claim). See generally Gleiss v. Newman, 415 N.W.2d 845, 846-47 (Wis. Ct. App. 1987) (asserting that as matter of public policy, Wisconsin would not permit noncustodial parent to sue under Restatement (Second) s 46 for interfering with visitation rights; if claim were permitted, host of actions for petty infractions would follow, and additionally, parents denied visitation already have adequate remedies to enforce that right).

[FN166]. Brooks v. Scherler, 859 S.W.2d 586, 588-89 (Tex. App. -- Houston 14th Dist. 1993, no writ) (finding that airport employee had official immunity to Restatement (Second) s 46 claim); Boozier v. Hambrick, 846 S.W.2d 593, 597-98 (Tex. App. -- Houston 1st Dist. 1993, no writ) (holding that airport employee had official immunity defense to Restatement (Second) s 46 claim); Towngate v. Bastrop Ind. Sch. Dist., 842 S.W.2d 823, 828 (Tex. App. -- Austin 1992, no writ) (holding that school district had governmental immunity against Restatement (Second) s 46 claim by student segregated due to excessive hair length); Hammond v. Katy Ind. Sch. Dist., 821 S.W.2d 174, 179 (Tex. App. -- Houston 14th Dist. 1991, no writ) (holding that education statute gives school employees immunity from Restatement (Second) s 46 claim by former teacher).

[FN167]. See Mitre v. La Plaza Mall, 857 S.W.2d 752, 755 (Tex. App. -- Corpus Christi 1993, writ denied) (stating that qualified privilege exists for communications made in good faith to person interested in trade and commercial standing of another); Schauer v. Memorial Care Sys., 856 S.W.2d 437, 449 (Tex. App. -- Houston 1st Dist. 1993, no writ) (holding qualified privilege exists as long as statement is substantially true and not made with malice or with lack of good faith).

[FN168]. See Silberg v. Anderson, 786 P.2d 365, 371 (Cal. 1990) (discussing, in connection with Restatement (Second) s 46 claim against opposing attorney in divorce, immunity for statements made in connection with court proceedings); Ribas v. Clark, 696 P.2d 637, 643 (Cal. 1985) (en banc) (applying privilege to thwart ex-husband's Restatement (Second) s 46 claim against third party who testified to things she heard while eavesdropping on conversation between ex-husband and ex-wife); Nagy v. Nagy, 258 Cal. Rptr. 787, 791 (Cal. Ct. App. 1989) (noting that statements made during deposition that husband was not father of child were privileged and could not serve as basis for Restatement (Second) s 46 claim); Green v. Uccelli, 255 Cal. Rptr. 315, 321 (Cal. Ct. App. 1989) (invoking statutory privilege for communications made in judicial proceeding to husband's Restatement (Second) s 46 claim against wife's divorce attorney); Carden v. Getzoff, 235 Cal. Rptr. 698, 701 (Cal. Ct. App. 1987) (confirming that accountant's valuation report and testimony in divorce proceeding were privileged as against husband's claim of abuse of process and intentional and negligent infliction of emotional distress); Chauncey v. Niems, 227 Cal. Rptr. 718, 727-28 (Cal. Ct. App. 1986) (determining that statutory privilege for communications made in connection with judicial proceeding applied to claims for intentional infliction of emotional distress brought by ex-husband against former wife and her attorney); see generally Montoya v. Bebensee, 761 P.2d 285, 289-90 (Colo. Ct. App. 1988) (reporting that Restatement (Second) s 46 claim could be brought against reporting psychologist when statutory immunity for reporting child abuse might not apply due to allegedly bad-faith reporting).

[FN169]. See Restatement (Second) of Torts s 46 cmt. g (1965) (‘The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no

more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. '); see also Pankratz v. Willis, 744 P.2d 1182, 1195-96 (Ariz. Ct. App. 1987) (relating that father of abducted child not liable under Restatement (Second) s 46 for pursuing discovery and successfully suing child's maternal grandparents for involvement in abduction).

[FN170]. See Burnette v. Wahl, 588 P.2d 1105, 1111 (Or. 1978) (denying children standing to sue mother for emotional injury resulting from mother's abandonment of children on basis of parent-child immunity doctrine).

[FN171]. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. ss 1001-1461 (1988).

[FN172]. See Light v. Blue Cross & Blue Shield, 790 F.2d 1247, 1249 (5th Cir. 1986) (finding action for intentional infliction of severe emotional distress in connection with private plan preempted by ERISA); Southland Life Ins. Co. v. Estate of Small, 806 S.W.2d 800, 801 (Tex. 1991) (per curiam) (concluding that former employee's Restatement (Second) s 46 claim regarding loss of group health insurance coverage related to employee benefit plan and thus was preempted by ERISA); Sams v. N.L. Indus., Inc., 735 S.W.2d 486, 488-89 (Tex. App. -- Houston 1st Dist. 1987, no writ) (citing federal cases indicating that Restatement (Second) s 46 claims preempted when they relate to ERISA plans).

[FN173]. See Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (noting that 'public figures and public officials may not recover for the tort of intentional infliction of emotional distress ... without showing ... that the publication contains a false statement of fact which was made with 'actual malice' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not is was true.'); Anonsen v. Donahue, 857 S.W.2d 700, 701 (Tex. App. -- Houston 1st Dist. 1993, writ denied) (recognizing that woman's right to tell her personal experiences enjoyed First Amendment protection against Restatement (Second) s 46 claim and other claims brought by family members whose private affairs were consequently revealed on television); McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904-05 (Tex. App. -- Corpus Christi 1991, writ denied) (asserting that federal and state constitutions protected newspaper against Restatement (Second) s 46 claim for publishing photograph which inadvertently revealed genitalia of young soccer player); Fridovich v. Fridovich, 598 So. 2d 65, 69 (Fla. 1992) (finding that 'if the sole basis of a complaint for emotional distress is a privileged defamatory statement, then no separate cause of action exists '); Walko v. Kean College, 561 A.2d 680, 684 (N.J. Super. Ct. Law Div. 1988) (holding that publication that is not actionable as defamation cannot support Restatement (Second) s 46 claim); see also Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 942 (Tex. 1988) (declaring public official or public figure asserting claim for intentional infliction of emotional distress based on defamatory publication must meet New York Times v. Sullivan test of actual malice, to-wit: knowledge of falsity or reckless disregard of truth). See generally Kinsey v. Macur, 165 Cal. Rptr. 608, 613 (Cal. Ct. App. 1980) (declaring right to be let alone must be balanced against public interest in dissemination of news). But see Valenzuela v. Aquino, 853 S.W.2d 512, 520 (Tex. 1993) (Gammage, J., dissenting) (relating that family of physician whose home was picketed by abortion protestors should have ability to recover damages for negligent infliction of severe emotional distress when actions go beyond need to deliver message).

[FN174]. Mitre v. La Plaza Mall, 857 S.W.2d 752, 754 (Tex. App. -- Corpus Christi 1993, writ denied). In the context of defamation, actual malice does not include 'ill will, spite or evil motive, but rather requires 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'' Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989); see Schauer v. Memorial Care Sys., 856 S.W.2d 437, 450 (Tex. App. -- Houston 1st Dist. 1993, no writ) (finding that allegations of purported threat does not establish actual malice in libel action).

[FN175]. See Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980) (establishing that woman's false representation that she was taking birth control pills was not subject to damage claim, because to permit such claims would

‘encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy‘).

[FN176]. 381 U.S. 479 (1965).

[FN177]. Griswold, 381 U.S. at 485-86.

[FN178]. Id. at 499 (Goldberg, J., concurring).

[FN179]. See id. at 502 (White, J. concurring) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[FN180]. Griswold, 381 U.S. at 502.

[FN181]. See Barbara A. v. John G., 193 Cal. Rptr. 422, 430-31 (Cal. Ct. App. 1983) (noting that privacy rights are not absolute).

[FN182]. Przybyla v. Przybyla, 275 N.W.2d 112, 115 (Wis. Ct. App. 1978).

[FN183]. E.g., Bowen v. Aetna Casualty & Sur. Co., 837 S.W.2d 99, 100 (Tex. 1992); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 575 (Tex. 1992); Burns v. Thomas, 786 S.W.2d 266, 267 n.1 (Tex. 1990); Sanchez v. Schindler, 651 S.W.2d 249, 254 (Tex. 1983); Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135, 142 (Tex. App. -- Dallas), judgm't set aside by agr., 825 S.W.2d 486 (1992); Service Lloyd's Ins. Co. v. Greenhalgh, 771 S.W.2d 688, 691 (Tex. App. -- Austin 1989), rev'd on other grounds, 787 S.W.2d 938 (Tex. 1990).

[FN184]. See Richard **Orsinger**, 6 McDonald Texas Civil Practice s 45:3 (1992 ed.) (discussing different concepts of retroactivity and when they apply).

[FN185]. 36 Tex. Sup. Ct. J. 1221 (June 30, 1993); see id. (citing Twyman in denying application for writ of error because negligent infliction of emotional distress is not viable theory for recovery in divorce proceeding, but noting that spouse may recover for intentional infliction of emotional distress).

[FN186]. See James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443-44 (comparing full retroactivity, selective prospectivity, and pure prospectivity). For example, the Restatement (Second) s 46 claim in Chiles v. Chiles, 779 S.W.2d 127 (Tex. App. -- Houston 14th Dist. 1989, writ denied), is barred by the doctrine of res judicata, regardless of the change in the law effected by Twyman. See Schein v. American Restaurant Group, Inc., 852 S.W.2d 496, 497 n.1 (Tex. 1993) (stating that ‘the fact that ‘a judgment may have been wrong or premised on a legal principle subsequently overruled does not affect the application of res judicata,’‘ and citing Victoria County Coop. Co. v. National Steel Prods. Co., 704 S.W.2d 80, 82 (Tex. App. -- Corpus Christi 1985, writ ref'd n.r.e.)); Getty Oil Co. v. Insurance Co. of North Am., 845 S.W.2d 794, 798 (Tex. 1992) (clarifying that ‘a judgment in an earlier suit 'precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit’‘).

[FN187]. See Andrew Schepard, Divorce, Interspousal Torts, and Res Judicata, 24 Fam. Law. Q. 127, 135-42 (1990) (providing extensive discussion of res judicata when interspousal tort claim is brought after divorce).

[FN188]. Getty Oil Co. v. Ins. Co. of North Am., 845 S.W.2d 794, 798 (Tex. 1993); Barr v. Resolution Trust Corp., 837 S.W.2d 627, 630-31 (Tex. 1992).

[FN189]. Barr, 837 S.W.2d at 630 (quoting Texas Water Rights Comm'n v. Crow Iron Works, 582 S.W.2d 768, 771-72 (Tex. 1979)).

[FN190]. See generally Cluck v. Cluck, 712 S.W.2d 599, 601-02 (Tex. App. -- Corpus Christi 1986, no writ) (refusing to permit wife to sue former husband for loss of services and loss of consortium, on ground that fault could be, and was, considered by trial court in dividing estate of parties in divorce).

[FN191]. Tex. R. Civ. P. 97(a). The court in Goins v. League Bank & Trust, 857 S.W.2d 628, 630 (Tex. App. -- Houston 1st Dist. 1993, no writ), described the test as follows:
To be compulsory, a counterclaim must: (1) be within the jurisdiction of the court; (2) not be the subject of a pending action at the time of filing the answer; (3) be mature and owned by the pleader at the time of filing the answer; (4) arise out of the transaction or occurrence that is the subject matter of the primary claim; (5) be against the opposing party in the same capacity in which that party brought suit; and (6) not require the presence of third parties over whom the court cannot acquire jurisdiction for the claim's adjudication. Id. (citing Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 247 (Tex. 1988)).

[FN192]. See Tevis v. Tevis, 400 A.2d 1189, 1196 (N.J. 1979) (stating that ‘marital tort and its potential for money damages were relevant in matrimonial proceeding‘ and should have been presented in conjunction with that action). But see McCoy v. Cooke, 419 N.W.2d 44, 46 (Mich. Ct. App. 1988) (ruling that Restatement (Second) s 46 claim not barred by res judicata arising from earlier divorce even when property was divided based upon fault); Walther v. Walther, 709 P.2d 387, 388 (Utah 1985) (holding that interspousal tort claim cannot be joined with divorce).

[FN193]. See Windauer v. O'Connor, 485 P.2d 1157, 1158 (Ariz. 1971) (ruling that divorce decree did not preclude spouse from later filing damage suit for intentional tort); Simmons v. Simmons, 773 P.2d 602, 604-05 (Colo. Ct. App. 1988) (asserting that wife's postdivorce Restatement (Second) s 46 claim not barred by res judicata as to prior divorce); McNevin v. McNevin, 447 N.E.2d 611, 616-18 (Ind. Ct. App. 1983) (holding that divorce decree did not bar subsequent interspousal suit for battery because cause of action was not marital property subject to division on divorce, nor was it sufficiently susceptible to valuation to be considered in property division); Stuart v. Stuart, 421 N.W.2d 505, 507-09 (Wis. 1988) (finding that when interspousal tort claim was not mentioned in divorce settlement, wife's claim was not barred by doctrines of res judicata, equitable estoppel, or waiver; however, in Wisconsin, divorce court cannot consider marital misconduct in dividing property or awarding alimony). But see Coleman v. Coleman, 566 So. 2d 482, 484-86 (Ala. 1990) (declaring that ex-wife was precluded from bringing postdivorce claim against ex-husband for transmission of sexual disease when infection was known at time divorce was settled and ex-wife used that claim ‘as leverage‘ in settlement; however, Alabama has no rule that divorce action routinely precludes later interspousal tort claims because each case must be examined on own facts). See generally Cater v. Cater, 846 S.W.2d 173, 175 (Ark. 1993) (stating that ‘a spouse having a cause of action in tort is not required to bring that action in the divorce case‘); Bhama v. Bhama, 425 N.W.2d 733, 737 (Mich. Ct. App. 1988) (asserting that one parent can sue other parent for intentional infliction of emotional distress by estranging children from first parent, and prior custody proceeding did not create res judicata bar to damage claim even though same behavior was considered in custody suit as basis for awarding custody).

[FN194]. See Vance v. Chandler, 597 N.E.2d 233, 237-38 (Ill. App. Ct. 1992) (declaring that Illinois divorce statute did not permit divorce court to try interspousal tort claims); Koepke v. Koepke, 556 N.E.2d 1198, 1199 (Ohio Ct. App. 1989) (explaining that it is ‘inconsistent to combine intentional tort claims with divorce actions since a party to a divorce cannot recover damages ‘). This separation in function may support a conclusion that legal remedies were not adjudicated in equitable proceedings in those states, but the distinction would be unimportant in Texas, where law and equity courts are combined. Cf. Kemp v. Kemp, 723 S.W.2d 138, 139-40 (Tenn. Ct. App. 1986) (holding that divorce was res judicata and

collaterally estopped wife from bringing postdivorce battery claim when battery was raised in divorce proceeding and wife received award for medical bills and lost wages, and finding that divorce court had jurisdiction to litigate tort claim as well as divorce).

[FN195]. See Koepke, 556 N.E.2d at 1199 (finding no right to jury in divorce action, so spouse combining tort action with divorce destroys right to jury trial for tort claims).

[FN196]. See Henriksen v. Cameron, 622 A.2d 1135, 1140 (Me. 1993) (noting that Maine courts do not consider fault in such cases); Plankel v. Plankel, 841 P.2d 1309, 1311 (Wash. Ct. App. 1992) (stating that court does not consider fault or proximate cause in divorce; tort action is based on proven damages instead of equitable considerations); see also Noble v. Noble, 761 P.2d 1369, 1371 n.4 (Utah 1988) (acknowledging that because right to jury exists in tort but not divorce case, problem arises if fact question with respect to which party is entitled to jury verdict is first decided by judge in divorce proceeding, and concluding that interspousal tort claims should be resolved prior to divorce proceeding).

[FN197]. Twyman v. Twyman, 855 S.W.2d 619, 625 (Tex. 1993); Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981).

[FN198]. Twyman, 855 S.W.2d at 624-25.

[FN199]. See Twyman, 855 S.W.2d at 624-25 (noting that joinder of tort and divorce ‘should be permitted, but subject to the principles of res judicata ‘). Justice Cornyn mentioned the transactional approach to res judicata analysis. Id. (citing Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993)). The court in Henriksen held that a divorce and a Restatement (Second) s 46 claim were so different that a divorce decree does not operate as res judicata against a later interspousal tort claim. Henriksen, 622 A.2d at 1141-42.

[FN200]. See Tarter v. Metropolitan Sav. & Loan Ass'n, 744 S.W.2d 926, 928 (Tex. 1988) (holding that collateral estoppel did not apply because ultimate issues in case were neither expressly nor necessarily litigated in prior suit). The doctrine of collateral estoppel applies only when the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior suit. Id.; see Valero Transmission v. Wagner & Brown, 787 S.W.2d 611, 613 (Tex. App. -- El Paso 1990, writ dism'd by agr.) (finding that collateral estoppel did not apply because damages in question in later suit had not ripened by time of first case).

[FN201]. Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985).

[FN202]. See Noble v. Noble, 761 P.2d 1369, 1374-75 (Utah 1988) (holding that finding in divorce proceeding that husband intentionally shot wife effected collateral estoppel and established liability for purpose of tort proceeding).

[FN203]. ‘Cruel treatment‘ has been described as ‘willful and persistent infliction of unnecessary suffering, whether in realization or apprehension, whether of mind or body,‘ and includes ‘acts that endanger or threaten life, limb, or health of the aggrieved party and inflict mental anguish.‘ Brown v. Brown, 704 S.W.2d 528, 529 (Tex. App. -- Amarillo 1986, no writ).

[FN204]. See Long v. Knox, 291 S.W.2d 292, 295 (Tex. 1956) (holding that husband having sworn under oath that his wife owned property as separate property could not later take contrary position).

[FN205]. Moore v. Neff, 629 S.W.2d 827, 829 (Tex. App. -- Houston 14th Dist. 1982, writ ref'd n.r.e.).

[FN206]. Watson v. Nortex Wholesale Nursery, Inc., 830 S.W.2d 747, 750 (Tex. App. -- Tyler 1992, writ denied); Aetna Life Ins. Co. v. Wells, 557 S.W.2d 144, 147 (Tex. Civ. App. -- San Antonio 1977), writ ref'd n.r.e., per curiam, 566

S.W.2d 900 (Tex. 1978).

[FN207]. Twyman v. Twyman, 855 S.W.2d 619, 624-25 (Tex. 1993) (plurality opinion). ‘A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining actions that they involve the same facts and issues.‘ See Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990) (citing Saxer v. Nash Phillips-Copus Co. Real Estate, 678 S.W.2d 736 (Tex. App. -- Tyler 1984, writ ref'd n.r.e.); see also Tex. R. Civ. P. 41 (listing statutory requirements regarding joiner of parties). The trial court can consolidate separate law suits to convenience further the parties, avoid prejudice, and promote the ends of justice. Tex. R. Civ. P. 174(a) .

[FN208]. Twyman, 855 S.W.2d at 625; see Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982) (affirming broad discretion of trial judge in determining propriety of severance and consolidation of claims).

[FN209]. Twyman, 855 S.W.2d at 625; see W. Wendell Hall, Revisiting Standards of Review in Civil Appeals, 24 St. Mary's L.J. 1045, 1068-69 (1993) (discussing factors trial court considers in determining whether to sever or consolidate claims).

[FN210]. Tex. R. Civ. P. 174(b).

[FN211]. McMillen v. Klingensmith, 467 S.W.2d 193, 196-97 (Tex. 1971) (‘A claimant in no event will be entitled to recover more than the amount required for full satisfaction of his damages.‘).

[FN212]. El Paso Nat. Gas Co. v. Berryman, 858 S.W.2d 362, 364 (Tex. 1993); Berry Property Mgmt., Inc. v. Bliskey, 850 S.W.2d 644, 664-66 (Tex. App. -- Corpus Christi 1993, writ dism'd by agr.) (finding that one-satisfaction rule applies when defendants commit same act, as well as when they commit technically different acts that result in single injury).

[FN213]. See Armstrong v. Armstrong, 750 S.W.2d 45, 47 (Tex. App. -- Fort Worth 1988, writ denied) (Farris, J., dissenting) (objecting to severing tort claims against husband from divorce action).

[FN214]. Twyman v. Twyman, 855 S.W.2d 619, 624-25 (Tex. 1993).

[FN215]. Id. at 625.

[FN216]. Id.

[FN217]. Id. The trial court can consider tort damages in dividing the estate of the parties only if the tort issues are litigated before or with the divorce. While actual damages for emotional distress would be separate property, a question arises as to whether punitive damages are separate or community property. See infra notes 250-56 and accompanying text.

[FN218]. Twyman, 855 S.W.2d at 625. A possible instruction would be: ‘You are instructed that, in dividing the estate of the parties, you shall not consider any of the acts or omissions, if any, you have found in answer to Question _____.‘ The question referred to should be the liability question in which the jury determines whether the one spouse intentionally or recklessly engaged in extreme and outrageous conduct that caused severe emotional distress. Another possible instruction would be: ‘You are instructed that any damages found by you in answer to Question ____ will be awarded to plaintiff-spouse, apart from the division of the estate of the parties.‘ As explained in the next section, however, a litigant can as-

sert alternative theories of recovery and elect between them after the finder of fact has returned its verdict or findings.

[FN219]. See McCoy v. Cooke, 419 N.W.2d 44, 46 (Mich. Ct. App. 1988) (finding that prior divorce did not preclude ex-wife from bringing battery case against ex-husband; however, because marital estate was divided in accordance with percentage fault in divorce, ex-husband could plead affirmative defense of whether, and to what extent, the divorce judgment compensated ex-wife for her injuries).

[FN220]. See Noble v. Noble, 761 P.2d 1369, 1373-74 (Utah 1988) (remanding divorce case to trial court for court to make findings sufficiently specific to permit court in tort case to avoid double recovery.)

[FN221]. Tex. R. Civ. P. 48 (Alternative Claims for Relief); id. R. 51 (Joinder of Claims and Remedies).

[FN222]. Zimmerman v. First Am. Title Ins. Co., 790 S.W.2d 690, 698 (Tex. App. -- Tyler 1990, writ denied) (noting that 'party may plead and prove totally inconsistent claims and defenses in Texas'); Angroson, Inc. v. Independent Communications, Inc., 711 S.W.2d 268, 272 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.) (introducing contract into evidence did not bar that party's alternative claim for quantum meruit); Abilene Nat. Bank v. Fina Supply, Inc., 706 S.W.2d 737, 739 (Tex. App. -- Eastland) (stating that 'party may plead, present evidence, and obtain special issues on two or more inconsistent remedies arising from the same state of facts'), rev'd on other grounds, 726 S.W.2d 537 (Tex. 1987).

[FN223]. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 367 (Tex. 1987) (noting that when litigant asserts alternative theories of recovery, he must either tacitly or expressly elect after verdict which theory of recovery and measure of damages he will take); International Piping Sys., Inc. v. M.M. White & Assoc., 831 S.W.2d 444, 452-53 (Tex. App. -- Houston 14th Dist. 1992, writ denied) (allowing party to elect between inconsistent theories of recovery after verdict is rendered); Triland Inv. Group v. Warren, 742 S.W.2d 18, 27 (Tex. App. -- Dallas 1987) (noting that when there are multiple recoveries of damages, plaintiff must elect one recovery at time court renders judgment), rev'd on other grounds, 779 S.W.2d 808 (Tex. 1989).

[FN224]. See supra notes 211-20 and accompanying text.

[FN225]. Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980). 'Election, an affirmative defense, has been held to bar remedies, rights, and inconsistent positions arising out of the same facts.' Id. at 850.

[FN226]. 605 S.W.2d 848 (Tex. 1980).

[FN227]. Bocanegra, 605 S.W.2d at 851. The supreme court noted, 'The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice.' Id. at 851.

[FN228]. Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 541 (Tex. 1987). The court also stated that 'an election of remedies does not occur unless a party having two or more inconsistent remedies pursues one of them to the exclusion of the others.' Id.; see Wasson v. Stracener, 786 S.W.2d 414, 417 (Tex. App. -- Texarkana 1990, writ denied) (noting that doctrine of election is designed to prevent double recovery for single harm); see also City of Ingleside v. Kneuper, 768 S.W.2d 451, 458 (Tex. App. -- Austin 1989, writ denied) (holding that former city employee who secured temporary injunction reinstating his job irrevocably elected reinstatement in lieu of recovery for lost future earnings).

[FN229]. Compare Plate & Platter, Inc. v. Wolf, 780 S.W.2d 453, 457 (Tex. App. -- Dallas 1989, writ denied) (finding no election of remedies bar based on facts of case) with George Bros. Fabrication, Inc. v. Bryant, 865 S.W.2d 622, 623 (Tex. App. -- Eastland 1993, writ requested) (determining that election of remedies bar in seeming contradiction to Plate

& Platter, Inc.).

[FN230]. Bocanegra, 605 S.W.2d at 850.

[FN231]. The doctrine of judicial estoppel bars a party who successfully maintained a position in a prior proceeding from afterward adopting an inconsistent position in a later suit. Noble v. Noble, 761 P.2d 1369, 1374-75 (Utah 1988). In Bocanegra, the court stated that 'judicial estoppel may arise when a question necessary for the determination of a prior adjudication is decided. It constitutes a bar to a redetermination of that issue in a different cause.' Bocanegra, 605 S.W.2d at 850-51 (citing Benson v. Wanda Petroleum Co., 468 S.W.2d 361 (Tex. 1971)).

[FN232]. See Bocanegra, 605 S.W.2d at 851 (noting that 'equitable estoppel differs . . . because it requires some deception that is practiced upon a party who relies upon it to his prejudice,' (citing Barfield v. Howard M. Smith Co., 426 S.W.2d 834 (Tex. 1968))); Watson v. Nortex Wholesale Nursery, Inc., 830 S.W.2d 747, 751 (Tex. App. -- Tyler 1992, writ denied) (noting that concealment or misrepresentation of material facts is necessary to show equitable estoppel).

[FN233]. See Bocanegra, 605 S.W.2d at 851 (stating that 'a ratification rests upon a manifestation of assent to confirm one's prior act or that of another. It may occur without any prior litigation and in the absence of any change of position by or prejudice to the other party.' (citing Texas & Pac. Coal & Oil Co. v. Kirtley, 288 S.W.2d 619 (Tex. Civ. App. -- Eastland 1926, writ ref'd))).

[FN234]. See id. (noting that 'waiver, the voluntary relinquishment of a known right, is sometimes spoken of as intentional conduct inconsistent with the assertion of a known right.' (citing Ford v. State Farm Mut. Auto Ins. Co., 550 S.W.2d 663, 667 (Tex. 1977))).

[FN235]. See id. ('Full satisfaction will bar a claim because the law will not permit double redress.' (citing McMillen v. Klingensmith, 467 S.W.2d 193 (Tex. 1971))).

[FN236]. Res judicata and collateral estoppel only apply to subsequent litigation between the same parties. Thus, if a prior lawsuit achieves a certain result between A and B, and A separately sues C, the doctrines of res judicata and collateral estoppel will not apply unless C is in privity with B. In this context, 'privity' is defined as 'an identity of interest in the legal right actually litigated.' Texas Real Estate Comm'n v. Nagle, 767 S.W.2d 691, 694 (Tex. 1989). When the lack of identity of parties eliminates res judicata or collateral estoppel as a protection to keep A from suing C in a manner inconsistent with A's position in the lawsuit with B, the doctrine of election may apply. See B&L Cherry Hill Assoc. v. Fedders Corp., 696 S.W.2d 667, 669 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.).

[FN237]. See Lomas & Nettleton Co. v. Huckabee, 558 S.W.2d 863, 864 (Tex. 1977) (per curiam) (extending preclusion rule based on judgments to settlements).

[FN238]. Bocanegra, 605 S.W.2d at 852. In Bocanegra, the supreme court stated:
One's choice between inconsistent remedies, rights, or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. An exception to that rule exists when the choice of a course of action, though made in ignorance of the facts, will cause harm to an innocent party. Id. at 852 (citations omitted); see United States Fire Ins. Co. v. Pettyjohn, 816 S.W.2d 839, 841 (Tex. App. -- Fort Worth 1991, no writ) (overruling jury finding that election of remedies had occurred because there was no evidence that party made 'informed choice'); Heath v. Herron, 732 S.W.2d 748, 750 (Tex. App. -- Houston 14th Dist. 1987, writ denied) (finding that client did not make decision to settle with 'full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent

choice‘). As noted above, the requirement of an informed choice does not apply when the choice of a course of action, though made in ignorance of the facts, will cause harm to an innocent party. Bocanegra, 605 S.W.2d at 852.

[FN239]. Allstate Ins. Co. v. Perez, 783 S.W.2d 779, 782 (Tex. App. -- Corpus Christi 1990, no writ).

[FN240]. France v. American Indem. Co., 648 S.W.2d 283, 285 (Tex. 1983).

[FN241]. See Tex. Civ. Prac. & Rem. Code Ann. s16.003 (Vernon 1986) (providing two-year limitations period for suits of personal injury); Stevenson v. Koutzaro, 795 S.W.2d 313, 319 (Tex. App. -- Houston 1st Dist. 1990, writ denied) (stating that ‘the tort of intentional infliction of emotional distress should be governed by the two-year statute of limitations ‘); see also Almazan v. United Servs. Auto. Ass'n, 840 S.W.2d 776, 780 (Tex. App. -- San Antonio 1992, writ denied) (holding torts are covered by two-year statute of limitations unless expressly covered by another limitation provision or unless the supreme court holds otherwise).

[FN242]. R.A.P. v. B.J.P., 428 N.W.2d 103, 109 (Min. Ct. App. 1988) (finding no basis in law for holding that statute of limitations on interspousal tort claim was ‘tolled‘ during marriage).

[FN243]. Twyman v. Twyman, 790 S.W.2d 819, 820-21 (Tex. App. -- Austin 1990), rev'd on other grounds, 855 S.W.2d 619 (Tex. 1993). The trial court found that the husband had engaged in a continuing course of conduct by attempting to coerce the wife to engage in sexual activities that caused her emotional distress. The statute of limitations started running when the last tortious activity occurred. Id. at 821; see Bartanus v. Lis, 480 A.2d 1178, 1186 (Pa. Super. Ct. 1984) (recognizing possible application of continuing tort doctrine to limitations question in connection with Restatement (Second) s 46 claim).

[FN244]. Twyman, 790 S.W.2d at 821.

[FN245]. Id. at 821.

[FN246]. Page v. United States, 729 F.2d 818 (D.C. Cir. 1984). The court viewed the injury claimed as being gradual, resulting from the cumulative impact of years of allegedly tortious drug treatment. Id. at 822. The court said that the plaintiff ‘charges precisely the sort of continuous conduct accreting physical and mental injury that justifies characterization as a continuing tort.‘ Id. at 823.

[FN247]. See Linker v. Custom-Bilt Mach., Inc., 594 F. Supp. 894, 903 (E.D. Pa. 1984) (recognizing allegations that defamation and intentional infliction of emotional distress continued until suit was filed).

[FN248]. 580 P.2d 544 (Or. 1978).

[FN249]. See Davis, 580 P.2d at 548 (holding that plaintiff was not entitled to recover for series of wrongs when evidence showed that each act in series was separately actionable and noting ‘a cause of action does not reaccrue every time another distress is inflicted‘).

[FN250]. Tex. Fam. Code Ann. s5.02 (Vernon 1993); see Kyles v. Kyles, 832 S.W.2d 194, 198 (Tex. App. -- Beaumont 1992, no writ) (providing that spouse had burden to prove what portion of settlement proceeds were separate property or else community property presumption would prevail).

[FN251]. Tex. Fam. Code Ann. s5.01(a)(3) (Vernon 1993); see Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972) (holding that, independent of statute, ‘recovery for personal injuries to the body of the wife, including disfigurement and

physical pain and suffering, past and future, is separate property of the wife‘).

[FN252]. See Moreno v. Alejandro, 775 S.W.2d 735, 738 (Tex. App. -- San Antonio 1989, writ denied) (holding that ‘recovery for loss of earning capacity during marriage is community property‘).

[FN253]. Graham, 488 S.W.2d at 396.

[FN254]. See Rosenbaum v. Texas Bldg. & Mortgage Co., 140 Tex. 325, 167 S.W.2d 506, 508 (Tex. 1943) (stating that punitive damages belong to community estate); Scott A. Hennis, Punitive Damages: Community Property, Separate Property, or Both, 14 Com. Prop. J. , Apr. 1987, at 51, 52-53 (discussing rationale for classification of personal injury punitive damage awards).

[FN255]. Tex. Fam. Code Ann. s5.61 (Vernon 1993); see Scott A. Hennis, Satisfying Punitive Damage Awards from an Individual's Separate Property, Community Property, or Both, 14 Com. Prop. J. , Jan. 1988, at 63, 64 (discussing question of whether exemplary damage awards can be satisfied out of separate and community property).

[FN256]. Tex. Fam. Code Ann. s 5.62 (Vernon 1993).

[FN257]. See generally Gregory G. Sarno, Annotation, Homeowner's Liability Insurance Coverage of Emotional Distress Allegedly Inflicted on Third Party by Insured, 8 A.L.R. 5th 254 (1992) (analyzing case law addressing whether or when homeowner's insurance covers claims for emotional distress).

[FN258]. The Texas Standard Homeowners Policy, Form B (effective Mar. 1, 1993) hereinafter Homeowners Policy (on file with the St. Mary's Law Journal). Coverage may exist under Texas Personal Umbrella or Excess Liability policies. Umbrella policies are quite varied in Texas and that subject is not covered in this Article.

[FN259]. See Tex. Ins. Code Ann. art. 5.35 (Vernon Supp. 1994) (empowering State Board of Insurance to adopt or approve policy forms and endorsements). Because the terms of the Homeowners Policy are uniform throughout Texas, references to specific sections of the policy are consistent regardless of the company issuing the policy.

[FN260]. See infra Part XXI.A.3 for further discussion on policy period.

[FN261]. ‘Insured‘ is defined as ‘you and residents of your household who are your relatives,‘ and other persons under age 21 who are in the care of any of the forgoing persons. Homeowners Policy, supra note 258, Definitions, para. 4. ‘You‘ includes the spouse of the named insured, if a resident of the same household. Id.

[FN262]. ‘Bodily injury‘ is defined as ‘bodily harm, sickness or disease,‘ including ‘required care, loss of services, and‘ resulting death. The definition of ‘bodily injury‘ can be expanded by obtaining Endorsement No. HO-201, Personal Injury Coverage (effective July 8, 1992) (on file with the St. Mary's Law Journal). With this endorsement, ‘bodily injury‘ is amended to include ‘personal injury,‘ which in turn is defined as including: ‘(1) false arrest, malicious prosecution, or willful detention or imprisonment; (2) libel, slander, or defamation of character; and (3) invasion of privacy, wrongful eviction or wrongful entry.‘ Id. The endorsement excludes ‘injury caused by the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of an insured.‘ Id.; cf. Decorative Ctr. v. Employers Casualty Co., 833 S.W.2d 257, 263 (Tex. App. -- Corpus Christi 1992, writ denied) (finding no duty to indemnify under business-related policy when liability was imposed for acts constituting criminal trespass).

[FN263]. ‘Occurrence‘ is defined as ‘an accident, including exposure to conditions, which results in bodily injury . . . during the policy period. ‘ Homeowners Policy, supra note 258, Definitions, para. 6. For a discussion of ‘policy period,‘

see Part XXI.A.3. The term ‘accident‘ is not defined in the policy.

[FN264]. Homeowners Policy, supra note 258, Section II, Coverage C.

[FN265]. The term ‘accident‘ is not defined in the policy.

[FN266]. An exclusion in an insurance policy takes something out of coverage that otherwise would have been covered by the policy. Liberty Mut. Ins. Co. v. American Employer Ins. Co., 556 S.W.2d 242, 245 (Tex. 1977). See discussion of exclusions in Part XXI.A.2.

[FN267]. Homeowners Policy, supra note 258, Section II, Coverage C.

[FN268]. See Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154, 1156 (Mass. 1988) (ruling that ‘bodily injury‘ under Massachusetts homeowner's policy includes mental suffering connected with or growing out of physical injuries, but not purely emotional distress); Greenman v. Michigan Mut. Ins. Co., 433 N.W.2d 346, 348-49 (Mich. Ct. App. 1988) (holding that when claimant for intentional infliction of emotional distress did not allege physical manifestations of emotional distress, claim did not constitute ‘bodily injury, sickness, or disease‘ under homeowner's policy); Hamlin v. Western Nat'l Mut. Ins. Co. 461 N.W.2d 395, 397 (Minn. Ct. App. 1990) (concluding that ‘bodily injury, sickness, or disease‘ under commercial multiperil policy does not include mental anguish arising from sexual harassment); Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1261-62 (N.J. 1992) (noting that ‘bodily injury‘ under homeowner's policy includes negligently or intentionally inflicted emotional distress that is accompanied by physical manifestations and reserving question of coverage for pure emotional distress); Northwest Farm Bureau Ins. Co. v. Roberts, 765 P.2d 328, 330 (Wash. Ct. App. 1988) (finding that homeowners policy did not cover claim for intentional and negligent infliction of emotional distress because emotional distress is not ‘bodily injury‘); see also Houston Petroleum Co. v. Highlands Ins. Co., 830 S.W.2d 153, 155-56 (Tex. App. -- Houston 1st Dist. 1991, writ denied) (reasoning that emotional distress connected with economic losses from operation of limited partnership was not ‘bodily injury‘ covered by insurance policy). But see Williamson v. Historic Hurstville Ass'n, 556 So. 2d 103, 106-07 (La. Ct. App. 1990) (asserting that embarrassment and mental anguish asserted in slander and defamation claim constituted ‘bodily injury‘ for purposes of homeowner's policy); Holcomb v. Kincaid, 406 So. 2d 646, 648-49 (La. Ct. App. 1981) (reasoning that because Louisiana homeowner's policy defined ‘bodily injury‘ to include ‘bodily injury, sickness, or disease,‘ policy covered ‘humiliation, mental anguish, pain and suffering‘ and was not limited to corporeal injury caused by external violence). See generally Lavanant v. General Accident Ins. Co. of America, 561 N.Y.S.2d 164, 168 (N.Y. App. Div. 1990) (stating that ‘bodily injury, sickness, or disease‘ in multiperil policy and commercial umbrella policy includes ‘the emotional and psychological effects of incidents that are otherwise covered by the policy‘); NPS Corp. v. Insurance Co. of North Am., 517 A.2d 1211, 1212 (N.J. Super. Ct. App. Div. 1986) (finding that worker's compensation and employer's liability policy covering ‘bodily injury by accident or disease‘ applied to emotional and psychological injury arising from offensive touching of buttocks and breasts). If the Texas Standard Homeowners Policy in question contains the personal injury coverage endorsement, the argument for coverage of purely emotional injuries is enhanced. See Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154, 1156 (Mass. 1988) (reasoning that in insurance law, ‘personal injury‘ is broader than ‘bodily injury‘ and ‘includes not only physical injury but also any affront or insult to the reputation or sensibilities of a person‘). The inclusion of the endorsement may open the door not only as to the causes of action specified in the endorsement, but also to the idea that the insurance contract in its entirety intends to cover emotional damages.

[FN269]. Homeowners Policy, supra note 258, Definitions, para. 6; see Greenman v. Michigan Mut. Ins. Co., 433 N.W.2d 346, 349 (Mich. Ct. App. 1988) (stating that on-the-job sexual harassment was not ‘occurrence‘ under homeowner's policy, because occurrence must be ‘accident‘ and claim asserted not negligence or accident, but, rather,

willful, malicious, and intentional behavior); National Ben Franklin Ins. Co. v. Harris, 409 N.W.2d 733, 735-36 (Mich. Ct. App. 1987) (noting that claim for racial and mental-health discrimination did not constitute 'occurrence' under policy, since occurrence must be 'accident' and complaint alleged intentional wrongs by insured); Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1264 (N.J. 1992) (stating that both negligent infliction and intentional infliction claims were 'accidents' which constituted 'occurrences' under homeowner's policy, because negligence and recklessness 'do not meet the subjective intent-to-injure requirement under insurance law').

[FN270]. An important exclusion that is not discussed in this Article is the exclusion of bodily injury or property damages arising out of the transmission of sickness or disease by an insured through sexual contact. Homeowners Policy, supra note 258, Section II, Exclusions 1.k. That exclusion became effective on May 1, 1987. 12 Tex. Reg. 1031-32 (1987); State Board of Insurance, Board Order 50372 (Mar. 31, 1987); State Farm Fire & Casualty Co. v. S.S. & G.W., 858 S.W.2d 374, 377 n.1 (Tex. 1993).

[FN271]. Homeowners Policy, supra note 258, Section II, Exclusions, para. 1.a. For purposes of coverage under a Texas Standard Homeowners Policy, 'intentionally' means done with intent to cause the injury, i.e., bodily injury. See State Farm, 858 S.W.2d at 378 (noting that policy exclusion applies not to intentional acts generally, but rather to bodily injury that is caused intentionally). See supra notes 29-33 and accompanying text (discussing definition of intent). One Texas court has held that public policy prohibits a person from insuring against her own intentional misconduct. Decorative Ctr. v. Employers Casualty Co., 833 S.W.2d 257, 160 (Tex. App. -- Corpus Christi 1992, writ denied). In Manriquez v. Mid-Century Ins. Co., 779 S.W.2d 482, 484-85 (Tex. App. -- El Paso 1989, writ denied), the court held that gross negligence fits within the meaning of 'accident' used in a Texas automobile insurance policy. Based upon Manriquez, it can be argued that the Homeowners Policy exclusion for intentional injury would not apply to a Restatement (Second) s 46 claim sounding in recklessness. See State Farm Fire & Casualty Co. v. Eddy, 267 Cal.Rptr. 379, 384 (Cal. Ct. App. 1990) (noting that California statute excluding coverage for losses caused by willful act of insured requires intention that transcends recklessness and amounts to specific intent to injure); Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1264 (N.J. 1992) (finding both negligent infliction and intentional infliction claims were 'accidents' which constituted 'occurrences' under homeowners policy, since negligence and recklessness 'do not meet the subjective intent-to-injure requirement under insurance law'). See generally Williamson v. Historic Hurstville Ass'n, 556 So. 2d 103, 106-07 (La. Ct. App. 1990) (holding intentional act exclusion from homeowners policy did not negate coverage of defamation claim because defamation, under Louisiana law which is based on Restatement (Second) of Torts s558, can occur negligently); Northwest Farm Bureau Ins. Co. v. Roberts, 52 Wash. App. 888, 765 P.2d 328, 330 (Wash. Ct. App. 1988) (declaring intentional act exclusion of homeowners policy did not apply to claim, brought under federal conspiracy statute, that insured negligently failed to prevent conspiracy). The issue of whether an alleged event is an 'occurrence' under the policy is related to the issue of whether the intentional injury exclusion applies, because an event is not an 'occurrence' unless it is an 'accident,' and it cannot be an accident if it was done intentionally.

[FN272]. Homeowners Policy, supra note 258, Section II, Exclusions, para. 2.e. An 'insured' is the named insured, the spouse of the named insured (if a resident of the same household), relatives who are residents of the insured's household, and persons under age 21 who are in the care of any of the forgoing persons. Texas Standard Homeowners Policy, Form B, Definitions, intro. & para. 4. Even if the spouses are separated, they will often both be listed as named insured on the community-property home. This practice would negate Schedule C coverage. See Farm Bureau Mut. Ins. Co. v. Moore, 475 N.W.2d 375, 376-77 (Mich. App. 1991) (stating that no coverage was available under homeowner's policy for wife who was injured by husband at construction site, because husband and wife were both named insured under policy).

[FN273]. Homeowners Policy, supra note 258, Section II, Exclusions, para. 2.e (excluding bodily injury to an insured). 'Insured' is defined to mean 'you and residents of your household who are ... your relatives' and the spouse of the named

insured, if a resident of the same household. Homeowners Policy - Form B, Definitions, para. 4.

[FN274]. Homeowners Policy, supra note 258, Section II, Exclusions, para. 3.b.

[FN275]. See Cullen/Frost Bank v. Commonwealth Lloyd's Ins. Co., 852 S.W.2d 252, 257 (Tex. App. -- Dallas 1993, writ granted) (‘In cases involving continuous or repeated exposure to a condition, there can be more than one manifestation of damage and, hence, an occurrence under more than one policy. ‘). It can also implicate how many ‘occurrences‘ happened during the policy period of a particular policy, which can affect the amount of coverage available. See American Indem. Co. v. McQuaig, 435 So. 2d 414, 415-16 (Fla. Ct. App. 1983) (holding that assailant who shot three police officers with three shotgun blasts several minutes apart caused three occurrences, not one occurrence). See generally Texas Dep't of Mental Health & Mental Retardation v. Petty, 817 S.W.2d 707, 720 (Tex. App. -- Austin 1991) (finding that because plaintiff alleged ‘a single, ongoing, indivisible injury . . . resulting from the totality and orchestration of numerous negligent acts and omissions on the part of Department employees over many years,‘ there was only one occurrence of negligence for purpose of statutory limitation of liability per occurrence), aff'd, 848 S.W.2d 680 (Tex. 1992).

[FN276]. Twyman v. Twyman, 790 S.W.2d 819, 820-21 (Tex. App. -- Austin 1990), rev'd on other grounds, 855 S.W.2d 619 (Tex. 1993). See supra notes 243-47 and accompanying text.

[FN277]. Twyman, 790 S.W.2d at 821.

[FN278]. See Holcomb v. Kincaid, 406 So. 2d 646, 649 (La. Ct. App. 1981) (concluding that exclusion for insured's spouse while resident of same household did not apply to events occurring after spouse moved out of house). Note, however, that if the moving-out spouse is a named insured, a different exclusion will apply. Homeowners Policy, supra note 258, Section II, Exclusions, para. 1.k.

[FN279]. Homeowners Policy, supra note 258, Section I, Conditions, para. 3.a.

[FN280]. See Filley v. Ohio Casualty Ins. Co., 805 S.W.2d 844, 847 (Tex. App. -- Corpus Christi 1991, writ denied) (declaring that if insurer is prejudiced by failure to notify, suit against insurer is precluded); see also Chiles v. Chubb Lloyds Ins. Co., 858 S.W.2d 633, 635 (Tex. App. -- Houston 1st Dist. 1993, writ denied) (holding that endorsement required for all Texas general liability policies, that insurer be prejudiced by insured's failure to forward suit papers before such failure liability bar under policy), did not apply to Texas Standard Homeowner's policy; the husband's failure to timely alert the insurance company to his wife's Restatement (Second) s 46 claim precluded his claim for the cost of defense. Id. See generally Andrew S. Hannen & Jett Hanna, Legal Malpractice Insurance: Exclusions, Selected Coverage, and Consumer Issues, 33 S. Tex. L. Rev. 75, 119-21 (1992) (discussing notice requirements under Texas legal-malpractice insurance policies).

[FN281]. Homeowners Policy, supra note 258, Section I, Conditions, para. 3.b(1)

[FN282]. Homeowners Policy, supra note 258, Section I, Conditions, para. 3.b(2).

[FN283]. See State Farm Fire & Casualty Co. v. Taylor, 832 S.W.2d 645, 648 (Tex. App. -- Fort Worth 1992, writ denied) (stating that ‘insurer defending the insured under such a reservation of rights reserves to itself all of its policy defenses in case the insured is subsequently found liable ‘); Britt v. Cambridge Mut. Fire Ins. Co., 717 S.W.2d 476, 481 (Tex. App. -- San Antonio 1986, writ ref'd n.r.e.) (finding reservation of rights is proper when insurer believes in good faith that claim alleges conduct not covered by policy). See, for example, Cluett v. Medical Protective Co., 829 S.W.2d 822 (Tex. App. -- Dallas 1992, writ denied), in which the husband sued his children's pediatrician for alienating the af-

fections of his wife. Id. at 824. Although the cause of action for alienation of affections was abolished in 1987, the plaintiff had originally filed suit in 1984. Id. n.1. The medical malpractice insurer agreed to defend the doctor, but declined to indemnify because the claim was outside the policy's coverage or within certain exclusions. Id. The doctor refused a qualified defense and entered into an agreed judgment in favor of the husband, assigning all policy rights to the husband. Id. The husband then intervened in the insurance company's suit for declaratory judgment to determine whether the claim was covered under the policy. Id.

[FN284]. Young Men's Christian Ass'n v. Commercial Standard Ins. Co., 552 S.W.2d 497, 504 (Tex. Civ. App. -- Fort Worth 1977), writ ref'd n.r.e., per curiam, 563 S.W.2d 246 (Tex. 1978).

[FN285]. See State Farm Fire & Casualty Co. v. S.S. & G.W., 858 S.W.2d 374, 376 (Tex. 1993) (describing how insured rejected defense subject to reservation of rights, settled, and assigned claims under policy to plaintiff, retaining right to two-thirds of any recovery against insurer for bad faith or statutory violations).

[FN286]. See Young Men's Christian Ass'n, 552 S.W.2d at 504 (holding that once insurance company has opportunity to defend suit or settle and refuses to do so based on decision of no liability, insured may settle with claimant and enter into covenant not to execute on any of defendant's assets other than claims against insurer).

[FN287]. See Employers Casualty Co. v. Block, 744 S.W.2d 940, 943 (Tex. 1988) (holding that insurance company may be collaterally estopped by agreed judgment as to amount of damages, but not as to question of coverage); Baze v. Marine Office of Am. Corp., 828 S.W.2d 152, 157 (Tex. App. -- Corpus Christi 1992, no writ) (noting that, generally, insurance company ‘steps into the shoes of its indemnitee‘ and thus can be collaterally estopped); Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 167 (Tex. Civ. App. -- Austin 1975, writ ref'd n.r.e.) (noting that insurance company can assert defenses, appoint counsel, and manage defense for indemnity). But see Cluett v. Medical Protective Co., 829 S.W.2d 822, 826 (Tex. App. -- Dallas 1992, writ denied) (finding that when insurer tendered qualified defense under reservation of rights and insured rejected it, entered into agreed judgment, and assigned policy rights to claimant, insurer was not collaterally estopped to challenge findings in underlying suit that purported to determine issues affecting coverage under insurance policy); supra note 283 (discussing Cluett insurer's tender of qualified defense).

[FN288]. Britt v. Cambridge Mut. Fire Ins. Co., 717 S.W.2d 476, 481 (Tex. App. -- San Antonio 1986, writ ref'd n.r.e.).

[FN289]. See State Farm, 858 S.W.2d at 376 (explaining that parties entered agreed judgment stipulating that plaintiff would not execute the judgment against defendant in exchange for one-third of defendant's interest in his claims against his insurance company for bad faith, deceptive trade practice, and Insurance Code violations).
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