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COMMENT

From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters

"Lord, don't let me die in this place. Don't take me away from my children."

—Mary Bryant, Hamlet survivor

"Tragedies happen. The whole package looked knee-jerk in a way. Just to use this tragedy to unbalance the employer-employee contractual relationship—that was going too far."

—Representative John Kerr III of Goldsboro

"There's no question that we need to build additional financial incentives for employers to have safe workplaces."

—Chris Scott, president of the state AFL-CIO

"Who knows exactly what substantial certainty means?"

—Charlotte lawyer Seth Bernanke

On September 3, 1991, a fire at the Imperial Foods Products plant in Hamlet, North Carolina, killed twenty-five workers, injured forty-nine others, and caused millions of dollars in damage to the plant facilities.¹ The fire was caused when a hydraulic fuel line ruptured near the plant's deep-fat fryer.² A flame used to heat the fryer ignited the fuel, starting the blaze and filling the plant with heavy black smoke. Most of the deaths and injuries were caused by smoke inhalation.³ It had been eleven years since state safety and health officials had inspected the plant.⁴ Investigations after the fire revealed that the plant lacked fixed fire suppression systems, such as automatic sprinklers, a fire evacuation program and that most of the fire exits were blocked or locked from the outside, trapping the workers inside the burning building.⁵ The North Carolina De-

1. *Exits blocked, 25 die as blaze sweeps plant*, CHI. TRIB., Sept. 4, 1991, at 1.

2. 21 O.S.H. Rep. (BNA) No. 14, at 387 (Sept. 4, 1991).

3. 21 O.S.H. Rep. (BNA) No. 30, at 1083 (Jan. 1, 1992).

4. 21 O.S.H. Rep. (BNA) No. 40, at 1361 (Mar. 11, 1992); *see also* 22 O.S.H. Rep. (BNA) No. 6, at 191 (finding that North Carolina's job safety and health agency failed to inspect a hazardous waste incinerator for ten years).

5. 21 O.S.H. Rep. (BNA) No. 40, at 1361 (Mar. 11, 1992). A report by the city of Hamlet Fire Department said that "the ignition scenario of this fire led to the rapid spread of products of combustion throughout most of the building that immediately threatened the majority of its occupants." *Id.*

partment of Labor levied a civil fine of \$808,150, the largest penalty assessed in North Carolina, against Imperial Food Products based on eighty-three citations, including fifty-four charges of willful violations.⁶ This tragedy placed renewed scrutiny on North Carolina's workplace safety programs, the liability of employers, and the safety of workers in an industrial environment that is becoming increasingly complex and dangerous.

The U.S. Department of Labor ordered a complete re-evaluation of North Carolina's safety and health programs and all safety and health plans administered by individual states.⁷ The completed report indicated that all state run programs had deficiencies, and that North Carolina's workplace safety program had the most deficiencies.⁸ Eight days after the Hamlet fire, the AFL-CIO petitioned the U.S. Labor Department to withdraw approval of North Carolina's state program.⁹ On October 24, 1991, the federal Occupational Safety and Health Administration (OSHA) formally announced that it was unilaterally assuming limited concurrent jurisdiction over North Carolina's workplace safety program.¹⁰ OSHA suspended plans to assume complete control over the

6. 21 O.S.H. Rep. (BNA) No. 30, at 1083 (Jan. 1, 1992). Emmett J. Roe, owner of Imperial Food Products Incorporated, Brad M. Roe, his son and director of plant operations and James Hair, the plant manager were indicted on twenty-five counts of involuntary manslaughter for "willfully and feloniously" causing the deaths of the workers trapped inside of the plant. Emmett Roe pled guilty and received ten years on one count and nine years and eleven months on another. Twenty-three other counts were consolidated, and Roe received a thirty year suspended sentence. The sentence was the longest given a United States criminal case for job related deaths. A twenty-five year sentence imposed in *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. Ct. 1990) (see note 222) was overturned on appeal. The charges against Brad Roe and James Hair were dropped. 22 O.S.H. Rep. (BNA) No. 16, at 561-62 (Sept. 16, 1992). This indictment represents only the second time that a North Carolina employer has been charged with a criminal offense for a workplace death. Coincidentally, the previous case involved the 1985 trenching death of a worker. The employer pleaded no contest to one charge of involuntary manslaughter and was given a three-year suspended sentence. 21 O.S.H. Rep. (BNA) No. 40, at 1361 (Mar. 11, 1992). One hundred and two plaintiffs in the Hamlet litigation, represented by thirty-four law firms, have agreed to a sixteen point one million dollar settlement. The recoveries ranged from one million dollars to eight hundred and seventy-five dollars. Jay Reeves, *Hamlet: The Story Behind the Settlement*, N.C. LAW. WKLY., Jan. 18, 1993, at 1.

7. 21 O.S.H. Rep. (BNA) No. 22, at 616 (Oct. 30, 1991) North Carolina is one of twenty-three states and U.S. territories that run its own job safety and health programs. The other states and territories that administer their own safety plans and which were examined by the Occupational Safety and Health Administration (OSHA) are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming, Puerto Rico and the U.S. Virgin Islands. 21 O.S.H. Rep. (BNA) No. 35, at 1207 (Feb. 5, 1992).

8. 21 O.S.H. Rep. (BNA) No. 35, at 1207 (Feb. 5, 1992). OSHA identified seven problem areas in the program: adopting standards; staffing; discrimination investigations; classification of violations; reports and information; financial management; and compliance procedures and management. 21 O.S.H. Rep. (BNA) No. 47, at 1553 (Apr. 29, 1992).

9. 21 O.S.H. Rep. (BNA) No. 16, at 428 (Sept. 18, 1991).

10. 21 O.S.H. Rep. (BNA) No. 22, at 615 (Oct. 30, 1991); 29 C.F.R. § 1952 (1991). The take over marked the first time that the Labor Department acted unilaterally to assume control over the existing programs of a state run plan. Federal OSHA assumed authority for Iowa's and Virginia's

program on the grounds that the proposals made by the North Carolina Labor Department demonstrated that satisfactory commitments had been made toward improving safety programs.¹¹ The proposals made by the North Carolina Labor Department were brought quickly to the General Assembly which enacted seven workplace safety bills.¹²

On August 14, 1991, with prophetic anticipation of the September 3 fire at Hamlet and the civil claims of Imperial Food Products employees, the Supreme Court of North Carolina addressed the issue of worker safety and employer liability in the case of *Woodson v. Rowland*.¹³ The Supreme Court of North Carolina held that an employee sustaining injuries in the course of and arising out of employment by conduct that the employer knew was substantially certain to cause injury is entitled to pursue both a civil remedy against the employer and a workers' compensation claim.¹⁴ This comment concerns the development of tort liability outside of workers' compensation laws in spite of the exclusive remedy doctrine and will assist attorneys by 1) summarizing North Carolina

programs but that was part of an agreement between state and federal officials. 21 O.S.H. Rep. (BNA) No. 21, at 571 (Oct. 23, 1991).

11. 22 O.S.H. Rep. (BNA) No. 4, at 139 (June 24, 1992); 22 O.S.H. Rep. (BNA) No. 8, at 243-44 (July 22, 1992).

12. The legislature enacted: House Bill [hereinafter H] 1386 which provided that state and local government agencies could be fined by the State OSHA (N.C. GEN. STAT. § 95-148 (1991)); H 1388, which required employers with experience rate modifiers of 1.5 or more to set up safety and health programs to reduce or eliminate hazards and to prevent employee injuries and illnesses. The experience rate modifier is the rating by which the insurance industry determines workers' compensation premiums. H 1388 also required employers with 11 or more employees and experience rate modifiers of 1.5 or more to establish safety and health committees with both employee and employer representatives (N.C. GEN. STAT. §§ 95-250 and 251 (1991)); H 1389 which required a state construction site safety study, the designation of safety officers and representation by minorities and women on the state building commission (N.C. GEN. STAT. § 143-135.26 (1991)); H 1390 which required each state agency to establish a written safety program for its workplaces (N.C. GEN. STAT. §§ 143-580 to -583 (1991)); H 1391 required that the Labor Department begin a special emphasis inspection program for employers with a high frequency of violations or high risk workplaces (N.C. GEN. STAT. § 95-136.1 (1991)); H 1392 requiring that state law meet federal standards by requiring employers to report annually on fatalities and serious injuries. (N.C. GEN. STAT. §§ 95-143, 97-81, 58-36-16 and 58-2-230 (1991)); H 1394 which protects whistle blowers from retaliatory discrimination by providing employees who have been discriminated against (discharged, suspended, demoted) with the right to file a civil action and collect treble damages when the employer acts was willfully. (N.C. GEN. STAT. §§ 95-240 to -244, 95-130, 95-25.20, 74-24.15 and 126-86 (1991)). Proposed but not enacted were the following: H 952 intended An act to establish a commission to study the effect of the exclusion of agriculture from workers' compensation coverage was postponed indefinitely (H.R. 952, 140th Leg., 1991 Session); H 1384 which would have appropriated over four million dollars for the employment of eighty safety and health inspectors was postponed indefinitely (H.R. 1384, 140th Leg., 1991 Session); H 1385 which would have created a special safety and health fund generated by a tax on insurance premiums for use by state agencies with their safety and health responsibilities was postponed indefinitely (H.R. 1385, 140th Leg., 1991 Session); H 1387, entitled "An act to repeal the statute of repose for the collection of death benefits under the Workers' Compensation Act and to allow an action against an employer for removal of machinery guards that results in injury to the employee," was referred to the committee on courts (H.R. 1387, 140th Leg., 1991 Session).

13. 407 S.E.2d 222 (N.C. 1991).

14. *Id.* at 226.

workers' compensation law; 2) providing a detailed analysis of the exclusive remedy doctrine, culminating in the *Woodson* decision and its recent progeny; and 3) defining substantial certainty in the context of workers' compensation law so that practitioners can recognize a *Woodson* claim and properly plead it. This comment will assist legislators, who may be called on to codify *Woodson*, by providing a survey of the law in jurisdictions which have legislatively addressed intentional employer misconduct. Although this comment offers a critical analysis of the *Woodson* opinion, this author supports the holding because it provides greater incentives for workplace safety. To accomplish this goal, this writer suggests that the North Carolina General Assembly should make employers liable in tort for their reckless conduct.

I. HISTORY

By the late nineteenth century and early twentieth century, the basis for the economy of the United States had moved from agriculture to industrial production with a concomitant increase in injuries to workers who were working in factories, mills, and mines.¹⁵ Most negligence actions filed by injured workers against their employers were unsuccessful because the employers had available to them the traditional common law defenses of the fellow servant rule, assumption of the risk, and contributory negligence.¹⁶ According to the doctrine of *respondeat superior*, employers are liable for the torts committed by their employees who are acting within the scope of their employment.¹⁷ This theory provided a basis of liability for the injured worker, but the "unholy trinity" of the fellow servant rule, assumption of the risk, and contributory negligence made recovery by the worker difficult if not impossible.¹⁸ The fellow servant rule foreclosed the imposition of liability on an employer for injuries caused to an employee by a co-employee.¹⁹ The defense of assumption of the risk barred from recovery injured employees who voluntarily continued to work with knowledge of a danger relating to their job.²⁰ The defense of contributory negligence barred a plaintiff from recovery if

15. *E.g.*, DONALD T. DECARLO & MARTIN MINKOWITZ, *WORKERS COMPENSATION INSURANCE AND LAW PRACTICE: THE NEXT GENERATION* 1-6 (1989).

16. *Id.* at 1-2.

17. *Snow v. DeButts*, 193 S.E. 224, 226 (N.C. 1937). This doctrine had its origin in *Jones v. Hart* [Nisi prius 1698] K.B. 642, 2 Salk. 441. 1 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 4.20, at 24-25 (1992).

18. SAMUEL B. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 2 (1944).

19. 1 LARSON, *supra* note 17, § 4.30, at 25. The origin of this exception can be traced to *Priestly v. Fowler*, [1837] 3 M. & W. 1, 150 Reprint 1030. *Id.*

20. *See generally* 56 C.J.S. *Master and Servant* §§ 357, 358 (1948).

his own negligence was a legal cause of the injuries.²¹ These defenses not only presented the injured employee with sizable legal obstructions, but the employee inevitably engendered the employer's ill will, making settlement and future employment unlikely.²² Moreover, the injured worker was forced to bear the losses during the lengthy pendency of the civil suit. As a result, many injured and disabled employees remained without an adequate remedy and became wards of the state.²³

Germany responded to this problem by adopting the first modern compensation system in 1884.²⁴ The German plan was divided into three parts: 1) the Sickness Fund, with workers contributing two-thirds and employers one-third; 2) the Accident Fund, with contributions by employers only; and 3) Disability Insurance, with workers and employers contributing one-half each.²⁵ In 1909, the New York legislature appointed a commission to study the law of employer liability in industrial accidents.²⁶ In 1910, the legislature enacted a workers' compensation statute without employee contributions, that imposed liability on employers for workplace injuries regardless of fault.²⁷ The statute applied only to hazardous employments, but was intended to be amended to include other industries in later years.²⁸ The coverage of the statute was not expanded because the New York Court of Appeals held that no fault liability was "unknown to the common law and . . . plainly constitute[d] a deprivation of liberty and property under the federal and state Constitutions unless its imposition [could] be justified under the police power."²⁹ The court found that because the law did not "preserve public health, morals, safety, or welfare of the employees," the police power of the state could not justify the law.³⁰

Just one day after the court's decision, a disastrous factory fire killed

21. CHARLES E. DAYE & MARK W. MORRIS, *NORTH CAROLINA LAW OF TORTS* § 19.21.1 (1991).

22. See HOROVITZ, *supra* note 18, at 1-4.

23. DECARLO & MINKOWITZ, *supra* note 15, at 2.

24. 1 LARSON, *supra* note 17, § 5.10, at 33. Professor Larson traces the origin of workers' compensation to the laws of Henry I, circa 1100, based on the following passage:

And in some cases a man cannot legitimately swear that another was not, through himself, further from life and nearer to death; among which cases are these: If anyone, on the mission of another, is the cause of death in the course of the errand; if anyone sends for someone, and the latter is killed in coming; if anyone meets death having been called by another.

Id. § 4.10, at 23.

25. *Id.* § 5.10, at 35.

26. *Id.* § 5.20, at 37.

27. *Id.* § 5.20, at 38. The New York commission studied the German program but did not recommend employee contributions for fear that it would be unconstitutional. *Id.* § 5.10, at 36.

28. DECARLO & MINKOWITZ, *supra* note 15, at 2-3.

29. *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431, 439 (N.Y. 1911).

30. *Id.* at 444.

one hundred and forty-five workers.³¹ A new workers' compensation statute followed in 1913 and in *Jensen v. Southern Pacific Co.*,³² the court found that the public welfare was preserved by a "compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity."³³ At the federal level, the constitutionality of mandatory, no-fault based workers' compensation was upheld two years later.³⁴

The North Carolina Workers' Compensation Act was enacted on May 1, 1929.³⁵ The social policy that supports all workers' compensation laws, including the North Carolina Workers' Compensation Act, is that injured workers, or their families in the case of death, should be provided with swift and certain compensation.³⁶ Workers were assured such a result by no longer having to prove that the employer was negligent. The defenses of the fellow servant rule, assumption of the risk and contributory negligence were effectively eliminated. In exchange for the loss of common law defenses, employers received limited and determinate liability.³⁷ Liability under workers' compensation laws was based upon the occurrence of an accident arising out of and in the course of employment.³⁸ Tort liability was replaced with no-fault liability.³⁹ Since the employer no longer had available the common law defenses to a negligence claim and faced liability irrespective of fault, the employee was forced to give up his right to pursue a common law action, thus shielding the employer from unlimited and unpredictable liability.⁴⁰ Consequently, employees surrendered their right to recover for pain and suffering⁴¹ and to a trial by jury.⁴² These trade-offs are the essence of the statutory compromise, the *quid pro quo*, which grounds workers' compensation law. The primary purpose of the North Carolina Workers'

31. DECARLO & MINKOWITZ, *supra* note 15, at 3. Most of the 145 people who died jumped to their deaths. The employer paid each of the families that sued him seventy-five dollars. *Id.* at 3-4.

32. 109 N.E. 600 (N.Y. App. Div. 1915).

33. *Id.* at 603.

34. New York Central R.R. v. White, 243 U.S. 188 (1917).

35. The North Carolina Workmen's Compensation Act, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-101 (1991)).

36. *Cabe v. Parker Graham Sexton, Inc.*, 162 S.E. 223, 229 (N.C. 1932).

37. DECARLO & MINKOWITZ, *supra* note 15, at 5. Some defenses were still preserved. An injured worker is not entitled to receive workers' compensation benefits if the injury or death to the employee was proximately caused by his intoxication or his willful intent to injure himself or another. N.C. GEN. STAT. § 97-12 (1991).

38. N.C. GEN. STAT. § 97-2(6) (1991); *Conrad v. Cook Lewis Foundry Co.*, 153 S.E. 266 (N.C. 1930).

39. *Andrews v. Peters*, 284 S.E.2d 748, 749 (N.C. Ct. App. 1981), *aff'd*, 347 S.E.2d 409 (N.C. 1986).

40. The North Carolina Workmen's Compensation Act, ch. 120, secs. 10, 11, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-9 and -10.1 (1991)).

41. *Jackson v. Fayetteville Area Sys. of Transp.*, 337 S.E.2d 110 (N.C. Ct. App. 1985).

42. *Heavner v. Town of Lincolnton*, 162 S.E. 909 (N.C. 1932).

Compensation Act was "to compel industry to take care of its own wreckage"⁴³ so that "[t]he cost of an industrial accident [could] be treated as a cost of production [eventually passed on to the consumer], just as the wear and tear of the machinery has always been treated as a cost."⁴⁴ The North Carolina Supreme Court held that the Workmen's Compensation Act was "enacted by the General Assembly in the exercise of its police power, and . . . constitutional and valid in all respects."⁴⁵

II. THE NORTH CAROLINA WORKERS' COMPENSATION ACT

The Industrial Commission, an agency of the Department of Commerce comprised of three commissioners who are appointed by the Governor,⁴⁶ has exclusive jurisdiction over the rights and remedies provided by the Act.⁴⁷ Jurisdiction is based on the finding of an employer-employee relationship at the time of the injury⁴⁸ and a finding that the employer regularly employed three or more employees.⁴⁹

In order to recover compensation under the Act, an injured employee must prove that (s)he suffered an injury by accident arising out of and in the course of employment.⁵⁰ An accident is "an unlooked for and untoward event" and "[a] result produced by a fortuitous cause."⁵¹ An accident results from the interruption of the employee's work routine by unusual conditions likely to cause unexpected consequences.⁵² An injury, no matter how great, occurring under normal working conditions and involving the employee's regular duties is not an accident.⁵³ The

43. Barber v. Minges, 25 S.E.2d 837, 839 (1943).

44. LEONARD T. JERNIGAN, JR., NORTH CAROLINA WORKERS' COMPENSATION-LAW AND PRACTICE § 1-2 (1988).

45. Lee v. American Enka Corp., 193 S.E. 809, 812 (N.C. 1937).

46. N.C. GEN. STAT. § 97-77 (1991).

47. Hedgepeth v. Lumberman's Mut. Cas. Co., 182 S.E. 704 (N.C. 1935).

48. Askew v. Leonard Tire Co., 141 S.E.2d 280 (N.C. 1965).

49. N.C. GEN. STAT. § 97(2)-1 (1991).

50. N.C. GEN. STAT. § 97-2(6) (1991).

51. Edwards v. Piedmont Publishing Co., 41 S.E.2d 592, 593 (N.C. 1947).

52. Davis v. Raleigh Rental Center, 292 S.E.2d 763 (N.C. Ct. App. 1982).

53. Searsey v. Perry M. Alexander Construction Co., 239 S.E.2d 847 (N.C. Ct. App. 1978), *rev. denied*, 244 S.E.2d 154 (1978) (The plaintiff suffered injury in an accident while he used an air hammer because, although he regularly used the air hammer, he was injured while using it for an unfamiliar purpose). In *Davis*, the plaintiff, a mechanic whose duties included helping customers load rented equipment, did not suffer an injury by accident when he injured his back carrying a saw rented by a customer. *Davis*, 292 S.E.2d at 766.

Back injury claims were typically unsuccessful because of plaintiffs' inability to establish injury by accident until § 97-2(6) was amended in 1983 to address claims for back injuries. JERNIGAN, *supra* note 44, at § 5-2. The statute provides:

where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. GEN. STAT. § 97-2(6) (1991).

definition of accident was extended to include a disablement or death resulting from an occupational disease.⁵⁴ An injury by accident arises from a definite event, whereas an occupational disease develops gradually over a period of time.⁵⁵ There are twenty-eight types of occupational diseases, from anthrax to asbestosis, that are covered by the Act.⁵⁶

The phrase "arising out of employment" refers to the cause or origin of the accident.⁵⁷ In order to satisfy the "arising out of employment" requirement, there must be a causal connection between the employment and the injury and so long as the injury had its origin in the employment, there is no requirement that the injury ought to have been foreseen.⁵⁸ Any reasonable relationship between the employment and the injury is sufficient to find that the injury arose out of the employment.⁵⁹ Whether an injury "arises out of the employment" is determined by an examination of the facts and circumstances surrounding each case.⁶⁰

The phrase "in the course of employment" refers to the time, place, and circumstances under which the accident occurred.⁶¹ The time of employment includes working hours as well as the time reasonably necessary to go to and from the workplace, and the place of employment includes the workplace of the employer.⁶² For example, injuries suffered while commuting to and from work or during lunch hours are generally not covered by the Act.⁶³ The dual requirement that an injury "arise out of" and "in the course of" employment does not involve two independent tests; they are both part of a single test used to determine whether the injury is connected with the employment.⁶⁴ Consequently, courts have allowed a deficiency in one factor to be made up by the strength of the

54. N.C. GEN. STAT. §§ 97-52 and 97-53 (1991); *Henry v. A.C. Lawrence Leather Co.*, 66 S.E.2d 693 (N.C. 1951).

55. *Henry*, 66 S.E.2d at 696.

56. N.C. GEN. STAT. § 97-53 (1991).

57. *Conrad v. Cook-Lewis Foundry Co.*, 153 S.E. 266, 269 (1930).

58. *Id.*

59. *Allred v. Allred-Gardner, Inc.*, 117 S.E.2d 476, 479 (N.C. 1960). In *Gallimore v. Marilyn's Shoes*, 228 S.E.2d 39 (N.C. Ct. App. 1976), *rev'd on other grounds*, 233 S.E.2d 529 (N.C. 1977), the court found that the murder of the plaintiff's daughter, occurring after she signed out from work but while making a deposit for her employer, arose out of and in the course of her employment. In *Robbins v. Nicholson*, 188 S.E.2d 350 (N.C. 1972), the court held that the murder of the plaintiff's husband did not arise out of the employment because, although the murder occurred while the plaintiff's husband was working and was motivated by the assailant's jealousy of his wife's working relationship with the plaintiff's husband, the motive which inspired the murder was unrelated to the employment.

60. *Gallimore*, 228 S.E.2d at 41.

61. *Conrad*, 153 S.E. at 269.

62. *Gallimore*, 228 S.E.2d at 42.

63. JERNIGAN, *supra* note 44, at §§ 6-3, 6-5.

64. *Lee v. F.M. Henderson & Assocs.*, 200 S.E.2d 32, 36 (N.C. 1973). The aggravation of an injury arising out of and in the course of employment, unless the result of an independent intervening cause attributable to the claimant's intentional conduct, is compensable under the Act. *Starr v. Charlotte Paper Co.*, 175 S.E.2d 342 (N.C. Ct. App. 1970).

other.⁶⁵

In exchange for no longer having to prove negligence and a guarantee of swift and certain compensation, employees relinquished their right to pursue a common law action against their employer.⁶⁶ This concession by the employee is embodied in the exclusivity provisions which are enunciated in sections 97-9 and 97-10.1 of the North Carolina General Statutes. Section 97-9 provides:

Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employee in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall *only* be liable to any employee for personal injury or death by accident to the extent and manner herein specified.⁶⁷

Section 97-10.1 provides:

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.⁶⁸

The remedies provided under the Act are the only remedies available to an injured worker or his dependents so long as the injury meets the requirements of the Act.⁶⁹ The Act does not take away the right of employees to bring a civil action against the employer if the injury is disconnected with the employment and the employee is injured not as an employee but as a member of the public.⁷⁰

A distinction must be drawn between an injury which does not come within the provisions of the Act, and an injury which is covered but not compensable under the Act.⁷¹ In order for an injured worker to be compensated under the Act, (s)he must prove that the injury resulted in a disability.⁷² Disability is defined as "incapacity because of injury to earn

65. *E.g.*, *Hoyle v. Isenhour Brick and Tile Co.*, 293 S.E.2d 196, 199 (N.C. 1982).

66. For a discussion of the historical development of workers' compensation law, see *supra* notes 15-45 and accompanying text.

67. N.C. GEN. STAT. § 97-9 (1991) (emphasis added).

68. N.C. GEN. STAT. § 97-10.1 (1991).

69. For a complete discussion of the requirements for compensation under the Act, see *generally* JERNIGAN, *supra* note 44.

70. *Bryant v. Dougherty*, 148 S.E.2d 548 (N.C. 1966) (The plaintiff was permitted to pursue a common law action against the defendant doctor who was found to be an independent contractor because, although the plaintiff was injured on the job and was referred to him by her employer, he was not employed by the plaintiff's employer full time.) See also N.C. GEN. STAT. § 97-26 (1991) (providing that the malpractice of a physician furnished by the employer is deemed part of the injury resulting from the accident). See *infra* note 192 for explanation of the dual capacity doctrine.

71. 2A LARSON, *supra* note 17, § 65.40, at 12-41.

72. N.C. GEN. STAT. § 97-2(9) (1991); *Hollman v. City of Raleigh*, 159 S.E.2d 874 (N.C. 1968).

the wages which the employee was receiving at the time of injury in the same or any other employment."⁷³ Some injuries, although within the Act, are not compensable because disability is defined in terms of the ability to earn wages and not by mere physical infirmity. For example, the loss of the sense of taste or smell as a result of a work-related injury is not compensable under the Act because such an injury does not result in the inability to earn the same wages the employee was previously earning.⁷⁴ Moreover, the Act remains the exclusive remedy, although it provides no compensation for this element of damages.

III. THE EXCLUSIVE REMEDY DOCTRINE

A. Background

The exclusive remedy doctrine protects "every employer . . . and . . . those conducting his business"⁷⁵ from common law liability so long as the injury was caused by an accident arising out of and in the course of the worker's employment.⁷⁶ The phrase "those conducting his business" includes fellow employees acting within the course of employment.⁷⁷ Co-employees are therefore also excluded from common law liability for negligence.⁷⁸ By extending the employer's immunity to co-employees, North Carolina has accepted the premise that by merely working, an employee increases the risk of negligently injuring himself and his co-employees and has made a policy decision that such injuries should be treated as a cost of production.⁷⁹ The Industrial Commission, therefore, has exclusive jurisdiction over all accidental injuries arising out of employment. The exclusivity provision is not absolute but "must be construed within the framework of the Act and as qualified by its subject and purposes."⁸⁰

The remainder of this comment is devoted to an examination of the exception to the exclusive remedy doctrine for intentional torts. Since the nature of intent plays such a crucial role in the development of this exception, a brief study of the definition of intent is in order. *The Re-*

73. N.C. GEN. STAT. § 97-2(9) (1991).

74. *Arrington v. Stone & Webster Eng'g Corp.*, 140 S.E.2d 759 (1965); *See also Grice v. Suwanee Lumber Mfg. Co.*, 113 So. 2d 742 (Fla. Dist. Ct. App. 1959) (workers' compensation provides no benefits for loss of testicle, and the exclusivity provisions bar a common law action).

75. N.C. GEN. STAT. § 97-9 (1991).

76. N.C. GEN. STAT. §§ 97-9 and 97-10.1 (1991); *Brown v. Motor Inns of Carolina, Inc.*, 266 S.E.2d 848 (N.C. Ct. App. 1980).

77. *Altman v. Sanders*, 148 S.E.2d 21, 24 (N.C. 1966).

78. *Smith v. Liberty Mut. Ins. Co.*, 409 F. Supp. 1211, 1215 (M.D.N.C. 1976), *aff'd*, 598 F.2d 616 (4th Cir. 1979); *Strickland v. King*, 239 S.E.2d 243, 244 (N.C. 1977).

79. *Andrews v. Peters*, 284 S.E.2d 748 (N.C. Ct. App. 1981), *aff'd*, 347 S.E.2d 409 (N.C. 1986).

80. *Barber v. Minges*, 25 S.E.2d 837 (N.C. 1943). An employee may bring a civil action against an employer for failure to provide workers' compensation coverage (N.C. GEN. STAT. §§ 97-95 and 97-94(b) (1991)) and for retaliatory discharge (N.C. GEN. STAT. § 97-6.1 (1991)).

statement of Torts states that intent "denote[s] that the actor desires to cause the consequences of his act or that he believes that the consequences are substantially certain to follow from it."⁸¹ An actor acts intentionally when he acts for the purpose of causing the consequences of his/her act or when he knows that the consequences are certain or substantially certain to result from his act.⁸² An actor who hits another with a left jab acts for the purpose (with the specific intent) of causing contact whereas an actor who pulls a chair out from under another who is about to sit down acts with knowledge that contact is substantially certain to occur.⁸³ Most courts, including North Carolina courts, have applied the intentional tort exception consistently with the *Restatement* definition in cases involving misconduct where the employer desires to bring about the consequences of his act, as in the cases of assault and battery. In cases involving misconduct that fails to establish an act done for the purpose of causing injury, the courts have deviated from the *Restatement* definition of intent and blurred the distinction between reckless conduct and intentional conduct.

B. *Intentional Misconduct*

1. Co-Employees

In *Andrews v. Peters*,⁸⁴ the court of appeals addressed the issue of whether the Act was the exclusive remedy for an employee who was intentionally injured by a co-employee. The plaintiff in this case brought an assault and battery action against the defendant, a co-employee, for injuries which resulted when the defendant walked behind the plaintiff and placed his right knee behind her knee. The court held that a worker, injured by the assaultive conduct of a co-employee, is not precluded from bringing an intentional tort action against a fellow worker.⁸⁵ The court stated that "an intentional tort is not the type of 'industrial accident' to which our legislature intended to give a co-employee immunity."⁸⁶ The court refused to employ the exclusivity provisions of the Act to shield a co-employee from liability for assaultive conduct.⁸⁷ The court next ad-

81. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

82. *Id.* at cmt. b.

83. *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955); see *infra* notes 185-187 and accompanying text.

84. 284 S.E.2d 748 (N.C. Ct. App. 1981).

85. *Id.* at 750.

86. *Id.*

87. *Id.* at 751. An employee who deliberately injured a co-worker received coverage from his homeowners insurance policy. *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 412 S.E.2d 318 (N.C. 1992). The defendant pushed a fellow employee who fell and broke her arm. The defendant deliberately pushed her but testified that he did not mean for her to fall. For the exclusionary provision of the defendant's insurance policy for expected or intended injuries to apply, the defendant must have intended the resulting injury. Since the plaintiff's only evidence was the intentional

dressed the issue of whether the injured worker was otherwise barred from a common law action because the worker already had recovered benefits from the employer under the Act.⁸⁸ On the issue of election of remedies, the court held that "in cases of intentional misconduct by a co-employee, the injured worker is free to pursue both his common law and compensation remedies."⁸⁹ The court acknowledged that in cases involving assaults by employers, the employee was required to elect between suing his employer at common law and accepting compensation under the Act⁹⁰ but found the rationale for election under these circumstances inapplicable to assaults committed by co-employees. In the case of intentional employer misconduct, without the requirement of election of remedies, an employer would suffer the expense of defending the same claim in two different forums.⁹¹ A co-employee, however, neither defends against a workers' compensation claim nor contributes to the satisfaction of such a claim. Barring a common law action would insulate the co-employee from the consequences of his behavior.⁹² The court believed that its holding would promote safer workplaces by providing financial incentives for employees to work dutifully.⁹³

2. Employers

Assaults committed by an employer are treated in the same manner as assaults committed by co-employees. The Act does not provide the exclusive remedy for injuries caused by the deliberate assault of an employer.⁹⁴ The rationale supporting this exception is that "the employer will not be heard to allege that the injury was 'accidental' and therefore was under the exclusive provisions of the Workmen's Compensation Act, when he himself intentionally committed the act."⁹⁵ Moreover, "[i]t would be against sound reasoning to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's com-

nature of the act, the exclusionary provision did not apply. In addition, the court held that the intentional act of the defendant was an occurrence or accident under the terms of the policy. *Stox*, 412 S.E.2d at 322.

88. It seems unlikely that an employer will be liable under the Act for the assault of an employee given the affirmative defenses provided by N.C. GEN. STAT. § 97-12(3) (1991); see *supra* note 37.

89. *Andrews*, 284 S.E.2d at 751.

90. *Id.*

91. *Id.* (citing *Warner v. Leder*, 69 S.E.2d 6 (N.C. 1951), *overruled by*, *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991) and *Essick v. City of Lexington*, 60 S.E.2d 106 (N.C. 1950)).

92. *Id.*

93. *Id.* at 750, 752.

94. *Essick v. Lexington*, 60 S.E.2d 106 (N.C. 1950); *Daniels v. Swofford*, 286 S.E.2d 582 (N.C. Ct. App. 1982).

95. 2A LARSON, *supra* note 17, § 68.11 at 13-4.

pensation benefits.”⁹⁶ *Daniels v. Swofford*⁹⁷ presented the question of how corporate entities and their employees are to be treated when one of their employees commits a battery. The defendant in this case, the corporate president, kicked the plaintiff behind the knee during the course of her employment, causing her to suffer personal injuries. The plaintiff filed a civil action against the defendant and the corporation, alleging intentional, unlawful, wanton, and malicious conduct. The court of appeals held that unless the corporate employer acted for the purpose of causing the injury, the Act provided the exclusive remedy.⁹⁸ The acts of a co-employee, even a supervisor, will not be imputed to the corporate employer unless the assailant is the alter ego of the corporation.⁹⁹ An employee will be found to be acting as the alter ego of the corporate employer only if the employer commanded or expressly authorized the assault.¹⁰⁰ In this case, although the defendant was the president of the corporation, the plaintiff’s claim against the corporation was barred by the exclusive remedy provision because the plaintiff failed to allege that the defendant was acting as an alter ego of the corporation. Simply alleging that the defendant was an agent of the corporation, acting within the course, scope, and authority of his employment as a supervisory employee, is not sufficient to impute the malice of the assaultive co-employee to the corporation. As to the liability of the defendant for his assaultive conduct, the court treated the defendant as a co-employee, applied the rule from *Andrews v. Peters* and held that the plaintiff could pursue her common law action against the defendant.¹⁰¹

C. Aggravated Misconduct

1. Co-Employees

The Supreme Court of North Carolina addressed the issue of co-employee liability for willful, wanton, and reckless negligence in *Pleasant v.*

96. HOROVITZ, *supra* note 18, at 336. Under the Act, an injured worker is entitled to compensation for lost earnings (N.C. GEN. STAT. §§ 97-31 (1991)), medical care and treatment (N.C. GEN. STAT. §§ 97-25 and 26 (1991)), disfigurement (N.C. GEN. STAT. § 97-31(21) (1991)), attorney’s fees (N.C. GEN. STAT. § 97-88 (1991)) and in the case of death, death benefits and burial expenses (N.C. GEN. STAT. § 97-38 (1991)), but there is no provision in the Act allowing compensation for physical pain or mental distress. (*Jackson v. Fayetteville Area Sys. of Transp.*, 337 S.E.2d 110 (N.C. Ct. App. 1985)). See generally JERNIGAN, *supra* note 44, at §§ 12-15 (discussing the extent of workers’ compensation benefits).

97. 286 S.E.2d 582 (1982).

98. *Id.* at 585. The Act does not provide the exclusive remedy for claims of intentional infliction of emotional distress inflicted by an employer through its agents and employees. *Hogan v. Forsyth Country Club*, 340 S.E.2d 116 (N.C. Ct. App. 1986), *rev. denied*, 346 S.E.2d 141 (N.C. 1986) (Since the employee’s allegation was based on acts of sexual harassment which resulted in non-physical injuries, the plaintiffs’ tort action was not barred by the exclusivity provisions of the Act).

99. *Id.*

100. 2A LARSON, *supra* note 17, § 68-21, at 13-74.

101. *Daniels*, 286 S.E.2d at 586.

Johnson.¹⁰² Equally as important as the holding is the court's discussion of the relationship between aggravated misconduct and intentional misconduct. In *Pleasant v. Johnson*, the plaintiff was injured when the defendant, a co-worker, attempted, as a joke, to drive a truck as close to the plaintiff as he could without striking him. The defendant's joke failed when the truck hit and injured the plaintiff's knee. The plaintiff filed a civil action alleging that his injury was the result of the willful, reckless, and wanton negligence of the defendant.¹⁰³ The court held that such allegations were sufficient to allege an intentional tort, enabling the plaintiff to overcome the exclusivity provisions.¹⁰⁴

The court defined wanton conduct as "an act manifesting a reckless disregard for the rights and safety of others"¹⁰⁵ and willful negligence as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed."¹⁰⁶ The court attempted to refine the definition of "willful negligence" by distinguishing between a willful breach of duty and the resulting injury. According to the court, when willfulness refers to a breach of duty, the injury is negligently caused but when the willfulness refers to the injury, the injury is intentionally caused.¹⁰⁷ If the injury is willful, then the intent to injure need not be actual, and constructive intent may provide the necessary mental state for an intentional tort.¹⁰⁸ The court stated that "constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified."¹⁰⁹ By using the theory of constructive intent, the court was able to manipulate the definition of intent to include willful, wanton, and reckless negligence, and avoid the

102. 325 S.E.2d 244 (N.C. 1985) (Meyer, J., dissenting).

103. *Id.* at 247.

104. *Id.* at 249.

105. *Id.* at 248. The Restatement (Second) of Torts provides the following definition of reckless: 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.

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

106. *Pleasant*, 325 S.E.2d at 248. The intentional breach of a statutory duty does not of itself establish recklessness. In order that the breach of a statute constitute recklessness, not only must the statute be intentionally violated, but the precautions required by the statute must be such that their omission will be acknowledged as involving a high degree of probability that serious harm will result.

RESTATEMENT (SECOND) OF TORTS § 500 cmt. e (1965).

107. *Pleasant*, 325 S.E.2d at 248.

108. *Id.* This statement appears to be consistent with the Restatement definition that intent can be established if the actor, although not desiring to cause the consequences of his act, knows that they are substantially certain to occur. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

109. *Pleasant*, 325 S.E.2d at 248.

exclusivity bar.¹¹⁰ The court believed that its holding would promote workplace safety by helping to deter reckless conduct in the future.¹¹¹

To the extent that the court's holding promotes positive social change in the workplace, there is little doubt that *Pleasant* is good law. The problem with the decision is the analysis employed by the court to avoid the exclusivity provisions of the Act. The facts in this case do not support a finding that the defendant acted for the purpose of injuring the plaintiff because the defendant was trying to play a joke on the plaintiff. The court did not consider whether the facts supported a finding that the defendant acted with knowledge to a substantial certainty that injury would result. According to the *Restatement*, intent is present only under these two circumstances. When the court defined constructive intent in terms of reckless conduct, it deviated from the *Restatement* definition of intent because the *Restatement* specifically excludes reckless conduct from its definition of intent.¹¹² The court, by blurring the distinction between reckless and intentional conduct, may have laid the foundation for the *Woodson* court's misapplication of the substantial certainty standard to the facts in that case.

2. Employers

In *Freeman v. SCM Corp.*,¹¹³ the plaintiff, an employee of the defendant, reported to her supervisor that the machine she was using was malfunctioning. Although the plaintiff continued to report the defect, she was repeatedly ordered to continue working with the machine. The plaintiff was later struck in the face by a bolt which flew out of the machine. The plaintiff alleged that she was injured by the gross, willful, and wanton negligence and intentional acts of the defendant. The North Carolina Supreme Court, in a *per curiam* opinion, held that the plaintiff's remedies under the Act were exclusive, precluding her from recovering in this *negligence* action.¹¹⁴

In *Barrino v. Radiator Specialty Co.*,¹¹⁵ the Supreme Court of North Carolina addressed the issue of whether the exclusive remedy doctrine applied to an injury caused by the willful, wanton, and reckless negli-

110. The court found support for equating willful, wanton and reckless negligence with an intentional act in cases where such conduct supports the recovery of punitive damages (*Hinson v. Dawson*, 92 S.E.2d 393 (N.C. 1956)) and in cases where reckless conduct implies malice necessary to support a second degree murder charge (*State v. Snyder*, 317 S.E.2d 394 (N.C. 1984)).

111. *Pleasant*, 325 S.E.2d at 250. The court's decision overruled *Wesley v. Lea*, 114 S.E.2d 350 (N.C. 1960) and *Warner v. Leder*, 69 S.E.2d 6 (N.C. 1952). *Id.*

112. RESTATEMENT (SECOND) OF TORTS § 8A illus. 2 (1965).

113. 316 S.E.2d 81 (N.C. 1984).

114. *Id.* at 82.

115. 340 S.E.2d 295 (1986) (Exum, Martin & Frye, JJ., dissenting), *overruled*, *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991).

gence of an employer.¹¹⁶ The plaintiff's daughter, an employee of the defendant, died after receiving second and third-degree burns over seventy percent of her body in an explosion and fire at the defendant's manufacturing plant. After receiving compensation under the Act, her parents sued the employer alleging that the defendant acted "recklessly, wantonly, willfully, intentionally and with reckless disregard of the rights and safety of plaintiff's intestate or with full knowledge and actual intent that defendant's willful misconduct would expose plaintiff's intestate to serious injury, harm or death."¹¹⁷ The plaintiff alleged that the defendant handled and stored liquefied petroleum gases without inspections and approvals required by law, and violated the National Electrical Code and the Occupational Safety and Health Act of North Carolina by: 1) using plastic bags to cover meters designed to detect and warn of dangerous gas levels; 2) turning off alarms which could detect explosive gas levels; and 3) instructing employees to resume work despite the sounding of the alarms.¹¹⁸ At trial, the defendant filed a motion for summary judgment arguing that the plaintiff's action was barred by the exclusive remedy provisions of the Act, and if the complaint alleged an intentional assault, the plaintiff was barred from further recovery by having made a binding election to receive benefits under the Act.¹¹⁹ The trial court granted summary judgment in favor of the defendant¹²⁰ and on appeal, the court of appeals affirmed.¹²¹

The court declined to apply the intentional tort exception because the plaintiff's daughter was not killed as a result of the deliberate assault of her employer, and held that an employee injured by the willful and wanton negligence of an employer may not pursue a common law tort action.¹²² The opinion, written by Justice Meyer, included the following rule:

[T]he common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury. . . . Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a

116. *Id.* at 297.

117. *Id.* at 297-98.

118. *Id.*

119. *Id.* at 299.

120. *Id.*

121. *Barrino v. Radiator Specialty Co.*, 317 S.E.2d 51 (N.C. Ct. App. 1984) (Phillips, J., dissenting), *overruled in part*, *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991).

122. *Barrino*, 340 S.E.2d at 297.

safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.¹²³

For Justice Meyer and Professor Larson, nothing less than the deliberate intent to injure is sufficient to escape the bar of the exclusive remedy doctrine. Justice Meyer went so far as to cite, in support of the majority holding, a case in which the Supreme Court of Georgia held that an employee, ordered by the president of the corporation to work with his bare hands in a vat of acid, was limited to workers' compensation benefits.¹²⁴

Moreover, even if the court found that the plaintiff had sufficiently alleged an action grounded in an intentional tort, the plaintiff would still have been barred from pursuing a common law remedy because the plaintiff had already made a binding election to recover compensation under the Act.¹²⁵ The plaintiff's allegations concerning violations of the National Electric Code and the Occupational Safety and Health Act of North Carolina were also held insufficient to avoid the bar of the exclusive remedy provisions.¹²⁶ The effect of safety code violations on workers' compensation claims is provided for in section 97-12 of the North Carolina General Statutes. This statute increases workers' compensation benefits by only ten percent when the employee is proximately injured or killed by the employer's willful failure to comply with any statutory requirement or any order of the Industrial Commission.¹²⁷

The majority recognized the harshness of the rule but was unwilling to overrule *Freeman*. Justice Martin, in his dissenting opinion, which is currently the law in North Carolina after *Woodson*, stated that because the case was decided on summary judgment, the proper question was whether the plaintiff's evidence created a genuine issue of material fact

123. *Id.* at 300 (quoting 2A LARSON, *supra* note 17, § 68.13, at 13-10).

124. *Southern Wire & Iron, Inc., v. Fowler*, 124 S.E.2d 738 (Ga. 1962) (The corporate president transferred the defendant from his job as a clerk and ordered him to work with his bare hands in a vat of acid which the employer knew was dangerous to human skin. The defendant alleged that the corporate president committed this act because the defendant refused to divulge the names of his fellow workers who attended a labor meeting). *Southern Wire & Iron, Inc. v. Fowler*, 105 S.E.2d 764 (Ga. Ct. App. 1958). The Supreme Court of Georgia characterized the employer's conduct as a failure to provide a safe workplace. *Southern Wire*, 124 S.E.2d at 740.

125. *Barrino*, 340 S.E.2d at 303.

126. *Id.* at 304. Violations of the federal Occupational Safety and Health Act do not affect workers' compensation laws. 29 U.S.C. § 653(b)(4) (1985). The federal Occupational Safety and Health Act states:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (1985). The court applied this same principle in denying the plaintiff a remedy at common law for violations of the Occupational Safety and Health Act of North Carolina. *Barrino*, 340 S.E.2d at 304.

127. N.C. GEN. STAT. § 97-12 (1991) Similarly, if an employee fails to use a safety appliance or perform a statutory duty and where such failure is the proximate cause of the injury or death, compensation is reduced by ten percent. *Id.*

concerning the defendant's intent.¹²⁸ The dissenting opinion stated a broader definition of the intent necessary to overcome the application of the exclusive remedy provisions which, if applied to the facts of the case, would have created a genuine issue of material fact sufficient to overcome the defendant's motion for summary judgment.¹²⁹

Justice Martin's dissenting opinion stated that the intentional tort exception should apply to acts which an employer knows are substantially certain to cause injury or death.¹³⁰ As support, Justice Martin cited section 8A of the *Restatement of Torts* which states: "Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."¹³¹ The dissent stated that based on the facts of this case the death of the plaintiff's daughter "or one of her co-workers was, at the very least, 'substantially certain' to occur given the defendant's deliberate failure to observe even basic safety laws."¹³² By adopting a broader notion of intent for purposes of the exclusive remedy doctrine, the courts could significantly deter intentional employer misconduct "which is likely to endanger the lives and safety of thousands of workers".¹³³

The dissenting justices found both *Freeman* and *Pleasant* inapplicable to the facts in this case because those cases dealt solely with negligent misconduct. According to the dissenting opinion, the facts in the case presented a pattern of criminal misconduct¹³⁴ because the deliberate disregard of basic safety regulations endangered the lives of every employee of the defendant.¹³⁵ On the issue of the defense of election of remedies, the dissenting opinion, without mention of *Andrews v. Peters*,¹³⁶ stated that an employee injured by the intentional conduct of his/her employer is not required to make a binding election between compensation under the Act and a remedy at common law.¹³⁷ The dissenters disagreed with the argument that compensation under the Act and remedies at common law were mutually exclusive because an intentional injury could not be defined as an accident within the provisions of the Act. Justice Martin

128. *Barrino*, 340 S.E.2d at 305.

129. *Id.* at 305.

130. *Id.*

131. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

132. *Barrino*, 340 S.E.2d at 305. On whether facts like these satisfy the substantial certainty standard, see *supra* note 105 and *infra* notes 185-190 and accompanying text.

133. *Id.* at 306.

134. N.C. GEN. STAT. § 95-139 (1991) (stating that a willful violation of an Occupational Safety and Health Act rule is a misdemeanor, punishable by a fine of up to \$10,000 and/or imprisonment for up to six months if the violation causes the death of an employee).

135. *Barrino*, 340 S.E.2d at 307.

136. See *supra* text accompanying notes 84-93.

137. *Barrino*, 340 S.E.2d at 307-08.

argued that from the perspective of the employee, "an unexpected assault may be considered an accident despite its characterization as an intentional tort."¹³⁸ The dissenting opinion stated that if the purpose of the defense of election of remedies is to prevent double recovery, then this purpose could be accomplished by reducing a worker's award in tort by the amount of workers' compensation already recovered, or by granting the employer's insurance carrier a right of subrogation, without forcing the injured worker to choose between workers' compensation and a common law remedy.¹³⁹

IV. WOODSON V. ROWLAND

Simply stated, the Supreme Court of North Carolina in the case of *Woodson v. Rowland*¹⁴⁰ adopted the views of the dissenting opinion in *Barrino*.¹⁴¹ The court held:

[W]hen an employer intentionally engages in misconduct knowing it is *substantially certain* to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in the case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because . . . the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery.¹⁴²

As is true of all cases requiring proof of intent, the facts are particularly important. The decedent in this case, Thomas Sprouse, was hired by Morris Rowland Utility, Incorporated (Rowland Utility), a subcontractor for co-defendant Davidson & Jones, Incorporated (Davidson & Jones), to dig two trenches for sewer lines to be installed for the developer and co-defendant Pinnacle One Associates (Pinnacle One). On the first day of digging, Davidson & Jones and Rowland Utility each supplied one crew. The foreman for the Davidson & Jones crew refused to allow his men to work in the trench because it was not sloped, shored, or braced and lacked a trench box. The Occupational Safety and Health Act of North Carolina required that these safety precautions be followed.¹⁴³ The president of Rowland Utility, Morris Rowland, supplied a trench box for the Davidson & Jones crew but did not supply one for his

138. *Id.* at 308 (quoting *Daniels v. Swofford*, 286 S.E.2d 582, 584 (N.C. App. 1982)).

139. *Id.* An injured worker who is not earning income cannot be described as freely choosing one remedy over another. *Id.*

140. 407 S.E.2d 222 (N.C. 1991) (Meyer & Mitchell, JJ., concurring in part and dissenting in part).

141. *Woodson*, 407 S.E.2d at 228; see *supra* text accompanying notes 128-139.

142. *Woodson*, 407 S.E.2d at 228 (emphasis added).

143. N.C. GEN. STAT. § 95-136(g) (1991).

own crew. In the previous six and one-half years, Rowland Utility had been cited four times for violating trench safety procedures.¹⁴⁴ The foreman for the Davidson & Jones crew testified that the Rowland Utility trench was not properly sloped and that he "would never [have] put a man in it."¹⁴⁵ On the next day the Davidson & Jones crew did not work and although its trench box was unused, Morris Rowland and the project supervisor decided not to use it. Shortly after the digging began, the ditch collapsed, completely burying Mr. Sprouse and burying another man, the project supervisor's son, up to his chest. Morris Rowland took the supervisor's son to the hospital while the other workers attempted to dig out Mr. Sprouse. The workers refused several offers of help and by the time they unearthed Mr. Sprouse he was dead. The plaintiff, administrator of Mr. Sprouse's estate, filed suit against Rowland Utility, Morris Rowland, Davidson & Jones, and Pinnacle One and filed a workers' compensation claim. The Industrial Commission granted the plaintiff's request not to hear her case until the completion of the civil actions, thus the plaintiff had not received any compensation under the Act. The trial court granted all of the defendants' motions for summary judgment and the court of appeals affirmed.¹⁴⁶

On appeal to the North Carolina Supreme Court, Chief Justice Exum, writing for the majority, found support for broadening the definition of intentional injury to include acts which an employer knows are *substantially certain* to cause injury or death in the concept of constructive intent and in a small number of jurisdictions that apply the substantial certainty test for work related injuries.¹⁴⁷ As discussed previously, the concept of constructive intent implies an actual intent to cause injury or death when an actor acts willfully, wantonly, and recklessly.¹⁴⁸ The *Woodson* court did not employ the concept of constructive intent, as the *Pleasant* court did, as a means of establishing intentional misconduct sufficient to overcome the exclusive remedy bar. The *Woodson* court adopted the *Restatement* definition of intent in order to establish the intentional misconduct on the part of the employer and enable the plaintiff to overcome the exclusivity provisions of the Act.¹⁴⁹ The court stated clearly that willful,

144. *Woodson*, 407 S.E.2d at 231.

145. *Id.*

146. *Woodson v. Rowland*, 373 S.E.2d 674 (N.C. Ct. App. 1988) (Phillips, J., concurring in part and dissenting in part).

147. *Woodson*, 407 S.E.2d at 229. The court cited: *Griffin v. George's, Inc.*, 589 S.W.2d 24 (Ark. 1979); *Mandolidis v. Elkins Indus.*, 246 S.E.2d 907 (W.Va. 1978); *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981); *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (Mich. 1986); *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046 (Ohio 1986); *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 433 N.E.2d 572 (Ohio 1982); *VerBouwens v. Hamm Wood Prod.*, 334 N.W.2d 874 (S.D. 1983). *Woodson*, 407 S.E.2d at 229. For a discussion of the treatment of the exclusive remedy doctrine in West Virginia and Ohio, see *infra* notes 192-208 and 237-238 and accompanying text.

148. See *supra* text accompanying notes 105-111.

149. *Woodson*, 407 S.E.2d at 229.

wanton, and reckless misconduct of a co-employee would be sufficient to establish the right to pursue a common law remedy, but that willful, wanton, and reckless misconduct of an employer would not be sufficient to overcome the exclusive remedy provision.¹⁵⁰ The court stated that the *Pleasant* holding was sound but that "it [was] also in keeping with the statutory workers' compensation trade-offs to require that civil actions against employers be grounded on more aggravated conduct than actions against co-employees."¹⁵¹ It would also be in keeping with the policy consideration of promoting safe workplaces, given the far-reaching effects of employer misconduct, to allow civil actions against employers to be grounded on less aggravated conduct than actions against employees.

Applying the substantial certainty standard to the facts in this case, the court found that the plaintiff, in her claim against Rowland Utility, presented sufficient evidence to establish a genuine issue of material fact regarding whether Morris Rowland's conduct satisfied the substantial certainty standard.¹⁵² An expert witness for the plaintiff testified that because the trench had sheer vertical walls of fourteen feet, there was "an exceedingly high probability of failure and the trench was substantially certain to fail."¹⁵³ The court found evidence that Morris Rowland had knowledge of the danger of the trench. His career consisted of excavating different kinds of soil; he had been cited four times for violating trench digging safety procedures; he was present at the site and directed his crew to dig without the trench box even though one was available. As to the plaintiff's claim against Morris Rowland individually, the court held that the plaintiff could not proceed against Morris Rowland as a co-employee based on the *Pleasant* holding because Morris Rowland was the corporate president and sole shareholder of Rowland Utility, but he could be held individually liable for an intentional tort based on the substantial certainty standard.¹⁵⁴ Since Rowland Utility's liability was dependent on the acts of its president, and since the plaintiff presented sufficient evidence to survive Rowland Utility's motion for summary judgment, the plaintiff's evidence was necessarily sufficient to survive Morris Rowland's motion for summary judgment.¹⁵⁵ Even though the court found that the facts in this case satisfied the substantial certainty standard, this comment asks whether the facts in this case are not more

150. *Id.*

151. *Id.*

152. *Id.* at 231. The plaintiff had presented sufficient evidence that Morris Rowland, as chief executive officer, was exercising corporate authority while directing the trench digging so as to attribute his conduct to his employer, Rowland Utility. *Id.*

153. *Id.*

154. *Id.* at 232. The court stated "that in the workers' compensation context, corporate officers and directors are treated the same as their corporate employer vis-a-vis application of the exclusivity principle." *Id.*

155. *Id.* at 233.

indicative of reckless conduct than conduct that is substantially certain to cause injury or death.

On the issue of election of remedies, the court restated the analysis of the dissent in *Barrino* and held:

Although . . . plaintiff may continue to pursue her civil action, . . . she is not barred from simultaneously pursuing her workers compensation claim because the injury to her intestate was the result of an "accident" as that term is used in the Act. A claimant may, but is not required to, elect between these remedies but, in any event, is entitled to but one recovery.¹⁵⁶

Double recovery is avoided by requiring the claimant who receives compensation in a civil action to reimburse the workers' compensation carrier for sums duplicated by the civil remedy or by subrogating the carrier for the claimant to the extent of benefits paid by the carrier.¹⁵⁷ The court believed that denying a remedy at common law based on the defense of election of remedies would undermine the overall policy of discouraging intentional misconduct.¹⁵⁸

In the shadow of this landmark holding, the court also addressed the issue of whether Davidson & Jones and Pinnacle One breached nondelegable duties owed to Mr. Sprouse.¹⁵⁹ The court's holding on this issue can easily be overlooked, but the factual circumstances giving rise to nondelegable duties may provide a fuller understanding of the court's substantial certainty standard.

Generally, an employer is not liable for the torts of an independent contractor so long as the employer used due care in the selection of a competent contractor to do the work.¹⁶⁰ An employer may be held vicariously liable for the torts of an independent contractor where the employer is found to have a nondelegable duty or the employment involves inherently dangerous activities.¹⁶¹ The plaintiff contended that Davidson & Jones and Pinnacle One breached nondelegable duties owed to Mr. Sprouse while he was involved in the inherently dangerous activity of trench digging. The court addressed the issue of the liability of Davidson & Jones and Pinnacle One by stating that "one who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others."¹⁶² The facts in this case illustrate that "the line be-

156. *Id.* (citations omitted). The court overruled *Wesley v. Lea*, 114 S.E.2d 350 (N.C. 1960) and *Warner v. Leder*, 69 S.E.2d 6 (N.C. 1952) to the extent that they prohibited the simultaneous pursuit of civil and workers' compensation remedies. *Id.*

157. *Woodson*, 407 S.E.2d at 233.

158. *Id.* at 234.

159. *Id.*

160. *DAYE & MORRIS*, *supra* note 21, at § 23.30.

161. *Id.* at § 23.31.

162. *Woodson*, 407 S.E.2d at 235.

tween non-delegable duties and inherently dangerous activities [can be] simply blurred.”¹⁶³ The policy considerations reflected in the liability of an employer and an independent contractor for injuries resulting from inherently dangerous activities are “that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them,”¹⁶⁴ and, with vicarious liability, “there is a greater likelihood that the safety precautions necessary to substantially eliminate the danger will be followed.”¹⁶⁵ This latter policy judgment has been used by North Carolina courts to justify the imposition of tort liability for injuries caused by intentional employer misconduct.¹⁶⁶

On the question of whether an inherently dangerous activity may be determined by the court as a matter of law or whether it is a factual question for the jury, the court could not agree.¹⁶⁷ The majority held:

In determining whether the trenching process which killed Thomas Sprouse was inherently dangerous, the focus is not on some abstract activity called “trenching.” The focus is on the particular trench being dug and the pertinent circumstances surrounding the digging. It must be shown that because of these circumstances, the digging of the trench itself presents a “a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor.”¹⁶⁸

What is readily apparent from the court’s conclusion is that the same evidence which established the intentional conduct of Rowland Utility and Morris Rowland will, for purposes of determining the general contractor’s liability in negligence, also establish the inherent danger of the trenching. What remains unclear is the connection, beyond mere evidentiary matters, between the substantial certainty standard and the substantial danger requirement. Since the court characterized Rowland Utility’s and Morris Rowland’s conduct as intentional, should a general contractor like Davidson & Jones be held liable for the intentional torts of its subcontractor? The *Woodson* court answered in the affirmative. The court found the plaintiff’s evidence sufficient to survive Davidson & Jones’s motion for summary judgment, stating that, “Davidson & Jones had a continuing duty of due care toward the plaintiff’s intestate during this entire time, and plaintiff’s forecast of evidence tends to show a breach of this duty.”¹⁶⁹ This comment questions the soundness of hold-

163. *DAYE & MORRIS*, *supra* note 21, at § 23.31.

164. *Woodson*, 407 S.E.2d at 235 (quoting *DAYE & MORRIS*, *supra* note 21 at § 23.31).

165. *Id.*

166. See *supra* text accompanying notes 93, 111 and 133.

167. *Woodson*, 407 S.E.2d at 235. The dissent argued that activities are either inherently dangerous or not as a matter of law. *Id.* at 240. See generally *DAYE & MORRIS*, *supra* note 21, at § 23.33 (discussing whether an inherently dangerous activity is a question of law or fact).

168. *Woodson*, 407 S.E.2d at 237 (quoting *Evans v. Elliott*, 17 S.E.2d 125, 128 (N.C. 1941)).

169. *Id.* at 238. The court used as evidence to support its holding the knowledge possessed by

ing a general contractor liable for the intentional torts of a subcontractor, but a more thorough discussion of this issue is beyond the scope of this comment.

V. BEYOND *WOODSON*

A. Applying *Woodson*

In the largest *Woodson* settlement to date, one hundred and eight workers settled asbestos-related damage claims brought against Duke Power for over ten million dollars.¹⁷⁰ The plaintiffs alleged that Duke Power failed to warn workers of the dangers of handling asbestos after the hazard became known to Duke Power, failed to provide a safe workplace, failed to inform workers of X-rays revealing asbestos-related dis-

Davidson & Jones that Rowland Utility was not following the proper safety procedures. Since the developer, Pinnacle One, had no such knowledge, the court affirmed summary judgment in favor of Pinnacle One. *Id.* But see *Cook v. Morrison*, 413 S.E.2d 922 (N.C. Ct. App. 1992) (no evidence presented that defendant knew or should have known of the circumstances that led to the decedent's death in a trenching accident).

Nine months after the *Woodson* decision, the administratrix of Thomas Sprouse's estate settled her claims with Davidson & Jones, Rowland Utility, and Morris Rowland for \$426,000. Of that sum, \$350,000 represented payments made by Davidson & Jones and Rowland Utility and \$76,000 represented payments recovered under the Act. The parties agreed that the plaintiff would not be required to reimburse the workers compensation carrier from the settlement with Davidson & Jones and Rowland Utility. Jay Reeves, *Woodson Settles Pre-Trial*, N.C. LAW. WKLY., May 25, 1992, at 1, 3.

170. *108 Suits Have Been Settled*, N.C. LAW. WKLY., May 11, 1992, at 1. This case raises the issue of the right of a third party to contribution from an employer under N.C. Gen. Stat. § 97-10.2 (1991). In the Duke Power case, the injured employees received workers' compensation and a settlement from a *Woodson* claim. The employees also recovered in tort, under § 97-10.2, from the sellers of the asbestos. The sellers claimed that they were entitled, pursuant to § 97-10.2(e), to contribution from the employer in the amount paid by the employer. Telephone Interview with David A. Shelby, Attorney for the law firm of Wallace and Whitley (Sept. 10, 1992). Section 97-10.2(e) provides that if the verdict against the third party included a finding of negligence on the part of the employer, the third party is entitled to contribution from the employer by the amount which the employer would recover by way of subrogation. N.C. GEN. STAT. § 97-10.2(e) (1991). The amount of the employer's subrogation claim is the amount of workers' compensation paid. N.C. GEN. STAT. § 97-10.2(f)(1)(c) (1991). Section 97-10.2(e) provides that after the court reduces the verdict against the third party by the amount of workers' compensation paid by the employer, "the entire amount recovered . . . shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer" except as may exist by an express contract of indemnity. N.C. GEN. STAT. § 97-10.2(e) (1991). The statute appears to limit the third party's right to contribution to the amount of workers' compensation paid by the employer. The problem with this interpretation is that without requiring contribution from the employer in the amount of the *Woodson* claim, the employee receives double recovery. If the employer is not found negligent in the third party action, then the third parties rights are defined under the Uniform Joint Tort-Feasors Act. N.C. GEN. STAT. § 1B-1-7 (1992). Relevant to the issue of intentional misconduct, the Uniform Joint Tort-Feasors Act provides that there is no right of contribution *in favor of* one who intentionally causes or contributes to the injury or wrongful death. N.C. GEN. STAT. § 1B-1(c) (1992). Under the Uniform Joint Tort-Feasors Act, an employer, whose liability includes a *Woodson* claim, would be liable for contribution. However, § 97-10.2 might completely abrogate the statutory rights under the Uniform Joint Tort-Feasors Act. *Hunsucker v. High Point Bending & Chair Co.*, 75 S.E.2d 768 (N.C. 1953). *But cf. Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131 (Iowa 1984)

eases, and failed to follow federal safety regulations.¹⁷¹ These settlements illustrate that the *Woodson* decision, by expanding the liability of employers in tort, has provided plaintiff's lawyers with a powerful new theory of recovery. Plaintiff's lawyers should not frivolously file *Woodson* claims in an attempt to gain leverage for negotiations. One lawyer went so far as to file a *Woodson* claim under the North Carolina Tort Claims Act.¹⁷² In *Winebarger v. N.C. Department of Transportation*, the Industrial Commission made clear, what should already have been clear to the plaintiff's attorney in this case, that a *Woodson* claim is an intentional tort action outside the scope of the North Carolina Tort Claims Act, not a negligence action.¹⁷³

Another case that illustrates the lengths to which plaintiff's attorneys will go to file a *Woodson* claim is *Journigan v. Fast Fare, Inc.*¹⁷⁴ The plaintiff's daughter was stabbed to death while working for the defendant. The plaintiff filed this action alleging negligent infliction of emotional distress, and moved to amend the complaint to include a *Woodson* claim based on the defendant's failure to provide a safe place for the plaintiff's daughter to work. The court permitted the plaintiff to amend his complaint but stated that, "to prove that working at a convenience store in a bad neighborhood is 'substantially certain' to result in death, seems a herculean task."¹⁷⁵ *Journigan* and *Winebarger* also demonstrate the extent to which attorneys are struggling to define for themselves what substantial certainty means.

A more notable case, addressing the retroactive application of the *Woodson* decision, is *Dunleavy v. Yates Construction Co.*¹⁷⁶ On facts remarkably similar to those in *Woodson*,¹⁷⁷ the North Carolina Court of Appeals held that the *Woodson* decision would apply retroactively to

171. 108 Suits Have Been Settled, N.C. LAW. WKLY., May 11, 1992, at 3. Most of the claims were brought by attorney Mona Lisa Wallace of the Salisbury firm Wallace and Whitley. *Id.* Ms. Wallace settled another *Woodson* claim for \$600,000, one of the top fifty largest settlements in North Carolina this year, in the case of *Smith v. Hoechst Celanese Corp. Large Verdicts and Settlements*, N.C. LAW. WKLY., Aug. 24, 1992 at 3, 14 (Special Supplement). In *Brewington v. Robeson County*, an emergency medical technician who contracted hepatitis B at work settled a *Woodson* claim for \$25,000. The plaintiff alleged that the county failed to provide hepatitis B vaccinations, despite being repeatedly asked to do so implement safety measures to protect him from the disease. Jay Reeves, *Unvaccinated EMT Gets Woodson Damages*, N.C. LAW. WKLY., Nov. 16, 1992, at 1.

172. *Woodson Case Booted from Tort Claims*, N.C. LAW. WKLY., June 15, 1992 at 1.

173. *Id.* The plaintiff in this case was injured when a ditch he was working in collapsed. *Id.* at 4. On the issue of whether working in a ditch without proper safeguards satisfies the substantial certainty standard see *infra* notes 182-187 and accompanying text.

174. *Journigan v. Fast Fare, Inc.*, No. 92-41-CIV-5-F (E.D.N.C. Apr. 11, 1992). One attorney was so eager to employ *Woodson* as a theory of recovery for plaintiffs in Hamlet that he improperly solicited legal business and was charged by the North Carolina State Bar. 21 O.S.H. Rep. (BNA) No. 20, at 557 (Oct. 16, 1991).

175. *Journigan v. Fast Fare, Inc.*, No. 92-41-CIV-5-F, slip op. at 5 (E.D.N.C. Apr. 11, 1992).

176. 416 S.E.2d 193 (N.C. Ct. App. 1992), *rev. denied*, 421 S.E.2d 146 (N.C. 1992).

177. The worker in this case was killed when a ditch, which was improperly supported, collapsed on top of him. In addition, the employer did not provide the worker with a hard hat. The

cases arising before August 14, 1991, the date of the *Woodson* decision.¹⁷⁸ Judge Greene's unanimous opinion stated that judicial policy dictates that North Carolina Supreme Court decisions be presumed to operate retroactively, and although the *Woodson* court was silent on the issue of the retroactive application of its decision, the Supreme Court ordered the court of appeals to reconsider *Dunleavy* in light of *Woodson*.¹⁷⁹

In *Pendergrass v. Child Care, Inc.*,¹⁸⁰ the plaintiff injured his arm while working at a textile machine and brought an action against his two supervisors, his employer, and the manufacturer of the machine alleging willful negligence and intentional misconduct. The plaintiff's supervisors altered the machine by removing the safety guards in violation of OSHA regulations and industry standards. As to the claims against the supervisors, the court held that

[a]lthough they may have known certain dangerous parts of the machine were unguarded when they instructed Mr. Pendergrass to work at the machine, . . . this [fails to support] an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so.¹⁸¹

The plaintiff's allegation failed to satisfy the standard enunciated in *Pleasant*, and the court affirmed the trial court's dismissal.¹⁸² The court also affirmed the trial court's dismissal of the claim against the plaintiff's employer. Since the plaintiff's *Woodson* claim was based on the same facts, if the allegation failed to support a finding of willful, wanton, and reckless negligence, then it also did "not rise to the higher level of negligence as defined in *Woodson*."¹⁸³

B. Critical Analysis

There has been much debate on the propriety of expanding the intentional tort exception of the exclusive remedy doctrine to include harms

plaintiff brought an action against the property owner, the independent contractor, officers of the independent contractor and the foreman on the project. *Id.* at 195.

178. *Id.* at 196. The court based its holding partly on the "'Blackstonian Doctrine' of judicial decision-making, also known as the 'declaratory theory of law' which provides that courts do not make law, they merely discover and announce it." *Id.* (citations omitted)

179. 416 S.E.2d at 196. The court also held that a landowner who hires an independent contractor to perform an inherently dangerous activity may be liable to the employees of the independent contractor if he had knowledge of the circumstances creating the danger. *Id.* at 197.

180. *Pendergrass v. Child Care, Inc.*, 424 S.E.2d 391 (N.C. 1993).

181. *Id.* at 394.

182. *Id.* Since the complaint was drafted before the *Woodson* decision, the Supreme Court should have remanded the case to the trial court for a further examination of the facts giving rise to the claim. Michael Dayton, *OSHA Violation Fails Woodson Standard*, N.C. LAW. WKLY., Jan. 18, 1993, at 1, 3. Ordering employees to work without safety guards is very similar to, if not identical with, placing a worker in a trench which is not properly secured.

183. 424 S.E.2d at 395. For a discussion of the court's treatment of the plaintiff's *Woodson* claim under the dual capacity doctrine, see *infra* note 192.

which the employer knows are substantially certain to occur.¹⁸⁴ The question raised by the *Woodson* decision is whether these facts are sufficient to meet the substantial certainty standard. The facts in *Woodson* are insufficient to meet the substantial certainty standard as defined by the *Restatement*, and the facts demonstrate, at most, willful, wanton, and reckless conduct on the part of the sub-contractor.

The case of *Garratt v. Dailey*¹⁸⁵ presents facts which satisfy the substantial certainty standard. This case is included in torts casebooks to help first year students understand the prong of intent embracing conduct done with knowledge that injury is substantially certain to occur.¹⁸⁶ In this case, the six year old defendant pulled a chair out from under his aunt, the plaintiff, as she was about to sit down. Since the plaintiff was about to sit down when the defendant pulled out the chair, the defendant *knew* that his act would cause his aunt to fall on the ground. Had the defendant pulled the chair away while the plaintiff was elsewhere inside the house, the defendant would not have known with substantial certainty that she would fall. She might simply have sat in a different chair. The defendant in *Garratt* possessed the requisite knowledge to establish an intentional tort because the probability that his aunt would fall was substantially certain given the fact that she was in the process of sitting down when he moved the chair, and the defendant knew it.

The *Restatement* provides the following illustration as an example of conduct which an actor knows is substantially certain to cause injury:

A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that this act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.¹⁸⁷

In the *Restatement* illustration, as in *Garratt*, injury is imminent. The bomb will explode. Since the bomb will explode, A knows with substantial certainty that anyone in the office will be hurt or killed. Although the employers in *Woodson* and at the Imperial Food Products plant had knowledge of the safety violations, they can not be attributed with the knowledge that injury or death was substantially certain to occur. To possess the requisite knowledge establishing intentional conduct, the employers in *Woodson* would have to have known that the ditch would collapse and the employers in Hamlet would have to have known that the plant would catch on fire. The defendant in *Garratt* possessed the requi-

184. E.g., 2A LARSON, *supra* note 17, at § 68.15; Helga L. Leftwich, Note, *The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Provision: Woodson v. Rowland*, 70 N.C. L. REV. 849 (1992).

185. 279 P.2d 1091 (Wash. 1955).

186. RESTATEMENT (SECOND) OF TORTS § 8A (1965). See *supra* text accompanying notes 81-83.

187. RESTATEMENT (SECOND) OF TORTS § 8A illus. 1 (1965).

site knowledge because he saw his aunt sitting down when he removed the chair. A, in the *Restatement* illustration, possessed the requisite knowledge because (s)he knew that the bomb would explode. The employer in *Woodson* knew that *if the ditch collapsed* a worker would be killed or injured, and the employers at Hamlet knew that *if the plant caught on fire* there would be injury or death. For the employers in *Woodson* and Hamlet to possess the knowledge necessary to establish intent, a further condition is required before injury or death can be properly termed "substantially certain" to occur. Violations of safety regulations certainly increase the likelihood that injury or death will occur, but, as exemplified by the Imperial Food Products plant, safety violations can exist for years before they contribute to the first death. The probability that injury or death will follow becomes less than substantially certain because the safety violations can exist for years before the first accident.¹⁸⁸ "As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined by § 500."¹⁸⁹ To say that violations of safety regulations made the deaths in *Woodson* or at Hamlet substantially certain to occur is to make a giant leap to the conclusion that the ditch was substantially certain to collapse and that plant was substantially certain to catch on fire. Moreover, by stating that the trench in *Woodson* was substantially certain to cave-in, the court, *a fortiori*, is finding that Rowland Utility and Morris Rowland committed a battery when they placed Thomas Sprouse in the trench. The absurdity of this conclusion illustrates the court's overly broad application of the substantial certainty standard. The misapplication of the substantial certainty standard by the *Woodson* court is consistent with the faulty analysis of the *Pleasant* court. The *Woodson* court appears to have confused the *Pleasant* court's definition of constructive intent with the *Restatement* definition of intent, thus blurring the distinction between reckless conduct and conduct that is substantially certain to cause death or serious injury. The misconduct in *Woodson* and at Hamlet can therefore be more accurately described as willful, wanton, and reckless negligence.¹⁹⁰

By incorrectly finding that the facts in *Woodson* satisfied the substantial certainty standard, the North Carolina Supreme Court contributed to the confusion surrounding the meaning of substantial certainty. As further evidence of the confusion, there is the court's own imprecise use of language in *Pendergrass*.¹⁹¹ In dismissing the plaintiff's claim, the

188. 2A LARSON, *supra* note 17, § 68.15, at 13-62.

189. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

190. See *supra* note 105 for the Restatement definition of reckless conduct.

191. See *supra* notes 180-183 and accompanying text.

court stated that the evidence failed to rise to the level of *negligence* as defined in *Woodson*. Legally, *Woodson* was not about negligence or aggravated misconduct. The decision is premised on the definition of intent. The preceding two examples should provide guidance on the fundamental distinction between reckless conduct and intentional conduct, but this comment seeks first to uncover the definition of substantial certainty as used by courts in workers' compensation cases and second, to determine how to plead a *Woodson* claim. Both objectives can be accomplished by examining the law in jurisdictions which have adopted the substantial certainty definition. These two goals are by no means independent of one another. Determining the meaning of substantial certainty can provide information on how to plead *Woodson* claims, and examining pleadings can provide aid in defining substantial certainty.

C. Substantial Certainty

Ohio adopted the substantial certainty standard as part of the exception for intentional torts in the case of *Jones v. VIP Development Co.*¹⁹² In *Jones*, the Ohio Supreme Court applied the substantial certainty standard to three separate cases. In the first case, the employees of the defendant were injured when construction equipment they were using came into contact with a high voltage electrical power line. The employees averred that their employer, "knew, or should have known, that employees and other frequenters would be on the premises . . . and would be in close proximity to high voltage electric lines . . . [yet failed to] inspect, and make safe the premises, nor to warn . . . of the high voltage . . . lines."¹⁹³ The court held that the complaint sufficiently alleged intentional misconduct against the employer to allow the employees to proceed to trial.¹⁹⁴ In the second case, the employee was killed while operating a coal conveyor system that had been altered when the employer removed the safety cover. The plaintiff alleged that the employer

192. 472 N.E.2d 1046 (Ohio 1984). Ohio law also provides that an employer may become liable in tort in spite of exclusivity bar if the injury arises out of a relationship other than the employer/employee relationship. *Mercer v. Uniroyal, Inc.*, 361 N.E.2d 492 (Ohio Ct. App. 1976). The dual capacity doctrine makes an employer vulnerable in tort if (s)he possesses a second persona completely independent from and unrelated to his status as an employer. 2A LARSON, *supra* note 17, § 72.80, at 14-220. In *Mercer*, a truck driver, injured by the blowout of his tire, sued and recovered from his employer in tort based on the fact that his employer had also manufactured the tire. *Mercer*, 361 N.E.2d at 496. The doctrine in North Carolina dates back to the case of *Tscheiller v. Weaving Co.*, 199 S.E. 623 (N.C. 1938). In *Pendergrass v. Child Care, Inc.*, 424 S.E.2d 391 (N.C. 1993), the plaintiff alleged that his employer was liable for removing safety guards because the employer was both manufacturer and designer of the machine. The court held that, because the alteration of the machine was not a risk shared by the public, if there was a dual capacity doctrine, it did not apply in this case. *Pendergrass*, 424 S.E.2d, at 394. See generally 2A LARSON, *supra* note 17, § 73.70 (discussing the problems with the dual capacity doctrine).

193. *Jones*, 472 N.E.2d at 1051-52.

194. *Id.* at 1052.

"intentionally, maliciously, willfully and wantonly"¹⁹⁵ removed the safety cover and presented evidence that the employer knew that the cover was intended to protect employees, but that no warnings were given to employees. The court found that this conduct could be characterized as an intentional tort.¹⁹⁶ In the third case, the employees alleged that they were exposed to toxic chemicals which caused serious injuries, and that their employer knew of the harmful exposure but misrepresented the danger of such exposure to their health.¹⁹⁷ The court held that "[s]uch conduct certainly falls within the parameters of intentional wrongdoing, particularly given the added feature of actively misrepresenting the degree of danger to employees, thereby prolonging their exposure to the risk."¹⁹⁸

The adoption of the substantial certainty doctrine in *Jones* had the same effect on trial judges and attorneys in Ohio as *Woodson* is having in North Carolina. Trial courts and attorneys simply wanted to know "what facts, as pleaded, and as otherwise shown upon a motion for summary judgment . . . may overcome such a motion, and present a case with intentional tort issues for the trier of the fact."¹⁹⁹ The Ohio Supreme Court attempted to answer the question of what constitutes an intentional tort in the employer/employee setting in *Van Fossen v. Babcock & Wilcox Co.*²⁰⁰ The court held that in order to establish an intentional tort under the substantial certainty standard the following must be demonstrated:

- (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty and not just a high risk; (3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue to perform his dangerous task.²⁰¹

The court felt the need to particularize the substantial certainty stan-

195. *Id.*

196. *Id.*

197. *Id.* at 1049. The employees told their supervisors about the problem but these complaints were either ignored or ridiculed. The employees experienced rashes and respiratory problems that the employer discovered were caused by acid fumes leaking into the fresh air system. The employer closed off this portion of the plant but continued to tell the employees that the plant was safe. The plant was eventually shut down and the employees were diagnosed with metal toxicity. *Id.*

198. *Id.* at 1053.

199. *Fyffe v. Jenos's Inc.*, 570 N.E.2d 1108, 1111 (Ohio 1991).

200. 522 N.E.2d 489 (Ohio 1988); see also *Kunkler v. Goodyear Tire & Rubber Co.*, 522 N.E.2d 477 (Ohio 1988); *Pariseau v. Wedge Products, Inc.*, 522 N.E.2d 511 (Ohio 1988).

201. *Van Fossen*, 522 N.E.2d at 504. These guidelines were amended slightly in *Fyffe v. Jenos's, Inc.*, 570 N.E.2d 1108 (Ohio 1991). In *Fyffe*, the supreme court held that industrial activities that involved a high risk of harm or a great risk of harm may reasonably encompass situations that fall within the scope of an intentional tort. *Fyffe*, 570 N.E.2d at 1111.

dard because "negligence actions [were being] filed and litigated as 'intentional torts.'"²⁰² In *Van Fossen*, for example, the plaintiff slipped and fell backwards on a set of stairs that had been welded to the platform on which he was working. The court affirmed the trial court's entry of summary judgment in favor of the employer.²⁰³ The Ohio Supreme Court believed that these guidelines were sufficient to resolve the uncertainty caused by *Jones* and to return the intentional tort exception to its proper scope, with the result that workers' compensation is the exclusive remedy for the vast majority of workplace injuries.²⁰⁴ The analysis of the substantial certainty standard by the Ohio Supreme Court reveals that the North Carolina courts are not alone in confusing reckless conduct with conduct done with the knowledge that injury is substantially certain to occur.

One re-occurring circumstance in the development of the substantial certainty standard has been the consequence of an employer's removal of safety guards.²⁰⁵ In the codification of the substantial certainty standard,²⁰⁶ the Ohio legislature stated:

Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.²⁰⁷

The question raised by this section is how a court is to treat evidence which tends to show that an employer intentionally removed a safety device. The Ohio Supreme Court answered that a trial court is to treat such evidence as just one part of the evidence presented for a summary judgment motion and not as a rebuttable presumption of the intent of the employer to commit an intentional tort.²⁰⁸

The elements listed by the *Van Fossen* court are intended to serve as a

202. *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, 734 (Ohio 1991) (Moyer, C.J. and Holmes & Wright J.J., dissenting).

203. *Van Fossen*, 522 N.E.2d at 505.

204. *Brady*, 576 N.E.2d at 734 (Brown, J., concurring). The court, in *Brady v. Safety-Kleen Corp.*, held that the legislature's codification of the substantial certainty standard in Ohio Rev. Code Ann. § 4121.80 was unconstitutional. *Id.* at 729.

205. *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046 (Ohio 1984); *Fyffe v. Jen's Inc.*, 570 N.E.2d 1108 (Ohio 1991). In *Fyffe*, the employer had removed a safety guard so that his employees could more quickly clean out the conveyor. The plaintiff reached into the conveyor, as his supervisor had shown him, and was injured. The court held that these facts presented a genuine issue of material fact of whether the employer committed an intentional tort. *Fyffe*, 570 N.E.2d at 1114. See *supra* note 12 for proposed North Carolina legislation dealing with the removal of safety guards.

206. OHIO REV. CODE ANN. § 4121.80 (Anderson 1990).

207. OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson 1990). Section 4121.80(G) could not be retroactively applied because it concerned a substantive right. *Van Fossen*, 522 N.E.2d at 489. Section 4121.80(G)(1) could not be retroactively applied. *Kunkler v. Goodyear Tire & Rubber Co.*, 522 N.E.2d 477 (Ohio 1988).

208. *Fyffe*, 570 N.E.2d at 1112 (Ohio 1991).

guideline for determining the existence of an intentional tort and as an example of how intentional tort claims based on the substantial certainty standard might be properly pled in North Carolina. An examination of the complaints of one North Carolina law firm reveals a different pleading method.²⁰⁹ In the case of *Scruggs v. Duke Power*,²¹⁰ the plaintiffs, employees of Duke Power, were exposed to asbestos and developed asbestosis. The complaint states:

12. Although one or more of the plaintiffs herein may have filed and/or resolved their workers' compensation claims with the defendant, said plaintiffs rely on the Supreme Court decision in *Woodson v. Rowland* . . . in that said settlements do not bar their claims herein because an employers intentional tort will support a civil action. It is the plaintiffs' contention that *Woodson*, supra, allows plaintiffs to pursue simultaneously their workers' compensation claims and civil actions as well without being required to elect between them.

13. The illnesses and disabilities of the plaintiffs are the direct and proximate result of the intentional conduct, gross negligence, recklessness and willfulness of the defendant in that, even though the defendant knew that the asbestos . . . used in Duke's power plant [was] deleterious, poisonous and harmful to plaintiffs' bodies, lungs, respiratory systems, skin and health, the defendant failed in its duties to the plaintiffs in at least the following ways: . . .²¹¹

This certainly seems adequate given the liberal pleading requirements²¹² and the exclusion of state of mind from matters requiring special pleading.²¹³ Based on the success of this attorney in handling *Woodson* claims, it might be unwise to deviate from her example. In the case of *White v. Fieldcrest Cannon, Inc.*,²¹⁴ the defendant forced its employees to ride in a freight elevator, a violation of safety regulations,²¹⁵ knowing that it was unsafe for passenger traffic. The elevator fell eighty feet with no resistance while the plaintiffs were aboard. The complaint stated that the defendant acted intentionally, willfully, wantonly, recklessly, and with gross negligence, deliberately causing injuries which "were substantially certain to follow the Defendant's malfeasance."²¹⁶ Unlike the previous complaint, this pleading uses the "substantial certainty" language.

209. The Salisbury law firm of Wallace and Whitley has been successful in handling *Woodson* claims. See *supra* notes 170-171 and accompanying text for a discussion of this firm's successes.

210. No. 91 CVS 1471 (Rowan County Sup. Ct. Sept. 10, 1991).

211. *Id.* at 8-9.

212. N.C. GEN. STAT. § 1A-1 Rule 8 (1991). Rule 8(a)(1) requires a "short plain statement of the claim sufficiently particular to give the court and parties notice of the occurrences intended to be proved showing that the pleader is entitled to relief." *Id.*

213. N.C. GEN. STAT. § 1A-1 Rule 9 (1991). Rule 9(b) provides that "[m]alice, intent, knowledge and other conditions of mind of a person may be averred generally." *Id.*

214. No. 91 CVS 1228 (Rowan County Super. Ct. July 26, 1991).

215. N.C. GEN. STAT. §§ 95-129 to 95-131 (1991).

216. *White v. Fieldcrest Cannon, Inc.*, No. 91 CVS 1228 (Rowan County Super. Ct. July 26, 1991).

There is no requirement that this language must be used, but there is no reason not to do so.²¹⁷

When considering whether to file a *Woodson* claim, an attorney should look for the following: 1) a worker who has been seriously injured or killed; 2) a prior injury or death occurring on the same equipment or instrumentality; 3) the faulty operation of the equipment or instrumentality, i.e., removal of safety guards or violation of safety regulations; 4) prior warnings received by the employer from employees or safety inspectors; and 5) the ongoing use by the employer of the equipment or instrumentality with the defect. A pleading should allege the existence of the employment relationship, the facts demonstrating how the injury occurred, the employer's misconduct, and the facts supporting the allegation that the employer acted intentionally, including a statement that the employer knew the misconduct was substantially certain to cause death or serious injury.

With the *Woodson* decision, The North Carolina Supreme Court has done more than "dip its toe into the treacherous waters" of willful and wanton misconduct.²¹⁸ North Carolina may have adopted the substantial certainty standard but North Carolina courts, like their predecessors in Ohio, are holding that reckless conduct satisfies the substantial certainty standard. Professor Larson's position on the intentional tort exception is that nothing short of an act done with the specific intent to injure is sufficient to overcome the exclusivity bar.²¹⁹ Naturally, the insurance lobby and defense attorneys cite Professor Larson when they argue that the legislature should reverse *Woodson*. Professor Larson attributes the expansion of the intentional tort exception to the misbegotten marriage of tort law with workers' compensation law.²²⁰ Professor Larson states:

Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced . . . to the importation of tort ideas. . . .

. . .

Among common-law trained lawyers and judges . . . the tort-connection fallacy has been most prevalent. . . . Failure to make a clean break with tort thinking can be harmful to the employer as well as to the employee.²²¹

217. Donnell "Trip" Van Noppen III, *Stating a Woodson Claim Against the Employer After Woodson v. Rowland*, 24 J. N.C. ACAD. TRIAL LAW. 26 (1992).

218. 2A LARSON, *supra* note 17, § 68.15, at 13-58.

219. *Id.* § 68.13, at 13-10.

220. ARTHUR LARSON, *The Nature and Origins of Workmen's Compensation*, 37 CORN. L.Q. 206 (1952).

221. *Id.* at 207 (citations omitted). As an example, Larson believes that cases that hold an employer liable for the deliberate assault of a supervisory employee are incorrect because they apply the nineteenth century concept of vice-principal liability. *Id.* See *Daniels v. Swofford*, 286 S.E.2d 582

The validity of this argument rests on the historical genesis of workers' compensation law as a *quid pro quo* wherein workers gave up their common law tort remedy in return for a swift no-fault remedy.²²² Opponents of *Woodson* argue that to restore tort liability would destroy the essence of the trade-off and tear workers' compensation asunder.²²³ This argument is not without its merits,²²⁴ but when one recalls that workers' compensation law was enacted to eliminate the defenses of the fellow servant rule, assumption of the risk, and contributory negligence, it is clear that by relinquishing a common law remedy the employee did not give up very much.²²⁵

In practice, can those that oppose *Woodson* possibly mean that before an intentional tort in the workplace can be established, the employer must be guilty of a criminal assault or murder? Those that advocate that intentional torts can only be proven when the employer acts with the specific intent to injure mean just that. Applying such a harsh rule would preclude the workers at Imperial Food Products from recovering anything except workers' compensation benefits. Even though criminal law serves a different purpose than tort law and workers' compensation law, there would seem to be much inequity in applying a less rigorous standard in criminal proceedings than is necessary to overcome the exclusive remedy doctrine.²²⁶ Employers should not be insulated from tort

(1982). It is, however, hard to see how applying tort concepts in workers' compensation cases could be harmful to employees.

222. For a discussion of the historical development of workers' compensation laws, see *supra* notes 15-45 and accompanying text.

223. 2A LARSON, *supra* note 17, § 68-15, at 13-65.

224. Opponents of expanded tort liability argue that if courts do not correctly apply the substantial certainty standard, then courts will be faced with a proliferation of *Woodson* claims that are nothing more than negligence actions, resulting in high settlements and jury verdicts. Employers will no longer be subject to limited and predictable liability thus jeopardizing the continuing health of business. David A. Mohler, Note, *In the Wake of Mandolidis: A Case Study of Recent Trials Brought Under the Mandolidis Theory-Courts are Grappling with Procedural Uncertainties and Juries are Awarding Exorbitant Damages for Plaintiffs*, 84 W. VA. L. REV. 893 (1982). Supporting this argument is the increased cost, in terms of time and expense, to employers and insurers in litigating tort claims. DECARLO & MINKOWITZ, *supra* note 15, at 218.

225. Jerry J. Phillips, *The Relationship between the Tort System and Workers' Compensation — the True Cost*, 1981 CONF. ON WORKERS' COMPENSATION 88.

226. Involuntary manslaughter is the unintentional killing of another resulting from some act done in a culpably negligent manner. *State v. Lawson*, 169 S.E.2d 265, 269 (N.C. Ct. App. 1969). Culpable negligence arises from the "intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb." *State v. Cope*, 167 S.E.2d 456, 458 (N.C. 1933).

In *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (Mich. 1986), the court made just such an argument in support of the adoption of the substantial certainty standard. The court cited *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. Ct. 1990) as an example of egregious employer misconduct that would meet the substantial certainty standard but would not constitute a true intentional tort. *Beauchamp*, 398 N.W.2d at 893. In *O'Neil*, the defendant employer used cyanide to recover silver from film negatives. The employer was aware of the danger, the labels on the chemicals so indicated, but the employer only hired non-English speaking employees. The employer did not provide safety instructions or protective clothing. One worker died and others were severely injured due to cyanide

liability for conduct that establishes criminal violations. The reluctance to extend tort liability to reckless conduct by an employer is inconsistent with the rationale used to support the conclusion that employees should be liable in tort for willful, wanton, and reckless negligence. The supreme court reasoned in *Pleasant v. Johnson* that "it would be a travesty of justice and logic to permit a worker to injure a co-employee [through reckless conduct], and then compel the injured co-employee to accept moderate benefits under the Act."²²⁷ If holding employees liable for willful, wanton, and reckless negligence promotes workplace safety, then is not this policy consideration better served by holding employers liable for their reckless conduct, inasmuch as the consequences of employer misconduct can be much broader and the resulting harm much greater than in cases of employee misconduct?²²⁸

After the highest courts in Ohio and West Virginia expanded the intentional tort exception to include employer misconduct which failed to demonstrate a specific intent to injure, the legislatures in these states passed statutes narrowing its scope.²²⁹ These statutory schemes present models that North Carolina legislators should consider when they address *Woodson*. Most importantly, North Carolina legislators will have to determine what level of employer misconduct is sufficient to overcome the exclusivity bar. The *Woodson* court and the Ohio courts, while employing a substantial certainty standard, have in effect held that reckless conduct is sufficient to overcome the exclusivity provisions. In opposition, Professor Larson would require a specific intent to injure. The decision confronting legislators brings into conflict the opposing interests of workers and their employers. Will the legislators remember and continue to be motivated by the disaster at Hamlet, or will the interests of big business succeed in convincing law makers that expanded liability would cripple North Carolina economically? Let us hope that the screams of Imperial Food Products employees continue to be heard.

The Ohio statute defined intentional tort as "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur"²³⁰ and substantial certainty as "acts

poisoning. *O'Neil*, 550 N.E.2d at 1096. Larson states that these facts support a finding that the employer acted with a specific intent to cause serious injury or death. 2A LARSON, *supra* note 17, § 68-15, at 13-63.

227. *Pleasant v. Johnson*, 325 S.E.2d 244, 250 (N.C. 1985). For a discussion of the *Pleasant* decision, see *supra* text accompanying notes 102-112.

228. David M. Ledbetter, Note, *Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight Zone-Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?* 64 N.C. L. REV. 688 (1986).

229. OHIO REV. CODE ANN. § 4121.80 (Anderson 1990); W. VA. CODE § 23-4-2 (1985). In *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978), West Virginia extended the intentional tort exception to include the willful, wanton and reckless conduct of an employer.

230. OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson 1990).

[done] with deliberate intent to cause an employee to suffer injury, disease, condition, or death."²³¹ Although Ohio law makers used the substantial certainty language, it is clear that Ohio chose to include only acts done with the specific intent to cause injury.²³² The Ohio statute included a section limiting the court's duties to determining whether the employer committed an intentional tort and placing the determination of the amount of damages with the Industrial Commission.²³³ Damages in this section could be no less than fifty percent or no more than three times the total amount of workers' compensation, with an overall ceiling on damages of one million dollars.²³⁴ However, the Ohio Supreme Court has held this statute void as an improper exercise of legislative power.²³⁵ Even though the Ohio statutory scheme appears to be a model of what North Carolina should not do, Ohio lawmakers may have provided North Carolina legislators with one provision worthy of duplication. Ohio created an intentional tort fund into which all employers paid a fixed sum and from which injured employees could be compensated for injuries caused by the intentional acts of their employers.²³⁶

In 1983, West Virginia enacted a statute that provided employees with a right to pursue a civil action against employers who act with a conscious, subjectively and deliberately formed intention to produce the specific result of injury or death.²³⁷ Deliberate intention can also be satisfied, if the employee can establish all the following facts:

- (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
- (B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;
- (C) That such specific unsafe working condition was a violation of a

231. *Id.*

232. Section 4121.80(A) included a retroactive one-year statute of limitations, applicable to pending actions, which was found to be unconstitutional because it obliterated an employee's substantive right under *Jones v. VIP Dev., Co.*, 472 N.E.2d 1046 (Ohio 1984) which was governed by a two-year statute of limitations. Section 4121.80(G) was held to impose a more stringent standard than that adopted in *Jones v. VIP Dev., Co.*, 472 N.E.2d 1046 (Ohio 1984) and because this new standard constituted a denial of substantive rights based on its retroactive application to pending cases, this section could not be retroactively applied. *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 498 (Ohio 1988).

233. OHIO REV. CODE ANN. § 4121.80(D) (Anderson 1990).

234. *Id.*

235. *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722 (Ohio 1991) (Douglas & Brown, JJ., concurring. Moyer, C.J., Holmes & Wright, JJ., dissenting). Justice Brown believed that the damage cap violated the right to equal protection and that the provision that the Industrial Commission determine the amount of damages violated the right to trial by jury. *Id.* at 733.

236. OHIO REV. CODE ANN. § 4121.80(E) (Anderson 1990).

237. W. VA. CODE § 23-4-2(2)(i) (1985).

state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.²³⁸

West Virginia lawmakers decided that employers should be liable for more than criminal assaults and murders. For this they should be commended, but more worthy of praise is their acknowledgment that the substantial certainty standard, as defined by the *Restatement*, is too narrow to provide sufficient protection for workers. The term "substantial certainty" is absent from the statute. The West Virginia statute is a codification of the willful, wanton, and reckless standard similar to the rule enunciated by the *Van Fossen* court. The *Woodson* court and the Ohio courts defined intent using the substantial certainty standard, but the standard actually applied required evidence establishing less than knowledge to a substantial certainty. One explanation for this inconsistency is the failure of these courts to sufficiently distinguish reckless conduct from intentional conduct. Another explanation is that these courts were struggling to expand tort liability within an exception for intentional torts. Based on this explanation, these decisions can be viewed as an attempt by the courts to refrain from engaging in judicial legislation.²³⁹ The courts recognized the need to protect workers from the reckless conduct of their employers but were limited by the intentional tort exception and the *Restatement* definition of intent. It is understandable that courts seeking to expand the intentional tort exception would look to the *Restatement* definition of intent, but decisions addressing workers' safety need not fit nicely into that scholarly definition of intent. The development of workers' compensation law as a unique remedy for employees supports this statement. Workplace safety demands more flexibility than the *Restatement* can provide and this fact was recognized in the law an-

238. W. VA. CODE § 23-4-2(2)(ii) (1985). An employee is prohibited from receiving punitive damages and the court is encouraged to dismiss the action if the plaintiff fails to prove one of the elements listed in (A) through (E). W. VA. CODE § 23-4-2(2)(iii) (1985). West Virginia lawmakers established an intentional tort fund called the Employers' Excess Liability Fund which pays the excess of damages over the amount of workers' compensation. W. VA. CODE § 23-4C-1 to § 23-4C-3 (1985).

239. *Deese v. Southern Lawn & Tree Expert Co.*, 293 S.E.2d 140 (N.C. 1982), *reh'g denied*, 303 S.E.2d 83 (N.C. 1982).

nounced by West Virginia legislators and the *Van Fossen* court. Applying either the West Virginia statute or the *Van Fossen* guidelines, the plaintiff in *Woodson* and the workers at the Imperial Food Products plant would be able to overcome the exclusivity provisions of the Act.

North Carolina lawmakers need to remember more than the screams of the workers and the twenty-five deaths at the Imperial Food Products plant. They need to remember that between 1978 and 1984, 1233 workers were killed on the job in North Carolina, an average of 176 each year.²⁴⁰ They need to remember that in 1988 there were 207,132 work-related injuries and/or illnesses in the private sector and another 19,185 in the public sector — eight percent of the North Carolina work force.²⁴¹ More workers die each year in North Carolina than United States soldiers died in the Persian Gulf War.²⁴² Knowing these statistics, one realizes that the worker safety bills passed by the North Carolina General Assembly in 1991 were not an overreaction to the disaster at Hamlet.²⁴³ The North Carolina General Assembly should continue to provide financial incentives for employers to have safe workplaces and to accomplish this end, North Carolina legislators should permit injured workers and surviving families with a cause of action for the willful, wanton, and reckless conduct of their employers.

DAVID L. LAMBERT

240. Marjorie Putnam, *Work-Place Safety: People and Statistics*, 24 J. N.C. ACAD. TRIAL LAW. 23 (1992).

241. *Id.*

242. *Id.* There were 124 combat deaths and 207 noncombat deaths. William Neikirk, *Noncombat Deaths in Gulf War Inflict Special pain on Families*, CHI. TRIB., Mar. 24, 1991, at C-11.

243. For an overview of the legislative bills, see *supra* note 12.