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Hogan v. Forsyth Country Club Co.: Workers' Compensation and Mental Injuries

Workers' compensation statutes restrict certain rights both employers and employees otherwise enjoy under common-law tort principles. In return, compensation statutes assure employees recovery for loss of earning capacity without regard to fault. Employers are shielded from unpredictable judgments by statutory limits on payments to injured employees and by provisions that make the workers' compensation statute the employee's exclusive remedy for injuries within its scope.¹ Although intended by legislatures to reduce civil litigation of injuries suffered in an employment context,² the exclusive remedy provisions of workers' compensation acts have themselves spawned much litigation over the coverage of the compensation acts. One source of controversy is whether mental injuries³ fall within the scope of the statutes. In *Hogan v. Forsyth Country Club Co.*⁴ the North Carolina Court of Appeals addressed this issue and held that plaintiffs' civil actions against their former employer for the intentional infliction of emotional distress⁵ were not barred by the exclusivity provision of the North Carolina Workers' Compensation Act (the Act).⁶ This Note analyzes the reasoning underlying the court's decision in *Hogan* and explores the various scenarios that logically follow from the decision. The Note concludes that application of the rule in *Hogan* will result in inequitable variations from case to case in the remedies available to an injured plaintiff.

Marlene Hogan, April Cornatzer, and Sonya Mitchell, all former employees of Forsyth Country Club, jointly sought damages in a civil action for injuries suffered as the result of alleged tortious acts of defendant club's general manager and chef.⁷ Although the specific incidents alleged by each plaintiff differed, all three plaintiffs' claims were based on sexual harassment.⁸ For April Cornatzer,

1. See *infra* text accompanying notes 23-26 (discussing the basic compromise inherent in workers' compensation acts, including the exclusive remedy provision); see also *infra* notes 31-53 and accompanying text (discussing North Carolina's exclusivity provision).

2. See 1 W. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 4 (1941).

3. Courts and commentators alternatively have referred to such injuries as mental, psychological, nervous, psychic, and emotional. This Note uses these designations interchangeably to refer to injuries having no physical manifestations.

4. 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

5. The tort of intentional infliction of emotional distress is comprised of the following elements: (1) an intent to cause emotional distress, (2) extreme and outrageous behavior, and (3) severe emotional distress caused by this behavior. PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 60-65 (W. Keeton 5th ed. 1984).

North Carolina recognized the tort in the form of "trespass to the person" in 1936. See *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936). In 1979 the North Carolina Supreme Court formally adopted the tort of intentional infliction of emotional distress. See *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979).

6. *Hogan*, 79 N.C. App. at 488, 340 S.E.2d at 120. The North Carolina Workers' Compensation Act is codified at N.C. GEN. STAT. §§ 97-1 to -122 (1985 & Supp. 1986). For a discussion of the exclusive remedy provision of the North Carolina Workers' Compensation Act, see *infra* notes 31-53 and accompanying text.

7. See Plaintiff-Appellants' Brief at 1, *Hogan* (No. 8521SC292).

8. Hogan had acted as the dining room manager and hostess. Record on Appeal at 1-2, 73-74, *Hogan* (No. 8521SC292). She alleged that chef Hans Pfeiffer shouted profanities at her, called her

this sexual harassment allegedly extended to unwanted sexual advances and suggestive physical contact.⁹

Each plaintiff filed a civil action against Forsyth County Club for intentional infliction of emotional distress, wrongful termination, and negligent retention of an employee.¹⁰ The trial court granted defendant's motion for summary judgment on all claims.¹¹ The North Carolina Court of Appeals affirmed the lower court's decision on the claims of Hogan and Mitchell for intentional infliction of emotional distress¹² and negligent retention of an employee,¹³ and on all three plaintiffs' claims of wrongful termination.¹⁴ However, the court of appeals reversed the trial court on Cornatzer's claims of intentional infliction of emo-

sexually derogatory names, chased her in a threatening manner, and interfered with employees under her supervision. *Id.* Hogan further alleged that when she complained to general manager Clifford Smith about this harassment, he refused to take action to remedy the situation. *Id.*

April Cornatzer had been a waitress under Hogan's supervision. According to her complaint, Pfeiffer made sexual advances toward her and rubbed against her in a sexually suggestive manner. *Id.* at 5, 75. She further claimed that when she refused his overtures, he began to harass her in ways similar to those alleged by Hogan. *Id.* Moreover, he placed her in fear of bodily harm. *Id.* Finally, Cornatzer asserted that the club's general manager at the time, Richard Brennan, failed to take any steps to control Pfeiffer. *Id.* at 5-6, 75. Brennan had notice of the chef's conduct because Cornatzer had complained to him repeatedly. *Id.*

Plaintiff Sonya Mitchell served as a housekeeper or maid. She alleged that when she was six months pregnant, Brennan refused her request for a pregnancy leave, and thereafter he became abusive to her by making her lift heavy linen bundles in violation of a physician's orders. *Id.* at 9, 76. Late in the pregnancy, she experienced labor pains and was instructed by her doctor to go to the hospital. *Id.* at 9, 76-77. Mitchell claimed that Brennan threatened to fire her if she left for the hospital. When she went to the hospital, Brennan terminated her employment. *Id.* All three plaintiffs further asserted that Brennan and Pfeiffer were often intoxicated while at work, which aggravated the abusive behavior. *Id.* at 73, 75, 77.

9. See *supra* note 8 and accompanying text.

10. Hogan, Cornatzer, and Mitchell sought, respectively, \$3,700,000, \$4,300,000, and \$4,300,000 in actual and punitive damages. Record on Appeal at 1, 4-5, 8, 11-12, *Hogan*.

11. *Hogan*, 79 N.C. App. at 486, 340 S.E.2d at 119. On a motion for summary judgment, the court must address itself to "whether there exists any genuine issue of material fact." *Id.* at 487, 340 S.E.2d at 119 (citing *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974)). Material offered either to support or to defeat the motion must be taken "in the light most favorable to the party opposing the motion." *Bradshaw v. McElroy*, 62 N.C. App. 515, 518, 302 S.E.2d 908, 911 (1983).

12. *Hogan*, 79 N.C. App. at 486-87, 340 S.E.2d at 119. The conduct Hogan and Mitchell complained of did not meet the "extreme and outrageous conduct" test. *Id.* at 493-94, 340 S.E.2d at 123. Concerning the chef's behavior toward Hogan, the court stated: "While we do not condone Pfeiffer's intemperate conduct, neither do we believe that his alleged acts 'exceed all bounds usually tolerated by a decent society.'" *Id.* at 493, 340 S.E.2d at 123 (quoting *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979)). The court found Brennan's actions toward Mitchell to be "unjustified," but insufficient to support Mitchell's claim. *Id.* at 494, 340 S.E.2d at 123.

13. The court deemed these claims deficient because plaintiffs had failed to demonstrate a viable claim of intentional infliction of emotional distress. *Id.* at 496-97, 340 S.E.2d at 124-25. Without a showing that an employee has tortiously injured the plaintiff, no basis exists for a claim of negligence against the employer for hiring or retaining that employee. *Pleasants v. Barnes*, 221 N.C. 173, 177, 19 S.E.2d 627, 629 (1942).

14. Under North Carolina law, employment contracts having no specified term are terminable at the will of either party. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). The court of appeals in *Hogan* refused to "articulate a public policy exception" to this doctrine to cover the circumstances present in *Hogan*. *Hogan*, 79 N.C. App. at 498, 340 S.E.2d at 126. The court interpreted *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), as recognizing the sole, very narrow exception to the terminable-at-will doctrine—an employee at will who is terminated "in retaliation for (1.) his refusal to perform an act prohibited by law, or (2.) his performance of an act required by law" has a cause of action against the employer. *Hogan*, 79 N.C. App. at 498, 340 S.E.2d at 126.

tional distress and negligent retention of an employee.¹⁵ Stating that "[n]o person should have to be subjected to non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment . . . without being afforded remedial recourse through our legal system,"¹⁶ the *Hogan* court held that Cornatzer alleged sufficiently extreme and outrageous conduct to support her claim against Pfeiffer for intentional infliction of emotional distress.¹⁷ In addition, the evidence indicated that defendant employer had ratified Pfeiffer's conduct. Thus, the claim established sufficient grounds for an action against the country club.¹⁸

Having concluded that Cornatzer had a viable claim for intentional infliction of emotional distress, the court addressed whether her claim should nevertheless be barred by the Act. The court noted that the tort of intentional infliction of emotional distress essentially is nonphysical and "the injuries alleged by plaintiff [did] not involve physical injuries resulting in disability"¹⁹—that is, plaintiff's injuries were psychic rather than physical. Thus, the court concluded that a civil action could be maintained because the injury suffered was part of "an entire class of civil wrongs"²⁰ outside the scope of the Act.²¹ In addition, the court upheld Cornatzer's claim for negligent retention of an employee.²²

15. *Hogan*, 79 N.C. App. at 500, 340 S.E.2d at 127. A judgment dated December 5, 1986, eventually was entered for plaintiff Cornatzer in the amount of \$900,000, comprised of \$150,000 actual damages and \$750,000 punitive damages. Judgment dated December 5, 1986, *Hogan*. On December 18, 1986, this judgment was overturned and a new trial granted on all issues. Judgment dated December 18, 1986, *Hogan*.

16. *Hogan*, 79 N.C. App. at 491, 340 S.E.2d at 121.

17. *Id.*

18. Brennan, as general manager, had authority to act on the club's behalf in personnel matters. However, whether his actions constituted "an [intent] to acquiesce in, approve and ratify Pfeiffer's act [was] a question for the jury." *Id.* at 492-93, 340 S.E.2d at 122.

In North Carolina, as in other jurisdictions, an employer may be liable for the torts of his or her employee on any of the following theories: (1) express authorization of the employee's conduct, (2) vicarious liability for all tortious conduct of the employee within the "scope of employment," (3) ratification of the employee's acts, (4) negligence of the employer in employing or dealing with the employee, (5) conduct of the employee in violation of a nondelegable duty, or (6) apparent authority of the employee. 1 RESTATEMENT (SECOND) OF AGENCY §§ 218-19 (1958).

The *Hogan* court was unable to find evidence indicating Pfeiffer had acted within the scope of his employment, *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122, which North Carolina courts have defined as requiring that the tortious act be "in the prosecution and furtherance of the business which was given him to do," *Overton v. Henderson*, 28 N.C. App. 699, 701, 222 S.E.2d 724, 726 (1976). Rather, "it [appeared] that he was acting in pursuit of some corrupt or lascivious purpose of his own." *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122. This finding could have provided another avenue for deciding the workers' compensation issue. See *infra* notes 104-08 and accompanying text.

19. *Hogan*, 79 N.C. App. at 490, 340 S.E.2d at 121.

20. *Id.* at 489, 340 S.E.2d at 120.

21. *Id.* An action could be brought notwithstanding the Act's exclusive remedy provision. *Id.* at 490, 340 S.E.2d at 121.

22. The court upheld this claim because plaintiff (1) had a cause of action for intentional infliction of emotional distress, and (2) offered evidence that the general manager knew of Pfeiffer's proclivity for sexual harassment when he hired the chef. *Id.* at 495, 340 S.E.2d at 124. The court, however, did not decide whether the country club's management acted negligently in hiring and retaining Pfeiffer despite having notice of his tendencies. Whether defendant had acted as a "reasonable and prudent employer" was a question of material fact appropriate for the jury. *Id.*

In rejecting defendant's assertion that this claim was barred by the exclusive remedy provision

Workers' compensation statutes seek to balance the interests of both employers and employees²³ by requiring each group to compromise certain rights in return for corresponding gains.²⁴ Employers must compensate injuries without regard to fault, and, in return, compensation statutes protect employers from large judgments.²⁵ Although employees are assured recovery for loss of earning capacity, they must relinquish any right to a civil remedy yielding full compensation and possible punitive damages.²⁶

North Carolina General Statutes section 97-9 sets forth one side of this equation by providing for certain, but limited, compensation. The statute provides that "[e]very employer . . . shall secure the payment of compensation to his employees . . . and . . . he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified."²⁷ The compensation scheme is premised on the notion of "disability," defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."²⁸ Loss of wages forms the basis for calculating benefits,²⁹ and the

of the North Carolina Workers' Compensation Act, N.C. GEN. STAT. § 97-10.1 (1985), the court stated that sexual harassment is not a risk peculiar to employment and therefore does not "arise out of" employment. Under § 97-3 of the Act, only injuries arising out of employment fall within the scope of the Act. *Id.* § 97-3. Thus, sexual harassment is outside the scope of the Act. *Hogan*, 79 N.C. App. at 496, 340 S.E.2d at 124. For a discussion of the "arising out of" employment requirement, see *infra* notes 104-08 and accompanying text.

23. 2A A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 65.11 (1983).

24. *Id.*

25. *Id.*

26. *Id.* The purposes of compensation under workers' compensation statutes differ substantially from the objectives of the tort system. Statutory benefits are aimed at relieving the community of the burden of supporting injured employees, while the tort system seeks to restore plaintiffs to the position they held prior to being injured. 1 A. LARSON, *supra* note 23, § 2.50; see also *Kellams v. Carolina Metal Prods., Inc.*, 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958) (minimum and maximum awards consistent with statute's purpose "to relieve against hardship rather than to afford full compensation"); *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943) (noting that the Workers' Compensation Act "compell[s] industry to take care of its own wreckage").

27. N.C. GEN. STAT. § 97-9 (1985).

28. *Id.* § 97-2(9).

29. Section 97-29 furnishes the basic formula for complete incapacity:

Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a *weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages*, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars (\$30) per week.

In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of [sic] rehabilitative services shall be paid for by the employer during the lifetime of the injured employee. If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38. . . .

. . . [O]n July 1 of each year . . . a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22) . . . and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation.

Id. § 97-29 (emphasis added).

When disability is only partial the Act provides for weekly compensation of "sixty-six and two-thirds percent (66 2/3%) of the difference between his average weekly wages before the injury and

statutory definition of injury is critical in determining whether a compensable disability exists. The North Carolina Act provides that "[i]njury and personal injury' shall mean only injury by accident arising out of and in the course of the employment. . . ."³⁰

The other provision integral to the statutory compromise of the Act is North Carolina General Statutes section 97-10.1,³¹ which makes compensation under the Act the employee's sole remedy against the employer "[i]f the employee and the employer are subject to and have complied with the provisions of this [Act]."³² Despite the seemingly definitive language of the exclusivity provision, the North Carolina Supreme Court has removed the section's protection from employers who inflict injury through their intentional acts.³³ The courts have concluded that "to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, either from his insurance carrier or from himself as self-insurer" would defy sound reason.³⁴

the average weekly wages which he is able to earn thereafter" for no more than 300 weeks. The annual maximum specified in § 97-29 applies. *Id.* § 97-30. Certain injuries—primarily loss of parts of the body—are covered by § 97-31, which permits compensation to continue through "the healing period and in addition the disability shall be deemed to continue" for a specified number of weeks. *Id.* § 97-31.

30. *Id.* § 97-2(6). A wealth of case law has been devoted to construction of this definition. See, e.g., *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964) ("Arising out of and in the course of" means the employee is engaged in an authorized activity that is intended to further the employer's business.); *Hardy v. Small*, 246 N.C. 581, 584, 99 S.E.2d 862, 865 (1957) (To "arise out of" employment, an injury must result from risk to which the general public is not subject.); *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 726, 153 S.E. 266, 268 (1930) (An accident is an "unlooked for and untoward event which is not expected or designed by the person who suffers the injury.").

31. N.C. GEN. STAT. § 97-10.1 (1985).

32. The exclusive remedy provision 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.

Id.

33. See *Warner v. Leder*, 234 N.C. 727, 69 S.E.2d 6 (1952). The North Carolina Supreme Court recently refined this principle in *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E.2d 295 (1986). In *Barrino* the father and estate administrator of an employee killed in a factory explosion alleged that the employer had violated the National Electrical Code and North Carolina's Occupational Safety and Health Act, failed to inspect adequately equipment utilizing liquefied combustible gases, violated safety regulations related to this equipment, and turned off or concealed various warning and detection devices. *Id.* at 502-04, 340 S.E.2d at 297-98. A divided court held that willful, wanton, and reckless conduct of the employer does not give rise to a civil suit as does intentional conduct; the exclusivity provision bars such actions. *Id.* at 507, 340 S.E.2d at 300. For an analysis of the rationales underlying the *Barrino* decision, see 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, 702-04 (1986).

34. *Warner v. Leder*, 234 N.C. 727, 733-34, 69 S.E.2d 6, 10 (1952) (quoting S. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 336 (1944)).

Although North Carolina has adopted this doctrine through judicial interpretation of the Workers' Compensation Act, other states' acts expressly provide the employee may pursue both a civil and a statutory remedy when an employer commits an intentional tort. See, e.g., ARIZ. REV. STAT. ANN. § 23-1022A (Supp. 1985); LA. REV. STAT. ANN. § 23:1032 (West 1985); OR. REV. STAT. § 656.156(2) (1985); WASH. REV. CODE ANN. § 51.24.020 (Supp. 1987); W. VA. CODE § 23-4-2 (1985).

North Carolina courts have also limited the exclusivity provision in other contexts. In *Andrews v. Peters*³⁵ the North Carolina Court of Appeals held the exclusivity provision inapplicable to intentional conduct of a co-employee.³⁶ In *Andrews* an employee walked up behind plaintiff and placed his knee behind plaintiff's knee.³⁷ Plaintiff fell and sustained injuries.³⁸ The court reasoned that because the North Carolina General Assembly had decided "economic loss should be absorbed by the industry and ultimately passed on to the consumer," employees are *not* subject to actions in tort for damage caused by their negligent acts.³⁹ The *Andrews* court, however, concluded that "an intentional tort is not the type of 'industrial accident' to which [the] legislature intended to give a co-employee immunity. To hold otherwise [would be] to remove responsibility from the co-employee for his intentional conduct."⁴⁰

The exclusive remedy provision remains a bar to civil actions against employers for the intentional, tortious acts of one employee against another. The North Carolina Court of Appeals reached this conclusion in *Daniels v. Swofford*.⁴¹ *Daniels* involved an intentional assault by one employee on another.⁴² The court first considered whether the assault constituted an "accident arising out of and in the course of employment."⁴³ Because North Carolina courts previously had defined accident from the injured employee's viewpoint,⁴⁴ the *Daniels* court concluded that an assault may constitute an accident within the meaning of the Act despite the actor's intent.⁴⁵ Moreover, the alleged assault was not personally motivated, but occurred while plaintiff and her co-employee were discussing plaintiff's job performance.⁴⁶ Therefore, plaintiff's injury arose

35. 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

36. *Id.* at 125, 284 S.E.2d at 749.

In *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), the North Carolina Supreme Court addressed the issue of willful, reckless, and wanton conduct of co-employees, as it later did in *Barrino*, with regard to employers' actions. The *Pleasant* court held that the injured employee could recover under the Workers' Compensation Act as well as in tort against the co-employee. *Id.* at 711, 325 S.E.2d at 246. For a comparison of *Barrino* and *Pleasant*, see Note, *supra* note 33, at 702-04.

37. *Andrews*, 55 N.C. App. at 124, 284 S.E.2d at 748.

38. *Id.*

39. *Id.* at 126-27, 284 S.E.2d at 750.

40. *Id.* at 127, 284 S.E.2d at 750. The court cited with approval several state statutes that permit an action in tort against a co-employee for purposeful acts. See ARIZ. REV. STAT. ANN. § 23-1022 (Supp. 1971-1980); CAL. LAB. CODE § 3601(a)(1) (West Supp. 1980); CONN. GEN. STAT. ANN. § 31-293 (West 1972); HAW. REV. STAT. § 386-8 (1976); LA. REV. STAT. ANN. § 23:1032 (West Supp. 1980); MONT. CODE ANN. § 39-71-413 (1981); N.J. STAT. ANN. § 34:15-8 (West Supp. 1981); OR. REV. STAT. § 656.018(3)(a) (1979); PA. STAT. ANN. tit. 77, § 72 (Purdon Supp. 1980); W. VA. CODE § 23-2-6a (1981).

41. 55 N.C. App. 555, 286 S.E.2d 582 (1982).

42. *Id.* Plaintiff alleged that the president of the company verbally abused her while criticizing her job performance, followed her down the hall, and kicked her in the back of the leg. Record on Appeal at 2-3, *Daniels* (No. 80CvS200).

43. *Daniels*, 55 N.C. App. at 558, 286 S.E.2d at 584.

44. An accident is "an unlooked for and untoward event which is not expected or designed by the injured employee." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962); see *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 726, 153 S.E. 266, 268 (1930).

45. *Daniels*, 55 N.C. App. at 558, 286 S.E.2d at 584.

46. *Id.*

out of and in the course of employment.⁴⁷

Having decided that the co-employee assault met the statutory definition of injury, the *Daniels* court addressed itself to the exclusivity provision. The court of appeals recognized that North Carolina courts had created an exception to the exclusivity rule for the employer's intentional acts.⁴⁸ The court then noted that this exception is founded on the idea that "the same person cannot commit an intentional assault and then allege it was accidental."⁴⁹ In the case of a co-employee assault the actor and defendant are not the same person, and therefore no salient reason exists for removal of the employer's immunity from suit.⁵⁰ The court in *Daniels* recognized that a limited exception to this rule exists when the defendant employer is a corporation and the assaultive employee is effectively its alter ego. In such situations the two should be treated as one and a civil action should be allowed.⁵¹ Despite the fact the co-employee in *Daniels* acted as president of the company, he was not alleged to be its alter ego, "nor [was] there any evidence . . . from which [the court could] conclude that Mr. Swofford was so acting."⁵² Thus, plaintiff's action was barred by the exclusivity provision.⁵³

To be consistent with *Andrews* and *Daniels*, *Hogan* could have been decided on the basis of the nature of the conduct involved.⁵⁴ The court, however, distinguished *Andrews* and *Daniels* on the basis that both cases dealt with assaultive conduct resulting in physical injury.⁵⁵ In contrast, plaintiffs in *Hogan* did not seek redress for "any physical or mental illness nor [did] they allege employment disability or loss of earning capacity."⁵⁶ The court in *Hogan* therefore declined an opportunity to base its decision on established doctrine.

Instead of using an *Andrews* or *Daniels* approach, the court in *Hogan* focused on the type of injury suffered by plaintiffs.⁵⁷ In North Carolina "capacity or incapacity to earn wages" has been the key factor in determining whether

47. *Id.*

48. *Id.* at 559-60, 286 S.E.2d at 585.

49. *Id.* at 560, 286 S.E.2d at 585 (quoting 2A A. LARSON, *supra* note 23, § 68.21, at 13-29 to -30).

50. *Id.*

51. *Id.* at 560-61, 286 S.E.2d at 585.

52. *Id.* at 560, 286 S.E.2d at 585.

53. *Id.* The *Daniels* court employed an "alter-ego" standard, rather than traditional employment agency principles, for purposes of defining when a co-employee's intentional acts may be attributed to the employer and the intentional act exception to the exclusive remedy provision invoked. Use of employment agency principles would have expanded the scope of the intentional act exception. For a discussion of the circumstances under which employers may be held liable for the actions of their employees under traditional agency theory, see *supra* note 18.

54. The *Hogan* court considered the reasoning of both *Andrews* and *Daniels* before choosing to analyze *Hogan* differently. *Hogan*, 79 N.C. App. at 488-89, 340 S.E.2d at 120.

55. *Id.* at 488, 340 S.E.2d at 120.

56. *Id.* at 489, 340 S.E.2d at 120.

57. The court actually considered the exclusive remedy issue prior to holding that plaintiffs *Hogan* and *Mitchell* failed to allege sufficiently extreme and outrageous conduct to support their claims for intentional infliction of emotional distress. Thus, although Cornatzer's claim was ultimately the only claim to avoid summary judgment, the court referred to all three plaintiffs in deciding the exclusivity issue. *Id.* at 488-93, 340 S.E.2d at 120-22.

a plaintiff is entitled to compensation under the Act.⁵⁸ The *Hogan* court held that because plaintiffs had alleged only mental distress and had not alleged incapacity, plaintiffs' injuries were recoverable in tort but not under the Workers' Compensation Act.⁵⁹ The court concluded that the nature of the wrong and of the associated injury was such that it was part of "an entire class of civil wrongs which are outside the scope of the Act."⁶⁰

The *Hogan* court compared its treatment of nonphysical injury torts to North Carolina's treatment of incidents not arising out of or in the course of employment, stating that neither of these two types of cases "come[s] within the fundamental coverage pattern of the Act."⁶¹ The class of cases that concerned the court has two essential characteristics: (1) "the essence of the tort, in law, is non-physical," and (2) "the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a make-weight."⁶² Thus, because the tort of intentional infliction of emotional distress essentially is nonphysical and plaintiffs did not claim to have suffered disabling physical injuries,⁶³ the exclusivity provision did not bar their claims.⁶⁴

In reaching its decision, the court of appeals adopted Professor Larson's view that both the formal, legal elements of a given tort and the injury sustained by the employee should be considered in determining whether a given wrong falls within the scope of the Act.⁶⁵ Thus, the *Hogan* court did not hold that the tort of intentional infliction of emotional distress always falls outside the scope of the Act. Rather, its decision more narrowly supports the proposition that when no physical injury results from the conduct intended to inflict emotional distress, a civil action can be brought.

Courts and commentators have divided personal injuries involving a mental or psychic aspect into three separate categories. In the first category a mental stimulus results in a physical injury, as when an emotionally traumatic event precipitates a heart attack. This type of injury consistently has been found com-

58. *Id.* at 489, 340 S.E.2d at 120 (quoting *Mills v. J.P. Stevens & Co.*, 53 N.C. App. 341, 343, 280 S.E.2d 802, 803, *disc. rev. denied*, 304 N.C. 196, 285 S.E.2d 100 (1981)); see *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 574, 139 S.E.2d 857, 861 (1965) ("Under the . . . Compensation Act *disability* refers not to physical infirmity but to a diminished capacity to earn money.").

59. *Hogan*, 79 N.C. App. at 489, 340 S.E.2d at 120.

60. *Id.*

61. *Id.* (quoting 2A A. LARSON, *supra* note 23, § 68.30, at 13-40).

62. *Id.* at 489, 340 S.E.2d at 120-21. The corollary of this standard is that "if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort." 2A A. LARSON, *supra* note 23, § 68.34(a), at 13-63.

63. *Hogan*, 79 N.C. App. at 490, 340 S.E.2d at 121. Although the complaints alleged only severe mental and emotional distress, Record on Appeal at 2, 6, 9, *Hogan*, April Cornatzer and Sonya Mitchell claimed in affidavits to have developed ulcers and high blood pressure coupled with irregular heartbeats, respectively, Record on Appeal at 75, 77, *Hogan*. For a discussion of mixed physical and nervous injury, see *infra* text accompanying notes 95-96.

64. *Hogan*, 79 N.C. App. at 490, 340 S.E.2d at 121.

65. 2A A. LARSON, *supra* note 23, § 68.34(a), at 13-61. Professor Larson supported this assertion by comparing the torts of assault and defamation. Although assault often is accompanied by battery and substantial physical injury, it does not invariably result in physical harm. Conversely, defamation normally involves injury to one's reputation and self-esteem, but could also conceivably harm one's physical well-being. *Id.* at 13-61 to -62.

pensable under workers' compensation acts.⁶⁶ The converse, when a physical trauma or accident produces a psychological effect, also is generally deemed compensable.⁶⁷ In a typical situation, an accident causes physical harm, and the disabling effects of this trauma are aggravated or prolonged by any one of a broad range of mental conditions.⁶⁸ Courts increasingly have recognized that "[w]hile psychiatry and psychology may not be exact sciences, they can now provide sufficiently reliable information concerning causation and treatment of psychic injuries, to provide . . . an intelligent basis for evaluating a particular claim."⁶⁹ North Carolina adheres to this view. In *Fayne v. Fieldcrest Mills, Inc.*⁷⁰ a psychiatrist testified that plaintiff suffered from a disabling neurotic depressive reaction that was in all likelihood caused by an injury to her back and related surgery.⁷¹ The *Fayne* court held that a mental condition is covered by the Act if it results from a compensable, physical injury.⁷²

The last category of mental or emotional injury, mental stimulus causing mental reaction, has not been uniformly accepted, although a majority of courts now find such injuries compensable under workers' compensation acts.⁷³ Prior to the *Hogan* decision, North Carolina courts had not squarely addressed

66. 1B A. LARSON, *supra* note 23, § 42.21(a); see, e.g., *Miller v. Bingham County*, 79 Idaho 87, 89, 310 P.2d 1089, 1090 (1957) (fright from narrow avoidance of a collision with an automobile carrying children resulting in cerebral hemorrhage); *Klein v. Len H. Darling Co.*, 217 Mich. 485, 488, 187 N.W. 400, 410 (1922) (worker died from shock after he accidentally caused co-worker's death); *Church v. Westchester County*, 253 A.D. 859, 859-60, 1 N.Y.S.2d 581, 581 (1938) (coronary occlusion caused by excitement of testifying at employer's trial).

North Carolina courts have not directly addressed this issue. In *Lewter v. Abercrombie Enter., Inc.*, 240 N.C. 399, 405-06, 82 S.E.2d 410, 415-16 (1954), plaintiff's decedent, who had hypertension, suffered a cerebral hemorrhage shortly after a fire broke out in the movie theater at which she worked. Decedent was overweight and had a history of high blood pressure. Compensation was denied on the grounds that the fire was not proven to be a contributing proximate cause. The court did not discuss whether physical injury or death caused by fright or shock is compensable. *Id.*

67. 1B A. LARSON, *supra* note 23, § 42.22(a), at 7-601.

68. "Dozens of cases, involving almost every conceivable kind of neurotic, psychotic, psychosomatic, depressive, or hysterical symptom, functional overlay, or personality disorder, have accepted this rule." 1B A. LARSON, *supra* note 23, § 42.22(a), at 7-601 to -602.

69. *Towns v. Anderson*, 195 Colo. 517, 519, 579 P.2d 1163, 1164 (1978) (en banc).

70. 54 N.C. App. 144, 282 S.E.2d 539 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E.2d 380 (1982).

71. *Id.* at 146, 282 S.E.2d at 540.

72. *Id.* at 146-47, 282 S.E.2d at 540. Previous cases had allowed compensation for suicidal death when pain associated with a compensable physical injury induced derangement. See *Petty v. Associated Transport, Inc.*, 276 N.C. 417, 428, 173 S.E.2d 321, 329 (1970); *Thompson v. Lenoir Transfer Co.*, 48 N.C. App. 47, 51, 268 S.E.2d 534, 537, *disc. rev. denied*, 301 N.C. 405, 273 S.E.2d 450 (1980); see also *Hill v. Hanes Corp.*, 79 N.C. App. 67, 339 S.E.2d 1 (back injury resulting in compensable depression), *disc. rev. granted*, 316 N.C. 376, 342 S.E.2d 895 (1986); *Davis v. Edgecomb Metals*, 63 N.C. App. 48, 303 S.E.2d 612 (1983) (post-traumatic neurosis produced by accidental injury to leg compensable).

73. 1B A. LARSON, *supra* note 23, § 42.23 n.81. The American Psychiatric Association has developed a manual to standardize the terms clinicians and research investigators use to refer to various psychological disorders. Post-traumatic stress disorders are described as follows:

The essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience. . . .

The stressor producing this syndrome would evoke significant symptoms of distress in most people Stressors producing this disorder include natural disasters (floods, earthquakes), accidental man-made disasters (car accidents with serious physical injury, airplane crashes, large fires), or deliberate man-made disasters (bombing, torture, death

whether this type of injury was compensable. Nonetheless, because the court in *Hogan* cited plaintiffs' lack of physical injury as the primary reason for allowing a civil action,⁷⁴ *Hogan* can be interpreted as implicitly adopting the view that "injury" excludes nervous injury caused by psychological stimuli.

In excluding mental injuries caused by mental stimuli from the definition of "injury," the *Hogan* court engaged in judicial legislation. The statutory language does not distinguish between physical and emotional harms in its definition of "injury."⁷⁵ Nor have any prior North Carolina cases drawn the distinction. Moreover, a disabling mental condition, although not compensable as a section 97-31 scheduled injury, could fit within the provisions of sections 97-29 and 97-30, which compensate for a disabling injury in general.⁷⁶ Assuming *arguendo* that the Act would not redress a mental injury, "[t]he existence of a noncompensable injury does not, by itself, abrogate the exclusive remedy provisions of the Workers' Compensation Act."⁷⁷ For example, workers' compensation statutes fail to compensate loss of taste, smell, or sensation,⁷⁸ and pain and suffering.⁷⁹ Moreover, the statutes bar recovery in tort for these types or components of injury.

camp) The disorder is apparently more severe and longer lasting when the stressor is of human design. . . .

The traumatic event can be reexperienced in a variety of ways. Commonly the individual has recurrent painful, intrusive recollections of the event or recurrent dreams or nightmares during which the event is reexperienced. . . . Diminished responsiveness to the external world, referred to as "psychic numbing" or "emotional anesthesia," usually begins soon after the traumatic event. A person may complain of feeling detached or estranged from other people, that he or she has lost the ability to become interested in previously enjoyed significant activities, or that the ability to feel emotions of any type, especially those associated with intimacy, tenderness, and sexuality, is markedly decreased.

After experiencing the stressor, many develop symptoms of excessive autonomic arousal, such as hyperalertness, exaggerated startle response, and difficulty falling asleep. . . . Some complain of impaired memory or difficulty in concentrating or completing tasks. . . . Activities or situations that may arouse recollections of the traumatic event are often avoided. . . .

Symptoms of depression and anxiety are common, and in some instances may be sufficiently severe to be diagnosed as an Anxiety or Depressive Disorder. Increased irritability may be associated with sporadic and unpredictable explosions of aggressive behavior, upon even minimal or no provocation. . . . Impulsive behavior can occur, such as sudden trips, unexplained absences, or changes in life-style or residence. . . .

Symptoms may begin immediately or soon after the trauma. It is not unusual, however, for the symptoms to emerge after a latency period of months or years following the trauma. . . .

Impairment may either be mild or affect nearly every aspect of life. *Phobic avoidance of situations or activities resembling or symbolizing the original trauma may result in occupational or recreational impairment.*

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236-37 (American Psychiatric Association 3d ed. 1980) (emphasis added).

74. *Hogan*, 79 N.C. App. at 490, 340 S.E.2d at 121.

75. See *supra* note 30 and accompanying text.

76. For a discussion of these statutory provisions, see *supra* note 29.

77. *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978).

78. See, e.g., *Arrington v. Stone & Webster Eng'r Corp.*, 264 N.C. 38, 140 S.E.2d 759 (1965) (loss of taste and smell not compensable as serious facial or head disfigurement).

79. See, e.g., *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E.2d 214 (1985) (pain and suffering noncompensable unless it impairs use of extremities).

In *Renteria v. County of Orange*,⁸⁰ a leading case on the relationship of compensation statutes to intentional infliction of emotional distress, a California Court of Appeal asserted that intentional infliction of emotional distress was "not an isolated instance of a *physical* injury which is noncompensable, but an entire class of civil wrongs outside the contemplation of the workers' compensation system."⁸¹ The *Renteria* court, however, did not make this conclusion dispositive and hold that the exclusive remedy provision did not bar a civil action. Rather, the court focused on the intentional nature of the conduct and the widespread concern that the workers' compensation system would not sufficiently deter intentional wrongdoing.⁸² The court emphasized that "[i]t would indeed be ironic if the . . . Act, created to benefit employees, were to be interpreted to shield the employer from all liability for such conduct."⁸³ Thus, the *Renteria* court relied heavily on both the intentional nature of the conduct and the non-physical nature of the injury.⁸⁴

The *Hogan* court declined the opportunity to base its decision on the intentional nature of the conduct.⁸⁵ As a result, the North Carolina Court of Appeals has created an exception to the exclusivity provision without relying on any apparent statutory, case law, or policy-based support.

Other jurisdictions, unable to distinguish mental stimulus, mental injury situations from mental-physical or physical-mental cases, have held such injuries compensable if they are disabling.⁸⁶ The New York Court of Appeals has noted:

[T]here is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. . . . In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same—

80. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

81. *Id.* at 841, 147 Cal. Rptr. at 451 (emphasis added). The *Hogan* court employed the same reasoning. See *supra* text accompanying note 60.

82. *Renteria*, 82 Cal. App. 3d at 841, 147 Cal. Rptr. at 451. The court noted:

While it is possible to believe that the Legislature intended that employees lose their right to compensation for certain forms of negligently or accidentally inflicted physical injuries in exchange for a system of workers' compensation featuring liability without fault, compulsory insurance, and prompt medical care, it is much more difficult to believe that the Legislature intended the employee to surrender all right to any form of compensation for mental suffering caused by extreme and outrageous misconduct by an employer.

Id. at 841, 147 Cal. Rptr. at 452.

83. *Id.*

84. The court noted that another California case, *Williams v. Schwartz*, 61 Cal. App. 3d 628, 131 Cal. Rptr. 200 (1976), had disposed of the exclusivity issue as it applied to negligently inflicted emotional distress. *Williams* held that recovery for such injuries was limited to the workers' compensation system. *Renteria*, 82 Cal. App. 3d at 839 n.3, 147 Cal. Rptr. at 450 n.3 (citing *Williams*, 61 Cal. App. 3d at 633-34, 131 Cal. Rptr. at 203). This suggests that the *Renteria* court was not primarily concerned with the physical/nonphysical distinction.

85. See *supra* text accompanying notes 54-56.

86. See, e.g., *Brock v. Industrial Comm'n*, 15 Ariz. App. 95, 486 P.2d 207 (1971); *International Harvester v. Labor & Indus. Review Comm'n*, 116 Wis. 2d 298, 341 N.W.2d 721 (Wis. Ct. App. 1983); *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885 (Wyo. 1984); cf. *Hackett v. Travelers Ins. Co.*, 195 So. 2d 758 (La. Ct. App. 1967) (witness to fatal dynamite blast denied compensation due to lack of physical trauma); *Egeland v. City of Minneapolis*, 344 N.W.2d 597 (Minn. 1984) (compensation for policeman's depression denied); *Vernon v. Seven-Eleven Stores*, 547 P.2d 1300 (Okla. 1976) (neurosis resulting from failure of polygraph test and subsequent termination not an accidental injury).

the individual is incapable of functioning properly because of an accident and should be compensated under the Workmen's Compensation Law.⁸⁷

In *Bailey v. American General Insurance Co.*⁸⁸ the Texas Supreme Court held that a steel worker, who watched a co-worker fall from a scaffold to his death, sustained a disabling neurosis and was entitled to compensation under the Texas Workers' Compensation Act.⁸⁹ The court reached this conclusion despite Texas' restrictive definition of "injury"—"damage or harm to the *physical structure* of the body."⁹⁰ Stating that the "structure should be considered that of a living person—not as a static, inanimate thing," the court interpreted injury to include mental harms.⁹¹

The *Hogan* court's refusal to place mental stimulus/mental injuries on equal footing with injuries involving physical stimuli will likely have far-reaching implications for both potential claimants and their employers. The decision's most significant effect is that some tort claims will be permitted against employers while other claims based on identical circumstances will be barred. For example, when a co-employee is so successful in his or her effort to inflict emotional harm that the injured party suffers not only nervous or emotional symptoms but also a heart attack or ulcers, the workers' compensation system will afford the only remedy against the employer. If the claimant is disabled, he or she will be compensated accordingly. If the claimant is not disabled, he or she will go without remedy. If, however, the same conduct results only in psychic injury or in psychic harm accompanied only by "makeweight"⁹² physical injury, a tort action against the employer will be permitted if the plaintiff can satisfy general agency principles.⁹³ Even if the plaintiff is disabled and therefore could have been compensated under the Act, he or she may seek full redress in a civil forum. Similar anomalous results will occur in the case of unintentional psychic trauma that causes mental injury.

The inequities that may result from the *Hogan* decision are emphasized by the difference in remedies available under the tort system and under workers' compensation statutes.⁹⁴ The serious combination of mental and physical injury will likely be compensated only to a limited extent under the Act. A claimant

87. *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 510, 330 N.E.2d 603, 606, 369 N.Y.S.2d 637, 641 (1975).

88. 154 Tex. 430, 279 S.W.2d 315 (1955).

89. *Id.* at 432, 279 S.W.2d at 316.

90. *Id.* at 435, 279 S.W.2d at 318.

91. "The phrase 'physical structure of the body,' as it is used in the statute [sic], must refer to the *entire* body, not simply to the skeletal structure or to the circulatory system or to the digestive system. It refers to the whole . . ." *Id.* at 436, 279 S.W.2d at 318.

92. *Hogan*, 79 N.C. App. at 489, 340 S.E.2d at 120-21 (citing 2A A. LARSON, *supra* note 23, § 68.30).

93. The plaintiff would have to show circumstances that would justify charging the co-employee's tort to the employer. For a discussion of employment agency principles, see *supra* note 18.

94. The tort system offers a full range of damages, including punitive damages, pain and suffering, and 100% of lost wages. Kawaler, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181, 185 (1983). In contrast, workers' compensation only redresses two-thirds of lost wages. See *supra* note 29.

sustaining such a combination of injuries will receive only reduced wages, and only if he or she is disabled. The employee who suffers only mental trauma will be able to recover in tort for pain and suffering and possibly punitive damages, regardless of whether he or she has been able to work since the accident occurred.

Another consequence of the physical injury/mental injury distinction is that both employers and employees will be unsure about the appropriate forum for resolution of a claim based on a physical injury. Because each factual situation is different, the question whether an injury's physical component is only "makeweight" necessarily will require litigation on an ad hoc basis. As a result, one of the purposes of the Act, "to provide swift and sure compensation to injured workers without the necessity of protracted litigation,"⁹⁵ will be defeated.

Furthermore, plaintiffs will face a dilemma when drafting their complaints. By adding physical symptoms to mental distress, a plaintiff will be able to emphasize the genuineness of the claim as well as increase the potential judgment. The more severe the physical injury pleaded, however, the greater the risk that the plaintiff's civil action will be barred. The court may deem the plaintiff's injuries to be essentially physical and, therefore, covered solely by the Workers' Compensation Act.⁹⁶

Courts in other jurisdictions have approached the issue of psychic harm from different perspectives. Some courts have focused on the unintentional or intentional nature of the conduct involved.⁹⁷ Mental and physical harms are not distinguished, but civil actions against the employer are allowed for the intentionally tortious conduct of the employer or its alter ego.⁹⁸ These jurisdictions have permitted tort actions for not only the intentional infliction of emotional distress,⁹⁹ but also for defamation,¹⁰⁰ false imprisonment,¹⁰¹ assault, and offensive battery.¹⁰² Had the *Hogan* court employed this reasoning, it could have integrated the treatment of mental harms into existing case law without creating another exception to the exclusivity provision.¹⁰³ In addition, judgments would be more predictable because the intentional/accidental distinction provides a bright line for establishing the extent of the compensation system's coverage.

95. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982).

96. *Kawaler*, *supra* note 94, at 197.

97. *See, e.g., Renteria*, 82 Cal. App. 3d at 833, 147 Cal. Rptr. at 447. *See generally Love, Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With An Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857, 869-70 (1985) (noting that several state courts define accidental injury from the actor's point of view, citing *Daniels*).

98. This is the reasoning used by the *Daniels* court. *Daniels*, 55 N.C. App. at 560, 286 S.E.2d at 585; *see, e.g., Thompson v. Maimonides Medical Center*, 86 A.D.2d 867, 447 N.Y.S.2d 308 (1982) (relying in part on *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975)). *See generally* 2A A. LARSON, *supra* note 23, § 68.11 (employer cannot allege injury is accidental if he or she acts intentionally).

99. *See, e.g., Thompson v. Maimonides Medical Center*, 86 A.D.2d 867, 447 N.Y.S.2d 308 (1982).

100. *Id.*

101. *See, e.g., Skelton v. W.T. Grant Co.*, 331 F.2d 593 (5th Cir.) (applying Georgia law), *cert. denied*, 379 U.S. 830 (1964); *Miller v. McRae's, Inc.*, 444 So. 2d 368 (Miss. 1984).

102. *See, e.g., Leopold v. Britt*, 58 A.D.2d 856, 396 N.Y.S.2d 680 (1977).

103. *See supra* text accompanying notes 60-64.

Other courts have focused on the "arising out of employment" requirement¹⁰⁴ and have held that certain intentional torts did not arise out of employment,¹⁰⁵ especially when the employer specifically aimed to inflict nonphysical harm.¹⁰⁶ Although this method is more difficult to apply than the intentional/accidental distinction, its flexibility allows courts to promote the compensation statute's underlying policies.¹⁰⁷

Although *Hogan* was not decided on the basis of the Act's "arising out of" language, it could have been. In determining whether Pfeiffer had acted as an agent of the country club, the court noted that the chef had not acted within the scope of his employment, but rather for his own "corrupt or lascivious" purposes.¹⁰⁸ Had the court similarly focused on the specific conduct of Pfeiffer's alleged sexual harassment when deciding whether the Workers' Compensation Act was plaintiff's exclusive remedy, it could have reached the same conclusion without also implicitly holding that nervous or emotional injury stemming from psychological trauma is not compensable under the Act.

The various approaches to the issue of psychic harm assume that a choice must be made between the workers' compensation system and traditional tort law. Commentators and some courts support remedial schemes that differ from the traditional "either-or" or "alternative action" approach. One scheme, the cumulative action theory,¹⁰⁹ allows a plaintiff to seek recovery both in tort and under the Act.¹¹⁰ Under this approach, no-fault benefits offset any tort judgment to prevent double recovery.¹¹¹ Three states have statutes¹¹² that expressly

104. See, e.g., *Lagies v. Copley*, 110 Cal. App. 3d 958, 970, 168 Cal. Rptr. 368, 375 (1980); *Tredway v. District of Columbia*, 403 A.2d 732, 734-35 (D.C.), cert. denied, 444 U.S. 867 (1979); *McKinley v. Holiday Inn*, 115 Mich. App. 160, 162, 320 N.W.2d 329, 331 (1982) (per curiam). See generally *Love*, *supra* note 97, at 874 (rationale of "arising out of" theory is that workers' compensation should be the plaintiff's remedy only for injury caused by "the ordinary risks of employment").

105. See, e.g., *Iverson v. Atlas Pac. Eng'g*, 143 Cal. App. 3d 219, 191 Cal. Rptr. 696 (1983) (intentional infliction of emotional distress and false imprisonment); *Foley v. Polaroid Corp.*, 381 Mass. 545, 413 N.E.2d 711 (1980) (defamation). *Contra Harned v. Farmland Foods, Inc.*, 331 N.W.2d 98 (Iowa 1983) (distinguishing intentional denial of care from other intentional torts for which civil action permitted); *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885, 891-92 (Wyo. 1984) (intentional infliction of emotional distress, assault, and battery resulting from sexual harassment have sufficient causal nexus to employment).

106. See, e.g., *Bennett v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887, 890-91 (D. Colo. 1982) (not deciding specific intent issue); *Kandt v. Evans*, 645 P.2d 1300, 1304 (Colo. 1982) (dictum noting that there is "some justification . . . for not [barring] intentional tort actions when it is the employer personally . . . who commits the tort"); *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 238-39, 408 N.E.2d 198, 202 (1980) (dictum noting the distinction between acts "commanded or expressly authorized" by the employer and regular accident); *Barnes v. Double Seal Glass Co.*, 129 Mich. App. 66, 78-83, 341 N.W.2d 812, 818-20 (1983) (Burns, J., concurring).

107. *Love*, *supra* note 97, at 875-76.

108. *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122.

109. *Love*, *supra* note 97, at 860.

110. *Love*, *supra* note 97, at 860. The cumulative action theory is more compensatory and punitive than the alternative action approach and is a more valuable deterrent. This theory is also easier to administer than other approaches, because a plaintiff's civil and statutory claims can be processed at the same time. However, because "[t]he cumulative action theory conflicts . . . with the no-fault objective of limiting a defendant's tort liability for compensatory damages . . . the theory should be recognized only to protect highly valued interests or to punish and deter serious misconduct." *Id.* at 894-95.

111. *Love*, *supra* note 97, at 894-95.

112. See OR. REV. STAT. § 656.156 (1985); WASH. REV. CODE ANN. § 51.24.020 (Supp. 1986);

authorize such actions when the employer specifically intends to produce injury or death.¹¹³ This approach, however, has been applied sparingly to actions for nonphysical injury.¹¹⁴

Another alternative is the cumulative remedy theory, which allows recovery under the compensation act for the types of injuries covered by the statute and also permits a civil action for all injuries not covered by the compensation act.¹¹⁵ Statutory compensation limits are honored for injuries compensable under the statute, but punitive damages and damages for noncompensable psychological harm are available through the tort system. No state legislature has expressly provided for a cumulative remedy, but several courts have moved toward use of this theory.¹¹⁶

At least one commentator has advanced the cumulative remedy theory as preferable to Professor Larson's physical/nonphysical distinction.¹¹⁷ The cumulative remedy theory "allows the no-fault plan to perform the compensatory function which it was designed to serve, and authorizes the tort system to vindicate dignitary interests and punish egregious misconduct."¹¹⁸ The theory also encourages the use of no-fault penalties or administrative fines, which could be supported by punitive damages in the most flagrant cases of intentional tortious conduct.¹¹⁹

In giving effect to the exclusive remedy provision of the Act only when physical injury is present, the *Hogan* court has formulated a principle that will be difficult to apply, will produce inequitable results in different factual settings, and is inconsistent with prior North Carolina case law. There are no notable differences between physical and psychic injury that support the court's holding. The court of appeals in *Hogan* should have applied workers' compensation doctrine as laid out in *Andrews* and *Daniels* consistently, rather than create an artificial distinction based on the existence of some elusive degree of physical injury. It is for the North Carolina General Assembly to change the benefit scheme to

W. VA. CODE § 23-4-2(b) (1985). No plaintiff has successfully brought a tort action solely for mental harm under these statutes.

113. Love, *supra* note 97, at 861.

114. It is difficult in a nonphysical injury case to prove the actor specifically intended to inflict mental or emotional injury. Love, *supra* note 97, at 863-64.

115. Love, *supra* note 97, at 860.

116. A few California and Michigan decisions have allowed a tort action for damage to some dignitary interest when physical or mental injuries had previously been settled through the workers' compensation system. See *Howland v. Balma*, 143 Cal. App. 3d 899, 192 Cal. Rptr. 286 (1983) (permitting separate civil action for slander); *McCalla v. Ellis*, 129 Mich. App. 452, 341 N.W.2d 525 (1983) (permitting civil action for sexual discrimination); *Slayton v. Michigan Host, Inc.*, 122 Mich. App. 411, 332 N.W.2d 498 (1983) (allowing separate civil action for mental anguish, loss of professional esteem, and damage to plaintiff's career). Several state courts have permitted both no-fault compensation for an injury and a tort action for a distinct nonphysical harm that an employer later inflicted. See 2A A. LARSON, *supra* note 23, § 68.34(b)-(c).

117. Love, *supra* note 97, at 889.

118. Love, *supra* note 97, at 896.

119. Love, *supra* note 97, at 896.

compensate for pain and suffering or nondisabling emotional distress or to reserve certain civil actions related to the employment relationship.

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