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THE “SUBSTANTIAL UNCERTAINTY” OF THE VIABILITY OF  
WOODSON CLAIMS AFTER *VALENZUELA V. PALLET EXPRESS, INC.* \*

*[I]f this doesn't make it then we'll at least know that there is no  
such thing as a Woodson claim.*

—Christopher Mauriello, Attorney for the  
Valenzuela Family<sup>1</sup>

INTRODUCTION

Two decades ago, the Supreme Court of North Carolina carved out an important exception to the exclusive remedy provision of the North Carolina Workers' Compensation Act<sup>2</sup> (the “Act”) which generally limits an employee's recovery for work-related injuries and precludes common law remedies.<sup>3</sup> A claim based on this exception, commonly called a *Woodson* claim, is a cause of action for employees' injuries resulting from an employer's intentional misconduct that is “substantially certain to cause serious injury or death”—the “substantial certainty” standard.<sup>4</sup>

The creation of this exception was significant for two reasons. First, the newly minted *Woodson* claim allowed injured employees to pursue tort remedies outside of the Act for employer misconduct that was not a true intentional tort, which already fell outside the exclusive remedy provision,<sup>5</sup> and second, it signaled to offending employers that they would no longer be allowed to hide behind the nearly impenetrable shield of the Act, and thus served as a deterrent. Yet, almost immediately after creating this new substantive right, North Carolina appellate courts began chipping away at the availability of the cause of action by disposing of most claims on summary judgment

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1. Sylvia Adcock, *No Woodson Claim for Teen Shredded in Machinery*, N.C. LAW. WKLY., Oct. 11, 2010, at 1.

2. North Carolina Workers' Compensation Act, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to -101 (2011)).

3. See § 97-10.1.

4. *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991).

5. See notes 50–52 and accompanying text.

in favor of the defendant employer, a practice that has continued to the present.<sup>6</sup>

In *Valenzuela v. Pallet Express, Inc.*,<sup>7</sup> the family of Nery Castañeda Valenzuela filed a *Woodson* claim against Pallet Express for alleged intentional misconduct.<sup>8</sup> Nery was an underage immigrant worker who was killed while working alone on an industrial pallet shredder.<sup>9</sup> In what has become customary practice when faced with a *Woodson* claim,<sup>10</sup> the North Carolina Court of Appeals once again affirmed summary judgment in favor of the defendant employer, finding insufficient evidence to support an issue of material fact regarding whether the defendant employer “engaged in intentional conduct substantially certain to cause Nery’s death.”<sup>11</sup> The court came to this conclusion despite the employer’s admission that manufacturer-installed safety guards were intentionally removed from the dangerous wood-shredding machinery and that the improperly trained underage immigrant was allowed to work on the unguarded machine unsupervised.<sup>12</sup>

This Recent Development argues that the *Woodson* exception has become an illusory cause of action for injured employees in North Carolina because of the confusion regarding the meaning of the substantial certainty standard and its use in evaluating *Woodson* claims.<sup>13</sup> Further, it argues that an employer that engages in misconduct such as intentionally disregarding safety regulations, as in *Valenzuela*, does not deserve the limited liability that the Act provides and should be held liable as a tortfeasor. Rather than allowing the exception to remain an ineffective remedy for injured employees, this Recent Development argues that the solution lies in discarding the current standard used to evaluate whether employer misconduct falls outside the Act in favor of a gross negligence standard. Requiring that injured employees allege their injury was caused by the gross negligence of their employer will ensure that cases such as *Valenzuela* can survive summary judgment and that employers will not continue to avoid liability for tortious misconduct

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6. See Mark McGrath, *Commentary: N.C. Appellate Courts’ Treatment of Woodson Amounts to Reversal*, N.C. LAW. WKLY., Oct. 22, 2007, at 3 (reviewing the appellate history of *Woodson* claims).

7. \_\_\_ N.C. App. \_\_\_, 700 S.E.2d 76 (2010).

8. *Id.* at \_\_\_, 700 S.E.2d at 79.

9. *Id.*

10. See McGrath, *supra* note 6, at 3; *infra* note 109.

11. *Valenzuela*, \_\_\_ N.C. App. at \_\_\_, 700 S.E.2d at 79–80.

12. *Id.*

13. See *Woodson v. Rowland*, 329 N.C. 330, 342, 407 S.E.2d 222, 229 (1991).

that was never meant to be protected by workers' compensation legislation.

Analysis proceeds in four parts. Part I discusses the facts and holding of *Valenzuela*. Part II briefly discusses the history and social policy behind workers' compensation legislation and explores the conception and development of the judicially created exceptions to the Act's exclusivity provisions leading to the *Woodson* exception, as well as the *Woodson v. Rowland* case. Part II then turns to the confusion surrounding the substantial certainty standard and the current understanding (or misunderstanding) of the standard. Part III suggests that the reasoning behind the adoption of the substantial certainty standard was not grounded in sound policy or fact and argues that the confusion in the courts surrounding this standard has made the *Woodson* claim an illusory cause of action. Next, this Part suggests gross negligence as a new, workable standard that encompasses the social policy behind workers' compensation legislation and the goals of deterrence and culpability that underlie the exceptions to the exclusivity provisions of the Act. Finally, Part IV outlines guidelines based on the *Restatement (Third) of Torts* for applying gross negligence in an employer-employee context. This Part concludes that even under the substantial certainty standard, the Valenzuela family's claim should have survived summary judgment, adding support to the proposition that a new standard is required in order to protect North Carolina workers and accomplish the policy goals behind *Woodson*.

### I. VALENZUELA V. PALLET EXPRESS, INC.

On October 2, 2007, seventeen-year-old Nery Castañeda Valenzuela was killed while working for Pallet Express in Greensboro, North Carolina.<sup>14</sup> Nery was a documented, non-English speaking Guatemalan immigrant with only a fourth-grade education.<sup>15</sup> On the day he died, Nery was working on a pallet-shredding machine called a "Horizontal Hog Shredder,"<sup>16</sup> which crushes and grinds wooden pallets into mulch.<sup>17</sup> He was assigned to this job by his employer even though federal and state law forbade a

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14. Plaintiff-Appellant's Brief at 4, *Valenzuela*, \_\_ N.C. App. \_\_, 700 S.E.2d 76 (2010) (No. COA10-87).

15. *Id.*

16. *Id.* Pallet Express specializes in the manufacture, repair, and disposal of wooden pallets. See PALLET EXPRESS, INC., [www.palletexpress.com](http://www.palletexpress.com) (last visited Feb. 25, 2012).

17. Plaintiff-Appellant's Brief, *supra* note 14, at 5.

child of seventeen to operate such power equipment.<sup>18</sup> Nery and a co-worker were scheduled to work on the Hog Shredder with a supervisor present, but the supervisor did not arrive for the three o'clock shift.<sup>19</sup> Unsupervised, Nery and the co-worker began feeding pallets into the Hog Shredder, and soon after the beginning of their shift, the co-worker left Nery alone at the running machine in order to retrieve a forklift to assist them.<sup>20</sup> When the co-worker returned, the Hog Shredder was still running, but Nery was gone.<sup>21</sup> Nery's remains were soon discovered on the discharge end of the Hog Shredder.<sup>22</sup>

The North Carolina Occupational Health and Safety Administration ("NCOSHA") immediately conducted a full investigation and cited Pallet Express with eleven separate violations based on the work conditions present when Nery was killed.<sup>23</sup> Pallet Express was cited for allowing an underage employee to work on the Hog Shredder, for operating the Hog Shredder without suitable lockout/tagout systems, and for operating the Hog Shredder without personnel trained in lockout/tagout procedure.<sup>24</sup> Most egregiously, Pallet Express was cited for the missing safety guards at the staging area, in-feed rollers, and mulch discharge conveyors on the Hog Shredder.<sup>25</sup> In fact, the company president admitted that he ordered the safety guard fitted near the Hog Shredder's wood-crushing mouth to be removed during the machine's installation five years earlier in order to increase productivity.<sup>26</sup>

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18. *Id.* at 7.

19. *Id.* at 8.

20. *Id.* at 9.

21. *Id.* at 10.

22. *Id.*

23. *Valenzuela v. Pallet Express, Inc.*, \_\_ N.C. App. \_\_, \_\_, 700 S.E.2d 76, 78 (2010); Plaintiff-Appellant's Brief, *supra* note 14, at 10.

24. Plaintiff-Appellant's Brief, *supra* note 14, at 10–11. Lockout/tagout are safety procedures mandated by the federal Occupational Safety and Health Act and enforced by the N.C. Department of Labor to prevent injury to employees caused by an "unexpected energization or startup of . . . equipment." OCCUPATIONAL SAFETY & HEALTH DIV., N.C. DEP'T OF LABOR, A GUIDE TO THE CONTROL OF HAZARDOUS ENERGY iv, 3 (2011), <http://www.nclabor.com/osha/etta/indguide/ig27.pdf>. Although the manufacturer of the Hog Shredder warned against operating the machinery in the absence of personnel validly certified in NCOSHA lockout/tagout procedures, there was no such person present at the Hog Shredder on the day Nery was killed, and there was no procedure in place to ensure proper supervision at the Hog Shredder. Plaintiff-Appellant's Brief, *supra* note 14, at 7.

25. Plaintiff-Appellant's Brief, *supra* note 14, at 10.

26. *Id.* at 6. A former NCOSHA director gave testimony that he had never seen a company president testify that he had ordered the manufacturer-required safety guards

The Valenzuela family filed a wrongful death action, alleging that Pallet Express:

- 1) removed safety guards from the shredder which sacrificed employee safety for increased production; 2) assigned an underage employee to work on heavy equipment in violation of State and federal law; 3) failed to provide Nery with proper training on the shredder; and 4) failed to ensure that trained personnel were present when the shredder was operated.<sup>27</sup>

Pallet Express moved for summary judgment, asserting that because there were no witnesses to the accident, the plaintiff failed to meet the burden of proof required for a *Woodson* claim.<sup>28</sup> The trial court agreed, granting summary judgment to Pallet Express, and the Valenzuela family appealed.<sup>29</sup>

In a brief opinion, the North Carolina Court of Appeals affirmed summary judgment in favor of Pallet Express.<sup>30</sup> Despite acknowledging Pallet Express's assignment of an underage, untrained employee to operate power machinery in contravention of federal and state law and the intentional removal of the manufacturer-installed safety guards on the Hog Shredder, the court found the facts insufficient to support the inference that Pallet Express "knew [its] actions were substantially certain to cause Nery's serious injury or death."<sup>31</sup> The family was thereby relegated to accepting only the limited compensation available under the Act.<sup>32</sup>

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removed on operable machinery during his fifty years of workplace safety experience. *Id.* at 12.

27. *Valenzuela*, \_\_ N.C. App. at \_\_, 700 S.E.2d at 79.

28. *Id.* at \_\_, 700 S.E.2d at 78. Among the alternate theories of the cause of Nery's death advanced by Pallet Express were that Nery was a victim of homicide, committed suicide, or fell into the Hog Shredder unconscious after being struck in the head. Defendants-Appellees' Brief at 19-20, *Valenzuela*, \_\_ N.C. App. \_\_, 700 S.E.2d 76 (2010) (No. COA10-87). At any rate, the lack of a witness to the accident should go to causation, not to whether Pallet Express had knowledge that such misconduct was substantially certain to cause injury or death.

29. *Valenzuela*, \_\_ N.C. App. at \_\_, 700 S.E.2d at 78.

30. *Id.* at \_\_, 700 S.E.2d at 79-80.

31. *Id.*

32. *See id.* at \_\_, 700 S.E.2d at 78. Generally, the benefits that an injured employee receives under the Act are based on the employee's "average weekly wage." LEONARD T. JERNIGAN, JR., NORTH CAROLINA WORKERS' COMPENSATION: LAW AND PRACTICE, WITH FORMS § 11:1, at 109 (4th ed. 2004); *see* N.C. GEN. STAT. § 97-2(5) (2011). Death benefits are typically paid for 400 weeks at a rate of two-thirds the decedent employee's average weekly wage. § 97-38; JERNIGAN, JR., *supra*, § 15.1, at 159-60.

The unfortunate decision in *Valenzuela* is neither surprising nor unique.<sup>33</sup> As a result of the confusion surrounding the misunderstood and poorly defined substantial certainty standard,<sup>34</sup> *Woodson* claims repeatedly fail in North Carolina appellate courts, typically through affirmation of the trial courts' grant of summary judgment in favor of the defendant employer.<sup>35</sup> The result in *Valenzuela* demonstrates that North Carolina courts have lost sight of the purpose, spirit, and policy behind both workers' compensation legislation and the *Woodson* opinion, thereby allowing an important substantive right to become an impotent remedy for injured employees. Rather than squandering an opportunity to protect North Carolina workers, the courts should adopt a new standard that serves both the original social goal behind worker's compensation legislation and the sound policy of disallowing employers engaged in egregious misconduct from hiding behind the Act and evading liability.

## II. EXCEPTIONS TO THE EXCLUSIVITY PROVISION OF WORKERS' COMPENSATION IN NORTH CAROLINA

In order to understand why *Valenzuela* should have been decided differently, it is necessary to first discuss its background: the history of workers' compensation legislation and the case law from which the *Woodson* claim emerged; the evolution, distortion, and current understanding of the *Woodson* substantial certainty standard;

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33. See, e.g., *Pendergrass v. Child Care, Inc.*, 333 N.C. 233, 238–40, 424 S.E.2d 391, 394–95 (1993) (holding that employer knowledge of unguarded dangerous machine parts in violation of OSHA standards fails to support an inference of intent sufficient to satisfy a *Woodson* claim); *Regan v. Amerimark Bldg. Prods., Inc.*, 127 N.C. App. 225, 228–29, 489 S.E.2d 421, 424 (1997) (concluding that evidence of a previous OSHA violation for an unguarded machine is insufficient to support *Woodson* claim), *aff'd* 347 N.C. 665, 495 S.E.2d 378 (1998); *Kolbinsky v. Paramount Homes, Inc.*, 126 N.C. App. 533, 535, 485 S.E.2d 900, 902 (1997) (concluding that evidence of an employer directing an employee's use of circular saw with knowledge that the safety guards had been removed in violation of OSHA standards is insufficient to support a *Woodson* claim), *discretionary review denied*, 347 N.C. 276, 493 S.E.2d 457 (1997). The *Valenzuela* court cited *Kolbinsky* in support of its affirmation of summary judgment in favor of Pallet Express. *Valenzuela*, \_\_\_ N.C. App. at \_\_\_, 700 S.E.2d at 79–80.

34. See *infra* Part II.C.

35. See, e.g., *Mickles v. Duke Power Co.*, 342 N.C. 103, 105, 110–11, 463 S.E.2d 206, 208, 211 (1995) (reinstating the trial court's summary judgment order in favor of the defendant employer where the employee fell to his death as a result of equipment that the employer failed to replace after becoming aware that it was defective); *Kolbinsky*, 126 N.C. App. at 534–36, 485 S.E.2d at 901–02 (affirming summary judgment in favor of the employer where an underage employee's hand was partially severed as a result of the lack of safety guards on a circular saw); see *McGrath*, *supra* note 6, at 3; *infra* note 109.

and how the standard is poorly suited to meet the policy goals behind both workers' compensation and the *Woodson* opinion.

The rise of industrialism in the second half of the nineteenth century was accompanied by an increase in workplace-related injury and death.<sup>36</sup> Employees injured at work could recover damages from their employer at common law, with the right to a jury trial, but the availability of defenses such as contributory negligence, negligence of a co-employee, and assumption of risk made successful litigation unlikely for the employee.<sup>37</sup> Amid a growing concern for the hardship imposed on the injured workers, states began passing legislation to replace both employer liability statutes and common law actions available to the employee.<sup>38</sup>

Following the lead of other states,<sup>39</sup> North Carolina passed its workers' compensation legislation in 1929.<sup>40</sup> The new system, which continues to govern all employer-employee relationships in North Carolina, sought to balance the interests of employers and employees.<sup>41</sup> Under the Act, employees lost their right to recover damages, including compensation for pain and suffering, under common law negligence, in exchange for quick, assured recovery for work-related injuries.<sup>42</sup> Employers, in return, relinquished the right to common law defenses for the shield of limited liability.<sup>43</sup> These trade-offs embody the dual purpose of the Act: expeditious remedy for the employee and limited liability for the employer.<sup>44</sup>

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36. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 162 (1994).

37. See JERNIGAN, JR., *supra* note 32, § 1:1, at 1; Helga L. Leftwich, Note, *The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provision: Woodson v. Rowland*, 70 N.C. L. REV. 849, 858-60 (1994); John Richard Owen, Note, *The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance*, 73 N.C. L. REV. 2502, 2504-05 (1995).

38. Spieler, *supra* note 36, at 166-68.

39. JERNIGAN, JR., *supra* note 32, § 1:1, at 2; Spieler, *supra* note 36, at 168.

40. See North Carolina Workers' Compensation Act, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to -101 (2011)); JERNIGAN, JR., *supra* note 32, § 1:1, at 1.

41. See N.C. GEN. STAT. § 97-3; JERNIGAN, JR., *supra* note 32, § 1:1, at 2.

42. JERNIGAN, JR., *supra* note 32, § 1:1, at 2; see N.C. GEN. STAT. § 97-10.1 ("If the employee and the employer are subject to and have complied with [the Act] . . . the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies . . .").

43. JERNIGAN, JR., *supra* note 32, § 1:1, at 2.

44. See *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966) ("The purpose of [workers' compensation] . . . is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers.").



The exclusive remedy provision is an important facet of the Act because it makes clear that, generally, recovery under the Act is the sole remedy available to injured employees.<sup>45</sup> Provided the employer and employee are subject to the Act and have complied with its provisions, employees are precluded from seeking other rights and remedies available at common law<sup>46</sup> and must settle claims with the Industrial Commission in lieu of a trial court.<sup>47</sup> Thus, an injured worker's claim must fall into a common law exception in order to bring a civil suit against an employer or co-employee for injuries sustained at work.<sup>48</sup> Since compensation under the Act is limited, the exceptions that permit claims to fall outside the Act's limited remedy are important rights for workers because they provide an opportunity for damages beyond what compensation under the Act will allow.

A. *Evolution of the Woodson Claim: Pleasant v. Johnson and Barrino v. Radiator Specialty Co.*

North Carolina courts sought to ameliorate the harshness of the restrictions on employee recovery and the immunity shielding employers by carving out several significant exceptions to the exclusivity provision of the Act that protected fellow employees and employers from common law negligence suits.<sup>49</sup> Decades ago, North Carolina courts first disallowed the Act to shield employers<sup>50</sup> and

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45. Section 97-10.1 of the General Statutes of North Carolina provides:

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

For a more thorough discussion of the exclusive remedy provision of the Act, see JERNIGAN, JR., *supra* note 32, § 10.1, at 97-100.

46. N.C. GEN. STAT. § 97-10.1.

47. See § 97-91 ("All questions arising under [the Act] . . . shall be determined by the Commission . . .").

48. See § 97-10.1.

49. See § 97-9 ("[An employer] 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."); *Andrews v. Peters*, 55 N.C. App. 124, 126, 284 S.E.2d 748, 749-50 (1981), *discretionary review denied*, 305 N.C. 395, 290 S.E.2d 364 (1982) (stating that the Supreme Court of North Carolina has interpreted section 97-9 as providing immunity to co-employees from common law liability).

50. See *Warner v. Leder*, 234 N.C. 727, 733-34, 69 S.E.2d 6, 10 (1952) ("It would be against sound reason 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." (quoting SAMUEL B. HOROVITZ,

fellow employees<sup>51</sup> from liability caused by intentional acts of harm. These courts based their decisions on public policy and the legislative intent behind the Act, concluding “that an intentional tort is not the type of ‘industrial accident’ to which our legislature intended to give a co-employee immunity.”<sup>52</sup>

However, the question remained whether injuries caused by intentional actions not necessarily meant to cause deliberate injury fell outside of the exclusivity provision of the Act. Based on the purpose behind workers’ compensation legislation and sound public policy, the Supreme Court of North Carolina in *Pleasant v. Johnson*<sup>53</sup> answered affirmatively and extended the exception to the Act’s exclusive remedy provision by giving an injured employee the ability to recover from a fellow employee for “willful, wanton and reckless negligence.”<sup>54</sup>

In *Pleasant*, the plaintiff was injured when the defendant co-employee struck him with a truck while trying to scare him by blowing the horn.<sup>55</sup> The *Pleasant* court began its analysis by acknowledging the social policy and purpose behind the Act: injured employees should be provided prompt, guaranteed benefits for work-related injuries caused by the *negligence* of the employer, and that cost should be borne by the employers and ultimately passed along to

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INJURY AND DEATH UNDER WORKMEN’S COMPENSATION LAWS 336 (1944) (internal quotation marks omitted)), *overruled by* Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), *and* Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985); Essick v. Lexington, 232 N.C. 200, 210, 60 S.E.2d 106, 113 (1950) (“[A] vicious assault by a fellow workman acting as *alter ego* of the employer was not within the contemplation of the Act and . . . confer[s] no immunity.”).

51. Daniels v. Swofford, 55 N.C. App. 555, 556, 561–62, 286 S.E.2d 582, 583, 585–86 (1982) (holding that the exclusivity provision of the Act did not bar an injured employee from bringing a claim against the employer’s corporate president for assault for kicking her from behind); *see* Andrews, 55 N.C. App. at 127, 284 S.E.2d at 750; Wesley v. Lea, 252 N.C. 540, 545, 114 S.E.2d 350, 354 (1960) (“[T]o take the case out of the Workmen’s Compensation Act the injury to an employee by a co-employee must be intentional.”), *overruled by* Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), *and* Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

52. Andrews, 55 N.C. App. at 127, 284 S.E.2d at 750 (“To hold otherwise is to remove responsibility from the co-employee for his intentional conduct.”). The court also held that previous recovery under the Act did not preclude the plaintiff from seeking recovery under common law intentional tort, concluding that such a rule would further insulate a tortfeasor from his tortious conduct. *Id.* at 130, 284 S.E.2d at 751–52; *see* Warner, 234 N.C. at 733–34, 69 S.E.2d at 10; Essick, 232 N.C. at 210, 60 S.E.2d at 113; Daniels, 55 N.C. App. at 556, 561–62, 286 S.E.2d at 583, 585–86.

53. 312 N.C. 710, 325 S.E.2d 244 (1985).

54. *Id.* at 715, 325 S.E.2d at 248.

55. *Id.* at 711, 325 S.E.2d at 246.

consumers.<sup>56</sup> Next, the court noted that willful injuries need not always be accompanied by an intent to injure, and that “wanton and reckless conduct” may also suffice.<sup>57</sup> The court cited the example of second-degree murder as an illustration of an area of the law where wanton and reckless misconduct is sufficient to supply intent.<sup>58</sup> Importantly, the court noted that punitive damages have been permitted by North Carolina courts in other contexts involving wanton and reckless<sup>59</sup> conduct because that type of misconduct can be deterred, unlike simple negligent conduct.<sup>60</sup> Thus, the court surmised, these considerations support the conclusion that injuries caused by a co-employee’s wanton and reckless behavior should fall outside the exclusivity provisions of the Act.<sup>61</sup>

By permitting recovery for injuries sustained as the result of a co-employee’s reckless conduct, the injured employee can both collect compensation under the Act and recover from the co-employee in tort.<sup>62</sup> However, the *Pleasant* court was unbothered by the availability of dual avenues for recovery for the injured employee, finding justification for this result in the mechanics of the Act.<sup>63</sup> First, any recovery received by the injured employee in tort can reduce the liability of employers or insurers who are innocent of wrongdoing.<sup>64</sup>

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56. *See id.* at 712, 325 S.E.2d at 246–47 (“The most important feature of the typical workers’ compensation scheme is that the employee and his dependents give up their common law right to sue the employer *for negligence* in exchange for limited but assured benefits.” (emphasis added)).

57. *Id.* at 715, 325 S.E.2d at 248. The court labeled intent supported by such misconduct “constructive intent.” *Id.* (“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.”).

58. *Id.*

59. The *Pleasant* court defined “wanton conduct” as “an act manifesting a reckless disregard for the rights and safety of others.” *Id.* at 714, 325 S.E.2d at 248 (internal quotation marks omitted). The court stated that the term “reckless” was merely a synonym for “wanton” when used in this context and the terms are often used in combination to describe “wanton” conduct. *Id.*

60. *Id.* at 715, 717, 325 S.E.2d at 248–49.

61. *Id.* at 716–17, 325 S.E.2d at 249–50. The court conceded that courts in other states, as well as courts in North Carolina, had explicitly declined the treatment of reckless conduct as an exception to co-employee immunity under workers’ compensation acts in the past. *Id.* at 715–16, 325 S.E.2d at 248–49. Yet, the court found its own reasoning more compelling. *Id.* at 718, 325 S.E.2d at 250 (“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.”).

62. *Id.* at 717, 325 S.E.2d at 249.

63. *Id.* at 717, 325 S.E.2d at 249–50.

64. *Id.*; *see* N.C. GEN. STAT. § 97-10.2 (2011) (granting subrogation rights to workers’ compensation insurance carriers from third-party tortfeasors).

Next, the co-employee is not exposed to dual liability because the co-employee does not contribute to the workers' compensation fund or participate in defending the workers' compensation claim.<sup>65</sup> Thus, the court calmed fears that an injured employee could receive a windfall or that a tortious co-employee could be exposed to double liability.

The *Pleasant* court's reasoning was simple, but its importance cannot be overstated. Injuries caused by simple negligence, misconduct which cannot be effectively deterred by punitive damages, is and should be covered by workers' compensation, but misconduct that can be deterred under threat of damages in tort should not be protected under the Act.<sup>66</sup>

The Supreme Court of North Carolina in *Pleasant* specifically declined to decide whether the reckless conduct of an employer should fall outside the exclusivity provision of the Act<sup>67</sup>—an issue that the court ruled on five years later in *Barrino v. Radiator Specialty Co.*<sup>68</sup> In *Barrino*, Lora Ann Barrino was severely burned after an explosion and fire at a manufacturing plant owned by Radiator Specialty Company and later died as a result of those injuries.<sup>69</sup> Radiator Specialty Company was accused of both failing to provide a safe working atmosphere and purposely creating a dangerous work environment, allegedly committing reckless acts which included, among others: using liquefied petroleum gases without gaining proper state inspection or approval; covering the meters that were installed to detect unsafe vapor levels; disengaging the alarm systems designed to warn employees of those hazardous vapor levels; and instructing employees to ignore the sounding alarms and to continue working.<sup>70</sup> After collecting workers' compensation death benefits, Barrino's parents filed a civil action against Radiator Specialty Company seeking damages for the "reckless, wanton, willful and intentional acts" that led to their daughter's death.<sup>71</sup> The defendant moved for summary judgment, asserting the action was barred by the exclusivity

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65. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249.

66. *Id.* at 717-18, 325 S.E.2d at 250.

67. *Id.* at 717, 325 S.E.2d at 250.

68. 315 N.C. 500, 340 S.E.2d 295 (1986), *overruled by* Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). *Barrino* was not a case of first impression for the Supreme Court of North Carolina. The *Barrino* court noted that just two years earlier, it held workers' compensation benefits to be the exclusive remedy for injuries resulting from an employer's gross negligence in *Freeman v. SCM Corp.*, 311 N.C. 294, 295-96, 316 S.E.2d 81, 82 (1984) (per curiam). *Barrino*, 315 N.C. at 509, 340 S.E.2d at 301.

69. *Barrino*, 315 N.C. at 502, 340 S.E.2d at 297.

70. *Id.* at 503, 340 S.E.2d at 298.

71. *Id.* at 502-03, 340 S.E.2d at 297-98.

provision of the Act.<sup>72</sup> The trial court agreed, granting the defendant's motion for summary judgment, and the North Carolina Court of Appeals affirmed.<sup>73</sup>

The Supreme Court of North Carolina also affirmed, declining the invitation to extend the holding in *Pleasant* to the misconduct of an employer, holding instead that recovery under the Act is the exclusive remedy for injuries sustained as a result of the willful, wanton, and reckless negligence of an employer.<sup>74</sup> The *Barrino* court conclusively stated that the intentional tort exception to the exclusivity provision requires a true intentional tort, and that anything less remains an "accident" within the meaning of the Act.<sup>75</sup> The *Barrino* opinion also emphasized that the *Pleasant* court's justification based on the mechanics of the Act does not hold true in the case of an employer because employers pay into the workers' compensation system.<sup>76</sup> Thus, an employer could be penalized a second time by being forced to participate in a tort suit defense after already taking part in the defense of a claim under the Act.<sup>77</sup> Moreover, the court was concerned that an employer could be exposed to greater liability than that under the Act, notwithstanding a reduction of tort liability for workers' compensation benefits already received by the injured employee.<sup>78</sup> The *Barrino* court then used this reasoning as a justification for strict adherence to a rule disallowing any cause of action for misconduct less than true intent to harm.<sup>79</sup>

Justice Harry Martin forcefully dissented, rejecting the view that the issue was whether the holding in *Pleasant* should be extended to provide a remedy for willful, wanton, or reckless acts of an employer.

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72. *Id.* at 505, 340 S.E.2d at 299. Radiator Specialty Company also asserted that the action was barred because the plaintiffs made a binding election to accept workers' compensation benefits, thus foreclosing any available common law action. *Id.* The *Barrino* court seized this chance to reemphasize that there was no election for the plaintiffs to make—the injuries sustained by Lora Ann Barrino were covered under the Act, thus workers' compensation was their exclusive path of recovery. *Id.* at 510, 340 S.E.2d at 301–02.

73. *Id.* at 505, 340 S.E.2d at 299.

74. *Id.* at 511, 513, 515, 340 S.E.2d at 302–05.

75. *Id.* at 507, 340 S.E.2d at 300 ("Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, *the 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.*").

76. *Id.* at 511–13, 340 S.E.2d at 302–03.

77. *Id.* at 512, 340 S.E.2d at 303.

78. *Id.*

79. *Id.*

Rather, he believed the issue to be whether a grant of summary judgment was appropriate regarding the defendant employer's subjective intent, given the plaintiff's evidence.<sup>80</sup> Since the issue of intent establishes an injured employee's right to bring an action against an employer falling outside the exclusivity provision of the Act, Justice Martin viewed the question of intent to be a material fact.<sup>81</sup> Thus, disposal of the action on summary judgment was inappropriate.<sup>82</sup> Justice Martin also departed from the *Barrino* majority in his view on the definition of intent for purposes of exclusivity of the Act by stating: "Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does."<sup>83</sup>

More noteworthy than his broader definition of intent was Justice Martin's nod to the reasoning of the *Pleasant* court and his connection between the creation of an effective deterrent and the overuse of summary judgment. First, he approved of the deterrent objective averred in *Pleasant* and warned against disposal of issues of material fact, such as the intent of the employer, through procedural devices because "we should be . . . concerned with deterring intentional employer conduct which is likely to endanger the lives and safety of . . . workers."<sup>84</sup> Distressed with the consequences of permitting employers to use the Act as a shield against intentional wrongs, he also predicted that employers would engage in an economic balancing test—"weigh[ing] the . . . costs of compliance with safety regulations against the costs of workers' compensation"—and emphasized that the courts must exercise caution in disposing of these actions on summary judgment if the likelihood of a tort suit is to act as an effective deterrent.<sup>85</sup>

Despite Justice Martin's compelling argument to the contrary, the court remained unconvinced and the question appeared to be answered—employees injured by intentional acts of the employer

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80. *Id.* at 517, 340 S.E.2d at 305 (Martin, J., dissenting). Justice Martin believed that the question of whether an employer may be sued for willful, wanton, or reckless conduct should be set aside because he considered the conduct of the defendant employer in *Barrino* to have well exceeded the reckless conduct of the co-employee in *Pleasant*, thus not decisive of the question at issue in *Barrino*. *Id.* at 521, 340 S.E.2d at 307.

81. *Id.* at 517, 340 S.E.2d at 305.

82. *Id.*

83. *Id.* at 518, 340 S.E.2d at 305 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 (4th ed. 1971)) (internal quotation marks omitted).

84. *Id.* at 519, 340 S.E.2d at 306.

85. *Id.*

were limited to workers' compensation benefits absent an allegation of intentional injury.<sup>86</sup> It would take five years, and a seemingly less compelling set of facts than in *Barrino*, for North Carolina courts to adopt a broader definition of intent in *Woodson v. Rowland*.<sup>87</sup>

### B. *Woodson v. Rowland*

In *Woodson*, Thomas Sprouse, an employee of Morris Rowland Utility, Inc., was killed when a trench in which he was laying pipe collapsed, burying him and another worker.<sup>88</sup> The employer had ordered Sprouse to work in the fourteen-foot trench in disregard of Occupational Safety and Health Act of North Carolina ("OSHANC") regulations that mandated the use of trench boxes as a safety precaution, despite the availability of a trench box at the construction site.<sup>89</sup> The administrator of Sprouse's estate brought a wrongful death action, alleging Sprouse's death was caused by the intentional misconduct of his employer.<sup>90</sup> The trial court granted summary judgment in favor of the defendant employer, concluding that Sprouse's death was an "accident" within the meaning of the Act and therefore covered under the Act's exclusive remedy provision.<sup>91</sup> The court of appeals affirmed.<sup>92</sup>

The Supreme Court of North Carolina, however, found the plaintiff's evidence of intentional misconduct sufficient to survive summary judgment under a broader definition of intent than previously allowed in *Barrino* and reversed, thus carving out the *Woodson* exception to the exclusivity provision of the Act.<sup>93</sup> Just as

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86. *Id.* at 511–13, 340 S.E.2d at 302–03.

87. 329 N.C. 330, 407 S.E.2d 222 (1991); *see also* Leftwich, *supra* note 37, at 851–58 (discussing the *Woodson* opinion).

88. *Id.* at 334–36, 407 S.E.2d at 224–26. The other worker was buried up to his torso and survived the trench collapse. *Id.*

89. *Id.* at 335–36, 407 S.E.2d at 225–26. A trench box is a large, metal structure designed to be placed in an excavated trench in order to shore the walls, protecting workers from being buried by the collapse of the soil. OCCUPATIONAL SAFETY & HEALTH DIV., N.C. DEP'T OF LABOR, A GUIDE TO THE OSHA EXCAVATIONS STANDARD v, 4–5 (2011), available at <http://www.nclabor.com/osha/etta/indguide/ig14.pdf>.

90. *Woodson*, 329 N.C. at 334, 337, 407 S.E.2d at 224, 226. The plaintiff delayed her case before the Industrial Commission and the collection of benefits under the Act for fear that the defendant would raise an "election of remedies" defense and defeat her claim. *Id.* at 336, 407 S.E.2d at 226.

91. *Id.* at 336–37, 407 S.E.2d at 226. For a discussion of the term "accident" as it pertains to workers' compensation, *see infra* notes 163–66 and accompanying text.

92. *Woodson*, 329 N.C. at 336, 407 S.E.2d at 226.

93. *Id.* at 337, 341, 407 S.E.2d at 226, 229; *see also* *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 507, 340 S.E.2d 295, 300 (1986) (requiring actual intent to injure in order to

Justice Martin had done six years earlier, the court embraced a broader definition of intent as described in the *Restatement (Second) of Torts*<sup>94</sup> and expressly adopted Justice Martin's dissent in *Barrino*<sup>95</sup>:

Today we adopt the views of the *Barrino* dissent. When 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 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.<sup>96</sup>

This new substantial certainty standard held employers liable for conduct that does not rise to the level of true intent to harm,<sup>97</sup> yet still failed to adopt the lower *Pleasant* standard that held co-employees liable for willful, wanton, or reckless conduct.<sup>98</sup>

The *Woodson* court found justification for the expansion of the definition of intent in statutory construction based on legislative intent and public policy. The court first noted that the purpose of the Act was to "provide[] for an injured employee's certain and sure recovery without having to prove *employer negligence*,"<sup>99</sup> further stating that it was not the objective of the legislature to shield an employer from liability for intentional torts that injure or kill an employee.<sup>100</sup> The court believed this new standard stayed true to the intent of the Act in which the legislature sought to strike the right balance between the interests of both employers and employees.<sup>101</sup> The court also believed that the new standard would continue to both encourage workplace safety and provide an effective deterrent for misconduct that creates unsafe work conditions.<sup>102</sup>

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support a civil action outside the exclusivity provision of the Act), *overruled by Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

94. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 229; *Barrino*, 315 N.C. at 518, 340 S.E.2d at 305; *see supra* note 83 and accompanying text.

95. *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228.

96. *Id.* at 340–41, 407 S.E.2d at 228 (emphasis added).

97. *See id.*; Michael Doran, *The Substantial Certainty Exception to Workers' Compensation*, 17 CAMPBELL L. REV. 413, 414–15 (1995) (discussing the standard in *Woodson* and its subsequent misapplication in the years immediately following *Woodson*).

98. *See Pleasant v. Johnson*, 312 N.C. 710, 716, 325 S.E.2d 244, 249 (1985).

99. *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227 (emphasis added).

100. *Id.* at 338–39, 407 S.E.2d at 227.

101. *Id.* at 342, 407 S.E.2d at 229.

102. *Id.*



The court made a point to acknowledge that the reasoning in *Pleasant* for allowing the availability of a cause of action for reckless conduct against co-employees was still sound, but distinguished the facts in *Pleasant* from instances in which an employer engages in misconduct that rises to a degree higher than ordinary negligence.<sup>103</sup> Much like the *Barrino* court, the *Woodson* court stated that since co-employees do not contribute to workers' compensation funds, but employers do, this difference warranted a requirement for a higher degree of culpability to hold employers liable for misconduct outside the provisions of the Act.<sup>104</sup>

### C. *The Substantial Uncertainty Caused by the Substantial Certainty Standard*

A successful *Woodson* claim requires “(1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct.”<sup>105</sup> The debate over the precise meaning of substantially certain in the third element has raged in the academic<sup>106</sup> and legal communities,<sup>107</sup> and in North Carolina's own appellate court system<sup>108</sup> since the *Woodson* opinion was issued just over twenty years ago. Regrettably, the confusion surrounding the substantial certainty standard has contributed to the failure of nearly all *Woodson* claims that have made it to the North Carolina appellate courts, usually through affirming summary judgment in favor of the employer.<sup>109</sup>

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103. *Id.*

104. *Id.* (“Co-employees do not finance or otherwise directly participate in workers' compensation programs; employers, on the other hand, do. *This distinction alone justifies the higher 'substantial certainty' threshold for civil recovery against employers.*” (emphasis added) (internal citation omitted)).

105. *Pastva v. Naegele Outdoor Adver., Inc.*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 494 (1996), *discretionary review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996).

106. *See, e.g.*, Doran, *supra* note 97 *passim* (discussing the misapplication of the standard in the years following *Woodson*); David L. Lambert, 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*, 20 N.C. CENT. L.J. 164, 189–92 (1992) (arguing that even the facts of *Woodson* do not meet the substantial certainty standard).

107. *See* McGrath, *supra* note 6, at 6 (discussing the failure of *Woodson* claims through a “distorting and narrowing” of the standard).

108. *See infra* notes 110–28 and accompanying text.

109. *See* McGrath, *supra* note 6, at 6–7. A thorough search of both Lexis and Westlaw reveals only two North Carolina Court of Appeals cases where *Woodson* claims brought by injured employees in which the trial court's summary judgment orders in favor of the

Indeed, the “tortured path” of the substantial certainty standard began soon after the *Woodson* claim was created.<sup>110</sup> Eighteen months following the *Woodson* decision, the Supreme Court of North Carolina mischaracterized and misapplied the standard it articulated in its first attempt to apply it in *Pendergrass v. Card Care, Inc.*<sup>111</sup> by asserting that, for a successful *Woodson* claim, “[t]he conduct must be so egregious as to be tantamount to an intentional tort.”<sup>112</sup> The *Pendergrass* court analyzed the misconduct of two co-employees, failing to find that their behavior rose to the level of the *Pleasant* standard and concluding that since “[t]he plaintiffs rely on the same allegations of negligence to support their [*Woodson*] claim against [the defendant employer] that they relied upon in their claim against [the co-employees],” the employer’s misconduct could not therefore be characterized as leading to a “substantial certainty of injury” sufficient to support a *Woodson* claim.<sup>113</sup> However, simply by not analyzing the misconduct of the co-employees under the *Pleasant* standard separately from that of the employer under the *Woodson* standard, the *Pendergrass* court failed to correctly apply *Woodson*.<sup>114</sup> As one commentator has noted, although tortious behavior can be viewed as a continuum, the *Pleasant* and *Woodson* standards are nevertheless “separate theories of liability [that] must be analyzed independently.”<sup>115</sup>

Soon after *Pendergrass*, in *Dunleavy v. Yates Construction Co.*,<sup>116</sup> a case involving a trench cave-in similar to *Woodson*, the court of

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defendant employer were reversed; however, in both cases, the Supreme Court of North Carolina reversed the court of appeals, agreeing with the trial courts that summary judgment was indeed appropriate. *Whitaker v. Town of Scotland Neck*, 154 N.C. App. 660, 665, 572 S.E.2d 812, 815 (2002), *reh’g granted*, 356 N.C. 696, 579 S.E.2d 104 (2003), *rev’d*, 357 N.C. 552, 597 S.E.2d 665 (2003); *Mickles v. Duke Power Co.*, 115 N.C. App. 624, 446 S.E.2d 369 (1994), *rev’d* 342 N.C. 103, 463 S.E.2d 206 (1995); *see also* McGrath, *supra* note 6, at 6–7 (discussing *Whitaker* and *Mickles*).

110. *See* McGrath, *supra* note 6, at 7 (discussing the history of *Woodson* claims in the appellate courts and describing the *Whitaker* case’s course through the court system as a “tortured path”).

111. 333 N.C. 233, 424 S.E.2d 391 (1993) (affirming the trial court’s dismissal for failure to state a claim); *see also* McGrath, *supra* note 6, at 6–7 (discussing the supreme court’s treatment of the *Woodson* claim in *Pendergrass*). For a more thorough discussion of the *Pendergrass* case, *see* Doran, *supra* note 97, at 421–22.

112. *Pendergrass v. Child Care, Inc.*, 333 N.C. 233, 239–40, 424 S.E.2d 391, 395 (1993); *see* Doran, *supra* note 97, at 421–22.

113. *Pendergrass*, 333 N.C. at 239–40, 424 S.E.2d at 395; *see* Doran, *supra* note 97, at 421–22.

114. Doran, *supra* note 97, at 421–22.

115. *Id.* at 422.

116. 114 N.C. App. 196, 442 S.E.2d 53 (1994).

appeals embarked on a lengthy factual comparison with *Woodson*, failing to actually apply the substantial certainty test to the facts at hand.<sup>117</sup>

Several attempts by the North Carolina Court of Appeals to explain the substantial certainty standard likewise have proved unsuccessful. First, in *Powell v. S & G Prestress Co.*,<sup>118</sup> the court equated the *Woodson* standard to the “bomb-throwing” illustration from the *Restatement (Second) of Torts*:

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.<sup>119</sup>

While the court affirmed summary judgment in favor of the employer,<sup>120</sup> Judge Wynn disagreed that summary judgment was

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117. *Id.* at 198–99, 201, 442 S.E.2d at 54–56. The *Dunleavy* court, after noting that “[t]he *Woodson* Court placed great emphasis on the extreme facts in [that case],” *id.* at 201, 442 S.E.2d at 55, affirmed summary judgment in favor of the employer after systematically comparing the facts at hand to the facts in *Woodson*:

In *Woodson*, the employer had been cited four times in the previous six and a half years for violating regulations governing trenching safety procedures; in the instant case, the employer had one previous citation . . . . In *Woodson*, the employer was at the job site when the accident occurred; in the instant case . . . [the foreman] had stopped by the site briefly the morning of the accident. . . . In *Woodson*, a trench box was available for use on the day of the accident and the employer chose not to use it; in the instant case, the employers had ordered trench boxes for the site but they had not yet arrived. In *Woodson*, the employer knew the trench had a depth of fourteen feet; in the instant case, employers’ foreman . . . believ[ed] that the crew would not complete enough work to exceed a depth of five feet in the trench before he returned. Finally, in *Woodson*, the employer consciously, intentionally and personally ordered the decedent to work in the fourteen foot trench; in the instant case, [the foreman] did not consciously, intentionally and personally order decedent to work in a portion of the trench . . . . Based on the foregoing, we find that the conduct . . . did not rise to the level of misconduct described in *Woodson*.

*Id.* at 201–02, 442 S.E.2d at 55–56. For a thorough analysis of the *Dunleavy* case, see Doran, *supra* note 97, at 422–25.

118. 114 N.C. App. 319, 442 S.E.2d 143 (1994), *abrogated by* *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995) (disavowing the bomb-throwing illustration), *aff’d*, 342 N.C. 182, 463 S.E.2d 79 (1995) (per curiam) (agreeing with the *Mickles* court’s rejection of the bomb-throwing illustration). In *Powell*, the decedent was an untrained, twenty-two-year-old temporary employee who was crushed and killed by a crane while performing construction work. *Id.* at 321–22, 442 S.E.2d at 144–45.

119. *Id.* at 325, 442 S.E.2d at 147 (quoting RESTATEMENT (SECOND) OF TORTS § 8A illus. 1 (1965)).

120. *Id.* at 325–26, 442 S.E.2d at 147.

appropriate given the plaintiff's evidence.<sup>121</sup> In his dissent, he observed that the *Woodson* court simply established the substantial certainty standard, without further defining it, and the majority's bomb-throwing illustration from the *Restatement (Second)* "set[] a higher standard than that actually applied" by the *Woodson* court.<sup>122</sup> The next year, the Supreme Court of North Carolina, in apparent agreement with Judge Wynn, renounced the bomb-throwing example as an incorrect illustration of the *Woodson* standard, stating "[i]n the above example, A is *actually* certain his act will injure or kill C. [But] the *Woodson* exception does not require such actual certainty."<sup>123</sup>

Following this decision, the court of appeals set out a second time to articulate a more workable *Woodson* standard, this time refining the *Woodson* opinion and its progeny into a multifactor test

121. *Id.* at 329–30, 442 S.E.2d at 148–49 (Wynn, J., dissenting).

122. *Id.* at 328, 442 S.E.2d at 148. The *Restatement (Second)* illustration was also cited, in apparent agreement with *Powell*, by the court in a second case, *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 378, 448 S.E.2d 289, 297 (1994), *discretionary review allowed*, 339 N.C. 737, 454 S.E.2d 649 (1995), *abrogated by* *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995).

123. *Mickles*, 342 N.C. at 110, 463 S.E.2d at 211; *see also Powell*, 342 N.C. at 183, 463 S.E.2d at 80 ("[A]s in *Mickles* . . . we disavow the language of the Court of Appeals in its decision in this case suggesting that Restatement (Second) of Torts § 8A illus. 1 (1965) is illustrative of the type of conduct required to satisfy the 'substantial certainty' test of *Woodson* . . ."). In *Pastva v. Naegele Outdoor Adver., Inc.*, 121 N.C. App. 656, 468 S.E.2d 491 (1996), *discretionary review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996), one year after the supreme court rejected the bomb-throwing illustration, Judge Wynn again took the opportunity to comment on the lack of guidance imparted by the supreme court in *Woodson*. *See id.* at 660, 468 S.E.2d at 494 (Wynn, J., concurring) ("[T]he opportunity should not be lost to point out the continuing dilemma faced by our trial judges and litigators in trying to assess what is needed to set forth a *Woodson* claim."). Noting that the bench and bar have nothing more to guide them on the precise meaning of the substantial certainty test other than the facts in *Woodson*, he urged the establishment of a "more articulate standard of law which would lend itself to an application of facts needed to overcome pretrial dismissal." *Id.* at 660–61, 468 S.E.2d at 494–95 ("[S]ince creating the *Woodson* exception, the Court has consistently pointed out facts that *do not* establish a *Woodson* claim. However, it remains an uncertainty as to what facts *do* allege a *Woodson* claim sufficient to overcome pretrial dismissal."). Judge Wynn implored the Supreme Court of North Carolina to do *something*, stating,

[O]ur Supreme Court could revisit *Woodson* and declare that the employer's conduct in that case was indeed intentional conduct—an already established exception to the Workers' Compensation Act. Regardless of which approach is taken, any direction is better than the uncertainty that currently exists with the state of the law on this issue.

*Id.* at 662, 468 S.E.2d at 495; *see also McGrath*, *supra* note 6, at 6 (discussing Judge Wynn's frustration with the substantial certainty standard in his *Pastva* concurrence).

in *Wiggins v. Pelikan, Inc.*<sup>124</sup> Once again, the supreme court rejected the court of appeals' attempts to provide guideposts, stating that "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves."<sup>125</sup> The court further stated that "[t]his exception applies only in the most egregious cases of employer misconduct."<sup>126</sup> *Wiggins* was the last time the supreme court spoke on the matter,<sup>127</sup> thereby relegating trial courts to comparing the facts at hand to the facts in *Woodson*.<sup>128</sup>

Given the lack of guidance by the Supreme Court of North Carolina on the type of evidence sufficient to survive summary judgment on a *Woodson* claim,<sup>129</sup> it is not surprising that the *Valenzuela* court summarily rejected the plaintiff's *Woodson* claim. Herein lies the fundamental problem. In the face of a vague standard, the only legal hook on which a plaintiff can hang a successful argument is to demonstrate that his facts are exactly like those in *Woodson v. Rowland*,<sup>130</sup> and if the facts are not like those in *Woodson*, a court may feel it has no choice but to grant a motion for

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124. 132 N.C. App. 752, 756–58, 513 S.E.2d 829, 832–33 (1999), *overruled in part by*, *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003). The six-factor test was first established by the *Wiggins* court and summarized in a later case as follows:

- (1) Whether the risk that caused the harm existed for a long period of time without causing injury;
- (2) Whether the risk was created by a defective instrumentality with a high probability of causing the harm at issue;
- (3) Whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm;
- (4) Whether the employer's conduct which created the risk violated state or federal work safety regulations;
- (5) Whether the defendant-employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation; and
- (6) Whether the defendant-employer offered training in the safe behavior appropriate in the context of the risk causing the harm.

*Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 555–56, 597 S.E.2d 665, 667 (2003) (quoting *Wiggins*, 132 N.C. App. at 756–58, 513 S.E.2d at 832–33) (internal quotation marks omitted) (summarizing but ultimately rejecting the six-factor test as overbroad), *reh'g granted*, 356 N.C. 696, 579 S.E.2d 104 (2003), *rev'd*, 357 N.C. 552, 597 S.E.2d 665 (2003).

125. *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668.

126. *Id.*

127. *See Valenzuela v. Pallet Express, Inc.*, \_\_ N.C. App. \_\_, \_\_, 700 S.E.2d 76, 78–79 (2010) (citing *Whitaker* for the *Woodson* standard); *Ellis v. Int'l Harvester Co.*, 178 N.C. App. 741, 2006 WL 2129709, at \*4 (N.C. Ct. App. Aug. 1, 2006) (unpublished table decision) (citing *Whitaker* as the most recent case addressing the substantial certainty standard).

128. McGrath, *supra* note 6, at 6. For examples of this type of fact-comparison analysis, see *Dunleavy v. Yates Constr. Co.*, 114 N.C. App. 196, 201–02, 442 S.E.2d 53, 55–56 (1994), and note 117 *supra*.

129. *See supra* notes 120–28 and accompanying text.

130. *See, e.g., Whitaker*, 357 N.C. at 557–58, 597 S.E.2d at 668–69.

summary judgment in favor of the defendant employer. A standard that consigns courts to employ a fact-based comparison with the original opinion from which the standard came is no standard at all. That the *Woodson* claim in *Valenzuela* failed under such damning facts is a clear signal that the substantial certainty standard is ineffective, and that a change must be made.

### III. A NEW STANDARD

Numerous pleas for a more workable and understandable standard have gone unanswered.<sup>131</sup> The substantial certainty standard—yet to be adequately defined by the Supreme Court of North Carolina—now stands as an insurmountable barrier that plaintiffs strive in vain to overcome, making the *Woodson* claim an illusory cause of action. Even if the substantial certainty standard were attainable, it is not a standard that is easily understood.<sup>132</sup> This confusion has effectively foreclosed the *Woodson* claim as a viable option for injured employees because with so little guidance, a court has almost no choice but to delve into fact-specific comparisons with *Woodson*, which leads to wholesale disposal of claims on summary judgment. Because *Woodson* claims are effectively no longer viable claims in North Carolina, plaintiffs such as the Valenzuela family are limited to the compensation the Act provides, a result that is contrary to the social policy behind workers' compensation legislation, sound public policy, and the intent of the *Woodson* court.

Since the substantial certainty standard has proved to be an unworkable and thus unsuccessful attempt at creating a tangible substantive right, the solution lies in using a clear, familiar standard for evaluating employer misconduct that will fulfill the intent of the *Woodson* court while continuing to balance the competing interests behind workers' compensation legislation. The standard should be gross negligence.

#### A. *Gross Negligence Creates a Distinct "Middle Ground"*

The Supreme Court of North Carolina's own confusion and misunderstanding of the precise meaning of substantial certainty is the root of the problem. The court adopted an intent-based standard,<sup>133</sup> then later rejected this standard by disavowing the bomb-

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131. See *supra* notes 122–23 and accompanying text.

132. See *supra* Part II.C and *infra* Part III.A.

133. See RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) ("Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are

throwing illustration from the *Restatement (Second)* as exemplifying actual intent, not substantial certainty.<sup>134</sup> Since the bomb-throwing illustration is the *Restatement's* primary example of what is meant by "substantial certainty,"<sup>135</sup> the supreme court was signaling either its misunderstanding of substantial certainty, or its discomfort with imposing such a high evidentiary burden on an injured employee. Further, if the *Restatement's* own illustration of substantial certainty is rejected by the court as requiring too much, there is nothing left to the standard, and it is no longer clear what types of misconduct are meant to fall outside the exclusivity of the Act.

The *Woodson* court plainly wanted to adopt a standard higher than negligence but lower than actual intent<sup>136</sup> and looked to the *Restatement (Second)* and *Prosser and Keeton* for guidance which would articulate a satisfactory middle-ground between those two types of misconduct.<sup>137</sup> However, the court's refusal to adopt the "willful, wanton, and reckless" standard similar to that in *Pleasant*—the only middle-ground that is provided by the *Restatement (Second)* and *Prosser and Keeton*<sup>138</sup>—led the *Woodson* court to adopt instead a standard that it misunderstood as a distinct middle ground. Substantial certainty is not a distinct middle ground, it is intent.<sup>139</sup> Conduct based on a "conscious and reckless disregard for the safety and rights of others" standard—what North Carolina courts call "wanton conduct" or "gross negligence"<sup>140</sup>—better reflects the

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. . . substantially certain, . . . he is treated by the law as if he had in fact desired to produce the result.").

134. See *Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995).

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

136. See *Woodson v. Rowland*, 329 N.C. 330, 344, 407 S.E.2d 222, 230 (1991) ("[B]oth courts and legislatures in . . . other jurisdictions have rejected the proposition that actual intent to harm is required for an employer's conduct to be actionable in tort and not protected by the exclusivity provisions of workers' compensation. Our adoption of the substantial certainty standard does the same."); see also *supra* Part II.C (discussing the North Carolina appellate courts' disagreements, through published opinions, on both the meaning of the substantial certainty standard and the level of intent required for a successful *Woodson* claim).

137. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228–29.

138. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 212–14 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 500 cmts. f, g (1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. a (2010) (equating wanton and reckless conduct with reckless disregard for risk).

139. See RESTATEMENT (SECOND) OF TORTS § 8A (1965) ("The word 'intent' is used . . . to denote that the actor . . . believes that the consequences [of his act] are *substantially certain* to result from it." (emphasis added)).

140. *Yancey v. Lea*, 354 N.C. 48, 53, 550 S.E.2d 155, 158 (2001) ("An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge

supreme court's desire to find this middle ground between negligent and intentional conduct.

It is highly questionable whether even the facts in *Woodson* met the substantial certainty standard.<sup>141</sup> While the defendant employer had previously been cited numerous times for violating trenching procedure, there was also evidence that prior experience allowed the employer to recognize when dangerous trenching conditions existed.<sup>142</sup> The defendant employer and project supervisor also testified that although a trenchbox was available, they believed the soil conditions to be such that a cave-in was unlikely.<sup>143</sup> Additionally, the project supervisor at the worksite placed his own son in the same trench where Thomas Sprouse was killed.<sup>144</sup> In order to meet the substantial certainty standard, the defendant employer and supervisor would have had to have known for certain that the trench would collapse, just as the bomb thrower is certain that the bomb will explode and the unintended victim will be killed.<sup>145</sup> It is highly unlikely that the supervisor would have placed his son in a trench that was certain to collapse.<sup>146</sup> Further, Judge Wynn acknowledged,<sup>147</sup> and the supreme court later agreed, that the bomb-throwing illustration set a higher bar than that which was applied in *Woodson*.<sup>148</sup> Since the bomb-throwing illustration is what is meant by substantial certainty,<sup>149</sup> anything less must be gross negligence.

Gross negligence, defined as “wanton conduct done with conscious or reckless disregard for the rights and safety of others,”<sup>150</sup> has the advantage of being a familiar and clear standard in North

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that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others.”)

141. Lambert, *supra* note 106, at 189–92 (discussing how the facts in *Woodson* do not meet the substantial certainty standard as exemplified by the bomb-throwing illustration and attributing the confusion surrounding the standard to the supreme court's initial misapplication of the standard in *Woodson*).

142. *Woodson*, 329 N.C. at 345, 407 S.E.2d at 231; see Lambert, *supra* note 106, at 191.

143. *Woodson*, 329 N.C. at 335, 407 S.E.2d at 225.

144. *Id.* at 346–47, 407 S.E.2d at 232; Lambert, *supra* note 106, at 190–91.

145. See RESTATEMENT (SECOND) OF TORTS § 8A cmt. b, illus. 1 (1965); Lambert, *supra* note 106, at 189–92.

146. *Woodson*, 329 N.C. at 346–47, 407 S.E.2d at 232 (stating that this argument was a more appropriate question for the jury to resolve).

147. *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 328, 442 S.E.2d 143, 148 (1994) (Wynn, J., dissenting), *aff'd*, 342 N.C. 182, 463 S.E.2d 79 (1995).

148. *Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995).

149. See RESTATEMENT (SECOND) OF TORTS § 8A cmt. b, illus. 1 (1965).

150. *Lunsford v. Renn*, \_\_ N.C. App. \_\_, \_\_, 700 S.E.2d 94, 98 (2010) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)), *discretionary review denied*, 365 N.C. 193, 707 S.E.2d 244 (2011).



Carolina with a body of established case law that can be used to evaluate employer misconduct and distinguish such misconduct from ordinary negligence.<sup>151</sup> The real fear has likely been the adoption of too low a standard such that employers would be held liable for simple negligence, misconduct that is clearly protected by the Act.<sup>152</sup> Although the courts have had occasional difficulty distinguishing between willful, wanton, and reckless conduct,<sup>153</sup> they have had no difficulty distinguishing between ordinary negligence and gross negligence,<sup>154</sup> the very distinction *Pleasant* and *Woodson* were in fact trying to preserve.<sup>155</sup>

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151. See, e.g., *Yancey v. Lea*, 354 N.C. 48, 52–53, 550 S.E.2d 155, 157–58 (2001) (“[T]he difference between [ordinary and gross negligence] is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others.”). An analog of gross negligence is “culpable negligence,” which is used in the criminal law to support a verdict of involuntary manslaughter. See *State v. Mack*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 697 S.E.2d 490, 494 (2010) (defining culpable negligence in such a context as “such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others” (quoting *State v. Wade*, 161 N.C. App. 686, 690, 589 S.E.2d 379, 382 (2003) (internal quotation marks omitted))), *discretionary review denied*, \_\_\_ N.C. App. \_\_\_, 704 S.E.2d 276 (2010).

152. See *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991).

153. See *Pleasant v. Johnson*, 312 N.C. 710, 715, 325 S.E.2d 244, 248 (1985) (“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. Wanton and reckless negligence gives rise to constructive intent.” (internal citation omitted)). The *Pleasant* court attempted to detangle the three, yet ultimately and unfortunately lumped all three into one category, concluding that an injury resulting from a co-employee’s “willful, wanton and reckless negligence” should fall outside the Act’s exclusivity provision. *Id.* at 714–15, 325 S.E.2d at 247–48 (emphasis added); see also KEETON ET AL., *supra* note 138, § 34, at 212 (“[T]here is a penumbra of what has been called ‘quasi-intent.’ To this area the words ‘willful,’ ‘wanton,’ or ‘reckless,’ are customarily applied; and sometimes, in a single sentence, all three. Although efforts have been made to distinguish them, in practice such distinctions have consistently been ignored . . . .” (internal citations omitted)); RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 2 cmts. a, b (2010) (discussing the manner in which the three terms are often used interchangeably or given the label “gross negligence”).

154. See, e.g., *Yancey*, 354 N.C. at 53, 550 S.E.2d at 158.

It is clear from the foregoing language of this Court that the difference between ordinary negligence and gross negligence is substantial. As this Court has stated:

An analysis of our decisions impels the conclusion that this Court, in references to gross negligence, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

*B. Adoption of a Gross Negligence Standard is Better Aligned with the Policy Goals Behind Workers' Compensation Law*

The *Woodson* court declined to hold an employer to the same standard as tortious co-employees, concluding that a higher degree of culpability for intentional misconduct of an employer is justified simply because employers fund the workers' compensation coffers and co-employees do not.<sup>156</sup> This justification is highly misleading and only true in a technical sense given that the public, which includes the employees, ultimately bears the cost of the workers' compensation system. The public assumes the cost of the workers' compensation system through the higher cost of goods, but it is a cost the public is willing to bear in exchange for preventing disabled workers from becoming public charges.<sup>157</sup> Further, employees also pay indirectly as the cost of workers' compensation insurance is passed on through lower pay and fewer benefits.<sup>158</sup> Industrial accidents are sometimes unavoidable, but it is doubtful that the public is willing to subsidize compensation for injuries resulting from an employer's intentional disregard for the law or basic safety.

As between employers and co-employees, there is a salient argument that an employer's conduct should be more rigorously scrutinized than the co-employee's conduct. Through the employer's knowledge of safety regulations and the means required to implement them, employers are in a better position to ensure the safety of their employees. This institutional knowledge puts them on notice of safety risks. If an employer's advantageous position provides knowledge of a risk, then a conscious disregard of that risk should result in tort liability for the employer.

The *Woodson* court also read more employer protection into the Act than what workers' compensation legislation originally intended to provide. Social policy behind the Act does not support protection from gross negligence; rather, workers' compensation legislation was designed to provide a swift remedy to workers for injuries caused by

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*Id.* (quoting *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 396–97 (1956)).

155. See *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227 (“The Act seeks to balance competing interests . . . between the rights of employees and their employers. It provides for an injured employee's certain and sure recovery without having to prove *employer negligence* . . .” (emphasis added) (citing *Pleasant*, 312 N.C. at 712, 325 S.E.2d at 247)).

156. *Id.* at 342, 407 S.E.2d at 229.

157. See JERNIGAN, JR., *supra* note 32, § 1.2, at 3.

158. See Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 309–10 (1998).

the hazards of the workplace,<sup>159</sup> to control and distribute liability for accidental injuries, and to require industry to “take care of its own wreckage.”<sup>160</sup> In a call for reform eventually culminating in the first state workers’ compensation legislation, President Theodore Roosevelt acknowledged that “it is revolting . . . that the financial burden of accidents occurring *because of the necessary exigencies of their daily occupation* should be thrust upon those sufferers who were least able to bear it.”<sup>161</sup> Thus, workers’ compensation legislation was meant to quickly compensate employees injured through the inherent dangers of industrial employment and encourage safety in the workplace, not to encourage misconduct by allowing employers to use it as a shield.<sup>162</sup>

Indeed, the North Carolina Act only covers “injury by *accident* arising out of and in the course of employment.”<sup>163</sup> An “accident” under the Act is defined as “an unlooked for and untoward event which is not expected or designed by the injured employee . . . [or] a result produced by a fortuitous cause.”<sup>164</sup> This statutory language and interpretation is meant to permit coverage when atypical conditions precipitate an unintended injury to an employee and to preclude compensation for injuries arising out of everyday work duties.<sup>165</sup> Thus, injuries as a result of an employer’s intentional tort are an unexpected “accident” under the Act from the perspective of the employee and still compensable.<sup>166</sup>

However, North Carolina courts have long held that the Act was not intended to shield an employer from liability injuries caused by

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159. See George H. Singer, *Workers’ Compensation: The Assault on the Shield of Immunity—Coming to Blows with the Exclusive-Remedy Provisions of the North Dakota Workers’ Compensation Act*, 70 N.D. L. REV. 905, 946 (1994).

160. Barber v. Minges, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943).

161. Spieler, *supra* note 36, at 166 (quoting Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 68 n.69 (1967)).

162. See Barrino v. Radiator Specialty Co., 315 N.C. 500, 519, 340 S.E.2d 295, 306 (1986) (Martin, J., dissenting), *overruled by* Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 221 (1991); see also Melissa F. Ross, Comment, *Ripples in Treacherous Waters: A Consideration of the Effects of North Carolina’s Intentional Tort Exception to Workers’ Compensation*, 31 WAKE FOREST L. REV. 513, 552–53 (1996) (discussing how retention of the Woodson exception is supported by the purposes and policy behind workers’ compensation legislation).

163. N.C. GEN. STAT. § 97-2(6) (2011) (emphasis added).

164. Edwards v. Piedmont Publ’g Co., 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (internal citations and quotation marks omitted).

165. JERNIGAN, JR., *supra* note 32, § 5.2, at 52–53.

166. See Woodson v. Rowland, 329 N.C. 330, 348–50, 407 S.E.2d 222, 233–34 (1991) (explaining that an injury suffered by an employee as a result of an intentional tort is still an “accident” within the meaning of the Act).

his own intentional misconduct, notwithstanding the injury qualifying as an accident under the Act.<sup>167</sup> Further, as the *Barrino* court rightly pointed out, the justification for allowing intentional torts committed by the employer to fall outside the exclusivity of the Act is that an employer cannot allege that an injury caused by his own intentional tort was an accident from his own point of view, and thus cannot insulate himself from liability through the Act.<sup>168</sup> Just as with a true intentional tort, an injury resulting from an employer's disregard for safety cannot ever reasonably be labeled an accident from the employer's own perspective and also should not be protected under the Act as an accident, and nothing more. Regardless of the label the conduct is given, the courts cannot contend that the legislature intended the workers' compensation fund to subsidize injuries that arise because employers engage in egregious misconduct such as an intentional disregard for safety,<sup>169</sup> even if that conduct was not intended to injure the employee.

*C. Adoption of a Gross Negligence Standard Better Addresses Policy Goals of the Exceptions to Workers' Compensation Exclusivity*

Holding employers accountable in tort for gross negligence better addresses the shared policy goals of both *Pleasant* and *Woodson*: culpability<sup>170</sup> and deterrence.<sup>171</sup> In order to import a sense

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167. See *id.* at 338–39, 407 S.E.2d at 227; *supra* notes 50–52 and accompanying text.

168. *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 507, 340 S.E.2d 295, 300 (1986) (quoting 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 68.11, 68.13 (1984)), *overruled by* *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). The *Barrino* court, however, agreed with Professor Larson that misconduct less than a true intentional tort should still be considered an "accident" under the Act, even from the perspective of the employer. *Id.*; see *supra* note 75.

169. See *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 203–04, 443 S.E.2d 716, 718–19 (1994) ("The philosophy which supports the Work[ers'] Compensation Act is 'that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products.' " (quoting *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951))).

170. Compare *Pleasant v. Johnson*, 312 N.C. 710, 717, 325 S.E.2d 244, 249 (1985) (explaining that allowing punitive damages for intentional torts, including those based on constructive intent, "places responsibility upon the tortfeasor where it belongs"), *with Woodson*, 329 N.C. at 341, 407 S.E.2d at 228 (requiring employer misconduct "tantamount to an intentional tort" in order to support a civil tort action).

171. Compare *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249 (rationalizing that because wanton conduct can be deterred, such conduct by a co-employee should fall outside the Act's exclusivity provision), *with Woodson*, 329 N.C. at 342, 407 S.E.2d at 229 (stating that

of moral deservedness, the important distinction in evaluating whether employer misconduct should fall outside of the exclusivity provision of the Act should not be a determination of whether employer misconduct was substantially certain to injure an employee. While a showing of a defendant employer's subjective knowledge of risk should be required, the current constraint of requiring a showing that the risk was substantially certain to injure is unnecessarily excessive and may be, in many cases, difficult to demonstrate. The important distinction is whether the injury was an "accident" caused by ordinary negligence—misconduct subject to the exclusive remedy provision<sup>172</sup>—or whether the injury was an "accident" caused by an employer that had subjective knowledge of a safety risk and consciously disregarded that risk—gross negligence that should not be protected by the exclusive remedy provision. Because misconduct that satisfies a gross negligence standard requires culpability as demonstrated by a subjective knowledge of risk and disregard of that risk, it is also certain to capture only misconduct that can be deterred. This is precisely the misconduct North Carolina courts have already recognized as behavior that can and should be deterred.<sup>173</sup>

Requiring an injured employee to demonstrate gross negligence on the part of the employer better serves the deterrence policy behind the exclusivity exceptions as well. Employers are now undoubtedly aware that employees have almost no judicial recourse against an employer for injuries caused by the employer's intentional misconduct, short of a true intentional tort such as battery—a result completely contrary to what the *Woodson* court was hoping to achieve.<sup>174</sup> Thus, the deterrent effect that the *Woodson* court sought to invite by allowing misconduct to fall outside the exclusivity provision of the Act<sup>175</sup> is completely undermined by the use of the substantial certainty standard.

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the substantial certainty standard operates as a deterrent for an employer's intentional misconduct).

172. *Pleasant*, 312 N.C. at 712, 325 S.E.2d at 246–47.

173. *See id.* at 715–17, 325 S.E.2d at 248–49; *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 396–97 (1956) (recognizing that punitive damages should be allowed for misconduct characterized by an "intentional disregard of and indifference to the rights and safety of others" because such misconduct can be deterred).

174. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229. ("The substantial certainty standard satisfies the Act's purposes of providing trade-offs to competing interests and balancing these interests, while serving as a deterrent to intentional wrongdoing and promoting safety in the workplace.")

175. *See id.*

Currently, the only deterrent to employer misconduct is the threat of state-imposed monetary sanctions for failure to abide by OSHANC regulations, but this system is largely ineffective. Employers are required by statute to assure that workplace conditions do not expose employees to “recognized hazards that . . . are likely to cause death or serious injury.”<sup>176</sup> State inspectors through the North Carolina Department of Labor enforce compliance by conducting inspections and levying fines,<sup>177</sup> but inspections are infrequent, if they occur at all.<sup>178</sup> When employers are issued citations and monetary fines, the penalties are often small compared to the cost of the injuries that may result or have resulted from the violation.<sup>179</sup> Thus, standing alone, the threat of citations for OSHANC violations and the monetary fines that accompany a failure to comply with OSHANC regulations are toothless compared to the threat of tort liability.<sup>180</sup>

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176. N.C. GEN. STAT. § 95-129(1) (2011). Employees are charged with complying with the Act’s standards as well. § 95-130(1).

177. See *Occupational Safety and Health Division Overview*, N.C. DEP’T OF LABOR, <http://www.nclabor.com/osh/oshover.htm> (last visited Feb. 25, 2012).

178. See Ames Alexander & Franco Ordoñez, *Safety Push that Followed Hamlet Wanes*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 4, 2011, at 1A (discussing the precipitous drop in both OSHA inspections and citations in recent years despite the continued increase in the state’s workforce).

179. Civil penalties may be assessed, but are not required, even for repeat or willful violations. See § 95-138(a)(1). Monetary penalties are required to be imposed for serious violations, defined in section 95-127(18), as “a substantial probability that death or serious physical harm could result from a condition which exists . . . unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation,” but the penalty is miniscule compared to damages in tort. See § 95-138(a)(1) (“A minimum penalty of five thousand dollars (\$5,000) to a maximum penalty of seventy thousand dollars (\$70,000) may be assessed for each willful or repeat violation.”); § 95-138(a)(2) (“A penalty of up to seven thousand dollars (\$7,000) shall be assessed for each serious violation, except that a penalty of up to fourteen thousand dollars (\$14,000) shall be assessed for each serious violation that involves injury to an employee under 18 years of age.”). Moreover, even when an employer willfully violates a regulation that causes the death of an employee and criminal penalties can be assessed, the violation is only a Class 2 misdemeanor and the monetary penalties are embarrassingly low considering the loss of life. § 95-139(a), (b) (stating that an employer that willfully violates a regulation that causes the death of an employee is guilty of a Class 2 misdemeanor and may be fined not more than \$10,000 if the employee was over the age of eighteen and not more than \$20,000 if the employee was under the age of eighteen).

180. For example, Legal Aid of North Carolina has recently lodged a complaint against the North Carolina Department of Labor for their lax enforcement of OSHANC regulations in the farm industry, and requested the federal Department of Labor to investigate. Letter from Mary Lee Hall, Senior Managing Att’y, Farmworker Unit, Legal Aid of North Carolina, Inc., to David Michaels, Assistant Sec’y of Labor for Occupational Safety & Health (Sept. 30, 2011), available at <http://pulse.ncpolicywatch.org/wp-content>

Pallet Express was no exception to the system's current inability to deter misconduct. Prior to Nery's death, Pallet Express had not been issued any citations for OSHANC safety violations regarding the Hog Shredder.<sup>181</sup> Although this point is not clear, it can be safely assumed that the Hog Shredder had not been inspected in the five years before Nery's death. Even if the Department of Labor had inspected the Hog Shredder prior to Nery's death, either the inspection failed to discover that the Hog Shredder's safety guards had been removed or Pallet Express remained noncompliant after the inspection. In any case, the inspection process certainly failed Nery.

Justice Martin, in his *Barrino* dissent, noted that courts should be very concerned with discouraging deliberate employer behavior that is likely to result in injury and allowing employers to assume statutory immunity for this behavior.<sup>182</sup> He aptly observed that a system where there is no accountability "encourage[s] the employer to weigh the economic costs of compliance with safety regulations against the costs of workers' compensation and to choose the most cost-effective course of conduct."<sup>183</sup> If fines for OSHANC violations serve as an ineffective deterrent and employers know that even the courts will not impose liability for willful safety violations, there is no incentive to comply with statutory safety regulations, or even to employ common sense safety provisions, especially when doing so would impose additional financial obligations. An effective, enforceable tort remedy incentivizes employers to comply with state safety regulations by threatening to penalize the employer twice—first through fines imposed by the state and second through tort damages awarded by a court. A tort remedy also compensates the injured employee or their estate in the case of an employee that has been killed; only the state is compensated as a result of OSHANC fines.<sup>184</sup>

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/uploads/2011/10/Letter-to-US-DOL-09-30-2011.pdf. In its complaint, Legal Aid alleges OSHANC violations are often improperly and inconsistently classified, and that penalties for violations are so regularly reduced that the citations have little to no deterrent effect. *Id.*

181. Defendants-Appellees' Brief, *supra* note 28, at 2–3, 17, 19.

182. *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 519, 340 S.E.2d 295, 306 (1986) (Martin, J., dissenting), *overruled by* *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 221 (1991). Justice Martin declined to comment as to whether an employer should be held liable for "willful, wanton, and reckless" conduct as was found in *Pleasant* because in his opinion, the degree of conduct in *Barrino* well exceeded recklessness. *Id.* at 521, 340 S.E.2d at 307.

183. *Id.* at 519, 340 S.E.2d at 306.

184. OCCUPATIONAL SAFETY & HEALTH DIV., N.C. DEP'T OF LABOR, A GUIDE TO OCCUPATIONAL SAFETY AND HEALTH IN NORTH CAROLINA 14, available at <http://www>

#### IV. APPLYING GROSS NEGLIGENCE IN THE EMPLOYER-EMPLOYEE CONTEXT

The *Restatement (Third) of Torts* provides guidance on types of evidence that support a finding of a “reckless disregard” or “reckless indifference to risk.”<sup>185</sup> This guidance can also inform courts as they determine whether an injured employee’s claim should survive summary judgment. The *Restatement (Third)* requires “knowledge of the danger or . . . facts that would make the danger obvious to anyone in the actor’s situation.”<sup>186</sup> In the context of employer misconduct, this knowledge could take a multitude of forms, including knowledge of a history of safety violations, knowledge of previous accidents caused by the risk, or knowledge of an improperly trained employee. Allegations of a defendant employer’s subjective knowledge and subsequent disregard of risks, likely supported by circumstantial evidence, should raise an issue of material fact sufficient to survive pre-trial dismissal.<sup>187</sup>

Under the current standard, courts have been inconsistent in their treatment of the presence of safety violations as support for a successful *Woodson* claim. Many *Woodson* claims involve employers that had knowledge of safety violations, yet some courts post-*Woodson* have found evidence of this type insufficient to support an inference of the requisite subjective knowledge.<sup>188</sup> Moreover, courts

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.nclabor.com/osha/etta/indguide/ig4.pdf (last updated Nov. 2011) (stating that penalties collected are placed into the “Civil Penalty and Forfeiture Fund”).

185. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmts. a, c (2010). The *Restatement (Third)* equates “reckless disregard” and “reckless indifference to risk” with the term recklessness. *Id.* at cmt. a. North Carolina courts distinguish reckless and wanton misconduct, using the latter term to describe behavior that is in reckless disregard of the rights or safety of others. *Pleasant v. Johnson*, 312 N.C. 710, 714, 325 S.E.2d 244, 248 (1985).

186. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. c (2010). The *Restatement (Third)* distinguishes “knowledge of facts that would make the danger obvious” from an ordinary negligence standard in which an actor fails to draw a reasonable inference from known facts. *Id.* at 19–20. In the case of reckless disregard for safety, an actor’s knowledge of risk can be inferred by circumstantial evidence such as evidence of the obviousness of a risk. *Id.*

187. See *Barrino*, 315 N.C. at 518, 340 S.E.2d at 305–06 (Martin, J., dissenting).

188. Compare *Woodson v. Rowland*, 329 N.C. 330, 345–46, 407 S.E.2d 222, 231–32 (1991) (finding evidence of previous citations as indicia of subjective knowledge of dangerous condition), with *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 238–40, 424 S.E.2d 391, 394–95 (1993) (holding employer knowledge of unguarded dangerous machine parts in violation of OSHA standards fails to support inference of intent sufficient for *Woodson* claim), and *Regan v. Amerimark Bldg. Prods., Inc.*, 127 N.C. App 225, 228–29, 489 S.E.2d 421, 424–25 (1997) (concluding evidence of previous OSHA violation for unguarded machine insufficient to support *Woodson* claim), *aff’d* 347 N.C. 665, 495 S.E.2d 378 (1998).



have also used an absence of citations for safety violations or absence of previous accidents as support for a lack of the requisite subjective knowledge requirement.<sup>189</sup> It is hard to reconcile these two positions: to say that an absence of citations or accidents helps to prove that the employer had no knowledge of a substantial risk of injury should also lead to the conclusion that a knowledge of safety violations or a history of previous accidents would support an inference of knowledge of a safety risk. Some courts, however, have tended to discount previous accidents or knowledge of a safety violation as evidence of nothing.<sup>190</sup>

Using a lack of safety violations or accidents as evidence of a lack of subjective knowledge is problematic because it creates an unstated requirement that someone actually be hurt or killed as a result of employer misconduct before the employer can be found to have the requisite knowledge that it has exposed its employees to a risk.<sup>191</sup> In *Powell*, Judge Wynn wisely recognized the absurdity of this proposition by rejecting “the implication that a worksite must have had a previous fatality or ‘near miss’ before its supervisors can be held to know of the likelihood of serious injury or death” and further asserting that “[e]mployees should not have to lose a co-worker before their own safety can be ensured.”<sup>192</sup> Moreover, it is anomalous that an employer can disregard state-mandated statutory safety regulations and in turn receive statutory protection from liability through workers’ compensation from the same state government.

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189. *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 558, 597 S.E.2d 665, 668 (2003), *reh’g granted*, 356 N.C. 696, 579 S.E.2d 104 (2003), *rev’d*, 357 N.C. 552, 597 S.E.2d 665 (2003); *Mickles v. Duke Power Co.*, 342 N.C. 103, 111, 463 S.E.2d 206, 211 (1995); *Jones v. Willamette Indus., Inc.*, 120 N.C. App. 591, 594, 463 S.E.2d 294, 297 (1995), *discretionary review denied*, 342 N.C. 656, 467 S.E.2d 714 (1996).

190. *See Pendergrass*, 333 N.C. at 238–40, 424 S.E.2d at 394–95; *Regan*, 127 N.C. App. at 228–29, 489 S.E.2d at 424. *But see Pastva v. Naegele Outdoor Adver., Inc.*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 494 (1996) (reversing a Rule 12(b)(6) dismissal of a *Woodson* claim where the employer had actual knowledge of unsafe conditions and a history of previous citations and fines for safety violations in the workplace), *discretionary review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996); *Arroyo v. Scottie’s Prof’l Window Cleaning, Inc.*, 120 N.C. App. 154, 156–60, 461 S.E.2d 13, 15–17 (1995) (reversing a Rule 12(b)(6) dismissal of a *Woodson* claim where the employer had knowledge of unsafe conditions practiced by a supervisor employee in contravention of OSHA requirements), *discretionary review granted*, 342 N.C. 190, 463 S.E.2d 231 (1995), *review dismissed by*, 343 N.C. 118, 468 S.E.2d 84 (1996). However, it is worth noting that *Pastva* and *Arroyo* were both reversals of Rule 12(b)(6) motions (dismissals for failure to state a claim), not reversals of motions for summary judgment in favor of the defendant employer. *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 494; *Arroyo*, 120 N.C. App. at 160, 461 S.E.2d at 17.

191. *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 330, 442 S.E.2d 143, 149 (1994), *aff’d*, 342 N.C. 182, 463 S.E.2d 79 (1995).

192. *Id.*

The guidance in the *Restatement (Third)* serves to solve this very problem by including not only actual knowledge of a risk, such as knowledge of a safety violation or previous accident, but also “facts that would make the danger obvious to anyone in the actor’s situation.”<sup>193</sup> This standard captures knowledge such as the intentional disregard of safety regulations or removal of safety guards from machinery as misconduct that comes with liability, without requiring previous citations or accidents. As previously noted, employers are in the best position to provide safe work conditions and their conscious disregard for safety, especially state-mandated regulations, should not be trivialized as ordinary negligence encompassed by the Act.

The *Restatement (Third)* also considers the magnitude and likelihood of risk as relevant inquiries in determining a finding of gross negligence.<sup>194</sup> While an employer’s failure to eliminate all risk cannot even be fairly characterized as ordinary negligence,<sup>195</sup> a considerable imbalance between the magnitude of an anticipated risk and the burden of providing preventative measures is indicative of a reckless disregard for the safety of others.<sup>196</sup> Although the courts have previously rejected the magnitude of the risk as a relevant inquiry for a *Woodson* claim,<sup>197</sup> the culpability and deterrence policies behind *Woodson* support holding a tortious employer liable for an injury as a result of gross negligence, however unlikely to occur, if the employer had the power to prevent the injury but chose to disregard that risk. Further, the *Restatement (Third)* asserts that actual knowledge of even an unlikely risk coupled with a small burden of providing safeguards can establish a reckless disregard for the risk.<sup>198</sup> Under *Woodson*, if an employer’s misconduct causes an unlikely injury, the misconduct would not fall outside the exclusivity provision of the

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193. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. c (2010).

194. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. d (2010).

195. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. e (2010) (“[C]onduct is not negligent if its advantages outweigh its disadvantages.”).

196. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. d (2010).

197. See *Valenzuela v. Pallet Express, Inc.* \_\_ N.C. App. \_\_, \_\_, 700 S.E.2d 76, 79 (2010) (rejecting plaintiff’s attempt to distinguish precedent by arguing the relevance that the magnitude of harm resulting from a pallet shredder is greater than the harm from a circular saw).

198. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. d (2010).

Act.<sup>199</sup> However, when the employer has the knowledge and power to safeguard against an injury, distinguishing employer liability based on the likelihood of an injury flies in the face of the policy behind workers' compensation legislation and *Woodson*.

*Valenzuela v. Pallet Express* graphically demonstrates the need for a new standard. The plaintiff alleged that Pallet Express intentionally removed manufacturer-installed safety guards from the Hog Shredder and incurred a multitude of OSHANC violations at the time of Nery's death, including assigning an untrained, underage employee to work on the Hog Shredder.<sup>200</sup> The president of Pallet Express admitted to ordering the removal of the safety guard at the mouth of the Hog Shredder—a guard intended to prevent personnel from falling into the machine and being crushed—in order to increase productivity, with the knowledge that the manufacturer specifically warned against such removal.<sup>201</sup> Moreover, the president concealed the removal from the employees, supervisors, and operations managers.<sup>202</sup> The court of appeals rejected these allegations as evidence that Pallet Express “knew its [actions were] substantially certain to cause serious injury or death to employees.”<sup>203</sup> However, the *Valenzuela* court offered nothing more, and therefore it remains unclear exactly what the plaintiff's evidence failed to demonstrate: a lack of evidence of Pallet Express's knowledge that it was creating a substantial risk of injury or death, a lack of evidence that the risk was substantially certain to cause injury or death, or both.

Moreover, *Valenzuela v. Pallet Express* demonstrates how adopting the gross negligence standard achieves the objectives of both workers' compensation legislation and the *Woodson* court. If the Supreme Court of North Carolina were to adopt the gross negligence standard, *Valenzuela* is a clear-cut case for overcoming a motion for summary judgment. The plaintiffs provided evidence that Pallet Express had both “knowledge of the danger [and] of facts that would make the danger obvious to anyone in the actor's situation.”<sup>204</sup> They alleged that Pallet Express intentionally removed safety guards in

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199. See *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991).

200. *Valenzuela*, \_\_ N.C. App. at \_\_, 700 S.E.2d at 79.

201. Plaintiff-Appellant's Brief, *supra* note 14, at 6. The manual warned that “[a] damaged or missing guard or defective safety device can fully expose operating personnel to the danger of personal injury or death.” *Id.*

202. *Id.*

203. *Valenzuela*, \_\_ N.C. App. at \_\_, 700 S.E.2d at 79 (citing *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228).

204. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. c (2010).

order to increase production and allowed an improperly trained underage worker to operate the pallet shredder without proper supervision, all in contravention of state and federal safety regulations.<sup>205</sup> These allegations demonstrate actual knowledge of a substantial risk of injury and the employer's intentional removal of manufacturer-installed safety guards resulted in a substantial risk to the employees. Further, the concealment of the removal supports an inference that the employer had knowledge of the substantial risk to employees. This evidence was exactly the type Justice Martin envisioned when he warned against using summary judgment to dispose of claims involving issues of subjective intent.<sup>206</sup> Additionally, because an employer is in the unique position of being charged with the knowledge of safety regulations, knowledge of a lack of compliance is a fact that would make a safety risk obvious to an employer, further bolstering the denial of the employer's motion for summary judgment. The gross negligence standard removes from the protection of the Act only misconduct in which the employer has knowingly, intentionally disregarded the safety of his employees, thus remaining true to the goal of workers' compensation legislation to protect employers from liability for ordinary negligence.<sup>207</sup> This standard also addresses the culpability and deterrence policy goals of the *Woodson* exception<sup>208</sup> by requiring a demonstration of an employer's subjective knowledge of risk-creation and ensuring that employers are not permitted to intentionally disregard employee safety without consequences.

### CONCLUSION

Twenty-one years ago, the Supreme Court of North Carolina in *Woodson v. Rowland* created a substantive right for injured employees to assert a tort claim against an employer in order to deter egregious employer behavior and to promote employee safety. The poorly defined, oft-misunderstood substantial certainty standard has eroded the utility of the *Woodson* claim as both a valuable remedy for employees and an effective deterrent for employer misconduct. Placing the lofty burden of proving both subjective knowledge and intent of the employer and a high likelihood of injury squarely on the

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205. *Valenzuela*, \_\_ N.C. App. at \_\_, 700 S.E.2d at 79.

206. *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 518, 340 S.E.2d 295, 305-06 (1986) (Martin, J., dissenting), *overruled by Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 221 (1991).

207. *See supra* Part III.B.

208. *See supra* Part III.C.

shoulders of the injured employee is manifestly unjust, and the substantial certainty standard has ultimately proved to be an unsuccessful attempt at providing injured employees recourse against employer misconduct. A hallmark principle of tort law is that “liability must be based upon conduct which is socially unreasonable.”<sup>209</sup> It is both socially unreasonable and unacceptable to allow employers to hide behind a shield of limited liability while affirmatively disregarding the safety of North Carolina workers. However, there is an opportunity, through a gross negligence standard, to redefine *Woodson* claims in such a way that continues to balance the competing interests of employer and employee, while satisfying the policy goals of both workplace safety and effectively deterring employer misconduct.

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209. KEETON ET AL., *supra* note 138, § 1, at 6.

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