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The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provision: Woodson v. Rowland

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NOTES

The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provision: *Woodson v. Rowland*

On September 3, 1991, a tragedy struck at the Imperial Food Products chicken processing plant in Hamlet, North Carolina. Inside the plant a hydraulic line ruptured and poured flammable fluid onto the natural gas flames that heated the plant's chicken fryers. The fire spread rapidly and enveloped the plant in heavy smoke. Several of the exit doors were either locked or blocked, preventing the employees from escaping. Twenty-five workers died; over fifty were injured.[1] In the aftermath of the fire, government officials accused Imperial Food of misconduct, alleging safety and fire code violations and dangerous working conditions at the Hamlet plant.[2] For the injured and dead employees and their families, as for most employees in North Carolina, the North Carolina Workers' Compensation Act[3] (the Act) provides certain modest statutory benefits; those limited benefits, however, unlike a tort recovery, do not and are not intended to compensate fully these individuals for their loss.[4] Accordingly, two major, related issues arise: (1) whether North Carolina law limits compensation for the Imperial Food workers to the benefits offered by the Workers' Compensation Act, or alterna-

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1. Most of the deaths resulted from smoke inhalation. Julie P. Rives & Tom Mather, *49 Injured as Doors Bar Safety Routes*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 4, 1991, at A1, A7. The death toll was the highest recorded in a North Carolina workplace accident since the state began keeping records in 1970. *Id.* at A1. Initial estimates that 45 workers had been injured quickly increased to over 50. Pamela Babcock & Julie P. Rives, *Families Say 25 Died Needlessly; Locked Exit Confirmed*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 5, 1991, at A1, A15.

2. A report prepared by the Fire and Rescue Services Division of the North Carolina Department of Insurance revealed that the plant had no sprinkler system or fire evacuation plan; that no exit in the building met state building codes; that at least two exits were locked and several others were bolted from the outside, blocked by freezers, or locked; and finally that one door labeled "Fire Door" remained locked. Pamela Babcock, *Imperial "Violated Every Code,"* NEWS & OBSERVER (Raleigh, N.C.), Sept. 7, 1991, at A1, A9.

Imperial Food workers described conditions at the plant as "deplorable." Babcock & Rives, *supra* note 1, at A15. According to some witnesses, the plant "smelled like a hog pen," the floors were slick with grease, and when employees slipped and fell on loose chicken parts, management discouraged them from seeking treatment. *Id.* One worker stated that when he and his fellow workers periodically detected the odor of gas in the room, management instructed the employees to continue working. *Id.* Doors stayed locked, the workers explained, to prevent workers or others from stealing chickens. Rives & Mather, *supra* note 1, at A7.

3. N.C. GEN. STAT. §§ 97-1 to -122 (1991).

4. For a discussion of the purposes of the workers' compensation system and the benefits provided under the Act, see *infra* notes 72-78 and accompanying text.

tively permits pursuit of tort claims against Imperial Food; and (2) whether an employee must relinquish all rights to workers' compensation benefits if he brings a common-law tort action. With its landmark decision in *Woodson v. Rowland*,[5] rendered barely two weeks prior to the tragedy in Hamlet, the North Carolina Supreme Court may well have changed the answers to these questions.

The North Carolina General Assembly enacted the state's workers' compensation system in 1929[6] to give employers and employees a fair and efficient method for handling job-related accidents. The workers' compensation scheme codified a trade-off: a worker injured on the job could no longer sue the employer; instead, the worker's sole recourse was to bring a claim under the statute, but he was guaranteed a recovery without having to prove fault.[7] The North Carolina Supreme Court eventually created an exception to the Act's exclusivity: when an employer deliberately injures his employee, the employee may seek the more liberal measure of damages available at common law.[8] The employee's choice of remedies, however, constitutes a binding election.[9]

In *Woodson* the supreme court expanded the exception for intentional misconduct by lowering the level of intent required to strip an employer of tort immunity under the Act. Rather than an actual, deliberate intent to injure the employee, the court held, misconduct that the employer knows is substantially certain to cause serious injury or death is sufficient to expose the employer to tort liability.[10] The court held further that when an employer exhibits the requisite intent, an employee may pursue statutory and common-law remedies simultaneously.[11] The

5. 329 N.C. 330, 407 S.E.2d 222 (1991).

6. *See* North Carolina Workmen's Compensation Act, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to -122 (1991)). For a discussion of the development of workers' compensation statutes, see *infra* notes 67-78 and accompanying text.

7. For a discussion of the quid pro quo inherent in the workers' compensation system and the historical factors that prompted the enactment of such statutes, see *infra* notes 67-78 and accompanying text.

8. *See* Essick v. City of Lexington, 232 N.C. 200, 210-11, 60 S.E.2d 106, 113-14 (1950) (embracing the general rule that the statute does not protect employers who deliberately assault their employees); *see also infra* notes 82-89 and accompanying text (discussing *Essick* and related cases).

9. Warner v. Leder, 234 N.C. 727, 733, 69 S.E.2d 6, 10 (1952) (quoting SAMUEL B. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 336 (1944)), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233; *Essick*, 232 N.C. at 210-11, 60 S.E.2d at 113-14 (quoting HOROVITZ, *supra*, at 336).

10. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228; *see infra* notes 43-50 and accompanying text.

11. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228; *see infra* notes 58-65 and accompanying text.

goals of protecting the employee, promoting a safe work environment, and deterring employer misconduct formed the bases of the court's decision.[12]

This Note discusses the *Woodson* decision in light of the history and development of workers' compensation systems in the United States and in North Carolina. It recounts the judicial creation in North Carolina of an intentional-tort exception to the exclusivity of the workers' compensation remedy,[13] examining the level of intent a plaintiff must show to establish an intentional tort and the necessity of an employee's election of remedies if intentional misconduct exists.[14] The Note next considers the potential impact of *Woodson*. It analyzes how the court applied the substantial-certainty standard to the facts before it and questions how this application may affect subsequent interpretations of the standard. It discusses the ramifications of the *Woodson* decision for both employees and employers. The Note concludes that, although the court's decision can be justified as sound social policy, it represents a modification of the balance of interests originally incorporated into North Carolina's workers' compensation statute. The Note suggests that the legislature is the proper body to address such fundamental changes and offers alternatives for revising the statute to protect the interests of both employers and employees.

Pinnacle One Associates, a developer, hired Davidson & Jones, Inc. as general contractor on one of its construction projects.[15] Davidson & Jones in turn retained Morris Rowland Utility, Inc. as subcontractor to dig a sanitary sewer line for the project.[16] Thomas Sprouse, who was employed by Rowland Utility as part of a crew digging trenches for the sewer line, died when the trench in which he was working caved in.[17]

On the day before the cave-in, crews from both Davidson & Jones and Rowland Utility arrived to dig trenches for the sewer line.[18] Davidson & Jones's foreman, Lynn Craig, refused to permit his crew to work in the trenches, which were not properly sloped, braced, or shored, and also were not equipped with a trench box, as required by the North Carolina

12. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229.

13. *See infra* notes 82-89 and accompanying text.

14. *Woodson* also involved claims relating to nondelegable duties and negligent hiring against the developer and general contractor who hired the employer. *See infra* note 28. This Note does not address these issues, and reference to those aspects of the decision will be made only for purposes of clarity.

15. *Woodson*, 329 N.C. at 334, 407 S.E.2d at 225.

16. *Id.*

17. *Id.* at 334, 407 S.E.2d at 224-25.

18. *Id.* at 334-35, 407 S.E.2d at 225.

Occupational Safety and Health Act.[19] At Craig's request, Morris Rowland, president of Rowland Utility, procured a trench box for the Davidson & Jones workers.[20] He did not, however, provide a trench box for his own crew.[21] Equipped with the trench box, the Davidson & Jones crew began work.[22]

The following day, Rowland Utility's crew continued to work in the trenches.[23] The Davidson & Jones crew did not work that day, leaving the trench box they had used available for Rowland Utility's workers. Morris Rowland, however, chose not to use the box.[24] At approximately 9:30 A.M., one side of the trench collapsed, completely burying Sprouse and covering the man next to him up to the armpits.[25] Sprouse died before his fellow workers could free him.[26]

The administratrix of Sprouse's estate brought a civil action under North Carolina's Wrongful Death Act[27] against Rowland Utility, Morris Rowland, Davidson & Jones, and Pinnacle One.[28] The administratrix maintained that Rowland Utility's violations of the Occupational Safety and Health Act constituted conduct so grossly negligent that it amounted to an intentional assault on Sprouse, thereby stripping Rowland Utility of its immunity under the Workers' Compensation Act.[29]

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19. *Id.* at 335, 407 S.E.2d at 225. Lynn Craig testified that the trench "could have been a little safer," and that he believed a trench box would best protect his workers. *Id.*

20. *Id.*

21. *Id.* Rowland Utility had been cited four times in the previous six years for violating safety procedures for trenching operations. *Id.* at 335 n.1, 407 S.E.2d at 225 n.1.

22. *Id.* at 335, 407 S.E.2d at 225. The crews used a backhoe to dig the trenches and then laid the pipe. *Id.* at 336, 407 S.E.2d at 225. A front-end loader followed the men's progress by driving along the edge of the trench behind the workers, dumping gravel onto the newly laid pipe. *Id.*

23. *Id.* at 335, 407 S.E.2d at 225. Sprouse worked in the trench at the point closest to the front-end loader. *Id.* at 336, 407 S.E.2d at 225.

24. *Id.* at 335, 407 S.E.2d at 225. Rowland testified that he discussed whether to use the trench box with the project supervisor, but that he believed the trench was safe, and that the packed soil would not collapse. *Id.*

25. *Id.* at 336, 407 S.E.2d at 225-26. The crew pulled the partially buried man from the trench and took him to the hospital, while the remaining workers attempted to uncover Sprouse. *Id.* at 336, 407 S.E.2d at 226.

26. *Id.*

27. N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1991).

28. Plaintiff contended that Davidson & Jones breached a nondelegable duty by allowing Rowland Utility negligently to perform an inherently dangerous activity, namely trench excavation. Woodson v. Rowland, 92 N.C. App. 38, 44, 373 S.E.2d 674, 678 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991). Plaintiff further maintained that Davidson & Jones negligently hired and retained Rowland Utility as subcontractor. *Id.* at 45, 373 S.E.2d at 678.

29. *Id.* at 41, 373 S.E.2d at 676. Sprouse's administratrix also contended that Morris Rowland was acting in his capacity as co-employee to Sprouse, rather than as employer, thereby taking the case outside the purview of the Act. *Id.* at 44, 373 S.E.2d at 677.

The trial court rejected this argument and granted each defendant's motion for summary judgment; the plaintiff appealed from these rulings.[30]

The North Carolina Court of Appeals affirmed the trial court's grant of summary judgment to Rowland Utility.[31] The court held that although merely filing a worker's compensation claim does not constitute an election of remedies, the exclusivity provision of the Workers' Compensation Act barred plaintiff's action.[32] The court of appeals reasoned that Rowland Utility's actions, albeit grossly negligent, did not rise to the

30. *Id.* at 39, 373 S.E.2d at 675.

31. *Id.* at 40-43, 373 S.E.2d at 675-77. The court of appeals also held that summary judgment with regard to the claims against Morris Rowland individually, Davidson & Jones, and Pinnacle One was proper. *Id.* at 44-48, 373 S.E.2d at 677-80. Judge Phillips dissented with respect to the dismissal of the claims against Davidson & Jones, maintaining that Davidson & Jones was under a duty to eliminate the hazard created by its subcontractor. *Id.* at 49-50, 373 S.E.2d at 680-81 (Phillips, J., concurring in part and dissenting in part).

The court held that Morris Rowland was the alter ego of Rowland Utility and consequently was entitled to the same immunity as that granted to employers pursuant to § 97-10.1 of the Act. *Id.* at 44, 373 S.E.2d at 677-78; *see infra* note 32 (discussing N.C. GEN. STAT. § 97-10.1 (1991)). Judge Phillips concurred in the majority's dismissal of the claims against Morris Rowland, but found aspects of the opinion "incorrect[] and unduly broad." Woodson v. Rowland, 92 N.C. App. 38, 48, 373 S.E.2d 674, 680 (1988) (Phillips, J., concurring in part and dissenting in part), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991). First, he maintained that dismissal was warranted not simply because Morris Rowland owned and controlled the corporate employer, but because the duty allegedly attributed by plaintiff to him individually constituted instead a nondelegable duty owed by the corporate employer to its employees. *Id.* at 48-49, 373 S.E.2d at 680 (Phillips, J., concurring in part and dissenting in part). Second, the corporate exclusivity provision set forth in § 97-10.1 applies only to an employee's claim against the employer, not to third parties. Thus, holding that Morris Rowland had violated a duty to Sprouse as a co-employee would not negate the Act's exclusivity provision. *Id.* (Phillips, J., concurring in part and dissenting in part).

Justice Phillips, however, failed to address the fact that §§ 97-9 and 97-10.1 of the Act must be construed together, so that the Act's exclusivity under § 97-10.1 is extended to employees as well as to employers; see *infra* note 32.

32. Woodson v. Rowland, 92 N.C. App. 38, 40-43, 373 S.E.2d 674, 675-77 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991). Section 97-10.1 provides that when an injury or death is compensable under the Act, the statutory benefits constitute an employee's sole recourse. Specifically, § 97-10.1 states that:

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

N.C. GEN. STAT. § 97-10.1.

North Carolina courts have held that the exclusivity provision of § 97-10.1 must be read in conjunction with similar language included in § 97-9 referring to the obligation and liabilities of employers under the Act. *See* Essick v. City of Lexington, 232 N.C. 200, 210, 60 S.E.2d 106, 113 (1950) (holding that contradictions and inequities would result unless "the immunity given in Section 97-9 [is] . . . carried through the provisions of Section 97-10"); *infra* notes 85-86 and accompanying text. Section 97-9 provides:

level of intentional conduct, and thus were not excepted from the Act's exclusivity provisions.[33] The court acknowledged that in *Pleasant v. Johnson*[34] the North Carolina Supreme Court had equated willful, wanton, and reckless negligence with an intentional injury in a personal injury claim between co-employees, but maintained that to extend this reasoning to employers' conduct would skew the "delicate balance established by the Act."[35] Such action, the court stated, is "more properly a legislative prerogative than a judicial function."[36] Thus, the court held that plaintiff's sole recourse was to pursue her claim for workers' compensation benefits under the Act. That she had received no workers' compensation benefits was irrelevant, stated the court; since her exclusive remedy lay in the Act's statutory benefits, she had no right to select another remedy.[37] The court of appeals' decision, therefore, comported with prior decisions limiting an injured employee's remedy against the employer to statutory benefits when the employer did not deliberately intend to injure the employee.

The North Carolina Supreme Court reversed the appellate court's

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

N.C. GEN. STAT. § 97-9. Thus, the employer's immunity from tort actions at common law also extends to employees "conducting [the employer's] business" under § 97-9.

The North Carolina Supreme Court created an exception to the exclusivity provision to cover intentional torts committed by an employer against its employees or by a co-employee. *See* Warner v. Leder, 234 N.C. 727, 733-34, 69 S.E.2d 6, 10 (1952), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233; *Essick*, 232 N.C. at 210-11, 60 S.E.2d at 113-14. For further discussion of this exception and its development, see *infra* notes 82-138 and accompanying text.

33. Woodson v. Rowland, 92 N.C. App. 38, 42, 373 S.E.2d 674, 676-77 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991).

34. 312 N.C. 710, 717, 325 S.E.2d 244, 250 (1985) (holding that willful, wanton, and reckless conduct by a co-employee constitutes an intentional injury and strips him of tort immunity under the Act). For a discussion of this aspect of the holding in *Pleasant*, see *infra* notes 90-98 and accompanying text.

35. Woodson v. Rowland, 92 N.C. App. 38, 42, 373 S.E.2d 674, 676 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991)

36. *Id.* at 42, 373 S.E.2d at 677.

37. *Id.* at 43, 373 S.E.2d at 677. The court cited as authority for this decision the supreme court's holdings in Barrino v. Radiator Specialty Co., 315 N.C. 500, 510, 340 S.E.2d 295, 302 (1986) (plurality opinion), *overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233, and Freeman v. SCM Corp., 311 N.C. 294, 295-96, 316 S.E.2d 81, 82 (1984). For a discussion of the holdings of these cases and the doctrine of election of remedies, see *infra* notes 162-227 and accompanying text.

decision and the trial court's summary judgment against the plaintiff.[38] In doing so, the court announced two major holdings with respect to an employer's intentional conduct as it relates to the exclusivity and immunity provisions of the Workers' Compensation Act. First, the court held that when an employee is killed or injured as a result of employer misconduct that the employer knows is substantially certain to cause serious injury or death, such conduct is tantamount to an intentional tort,[39] and the employee or his personal representative may pursue a civil action against the employer.[40] Second, the court decided that a plaintiff need not choose between a workers' compensation claim or a civil action under these facts, but instead may pursue both, because the employee's death or injury results both from an "accident" as that term is defined under the Act[41] and from an intentional tort.[42]

As to the issue of the employer's conduct, the court began its analysis by asserting that the Workers' Compensation Act should be interpreted in light of the legislative purpose behind the statute.[43] Chief Justice Exum, writing for the majority, stated that shielding an employer from civil liability for intentional torts that result in injury or death to

38. *Woodson*, 329 N.C. at 360, 407 S.E.2d at 240. The court also reversed the appellate court as to the summary judgment motions in favor of Morris Rowland, affirmed the lower courts' rulings as to Pinnacle One and Davidson & Jones on the negligent hiring and retention claims, and reversed as to plaintiff's claim against Davidson & Jones based on breach of a nondelegable duty. *Id.*

39. This standard is applied to intentional torts in common-law tort actions. A leading commentator has defined intent in the context of intentional torts as "broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 35 (5th ed. 1984). Intent "extends not only to having in the mind . . . a desire to bring about given consequences but also to having in mind knowledge that given consequences are substantially certain to result from the act." *Id.* at 34 (parentheses omitted); *accord* RESTATEMENT (SECOND) OF TORTS § 8A & cmt. b (1965) ("As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent . . . ."). The *Woodson* court adopted the dissenting opinion in *Barrino*, 315 N.C. at 517-22, 340 S.E.2d at 305-08 (Martin, J., dissenting). *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228. For a discussion of Justice Martin's rationale in *Barrino*, see *infra* notes 114-20 and accompanying text.

40. *Woodson*, 329 N.C. at 337, 407 S.E.2d at 226.

41. The courts have defined an "accident" for purposes of workers' compensation claims as "an unlooked for and untoward event which is not expected or designed by the injured employee . . . a result produced by a fortuitous cause." Harding v. Thomas & Howard Co., 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962); *accord* Rinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 588, 157 S.E.2d 1, 3 (1967).

42. *Woodson*, 329 N.C. at 337, 407 S.E.2d at 226.

43. *Id.* at 338, 407 S.E.2d at 227. For a discussion of the purposes and trade-offs inherent in the workers' compensation system, see *infra* notes 67-78 and accompanying text.

employees does not reinforce that legislative purpose.[44] Chief Justice Exum noted that North Carolina recognizes the doctrine of constructive intent,[45] pointing to *Pleasant v. Johnson*,[46] a decision that relied in part on that doctrine, and concluded that actual intent to cause injury is not an essential element of intentional tort claims based on work-related injuries caused by co-employees.[47] Acknowledging that the rationale for holding co-employees civilly liable for their willful, wanton, and reckless conduct is not equally applicable to employers, Chief Justice Exum declined to adopt the *Pleasant* standard.[48] He reasoned that the higher threshold of "substantial certainty" both satisfies the legislative purpose in enacting the workers' compensation statute by maintaining the balance of trade-offs and compromises between employers and employees, and furthers the stated legislative goal of promoting safety in the workplace[49] by deterring intentional wrongdoing.[50]

Justice Mitchell dissented from the majority's holding on this issue,[51] approving instead the reasoning of the court of appeals that permitting an employee to bring a tort action against his employer " 'even for gross, willful and wanton negligence, would skew the balance of interests' " of the workers' compensation system.[52] Changes in this balance, Justice Mitchell asserted, should come from the General Assembly, not

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44. *Woodson*, 329 N.C. at 338-39, 407 S.E.2d at 227.

45. *Id.* at 342, 407 S.E.2d at 229. For a definition of constructive intent, see *infra* text accompanying note 95.

46. 312 N.C. 710, 325 S.E.2d 244 (1985).

47. *Id.* at 715-16, 325 S.E.2d at 248-49. For a discussion of the court's reasoning in *Pleasant*, see *infra* text accompanying notes 183-87.

48. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229. For a discussion of the factors outlined in *Pleasant*, see *infra* notes 107-10, 183-87, and accompanying text.

49. N.C. GEN. STAT. § 95-126(b)(2) (1989). The pertinent provisions of this section are set forth *infra* note 119.

50. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229.

51. *Id.* at 361, 407 S.E.2d at 240 (Mitchell, J., concurring in part and dissenting in part). Justice Meyer joined in this concurring and dissenting opinion. *Id.* (Mitchell, J., concurring in part and dissenting in part).

Justice Mitchell had no quarrel with the majority's upholding of summary judgment in favor of Pinnacle One. *Id.* at 361, 407 S.E.2d at 240 (Mitchell, J., concurring in part and dissenting in part). He also concurred in the court's holding that Davidson & Jones could not be liable for its negligent hiring and retention of Rowland Utility. *Id.* (Mitchell, J., concurring in part and dissenting in part). He argued, however, that the court also should have upheld summary judgment for Davidson & Jones on the nondelegable duty claim, observing that excavating was not an inherently dangerous activity. *Id.* at 361-62, 407 S.E.2d at 240-41 (Mitchell, J., concurring in part and dissenting in part).

52. *Id.* at 362, 407 S.E.2d at 241 (Mitchell, J., concurring in part and dissenting in part) (quoting Woodson v. Rowland, 92 N.C. App. 38, 42, 373 S.E.2d 674, 677 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991)). See *supra* notes 32-37 and accompanying text for a discussion of the appellate court's reasoning on this issue.

the courts.[53]

In applying the "substantial certainty" standard to the facts of the case, the court imputed to Rowland Utility the conduct of Morris Rowland as chief executive officer.[54] Plaintiff's evidence indicated that the trench, as constructed by Rowland Utility, was substantially certain to collapse,[55] and that Morris Rowland knew of this substantial certainty.[56] Since the court concluded that a juror could reasonably determine from the evidence that there existed a substantial certainty both that the trench would collapse and that Morris Rowland knew this would happen, the court found that plaintiff's evidence was sufficient to withstand summary judgment.[57]

The court's second major holding in *Woodson* concerned the plaintiff's election of remedies. The court found that when an employee brings an action at law against his employer on an intentional-tort theory, he need not elect between the remedies available at common law and those provided under the Workers' Compensation Act.[58] Since the Act

53. *Woodson*, 329 N.C. at 362, 407 S.E.2d at 241 (Mitchell, J., concurring in part and dissenting in part).

54. *Id.* at 344-45, 407 S.E.2d at 231. The court noted that a corporation can act only through its agents, including its officers. *Id.* at 344, 407 S.E.2d at 231 (citing Raper v. McCrory-McLellan Corp., 259 N.C. 199, 205, 130 S.E.2d 281, 285 (1963)).

55. Plaintiff's expert in soil and environmental analysis concluded that, based on the physical conditions of the soil and the character of the trench (which consisted of 14-foot high vertical walls), the trench " 'had an exceedingly high probability of failure, and the trench was substantially certain to fail.' " *Id.* at 345, 407 S.E.2d at 231 (quoting Affidavit of James Rees).

56. *Id.* The evidence revealed that Morris Rowland had considerable experience in excavating different types of soil, that he knew the risks inherent in this type of work, and that he had been cited four times in the past six and a half years for violating trenching and safety regulations. *Id.* The plaintiff's evidence showed that Rowland was present at the site on the day Sprouse was killed and was therefore aware of the conditions in the trenches. *Id.* at 345-46, 407 S.E.2d at 231. Further, Davidson & Jones's foreman had indicated that, in his opinion, the trench was unsafe. *Id.* at 345, 407 S.E.2d at 231. Despite this, Rowland disregarded the clear danger and directed work to proceed without any safety precautions. *Id.* The court noted that Rowland's desire that work proceed at as fast a pace as possible might have been a motive for his decision to disregard the dangers. *Id.*

57. *Id.* at 346, 407 S.E.2d at 231-32. As for Morris Rowland's individual liability, the court held that because he was at all relevant times the president and sole shareholder and was acting in furtherance of the corporation's business, his individual tort liability must be grounded on the same principles as that of his employer. *Id.* at 347, 407 S.E.2d at 232. Chief Justice Exum cited cases from other jurisdictions that held that corporate officers and directors cannot be held civilly liable when the workers' compensation exclusivity provisions shielded their corporate employers. *Id.* Hence, by implication, when the corporate employer may be held liable if the plaintiff establishes that the employer knew with substantial certainty that serious injury or death would result from its intentional conduct, so the corporate officer may be held individually liable by applying the same standard. *See id.* at 347-48, 407 S.E.2d at 232.

58. *Id.* at 348, 407 S.E.2d at 233. For a discussion of the election-of-remedies doctrine in workers' compensation actions, both with regard to employers' and co-employees' claims, see *infra* notes 162-210 and accompanying text.

defines an "accident" from the perspective of the employee,[59] and the employee does not expect intentional torts to be committed against him, the employee may treat such injuries as accidents compensable under the Act.[60] At the same time, the employee may allege that the behavior in question constituted an intentional tort and seek remedies outside the Act.[61] To assert both positions, the court maintained, is not inherently inconsistent with the goal of the election-of-remedies doctrine—to prevent double recovery for a single wrong.[62] Chief Justice Exum, however, emphasized that a worker is entitled to but one recovery, and suggested that the court avoid double recovery by requiring reimbursement to the employer's insurance carrier of any amount paid under workers' compensation or by subrogating the employee's claim to the extent of workers' compensations benefits paid.[63]

The court observed further that its refusal to require an election rested on equitable grounds.[64] If forced to choose, an employee in financial difficulty will likely feel compelled to accept lower workers' compensation benefits rather than pursue a potentially higher, yet riskier, tort award, even if he believes he has a valid common-law claim. The penurious employee cannot be said to have made a "choice" between two remedies.[65]

To assess properly the impact of *Woodson*, it is important to understand the legislative purpose behind the Workers' Compensation Act, the development of the Act's exclusivity provision, and the recognized exceptions to that provision. By looking at the reasons for relinquishing rights in the workers' compensation system,[66] one can better determine the extent to which *Woodson* alters the balances created by the Act.

At the beginning of this century, laborers, who had flocked to factory jobs in the wake of the Industrial Revolution, suffered serious work-

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59. *See supra* note 41.

60. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

61. *Id.*

62. *Id.* For a discussion of the basic tenets of the election-of-remedies doctrine, see *infra* notes 162-68 and accompanying text.

63. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. Subrogation can be accomplished under N.C. GEN. STAT. § 97-10.2(f) (1991). *See infra* note 110.

64. *Woodson*, 329 N.C. at 349-50, 407 S.E.2d at 233-34. The court relied on the analysis in Justice Martin's dissenting opinion in Barrino v. Radiator Specialty Co., 315 N.C. 500, 521-22, 340 S.E.2d 295, 307-08 (1986) (Martin J., dissenting), *overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. For a discussion of Justice Martin's reasoning, see *infra* notes 203-10 and accompanying text.

65. *Woodson*, 329 N.C. at 349-50, 407 S.E.2d at 234 (quoting *Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting)).

66. For a discussion of the rights given up by both groups, see *infra* notes 74-78 and accompanying text.

related injuries that typically went uncompensated.[67] Although an employee could sue his employer at common law, he was seldom successful, due in large part to the protection afforded employers by three common-law defenses—contributory negligence, assumption of risk, and the fellow-servant rule.[68] Employees, compelled by limited financial resources and the time required to pursue a tort recovery, accepted settlements that often were woefully inadequate to compensate their injuries.[69] Thus, the employee bore a disproportionate share of the burden of work-related accidents.

In response to the laborers' plight, state legislatures began enacting workers' compensation statutes in the first years of the twentieth century.[70] North Carolina promulgated its Workers' Compensation Act in 1929.[71] Like other states, North Carolina based its workers' compensation system on an enterprise liability theory:[72] the costs of accidental work-related injuries should be treated as overhead, absorbed into the price of the product, and ultimately passed along to the consumer.[73]

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67. KEETON et al., *supra* note 39, § 80, at 572 & n.43.1; 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 4.00, at 23 (1990); *id.* § 4.50, at 32; *id.* § 5.20, at 37.

68. KEETON et al., *supra* note 39, § 80, at 569-72 (describing defenses); 1 LARSON, *supra* note 67, § 4.30, at 25-28 (same). The courts required workers to exercise reasonable care for their own safety, and their own negligence (no matter how slight) would completely bar their recovery. KEETON et al., *supra* note 39, § 80, at 569-70. Further, the employee was said to have assumed the risk of hazards normally found in the workplace, against which employers had no duty to protect workers. If a worker knew of a dangerous condition and voluntarily remained, he was said to have accepted the risk of injury. *Id.* at 570-71. The fellow-servant rule, an exception to the general rule of vicarious liability, stated that an employer was not liable for injuries caused solely by a coworker's negligence (another hazard for which employees were said to have assumed the risk). *Id.* at 571.

69. KEETON et al., *supra* note 39, § 80, at 572-73 & n.44.

70. The push for workers' compensation laws began in Europe. 1 LARSON, *supra* note 67, § 5.10, at 33-35. By 1920 all but eight states in the United States had workers' compensation statutes. *Id.* § 5.30, at 39.

71. *See* North Carolina Workmen's Compensation Act, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to -122 (1991)).

72. 1 LARSON, *supra* note 67, § 2.20, at 6-7; *id.* § 3.20, at 17-18. Workers' compensation is a no-fault system. The employer pays insurance premiums: when an employee is injured in a work-related accident that arises out of and in the course of his employment, he automatically receives compensation benefits under the statutory scheme, without regard for his own or his employer's negligence. *Id.* § 1.10, at 1-2; *id.* § 2.10, at 5.

"Arising out of" refers to the cause of an accident, while "in the course of" refers to the time, place, and circumstances of an injury. Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982). An accident arises out of and in the course of employment when it occurs while the employee "is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." Long v. Asphalt Paving Co., 47 N.C. App. 564, 566, 268 S.E.2d 1, 3 (1980).

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

The workers' compensation system envisions mutual concessions by the employer and employee—a quid pro quo in which the employer, in exchange for giving up its three common-law defenses,[74] receives limited and predictable liability, while the employee, in return for the guarantee of automatic and speedy compensation, relinquishes his right to the potentially greater damages available at common law.[75] The workers' compensation system, although judicially approved as a sound public policy and as fair both to employer and employee,[76] was never designed to provide compensation equal to an employee's actual loss.[77] Rather, its intent was to reduce litigation and judicial involvement in work-related injuries and to provide employees with quick, uncontested compensation.[78]

For negligently inflicted injuries or death, workers' compensation benefits serve as an employee's exclusive remedy.[79] The North Carolina courts and legislature have never maintained, however, that the Act preempts common-law recovery for intentional wrongdoing.[80] In contrast the courts have recognized that intentional torts committed by an employer or by co-employees constitute an exception to the exclusivity provision of the Act.[81] To define the exception for intentional misconduct North Carolina courts have focused primarily on two issues: (1) the level of intent required to constitute intentional conduct; and (2) the ne-

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74. *See supra* note 68 and accompanying text.

75. Pleasant v. Johnson, 312 N.C. 710, 711-12, 325 S.E.2d 244, 246-47 (1985); 2A LARSON, *supra* note 67, § 65.11, at 12-1.

76. *Barber*, 223 N.C. at 216, 25 S.E.2d at 839.

77. KEETON et al. *supra* note 39, § 80, at 574; 1 LARSON, *supra* note 67, § 2.20, at 6-7; *id.* § 2.50, at 11-12. An employee receives compensation for his economic losses. Compensation benefits are awarded for "disability." The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury." N.C. GEN. STAT. § 97-2(9) (1991). Benefits are based on a percentage of an employee's wages for a prescribed period of time. *See generally* N.C. GEN. STAT. §§ 97-29 to -31 (1991) (outlining compensation calculations for total, partial, and scheduled disability).

78. 1 LARSON, *supra* note 67, § 1.10, at 1-2.

79. *See, e.g.*, Hicks v. Guilford County, 267 N.C. 364, 366, 148 S.E.2d 240, 242 (1966) (holding that Workers' Compensation Act bars negligence action against employer); Altman v. Sanders, 267 N.C. 158, 162, 148 S.E.2d 21, 24 (1966) (same holding in action against co-employee).

80. The rationale for excluding intentional wrongdoing from the Act's exclusivity provision is that such conduct is not an "accident" from the employer's perspective. *See* 2A LARSON, *supra* note 67, § 68.11, at 13-4.

81. The Act's exclusivity provision appears at N.C. GEN. STAT. § 97-10.1 (1991). For the text of § 97-10.1, see *supra* note 32. For a discussion of the development of the intentional-tort exception, see *infra* notes 82-138 and accompanying text. Some states' statutes create this exception explicitly for intentional torts; in other states, as in North Carolina, the exception has been judicially recognized. *See* 2A LARSON, *supra* note 67, § 68.13, at 13-10 to 13-35 n.11 and cases cited therein.

cessity of the employee's election between statutory and common-law remedies.

THE NATURE OF INTENT

The North Carolina courts implicitly recognized the right of an employee to recover at common law for injuries intentionally inflicted by his employer nearly four decades ago in *Essick v. City of Lexington*[82] and *Warner v. Leder*.[83] Prior to *Woodson*, however, only deliberate intent to injure the employee constituted intentional conduct within the meaning of the Act.[84] In dictum, the *Essick* court[85] approvingly quoted the general rule, as expressed by one commentator:

> "[W]here the *employer* is guilty of a felonious or *wilful assault* on an employee he cannot relegate him to the compensation act for recovery. 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. The weight of authority gives the employee the choice of suing the employer at common law or accepting compensation."[86]

The court reiterated its support for this general rule in *Warner*, stating that the employer cannot relegate its employee to workers' compensation benefits in the case of a felonious assault.[87] Although the facts of *Warner* involved a potential suit against a co-employee, so that the court addressed the requisite intent to strip a co-employee of immunity from suit, it found the reasoning equally applicable to employers.[88] To remove

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82. 232 N.C. 200, 210, 60 S.E.2d 106, 112 (1950).

83. 234 N.C. 727, 732, 69 S.E.2d 6, 10 (1952), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

84. 2A LARSON, *supra* note 67, § 68.13, at 13-10. A majority of jurisdictions still require actual intent to injure the employee to strip the employer's immunity from tort liability under workers' compensation. *Id.*

85. At issue in *Essick* was the liability of two fellow workmen of the employee-decedent. *Essick*, 232 N.C. at 207, 60 S.E.2d at 111. The court construed § 97-9 of the Act, which extended immunity from tort actions to an employer and "those conducting his business," in conjunction with § 97-10.1, the exclusivity provision, so as to provide co-employees with the same immunity from common-law suits that the employer enjoys. *See supra* note 32 (quoting these provisions). Employer and co-employee conduct are thus governed by the same principles.

86. *Essick*, 232 N.C. at 210-11, 60 S.E.2d at 113 (quoting HOROVITZ, *supra* note 9, at 336).

87. *Id.* (quoting HOROVITZ, *supra* note 9, at 336); *see Warner*, 234 N.C. at 733-34, 69 S.E.2d at 10 (quoting *Essick*, 232 N.C. at 210-11, 60 S.E.2d at 113 (quoting HOROVITZ, *supra* note 9, at 336)).

88. *Warner*, 234 N.C. at 733, 69 S.E.2d at 10.

the Workers' Compensation Act's immunity, the *Warner* court held, injury must result from an actual intent to injure the employee.[89]

In *Pleasant v. Johnson*[90] the North Carolina Supreme Court expanded the type of conduct necessary to lift the shield that protected co-employees from tort liability.[91] The plaintiff in *Pleasant* suffered injuries when a fellow employee, in an attempt to scare him, drove a van close to the plaintiff and blew the horn, actually striking him and injuring his knee.[92] The court held that such willful, wanton, and reckless conduct also represented an intentional injury, thus removing the co-employee from the Act's immunity provision and giving the injured employee the right to seek recovery in tort.[93]

The court asserted that North Carolina tort law recognized constructive intent as sufficient to constitute an intentional tort:[94] "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."[95] Willful, wanton, and reckless conduct, therefore, according to the *Pleasant* court, should equate with intent to injure for purposes of the Act.[96] The court acknowledged that the majority of states recognizing similar immunity for co-employees required an actual intent to injure to remove the co-employee's immunity from suit.[97] The

89. *Id.*; *see also* Wesley v. Lea, 252 N.C. 540, 545, 114 S.E.2d 350, 354 (1960) (holding that since the co-employee defendant's actions were reckless and wanton and did not demonstrate an intent to injure the plaintiff, the co-employee's immunity protected him from tort liability), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

The view expressed in *Warner* and *Wesley* is consistent with the majority view in other jurisdictions—an actual intent to injure is required to override the exclusivity of the workers' compensation act. *See* 2A LARSON, *supra* note 67, § 68.13 and cases cited therein.

90. 312 N.C. 710, 325 S.E.2d 244 (1985).

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

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

93. *Id.* at 717, 325 S.E.2d at 250. The *Pleasant* court overruled *Wesley* and *Warner* to the extent that they required an actual intent to injure on the part of a co-employee; these cases remained good law, however, insofar as they required actual intent for common-law suits against employers. *Id.* at 718, 325 S.E.2d at 250.

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

95. *Id.* (citing Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929)). The court noted that "wanton and reckless negligence gives rise to constructive intent." *Id.*

96. *Id.* Justice Meyer dissented from this holding. *Id.* at 718-24, 325 S.E.2d at 250-51 (Meyer, J., dissenting); *see infra* note 99.

97. *Pleasant*, 312 N.C. at 715-16, 325 S.E.2d at 248-49. The court noted, however, that the West Virginia Supreme Court had held that *employers* could be sued for injuries caused by willful, wanton, and reckless conduct. *Id.* at 716, 325 S.E.2d at 249 (citing Mandolidis v. Elkins Indus., 161 W. Va. 695, 246 S.E.2d 907 (1978)). For a discussion of the West Virginia court's rationale in *Mandolidis*, see *infra* notes 124-27 and accompanying text.

court, however, rejected the prevailing view and maintained that permitting suit would serve as a deterrent against future misconduct, would place the responsibility properly upon the tortfeasor, and would comport with basic ideas of justice and logic.[98]

Although *Pleasant* opened the door for increased suits against co-employees,[99] the court declined to consider whether its broad holding should extend to cover similar conduct by employers.[100] Little more than a year later, the court faced this unanswered question of employer liability. In *Barrino v. Radiator Specialty Co.*[101] plaintiff, the administrator of decedent employee's estate, filed suit against the decedent's employer, alleging that an explosion resulting from the employer's willful, reckless, and intentional actions killed the decedent.[102] The complaint alleged that the employer had failed to provide a safe workplace and had taken affirmative steps to create dangerous working conditions.[103]

Justice Meyer, writing for the court in an opinion joined only by one other justice,[104] reaffirmed the recognized exception to the Workers'

98. "It would be a travesty of justice and logic to permit a worker to injure a co-employee through such conduct, and then compel the injured co-employee to accept moderate benefits under the Act." *Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250. For a more detailed discussion of the court's reasoning in *Pleasant*, see David M. Ledbetter, Note, Pleasant v. Johnson: *The North Carolina Supreme Court Enters the Twilight Zone—Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?*, 64 N.C. L. REV. 688, 693-702 (1986).

99. In a dissenting opinion, Justice Meyer predicted a proliferation of lawsuits against co-employees for injuries, the responsibility for which the industry ought properly to absorb. *Pleasant*, 312 N.C. at 721, 325 S.E.2d at 251 (Meyer, J., dissenting).

100. The court stated, "[w]e need not consider and do not decide whether an employer may be sued for such conduct." *Id.* at 717, 325 S.E.2d at 250. In fact, the court's stated rationale for equating willful, wanton, and reckless conduct with intentional torts when committed by co-employees does not hold true in cases involving employers. *See infra* notes 108-10 and accompanying text (discussing this distinction as addressed by the court in Barrino v. Radiator Specialty Co., 315 N.C. 500, 511-12, 340 S.E.2d 295, 302-03 (1986) (plurality opinion), *overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233).

101. 315 N.C. 500, 340 S.E.2d 295 (1986), *overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

102. *Id.* at 502-03, 340 S.E.2d at 297-98 (plurality opinion).

103. *Id.* at 502-03, 340 S.E.2d at 298 (plurality opinion). The complaint specifically alleged that the employer had designed and operated equipment used in the handling and storing of flammable petroleum gases without proper inspections and in violation of state safety regulations, and had committed multiple violations of both the National Electrical Code and the state's occupational safety and health act. *Id.* (plurality opinion). The complaint further stated that the employer had covered meters designed to detect and warn of dangerous gas and vapor levels in the plant to prevent employees from becoming aware of the dangers existing, had deactivated alarms which sounded to warn of dangerous gas levels, and had instructed decedent and other employees to continue working despite the alarms. *Id.* (plurality opinion).

104. Only two of the four justices in the majority decided the case on the basis of the Act's exclusivity. The other two justices concurred on the ground that the plaintiff was barred under the election-of-remedies doctrine from bringing a civil suit, having already accepted workers' compensation benefits. *Id.* at 515-16, 340 S.E.2d at 308-09 (Billings, J., concurring). For a

Compensation Act's exclusivity provision for injuries to employees resulting from a "deliberate assault by the employer with intent to actually injure him."[105] He refused, however, to extend the right of an injured employee to sue his employer in situations involving willful, wanton, and reckless behavior, noting that to expand the exception so "would be contrary to the virtually unanimous rule throughout the country."[106] Justice Meyer specifically addressed the reasons set forth by the *Pleasant* court to justify suits against co-employees for this type of aggravated negligence[107] and maintained that this reasoning does not apply to employers.[108] Unlike the co-employee, the employer must participate in the defense of the workers' compensation claim and pay the compensation award; thus, if immunity were lifted the employer would be forced to defend the same claim in a second forum.[109] Moreover, the employer would incur greater liability if an employee obtained a tort judgment, even if it received credit for any workers' compensation benefits paid.[110]

Justice Meyer further held that allegations that plaintiff's injuries

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discussion of the election-of-remedies aspect of *Barrino*, see *infra* notes 196-210 and accompanying text.

Three justices dissented from the decision. *See infra* notes 114-20 and accompanying text.

105. *Barrino*, 315 N.C. at 507, 340 S.E.2d at 300 (plurality opinion) (citing Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233, and Essick v. City of Lexington, 232 N.C. 200, 210, 60 S.E.2d 106, 113 (1950)). According to the *Barrino* court, the legal theory underlying this exception is that when the employer intentionally commits an assault against the employee, he also cannot contend that the injury was accidental and therefore within the exclusive coverage of the Act. *Id.* (plurality opinion) (citing 2A LARSON, *supra* note 67, § 68.11, at 13-4). By contrast, an injury resulting from reckless conduct may be deemed "accidental."

106. *Id.* (plurality opinion); *see* 2A LARSON, *supra* note 67, § 68.13, at 13-10 to 13-35 and cases cited therein. Describing the high degree of intent required to come within the exception, the court quoted Professor Larson:

> "Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character."

Barrino, 315 N.C. at 507-08, 340 S.E.2d at 300 (plurality opinion) (quoting 2A LARSON, *supra* note 67, § 68.13, at 13-36 to 13-44).

107. For a complete discussion of the reasons set forth by the *Pleasant* court, see *infra* text accompanying notes 186-87. Essentially, Justice Meyer argued that basic notions of justice and logic dictate a different result in the context of employers. *Barrino*, 315 N.C. at 512, 340 S.E.2d at 303 (plurality opinion).

108. *Barrino*, 315 N.C. at 512, 340 S.E.2d at 303 (plurality opinion).

109. *Id.* (plurality opinion).

110. *Id.* (plurality opinion). In *Pleasant*, the court employed this reasoning specifically to justify its holding that the injured employee was not held to an election of remedies. *See infra* notes 183-87 and accompanying text. Nonetheless, the *Barrino* court used this reasoning with

resulted from violations of state safety regulations by her employer did not justify an exception to the exclusivity provision of the Workers' Compensation Act.[111] Citing decisions from other jurisdictions, the court concluded that North Carolina's Occupational Safety and Health Act[112] did not provide a mechanism for disregarding the provisions of the Workers' Compensation Act.[113]

In a powerful dissenting opinion, Justice Martin[114] foreshadowed the *Woodson* decision, maintaining that the standard for intentional misconduct sufficient to remove an employer's immunity under workers' compensation should mirror the tort standard for intentional torts[115]—that " '[i]ntent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also

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regard to the intent issue. *Barrino*, 315 N.C. at 511-12, 340 S.E.2d at 302-03 (plurality opinion).

Under § 97-10.2(f) of the North Carolina General Statutes, an employee must reimburse an employer from any tort judgment obtained from a third party to the extent of the workers' compensation benefits the employer already paid to the employee. The relevant portions of the statute read:

> [A]ny amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . .
>
> [T]he reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

N.C. GEN. STAT. § 97-10.2(f) (1991). If an employer is concurrently negligent with the third party, however, the court must reduce the damages award against the third party by the amount the employer otherwise would be entitled to recover. *Id.* § 97-10.2(e).

111. *Barrino*, 315 N.C. at 513-14, 340 S.E.2d at 304 (plurality opinion).

112. N.C. GEN. STAT. §§ 95-126 to -155 (1989 & Supp. 1991).

113. *Barrino*, 315 N.C. at 514, 340 S.E.2d at 304 (plurality opinion) (citing Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974) (holding that no private action is available under the federal Occupational Safety and Health Act if such private remedy in any manner affects parties' rights under workers' compensation act) and Mauch v. Stanley Structures, Inc., 641 P.2d 1247 (Wyo. 1982) (holding no private action under the state occupational safety and health act)). The same reasoning applies to state occupational safety and health acts. *See, e.g.*, North v. United States Steel Corp., 495 F.2d 810, 813 (7th Cir. 1974) (stating that Indiana's workers' compensation statute reserved no civil right of action for violations of occupational safety and health act); Frith v. Harrah S. Shore Corp., 92 Nev. 447, 451, 552 P.2d 337, 340 (1976) (holding that violation of state's occupational safety and health act created no private civil remedy); 2A LARSON, *supra* note 67, § 65.34, at 12-29 to -31.

114. Justices Exum and Frye joined Justice Martin in his dissent. *Barrino*, 315 N.C. at 517-23, 340 S.E.2d at 305-08 (Martin, J., dissenting).

115. Justice Martin also maintained that the court should not deem plaintiff to have made a binding election of remedies by having accepted workers' compensation benefits. *Id.* at 521-22, 340 S.E.2d at 307-08 (Martin, J., dissenting). For a complete discussion of the election-of-remedies issue in this case, see *infra* notes 196-210 and accompanying text.

to those which the actor believes are substantially certain to follow from what he does.' "[116] Using this standard, Justice Martin contended that plaintiff's decedent's death was "at the very least, 'substantially certain' to occur, given defendant's deliberate failure to observe even basic safety laws."[117] From a policy standpoint, Justice Martin asserted, it was even more critical to deter employers' intentional misconduct than that of co-employees, because an employer's actions will likely affect the lives and safety of a far greater number of individuals.[118] To permit an employer to subject his workers to this type of danger with impunity would contravene the legislative goal of fostering a safe workplace.[119] Moreover, the goal of deterrence would not be furthered if an employer could insure itself against liability for its intentional acts. An employer so situated may choose to make decisions regarding compliance with safety regulations based not on workers' safety but on economics.[120]

The *Barrino* majority opinion clearly represented the prevailing view in this country, that a plaintiff must show a specific intent by the employer to injure the employee before the employer can be stripped of immunity.[121] During the early 1980s, however, a number of other states discarded the then-unanimous view that an employee must prove actual intent to injure and adopted varying degrees of lesser intent as their standard. The courts in these states chose in large part the same standard later selected by the *Woodson* majority—the substantial-certainty standard.[122] Only the West Virginia Supreme Court of Appeals held that

116. *Barrino*, 315 N.C. at 518, 340 S.E.2d at 305 (Martin, J., dissenting) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8, at 31 (4th ed. 1971)).

117. *Id.* (Martin, J., dissenting). Plaintiff need not show that defendant intended decedent to be the particular victim or that death, as opposed to mere injury, would result. *Id.* (Martin, J., dissenting) (citing Fallins v. Durham Life Ins. Co., 247 N.C. 72, 100 S.E.2d 214 (1957)).

118. *Id.* at 519, 340 S.E.2d at 306 (Martin, J., dissenting).

119. *Id.* (Martin, J., dissenting) (citing N.C. GEN. STAT. § 95-126(b)(2) (1989)). Section 95-126(b)(2), a portion of the Occupational Safety and Health Act of North Carolina, expressly announces the public policy of North Carolina with respect to safety in the workplace:

> [T]he General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources.

N.C. GEN. STAT. § 95-126(b)(2). The subsection also enumerates several methods for furthering this purpose. *Id.*

120. *Barrino*, 315 N.C. at 519, 340 S.E.2d at 306 (Martin, J., dissenting).

121. *See* 2A LARSON, *supra* note 67, § 68.13 and cases cited therein.

122. *See, e.g.*, Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981); Beauchamp v. Dow Chem. Co., 427 Mich. 1, 25, 398 N.W.2d 882, 893 (1986); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 177-78, 501 A.2d 505, 514 (1985); Blankenship v. Cincinnati Milacron Chems., Inc., 69 Ohio St. 2d 608, 615, 433 N.E.2d 572, 577-78, *cert. denied*, 459 U.S. 857 (1982); VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983); Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985).

willful, wanton, and reckless behavior by an employer sufficed to strip the employer of its immunity from tort liability.[123]

These courts offered several reasons for lowering the threshold. Some courts focused on the language of the applicable workers' compensation statute. In the West Virginia case, *Mandolidis v. Elkins Industries*,[124] for example, the court construed the state's workers' compensation statute's then-existing exception to the exclusivity provision when injury resulted from a "deliberate intention of the employer to produce such injury or death."[125] Two West Virginia cases decided in the 1930s had suggested that this language did not require a specific intent to injure; these cases provided the basis for the court's holding.[126] The court reasoned that the purpose of the workers' compensation system was to remove negligently caused accidents from the tort system, and willful and wanton conduct was not a form of negligence since such conduct required a subjective realization of risk.[127]

In *Bazley v. Tortorich*,[128] the Louisiana Supreme Court likewise based its adoption of the more liberal substantial-certainty standard for intentional torts on its interpretation of the legislature's goal in enacting workers' compensation legislation. The court viewed workers' compensation as an attempt to create a distinction between negligently and intentionally committed work-related torts.[129] Thus, the court concluded that it should use the tort standard for intent.[130]

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123. Mandolidis v. Elkins Indus., 161 W. Va. 695, 705-06, 246 S.E.2d 907, 914 (1978).

124. 161 W. Va. 695, 246 S.E.2d 907 (1978).

125. *Id.* at 698, 246 S.E.2d at 910 (quoting W. VA. CODE § 23-4-2 (1969) (amended 1985)). The West Virginia legislature significantly modified this provision in response to the court's decision in *Mandolidis*. *See infra* notes 135-38, 154, and accompanying text.

126. *Mandolidis*, 161 W. Va. at 701-02 & n.5, 246 S.E.2d at 911-12 & n.5 (citing Maynard v. Island Creek Coal Co., 115 W. Va. 249, 252-53, 175 S.E. 70, 71-2 (1934) (applying exception to willfully inflicted injuries if the carelessness, indifference, and negligence of employer are so egregious as to warrant determination that ultimate intent was to injure)); Collins v. Dravo Contracting Co., 114 W. Va. 229, 234-35, 171 S.E. 757, 759 (1933) (holding that employer could deliberately intend to cause injury or death by act of omission)). Later cases had required actual intent, but these cases were overruled by *Mandolidis*. *Id.* at 703-05, 246 S.E.2d at 912-13 (overruling Eisnaugle v. Booth, 159 W. Va. 779, 783, 226 S.E.2d 259, 261 (1976); Brewer v. Appalachian Constructors, Inc., 135 W. Va. 739, 750, 65 S.E.2d 87, 93-94 (1951); Allen v. Raleigh-Wyo. Mining Co., 117 W. Va. 631, 634, 186 S.E. 612, 613-14 (1936)).

127. *Id.* at 705, 246 S.E.2d at 913-14.

128. 397 So. 2d 475 (La. 1981).

129. *Id.* at 480. Although the *Bazley* court decided the issue in the context of co-employees' liability, subsequent Louisiana courts applied the standard established for intentional conduct to claims involving employers as well. *See also* 2A LARSON, *supra* note 67, § 68.13, at 13-17 to 13-22 n.11 (abstracting Louisiana cases).

130. *Bazley*, 397 So. 2d at 482 (citing KEETON et al., *supra* note 39, § 8, at 34-35; RESTATEMENT (SECOND) OF TORTS § 8A (1965)). The court held that the facts before it (allegations that co-employee operated truck without horn, in disregard of maintenance standards,

In contrast to *Mandolidis* and *Bazley*, the Michigan Supreme Court in *Beauchamp v. Dow Chemical Co.*[131] focused not on statutory language but on pure public policy. The court cited as a basis for its adoption of the substantial-certainty standard its concern that employers who injure or kill employees under circumstances that might result in criminal liability but in which the employee is nevertheless unable to establish that the employer specifically intended to injure him might escape tort liability.[132] While acknowledging that this standard is problematic because it is difficult to draw the line between substantial *certainty* and substantial *risk*,[133] the court found this preferable to allowing employers to escape tort liability for truly egregious behavior.[134]

Legislators in West Virginia, Ohio, and Michigan, unhappy with the judicial expansion of employer liability, moved expeditiously to modify the courts' holdings.[135] Legislators were concerned with the effect that broadening employer tort liability might have on their state's business and economy.[136] The statutes modified in response to these judicial decisions attempted to balance the interests of management and labor, but often created ambiguities regarding the standard the legislation sought to impose.[137] The general tenor of the legislation, however, was to restrain further attempts to expand the intentional-tort exception.[138]

The North Carolina Supreme Court in *Woodson* pointed to these changes in other jurisdictions and rejected (and, to a certain extent, over-

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without keeping a proper lookout, and without warning plaintiff of danger) were insufficient to constitute an intentional act under the standard it established. *Id.* at 478, 482.

131. 427 Mich. 1, 398 N.W.2d 893 (1986).

132. *Id.* at 24-25, 398 N.W.2d at 893.

133. *Id.* The court pointed to Ohio cases as evidence of this confusion. *Id.* at 24, 398 N.W.2d at 893 (citing Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 96, 472 N.E.2d 1046, 1052 (1984) (holding standard met where employer knew action posed substantial *risk* to employees)).

134. *Id.* at 24-25, 398 N.W.2d at 893.

135. Act of May 14, 1987, ch. 28, 1987 Mich. Pub. Acts 92, 92-96 (codified at MICH. COMP. LAWS ANN. §§ 418.131, 418.301(4), (6)-(8), (9), 418.354(1) (West Supp. 1991)); Act of May 28, 1986, ch. 307, 1985-86 Ohio Laws 718, 733-36 (codified at OHIO REV. CODE ANN. § 4121.80 (Anderson 1991)); Act of Feb. 7, 1983, ch. 192, 1983 W. Va. Acts 1039, 1040-43 (codified at W. VA. CODE § 23-4-2 (Supp. 1991)); *see* 2A LARSON, *supra* note 67, § 68.15, at 13-50 to -56; Gail S. Parkhurst, Note, *Michigan Worker's Disability Compensation Act: The Intentional Tort Exception To the Exclusive Remedy Provision*, 23 VAL. U. L. REV. 371, 390-408 (1989).

136. *See, e.g.*, Michael A. Mixer, Note, *Intentional Torts and Workers' Compensation:* Beauchamp v. Dow Chemical Co., 427 Mich. 1, 398 N.W.2d 882 (1986), 4 COOLEY L. REV. 707, 721-22 (1987) (analyzing Michigan legislative response); Parkhurst, *supra* note 135, at 395-97 (describing Michigan legislative reaction).

137. *See* Parkhurst, *supra* note 135, at 391-408 (discussing statutory modifications in Ohio, Michigan, and West Virginia); *infra* notes 152-54 and accompanying text.

138. Parkhurst, *supra* note 135, at 391-408.

ruled) North Carolina precedent by expanding the intentional-tort exception as applied to employers as had this small minority of states. The *Woodson* court adopted the reasoning outlined in Justice Martin's dissenting opinion in *Barrino*.[139]

This decision of the *Woodson* court suffers from three major problems. First, it is likely that the court improperly invaded the legislative arena. Second, the court failed to address adequately several inconsistencies with Justice Martin's approach in *Barrino*. Third, the danger exists that later courts will expand the substantial-certainty standard far beyond the scope intended by the *Woodson* court.

Although public policy may support the result in *Woodson*, the court likely overstepped the proper bounds of judicial decisionmaking and trespassed into the domain of legislative prerogative. It is well settled that the role of the courts is "not to make the law, but to expound it," and to give effect to the legislative intent of a statute.[140] In discussing the purpose of and policy behind the Workers' Compensation Act, the North Carolina Supreme Court has frequently acknowledged this judicial limitation, stating that although the Act should be construed liberally to effect its intent, the court cannot "judicially expand the employer's liability beyond the statutory parameters."[141]

Not only did the court arguably overstep its bounds in adopting Justice Martin's standard, but it ignored several inherent inconsistencies with this approach. Chief Justice Exum, writing for the *Woodson* majority, asserted that the court's holding, establishing "substantial certainty" as the standard for intentional injury within the workers' compensation setting, is both true to the legislative intent in enacting workers' compensation and "consistent with general concepts of tort liability outside the workers' compensation context."[142] He reasoned that both actual intent and "substantial certainty" satisfy the level of tortious conduct required to constitute an intentional tort.[143] When an actor specifically desires to bring about certain consequences, he *intends* his act as well as its consequences; when the actor intentionally acts knowing that particular consequences are substantially certain to follow, he, too, *intends* those

139. For a discussion of the *Barrino* dissent, see *supra* notes 114-20 and accompanying text.

140. State v. Bell, 184 N.C. 701, 705, 115 S.E. 190, 192 (1922).

141. Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986) (citation omitted); *see also* Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 709, 295 S.E.2d 458, 460-61 (1982) (holding that Workers' Compensation Act insures limited liability for employers as well as swift and certain remedy for employees; thus courts "cannot legislate expanded liability [of employers] under the guise of construing a statute liberally").

142. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228.

143. *Id.* at 341, 407 S.E.2d at 228-29.

consequences for purposes of tort liability.[144] Thus, either level of intent should suffice to remove an employer's immunity from tort liability under the Workers' Compensation Act. Because the workers' compensation statute does not provide exclusive coverage for intentional misconduct, using a common-law tort standard to define intentional acts seems reasonable.

Chief Justice Exum failed specifically to address the differences between the employer and employee, although he acknowledged that the reasons in *Pleasant*[145] for further expanding the grounds on which a co-employee may lose his statutory immunity[146] do not apply where an employer's liability is at issue.[147] His opinion merely recited that since *Pleasant* did not apply, a higher threshold—that of substantial certainty—should exist for employer misconduct.[148] In *Barrino* the court relied on these differences between the employer and the co-employee as the grounds for refusing to extend *Pleasant* to employers;[149] in *Woodson*, the court glossed over this inconsistency. The court simply stated in conclusory fashion that the substantial-certainty standard satisfied the balance of interests and compromises inherent in workers' compensation while accomplishing the goal of deterring intentional wrongdoing.[150]

Chief Justice Exum supported his position by pointing to the other states that had adopted standards requiring less than specific intent to take employer misconduct outside the exclusivity provision of the workers' compensation statute.[151] The court correctly stated that legislative modifications of judicial standards adopted by these states other than actual intent narrowed but did not abolish the application of the new standards.[152] Although both the Michigan and the Ohio modifications specified that an intentional tort shall exist only where an employer specifically intended to injure an employee, both also retained language supportive of the substantial-certainty test.[153] The West Virginia legislature

144. *Id.* For a further discussion of the meaning of intent, see *supra* note 39.

145. *See supra* notes 90-100 and accompanying text.

146. For a discussion of the factors discussed in *Pleasant*, see *infra* text accompanying notes 186-87.

147. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229.

148. *Id.*

149. For a discussion of the reasoning of the *Barrino* plurality in this regard, see *supra* notes 108-10 and accompanying text.

150. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229.

151. *Id.* at 342-43, 407 S.E.2d at 229-30; *see supra* notes 122-38 and accompanying text.

152. *Woodson*, 329 N.C. at 344, 407 S.E.2d at 230.

153. *Id.*; *see* MICH. COMP. LAWS ANN. § 418-131(1) (West Supp. 1991) ("[The] employer shall be deemed to have intended to injure if [he] had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."); OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson 1991) (defining intentional tort as "an act committed with the in-

overruled the willful, wanton, and reckless standard established in *Mandolidis* and required a deliberate intention to injure the employee, but did provide an alternative method for proving intent in cases involving an employer who knowingly violated a safety code or industry practice.[154] Legislators, therefore, seemingly acknowledged that a strictly construed requirement of specific intent to injure, standing alone as a basis for stripping the employer's immunity, cannot adequately further the goal of protecting workers from serious employer misconduct. The *Woodson* court, although it did not expressly recite the reasoning of these other jurisdictions, incorporated by reference their rationale.[155]

Finally, whether *Woodson* does preserve the North Carolina legislature's intent in enacting workers' compensation, however, depends in part on how North Carolina courts apply the standard established by *Woodson*. The *Woodson* court may well have opened the door to a broadening by subsequent lower court decisions of the standard, due to its application of substantial-certainty intent to facts that arguably do not meet that standard. The *Woodson* court concluded that a juror could find that the trench in which Sprouse was working was substantially certain to collapse and that Morris Rowland knew of that substantial certainty.[156] Rowland knew that the sides of the trench were inadequately sloped. He intentionally chose not to provide his workers with a trench box, despite its availability and despite concerns expressed by Davidson & Jones's foreman the previous day as to the trench's safety.[157] That Rowland knew there was some risk of danger in acting as he did seems clear. To meet the substantial-certainty test, however, Rowland must have known not just that there was a substantial likelihood (a probable risk) that the trench would collapse, but that a cave-in was substantially *certain* to occur. The *Woodson* court offers no guidance on how it defines "substantial certainty." Some courts have demanded a "virtual certainty,"[158] while one commentator has suggested that the consequence must be "unavoidable."[159] Can it be said that Morris Rowland "knew" that the trench's collapse, and the death of one of his employees, was unavoidable? The court of appeals, in reviewing these same facts, con-

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tent to injure another or committed with belief that the injury is substantially certain to occur"; substantial certainty means the "employer acts with deliberate intent to cause injury, disease, condition, or death").

154. W. VA. CODE § 23-4-2(c)(2)(i)-(ii) (Supp. 1991). For a general discussion of West Virginia's statutory modifications, see Parkhurst, *supra* note 135, at 405-08.

155. *Woodson*, 329 N.C. at 342-43, 407 S.E.2d at 229-30.

156. *See supra* note 56 and accompanying text.

157. *See supra* notes 19-24, 56 and accompanying text.

158. *See infra* notes 231-39 and accompanying text.

159. KEETON et al., *supra* note 39, § 8, at 35.

cluded that the employer's conduct was only "grossly negligent."[160] In evaluating the *Woodson* standard, one cannot disregard the fact that the standard exists not in a vacuum, but rather in relation to the facts to which it was applied. If those facts only marginally support the court's holding, the possibility for misinterpretation and broadening of the standard arises. Moreover, if courts misapply the standard by permitting levels of aggravated, yet negligent, conduct to equate with intentional conduct, the legislatively enacted quid pro quo of workers' compensation will not be maintained.[161]

THE ELECTION OF REMEDIES

The second major issue that the North Carolina courts have confronted in intentional work-related injury cases and that *Woodson* also addressed involves the election-of-remedies doctrine. This doctrine provides that when a party has inconsistent rights or remedies available, a choice of one is an election not to pursue the others.[162] One generally is deemed to have made an election only if one has obtained some sort of final judgment.[163] In other words, the mere filing of an action based on one theory ordinarily does not constitute an election, and, under the current procedural rules permitting alternative pleading, a party's pleading may contain inconsistent claims without being barred by the doctrine.[164]

When remedies are not inconsistent, the election-of-remedies principle does not apply; a plaintiff may select one remedy as better adapted to his needs, but the choice is not final, and he may pursue the other remedy if dissatisfied with the result of prosecuting the first.[165] The doctrine further presupposes that co-existing remedies, if inconsistent, both vest in the same person; otherwise there can be no right of election.[166] Although

160. Woodson v. Rowland, 92 N.C. App. 38, 42, 373 S.E.2d 674, 676 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991).

161. For a discussion of the quid pro quo of workers' compensation, see *supra* notes 74-79 and accompanying text.

162. Richardson v. Richardson, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964).

163. McCabe v. Dawkins, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572, *disc. rev. denied*, 326 N.C. 597, 393 S.E.2d 880 (1990); *see also* Lamb v. Lamb, 92 N.C. App. 680, 687, 375 S.E.2d 685, 687 (1989) (holding that because equitable distribution action was not yet prosecuted to final judgment, counterclaims for constructive trust were not barred by election doctrine).

164. *Lamb*, 92 N.C. App. at 685, 375 S.E.2d at 687-88.

165. Standard Sewing Mach. Co. v. Owings, 140 N.C. 503, 504-05, 53 S.E. 345, 346 (1906) (holding that it is not inconsistent to sue to collect on sales contract and, thereafter, to sue to recover damages for fraud based on the means by which the sale was procured); *see also* Wirth v. Bracey, 258 N.C. 505, 508-09, 128 S.E.2d 810, 813-14 (1963) (finding suit against state highway commission under Tort Claims Act no bar to suit against individual state employee).

166. Competitor Liaison Bureau of NASCAR, Inc. v. Midkiff, 246 N.C. 409, 414, 98

the primary purpose underlying the doctrine is to prevent double redress for a single wrong,[167] the doctrine often goes beyond achieving this purpose and therefore has been criticized and even abolished in some states.[168]

The North Carolina Supreme Court in pre-*Woodson* workers' compensation decisions applied the election-of-remedies doctrine in its traditional form. For example, in *Essick v. City of Lexington*,[169] the court stated that when an employer feloniously assaults his employee, the employee has the choice of either suing the employer at common law or accepting workers' compensation benefits.[170] In other words, the employee could choose either remedy, but he could not pursue both.[171] The court specifically held in *Warner v. Leder*[172] that receiving workers' compensation benefits forecloses the employee's right to maintain a common-law action.[173]

In *Andrews v. Peters*,[174] however, the North Carolina Court of Appeals held that in the case of an assault by a co-employee, an injured employee is not required to elect remedies.[175] In *Andrews*, a co-employee walked up behind the plaintiff and placed his knee behind her knee, causing her to fall and injure herself. Plaintiff, after collecting workers' compensation benefits, brought a tort action against her co-employee for intentional assault.[176] Although the court of appeals acknowledged that a majority of jurisdictions bars subsequent tort actions upon prosecution of a successful workers' compensation claim,[177] the court reasoned that

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S.E.2d 468, 472 (1957) (deciding that when intestate decedent signed release and entitlement to death benefit with mother as beneficiary, and administrator of estate neither had nor made claim to death benefit, administrator made no election).

167. Smith v. Gulf Oil Corp., 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954).

168. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.5, at 15 (1973). The Uniform Commercial Code, for example, has eliminated the election-of-remedies doctrine in all sale-of-goods cases. *Id.*

169. 232 N.C. 200, 60 S.E.2d 106 (1950).

170. *Id.* at 210-11, 60 S.E.2d at 113-14 (quoting HOROVITZ, *supra* note 9, at 336).

171. *Id.*

172. 234 N.C. 727, 69 S.E.2d 6 (1952), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d 233.

173. *Id.* at 733-34, 69 S.E.2d at 10. For a general discussion of this case, see *supra* notes 87-89 and accompanying text.

174. 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

175. *Id.* at 128, 284 S.E.2d at 750.

176. *Id.* at 124, 284 S.E.2d at 748.

177. *Id.* at 125, 284 S.E.2d at 749 (citing 2A LARSON, *supra* note 67, § 67.22, at 12-134 to -135); *see infra* note 213. The court also discussed cases from Alaska and Utah that permitted recovery both under workers' compensation and at common law. *See* Elliott v. Brown, 569

because a co-employee has contributed neither to the defense of any compensation claim nor to the payment of any compensation award, he is not prejudiced by having to defend a subsequent tort claim.[178] Moreover, if accepting workers' compensation benefits prevents an employee from pursuing an intentional tort action, the courts in effect would insulate the co-employee from accountability for assaultive behavior.[179] The court noted that permitting a subsequent tort action would not adversely affect the employer, who may recover from the plaintiff any duplicative amounts paid pursuant to the Act.[180] The court maintained that its holding would benefit the injured employee, who could seek damages not available under the workers' compensation statute, such as pain and suffering.[181] The same rationale, noted the court, is not applicable when the intentional tortfeasor is the employer, who, by virtue of his being responsible for the defense and satisfaction of claims under the workers' compensation act, must defend the same claim in two separate forums if election is not required of the employee.[182]

The North Carolina Supreme Court adopted the *Andrews* reasoning four years later in *Pleasant v. Johnson*,[183] holding that when a co-employee has injured a fellow employee through willful, reckless, and wanton misconduct, the injured employee need not choose between workers' compensation and common-law recoveries, but may pursue both.[184] The court observed that the same rationale that led the *Andrews* court to permit both statutory and common-law claims when a co-employee committed an intentional tort should apply to injuries caused by willful, reckless, and wanton misconduct.[185] The court reiterated that the lack of participation by the co-employee in the defense or payment of a workers' compensation claim eliminated any undue prejudice to the co-employee from

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P.2d 1323, 1327 (Alaska 1977) (holding that despite election-of-remedies provision in statute, exclusivity provision, which contained similar language, did not protect co-employee who intentionally injured another employee; hence, co-employee also outside purview of election-of-remedies provision); Bryan v. Utah Int'l, 533 P.2d 892, 894 (Utah 1975) (holding that since election is not required when third party intentionally injures employee, election also should not be required if intentional tortfeasor is co-employee).

178. *Andrews*, 55 N.C. App. at 130, 284 S.E.2d at 751.

179. *Id.*

180. *Id.* at 130, 284 S.E.2d at 752. The employer receives reimbursement under § 97-10.2(f) of the Act. For a discussion of the operation of § 97-10.2, see *supra* note 110.

181. *Andrews*, 55 N.C. App. at 130, 284 S.E.2d at 752.

182. *Id.* at 130, 284 S.E.2d at 751.

183. 312 N.C. 710, 325 S.E.2d 244 (1985). For a description of the facts in this case, see *supra* text accompanying note 92.

184. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249-50. For a discussion of the intent required in *Pleasant* to sue at common law, see *supra* notes 93-98 and accompanying text.

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

being required to defend against a tort action.[186] The court also reaffirmed the *Andrews* court's reasoning that the method of employer reimbursement provided in the Act reduced the burden that otherwise would fall on innocent employers.[187]

With regard to misconduct by an employer as opposed to a co-employee, however, the North Carolina Supreme Court did not waver from its earlier view[188] that the injured employee's receipt of workers' compensation benefits in situations not involving a deliberate intent to injure the employee precluded a common-law tort action. In the 1984 decision *Freeman v. SCM Corp.*,[189] the court stated that an injured employee's only option was to pursue her workers' compensation claim.[190] That case involved an employee who was injured when a bolt from the machine on which she was working blew out and struck her in the face.[191] Her employer had denied several prior requests by the plaintiff to turn off the machine because it was malfunctioning, and had instead ordered that she continue working.[192] Quoting section 97-10.1 of the Act,[193] the court reasoned that because the plaintiff here was subject to and covered by the provisions of the Act, she could not bring an independent negligence action against her employer in lieu of receiving workers' compensation benefits; the Act limited her to an award under the Act.[194] The court specifically addressed the implication of the court of appeals opinion that plaintiff had selected a remedy by stating, "[w]e wish to make it abundantly clear that in fact plaintiff had no 'selection' as to the appropriate avenue of recovery for her injuries."[195] Since the *Freeman* court did not find the requisite deliberate intent to injure the plaintiff, its decision rests more on the exclusive remedy doctrine of the Act than on election of remedies.

By contrast, in *Barrino v. Radiator Specialty Co.*,[196] the court addressed both exclusive-remedy and election-of-remedies issues. The ma-

186. *Id.*

187. *Id.* at 717, 325 S.E.2d at 249-50; *see supra* notes 178-82 and accompanying text.

188. *See supra* notes 169-73 and accompanying text.

189. 311 N.C. 294, 316 S.E.2d 81 (1984).

190. *Id.* at 295-96, 316 S.E.2d at 82.

191. *Id.* at 294-95, 316 S.E.2d at 81-82.

192. *Id.* at 295, 316 S.E.2d at 82.

193. *See supra* note 32 (quoting N.C. GEN. STAT. § 97-10.1 (1991)).

194. *Freeman*, 311 N.C. at 295-96, 316 S.E.2d at 82. The employee had sought and recovered workers' compensation benefits, and the court found her allegations inadequate to establish intentional misconduct on the part of the employer. *Id.* at 295, 316 S.E.2d at 82.

195. *Id.* at 296, 316 S.E.2d at 82.

196. 315 N.C. 500, 340 S.E.2d 295 (1986) (plurality opinion), *overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. For a discussion of the facts surrounding *Barrino*, see *supra* notes 101-03 and accompanying text.

jority declined to overrule *Freeman* and "numerous other decisions to the same effect," holding that workers' compensation benefits constitute an employee's sole remedy when actions involve an employer's exhibiting other than a deliberate intent to injure.[197] Although *Pleasant* overruled the holdings in *Wesley v. Lea*[198] and *Warner v. Leder*[199] with respect to the plaintiff's remedies in suits involving co-employees, the court noted that those holdings still stood when applied to an employer.[200] Moreover, even if plaintiff's complaint adequately alleged the employer's intent actually to injure him[201] (an issue the majority refused to decide), plaintiff could not seek a tort recovery because such allegations would only have provided plaintiff with a *choice* of remedies. Having made a binding election to recover under the Workers' Compensation Act, he could not pursue a common-law action.[202]

In his dissenting opinion, Justice Martin argued that the employer's conduct constituted intentional behavior sufficient to strip him of immunity under the Act; thus, the *Warner* holding regarding election of remedies should not apply.[203] According to Justice Martin, the *Warner* court stated that acceptance of workers' compensation benefits forecloses an employee's right to bring a *negligence* action, but not an action sounding in intentional tort.[204] Justice Martin supported his position by stressing that for the election doctrine to apply, an inherent contradiction must exist between the common-law and statutory positions advanced by the plaintiff.[205] Given the definition of an "accident" for purposes of work-

197. *Barrino*, 315 N.C. at 510, 340 S.E.2d at 302 (plurality opinion). The court distinguished the liability of third parties and of co-employees, against whom an employee may, under *Pleasant*, bring an action for civil damages even without a deliberate intent to injure the employee. *Id.* at 511-12, 340 S.E.2d at 302-03 (plurality opinion). For a discussion of this aspect of *Pleasant*, see *supra* notes 183-87 and accompanying text. For a complete discussion of the court's decision with regard to the intent required to avoid the exclusivity of workers' compensation benefits, see *supra* notes 91-98 and accompanying text.

198. 252 N.C. 540, 543, 114 S.E.2d 350, 353 (1960), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

199. 234 N.C. 727, 733-34, 69 S.E.2d 6, 10 (1952), *overruled in part by Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250, *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

200. *Barrino*, 315 N.C. at 513, 340 S.E.2d at 303 (plurality opinion).

201. *Id.* (plurality opinion). Plaintiff had alleged the employer's willful, reckless, and intentional conduct as the cause of his injuries. *Id.* at 502-03, 340 S.E.2d at 297 (plurality opinion).

202. *Id.* at 513, 340 S.E.2d at 303 (plurality opinion).

203. *Id.* at 521-22, 340 S.E.2d at 307-08 (Martin, J., dissenting).

204. *Id.* (Martin, J., dissenting) (citing Warner v. Leder, 234 N.C. 727, 727, 69 S.E.2d 6, 6 (1952), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233).

205. *Id.* (Martin, J., dissenting) (citing 2A LARSON, *supra* note 67, § 67.35, at 12-154).

ers' compensation as an " 'unlooked for and untoward event . . . not expected or designed by . . . the employee,' "[206] Justice Martin asserted that it was not inherently inconsistent for plaintiff to allege that the happening was both an accident within the meaning of the Act and also an intentional tort.[207] The court could accomplish the purpose of the doctrine of election of remedies—preventing double recovery for a single wrong—by applying the disbursement provisions of section 97-10.2 of the Workers' Compensation Act.[208]

Justice Martin also presented an equitable argument against the application of the election doctrine. Deterrence of employer misconduct, he asserted, would not be furthered if an injured employee felt compelled by financial constraints to accept workers' compensation benefits in lieu of a larger tort judgment.[209] Further, given that the policy underlying the election requirement proceeds on the assumption that the plaintiff has a meaningful choice between two remedies, Justice Martin maintained that an employee who opts to settle for workers' compensation benefits under circumstances colored by financial need cannot be said to have "chosen" that remedy.[210]

The most important question with respect to the *Woodson* court's election-of-remedies analysis is whether the court properly can assert, on the one hand, that certain behavior is not accidental or negligent from the perspective of the wrongdoer and therefore should not be covered exclusively by the workers' compensation system, while maintaining on the other hand that the incident is *both* an accident *and* an intentional tort, so as to prevent the application of the election-of-remedies doctrine. It is well settled that whether an accident will give rise to the availability

206. *Id.* at 522, 340 S.E.2d at 308 (Martin, J., dissenting) (quoting Harding v. Thomas & Howard Co., 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962)).

207. *Id.* (Martin, J., dissenting). Many North Carolina cases have held that an assault, the classic intentional tort, also may represent an accident for purposes of workers' compensation coverage. *See, e.g.*, Withers v. Black, 230 N.C. 428, 432, 53 S.E.2d 668, 672 (1949) (holding that injury from assault is accident within meaning of Act when from viewpoint of employee it is unexpected, although intentionally caused by another); Conrad v. Cook-Lewis Foundry, 198 N.C. 723, 726, 153 S.E. 266, 268 (1930) (holding that mere fact that an injury results from willful or criminal assault of third persons does not prevent its being accident); Williams v. Salem Yarns, 23 N.C. App. 346, 348, 208 S.E.2d 855, 856 (1974) (finding that assault, although intentional act, may be accident within meaning of Workers' Compensation Act).

208. *Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting). For a discussion of the provisions of § 97-10.2, see *supra* note 110.

209. *Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting). Deterrence of misconduct by employers is relevant, Justice Martin contended, in light of N.C. GEN. STAT. § 95-126(b)(2) (1981). *Barrino*, 315 N.C. at 519, 340 S.E.2d at 306 (Martin, J., dissenting); *see supra* notes 119-20 and accompanying text.

210. *Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting) (citing Competitor Liaison Bureau of NASCAR, Inc. v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957)).

of workers' compensation benefits is determined from the perspective of the worker.[211] It is thus equally clear that, from the employee's standpoint, an intentional act committed against him is unexpected and undesigned, and hence an accident.[212] Although courts, therefore, generally accept that workers' compensation statutes cover intentional acts, so that the employee receives benefits, they differ on whether acceptance of statutory benefits removes the employee's right to sue at common law based on the intentional nature of the act.[213] The reasoning of the *Woodson* majority and the *Barrino* dissent[214] (on which the *Woodson* court relied) represents the better view on this issue. Once an employer commits an intentional tort against his employee (using whatever standard for intent the court applies), the employer essentially loses his special status under the Act and falls within the same classification as third parties.[215] North Carolina's Workers' Compensation Act provides for a reduction in an employee's tort recovery from a third party in an amount equal to the workers' compensation benefits he received.[216] No logical reason supports not applying this same provision to employers.[217] This way, the purpose of the election-of-remedies doctrine—preventing double recovery—is preserved.[218] This reasoning was applied to co-employees' claims in *Pleasant v. Johnson*,[219] and in partial reliance on that holding, the *Woodson* court extended the analysis to cover instances involving

211. *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233; 2A LARSON, *supra* note 67, § 68.12, at 13-8 to -10 (identifying assault as "accidental injury" from viewpoint of victim); *see supra* note 41 (discussing the meaning of "accident" as defined by the North Carolina courts).

212. *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233 (citing Harding v. Thomas & Howard Co., 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962)); 2A LARSON, *supra* note 67, § 68.11, at 13-4 to -5.

213. Most states hold plaintiff to an election if a claim is successful; pursuit of a subsequent recovery is not barred, however, if the initial claim is unsuccessful. 2A LARSON, *supra* note 67, §§ 67.31-.32 and cases cited therein; *see, e.g.*, Marta v. Continental Mfg. Co., 400 So. 2d 181, 182 (Fla. Dist. Ct. App. 1981) (holding that filing of unsuccessful compensation claim did not constitute election of remedy barring subsequent civil suit); Haynie v. National Gypsum Corp., 62 Md. App. 528, 533, 490 A.2d 724, 727-28 (1985) (reversing order dismissing compensation claim on ground that plaintiff had elected tort remedy, when plaintiff had received partial compensation benefits and brought subsequent tort action); Neff v. Baiotto Coal Co., 361 Mo. 304, 307-08, 234 S.W.2d 578, 579-80 (1950) (holding that receipt of medical expenses and compensation barred subsequent damage suit); Stevenson v. Kollsman Mineral & Chem. Corp., 91 Nev. 529, 530, 539 P.2d 463, 463 (1975) (stating that plaintiff's acceptance of permanent disability award barred common-law action).

214. *Woodson*, 329 N.C. at 348-49, 407 S.E.2d at 233-34; *Barrino*, 315 N.C. at 521-22, 340 S.E.2d at 307-08 (Martin, J., dissenting).

215. 2A LARSON, *supra* note 67, § 68.12, at 13-9.

216. For a discussion of disbursements under § 97-10.2(f) of the Act, see *supra* note 110.

217. *See Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting).

218. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. For a general discussion of the election-of-remedies doctrine, see *supra* notes 162-68 and accompanying text.

219. *See supra* notes 183-87 and accompanying text.

employers.[220]

Another policy used to justify requiring an election of remedies is the concern that the court will compel the employer to defend the same claim twice[221]—once in the workers' compensation proceeding and again in the civil suit. Chief Justice Exum implicitly refuted this argument by asserting that the two claims are not inconsistent.[222] This conclusion is not unwarranted. A workers' compensation claim is grounded in the accidental nature of the injury, and the employer would base a defense on whether the employee acted within the course and scope of his employment and whether the incident arose out of that relationship.[223] In the civil suit, by contrast, the employer's intent will be at issue—an element that, by virtue of the no-fault nature of workers' compensation, would not even be a part of the statutory claim.[224] These are, in fact, two distinct claims. The election doctrine is thus not offended by permitting an intentional tort victim to pursue both avenues of recovery.[225]

The *Woodson* court also relied on Justice Martin's analysis in the

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220. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. In doing so, *Woodson* overruled the following cases to the extent they conflicted with its election-of-remedies holding: *Barrino*, 315 N.C. at 513, 340 S.E.2d at 303; Wesley v. Lea, 252 N.C. 540, 545, 114 S.E.2d 350, 354 (1960), *overruled in part by* Pleasant v. Johnson, 312 N.C. 710, 718, 325 S.E.2d 244, 250 (1985), *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233; Warner v. Leder, 234 N.C. 727, 733-34, 69 S.E.2d 6, 10 (1952), *overruled in part by Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250, *and overruled in part by Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233. *Wesley* and *Warner* already had been overruled, insofar as co-employees were concerned, by *Pleasant*. *Id.* at 349 n.3, 407 S.E.2d at 233 n.3; *Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250.

In *Woodson*, plaintiff had not received any workers' compensation benefits; she had requested that the court hold her workers' compensation claim in abeyance until the resolution of the civil action in order to avoid the risk of making a binding election. *Woodson*, 329 N.C. at 336, 407 S.E.2d at 226. Thus, the court did not need, but rather chose, to decide this issue.

221. *See Barrino*, 315 N.C. at 512, 340 S.E.2d at 303 (plurality opinion); *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249.

222. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

223. *See supra* note 72.

224. *Id.*

225. *See* Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 98-100, 472 N.E.2d 1046, 1054-55 (1984). The court maintained in *Jones* that, because workers' claims do not involve the issue of intent, a determination by the state industrial commission that the injury arose out of employment is not res judicata on the issue of intention to injure. *Id.* at 99-100, 472 N.E.2d at 1055. The requisite identity of issues for operation of res judicata and collateral estoppel does not exist. *Id.*

The *Jones* court, however, also held that the law does not entitle the employer to a set off of the amounts paid for the workers' compensation claim. *Id.* at 100, 472 N.E.2d at 1055. This reasoning runs afoul of the goal of the election-of-remedies policy of preventing double recovery. The court asserted that a common-law award supplements a workers' compensation claim in that a plaintiff recovers for pain and suffering and punitive damages, which are not recoverable in a workers' compensation setting. *Id.* at 99, 472 N.E.2d at 1055. The court failed to account, however, for the fact that a common-law compensatory award necessarily

Barrino dissent of the inequities that may result from forcing an injured employee to choose between workers' compensation and common-law remedies.[226] Other courts also have acknowledged the lack of meaningful choice for an employee who, out of financial necessity, elects the certainty of a lower workers' compensation award.[227] The common-sense argument presented by Chief Justice Exum (and by Justice Martin in *Barrino*)—that an employee in financial constraints may out of necessity choose the more certain, yet lower, recovery of workers' compensation—cannot easily be countered.

THE IMPACT OF WOODSON

Although one can justify the *Woodson* court's expansion of the intentional-tort exception and abolition of the election requirement as sound, socially responsible policy, and although it can reasonably be argued that the *Woodson* court did not create a new exception to the statutory framework but merely expanded an existing judicially created exception, it is equally true that the making or altering of state policy is a legislative function.[228] The *Woodson* decision inevitably will alter the balance of interests within the workers' compensation system, and in the words of dissenting Justice Mitchell, changes in this "delicate balance" should come from the legislature.[229]

In evaluating the impact of *Woodson*, two primary areas of concern emerge: (1) whether lower courts will apply the substantial-certainty standard consistently and strictly, and (2) whether the increased number of civil lawsuits that will likely result from the *Woodson* decision will adversely affect the economy and/or the state's workers. In addressing the first of these issues, one must examine the completeness and clarity of *Woodson*. The *Woodson* decision leaves many questions unanswered. What level of employer misconduct is required to meet the *Woodson* standard? When is an unsafe job condition "substantially certain" to lead to injury?[230] How other courts will apply the *Woodson* standard

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includes medical expenses and other special damages that would be duplicative of the workers' compensation award.

226. For a discussion of Justice Martin's reasoning, see *supra* notes 209-10 and accompanying text.

227. *See, e.g., Jones*, 15 Ohio St. 3d at 99, 472 N.E.2d at 1054 (reasoning that seriously injured employees' high medical bills and inability to earn wages often results in a lack of financial resources to support a lengthy and expensive tort suit, thus forcing the employee to choose workers' compensation benefits).

228. *See supra* notes 140-41 and accompanying text.

229. *Woodson*, 329 N.C. at 362, 407 S.E.2d at 241 (Mitchell, J., concurring in part and dissenting in part).

230. *See* Jay Reeves, *Lawyers Searching Old Files in Wake of* Woodson *Ruling*, N.C. L.

remains uncertain at best, and, as discussed previously, given the facts on which the court based its holding, the risk of misapplication certainly exists.

That courts in other jurisdictions realized this risk is evident from the wording of their decisions. For example, in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*,[231] the Ohio Supreme Court stressed that courts should, in deciding whether an employer knew that a substantial certainty of injury or death existed, "demand a *virtual* certainty."[232] That one knows and appreciates a risk is not the equivalent of intent, unless substantial certainty exists.[233] The concern of the *Blankenship* court was realized in Ohio, where later interpretation of the standard established by *Blankenship* failed to adhere strictly to a "virtual certainty" test. In *Jones v. VIP Development Co.*,[234] for example, the Ohio Supreme Court lowered the threshold by holding that when the evidence demonstrated that the employer knew that removing a safety device from a discharge chute posed a *substantial* risk to its employees, the employee had met the test of *Blankenship*.[235] In *Millison v. E.I. du Pont de Nemours & Co.*,[236] the New Jersey court expressed a similar concern, focusing on the necessity of a finding of "virtual certainty."[237] The distinctions between negligence, recklessness, and intent are subtle, asserted the court, and the dividing line separating intentional wrong from lesser degrees of fault "must be drawn with caution" lest the statutory framework of workers' compensation be circumvented.[238] The court expressed

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WKLY., Sept. 2, 1991, at 4 (describing the feeling among the state's lawyers that although *Woodson* has opened the door for tort claims based on a variety of types of employer misconduct, uncertainties exist concerning the application of the court's standard).

231. 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982).

232. *Id.* at 621, 433 N.E.2d at 581 (Locher, J., concurring in part and dissenting in part) (emphasis added).

233. *Id.* (Locher, J., concurring in part and dissenting in part) (quoting PROSSER, *supra* note 116, § 8, at 32).

234. 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

235. *Id.* at 96, 472 N.E.2d at 1052; *see also* Nayman v. Kilbane, 1 Ohio St. 3d 269, 271-72, 439 N.E.2d 888, 889-90 (1982) (holding that allegations that a worker who got his hands entangled in a machine he was adjusting, without any indication that the employer knew of the condition or compelled the employee to use the machine, constituted intentional injury by the employer); Bryant v. Lawson Milk Co., 22 Ohio App. 3d 69, 71-73, 488 N.E.2d 934, 936-39 (1985) (reversing summary judgment for the employer, when employee was beaten and raped while working as a store clerk; employer's failure to provide safe working conditions raised issue of material fact of employer's intentional conduct). For further discussion of these cases, see 2A LARSON, *supra* note 67, § 68.15, at 13-54.

236. 101 N.J. 161, 501 A.2d 505 (1985).

237. *Id.* at 178, 501 A.2d at 514 (citing *Blankenship*, 69 Ohio St. 2d at 621, 433 N.E.2d at 581 (Locher, J., concurring in part and dissenting in part)). New Jersey had adopted substantial certainty as its test for intentional injury. *See supra* note 122 and accompanying text.

238. *Millison*, 101 N.J. at 178, 501 A.2d at 514.

concern that a known risk that later becomes a reality not be construed, without more, as meeting the substantial-certainty test.[239] That these concerns might be realized in North Carolina in the wake of *Woodson* is not impossible.

Moreover, courts frequently have warned of the potential for a proliferation of unwarranted suits as a result of lowering the threshold for a finding of intentional misconduct sufficient to establish a common-law tort action.[240] The history of the post-*Bazley* era in Louisiana demonstrates this problem. After the state supreme court in *Bazley*[241] adopted substantial certainty as the standard, the courts rejected numerous cases that obviously failed to meet the standard but had nonetheless reached the appellate level.[242] The experience of West Virginia in the aftermath of *Mandolidis* is also instructive. One author reported that after *Mandolidis*, West Virginia experienced a flood of cases resulting in elevated settlement amounts and high jury verdicts, including the largest jury verdict ever reported in West Virginia.[243] The author also pointed

239. *Id.*

240. *See, e.g.*, Pleasant v. Johnson, 312 N.C. 710, 721, 325 S.E.2d 244, 251 (1985) (Meyer, J., dissenting) (arguing that expanding co-employee liability will result in proliferation of suits whenever insurance is available); Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 102, 472 N.E.2d 1046, 1057 (1984) (Brown, J., dissenting) (asserting that changing the standard encourages every employee to pursue both remedies under facts that only support negligence, which undermines the theory of workers' compensation); Blankenship v. Cincinnati Milacron Chems., Inc., 69 Ohio St. 2d 608, 623, 433 N.E.2d 572, 582 (Krupansky, J., dissenting) (arguing that broadening of standard for employers will release floodgates to a "whole vista of lawsuits," each claiming exceptions to the language of the Act), *cert. denied*, 459 U.S. 857 (1982); Mandolidis v. Elkins Indus., 161 W. Va. 695, 723, 246 S.E.2d 907, 923 (1978) (Neely, J., dissenting) (contending that expanding standard invites nuisance suits which will be settled to avoid costs of litigation, rather than because claims are necessarily justified; costs of litigation will divert funds from industrial improvement and will contribute to inflation by increasing costs and reducing production).

241. *See supra* notes 128-30 and accompanying text.

242. 2A LARSON, *supra* note 67, § 68.13, at 13-17 to -22 & n.11, and cases cited therein; *id.* § 68.15, at 13-56 to -57; *see, e.g.*, Schwendinger v. Fidelity & Casualty Co., 451 So. 2d 54, 58 (La. Ct. App. 1984) (holding that employee's falling from a ladder did not meet the substantial-certainty standard); Buckbee v. Aweco, Inc., 418 So. 2d 698, 703 (La. Ct. App.) (holding that employer's knowledge of oil heater accident more than one year earlier did not demonstrate substantial certainty), *cert. denied*, 422 So. 2d 166 (La. 1982).

243. David A. Mohler, Note, *In Wake of* Mandolidis: *A Case Study of Recent Trials Brought Under the* Mandolidis *Theory—Courts are Grappling with Procedural Uncertainties and Juries are Awarding Exorbitant Damages for Plaintiffs*, 84 W. VA. L. REV. 893, 906 & n.85, 925-26 (1982). Mohler argued that some cases producing verdicts arguably alleged or proved only negligence or gross negligence. *Id.* at 898-909. Mohler noted that jury confusion resulted from the court's failure to define the parameters of the standard adequately. *Id.* at 929. For a discussion of the standard adopted by the West Virginia court, see *supra* notes 124-27.

Procedural uncertainty also accounted for difficulties in applying the new standard. Mohler, *supra*, at 909-23 (defining the procedural issues raised: whether future workers' compensa-

to the potential uninsurability of *Mandolidis* injuries.[244] It is important to remember, however, that of those states departing from the actual-intent-to-injure standard, West Virginia was the most liberal—willful, wanton, and reckless behavior sufficed to establish the requisite intent to sue the employer at common law[245] before the legislature acted to modify the *Mandolidis* ruling.[246]

Because an employee may pursue both a workers' compensation claim and a civil suit without jeopardizing either after *Woodson*,[247] it seems reasonable to assume that bringing a civil action will inevitably receive serious consideration. A recent article canvassing North Carolina lawyers' reactions to the *Woodson* decision confirms this assumption.[248] As one lawyer stated, "Things are definitely opened up now."[249] Plaintiffs' lawyers are reviewing their closed workers' compensation claim files with an eye to uncovering "potential *Woodson* claims" before the expiration of the statute of limitations.[250] One lawyer in Rowan County has filed fifty-eight previously dormant claims since the *Woodson* court rendered its decision.[251] Another lawyer said, "[I]t seems anytime an employer subjects an employee to substantial certainty of injury or harm, there's a possible *Woodson* claim."[252] This statement fails to take into account the requirement that the employer *know* of the substantial certainty of injury. Such statements lend additional credence to the prediction that the standard may be subject to misinterpretation.[253]

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tion benefits are included; how to handle present-value determination; the availability of punitive damages and whether punitive damages are subject to offset; and the availability of common-law defenses for employers).

244. Mohler, *supra* note 243, at 926-27. The author predicted that smaller companies will be unable to absorb large verdicts and that larger companies, faced with similar verdicts, will be unable to continue to make a profit in the state. *Id.* at 927-28.

245. Mandolidis v. Elkins Indus., 161 W. Va. 695, 706, 246 S.E.2d 907, 914 (1978).

246. For a discussion of the legislative reaction to *Mandolidis*, see *supra* notes 135-38, 154, and accompanying text.

247. *Woodson*, 329 N.C. at 337, 407 S.E.2d at 226.

248. Jay Reeves, *Tort Remedies Have Slowly Expanded Over the Years*, N.C. L. WKLY., Sept. 2, 1991, at 4. Permitting an employee to pursue both his workers' compensation and common-law remedies accounted in part, according to one author, for the large numbers of suits brought in West Virginia following *Mandolidis*. Mohler, *supra* note 243, at 928, 931-32.

249. Reeves, *supra* note 248, at 4.

250. *Id.* It should be noted that the *Woodson* court did not specify whether its holding shall be retroactively applied.

251. Jay Reeves, *58* Woodson *Claims Filed by Rowan Firm*, N.C. L. WKLY., Sept. 30, 1991, at 1.

252. Reeves, *supra* note 230, at 4.

253. That lawsuits may be filed which do not meet the *Woodson* standard really addresses only one aspect of the problem. Even if every *Woodson* action filed presents a fact situation clearly within the substantial-certainty test, an increase in judicial and legal involvement and a concomitant increase in the costs placed on the employer will necessarily result. If employers

Given the uncertainties created by *Woodson* and the potential ramifications of the decision, the North Carolina General Assembly should take affirmative action to clarify the state's policy. The General Assembly could follow any of several steps to further the goals of worker safety while simultaneously preserving the quid pro quo which underlies workers' compensation systems.[254] The legislature could choose to restrict the *Woodson* standard but provide alternative devices for compensating injured employees within the Workers' Compensation Act or permit them to sue outside the Act for enumerated conduct. The legislature also could leave the substantial-certainty standard undisturbed but enact safeguards for employers against some of the less desirable effects of *Woodson*.

North Carolina's Workers' Compensation Act currently provides for an increase in an employee's award when the employer willfully fails to comply with any statutory requirement or Industrial Commission order.[255] This provision could be expanded to encompass such specific employer misconduct as violations of safety and health regulations and other particularly egregious behavior. If the legislature should select this option, the ten-percent penalty currently assessed in favor of the injured employee for violations of the statute should be significantly increased. If the legislature modifies section 97-12 of the Act in this fashion, it might choose to restrict the intentional-tort exception to a standard of deliberate and specific intent to injure the employee.[256] This limitation would serve the dual function of protecting employers against meritless or negli-

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are forced to spend more to defend lawsuits, businesses will have less funds to pay workers' wages, modernize plants, and improve working conditions. If costs increase dramatically as a result of employers' heightened liability, the state's entire economy could suffer, as local businesses become financially constrained and other businesses are discouraged from moving to the state. On the other hand, if, as a part of risk management programs designed to deal with the more expansive *Woodson* standard, employers devote more resources to promoting workplace safety—by increasing compliance with safety regulations and modernizing defective and outmoded equipment—employees will greatly benefit in the long run from a reduction in serious work-related injuries.

254. *See supra* notes 74-78 and accompanying text (describing the balance of interests in the workers' compensation scheme).

255. N.C. GEN. STAT. § 97-12 (1991). Section 97-12 provides in pertinent part: "When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the [Industrial] Commission, compensation shall be increased ten percent." *Id.* § 97-12(3). Several states mandate statutorily increased compensation for intentional misconduct. *See, e.g.*, Mohler, *supra* note 243, at 931 (identifying several states' statutory provisions increasing awards where employers engage in intentional misconduct). *See generally* 2A LARSON, *supra* note 67, §§ 69.00-.24(e), at 13-199 to 13-226 (discussing statutory provisions penalizing employers for misconduct); *id.* § 69.30, at 13-228 to 13-229 (same).

256. Other states have chosen this route. *See* 2A LARSON, *supra* note 67, § 69.30, at 13-228 to 13-229.

gence-based lawsuits and more adequately compensating employees injured by their employers' serious misconduct. As a second option, the legislature could modify the statute to permit common-law tort actions in specified instances only—for example, when an employer violates a particular safety regulation. The legislature could reinstate the specific-intent-to-injure standard in that scenario in order to ensure an employer's immunity from tort suits other than in the enumerated situations. Alternatively, specified situations could give rise to a presumption of an intentional tort. Ohio's workers' compensation statute, for example, provides that if the employer deliberately removes an equipment safety guard or deliberately misrepresents the toxicity or hazardousness of a substance to which an employee is exposed, a rebuttable presumption arises that the employer acted with the requisite intent to injure the employee required to strip the employer of tort immunity.[257]

If, on the other hand, the legislature should opt to retain the substantial-certainty standard adopted in *Woodson*, it should build evidentiary and procedural safeguards into the statute to protect the employer against suits not meeting the standard. Ohio adopted this type of provision when it modified its statute in 1986, by placing the initial burden of presenting evidence of the employer's intent on the employee.[258] Additionally, the statute should provide expressly for summary judgment or directed verdict against the employee who fails to meet the statute's requirements.[259]

The Ohio workers' compensation statute includes several other features that North Carolina's legislature could incorporate into its statute. First, the Ohio courts submit only the issue of liability to the jury; the Industrial Commission determines damages separately.[260] Second, the statute sets a ceiling on possible damages.[261] Third, the statute authorizes the Industrial Commission to review all attorneys' fees,[262] and all awards and attorneys' fees are paid from an intentional-tort fund.[263] North Carolina's legislature should promulgate changes of this nature, however, with caution. Removing a portion of a case from jury consideration may infringe on a plaintiff's constitutional right to a jury trial.[264]

257. *See* OHIO REV. CODE ANN. § 4121.80(G)(1) (Anderson 1991).

258. *See id.*; Parkhurst, *supra* note 135, at 402-03.

259. *See* OHIO REV. CODE ANN. § 4141.80(c).

260. *Id.* § 4121.80(D). A recent Ohio Supreme Court decision, however, has held this provision unconstitutional. *See infra* note 264.

261. OHIO REV. CODE ANN. § 4121.80(D).

262. *Id.* § 4121.80(F).

263. *Id.* § 4121.80(D).

264. In Brady v. Safety-Kleen Corp., 61 Ohio St. 3d 624, 576 N.E.2d 722 (1991), the Ohio Supreme Court held that the state's entire intentional-tort statute (OHIO REV. CODE ANN.

Even if the legislature concludes that the substantial-certainty standard of *Woodson* properly fulfills the goals of the workers' compensation system, it should define with some particularity what the term "substantial certainty" means. The *Woodson* decision provides little guidance in this regard. If the General Assembly fails to act, the onus will fall on the courts to define the parameters of the *Woodson* standard. If judicial decisions accurately and strictly apply the tort substantial-certainty standard, beneficial effects will accrue to the state's workers without unduly prejudicing employers. Employers guilty of knowingly placing their employees at certain risk of injury will have to answer for their conduct, and injured workers will be able to seek compensation sufficient to redress their losses. If, on the other hand, the courts permit lesser levels of conduct to satisfy the *Woodson* standard, businesses will pay disproportionately for negligently caused injuries, ultimately placing at jeopardy the entire workers' compensation concept.

Chief Justice Exum asserted that the court's decision in *Woodson* was true to the legislative intent in enacting workers' compensation and to the Workers' Compensation Act's underlying purposes.[265] Only if the distinction between substantial certainty and lesser degrees of aggravated behavior remains unblurred, however, will the goal of limited and predictable liability for the employer be preserved. Further, by expanding the class of work-related incidents amenable to civil suit and thereby increasing the role of the courts in the work-related context, the goal of certain and speedy compensation to the employee could have been frustrated by *Woodson*, had the court required that the employee give up workers' compensation benefits to pursue a common-law recovery.[266]

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§ 4121.80) exceeds the scope of legislative authority granted under the Ohio Constitution and is thus unconstitutional. *Id.* at 634-35, 576 N.E.2d at 729-30. The court maintained that the constitution authorizes the legislature to regulate compensation occasioned within the course of employment; intentional torts are by their nature outside the scope of employment. *Id.* at 634, 576 N.E.2d at 729. Thus, an attempt to regulate intentional torts is void as an improper exercise of legislative power. *Id.* (quoting Taylor v. Academy Iron & Metal Co., 36 Ohio St. 3d 149, 162, 522 N.E.2d 464, 476 (1988) (Douglas, J., dissenting)). In a concurring opinion, Justice Douglas asserted that § 4121.80(D), limiting the court to a determination of liability, specifically abrogates the right to trial by jury on the issue of damages, thereby violating the Ohio Constitution. *Brady*, 61 Ohio St. 3d at 636, 576 N.E.2d at 730-31 (Douglas, J., concurring).

265. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229. For a general discussion of the goals and purposes of the workers' compensation system, see *supra* notes 67-78 and accompanying text.

266. Before the *Woodson* decision, in suits permitted against an employer outside the province of the Workers' Compensation Act, an employee had to elect between the workers' compensation or common-law recovery; he could not pursue both. For a discussion of the development and status of the election-of-remedies doctrine in North Carolina workers' compensation cases before *Woodson*, see *supra* notes 162-210 and accompanying text.

The court, however, resolved this problem by not holding the employee to such an election.[267] The employee thus receives added benefits from this decision, while at the same time retaining those benefits which originally formed the employee's part of the workers' compensation compromise. The employer, on the other hand, loses some of the predictability of limited liability that also constituted part of the basis for the workers' compensation bargain.[268] The employer continues to be responsible for providing workers' compensation benefits, but must now defend against tort actions in an increased percentage of cases. The *Woodson* decision has definitely shifted the balance of interests toward the employee at the expense of the employer. This is not to say that an employer should not be held accountable or that an injured employee should recover only modest workers' compensation benefits when the employer engages in egregious misconduct with full knowledge that such conduct will injure his workers. The policy espoused in *Woodson* is laudable, and the necessity for further protection for employees has been brought home by the recent Hamlet tragedy.[269] On the other hand, modifying the quid pro quo on which the workers' compensation system is based should rest with the legislature. The general assembly, spurred by the *Woodson* decision and by the current climate of concern for employee safety engendered by the Hamlet tragedy, should now take the initiative and enact legislation to safeguard the interests of both employees and employers.

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267. *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233.

268. *See supra* notes 74-78 and accompanying text.

269. *See supra* notes 1-4 and accompanying text.