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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

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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?

The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury.[1]

In *Pleasant v. Johnson*[2] the North Carolina Supreme Court examined this twilight zone for the first time when it determined whether willful, wanton, and reckless conduct[3] should receive the same treatment as intentional misconduct[4] in a workers' compensation context. The issue in *Pleasant* was whether the North Carolina Workers' Compensation Act provides the exclusive remedy for a worker injured by the willful,[5] wanton,[6] and reckless[7] conduct[8] of a co-employee.[9] The court held that the injured worker could recover both under the

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1. Pleasant v. Johnson, 312 N.C. 710, 714, 325 S.E.2d 244, 247 (1985).

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

3. The *Pleasant* court failed to distinguish willful, wanton, and reckless conduct from willful, wanton, and reckless negligence. The court apparently viewed conduct and negligence in this case to be synonymous. Negligence has been defined as "conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.' " PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (W. Keeton 5th ed. 1984) [hereinafter cited as PROSSER & KEETON] (quoting RESTATEMENT OF TORTS § 282 (1925)). The traditional elements of a cause of action for negligence are: (1) a legal duty to conform to a certain standard of behavior to protect others from unreasonable risks; (2) a failure to conform to the required standard; (3) the existence of proximate cause demonstrated by a reasonably close causal relationship between the conduct and the injury, and; (4) actual loss or damage. *Id.* § 30, at 164-65. For a discussion of willful, wanton, and reckless conduct, see *infra* notes 5-8.

4. An intentional tort involves "an intent to bring about a result which will invade the interests of another in a way that the law forbids." *Id.* § 8, at 36. Intent extends not only to those consequences desired by the party but also to those he or she believes are substantially certain to follow. Because the invasion of the plaintiff's rights is regarded as a tort in itself, proof of actual damage is not required. *Id.* Intentional torts include assault, battery, false imprisonment, infliction of mental distress, trespass to land, trespass to chattels, and conversion. *Id.* §§ 9-15.

5. The *Pleasant* court defined "willful" as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." 312 N.C. at 714, 325 S.E.2d at 248. When "willful" is used to refer to a breach of duty, only the negligence is intentional. *Id.* at 714-15, 325 S.E.2d at 248. When "willful" is used in reference to an injury, however, it is the injury that is intended. *Id.* Even though there may not be an actual intent to injure, constructive intent may suffice when the conduct is "so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified." *Id.* at 715, 325 S.E.2d at 248.

6. The court defined "wanton" behavior as "an act manifesting a reckless disregard for the rights and safety of others." *Id.* at 714, 325 S.E.2d at 248.

7. The *Pleasant* court stated that "reckless" is "merely a synonym for 'wanton' [that] has been used in conjunction with it for many years." *Id.*

8. Willful, wanton, and reckless behavior has been defined as conduct that is "so far from a proper state of mind that it is treated in many respects as if it were so intended." PROSSER & KEETON, *supra* note 3, § 34, at 213. Gross negligence has been defined as "a failure to exercise even that care which a careless person would use." *Id.* at 212. The difference between the two is that gross negligence concentrates on the particular act of the tortfeasor whereas willful, wanton, and reckless conduct concentrates on the tortfeasor's state of mind at the time the act was committed. *Id.* at 213-14. The court in *Pleasant* failed to make any distinction between gross negligence and willful, wanton, and reckless behavior.

9. The claimant must first show that he or she is an "employee" within the meaning of the Workers' Compensation Act. Some employment relationship must exist, although it need not be

Workers' Compensation Act and in a common-law tort action against the co-employee.[10] This Note analyzes the court's reasoning in *Pleasant* and discusses new issues raised by the decision. It criticizes the court for frustrating the basic policy behind the Workers' Compensation Act and suggests that the court could have found the co-employee defendant liable without eroding traditional workers' compensation doctrine.

On May 13, 1980, Bill Pleasant was injured while returning from lunch to the construction site where he and Victor Johnson were working on a project for Electricon Incorporated.[11] Johnson saw Pleasant walking across the parking lot[12] and decided to scare him by driving a van[13] close to him and blowing the horn.[14] Johnson misjudged the distance, however, and struck Pleasant, injuring Pleasant's right knee.[15]

Pleasant received disability payments under the Workers' Compensation Act.[16] He also filed a civil action for damages against Johnson.[17] In addition to alleging simple negligence, plaintiff asserted that "[d]efendant was willfully, recklessly and wantonly negligent in that he was operating the motor vehicle in

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formal and can even be oral or implied. *See* 8 N.C. INDEX 3D *Master and Servant* §§ 49-54 (1977) (discussing the various categories of employees and whether they are covered by the North Carolina Workers' Compensation Act).

10. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246. The court held that the employee was not required to elect which remedy to pursue. *Id.* at 717, 325 S.E.2d at 249.

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

12. Pleasant was clearly within the scope of his employment for workers' compensation purposes. "Neither side denies that Pleasant's injury arose out of and in the course of his employment." Pleasant v. Johnson, 69 N.C. App. 538, 540, 317 S.E.2d. 104, 106 (1984), *rev'd on other grounds*, 312 N.C. 710, 325 S.E.2d 244 (1985); *see also* Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968) (employee injured by co-employee while leaving her employer's parking lot for lunch covered by the North Carolina Workers' Compensation Act).

13. Electricon Inc. owned the van. *See* Plaintiff-Appellant's New Brief at 6; Defendant-Appellee's Brief at 4.

14. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246.

15. *Id.* Pleasant was walking with another worker, Jessie Turner, at the time. At trial, Turner testified that "he saw the van coming towards the two of them, he jumped out of the way, he yelled 'Look out, Bill,' he saw Bill Pleasant spin around towards the van and he saw the van hit Mr. Pleasant." Plaintiff-Appellant's New Brief at 6. Pleasant also testified:

> Jessie and I started back towards the building. Jessie was walking to me and I had my head turned talking to him. Jessie hollered and said "Look out," and [then] I turned to look, and when I did, the truck caught me on my right side, that is when it knocked me down.

Id.

Johnson was fired as a result of the incident. The discharge slip read: "Victor Johnson was fired today for horseplay with the company vehicle. He ran into William Pleasant with the truck, knocking him to the ground, and tearing a ligament in his right knee." *Id.*

16. Pleasant, Electricon, and its carrier, U.S. Fire Insurance Co., signed an "Agreement for Compensation for Disability." Record on Appeal at 19 (Defendant's Exhibit No. 1). Pleasant's average weekly wage at the time of the injury was $211.35. The employer and carrier agreed to pay him $140.90 a week until he could return to work at his usual salary. *Id.* This payment was in compliance with the temporary total disability provision of the North Carolina Workers' Compensation Act, which requires that "where the incapacity for work resulting from the injury is total, the employer shall pay . . . to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages." N.C. GEN. STAT. § 97-29 (1985).

17. The complaint, demanding a jury trial and compensatory and punitive damages in the amount of $500,000, was filed on January 9, 1981. Record on Appeal at 1-2.

such a fashion so as to see how close he could operate the said motor vehicle to the plaintiff without actually striking him . . . ."[18]

At the close of plaintiff's evidence the trial court granted defendant's motion for a directed verdict.[19] The North Carolina Court of Appeals affirmed, holding that the Workers' Compensation Act serves as the exclusive remedy for work-related injuries and bars any later action against a co-employee.[20] On appeal, the North Carolina Supreme Court reversed the court of appeals,[21] holding that willful, wanton, and reckless conduct removes a co-employee from the workers' compensation immunity and allows the injured fellow worker a recovery both under the Act and in tort.[22]

Co-employee liability in North Carolina is governed by sections 97-9 and 97-10.1 of the North Carolina Workers' Compensation Act.[23] Section 97-9

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18. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246.

19. *Id.* When the defendant moves for a directed verdict at the conclusion of the plaintiff's evidence, the judge, in deciding whether to grant the motion, must examine the evidence in the light most favorable to the plaintiff, giving it every reasonable inference that can be drawn. Investment Properties of Asheville v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972).

20. Pleasant v. Johnson, 69 N.C. App. 538, 539, 317 S.E.2d 104, 105 (1984), *rev'd*, 312 N.C. 710, 325 S.E.2d 244 (1985). The court interpreted plaintiff's complaint as alleging only negligence: "Pleasant brought his action in negligence; the trial court's instructions to the jury at recess indicated its understanding that this was a 'negligence action;' and Pleasant requested a directed verdict in his favor solely on negligence grounds." *Id.* at 540, 317 S.E.2d at 106. The court refused to accept plaintiff's contention that the evidence at trial established an intentional tort by defendant. If the court had found that plaintiff's actions amounted to an intentional tort, the result of the case would have been controlled by Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). In *Andrews* defendant crept up behind plaintiff and placed his knee behind hers, causing her to fall and injure herself. The court held that intentional injuries committed by a co-employee allowed an injured coworker to recover both in tort and under the Workers' Compensation Act. *Id.* at 131, 284 S.E.2d at 752. For a more detailed discussion of *Andrews*, see *infra* text accompanying note 54 and note 55 and accompanying text.

The court of appeals noted that *Andrews* had been decided in December 1981 and that *Pleasant* had not gone to trial until September 1982. Nevertheless, "Pleasant made no effort to amend his complaint [to allege commission of an intentional tort]. Moreover, the pretrial order, approved and filed September 27, 1982, discloses only issues of negligence. The same evidence supports the theory of assault now raised on appeal and the theory of negligence tried below." *Pleasant*, 69 N.C. App at 541, 317 S.E.2d at 106. The court therefore refused to hear the additional intentional tort theory raised by plaintiff on appeal because defendant had not been given notice and an opportunity to rebut such a theory at trial. *Id.*

Chief Judge Vaughn dissented. In his dissenting opinion, he stated that the complaint and the evidence at trial were sufficient to show an intentional wrongful act by the defendant. "The results of his intentional wrongful act were just as foreseeable as if he had aimed a pistol at [plaintiff] instead of a truck." *Id.* at 543, 317 S.E.2d at 107.

21. *Pleasant*, 312 N.C. 710, 717, 325 S.E.2d 244, 250.

22. The case was remanded to the Durham County Superior Court for trial in light of the supreme court's holding. *Id.* at 718, 325 S.E.2d at 250. The court also overruled Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960), and Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952), to the extent that they conflicted with the opinion. *Id.* The court in *Wesley* and in *Warner* had required intentional infliction of injury by a co-employee to remove the case from the Workers' Compensation Act. Reckless and wanton behavior was not sufficient to establish the requisite intent. *Wesley*, 252 N.C. at 545, 114 S.E.2d at 354; *Warner*, 234 N.C. at 733, 69 S.E.2d at 10.

23. N.C. GEN. STAT. §§ 97-1 to -122 (1985). North Carolina first adopted a workers' compensation act in 1929. North Carolina Workmens' Compensation Act, ch. 120, 1929 N.C. Sess. Laws 117. For a general discussion of the history, development, and constitutionality of workers' compensation laws, see 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 4.10–5.30 (1983); S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS (1944).

states: "Every employer . . . shall secure the payment of compensation to his employees in the manner hereinafter provided; and . . . he *or those conducting his business* shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified."[24] Section 97-10.1 states:

> If the employee and employer are subject to and have complied with the provisions of this Article, then *the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee, . . . as against the employer at common law* or otherwise on account of such injury or death.[25]

The North Carolina Supreme Court has declared that these two provisions must be read together.[26] Therefore, the immunity from common-law actions the employer has under section 97-10.1 also extends to "those [employees] conducting his business"[27] under section 97-9. An individual who does not possess the immunity conferred by sections 97-9 and 97-10.1 is classified as a "third party"[28] and is amenable to suit at common law.[29]

In North Carolina an employee cannot bring a common-law action against a co-employee for negligence; the injured employee may recover only under the

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24. N.C. GEN. STAT. § 97-9 (1985) (emphasis added).

25. N.C. GEN. STAT. § 97-10.1 (1985) (emphasis added).

26. Essick v. City of Lexington, 232 N.C. 200, 210, 60 S.E.2d 106, 113 (1950) ("We have no space to call attention to the contradictions and fantastic situations that must arise under the application of G.S. § 97-10[.1] unless § 97-9 is given its weight in *pari materia* interpretation of both sections, and the immunity given in Section 97-9 . . . be . . . carried through the provisions of Section 97-10[.1]."); *see also* Smith v. Liberty Mut. Ins. Co., 409 F. Supp. 1211, 1215 (M.D.N.C. 1976) ("The courts of North Carolina have read § 97-9 in conjunction with § 97-10.1 to find that the immunity from common law actions granted the employer in § 97-10.1 extends to those conducting his business.").

27. The term "those conducting his business" in § 97-9 is to be given "a liberal construction." Essick v. City of Lexington, 232 N.C. 200, 210, 60 S.E.2d 106, 113 (1950). Under workers' compensation, "[i]t is not necessary, in order to bring an employee within the protection of this statute, to show that his act was such as would have been imputed to the employer at common law." Altman v. Sanders, 267 N.C. 158, 161, 148 S.E.2d 21, 24 (1966).

28. The pertinent parts of N.C. GEN. STAT. § 97-10.2 (1985) provide as follows:

> (a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party" . . . .
>
> (b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party . . . .
>
> (c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings . . . .

29. *See* 2A A. LARSON, *supra* note 23, § 72.00, at 14-54. Regarding the issue whether a co-employee is a "third party" and therefore liable to common-law suit, the various jurisdictions throughout the United States may be separated into four categories: (1) those jurisdictions where the co-employee is completely immune from any common-law action; (2) jurisdictions that allow a tort action against a co-employee based on negligence alone; (3) jurisdictions that allow a tort action against a co-employee only when he or she has engaged in an intentional tort or other specifically prohibited activities; and (4) jurisdictions that allow for co-employee liability based on gross negligence or willful, wanton, and reckless conduct. *Id* §§ 72.11, 72.21.

Workers' Compensation Act.[30] Prior to *Pleasant*, courts treated willful, wanton, and reckless conduct or gross negligence by a co-employee as ordinary negligence. Such conduct therefore was insufficient to remove a co-employee's immunity.[31] Thus, workers injured by a co-employee's willful, wanton, and reckless conduct could recover benefits only under the Workers' Compensation Act.[32] An intentional tort by a co-employee, however, has always been held to strip the co-employee of immunity under the Workers' Compensation Act and to make him or her liable to the injured worker for common-law damages.[33]

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30. *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247 ("We . . . have interpreted the Act as foreclosing a worker who is injured in the course of his employment from suing a co-employee whose negligence caused the injury."); *see* Strickland v. King, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977) (allowing for common-law suit against a co-employee for injuries sustained in an automobile collision on grounds that the injuries did not arise out of and in the course of their employment); Altman v. Sanders, 267 N.C. 158, 161, 148 S.E.2d 21, 24 (1966) (employee struck by automobile driven by co-employee in their employer's parking lot could not maintain common-law negligence action for injuries sustained); Burgess v. Gibbs, 262 N.C. 462, 467, 137 S.E.2d 806, 809 (1964) (plaintiff could not hold co-employee liable in action for negligence when injuries sustained in truck accident occurred on drive home from work); Wesley v. Lea, 252 N.C. 540, 543, 114 S.E.2d 350, 353 (1960) (recovery by a National Guard private injured while riding as a passenger in a National Guard specialist's automobile limited solely to a claim under the Workers' Compensation Act when driver negligently struck telephone pole and overturned car), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985); Warner v. Leder, 234 N.C. 727, 732, 69 S.E.2d 6, 9 (1952) (common-law recovery denied for injuries sustained in an automobile accident negligently caused by co-employee driver when injuries arose out of and in the course of their employment), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985). *See generally* Stanley v. Brown, 261 N.C. 243, 245, 134 S.E.2d 321, 323 (1964) ("The Act does not purport to deal with an employee's common law right of action against his fellow employee for damage to property." Therefore, a police officer could not hold a fellow officer liable in tort for his personal injuries but could bring a cause of action for damages to his car.).

31. Wesley v. Lea, 252 N.C. 540, 545, 114 S.E.2d 350, 354 (1960), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985); Warner v. Leder, 234 N.C. 727, 733, 69 S.E.2d 6, 10 (1952), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985). *Wesley* involved an action by a National Guard private against a fellow National Guard specialist for injuries sustained in an automobile accident in which the specialist negligently left the road, hit a telephone pole, and overturned the car. The court stated:

> Plaintiff contends that the conduct of defendant in the operation of the car was not merely negligent, but was *reckless and wanton*. But to take the case out of the Workmen's Compensation Act the injuring of the employee by a co-employee must be intentional. . . . There is no evidence of any intention on the part of defendant to injure plaintiff.

Wesley, 252 N.C. at 545, 114 S.E.2d at 354 (emphasis added).

In *Warner* the employee brought an action against a co-employee who was driving a car at an excessive rate of speed and collided with another car causing serious and permanent injuries to the plaintiff. The court rejected plaintiff's argument that because defendant was guilty of "willful and wanton conduct" he could be sued at common law. *Warner*, 234 N.C. at 733, 69 S.E.2d at 10. The court based its holding on two considerations. First, defendant had claimed at trial that he did not intentionally injure plaintiff. *Id.* Second, plaintiff had applied for and received benefits under the Workers' Compensation Act, thereby foreclosing any right he may have had under common law. *Id.*

32. Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985).

33. *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247; Daniels v. Swofford, 55 N.C. App. 555, 286 S.E.2d 582 (1982) (exclusivity provision of Workers' Compensation Act did not bar employee from bringing action against co-employee who subjected her to verbal abuse and kicked her in the leg); Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981) (North Carolina Workers' Compensation Act is not the exclusive remedy for an employee injured by a co-employee who walked up behind her and placed his right knee behind her right knee causing her to fall and injure herself), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

Prior to *Pleasant* the North Carolina Supreme Court had never directly faced the issue whether

The majority[34] in *Pleasant* offered three broadly stated rationales in support of its holding that willful, wanton, and reckless conduct removes a co-employee's immunity from common-law tort actions. First, the court stated that in the past it has implicitly treated wanton and reckless behavior as intentional for purposes of awarding punitive damages and similarly has held that evidence of wanton and reckless conduct is sufficient to impute malice to a defendant charged with second degree homicide.[35] The court concluded "that injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act."[36]

The court acknowledged that the *quid pro quo* between the employer, who cannot raise common-law defenses[37] under the Workers' Compensation Act and

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an employee could pursue a common-law remedy when intentional misconduct by a co-employee was involved. In Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985), however, the court stated in dicta that "to take the case out of the Workmen's Compensation Act the injury to the employee by a co-employee must be intentional." *Id.* at 545, 114 S.E.2d at 354.

34. Justice Meyer dissented. *Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250. His dissent is discussed *infra* at notes 134-38 and accompanying text.

35. *Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248. In support of its analogy to punitive damages, the court cited two cases, Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956), and Binder v. General Motors Acceptance Corp., 222 N.C. 512, 23 S.E.2d 894 (1943). *Hinson* involved a personal injury and property damage action that arose out of an automobile collision. The plaintiff alleged that defendants were guilty of reckless and wanton disregard for the life and safety of plaintiff's intestate because defendant minor, who suffered from defective vision, was driving the car with defendant owner's permission. *Hinson*, 244 N.C. at 28-29, 92 S.E.2d at 397. The court held that these allegations were sufficient to show wanton negligence, thereby justifying an award of punitive damages. *Id.* at 29, 92 S.E.2d at 397. The *Hinson* court stated that courts have used gross negligence in the same sense as wanton negligence, *id.* at 28, 92 S.E.2d at 396, and that "[c]onduct is wanton when [it is] in conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* at 28, 92 S.E.2d at 397.

In *Binder* agents of defendant seized the plaintiff's car under the mistaken belief that payments were in arrears. The methods used by the agents were sufficient to put plaintiff on notice that any resistance on his part would inevitably lead to a breach of the peace. *Binder*, 222 N.C. at 516, 23 S.E.2d at 896. The court held that the manner in which the car was taken showed a willful disregard for the rights of another sufficient to justify punitive damages. *Id.*

To illustrate the analogy to malice cases, the court cited State v. Snyder, 311 N.C. 391, 317 S.E.2d 394 (1984), and State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925). In *Snyder* the supreme court reversed the court of appeals' holding that there was no evidence of malice on the part of the defendant on grounds that the testimony at trial showed that defendant had been drinking throughout the afternoon, had been fighting with others at a bar, and had gone through a red light at sixty to seventy miles per hour. *Snyder*, 311 N.C. at 392, 317 S.E.2d at 394-95. The *Snyder* court held that when a defendant acts in a manner exhibiting " 'a mind regardless of social duty and deliberately bent on mischief, though there be no intention to injure a particular person,' " there is sufficient evidence to supply the malice necessary for second degree murder. *Id.* at 394, 317 S.E.2d at 396 (quoting State v. Wilkerson, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978)). In *Trott* the court held that a defendant under the influence of alcohol, who instructed another intoxicated individual to drive, could be found to have acted so recklessly or wantonly as to show depravity of mind and disregard for human life. *Trott*, 190 N.C. at 680, 130 S.E. at 630. In *Pleasant* Justice Meyer expressed disapproval of the majority's reliance on *Trott*. *Pleasant*, 312 N.C. at 723-24, 325 S.E.2d at 252-53 (Meyer, J., dissenting).

36. *Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248.

37. These defenses, which include contributory negligence, assumption of risk, and the fellow-servant rule, traditionally have been known as the "unholy trinity" because of the harsh manner in which they serve to excuse the employer and leave an injured employee without any remedy. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246; S. HOROVITZ, *supra* note 23, at 2-3; 1 A. LARSON, *supra* note 23, § 4.30, at 25 to 27.

who thus becomes automatically liable, and the employee, who abandons the right to damages at common law,[38] is applicable to co-employees.[39] "[I]mmunity from common law suit for ordinary negligence is part of that which an employee receives for forfeiting his own right to bring a negligence action."[40] The court found that the *quid pro quo* theory, however, does not apply to intentional torts.[41] "One can understand the extension of an employer's immunity to employees when one considers the industrial setting. Accidents are bound to happen. By accepting employment, a worker increases not only the risk of injuring himself but also the risk of negligently injuring others."[42] Injuries due to intentional wrongful conduct, however, are not expected to occur in the workplace. The *Pleasant* court viewed injuries resulting from willful, wanton, and reckless conduct in the same light—such injuries are not of the sort expected to occur in the workplace. Therefore, such behavior falls outside the scope of the immunity.[43]

The *Pleasant* court's second rationale for permitting an injured employee to sue a fellow employee for willful, wanton, and reckless conduct was that "allowing an injured co-worker to sue the tortfeasor serves as a deterrent against future misconduct."[44] The court reasoned that "since negligence connotes unconscious inadvertence, allowing injured workers to sue co-employees would not reduce injuries caused by ordinary negligence. The same cannot be said in cases involving intentional torts."[45] Therefore, the court concluded that "this result will help to deter such conduct in the future."[46]

The *Pleasant* court reasoned that allowing a common-law action against the co-employee would place responsibility upon the actual tortfeasor, where it rightfully belongs.[47] This reasoning appears inconsistent with the theory of enterprise liability on which the workers' compensation system is based.[48] As one commentator noted:

The right to compensation benefits depends on one simple test: Was

38. 2A A. LARSON, *supra* note 23, § 65.11, at 12-1.

39. *Id.* § 72.22, at 14-86.

40. *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249; 2A A. LARSON, *supra* note 23, § 72.22, at 14-86.

41. *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249. The West Virginia Supreme Court has rejected the *quid pro quo* theory. *See* Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634 (1947). *Tawney* involved an action for the death of a truck passenger at a railroad crossing as the result of a co-employee truck driver's negligence. The court reasoned that because employees did not contribute to the workers' compensation fund, giving them any immunity would amount to "gratuitous protection for [their] own misconduct." *Id.* at 563, 44 S.E.2d at 641; *see also* Note, Massey v. Selensky: *Workers' Compensation and Co-Employee Immunity in Montana*, 46 MONT. L. REV. 217, 224-25 (1985) (citing *Tawney* and arguing that the *quid pro quo* rationale cannot apply to co-employees).

42. Andrews v. Peters, 55 N.C. App. 124, 126-27, 284 S.E.2d 748, 750 (1981) (cited with approval in *Pleasant*, 312 N.C. at 716, 325 S.E.2d at 249). For a discussion of *Andrews*, see *infra* text accompanying note 54 and note 55 and accompanying text.

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

44. *Id.*

45. *Id.* at 716, 325 S.E.2d at 249.

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

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

48. *See infra* notes 136-38 and accompanying text.

> there a work connected injury? Negligence, and for the most part, fault, are not in issue and cannot affect the result . . . . Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.[49]

The court, however, relying on the reasoning of the North Carolina Court of Appeals in *Daniels v. Swofford*[50] and *Andrews v. Peters*,[51] rejected the argument that permitting an employee to sue a co-employee would frustrate the goals of the workers' compensation system.

Plaintiff in *Daniels* alleged that defendant, the president of a codefendant corporation, had "intentionally, unlawfully, wantonly and maliciously"[52] assaulted her by kicking her in the right knee. The North Carolina Court of Appeals held that "[s]uch misconduct is outside the realm of industrial accidents which workers' compensation laws were designed to exclusively cover. We will not allow the assaultive employee to use a remedial statute as a shield against financial responsibility for his misconduct."[53]

In *Andrews* defendant crept up behind plaintiff and placed his knee behind hers, causing her to fall and injure herself.[54] After receiving compensation under the Act, plaintiff filed suit against the co-employee defendant. The court concluded that in passing the Act the general assembly did not intend for intentional torts to give rise to co-employee immunity.[55] The *Pleasant* court held that the arguments in *Daniels* and *Andrews* were just as applicable in the context of willful, wanton, and reckless conduct as they were in the context of intentional wrongful conduct.[56]

The court's final reason for giving employees injured through willful, wanton, and reckless conduct a cause of action in tort was that "[i]t 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."[57] This argument is similar to the theory that co-employee

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49. 1 A. LARSON, *supra* note 23, § 2.10.

50. 55 N.C. App. 555, 286 S.E.2d 582 (1982).

51. 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

52. *Daniels*, 55 N.C. App. at 556, 286 S.E.2d at 583.

53. *Id.* at 562, 286 S.E.2d at 586.

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

55. *Id.* at 127, 284 S.E.2d at 750. The court stated that to hold otherwise would relieve co-employees of any responsibility for their actions: "Why should [a co-employee] be concerned about the consequences if the cost of any intentionally-inflicted injury will be absorbed by the industry?" *Id.*

56. *Pleasant*, 312 N.C. at 713-14, 325 S.E.2d at 247.

57. *Id.* at 718, 325 S.E.2d at 250. The *Pleasant* court cited S. HOROVITZ, *supra* note 23, which states:

> Where the employer is guilty of felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. It would be against sound reason to allow the employer 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.

immunity is unconscionable[58] because workers' compensation recoveries traditionally provide only minimal compensation for injuries. Holding a co-employee liable may violate the principle of enterprise liability, which shifts the burden of compensating injured employees to the employer so that it may be passed on to consumers.[59] At least one commentator has argued, however, that the burden is no better distributed when it is disproportionately placed on the injured employee.[60] In response, another commentator has asserted:

> Even among those who contend that the scale of benefits is generally too low, there are few if any who would contend that anything resembling tort principles of amount of recovery should be imported into compensation law. It was never intended that compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering.[61]

Id. at 336. Apparently the court intended to draw an analogy between intentional torts committed by an employer and willful, wanton, and reckless conduct by a co-employee.

58. *See* Note, *supra* note 41, at 225 (co-employee immunity unconscionable because payments made to an employee under the Workers' Compensation Act are inadequate).

The Alabama Supreme Court has declared co-employee immunity under workers' compensation to be unconstitutional as a violation of its open courts provision, Grantham v. Denke, 359 So. 2d 785 (Ala. 1978), which provides that "all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." ALA. CONST. art. I, § 13. For a discussion of co-employee liability under the Alabama Workers' Compensation Act, see Johnson & Cassady, *Co-Employee Lawsuits Under the Alabama Workmen's Compensation Acts*, 14 CUM. L. REV. 267 (1984). North Carolina has a similar constitutional provision: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. I, § 18.

59. *See infra* notes 136-38 and accompanying text.

60. Note, *supra* note 41, at 225.

61. 1 A. LARSON, *supra* note 23, § 2.50, at 12.

Two other reasons have been given for providing an employee a common-law remedy against a co-employee. First, the prevailing view is that unless there is clear language in the statute, the legislature will not be presumed to have acted in derogation of the common law. Unless the legislature has specifically eliminated a common-law remedy by statute, the remedy is deemed to still exist. *See* Roda v. Williams, 195 Kan. 507, 510, 407 P.2d 471, 475 (1965) (holding that parents of employee killed by negligence of co-employee could bring wrongful death action under Kansas Workers' Compensation Act that allowed a common-law tort action against "some person other than the employer"); Hockett v. Chapman, 69 N.M. 324, 325, 366 P.2d 850, 851 (1961) (holding that co-employee was liable in tort for his negligence in automobile accident because New Mexico Workers' Compensation Act broadly stated that an employee may proceed in tort against "any person other than the employer"). In North Carolina this argument has not been successful. As noted by the court in Essick v. City of Lexington, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950):

> The Workmen's Compensation Act is not a mere island in the sea of common law. The statutes creating it, amended from time to time, are superior to the common law in those respects in which they can and do, amend or abrogate it. There is no presumption of superiority in the common law where they seem to clash.

A second rationale is that workers' compensation may pose a danger to workers engaged in dangerous occupations because it provides little incentive for the promotion of industrial safety. A worker who knows he or she will be immune from personal liability for on-the-job accidents may be less safety conscious. *See* Judson v. Fielding, 227 A.D. 430, 237 N.Y.S. 348 (1929), *aff'd*, 253 N.Y. 596, 171 N.E. 798 (1930). In *Judson* the court held that a cause of action against a co-employee existed for the death of a passenger in a car driven by a co-employee at an excessive speed over icy roads. The court reasoned that to "hold that a fellow servant should under no circumstances be liable to another for damages resulting from a negligent or willful act . . . would be fraught with highly dangerous consequences and would remove in a large measure the restraint of personal responsibility of the employee for his acts." *Id.* at 438, 237 N.Y.S. at 354. *But see* Marks, *Erosion of*

Courts and commentators have advanced several reasons in support of providing co-employee immunity under workers' compensation schemes. First, by providing immunity, the Workers' Compensation Act reduces the tension co-employees may feel at the possibility of being sued because of mishaps in the workplace. Co-employee immunity eliminates the possibility of civil actions between employees and thus increases harmony in the workplace.[62]

Second, some courts apply the traditional master-servant vicarious liability test, which provides immunity to an employee whenever he or she is acting within the scope of employment.[63] Under this test, as long as the employee is acting in the employer's interests, he or she "becomes" the employer for purposes of the suit and takes on the employer's immunity.[64]

Third, co-employee immunity has been recognized as a necessary and consistent corollary to the basic workers' compensation principle of enterprise liability.[65] The North Carolina Supreme Court itself has been a major advocate of this position. In *Warner v. Leder*[66] plaintiff passenger was injured in a car driven by defendant co-employee. After receiving benefits under the Workers'

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the Exclusive Workers' Compensation Remedy: Suits Against Co-Employees and Compensation Carriers, 17 A.B.A. FORUM 395 (1981) (criticizing the recent trend towards allowing common-law suits against co-employees and insurance carriers).

62. *See* Note, *supra* note 41, at 225-26; O'Brien v. Rautenbush, 10 Ill. 2d 167, 139 N.E.2d 222 (1956). In *O'Brien* plaintiff attempted to recover damages against a negligent co-employee for injuries suffered in an automobile accident. Holding such an action barred by the Workers' Compensation Act, the court stated:

> In view of the fact that a considerable portion of industrial injuries can be traced to the negligence of a coworker, [co-employee] litigation could reach staggering proportions, and would not only tend to encourage corrupt and fraudulent practices but would also disrupt the harmonious relations which exist between coworkers.

Id. at 174, 139 N.E.2d at 226.

The reasoning in *O'Brien* subsequently has been disapproved, however. *See* Rylander v. Chicago Short-line Ry. Co., 17 Ill. 2d 618, 161 N.E.2d 812 (1959). The *Rylander* court held that the Workers' Compensation Act precludes a common-law action for damages by an employee against a negligent co-employee, but stated that this result primarily follows from the enterprise liability principle of placing the cost of industrial accidents on the industry. *Id.* at 628, 161 N.E.2d at 818.

63. *See* Marks, *supra* note 61, at 398.

64. Idaho uses this approach. *See* Nichols v. Godfrey, 90 Idaho 345, 411 P.2d 763 (1966) (plaintiff could not maintain common-law tort action against co-employee who was driving state truck under the consent and direction of the state and in the course of its business); White v. Ponozzo, 77 Idaho 276, 280, 291 P.2d 843, 845 (1955) (defendant co-employee was acting within scope of his employment as agent of his employer when he injured plaintiff in automobile accident: "His acts and conduct became the acts and conduct of the employer, and the exemption from damages at law extended to the employer by the Workmen's Compensation Law is also by the act extended to co-employees through whom the employer acts."); *see also* House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976) (union member cannot sue fellow union member for negligence in enforcing safety standards against mine fires because fellow members are equivalent to co-employees and acted as agents of their employer).

In North Carolina, however, this approach has been rejected. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966). In *Altman* plaintiff had parked her car in a parking lot maintained by her employer and was struck by a co-employee who was also arriving for work. The *Altman* court refused to limit immunity to only those acts for which the employer would be liable under *respondeat superior*. Under *Altman*, the co-employee is immune from suit so long as he or she is acting within the course and scope of employment. *Id.* at 161, 148 S.E.2d at 24.

65. *See infra* notes 136-38 and accompanying text.

66. 234 N.C. 727, 69 S.E.2d 6 (1952), *overruled in part, Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985). For a general discussion of *Warner*, see Note, *Workmen's Compensation—Right of Employee to Bring Common Law Action Against Negligent Co-Employee*, 30 N.C.L. REV. 474 (1952).

Compensation Act, plaintiff sued defendant for negligence. The court held that the Act foreclosed plaintiff's common-law action.[67] Allowing recovery in tort would defeat the very purpose of the Act, which is to transfer "from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents."[68]

A related criticism of co-employee liability is that it shifts the risk of loss resulting from an accident from the employer and the business to the employee. Under section 97-10.2(f), any award received by an injured worker in a civil action must be used to reimburse the employer or the carrier for expenses incurred and benefits paid out under the Act.[69] Thus, the injured employee is entitled only to the amount of a civil award remaining after the employer has been repaid for workers' compensation benefits.[70] For example, in *Byers v. North Carolina State Highway Commission*,[71] the administratrix of a deceased employee received $7,500 in full settlement of a claim against a company for the negligence of its agent in driving a 40,000 pound load of concrete across a bridge designed to carry only 20,000 pounds.[72] At the time of the settlement, the decedent's employer projected an outlay of over $12,000 in workers' compensation payments on account of the employee's death.[73] The North Carolina Supreme Court held that the reimbursement provisions of section 97-10.2(f) were mandatory and that plaintiff was required to deliver to the employer all of the proceeds of the settlement of death action against the third party.[74] Similarly, the court of appeals has required a third-party tortfeasor's liability carrier to withhold from its wrongful death settlement with the employee's widow the amount of money the employer's carrier had previously paid the widow pursuant to the Workers' Compensation Act.[75] This reimbursement had to be withheld even though it required the insurance carrier to pay an amount over and above the agreed upon settlement reached with the widow.[76] Thus, holding the co-employee liable frees the employer and the compensation carrier from their normal financial responsibilities and places the burden on the co-employee.

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67. *Warner*, 234 N.C. at 732-33, 69 S.E.2d at 9-10.

68. *Id.* at 733, 69 S.E.2d at 10.

69. N.C. GEN. STAT. § 97-10.2(f)(1)(c) (1985). For a summary of this provision, see *infra* note 79. The insurance carrier is granted all rights of the employer in subsection (g). *See generally* 2A A. LARSON, *supra* note 23, §§ 74.00-.42 (discussing the five types of subrogation statutes, acts affecting assignment, distribution of proceeds, and proper parties to third party actions).

70. N.C. GEN. STAT. § 97-10.2(f)(1)(d) (1985). For a summary of this provision, see *infra* note 79.

71. 275 N.C. 229, 166 S.E.2d 649 (1969).

72. *Id.* at 231, 166 S.E.2d at 650.

73. *Id.*

74. *Id.* at 232-34, 166 S.E.2d at 651-52.

75. Williams v. Insurance Repair Specialists, 32 N.C. App. 235, 232 S.E.2d 5 (1977). In *Williams* the third-party tortfeasor's liability carrier entered into an agreement with the deceased employee's widow for the payment of $55,000 in full settlement of her wrongful death claim without the knowledge or consent of the employer's workers' compensation carrier. Thereafter, the compensation carrier agreed to pay the widow a total of $28,500. The court of appeals held that the tortfeasor's liability carrier had to pay the workers' compensation carrier the $28,500 despite the fact that the widow had spent her entire share of the $55,000 wrongful death settlement. *Id.* at 240-41, 232 S.E.2d at 9.

76. *Id.*

Section 97-10.2(c) further shifts the risk of loss by providing that the employer or the employer's carrier may sue a liable co-employee for reimbursement if the injured worker fails to do so within one year.[77] The Virginia Supreme Court has commented on the problems likely to result from allowing employers to sue co-employees directly:

> Instead of the loss of . . . industrial accidents being cast upon business as an expense thereof, the wages of fellow workmen will become an ultimate insurance fund for the exoneration of both industry and compensation insurance carriers for the ultimate loss. Instead of providing relief to workmen, it will place in the power of employers and compensation insurance carriers the right to recoup [losses] from workmen which should be borne by the business.[78]

The *Warner* court noted that under the North Carolina Workers' Compensation Act's subrogation provisions, which provide for the manner of disbursement,[79] the burden would be shifted "to those conducting the business of the employer to the extent of their solvency."[80] Justice Meyer in *Pleasant* echoed this concern in his dissenting opinion: "[Allowing co-employee liability] will not hurt the employer—he can only gain by recovery of amounts already paid out in benefits. It will harm the employee by subjecting him to civil actions to which he is not now exposed."[81] It is unlikely that a co-employee exposed to personal liability will be able to satisfy a large tort judgment. Thus, allowing co-employee liability generally will not promote the central purpose of tort law—to restore the injured party to his or her position before the tort,[82] and it also violates the basic premise of workers' compensation law—to place the burden on the industry so that costs may be passed on to the consumer.[83]

The North Carolina Supreme Court's second major holding in *Pleasant* was that the injured employee need not choose whether to recover under workers'

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77. N.C. GEN. STAT. § 97-10.2(c) (1985); *see supra* note 28 (quoting statute).

78. Feitig v. Chalkley, 185 Va. 96, 104, 38 S.E.2d 73, 76-77 (1946); *see infra* text accompanying note 81.

79. The pertinent provision of the North Carolina Workers' Compensation Act providing for the manner of disbursement and subrogation is N.C. GEN. STAT. § 97-10.2 (1985). Subsection (f) provides that if an injured employee is entitled to or receives benefits under the Act and is also successful in obtaining a common-law judgment against the negligent "third party," the proceeds are to be distributed in the following order of priority: First, to the payment of actual court costs; second, to the employee's attorney for fees incurred in the successful tort action or settlement; third, to the employer for medical treatment or compensation benefits paid or to be paid under the Act; and last, to the injured employee who brought the suit or his or her personal representative. Subsection (g) grants the employer's workers' compensation carrier the right of subrogation to any rights and liabilities the employer may have. Subsection (h) grants to each of the parties in subsection (f) an automatic lien on any favorable judgment or settlement received in the common-law tort action. Neither the employer nor the employee can accept any payment from the negligent third party or release him or her from liability unless the other party gives written consent. *See* N.C. GEN STAT. § 97-10.2 (f), (g), (h) (1985).

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

81. *Pleasant*, 312 N.C. at 724, 325 S.E.2d at 253 (Meyer, J., dissenting).

82. "The civil action for a tort . . . is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer." PROSSER & KEETON, *supra* note 3, § 2, at 7.

83. *See infra* notes 136-38 and accompanying text.

compensation or under common law but may recover under both.[84] The court gave two reasons in support of this decision. First, because the negligent co-employee neither participates in the workers' compensation claim nor contributes to the amount awarded, he or she cannot suffer any undue prejudice by being sued after an award has been made.[85] The court of appeals had previously used this reasoning in *Andrews v. Peters.*[86] In deciding to allow recovery against a co-employee who had committed an intentional tort,[87] the court of appeals noted the difference between those cases in which the defendant is an employer and those in which the defendant is a co-employee. If the defendant employer is liable in tort, the employee should be required to make an election between common-law and workers' compensation recoveries.[88] Under the Workers' Compensation Act, either the employer or the employer's insurance carrier must defend the claim and satisfy any amount of compensation awarded.[89] "Therefore a tort action in addition to the statutory action means the employer must defend against the same claim in two separate forums."[90] The court held that the same reasoning does not apply to a co-employee who "has contributed neither to the defense of any compensation claim nor to the satisfaction of any award."[91]

The second reason advanced by the *Pleasant* court for allowing both workers' compensation and common-law recoveries was based on the method of disbursement provided by the Act.[92] Any amount the injured worker receives from the tort action will be disbursed according to the provisions of North Carolina General Statutes section 97-10.2, which requires reimbursement to the employer or the insurance company for amounts paid under the Workers' Compensation Act.[93] Because the employer or the carrier is entitled to reimbursement from any tort proceeds the injured employee may receive,[94] "the burden otherwise placed upon an innocent employer or insurer" may be reduced.[95]

The advantages of allowing recovery under workers' compensation and in tort are evidenced by the dilemma that may arise when a plaintiff is forced to elect only one remedy. In South Carolina, where a plaintiff may be required to elect a single remedy,[96] such a dilemma arose in *Talley v. Johns-Manville Sales*

84. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249-50.

85. *Id.*

86. 55 N.C. App. 124, 130, 284 S.E.2d 748, 751 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d (1982).

87. *Id.*; *see supra* notes 54-55 and accompanying text.

88. *Id.* at 129, 284 S.E.2d at 751.

89. *Id.*

90. *Id.*

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

92. *See supra* note 79.

93. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249-50. N.C. GEN. STAT. § 97-10.2 and its effect on disbursement are discussed *supra* at text accompanying notes 69-70 and *supra* at note 79.

94. N.C. GEN. STAT. § 97-10.2(f)(1)(c) (1985) (summarized *supra* note 79).

95. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249-50.

96. *See* Fisher v. South Carolina Dept. of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982) (plaintiff who entered into a settlement with a third-party tortfeasor without the consent of the workers' compensation carrier had made an election of remedies and could not thereafter maintain a workers' compensation claim for additional benefits).

Corp.[97] Plaintiffs in *Talley* were diagnosed as having asbestosis, a slowly progressive occupational disease that frequently is diagnosed years before any disability actionable under workers' compensation occurs. The statute of limitations in these cases, however, generally runs from the date of diagnosis.[98] The South Carolina Supreme Court summed up plaintiffs' position: "If [plaintiffs] bring and conclude their third-party actions, they will be barred from seeking Workers' Compensation. . . . If they wait until they become disabled for the purposes of worker's compensation, their third-party actions will be barred by the statute of limitations."[99] Such an unjust result is a good reason to allow recovery under both workers' compensation and tort.[100]

In North Carolina, however, the most compelling argument for allowing election of remedies is the wording of the workers' compensation statute itself:

> Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and *the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.*[101]

Thus, if the injured employee complies with the other sections of the Act, he or she may bring a common-law action against the third party in addition to seeking recovery under workers' compensation.[102]

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97. 285 S.C. 117, 328 S.E.2d 621 (1985).

98. *Id.* at 118, 328 S.E.2d at 622. For a discussion of how statutes of repose may unconstitutionally bar actions by plaintiffs with delayed manifestation diseases such as asbestosis even if the action is brought within the applicable statute of limitations, see Note, Wilder v. Amatex Corp.: *A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases*, 64 N.C.L. REV. 416 (1986).

99. *Talley*, 285 S.C. at 119, 328 S.E.2d at 622.

100. The South Carolina Supreme Court's solution was a makeshift one. Plaintiffs were granted a stay of their third-party actions until their workers' compensation actions were resolved or "[t]he legislature solves this dilemma." *Talley*, 285 S.C. at 119, 328 S.E.2d at 623. As the dissenting justice pointed out, it is likely that the matter will remain stayed for many years, forcing defendants to retain attorneys and keeping the lawsuits on the dockets for years to come. *Id.* at 120-21, 328 S.E.2d at 623. (Littlejohn, C.J., dissenting).

101. N.C. GEN. STAT. § 97-10.2(i) (1985) (emphasis added).

102. The requirement that the employee comply with the other sections of the Workers' Compensation Act protects against a double recovery. N.C. GEN. STAT. § 97-10.2 (1985) requires reimbursement to the employer for expenses incurred under the Act, grants each party a lien upon any amount awarded, and provides that no settlement can be made against the third party without the written consent of the employer. For a summary of these provisions, see *supra* note 79.

In Barrino v. Radiator Specialty Co., No. 439A84 (N.C. Feb. 18, 1986), the supreme court acknowledged that an employee injured by a co-employee's willful, wanton, and reckless conduct can recover under both the Workers' Compensation Act and in tort. *Id.* at 14-15. The court, however, refused to hold that an employee injured by an *employer's* willful, wanton, and reckless conduct could bring an action in tort. The court held that only proof of *intentional* conduct by the employer was sufficient to remove the employer from the shield against tort liability provided by the Workers' Compensation Act. *Id.* at 9-10. Even if plaintiff's allegations had established the intent necessary to remove the immunity an employer normally enjoys under the Workers' Compensation Act, the fact that plaintiff had already received compensation benefits under the Act established a binding election of remedies. *Id.* at 18-19; *see also id.* at 1 (Billings, J., concurring) (stating that the court did not need to decide whether defendant was guilty of an intentional assault because plaintiff had made a binding election in receiving compensation under the Act). In his dissent, Justice Martin disagreed with the court's election of remedies analysis. First, the election of remedies doctrine has only been applied in North Carolina to cases involving negligence; it is not appropriate to apply it in a case in

The decision in *Pleasant* raises several new issues.[103] The principles enunciated in *Pleasant* suggested the question whether an injured employee may sue the *employer* in tort for willful, wanton, and reckless conduct. In assessing the potential liability of an employer, the *Pleasant* court stated: "The issue in this case is whether an injured worker may maintain a common law tort action against a *co-employee* whose willful, wanton and reckless negligence caused the worker's injury. We need not consider and do not decide whether an *employer* may be sued for similar conduct."[104]

The court's reluctance to decide the question of employer liability in *Pleasant* foreshadowed its ultimate resolution of this question less than a year later in *Barrino v. Radiator Specialty Co.*[105] In *Barrino* the supreme court held that the Workers' Compensation Act provided the exclusive remedy for an employee injured through an employer's willful, wanton, and reckless conduct.[106] Plaintiff in *Barrino*, the father and administrator of decedent employee's estate, filed suit against decedent's employer after decedent was killed in a factory explosion.[107] The complaint alleged that the employer had operated equipment utilizing liquified petroleum gases without adequate inspections and in violation of safety regulations, had committed six separate violations of the National Electrical Code and the Occupational Safety and Health Act of North Carolina, had covered meters designed to detect dangerous gases and vapors so as to render them inoperative, had used equipment without explosion-proof safeguards, and had turned off the warning alarms and instructed the employees to continue working despite

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which the plaintiff has alleged an intentional tort. Second, the defendant did not meet his burden of demonstrating that there is an inherent inconsistency in receiving both workers' compensation payments and a recovery in tort. Third, it was equitable for the court to impose the requirement that an injured employee forego all compensation while pursuing a common-law tort claim. Last, the reasoning that an employee suffering economic pressures "freely" decides to accept compensation under the Act rather than pursue a recovery in tort is sophistic. *Id.* at 8-10 (Martin, J., dissenting).

103. A tangential issue that arises in the wake of *Pleasant* concerns the problems that an employee is likely to face in being insured for liability to a co-employee. There are usually three insurance policy carriers involved in a workers' compensation case: the employer's workers' compensation carrier, the employer's general liability carrier, and the sued co-employee's personal carrier. The typical workers' compensation policy does not cover tort actions and does not cover direct actions by an injured employee against a co-employee because the employer is the named insured. The typical employer's general liability policy contains a clause that excludes compensation to any employees. Finally, the co-employee's general liability policy, most often a homeowner policy, usually contains an exclusion for conduct arising out of business activities. As a result, the co-employee may be left without any insurance coverage and may be faced with trying to satisfy a common-law judgment with personal assets and savings. *See* Marks, *supra* note 61, at 399-401 (discussing various potential problems involving insurance policies). *But see* R. KEETON, INSURANCE LAW § 7.6(a) (1971) (discussing source and nature of insurer's duty to defend and the general position that the obligation to defend is determined by the nature of the claim irrespective of whether it is meritorious); Kircher & Quinn, *Insurer's Duty To Defend—An Overview*, in INSURER'S DUTY TO DEFEND 7 (D. Hirsch & A. Karpowitz eds. 1978) (discussing when the insurer's duty to defend may arise, the alternatives possible when the duty is doubtful, and the liability the insurer may face for a wrongful refusal to defend).

104. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250.

105. No. 439A84 (N.C. Feb. 18, 1986).

106. *Id.*, slip op. at 3. Justice Meyer, who dissented in *Pleasant*, wrote the majority opinion. The court, by a vote of four to three, affirmed the trial court's grant of defendant employer's motion for summary judgment. A strong dissent was filed by Justice Martin, joined by Justices Exum and Frye.

107. *Id.* at 3-4.

the alarms.[108] Citing the "virtually unanimous rule throughout the country,"[109] the court held that even considering the complaint in the light most favorable to the plaintiff, the allegations were insufficient to overcome the exclusiveness of the workers' compensation remedy.[110]

The *Barrino* court stated that the rationales for allowing a common-law tort action against a co-employee did not apply to an employer. First, an employer actively participates in the defense of any compensation claim and in the satisfaction of any award.[111] Therefore, the employer should not be required to defend against the same claim in another forum.[112] Second, the rationale in *Pleasant*, that co-employee liability reduces the burden on an innocent employer, did not apply because "recovery in the civil action . . . can only result in greater liability even if credit is given for the benefits paid under the Act."[113] Last, the employer, unlike the co-employee, has paid into the compensation system in exchange for tort immunity.[114]

It can be persuasively argued, however, that if a co-employee loses immunity under the Workers' Compensation Act due to willful, wanton, and reckless conduct, an employer who engages in the same type of conduct[115] should also lose the Act's immunity. Justice Martin made this argument in his dissenting opinion:

> In the present case, company officials systematically flaunted basic safety regulations and knowingly subjected every employee at the . . . plant to death or serious injury. . . . If the defendant's conduct in *Pleasant* constitutes willful, wanton and reckless negligence, then

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108. *Id.* at 4-5.

109. *Id.* at 10. West Virginia has held an employer liable in tort for willful, wanton, and reckless misconduct. In Mandolidis v. Elkins Indus., 246 S.E.2d 907 (W. Va. 1978), the West Virginia Supreme Court noted that the purpose of the workers' compensation system is to remove negligently caused injuries from the common-law tort system. *Id.* at 911. When an act involves willfulness and awareness of danger, it ceases to be negligent and becomes deliberate misconduct. Therefore, "when death or injury results from wilful, wanton or reckless misconduct such death or injury is no longer accidental in any meaningful sense of the word, and must be taken as having been inflicted with deliberate intention for the purposes of the workmen's compensation act." *Id.* at 914.

110. *See Barrino*, slip op. at 10-13 (discussion of cases requiring deliberate intent to commit the specific injury as opposed to intentionally permitting dangerous working conditions to exist); *see also* 2A A. LARSON, *supra* note 23, § 69.20, at 13-111 (discussing the high level of intent required to remove an employer from workers' compensation immunity).

111. *Barrino*, slip op. at 17.

112. *See supra* text accompanying notes 88-91.

113. *Barrino*, slip op. at 17. *See supra* text accompanying notes 92-95. The third reason given by the *Barrino* court, that plaintiff had made a binding election of remedies upon receiving the workers' compensation benefits, is discussed *supra* note 102.

114. *See supra* note 41.

115. It is clearly the law in North Carolina that an employer loses the Act's immunity for intentional injuries. "We have recognized that, in cases involving intentional injury by the employer, the employee cannot be relegated to the limited recovery afforded by the Act, but may bring a common-law action against the employer." *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247; *see Warner*, 234 N.C. at 733, 69 S.E.2d at 10 (holding that an action against an employer was not maintainable because "it was admitted in the trial below that the defendant did not intentionally injure the plaintiff"), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985); Essick v. City of Lexington, 232 N.C. 200, 210, 60 S.E.2d 106, 114 (1950) (quoting S. HOROVITZ, *supra* note 23, at 336: "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 . . . .").

> clearly the conduct of the defendant-employer in this case embodies a degree of culpability beyond negligence and as such the exclusivity provision of the Workers' Compensation Act should not serve to shield the employer from liability for his tortious conduct.[116]

In fact, there may be more compelling reasons to remove the shield of immunity from an employer who is guilty of such conduct than to remove it from a co-employee because the consequences of employer misconduct can be much broader and the resulting harm greater. Because the safety of a large group of workers may be involved, as well as that of the public in general, employers should be held to a higher standard of care.[117] Further, as the dissent in *Barrino* noted, the general assembly's stated desire for workplace safety[118] is hindered by allowing "an employer to assume that no matter how egregious and deliberate his misconduct, the Workers' Compensation Act will allow him statutory immunity."[119] Allowing an employer to hide behind the protection of the Workers' Compensation Act violates public policy and inevitably "encourage[s] the employer to weigh the economic costs of compliance with safety regulations against the costs of workers' compensation and to choose the most cost-effective course of conduct."[120] Thus, it is difficult to reconcile the reasoning in *Barrino* with *Pleasant* simply by showing that in the prior case the defendant was an employer and in the latter case a co-employee. Not only was the degree of culpability significantly greater in *Barrino*, but also the effect and the scope of the employer's behavior greatly exceeded that in *Pleasant*.

A second issue raised by the *Pleasant* decision is whether the employer, under the principles established in *Pleasant*, may be held vicariously liable under the doctrine of *respondeat superior*[121] for the willful, wanton, and reckless conduct of an employee. In North Carolina, the answer appears to be that the employer cannot be held liable. When an employee has committed a malicious or intentional tort, the employer cannot be held liable unless it is shown that the

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116. *Barrino*, slip op. at 7-8 (Martin, J., dissenting).

117. *See id.* at 4 (Martin, J., dissenting) ("While this Court should be concerned with deterring negligent and injurious horseplay on the part of a co-employee, we should be more concerned with deterring intentional employer conduct which is likely to endanger the lives and safety of thousands of workers."); *see also* Barrino v. Radiator Specialty Co., 69 N.C. App. 501, 317 S.E.2d 51 (1984), *aff'd*, No. 439A84 (N.C. Feb. 18, 1986). Judge Phillips, dissenting from the opinion of the court of appeals in *Barrino*, argued:

> [When] it is alleged that defendant's plant handles, stores and utilizes liquified petroleum gases; and the death of plaintiff's decedent was caused by an explosion and fire that resulted from various deliberate acts of defendant . . . the welfare of all workers, their families, and the public at large requires . . . that defendant not be deemed immune from suit because of the Workers' Compensation Act.

Id. at 504-05, 317 S.E.2d at 53 (Phillips, J., dissenting).

118. "The 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 . . . ." N.C. GEN. STAT. § 95-126(b)(2) (1985).

119. *Barrino*, slip op. at 4 (Martin, J., dissenting).

120. *Id.* at 5 (Martin, J., dissenting).

121. In North Carolina an employer is liable under *respondeat superior* if: (1) the employee was negligent, (2) such negligence was the proximate cause of the injury, and (3) an employer-employee relationship existed at the time of the injury and in respect to the act causing the injury. *See* Graham v. North Carolina Butane Gas Co., 231 N.C. 680, 58 S.E.2d 757 (1950).

tort was committed within the scope of the employee's employment and in furtherance of work the employee was hired to do.[122] In the case of an assault, it must be shown that the employer expressly authorized the action.[123] Otherwise, the injury is " 'just one more industrial mishap in the factory, of the sort [the employer] has a right to consider exclusively covered by the compensation system.' "[124] Because the *Pleasant* court has equated intentional torts and willful, wanton, and reckless conduct, presumably an employer cannot be held liable under the theory of *respondeat superior* unless the employer expressly authorizes the action.

A final issue raised by the *Pleasant* decision concerns the difficulty in distinguishing between a willful, wanton, and reckless act and an act that merely results from a "residuum of vivacity and good nature which frequently manifests itself in joking and harmless pranks."[125] The North Carolina Supreme Court has recognized that:

> It is a self-evident fact that men required to work in daily and intimate contact with other men are subjected to certain hazards by reason of the very contact itself because all men are not alike. Some are playful and full of fun; others are serious and diffident. *Some are careless and reckless*; others are painstaking and cautious. The assembling of such various types of mind and skill into one place must of necessity create and produce certain risks and hazards by virtue of the very employment itself.[126]

This recognition is at the heart of the dissent in *Pleasant*.[127] To Justice Meyer, the facts showed only "playful, although admittedly dangerous, *horseplay*—an attempt to scare Pleasant by driving close to him and scaring him by blowing the horn."[128]

Two North Carolina cases have addressed the issue whether an injured employee can recover under workers' compensation for injuries suffered while engaged in horseplay.[129] In *Chambers v. Union Oil Co.*[130] plaintiff was filling a fuel tank while taunting a co-employee about a pistol the co-employee was carrying. The co-employee tossed the gun into the truck and it accidentally dis-

122. Robinson v. McAlhaney, 214 N.C. 180, 182, 198 S.E. 647, 649 (1938). *See generally* 8 N.C. INDEX 3D *Master and Servant* § 34.2, at 535 (1977) (discussing an employer's liability for an employee's intentional, reckless, or malicious acts).

123. *Daniels*, 55 N.C. App. at 560, 286 S.E.2d at 585.

124. *Id.* (quoting 2A A. LARSON, *supra* note 23, § 68.21, at 13-32).

125. Chambers v. Union Oil Co., 199 N.C. 28, 31, 153 S.E. 594, 596 (1930) (injury to employee caused by accidental discharge of fellow worker's pistol when fellow worker threw pistol into a truck).

126. *Id.* at 31, 153 S.E. at 595 (emphasis added). In Bare v. Wayne Poultry Co., 70 N.C. App. 88, 94, 318 S.E.2d 534, 539 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985), the North Carolina Court of Appeals cited Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930), for "its proper and insightful recognition that the workers' compensation system is based upon the realities of human conduct, and that [workers'] occasionally relieving the tedium of their labors by sportive and foolish acts is a routine and accepted incident of employing them."

127. *See Pleasant*, 312 N.C. at 718, 325 S.E.2d at 250 (Meyer, J., dissenting).

128. *Id.*

129. The horseplay doctrine holds that if an employee is injured while engaged in play, he or she is barred from recovery regardless of whether he or she participated in the particular prank. Chambers v. Union Oil Co., 199 N.C. 28, 32, 153 S.E. 594, 596 (1930); *see also* 1A A. LARSON, *supra* note

charged, injuring plaintiff in the foot. The court held that plaintiff could recover under the Workers' Compensation Act irrespective of whether the activity could have been regarded as horseplay.[131] Plaintiff in *Bare v. Wayne Poultry Co.*[132] was cut by a chicken deboning knife. Plaintiff had playfully cut a co-employee's apron string and the co-employee was trying to retaliate. He missed and cut plaintiff's thigh. The court held that the horseplay did not put plaintiff beyond the protection of the Workers' Compensation Act.[133]

Pleasant can be distinguished from these cases on several grounds. Unlike the plaintiffs in *Chambers* and *Bare*, the plaintiff in *Pleasant* was attempting to obtain compensation in addition to that already received under the Workers' Compensation Act. Further, the negligence at issue in the horseplay cases was that of the injured employee. In *Pleasant* the negligence of the co-employee was at issue. Perhaps the courts in *Chambers* and *Bare* viewed the acts involved more leniently in order to find the conduct of an injured employee within the scope of employment so that the employee could recover under workers' compensation. There is no reason, however, to adopt such a lenient approach when the acts of an employee tortfeasor are involved.

Justice Meyer's dissent was highly critical of the majority's reasoning in *Pleasant*. He rejected the idea that reckless or wanton conduct is the equivalent of intentional conduct: "Where the employee . . . intends only to *do the act* and

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23, § 23.10, at 5-161 (uniform denial of compensation in older cases based upon the theory that all sportive assaults were foreign to the peculiar risks of the employment).

In North Carolina the rule has been severely criticized as "inconsistent with the underlying philosophy of compensation acts," Bare v. Wayne Poultry Co., 70 N.C. App. 88, 94, 318 S.E.2d 534, 539 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985), and nothing more than "the old 'fellow-servant' doctrine . . . appearing in a brand-new suit of legal clothes and parading through the law under the brand-new name of 'horseplay.'" *Chambers*, 199 N.C. at 32, 153 S.E. at 596. Because of similar criticisms, the majority of jurisdictions allow for recovery when the injured employee took no part in the horseplay and was going about his or her duties. *See, e.g.*, Gates Rubber Co. v. Industrial Comm'n, 112 Colo. 480, 150 P.2d 301 (1944) (employee entitled to recover under Workers' Compensation Act when he was playfully pushed off a roller on which he was sitting and injured himself); Ivy H. Smith Co. v. Kates, 395 So. 2d 263 (Fla. Dist. Ct. App. 1981) (compensation awarded to employee when co-employee threw a vine at him and yelled "snake" causing him to jump up and down in fright and run until he suffered a heart attack); Johnson v. Zurich Gen. Accident & Liab. Ins. Co., 161 So. 667 (La. App. 1935) (watchman's widow allowed to receive workers' compensation benefits when husband died as a result of a heart attack when kidnapped by his co-employees as a joke); Carvalho v. Decorative Fabrics Co., 117 R.I. 231, 366 A.2d 157 (1976) (employee injured when co-employee removing lint from his clothing with an air hose stuck the hose up the employee's rectum as a joke); Sizemore v. State Workmens' Compensation Comm'n, 160 W. Va. 407, 235 S.E.2d 473 (1977) (employee injured by a fellow worker hitting him on his hardhat with the handle from a hammer). For additional cases and a discussion of the general rule that nonparticipating victims of horseplay may recover under their state's Workers' Compensation Act, see 1A A. LARSON, *supra* note 23, § 23.10.

Whether the doctrine of horseplay is a viable defense against employer liability in North Carolina remains undecided. *See* Bare v. Wayne Poultry Co., 70 N.C. App. 88, 93, 318 S.E.2d 534, 538 (1984) (discussing the opinion in *Chambers* and noting that although some discussion of the defense was made, "that question was not before the Court"), *disc. rev. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). *But see Pleasant*, 312 N.C. at 721, 325 S.E.2d at 251 (Meyer, J., dissenting) ("As this plaintiff neither initiated nor participated in the horseplay resulting in his injury his claim is covered by our Act.").

130. 199 N.C. 28, 153 S.E. 594 (1930).

131. *Id.* at 33, 153 S.E. at 596.

132. 70 N.C. App. 88, 318 S.E.2d 534 (1984).

133. *Id.* at 91-92, 318 S.E.2d at 537-38.

clearly does not intend to *do the injury*, negligence is not eliminated. '[T]he idea of *negligence* is eliminated only when the *injury* or damage *is intentional*.' "[134]

In a workers' compensation context, therefore, Justice Meyer would require an intent to injure, as opposed to an intent merely to do the act, for common-law liability to be imposed.[135] This requirement is consistent with the basic policies underlying workers' compensation. Unlike actions involving punitive damages or second degree homicide, in workers' compensation cases there is an interest that mitigates against imposing liability on the individual. The entire system of workers' compensation is based upon the enterprise liability theory.[136] Under this theory there is a strong preference for holding the employer liable because "the cost of the product should bear the blood of the workman."[137] That is, the burden of the injury should be passed on to the consumers of the product instead of being shouldered by the employee.[138] The majority's holding in *Pleasant* frustrates this basic policy.

The holding in *Pleasant* may also be criticized for another reason. By allowing an injured employee a tort recovery, the *Pleasant* court unnecessarily eroded the immunity provision of the Workers' Compensation Act. There was no need for the court to enter the "twilight zone" of willful, wanton, and reckless conduct in reaching its conclusion that defendant should be held liable for the injury he caused plaintiff.[139] The court should have held that defendant lost his immunity under the Act because he committed a battery—an intentional tort.

The evidence at trial conclusively established that defendant intended to scare plaintiff by driving as close to him as possible and blowing the horn.[140] According to North Carolina law, such an act constitutes an assault.[141] The contact of defendant's van with plaintiff was therefore a battery. The essential

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134. *Pleasant*, 312 N.C. at 724, 325 S.E.2d at 253 (quoting Foster v. Hyman, 197 N.C. 189, 191, 148 S.E. 36, 38 (1929)).

135. *Id.* In support of his position, Justice Meyer cited Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960), *overruled in part*, *Pleasant*, 312 N.C. 710, 325 S.E.2d 244 (1985), wherein the court stated: "There is no evidence of any intention on the part of defendant *to injure* plaintiff." *Id.* at 545, 114 S.E.2d at 354 (emphasis added by Justice Meyer). Justice Meyer apparently believed the emphasized language highlighted the distinction between intent to do the act and intent to injure. *Pleasant*, 312 N.C. at 724, 325 S.E.2d at 253.

136. *See* 1 A. LARSON, *supra* note 23, § 2.20.

137. PROSSER & KEETON, *supra* note 3, § 80, at 573 (quoting A. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 401, 517 (1912)).

138. As one commentator noted:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 A. LARSON, *supra* note 23, § 2.20, at 5.

139. *See supra* text accompanying note 1.

140. The plaintiff saw the van approaching while it was 20 to 30 feet away. The plaintiff was unable to get out of the way and was therefore hit by the van. *See supra* note 15 and text accompanying notes 12-15; *see also Pleasant*, 312 N.C. at 718-21, 325 S.E.2d at 250-51 (Meyer, J., dissenting) (reproduction of the testimony of the defendant at trial).

141. The North Carolina Supreme Court has defined assault as the intent to create an immediate

elements of a battery are: (1) the intent to cause a harmful or offensive contact or the intent to create an imminent apprehension of such a contact, and (2) the actual occurrence of such a contact.[142] Defendant intended to create the imminent apprehension of a harmful or offensive contact and such a contact actually occurred. The court, therefore, could have found defendant liable by simply recognizing that the evidence established an intentional tort and that plaintiff was entitled to recover under the rule of *Andrews*.[143]

In *Pleasant* the court undertook to provide a remedy to an innocently injured employee and in the process expanded workers' liability under the workers' compensation system in a way that frustrates the very purposes for which the Workers' Compensation Act was created. The holding removed the burden of the injury from the consumer and placed it upon the employee. This result effectively disadvantages thousands of North Carolina employees by increasing the number of cases in which employees can be stripped of their immunity from liability in tort.

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apprehension of a harmful or offensive contact with such an apprehension resulting. Dickens v. Puryear, 302 N.C. 437, 444-45, 276 S.E.2d 325, 331 (1981).

142. PROSSER & KEETON, *supra* note 3, § 9, at 39; RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

The doctrine of transferred intent does not apply in this case. Transferred intent would apply if defendant had driven a van towards plaintiff with the intent to scare him (assault) but had unintentionally scared or hit a third person. *See* Prosser, *Transferred Intent*, 45 TEX. L. REV. 650 (1967) (discussing the history of the doctrine and the limits of its application).

143. *See supra* note 55 and accompanying text. This suggestion was rejected by the court of appeals in *Pleasant*, *supra* note 20, but the supreme court never addressed the issue.