

# Oklahoma Law Review

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Volume 65 | Number 1

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2012

## How Exclusive is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret

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### Recommended Citation

Matthew K. Brown, *How Exclusive is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 OKLA. L. REV. 75 (2012), <https://digitalcommons.law.ou.edu/olr/vol65/iss1/3>

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## NOTES

### How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down *Parret*

#### *I. Introduction*

Workers' compensation generally provides the exclusive remedy for injured employees.<sup>1</sup> That is, employees injured on the job must pursue their claims against their employers through the workers' compensation system rather than through the traditional common law court system in which plaintiffs ordinarily pursue tort claims. Not only are injured employees jurisdictionally limited to the workers' compensation courts in pursuing claims against employers, their recovery for personal injuries sustained on the job is also limited to the relief afforded them through the workers' compensation system—thus the determination of liability is also exclusive.

The workers' compensation exclusive remedy limitation developed through a delicate legislative compromise in response to competing public policy concerns.<sup>2</sup> In this compromise, “both the employer and the employee relinquished certain rights to obtain other advantages.”<sup>3</sup> When an employer intentionally injures an employee, however, the public policy rationale motivating workers' compensation exclusivity is weakened. In fact, many states have recognized an exception to the exclusive remedy limitation if the employer intentionally injures the employee.<sup>4</sup> In those situations, the employee's remedy is not limited to those available under the workers' compensation system.<sup>5</sup> Instead, the employee may choose to pursue his or her claim either through the workers' compensation system or through the traditional common law court system.<sup>6</sup>

Now that the door allowing an exception to the workers' compensation exclusive remedy has been opened for an employer's intentional misconduct, the debate regarding how to define intent for purposes of this exception is raging in state courts and legislatures across the country.<sup>7</sup> Two

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1. *See, e.g.*, 85 OKLA. STAT. § 302 (2011).

2. *See Kohr v. Raybestos-Manhattan, Inc.*, 522 F. Supp. 1070, 1072 (E.D. Pa. 1981) (quoting *Wagner v. Nat'l Indem. Co.*, 422 A.2d 1061, 1065 (Pa. 1980)).

3. *See id.*

4. *See Appendix.*

5. *See, e.g.*, 85 OKLA. STAT. § 302.

6. *See, e.g., id.*

7. *See Appendix.*

primary definitions of intent compete for acceptance: (1) purpose to cause injury and (2) knowledge of the substantial certainty of injury.<sup>8</sup> Behind this conflict is the public policy question of what weight to give the rights of injured employees to workplace safety and automatic compensation versus employers' interests in limited and foreseeable liability.

In the most recent legislative session, Oklahoma's legislature authoritatively weighed in on the debate, defining "intent" for purposes of the exclusivity provision as the "willful, deliberate, specific intent of the employer to cause such injury."<sup>9</sup> In so doing, the Oklahoma legislature effectively overturned the Oklahoma Supreme Court decision *Parret v. UNICCO Service Co.* In *Parret*, the court adopted a broader definition of intent than the current statutory formulation, holding that intent includes: (1) purpose to injure and (2) knowledge of the substantial certainty of injury.<sup>10</sup>

Part II of this note discusses the historical context in which workers' compensation laws developed and the policies motivating these laws. Part III explains the two competing standards for intent-based exceptions to workers' compensation exclusivity and analyzes how courts have applied the two standards. Part IV explores Oklahoma's approach to defining intent. This part begins by tracing the evolution of the intentional tort exception in pre-*Parret* cases, continues with a thorough analysis of the *Parret* decision and *Parret's* application in subsequent cases, and concludes with an overview of the legislature's 2010 response as manifested in the amended statute. Part V analyzes the competing standards in light of the policies motivating workers' compensation law. Considering these policies, this part argues that the Oklahoma legislature adopted the proper standard of intent—purpose to injure. Part VI briefly summarizes and concludes.

## *II. Historical Context Motivating Workers' Compensation Statutes and Oklahoma's Codification of Workers' Compensation*

### *A. An Industrial Bargain Between Employers and Employees*

The socio-economic climate of America at the turn of the twentieth century demanded legislation to protect workers.<sup>11</sup> As the United States

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8. See *Davis v. CMS Cont'l Natural Gas, Inc.*, 23 P.3d 288, 294 (Okla. 2001).

9. 85 OKLA. STAT. § 302.

10. See *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 579 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33.

11. *Id.* at 577-78.

rapidly industrialized, workplace injuries skyrocketed.<sup>12</sup> At the same time, employees could not recover for these injuries against their employers because common law defenses such as assumption of risk, contributory negligence, and the fellow servant doctrine shielded employers from liability.<sup>13</sup> The injuries workers sustained frequently resulted in permanent disability.<sup>14</sup> As a result, the injured employee—often his family’s sole breadwinner—could not earn a living, leaving his family destitute.<sup>15</sup>

Workers’ compensation statutes, first enacted in 1908 and now adopted in every state, emerged to address this problem.<sup>16</sup> These statutes are primarily designed to prevent injured workers and their families from falling into destitution.<sup>17</sup> Workers’ compensation benefits provide injured employees and their families a modest living and “prevent them from becoming public charges.”<sup>18</sup> Initially, these statutes covered only employees in ultra-hazardous occupations; however, today, workers’ compensation has been expanded to cover workers in nearly every occupation.<sup>19</sup>

To achieve these purposes, an “industrial bargain” was imposed upon injured employees and their employers.<sup>20</sup> Employees “gave up the right to bring a common law negligence action against the employer.”<sup>21</sup> In return, employees received automatic benefits irrespective of the employer’s fault.<sup>22</sup> These guaranteed benefits reduced the costs, delay, and uncertainty of litigation, providing employees with a “swift and certain” recovery.<sup>23</sup>

Employers, on the other hand, gave up common law defenses such as assumption of risk, contributory negligence, and the fellow servant doctrine. Historically, when asserted, the fellow servant doctrine entirely

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12. *See id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. *See id.*; *see also* 1 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 2.08 (rev. ed. 2011) (“[I]n 1963, the last state, Hawaii, came under the system.”).

17. *Parret*, 127 P.3d at 577-78.

18. *Id.* (quoting *Corbin v. Wilkinson*, 53 P.2d 45, 48 (Or. 1935)).

19. *See* 1 LARSON, *supra* note 16, § 2.07 (“All but one [state], Wyoming, have since broadened their scope.”); *see also* *Ragsdale v. Wheelabrator Clean Water Sys., Inc.*, 959 P.2d 20, 22 (Okla. Civ. App. 1998).

20. *Parret*, 127 P.3d at 578.

21. *Id.*

22. *Id.*

23. *See* *Copass v. Ill. Power Co.*, 569 N.E.2d 1211, 1216 (Ill. App. Ct. 1991).

denied the injured employee's recovery.<sup>24</sup> In return for relinquishment of common law defenses, the employer "received reduced exposure to liability"<sup>25</sup> as the employer's liability under workers' compensation schemes is both "limited and determinate."<sup>26</sup>

### *B. How Workers' Compensation Works*

The hallmark of workers' compensation is the employee's automatic entitlement to predetermined benefits if the employee "suffers a 'personal injury by accident arising out of and in the course of employment.'"<sup>27</sup> Types of compensable injuries, unlike tort, are limited to those "which either actually or presumptively produce disability and thereby presumably affect earning power."<sup>28</sup>

In this system, fault proves generally immaterial, both from the perspective of the employee and the employer. An employee's contributory negligence fails to bar or reduce recovery, and an employer's freedom from fault does not abrogate or reduce his liability.<sup>29</sup> If "an employee experiences . . . a job related injury, the employer is obligated to make payments pursuant to the Act"<sup>30</sup>

Workers' compensation benefits are predetermined, based upon the employee's: (1) average weekly wage; (2) length of disability (permanent or temporary); (3) extent of disability (total or partial); and (4) type of injury.<sup>31</sup> Considering these factors, an employee's cash-wage benefits generally consist of "one-half to two-thirds of the employee's average weekly wage."<sup>32</sup> In addition to the cash-wage benefits, injured employees are typically also entitled to reimbursement for related medical expenses.<sup>33</sup> These benefits are usually subject to "arbitrary maximum and minimum limits."<sup>34</sup>

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24. *Parret*, 127 P.3d at 578.

25. *Id.*

26. *Kittell v. Vt. Weatherboard, Inc.*, 417 A.2d 926, 927 (Vt. 1980) (quoting *Morrisseau v. Legac*, 181 A.2d 53, 57 (1962)).

27. 1 LARSON, *supra* note 16, § 1.01 (emphasis added).

28. *Id.* § 1.03(4). For example, workers' compensation does not provide benefits for pain and suffering, loss of consortium, or conscious suffering.

29. *Id.* § 1.01.

30. Edward John Main, *Bad Faith in the Workers' Compensation Context: A Cause in Search of an Action*, 30 TULSA L.J. 507, 509 (1995) (footnote omitted).

31. *See, e.g.*, 85 OKLA. STAT. §§ 331-334 (2011).

32. 1 LARSON, *supra* note 16, § 1.01.

33. *Id.*

34. *Id.*

Ordinarily, administrative commissions oversee the workers' compensation system.<sup>35</sup> Employers are required to secure workers' compensation liability through "private insurance, state-fund insurance . . . or self-insurance," depending on the state.<sup>36</sup> The costs of these insurance premiums are then included in the cost of production and reflected in the price of the employer's goods or services, thereby shifting the burden of compensating injured employees from the employer to the consuming public.<sup>37</sup>

*C. Workers' Compensation as the Exclusive Remedy*

In exchange for guaranteed benefits, the employee relinquishes his common law right to sue his employer "for damages for any injury covered by the act."<sup>38</sup> Effectively, workers' compensation has become the exclusive remedy for injured employees. The purpose of the exclusivity of the remedy mirrors that of workers' compensation generally—to shift "the burden of all work-related injuries from individual employers and employees to the consuming public with the concept of fault being virtually immaterial."<sup>39</sup>

Nevertheless, exceptions to workers' compensation exclusivity have developed both judicially and legislatively.<sup>40</sup> One of these exceptions allows an employee intentionally injured by his employer to pursue a common law tort suit for damages against that employer.<sup>41</sup>

The primary basis for this exception is that an employer's intentional torts against an employee fall outside the scope of, and therefore are not covered by, workers' compensation. Workers' compensation guarantees employees benefits for *accidental* injuries sustained during the *course of employment*. But an employer's intentional torts against an employee fall outside this scope for two reasons. First, an employer's intentional tort "is

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See, e.g.*, 85 OKLA. STAT. § 302 (2011) (providing the exclusive remedy "except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee" as required by the workers' compensation statute).

41. *See id.*

not accidental and therefore not covered by the act.”<sup>42</sup> Second, the intentional nature of the harm severs the employer-employee relationship.<sup>43</sup>

Because intentional torts are outside its scope, workers’ compensation provides no remedy at all for intentional injuries. Accordingly, employees injured by the intentional torts of their employers should not be subject to workers’ compensation exclusivity. Instead, these employees should be allowed to pursue their common law claims for damages against their employer.

The issue then, becomes how to define intent for purpose of the intentional torts exception to workers’ compensation exclusivity. States split between: (1) adopting the more exacting, and therefore more exclusive, “standard of purpose to cause injury” and (2) adopting the more liberal, and therefore less exclusive, standard of “knowledge to a substantial certainty that injury will result.”<sup>44</sup>

### *III. The Dueling Standards: Purpose vs. Substantial Certainty*

#### *A. Purpose*

Outside the workers’ compensation system, two intrinsically different standards of intent allow an employee to bring a claim against the employer. The first of those standards of intent is the “purpose” to injure standard.

##### *1. Overview*

The modern view of the intentional tort exception to workers’ compensation exclusivity is that only an employer’s purpose to cause injury satisfies the requisite standard of intent for the exception to apply.<sup>45</sup> Today, a clear majority of jurisdictions that have an intentional tort exception to workers’ compensation exclusivity have adopted the purpose standard.<sup>46</sup>

Courts adopting this standard employ various formulations of the standard, including: deliberate intent, specific intent, actual intent, and true

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42. *Van Biene v. Era Helicopters, Inc.*, 779 P.2d 315, 318 (Alaska 1989) (quoting *Stafford v. Westchester Fire Ins. Co.*, 526 P.2d 37, 43 n.29 (Alaska 1974), *overruled on other grounds*, 556 P.2d 525 (Alaska 1976)).

43. *Guerrero*, 230 S.W.3d at 298 (quoting *Heskett v. Fisher Laundry & Cleaners Co.*, 230 S.W.2d 28, 32 (Ark. 1950)).

44. *See* Appendix.

45. *See* *Copass v. Ill. Power Co.*, 569 N.E.2d 1211, 1216 (Ill. App. Ct. 1991).

46. *See* Appendix; *see also* *Van Biene*, 779 P.2d at 319.

intent.<sup>47</sup> In all variations, however, each court applying the standard is describing “purpose” to injure: a person acts with purpose to cause injury when the person’s conscious object is to cause the injury.<sup>48</sup>

Many of these jurisdictions have determined that purpose “implies the formation by the employer of a specific intention to cause injury or death combined with some action aimed at accomplishing such result, as opposed to mere employer negligence or gross negligence.”<sup>49</sup>

Because an employer’s purpose to cause harm is sufficient to bring an employee’s claim within the intentional tort exception, the employee is not additionally required to show that injury was substantially certain to result.<sup>50</sup>

### *2. How the Purpose Standard Is Applied*

The purpose standard is exacting. The Oklahoma Supreme Court in *Parret* noted that “in any jurisdiction applying the ‘specific intent’ standard, ‘unless the case involves an assault or a battery, recovery will probably be denied.’”<sup>51</sup>

As the *Parret* court observed, an employer’s assault of an employee is usually sufficient to bring the employee’s claim outside the coverage of workers’ compensation. For example, in *Sitzman v. Schumaker*,<sup>52</sup> an employee worked for his employer providing general ranch labor.<sup>53</sup> Following an argument, the employer struck the employee several times in the face.<sup>54</sup> The employee responded, pushing the employer to the ground.<sup>55</sup> The employer then picked up a four-foot piece of two-inch pipe.<sup>56</sup> The employee asked the employer not to hit him with the pipe, but as the employee turned to walk away, the employer hit the employee in the back

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47. See, e.g., *Johnson v. Mountaire Farms of Delmarva, Inc.*, 503 A.2d 708, 711 (Md. 1986) (using “specific” and “deliberate” intent); *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 575 (Okla. 2005), *superseded by statute* 2010 Okla. Sess. Laws 2032-33 (recognizing an exception in many jurisdictions when an employer acts “deliberately and with the actual intent to cause injury”).

48. See MODEL PENAL CODE § 2.02(2)(a)(i) (2010).

49. *Johnson*, 503 A.2d at 711.

50. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. c (2010).

51. *Parret*, 127 P.3d at 575 (quoting 48 AM. JUR. 2d *Proof of Facts* § 2 (1987)).

52. *Sitzman v. Schumaker*, 718 P.2d 657 (Mont. 1986).

53. *Id.* at 658.

54. *Id.*

55. *Id.*

56. *Id.*



of the head with the pipe.<sup>57</sup> As the employee maneuvered to protect himself, the employer hit him again with the pipe, this time in the front of the head.<sup>58</sup> This final blow cracked the employee's skull, rendered him unconscious, and ultimately caused life altering injuries.<sup>59</sup>

The court held: "The egregiousness of these circumstances removes the exclusivity bar for an employee."<sup>60</sup> It explained that shielding an employer from tort liability when he assaults his employee would entirely disregard the quid pro quo of the industrial bargain between employers and employees.<sup>61</sup> If this were not the case, the employer could effectively obtain insurance coverage for the right to assault his employees and spread that cost over other employers who participate in the system.<sup>62</sup>

Even if an employee alleges employer misconduct that rises to the level of purpose to injure, however, the employee will likely fail. In the face of culpable employer conduct, unless the facts clearly show the employer's purpose to injure, the employee will fail to satisfy this high standard.

In *Davis v. U.S. Employers Council, Inc.*,<sup>63</sup> for example, an employee worked as an automobile painter.<sup>64</sup> The employee and others repeatedly informed their employer of severe respiratory symptoms they were experiencing and complained of inadequate ventilation.<sup>65</sup> As a result of exposure to toxic levels of paint fumes, the employee was diagnosed with "chronic toxic encephalopathy, with organic brain damage."<sup>66</sup>

The court assumed the employer knew that the employee and others had been exposed to toxic levels of paint fumes and that these fumes were causing severe respiratory symptoms.<sup>67</sup> Furthermore, the court assumed the employer knew that if it did not provide adequate ventilation, the employee or "some other similarly situated employee was *certain* to suffer severe injury."<sup>68</sup> Notwithstanding this knowledge, the employer allegedly failed to provide adequate ventilation.<sup>69</sup> The employee conceded that the employer,

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 659.

61. *Id.*

62. *Id.*

63. *Davis v. U.S. Emp'rs Council, Inc.*, 934 P.2d 1142 (Or. Ct. App. 1997).

64. *Id.* at 1144.

65. *Id.*

66. *Id.*

67. *Id.* at 1146.

68. *Id.*

69. *Id.*

in failing to provide the ventilation, was motivated by a desire to save money.<sup>70</sup>

Despite the employer's *actual* knowledge that a working condition was causing injury, the court barred the employee's claim, stating that the *sine qua non* of the intentional tort exception is the employer's purpose to harm the employee.<sup>71</sup> The employee's acknowledgement that the employer was motivated by a desire to save money rather than to injure the employee precluded recovery outside of workers' compensation.<sup>72</sup>

### *B. Substantial Certainty*

The second of the two primary intent standards recognized for an employer's conduct to fall within the intentional tort exception to workers' compensation exclusivity is the "substantial certainty" standard.

#### *1. Overview*

A significant minority of states now allow an employee to bring a common law suit outside of the workers compensation system when the employer was substantially certain an employee would be injured, even if injury to the employee was not the purpose of the employer.<sup>73</sup>

The substantial certainty standard proves consistent with the Restatement (Second) of Tort's dual definition of intent, which provides that intent **"denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."**<sup>74</sup>

To satisfy this standard, an employee need not prove that the employer acted with purpose to injure the employee; it is sufficient to show that the employer was substantially certain injury would result.<sup>75</sup> The substantial certainty standard is a subjective standard.<sup>76</sup> The employer must be subjectively aware of the substantial certainty of resulting injury; it is not sufficient that the injury is objectively substantially certain to occur.<sup>77</sup>

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70. *Id.*

71. *See id.*

72. *Id.*

73. *See* Appendix; *see also* King v. Penrod Drilling Co., 652 F. Supp. 1331, 1334 (D. Nev. 1987); *see, e.g.,* Jones v. V.I.P. Dev. Co., 472 N.E.2d 572 (Ohio 1984), *superseded by statute*, OHIO REV. CODE ANN. § 2745.01 (West 2011).

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

75. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. c (2010).

76. *See id.*

77. *See id.*

An employee does not carry his burden by demonstrating the employer's knowledge of foreseeable risk, a high probability of risk, or even a substantial likelihood of risk.<sup>78</sup> On the other hand, the employee is not required to demonstrate the employer's awareness of the actual or virtual certainty of the injury.<sup>79</sup> Instead, the employee must show that the employer was aware of the substantial certainty of injury to the employee.<sup>80</sup>

### *2. How the Substantial Certainty Standard Is Applied*

Cases in which courts have applied the substantial certainty standard to allow a common law tort claim have generally involved "a localized job-site hazard, which threatens harm to a small number of identifiable employees during a relatively limited period of time."<sup>81</sup> The substantial certainty standard "loses its persuasiveness when the identity of potential victims becomes vaguer and when, in a related way, the time frame involving the actor's conduct expands and the causal sequence connecting conduct and harm becomes more complex."<sup>82</sup>

To illustrate this point, the Restatement (Third) of Torts provides two contrasting examples. In the first scenario, a land developer constructing a high-rise building "can confidently predict that some number of workers will be seriously injured in the course of the construction project."<sup>83</sup> Despite the developer's knowledge, the owner is guilty of neither an intentional tort nor even negligence.<sup>84</sup>

In the second scenario, an employer provides a machine lacking adequate safety guards to its employees.<sup>85</sup> The employer knows that employees use this machine and that over time, an employee is substantially certain to be injured.<sup>86</sup> Courts applying the substantial certainty standard generally find this type of action satisfies the standard and exempts the employee's claim from workers' compensation exclusivity.<sup>87</sup>

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78. *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 579 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33.

79. *Sorban v. Sterling Eng'g Corp.*, 830 A.2d 372, 379 (Conn. App. Ct. 2003).

80. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. c.

81. *Id.* § 1 cmt. e.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* § 1 reporter's note to cmt. e (citing *Rose v. Isenhour Brick & Tile Co.*, 472 S.E.2d 774 (N.C. 1996)).

86. *Id.*

87. *Id.*

In *Millison v. E.I. du Pont de Nemours & Co.*,<sup>88</sup> a New Jersey case, an employee sued his employer for: (1) intentionally exposing the employee to a known danger, asbestos; (2) withholding the nature of that danger from the employee; and (3) withholding specific information obtained during the employee's physical examination which revealed existing injuries caused by exposure to asbestos.<sup>89</sup>

As part of the employer's medical benefits, the employer's physicians provided employees with routine physical examinations.<sup>90</sup> Although chest x-rays taken during one of these physical examinations revealed asbestos-related injuries, the physicians failed to inform the employee of the injuries.<sup>91</sup> The employee alleged this concealment was part of a concerted corporate plan to prevent employees from leaving the workforce.<sup>92</sup> As a result of both the initial exposure to asbestos and this concealment of existing injuries, the employee suffered severe and irreversible injury.<sup>93</sup>

The Supreme Court of New Jersey held that the employee's claim based upon the initial exposure to asbestos in the workplace was barred by workers' compensation exclusivity.<sup>94</sup> The court, however, applying the substantial certainty standard, allowed the tort claim for aggravation of existing injuries caused by the fraudulent concealment of the existing injuries.<sup>95</sup> The court explained that there "is a difference between . . . tolerating . . . conditions that will result in a certain number of injuries . . . and . . . actively misleading the employees who have already fallen victim to those risks"<sup>96</sup>, finding that the concealment of existing known injuries is outside the industrial bargain struck between employers and employees and is beyond the scope of tort liability from which the legislature intended to exempt the employer.<sup>97</sup>

Similar to *Davis v. U.S. Employers Council, Inc.*, the employee in *Millison* acknowledged that the employer concealed the existing injury to prevent the employee and others from leaving the workforce rather than out

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88. 501 A.2d 505 (N.J. 1985).

89. *See id.* at 508.

90. *Id.* at 516.

91. *Id.*

92. *Id.*

93. *Id.* at 507.

94. *Id.* at 519.

95. *See id.* at 514, 516.

96. *Id.* at 516.

97. *Id.*

of a desire to injure the employee.<sup>98</sup> Had the court applied the purpose standard as in *Davis*, the employee's claim for fraudulent concealment likely would have been barred as was the employee's claim in *Davis*.<sup>99</sup>

While a minority of states will allow plaintiffs relief upon a showing of substantial certainty, mere negligence is not sufficient to justify that relief. For example, in *Jensen v. Sport Bowl, Inc.*,<sup>100</sup> a fourteen-year-old employee worked for a bowling alley as a pinchaser.<sup>101</sup> The young employee's job responsibilities included wiping oil from the automatic pinsetting machines.<sup>102</sup> One night, the employee's right index finger was severed when a rag he was using to clean the automatic pinsetting machine got stuck in a moving pulley.<sup>103</sup> The employee filed a tort claim against his employer, alleging that the employer was substantially certain that injury would result.<sup>104</sup>

The court, viewing the allegations in a light most favorable to the employee, determined that the employee "was an inexperienced, inadequately trained, 14-year-old boy ordered by his employer, without any warning of the danger, to perform a maintenance task which the employer knew from personal experience to be risky."<sup>105</sup> The court held, however, that even though the boy's employment violated child labor regulations and even though the employer knew the assigned task was risky, the alleged facts did not demonstrate the employer was substantially certain that injury would result.<sup>106</sup> Therefore, the court affirmed the trial court's grant of summary judgment in favor of the employer.<sup>107</sup>

#### *IV. Oklahoma's Approach to Defining Intent for Purposes of the Exception to the Exclusivity Provision of Workers' Compensation*

The Oklahoma Worker's Compensation Act delineates the rights of an employee to recover from his employer for an on-the-job injury. An employer subject to the Workers' Compensation Act must:

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98. *See id.*; *Davis v. U.S. Emp'rs Council, Inc.*, 934 P.2d 1142, 1146 (Or. Ct. App. 1997).

99. *See Davis*, 934 P.2d at 1146.

100. 469 N.W.2d 370 (S.D. 1991).

101. *Id.* at 370.

102. *Id.*

103. *Id.*

104. *Id.* at 372.

105. *Id.*

106. *See id.*

107. *Id.*

pay or provide benefits according to the provisions of this act for the accidental injury or death of an employee arising out of and in the course of his or her employment, without regard to fault for such injury, if the employee's contract of employment was made or if the injury occurred within this state.<sup>108</sup>

Under this statute, employee benefits are automatic and predetermined based upon the employee's average weekly wage and the duration, degree, and type of injury.<sup>109</sup> These benefits are exclusive.<sup>110</sup>

Before the 2010 amendments to the Oklahoma Workers' Compensation Act, there was not a statutory exception in Oklahoma to the workers' compensation exclusive remedy provision for intentional injuries. Instead, the intentional tort exception was judicially constructed.<sup>111</sup> Consequently, there was not a statutory definition of "intent" for this exception.

As the following cases will show, Oklahoma courts struggled to define the parameters of the intentional tort exception from 1917 through the *Parret v. UNICCO Service Co.* case in 2005. Then, in 2010, the Oklahoma legislature authoritatively weighed in, effectively overturning *Parret* and codifying the "purpose to injure" standard.<sup>112</sup>

#### *A. The Road to Parret v. UNICCO Service Co.: A Survey of Pre-Parret Decisions*

The basis for the intentional tort exception created by Oklahoma case law is that an employer's intentional tort against an employee is, by definition, not accidental.<sup>113</sup> Since workers' compensation covers only accidental injuries, the act does not cover an employer's intentional torts against its employees.<sup>114</sup> Because the act does not address an employer's intentional torts, the act cannot provide the exclusive remedy.<sup>115</sup> Therefore,

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108. 85 OKLA. STAT. § 310 (2011).

109. *See id.* §§ 331-334.

110. *See id.* § 302.

111. *See Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 574 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33.

112. 85 OKLA. STAT. § 12 (Supp. 2010).

113. *See Roberts v. Barclay*, 369 P.2d 808, 809 (Okla. 1962).

114. *See Thompson v. Madison Mach. Co., Inc.*, 684 P.2d 565, 568 (Okla. Civ. App. 1984) (quoting *Hull v. Wolfe*, 393 P.2d 491, 493 (Okla. 1964)) ("[T]he Act was intended to cover all accidental injuries, but did not include willful or intentional injuries whether inflicted by the employer or the employee, since same was not accidental." (internal quotation marks omitted)).

115. *See Roberts*, 369 P.2d at 809.

an employee should not be precluded from pursuing common law tort claims arising out of an employer's intentional tort.<sup>116</sup>

As soon as an exception is made to exclusivity for intentional torts of the employer, the definition of intent becomes highly significant. Oklahoma courts have "long recognized . . . that in some cases 'an employee who has been wilfully injured by his employer [may] ha[ve] a common law action for damages.'"<sup>117</sup> As early as 1917, the Oklahoma Supreme Court held that worker's compensation did not cover an employer's willful or intentional conduct and accordingly an employee maintained his common law rights to sue his employer for such conduct in tort.<sup>118</sup>

An employee's negligence claim is insufficient to fall within the intentional tort exception in Oklahoma.<sup>119</sup> In *Adams v. Iten Biscuit Co.*, a baker filed a negligence claim against his employer when natural gas used to heat an oven in the bakery exploded.<sup>120</sup> The explosion burned the baker, severely scarring his entire body, including his face, head, back, arms, and hands.<sup>121</sup> Because the baker claimed the injuries were caused by the negligence of the employer, rather than the willful or intentional conduct of the employer, the court held that the baker's claims were barred by the exclusivity of workers' compensation.<sup>122</sup>

At the other end of the spectrum, a physical assault is sufficient to bring an employee's claim within the intentional tort exception.<sup>123</sup> An employee

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116. *See id.* ("Since our Workmen's Compensation Law by its terms applies only to disability or death resulting from *accidental* injuries . . . it may be conceded that an employee who has been *wilfully* injured by his employer has a common law action for damages." (citation omitted)).

117. *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 574 (Okla. 2005), *superseded by statute* 2010 Okla. Sess. Laws 2032-33 (alterations in original) (quoting *Roberts*, 369 P.2d at 809).

118. *See Adams v. Iten Biscuit Co.*, 162 P. 938, 945-46 (Okla. 1917).

119. *See, e.g., id.*

120. *Id.*

121. *Id.*

122. *See id.* The baker appealed, arguing the statute denied the baker equal protection under the law because the statute covered only accidental injuries, thereby denying the baker compensation for the employer's intentional conduct. The court upheld the constitutionality of the statute, holding that although the statute only applies to accidental injuries, the statute does not deny injured employees equal protection because the act "leaves the injured employe[e] to his remedy as it existed when the act was passed" regarding the employer's intentional torts. *Id.* at 945.

123. *See Thompson v. Madison Mach. Co., Inc.*, 684 P.2d 565, 568 (Okla. Civ. App. 1984); *see also Pursell v. Pizza Inn Inc.*, 786 P.2d 716 (Okla. Civ. App. 1990) (holding that employees' common law suit against supervisors for sexual battery and assault was not

brought a tort claim against his employer in *Thompson v. Madison Machinery Co.*<sup>124</sup> when a co-employee struck the employee “in the face with a twelve inch crescent wrench during an argument.”<sup>125</sup> The Oklahoma Civil Court of Appeals reversed the trial court’s grant of summary judgment in favor of the employer and held that workers’ compensation is not the exclusive remedy for willful, intentional, or violent acts, as these acts are not accidental.<sup>126</sup> The court explained that workers’ compensation was not “designed to shield employers or co-employees from willful, intentional or even violent conduct.”<sup>127</sup>

Like courts in virtually every other jurisdiction, Oklahoma courts have struggled to articulate a standard that adequately addresses employee claims arising in the vast grey area between negligence and purpose that includes gross negligence, recklessness, knowledge of a foreseeable risk, knowledge of a substantially certain risk, and various gradations between these standards.

For example, the court initially passed on the opportunity to establish whether or not gross negligence was sufficient to bring an employee’s claim within the intentional tort exception in *U.S. Zinc Co. v. Ross*.<sup>128</sup> While attempting to remove ore that had become stuck in a rock crushing machine, the employee’s hand got stuck and was crushed.<sup>129</sup> The court determined it was unnecessary to decide whether, in the abstract, negligently failing to safeguard such a machine could constitute “such gross negligence to amount to a willful and intentional injury inflicted by the employer.”<sup>130</sup> Even if possible, the facts at bar were insufficient to establish such a claim.<sup>131</sup> Accordingly, the court held that the employee’s claim was barred.<sup>132</sup>

The court explained, “[t]he willfulness contemplated amounts to more than a mere act of the will, and carries with it the idea of premeditation, obstinacy, and intentional wrongdoing.”<sup>133</sup> Among other shortcomings, the

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barred by workers’ compensation exclusivity provision because the injury was not accidental).

124. 684 P.2d 565 (Okla. Civ. App. 1984).

125. *Id.* at 566.

126. *See id.* at 567, 568, 570.

127. *Id.* at 568; *see also Pursell*, 786 P.2d 716.

128. 208 P. 805 (Okla. 1922).

129. *Id.* at 806.

130. *Id.* at 807.

131. *Id.*

132. *See id.* at 806.

133. *Id.* at 807 (quoting *Wick v. Gunn*, 169 P. 1087, 1090 (Okla. 1917)).



employee failed to adduce any evidence that covering the machine with an apron, as the employee contended the employer should have done, was legally required, customary in the industry, or even practicable.<sup>134</sup> Were these standard allegations of negligence sufficient to constitute a willful and intentional injury, the act would prove null “because every injury could be defined to be a willful and intentional injury.”<sup>135</sup>

In *Harrington v. Certified Systems, Inc.*, an Oklahoma court directly addressed for the first time the requisite standard of intent necessary to bring an employee’s claim within the intentional tort exception.<sup>136</sup> The court concluded that in all Oklahoma cases applying the intentional tort exception, the court had decided whether the conduct at issue constituted an intentional tort without ever clearly defining what constituted an intentional tort in the first place.<sup>137</sup> The court explained that intent requires “knowing and purposeful conduct on the part of the employer to injure the employee.”<sup>138</sup>

The Oklahoma Supreme Court noted the jurisdictional split regarding the standard of intent—purpose versus substantial certainty—necessary to bring an employer’s conduct within the intentional tort exception to workers’ compensation exclusivity in *Davis v. CMS Continental Natural Gas, Inc.*<sup>139</sup> Because the employee conceded the employer’s conduct was neither willful nor wanton (states of mind less culpable than either competing standard of intent), the Supreme Court determined it was unnecessary to resolve the issue of which standard to adopt in Oklahoma, as the employee’s claim was insufficient to satisfy either standard.<sup>140</sup>

#### B. *Parret v. UNICCO Service Co.*

In *Parret v. UNICCO Service Co.*, the Oklahoma Supreme Court determined an employee’s claim would fall outside of the exclusive remedy provisions of workers’ compensation if the injuries were the result of

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134. *Id.*

135. *Id.*

136. 45 P.3d 430 (Okla. Civ. App. 2001).

137. *Id.* at 434.

138. *Id.* at 435 (emphasis added). The Court, however, did not rely on this higher standard in barring the employee’s claim. The court noted that the facts in this case were not sufficient to constitute an intentional tort under even the more liberal substantial certainty standard. *Id.* at 436.

139. 23 P.3d 288, 294 (Okla. 2001).

140. *See id.* at 290, 291 n.6.

actions the employer knew were substantially certain to cause injury.<sup>141</sup> By doing so, it chose to incorporate the broader of the two standards of intent in applying the intentional tort exception to workers' compensation exclusivity.<sup>142</sup>

### *1. Facts and Procedural History*

Parret was electrocuted at a tire plant replacing emergency lights while on the job.<sup>143</sup> He died from his injuries two days later.<sup>144</sup> Parret's employer knew of the danger to its employees in working on the emergency lights while they were still energized—that is, without first cutting off the electricity to the light system as Parret was doing when he was fatally injured.<sup>145</sup> The employer even “had written policies prohibiting employees from working on energized equipment” but apparently allowed the employees to continue working on the emergency lights knowing it was unsafe.<sup>146</sup>

After Parret's death, his widow brought a case in tort against Parret's employer, UNICCO. The Federal District Court for the Western District of Oklahoma, where the action was pending, certified the following question to the Oklahoma Supreme Court: “What is the standard of intent necessary for an employee's tort claim against an employer to fall outside the protection of the Oklahoma Workers' Compensation Act? Is the standard the ‘true intentional tort’ test, requiring deliberate specific intent to cause injury, or is the standard the ‘substantial certainty’ test?”<sup>147</sup> The Oklahoma Supreme Court determined the requisite standard of intent: “the employer must have (1) desired to bring about the worker's injury or (2) acted with

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141. *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 574 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33. Also at issue was “the test for determining statutory employer status.” However, this issue is not addressed since it is not relevant to this Note.

142. *Id.* at 579. The *Parret* court explained that the substantial certainty standard is not meant to expand the narrow intentional tort exception to workers' compensation exclusivity. Instead, the substantial certainty test reflects the court's “refusal to apply a stricter standard of intent to a worker's tort claim against the employer than the Restatement standard of intent which would be applied to any other intentional tort.” *Id.*

143. *Id.* at 574.

144. *Id.* This note will not address Justice Opala's argument that plaintiff's suit should have been barred as a result of plaintiff's earlier selection of the compensation remedy which she prosecuted to a successful conclusion.

145. *See id.* at 574.

146. *Id.*

147. *Id.* at 573.

the knowledge that such injury was substantially certain to result from the employer's conduct."<sup>148</sup>

2. *The Majority Opinion of Justice Colbert*

In describing the substantial certainty standard, the court stated that to act with knowledge of a substantial certainty of impending injury, the employer must intend "the act that caused the injury with knowledge that the injury was substantially certain to follow."<sup>149</sup> The court determined it was not sufficient that the injury was objectively substantially certain to occur.<sup>150</sup> Instead, the plaintiff must demonstrate, often through circumstantial evidence, that the employer subjectively appreciated the substantial certainty of the impending injury.<sup>151</sup> This subjective appreciation may be "inferred from the employer's conduct and all the surrounding circumstances."<sup>152</sup>

The court noted that the plaintiff bears a heavy burden in demonstrating an employer's knowledge of the substantial certainty of an injury. The plaintiff does not carry his burden by demonstrating knowledge of foreseeable risk, high probability, or even substantial likelihood.<sup>153</sup> To be sure, "[n]othing short of the employer's knowledge of the 'substantial certainty' of injury will remove the injured worker's claim from the exclusive remedy provision of the Worker's Compensation Act."<sup>154</sup>

The court advanced several policy reasons for adopting the substantial certainty standard including:

(1) the substantial certainty standard is consistent with the traditional definition of intent in torts;<sup>155</sup>

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148. *Id.* at 579.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)). The Restatement, for example, uses the term "intent" to refer to instances in which the actor "desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* at 577. Intent is not exclusively used throughout the Restatement to refer to desired consequences. Instead, "[i]f the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Id.*

(2) the substantial certainty standard of intent preserves the proper balance of interests achieved in the industrial bargain between employees and employers,<sup>156</sup> and

(3) the substantial certainty standard promotes workplace safety.<sup>157</sup>

Finally, the court acknowledged two primary concerns with employing the substantial certainty standard: (1) that there is potential for confusion in applying the standard and (2) the standard could open the floodgates of litigation.<sup>158</sup> In the majority's view, however, neither concern proved significant enough to warrant the adoption of the contending "true intent" standard.<sup>159</sup> With respect to the first concern, the majority felt that confusion in applying the standard could be avoided as the court had meticulously outlined what a plaintiff must show in order to meet the burden of demonstrating that the employer was substantially certain that an injury would result.<sup>160</sup> As to the concern over proliferation of lawsuits, the majority thought that this result was not likely to obtain in Oklahoma since "in most instances, the predicted flood of litigation has not occurred, mainly because the courts, undoubtedly conscious of the dangers, have been quite

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156. See *id.* at 578. The Oklahoma workers' compensation statute provides many exceptions to workers' compensation coverage for the *employee's* willful misconduct, including "(1) willful injury to self or another, (2) failure to use a guard or protection furnished against accident, (3) substance abuse, or (4) horseplay." *Id.* To preserve this delicate balance, in light of these exceptions "which favor the employer . . . a less stringent standard than 'specific intent' [should] be applied in determining whether an employee may recover damages, as opposed to benefits, as a result of the employer's intentional misconduct." *Id.* The substantial certainty standard achieves this balance "by emphasizing employees' interest in protection from employer misconduct while maintaining employers' fixed liability for all but intentional workplace injuries." *Id.*

157. *Id.* Even when an employer does not desire, or specifically intend, to cause injury to an employee, at times the employer "certainly takes a calculated risk with their lives and safety—and perhaps takes all the greater risk because the employer knows that when injury inevitably does occur, the cost will be less because of the exclusive remedy and limited compensation provisions of the workers' compensation." *Id.* In these situations, applying the true intentional tort standard "allows employers to injure and even kill employees and suffer only workers' compensation damages so long as the employer did not specifically intend to hurt the worker." *Id.* Along similar lines, the *Parret* court explained that the substantial certainty test "furthers the general tort principle that injuries are to be compensated and antisocial behavior is to be discouraged." *Id.* at 579.

158. See *id.* at 578-79, 79 n.3.

159. *Id.*

160. *Id.* at 572.

conservative about allowing these kind of exceptions to exclusivity. Most have been careful to limit use to the most egregious cases.”<sup>161</sup>

*3. Justice Winchester, with Whom Justices Lavender and Opala Join, Concurring in Part, Dissenting in Part*

Instead of adopting the substantial certainty standard, Justices Winchester, Lavender, and Opala would have adopted the true intent standard.<sup>162</sup> The dissent authored by Justice Winchester reasoned, in part:

(1) the Oklahoma legislature established the workers’ compensation system and its separate court system specifically to address work-related injuries;<sup>163</sup>

(2) the Oklahoma’s Workers’ Compensation Act represents a mutual compromise, reflecting on the industrial bargain reached between employers and employees.<sup>164</sup>

(3) since “the express words of the Legislature provide balance to competing interests . . . the Legislature intended all but the most egregious circumstances to be covered by this statutory remedy,”<sup>165</sup> and

(4) [t]he standard set for such cases must be clear, concise and easily ascertainable and only the ‘true intentional tort’ test provides such an objective standard.”<sup>166</sup>

*4. Justice Opala, with Whom Justice Winchester Joins, Dissenting in Part*

Justice Opala stated that instead of adopting the “foreign doctrine of ‘substantial certainty,’ the court should respect the parameters that have confined the intentional tort exception “for nearly a century—at the willful tort line.”<sup>167</sup> Justice Opala was concerned that the substantial certainty

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161. *Id.* at 579 n.3 (internal quotation marks omitted) (quoting 6 ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 103.04[4] (Matthew Bender 2004)).

162. *Id.* at 581 (Winchester, V.C.J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 583 (Opala, J., dissenting). Note that in Justice Opala’s view, the Oklahoma Supreme Court should not address the certified question of what intent standard should apply to avoid workers’ compensation exclusivity without further assurances from the certifying court that plaintiff’s tort claim was not barred by issue preclusion since *Parret* had elected to receive workers’ compensation death benefits and the order in the workers’ compensation matter stated that the injury was accidental. *Id.*

standard subjects employers to tort liability for torts of gross negligence and recklessness.<sup>168</sup>

Justice Opala recounted the industrial bargain between employees and employers in which the employee gave up the right to common law tort suits based upon the employer's negligence and the employer gave up its corresponding defenses including contributory negligence.<sup>169</sup> Justice Opala observed that the employer maintains the defense of contributory negligence against employee tort claims premised on employer recklessness.<sup>170</sup> Justice Opala concluded that the standard of intent should be set "at the demarcation that separates torts in which contributory negligence is a defense from torts in which contributory negligence is not a defense"—that is at the willful tort line.<sup>171</sup>

*5. Continuation in Trial Court After Oklahoma Supreme Court  
Determined the Substantial Certainty Standard Applied*

After the Oklahoma Supreme Court answered the question posed by the trial court and adopted the substantial certainty standard, Parret's employer filed a motion for summary judgment in the trial court. The employer asserted Parret could not meet his burden under the substantial certainty test.<sup>172</sup> The trial court first addressed whether Parret's tort claim was barred by issue preclusion.<sup>173</sup> It found Parret's claim was not barred even though Parret's widow received death benefits through workers' compensation.<sup>174</sup>

The trial court then looked to the evidence. There was evidence presented "that UNICCO knew that there were no current electrical prints or lockout/tagout procedures for the emergency lighting system in the warehouse area" where Parret was working and that "UNICCO employees

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168. *Id.*

169. *Id.*

170. *Id.* at 584.

171. *Id.*

172. *Parret v. UNICCO Serv. Co.*, No. CIV-01-1432-HE, 2006 WL 752877, at \*1, \*2 (W.D. Okla. Mar. 21, 2006) ("The record before the court does not demonstrate that the nature of the decedent's injury, as relevant to the present inquiry, was 'actually litigated.' Whether the injury was 'accidental' from the standpoint of the employee, which was the issue in the workers' compensation proceeding, is not the same question as whether the employer's conduct was 'intentional' within the meaning of the exclusivity exception. There is no suggestion here that the nature of the employer's conduct was decided or even addressed in the proceeding. Under these circumstances, the doctrine of issue preclusion does not apply to bar the plaintiff's claim.")

173. *Id.*

174. *Id.*

did not know how to disconnect the power to the lights without serious adverse consequences.”<sup>175</sup> The record also reflected that a few months before Parret was killed, another employee was electrically shocked and his hand badly burned “while working on a similar voltage lighting system.”<sup>176</sup> More importantly, evidence had been “submitted that UNICCO supervisors not only were aware that employees worked on the emergency lighting system ‘hot,’ but directed them to do so.”<sup>177</sup> There was also “evidence that several employees refused to work on the emergency lights because they could not be de-energized, but that UNICCO supervisors would then, on occasion, direct the same work order to other employees.”<sup>178</sup>

Analyzing the evidence in the light most favorable to Parret, the trial court denied the employer’s motion for summary judgment stating:

The court concludes the evidence identified above, combined with other evidence in the record, is sufficient to create a triable issue and to warrant submission of the plaintiff’s intentional tort claim against UNICCO to a jury. The question is close because of the very narrow nature of the intentional tort exception to the exclusive remedy rule. The “substantial certainty” test announced by the Oklahoma Supreme Court in *Parret* is a high standard and will rarely be met. Nonetheless, in the circumstances existing here, the court concludes the plaintiff’s claim against UNICCO is supported by evidence which, when taken in the light most favorable to the plaintiff, is sufficient to create a triable issue of fact as to whether that admittedly stringent standard has been satisfied.<sup>179</sup>

It is interesting to note that after the employer’s motion for summary judgment was denied, the *Parret* case did not go to trial.

### C. *The Effect of Parret: A Survey of Post-Parret Decisions*

Oklahoma’s adoption of the substantial certainty standard produced three related effects. First, the substantial certainty standard liberalized the requirements an employee must satisfy to *proceed* in tort—that is withstand a motion for summary judgment—against an employer. Second, adopting the substantial certainty standard affected when an employee may *recover*

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175. *Id.* at \*4.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* (footnote omitted).

in tort against an employer. Third, adopting the substantial certainty standard affected the scope of employers' liability insurance.

The first effect of the substantial certainty standard was seen in the denial of summary judgment in *Baggett v. Yaffe Companies, Inc.*<sup>180</sup> In *Baggett*, part of the employer's business included the decommissioning of artillery shells.<sup>181</sup> At least one employee refused to work on one of these shells after a supervisor "observed flammable gases, melting substances and tan liquid explosive pour out of the shells."<sup>182</sup> The employer was alerted of these dangers.<sup>183</sup>

The employer then assigned a twenty-four-year-old temporary employee to work on the shells.<sup>184</sup> The employee, unaware of any dangers, cut into the shell as instructed using a hand-held acetylene torch.<sup>185</sup> The shell exploded and, after spending two weeks in the intensive care unit, the employee died.<sup>186</sup>

The employee's estate filed suit, alleging the employer was aware of the substantial certainty of injury to the employee.<sup>187</sup> The plaintiffs alleged the employer instructed the employee to engage in unreasonably dangerous conduct all for opportunity to recover a dollar's worth of brass and steel from the shell.<sup>188</sup>

Had Oklahoma adopted the purpose to injure standard, the court likely would have granted the employer's motion for summary judgment, as the plaintiffs conceded that the employer was motivated by the desire to recover the value of the brass and steel, not to injure the employee.<sup>189</sup> Instead, applying the substantial certainty standard, the court denied the employer's motion for summary judgment, finding a genuine issue of

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180. Order at 3, *Baggett v. Yaffe Cos.*, No. CJ-2009-87 (Leflore Cnty., Okla. May 10, 2010).

181. *See id.*

182. *See id.* at 2.

183. *See id.*

184. *See id.*

185. *See id.* at 1-3.

186. *See id.* at 3.

187. *See* Plaintiff's Response In Chief to Yaffe Cos. & Yaffe Iron & Metal Corp.'s Motion for Summary Judgment at 10, *Baggett v. Yaffe Cos.*, No. CJ-2009-87 (Leflore Cnty., Okla. Nov. 16, 2009).

188. *See id.* at 1.

189. *See* *Davis v. U.S. Emp'rs Council, Inc.*, 934 P.2d 1142, 1146 (Or. Ct. App. 1997) (applying the purpose to injure standard, the court barred an employee's claim despite the employer's actual knowledge of certain injury because the employee conceded the employer was motivated by a desire to save money).



material fact existed as to whether the employer was substantially certain the employee would be injured.<sup>190</sup>

Second, the substantial certainty standard affected when an employee may *recover* in tort against an employer. In *Price v. Howard*,<sup>191</sup> an employee was killed in a plane crash.<sup>192</sup> His wife sued, alleging the employer was substantially certain the employee would be injured during the flight.<sup>193</sup>

The airplane, carrying passengers in violation of flight restrictions and cargo in excess of weight restrictions, took off in a turbulent rain storm the night of the crash.<sup>194</sup> The plane had been modified to include an experimental five-bladed propeller and fuel tanks.<sup>195</sup>

The court barred the wife's claim, holding that the alleged facts did not satisfy the substantial certainty standard.<sup>196</sup> The court emphasized the substantial certainty standard "presents a formidable barrier to recovery in tort."<sup>197</sup>

Canvassing the record, the court noted that other aircraft utilizing the experimental five-bladed propeller had made successful flights before and that this specific aircraft had flown with the experimental propeller between twenty and thirty hours without incident; however, "the plane had not flown with the additional tanks fueled."<sup>198</sup> The court was also persuaded by the lack of evidence indicating that any of the passengers of the plane "appreciated the risk or were intent on committing suicide by boarding the plane for takeoff."<sup>199</sup>

The court was aware that taking off in a rainstorm with cargo in excess of 1,000 pounds over the plane's weight limit "substantially increased the likelihood that complications could occur."<sup>200</sup> Although it concluded that allowing the plane to take flight under the stated conditions was reckless, recklessness alone is insufficient to bring a claim within the intentional tort exception.<sup>201</sup> Similarly, the violation of safety regulations, "even if wilful

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190. Order, *supra* note 180, at 3.

191. 236 P.3d 82 (Okla. 2010).

192. *Id.* at 86.

193. *Id.*

194. *Id.* at 85-86.

195. *Id.* at 86.

196. *Id.* at 90.

197. *Id.*

198. *Id.* at 88-89.

199. *Id.* at 90.

200. *Id.* at 89-90 (internal quotation marks omitted).

201. *See id.* at 90.

and knowing, does not rise to the level of an intentional tort or an actual intent to injure.”<sup>202</sup>

Third, the substantial certainty standard affected the scope of employers’ liability insurance. Where an employer’s liability insurance excludes liability predicated on the employer’s intentional misconduct, the more liberal substantial certainty standard has the effect of broadening the coverage exclusion. The result is that an employer, shielded from liability under the more restrictive purpose standard, may be surprised to find that the insurance does not cover certain conduct under the substantial certainty standard.<sup>203</sup>

In *CompSource Oklahoma v. L & L Construction, Inc.*, an employee, while working in a confined space, was overcome by hydrogen sulfide—a gas that the employer allegedly knew or should have known was fatally toxic and a common byproduct of the employer’s line of business.<sup>204</sup> The employee then lost consciousness, fell, violently struck his head, and ultimately died a few hours later.<sup>205</sup>

The employee’s estate filed a tort claim against the employer, alleging that injury to the employee was substantially certain to result from the employer’s failure “to properly educate, train and protect decedent in conjunction with its knowledge of the lethal properties of hydrogen sulfide gases and decedent’s exposure to them.”<sup>206</sup>

The issue before the court involved the contract between the employer and CompSource. In its contract with L & L Construction, CompSource agreed to indemnify, defend, and compensate the employer against and for workers’ compensation claims.<sup>207</sup> The policy provided an exclusion for “bodily injury *intentionally* caused or aggravated by [the employer].”<sup>208</sup> Relying on this provision and Oklahoma’s recent standard of intent set forth in *Parret*, CompSource sought declaratory judgment to establish CompSource did not have a duty to defend or compensate the employer.<sup>209</sup>

The court ruled in favor of CompSource, holding that CompSource owed no duty to the insured employer as the policy specifically excludes

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202. *Id.* (footnote omitted).

203. *See, e.g.*, *CompSource Okla. v. L & L Constr., Inc.*, 207 P.3d 415 (Okla. Civ. App. 2009).

204. *Id.* at 417.

205. *Id.*

206. *Id.* (internal quotations omitted).

207. *See id.* at 416.

208. *Id.* at 418 (emphasis added).

209. *See id.* at 416-17.

intentional torts.<sup>210</sup> The court explained that in *Parret*, the Supreme Court of Oklahoma had “clarified what kind of conduct constituted an intentional tort.”<sup>211</sup> An employee’s claim satisfies the requisite intent standard if the employee shows that the employer “(1) desired to bring about the worker’s injury, or (2) acted with the knowledge that such injury was substantially certain to result.”<sup>212</sup> Although declining to assess the sufficiency of CompSource’s underlying petition, the court held, “it is enough that [the employee] has attempted to allege an intentional tort under the Workers Compensation Act so as to avoid the exclusive remedy provision.”<sup>213</sup>

*D. The 2010 Amendments to Oklahoma Worker’s Compensation Act: Title 85, Section 12 of the Oklahoma Statutes*

The Oklahoma legislature, in adopting the 2010 amendments to workers’ compensation, effectively overturned *Parret* and adopted the purpose to injure standard.<sup>214</sup> The amended exclusivity provision now provides that workers’ compensation is the exclusive remedy for an injured employee “except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee.”<sup>215</sup> The statute explicitly states that an intentional tort “exist[s] only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury.”<sup>216</sup> A plaintiff’s successful demonstration that the employer had “knowledge that such injury was substantially certain to result from [its] conduct”<sup>217</sup> is insufficient to establish an intentional tort for purposes of the exception to workers’ compensation exclusivity.<sup>218</sup>

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210. *See id.* at 420-21.

211. *Id.* at 420.

212. *Id.* at 420-21 (quoting *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 579 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33).

213. *Id.* at 421.

214. *See* 85 OKLA. STAT. § 302 (2011); *Parret*, 127 P.3d at 579.

215. 85 OKLA. STAT. § 302. The statute also provides an exception to exclusivity “where the employer has failed to secure the payment of compensation for the injured employee”. *Id.*

216. *Id.*

217. *Parret*, 127 P.3d at 579.

218. *See* 85 OKLA. STAT. § 302.

*V. Purpose to Injure Is the Appropriate Standard to Define the Scope of the Intentional Tort Exception to Workers' Compensation Exclusivity*

The Oklahoma Legislature adopted the proper standard of intent—purpose to injure—for defining the parameters of the intentional tort exception to workers' compensation exclusivity.

*A. Purpose to Cause Injury Is Consistent with the Majority of Jurisdictions*

Oklahoma has joined the majority of states in adopting the true intent standard.<sup>219</sup> Today, all but nine states recognize an exception to workers' compensation exclusivity for an employer's intentional torts.<sup>220</sup> Of the states that do provide such an exception, slightly more than twenty states expressly have adopted the purpose to injure standard.<sup>221</sup> Approximately eight other states have adopted a similar or slightly more restrictive formulation of the purpose to injure standard.<sup>222</sup> The remaining minority of roughly ten states have adopted the substantial certainty standard.<sup>223</sup>

While the mere fact that the majority of legislatures have adopted a similar standard does not in itself warrant the adoption of the same in Oklahoma. Nonetheless, it indicates that other legislatures in weighing the competing interests of employees and employers involved in setting the standard of intent have determined that the purpose to injure standard is more consistent with workers' compensation policy.

Adopting the majority standard in Oklahoma is also important for Oklahoma business. If Oklahoma adopted the less exacting minority substantial certainty standard, employers may be discouraged from operating their businesses in Oklahoma when instead they could operate in nearby states such as Arkansas, Colorado, Kansas, and Missouri that apply a more exacting standard.<sup>224</sup>

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219. See Appendix; see also *King v. Penrod Drilling Co.*, 652 F. Supp. 1331, 1334 (D. Nev. 1987).

220. See Appendix (stating that Kansas, Maine, Missouri, Nebraska, New Hampshire, Pennsylvania, Rhode Island, Wisconsin and Wyoming do not currently allow an exception to exclusivity for an employer's intentional conduct).

221. See *id.*

222. See *id.*

223. See *id.*; *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 575 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33.

224. See Appendix.

*B. The Purpose to Cause Injury Standard Is a Bright Line Rule*

An employer acts with “purpose” to cause injury if, and only if, it is his conscious object to cause such injury.<sup>225</sup> As a result, an employer harboring any motive other than a desire to injure the employee does not act with purpose.<sup>226</sup> This holds true irrespective of the employer’s awareness of the certainty of the employee’s injury.<sup>227</sup>

In stark contrast to the bright line rule, the substantial certainty standard depends upon subtle gradations of knowledge that include knowledge of foreseeable risk, substantial likelihood of risk, substantial certainty of risk, and virtual certainty of risk. The Supreme Court of Michigan criticized the standard, noting:

The problem with the substantial certainty test is that it is difficult to draw the line between substantial certainty and substantial risk. In applying the substantial certainty test, some courts have confused intentional, reckless, and even negligent misconduct, and therefore blurred the line between intentional and accidental injuries. The true intentional tort standard [should] keep the distinction clear.<sup>228</sup>

Part of the reason that the substantial certainty standard is confusing is that it is inconsistent with the common use of the word “intent.” The Court of Appeals of Maryland noted that intent “is the word commonly used to describe the purpose to bring about stated physical consequences.”<sup>229</sup> Because the substantial certainty standard is inconsistent with the common understanding of intent, “any serious application of the [standard] . . . requires us to engage in strange verbal contortions.”<sup>230</sup> The substantial certainty standard,

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225. See MODEL PENAL CODE § 2.02(2)(a)(i) (2011).

226. See *Davis v. U.S. Emp’rs Council, Inc.*, 934 P.2d 1142, 1146 (Or. Ct. App. 1997).

227. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. c (2010).

228. *Beauchamp v. Dow Chem. Co.*, 398 N.W.2d 882, 893 (Mich. 1986) (footnote omitted), *superseded by statute*, MICH. COMP. LAWS § 418.131 (West Supp. 2011) (providing that the exception to exclusivity is satisfied only when an “employer specifically intended an injury”).

229. *Johnson v. Mountaire Farms of Delmarva, Inc.*, 503 A.2d 708, 712 (Md. 1986) (emphasis omitted) (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 80 (W. Page Keeton ed., 5th ed. 1984)).

230. Anthony Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)’s Definition of Intent*, 54 VAND. L. REV. 1165, 1173 (2001).

like Voltaire's God, seems to have been invented out of necessity, since it resembles no intuitively familiar mental state and is famously difficult to explain to skeptical first year students who have not yet checked their common sense at the law school's front door. It is something less than certainty (which would be too strong) and more than highly probable (which would be too weak, and would collapse the whole category into recklessness). It is a concept, which, having no fixed meaning, can, as the workman's compensation cases discussed above show, mean whatever a judge wants.<sup>231</sup>

The *Parret* court thought its careful articulation of the substantial certainty standard would prevent the newly adopted standard from opening the floodgates of litigation. But, the standard has proven to be both difficult to apply and fact intensive. Even after the Oklahoma Supreme Court required the use of the substantial certainty test, the trial court in *Parret* refused to grant the employer's motion for summary judgment.<sup>232</sup> Many other tort cases involving employee injury were filed outside of the workers compensation arena and similarly survived motions for summary judgment.

The difficulty in applying the standard is illustrated in a recent unreported decision in Oklahoma wherein the court, discussing the substantial certainty test, found "it interesting that the 'substantial certainty' standard as adopted in this case is closely akin to the standards established for 'willful and wanton' misconduct as described by Professor Prosser in his treatise on torts."<sup>233</sup> The court explained that for an employer's conduct to be willful or wanton, the employer need not intend to cause injury.<sup>234</sup> Instead, it is sufficient that the employer act "in total disregard of the consequences and under such circumstances that a reasonable man would know or have reason to know that such conduct would be *likely* to result in substantial harm to another."<sup>235</sup>

The requisite intent for willful and wanton conduct differs from substantial certainty described in *Parret* because it requires only that the injury be "likely" to occur as opposed to being substantially certain to

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231. *Id.*

232. *See Parret v. UNICCO Serv. Co.*, No. CIV-01-1432-HE, 2006 WL 752877, at \*4 (W.D. Okla. Mar. 21, 2006).

233. Order, *supra* note 180, at 2.

234. *Id.* at 2-3 (citing *Graham v. Keuchel*, 847 P.2d 342 (Okla. 1993)).

235. *Id.* at 3 (emphasis added).

occur.<sup>236</sup> The court's recognition of standard similarity, even after the *Parret* court's painstaking efforts to distinguish the substantial certainty standard from less culpable states of mind, highlights the difficulty courts across the country have had in applying the standard.

*C. The Purpose to Cause Injury Standard Avoids Litigation in All but the Most Egregious of Situations*

An employee's tort claim, in a jurisdiction applying the purpose to injure standard, will be barred in all but the most egregious of cases.<sup>237</sup> An employee's tort claim in a jurisdiction applying the substantial certainty standard, however, will likely survive an employer's motion for summary judgment even if based upon factual allegations sufficient to satisfy only the recklessness standard. Requiring juries to resolve these grey area cases, ranging from recklessness to certainty of injury, creates uncertainty both in terms of the existence and extent of employer liability. This uncertainty threatens to unsettle the balance of the interests reflected in the industrial bargain which provides employers with definite yet limited liability and employees with automatic yet limited recovery.

As with any claim, once the standard is established, the underlying facts of the claim must be applied to the requisite standard. In the workers' compensation context, not only is the substantial certainty standard itself imprecise and confusing, but the facts introduce their own complexities, given that the dispositive issue is the degree of the employer's subjective appreciation of a known risk.

Due to the importance of subtle fact variations in each case, appellate courts across various jurisdictions have overturned trial courts' grants of summary judgment in favor of the employer, holding that whether the employer's alleged conduct was sufficient to constitute knowledge of a substantial certainty of injury presented an issue of material fact that must be resolved by the jury.<sup>238</sup>

For example, in *O'Brien v. Ottawa Silica Co.*, an employee contracted respiratory disease from exposure to asbestos.<sup>239</sup> Company doctors

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236. *See id.*; *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 579 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33.

237. *Parret*, 127 P.3d at 575 (quoting 48 AM. JUR. 2D *Proof of Facts* § 2 (1987)) (“[I]n any jurisdiction applying the ‘specific intent’ standard, ‘unless the case involves an assault or a battery, recovery will probably be denied.’”).

238. *See, e.g.*, *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507, 508, 513 (Conn. 1994) (noting cases in which other appellate courts have made similar holdings).

239. 656 F. Supp. 610, 611 (E.D. Mich. 1987).

recommended that the employer take precautionary measures to protect the employee.<sup>240</sup> The employer, however, not only failed to implement these precautionary measures, but also withheld the doctors' finding of calcified plaques in the employee's lungs, effectively precluding the employee from seeking early medical treatment.<sup>241</sup> The court reasoned, "[i]f proven, these facts might permit an inference that [the employer] knew injury to [the employee] was substantially certain to occur."<sup>242</sup>

Likewise, in *Kielwein v. Gulf Nuclear, Inc.*, when the employer directed the employee to clean up a radiation spill while denying the employee access to safety materials, the court held that an issue of material fact existed as to whether the employer was substantially certain injury would result.<sup>243</sup>

Similarly in *Suarez v. Dickmont Plastics Corp.*, an employee's fingers were partially amputated when his fingers got stuck in a plastic molding machine while the employee was "attempting to clear hot molten plastic out of . . . [the] machine."<sup>244</sup> The employee alleged that injury resulted from the employer's "wilful and serious misconduct."<sup>245</sup> More specifically, the defendant alleged the employer: (1) required employees to clear the machine while the machine was in use; (2) denied employees access to safer methods; and (3) failed to install a protective covering over the machine to mitigate the likelihood of injury.<sup>246</sup> The appellate court reversed the trial court's grant of summary judgment in favor of the employer, finding that a genuine issue of material fact existed as to whether the employer was substantially certain that injury would result.<sup>247</sup>

The employer, in each of the cases, was aware that the employer's conduct created some degree of risk of injury to the employee.<sup>248</sup> In these

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240. *Id.*

241. *Id.*

242. *Id.*

243. 783 S.W.2d 746, 747-48 (Tex. App. 1990).

244. 639 A.2d 507, 508 (Conn. 1994).

245. *Id.*

246. *Id.*

247. *See id.* at 508, 513 ("Here, a jury could reasonably infer, from all the circumstances viewed in the light most favorable to the plaintiff, that the defendant's conduct constituted more than a mere failure to provide appropriate safety or protective measures, and that the plaintiff's injury was the inevitable and known result of the actions required of him by the defendant.").

248. *See O'Brien v. Ottawa Silica Co.*, 656 F. Supp. 610, 611 (E.D. Mich. 1987) (employer withheld from employee a physician's report indicating the employee had calcified plaques in his lung); *Suarez*, 639 A.2d 507, 509 (Conn. 1994) (employer's conduct



cases, the only issue remaining for the juries to resolve was how aware the employers were of the likelihood of injury to the employee. If the employer was substantially certain of the risk of injury, the employee's claim would fall within the intentional tort exception and the claim would not be barred by the exclusivity provision. If, on the other hand, the employer was only aware of the substantial likelihood of injury or was reckless with respect to the likelihood of injury, the employee's claim does not satisfy the intentional tort exception and the claim will be barred.

Although courts have attempted to clearly define the substantial certainty standard, as *O'Brien*, *Kielwein*, and *Suarez* demonstrate, employers' motions for summary judgment in all but the most basic negligence claims will be denied. Thus, while only conduct rising to the level of substantial certainty is sufficient to establish liability, many claims ultimately amounting to mere recklessness must survive summary judgment so that the jury can make that determination. Since employee claims premised on employer recklessness must survive summary judgment, employers must either defend against or settle claims that under the more exacting purpose to injure standard would be barred by workers' compensation exclusivity. This substantial increase in litigation countermands the employer's principal benefit of the industrial bargain—certain yet limited liability.

*D. The Purpose to Cause Injury Standard Is More Consistent with the No-fault Principle of Workers' Compensation*

Not only does the substantial certainty test require the trier of fact to assess the employer's degree of awareness of risk, it also requires a determination of whether the employer was culpable as opposed to just whether the injury was work related.

Even with the most precise definition by a state's legislature or highest court, a jury may be unlikely to understand, let alone apply, a complex substantial certainty standard. The jury may instead inappropriately associate egregious conduct or heinous injury with an employer's knowledge of the substantial certainty of injury. But, unlike tort, recovery in workers' compensation depends not upon the egregiousness of the employer's conduct but instead "depends on one simple test: Was there a work-connected injury?"<sup>249</sup> If so, the employee's claim is generally

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violated O.S.H.A. standards and other accepted safety standards); *Kielwein*, 783 S.W.2d at 748 ("It is impossible for [the employer] to have been unaware that exposing [the employee] to such risks without any protection whatsoever would be *substantially certain* to cause [injury].").

249. 1 LARSON, *supra* note 16, § 1.03(1).

covered by workers' compensation and therefore barred by exclusivity. Professor Larson explains:

Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.

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."<sup>250</sup>

Allowing juries to determine whether an employer's subjective knowledge satisfies an imprecise substantial certainty standard risks violating this fundamental principle that fault is largely immaterial in workers' compensation.

Having juries assess the degree of knowledge with which the employer acted in itself disregards this fundamental test for coverage of whether the injury was work related. For example, in denying the employers' motions for summary judgment in *O'Brien*, *Kielwein*, and *Suarez*, the courts held that the juries must determine the likelihood of injury of which the employers were aware.

In all three cases, the employer engaged in egregious conduct. In *O'Brien*, the employer concealed the existence of a medical condition from an employee effectively denying that employee the opportunity to seek medical treatment.<sup>251</sup> In *Kielwein*, the employer exposed the employee to radiation yet denied the employee access to appropriate safety materials.<sup>252</sup> In *Suarez*, the employer violated OSHA requirements and other safety standards in failing to furnish an adequate guard to a plastic molding machine and in refusing to allow the employee to fulfill his work responsibilities in a safer fashion.<sup>253</sup> Yet, in focusing upon the culpability of the employer, the courts in each of these cases failed to address the more

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250. *Id.*

251. *O'Brien*, 656 F. Supp. at 611.

252. *Kielwein*, 783 S.W.2d at 747.

253. *Suarez*, 639 A.2d at 508-09.

relevant question of whether these injuries were work related and invited juries to make their factual determinations in reference to the culpability of the employer.

In each case, the injuries were work related and therefore within the purview of workers' compensation and its exclusivity. In *O'Brien*, for example, the employee was exposed to asbestos in the workplace.<sup>254</sup> The employee in *Kielwein* was exposed to radioactive isotopes while decontaminating an area following a radiation spill that occurred "when another employee accidentally sliced through a sealed capsule."<sup>255</sup> Finally, in *Suarez*, an employee sued his employer, Dickmont Plastics Corporation, when two of the employee's fingers were permanently injured after his hand was caught in the plastic molding machine while the employee was attempting to remove "hot molten plastic" from the machine.<sup>256</sup> Had the court applied the proper standard—whether there was a work related injury—the employees' remedy in *O'Brien*, *Kielwein*, and *Suarez* would have been limited to that which is provided by workers' compensation.<sup>257</sup>

*E. Tort Law and Its Underlying Policies Should Not Govern Recovery in Work Related Injuries*

Considering the different objectives of workers' compensation and tort law, the legislature should assess the relative strengths and weaknesses of the two competing standards in relation to the unique objectives of workers' compensation law rather than the objectives of tort law. Professor Larson observed one of two mistakes responsible for virtually "every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced . . . to the importation of tort ideas."<sup>258</sup> A general understanding of the relationship between workers' compensation, tort law, and social insurance proves fundamental to avoiding this mistake.<sup>259</sup>

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254. See *O'Brien*, 656 F. Supp. at 611.

255. *Kielwein*, 783 S.W.2d at 747.

256. *Suarez*, 639 A.2d at 508.

257. To be sure, the rationale behind the exception to exclusivity in jurisdictions that apply the purpose to injure standard is that an employer's purposeful injury of an employee is neither accidental nor work-related. Thus the purpose to injure standard is consistent with Professor Larson's test of whether there was a work related injury. See 1 LARSON, *supra* note 16, § 1.03(1).

258. *Id.* § 1.02. The other mistake attributable to these errors is "the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy." *Id.* § 1.20.

259. See *id.*

Workers' compensation "is neither a branch of tort law nor [a form of] social insurance;" however, workers' compensation does exhibit some characteristics of each.<sup>260</sup> Similar to tort, but unlike social insurance, liability for compensation rests solely with the employer.<sup>261</sup> Neither the employee nor the state contributes to the system from which benefits are disbursed.<sup>262</sup> On the other hand, similar to social insurance, but unlike tort, benefits are determined "based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame."<sup>263</sup>

To be clear, the substantial certainty standard is consistent with the standard of intent used throughout the Restatement (Second) of Torts for most intentional torts.<sup>264</sup> Nevertheless, even tort law is now recognizing the importance of distinguishing between purpose and substantial certainty in a variety of contexts. The Restatement (Third) of Torts, for example, distinguishes between the two standards in certain respects and acknowledges that "purpose [provides] a clearly stronger basis for liability."<sup>265</sup>

The Restatement (Third) of Torts goes even further, explicitly separating the two standards of intent and moving "what was once a mere comment"—the definition of intent—"to the most prominent position," the first section.<sup>266</sup> The Restatement (Third) of Torts summarizes the complexity and centrality of the definition of intent in a variety of legal contexts as follows:

[w]hether an act is characterized as intentional, reckless, or negligent may determine whether punitive damages are available, whether contribution is permitted in comparative fault, whether a tort judgment will be dischargeable in bankruptcy, whether liability insurance will cover an insured's tortious conduct, whether a worker will be able to exit the workman's compensation system and sue her employer in tort, whether emotional distress will be available to a bystander, whether a municipality can be sued in tort, whether affirmative defenses

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260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965).

265. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. a (2010).

266. Sebok, *supra* note 230, at 1167.

are available, and whether the statute of limitations applicable to a given action.<sup>267</sup>

The Restatement (Third) separates the two competing standards of intent “to accommodate courts that in particular contexts might want to distinguish between intent in the sense of purpose and intent in the sense of knowledge.”<sup>268</sup> Interestingly, the Restatement (Third) specifically identifies the struggle among state courts to define intent for purposes of the intentional tort exception to workers’ compensation as one of the primary factors motivating its separation of the two definitions of intent.<sup>269</sup>

Despite important differences in policy objectives of tort law and compensation law and the Restatement (Third)’s recognition of the need to distinguish the two standards of intent, *Parret* relied heavily in its reasoning on adopting a standard of intent consistent with tort policies and terminology.<sup>270</sup> The *Parret* court stated that the substantial certainty standard “furthers the general tort principle that injuries are to be compensated and anti-social behavior is to be discouraged.”<sup>271</sup>

Although fully compensating injuries and deterring misconduct remain important policy objectives, these policies prove subordinate to other policy considerations in workers’ compensation law.

As the *Parret* court observed, limiting an individual employee’s recovery to that provided by workers’ compensation will often deny the employee full and adequate compensation. The *Parret* court failed to realize, however, that workers’ compensation law, unlike tort recovery, “does not pretend to restore to the claimant what he or she has lost; it gives claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable claimant to exist without being a burden to others.”<sup>272</sup>

It is important to remember that—unlike barring a claim for another reason, such as the running of the statute of limitations which has the effect of denying recovery entirely—barring an injured employee’s tort claim

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267. *Id.* at 1168.

268. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. a (2010).

269. *Id.*

270. *See Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 577 (Okla. 2005), *superseded by statute*, 2010 Okla. Sess. Laws 2032-33; *see also* RESTATEMENT (SECOND) OF TORTS § 8A (1965) (“THE WORD ‘INTENT’ IS USED THROUGHOUT THE RESTATEMENT . . . TO DENOTE THAT THE ACTOR DESIRES TO CAUSE CONSEQUENCES OF HIS ACT, OR THAT HE BELIEVES THAT THE CONSEQUENCES ARE SUBSTANTIALLY CERTAIN TO RESULT FROM IT.”).

271. *Parret*, 127 P.3d at 579.

272. 1 LARSON, *supra* note 16, § 1.03(5).

because of the exclusivity of workers' compensation means only that the employee's recovery will be limited to workers' compensation benefits. Although these benefits are modest compared to potential tort damages, the legislature set the benefit levels to meet the basic needs of the employer and his dependents.<sup>273</sup> The purposes of workers' compensation "are best served by allowing th[is] remedial system which the Legislature has created a broad sphere of operation."<sup>274</sup> Courts should be wary not to disturb the balance the legislature has struck in determining that "the benefits derived from quick and certain basic compensation outweigh those from delayed and contingent full compensation."<sup>275</sup>

Additionally, the *Parret* court correctly observed that subjecting employers to tort liability would have substantial deterrent value.<sup>276</sup> Although the underlying employer conduct in many employee claims is reprehensible, workers' compensation law is motivated by policy considerations other than deterring or punishing this conduct. Unlike tort recovery, "[i]n compensation theory, liability is not supposed to hurt the employer as it helps the employee, since the loss is normally passed on to the consumer."<sup>277</sup> The ability of the employer to spread the cost of liability for claims covered by the act likely decreases the employer's incentive to avoid the liability causing conduct. The legislature, however, in promulgating the workers' compensation system has determined that the benefits of certain and limited liability and automatic and certain recovery outweigh the costs of the diminution in deterrent effect.

## VI. Conclusion

The choice between which of the competing standards of intent to apply to the intentional tort exception to workers' compensation remains difficult

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273. *See id.*

274. *Kittell v. Vt. Weatherboard, Inc.*, 417 A.2d 926, 927 (Vt. 1980).

275. *Id.*

276. *Parret*, 127 P.3d at 578. In *CompSource Oklahoma v. L & L Construction, Inc.*, the employer's liability insurance carrier successfully denied coverage of an employee's claim based upon a work related injury where the employee alleged the employer's actions were substantially certain to cause injury so as to not be bound by worker's compensation exclusivity, as the policy excluded coverage for intentional misconduct. 207 P.3d 415, 420-21 (Okla. Civ. App. 2009). To the extent that substantial certainty has this effect, the deterrent effect achieved in holding employers liable in tort for conduct substantially certain to result in injury to an employee could be considerable.

277. 1 LARSON, *supra* note 16, § 1.03(7).

due to competing policy considerations that militate in favor of each standard.

The Oklahoma Supreme Court in *Parret*, weighing the competing interests of employers and employees, adopted the substantial certainty standard. In its view, the substantial certainty standard satisfies the general purposes of workers' compensation while simultaneously deterring intentional employer wrongdoing and promoting safety in the workplace. Subsequent to the *Parret* decision, the Oklahoma legislature, also weighing these policy considerations, adopted the stricter "purpose" standard.

Considering overarching policies underlying workers' compensation as a whole, including ensuring certain and limited liability, the Oklahoma Legislature adopted the proper standard. In individual instances, however, the purpose standard will provide inadequate compensation to employees injured by at times egregious employer conduct. The *Parret* court correctly identified that the challenging cases lie between the extremes of employer negligence and purposeful misconduct—"where the employer [is] . . . not motivated by a desire to harm employees, but certainly tak[es] a calculated risk with their lives and safety."<sup>278</sup> While those situations are likely rare, the newly adopted purpose standard will bar employee recovery against the employer in all but those situations where the employer purposefully injured its employee.

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278. *Parret*, 127 P.3d at 578 (quoting 7 CAUSES OF ACTION 2d 197, § 2, at 204).

## APPENDIX

State	Approach	Statute	Case Law
Alabama	No exception for employer's intentional torts, except those torts so tenuously related to the employment relationship as to fall outside the coverage of workers' compensation, such as fraud and outrage.	Ala. Code § 25-5-53 (1975) (exclusive remedy).	Raines v. Browning-Ferris Industries of Alabama, Inc., 638 So.2d 1334 (Ala. Civ. App. 1993) (providing an exception for "tortious conduct committed outside the course of the claimant's employment, such as fraud or outrage."); Ex parte Progress Rail Services Corp., 869 So.2d 459, 473 (Ala. 2003) ("It certainly can be argued that the Legislature manifested an entirely different intent in 1992 when it completely rewrote § 25-5-11 so as to specifically provide that various parties, exclusive of the employer, could be sued for willful conduct. The Legislature's so specifying as to various nonemployer parties, but providing no corresponding "limited" immunity for employers that would modify the "complete" immunity employers had previously been declared to enjoy, suggests that the Legislature intended to leave unaltered the nature of employer immunity."); Lowman v. Piedmont Executive Shirt Mfg. Co., 547 So.2d 90, 94 (Ala. 1988) ("[T]he Act should not be an impervious barrier, insulating a wrongdoer from the payment of just and fair damages for intentional tortious acts only very tenuously related to workplace accidents.").
Alaska	Purpose/Specific Intent (Judicial)	Alaska Stat. § 23.30.055 (exclusive remedy).	Van Biene v. Era Helicopters, Inc., 779 P.2d 315, 319 (Alaska 1989)(requiring showing of "intent to harm by the employer"; Fenner v. Municipality of Anchorage, 53 P.3d 573, 577-78 (Alaska 2002)(finding no genuine issue of material fact when plaintiff failed to adduce evidence indicating defendant "specifically intended to cause his injuries."
Arizona	Purpose/Specific Intent (Statutory)	Ariz. Rev. Stat. Ann. § 23-1022(A)-(B) (exception to exclusivity for employer's "wilful misconduct," defined as "an act done knowingly and purposely with the direct object of injuring another."	Johnson v. Kerr-McGee Oil Industries, Inc., 631 P.2d 548, 552 (Ariz. Ct. App. 1981)(requiring showing of "deliberate intention [to inflict injury] as distinguished from some kind of intention presumed from gross negligence."



State	Approach	Statute	Case Law
Arkansas	Purpose/ Specific Intent (Judicial)	Ark. Code Ann. § 11-9-105(a) (LexisNexis Year)(exclusive remedy).	Guerrero v. OK Foods, Inc., 230 S.W.3d 296, 298 (Ark. Ct. App. 2006)(internal quotation omitted)("[T]he exception only applies to acts committed with an actual, specific, and deliberate intent on the part of the employer to injure the employee.").
California	3 Statutory Exceptions	Cal. Labor Code § 3602 (exceptions to exclusivity for: (1) employer's "willful physical assault" (2) employer's "fraudulent concealment of the existence of the injury and its connection with the employment" (3) "employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person."	Gunnell v. Metrocolor Laboratories, Inc., Cal. Rptr. 2d 195 (Cal. Ct. App. 2001)(check cite and page)(framing inquiry as whether injury arose out of and in the course of employment rather than an inquiry as to "the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury."
Colorado	Purpose/Specific Intent (Judicial)	Colo. Rev. Stat. § 8-41-102 (exclusive remedy).	Schwindt v. Hershey Foods Corp., 81 P.3d 1144, 1146-47 (Colo. App. 2003) (rejecting outright the substantial certainty standard and holding that the exception applies only if "employer deliberately intended to cause the injury").
Connecticut	Substantial Certainty (Judicial)	Conn. Gen. Stat. § 31-284(a) (year) (exclusive remedy).	McClain v. Pfizer, Inc., 692 F.Supp.2d 229, 243 (D.Conn., 2010) (quoting Suarez v. Dickmont Plastics Corp., 698 A.2d 838, 840-841 (Conn. 1997) ("[A] plaintiff employee [can] establish an intentional tort claim ... by proving either [(1)] that the employer actually intended to injure the plaintiff (actual intent standard) or [(2)] that the employer intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur (substantial certainty standard)."

State	Approach	Statute	Case Law
Delaware	Purpose/ Specific Intent (but statute/ cases applies to <u>co-employee</u> not employer; possible employer enjoys absolute immunity (no exception)	Del. Code Ann. tit. 19 §§ 2301, 2304	Ward v. General Motors Corp., 431 A.2d 1277, 1279 (Del. Super. Ct. 1981)(citing Del. Code Ann. Tit. 19 § 2301 and explaining that Delaware requires specific intent).
Florida	Virtually Certain (Statutory)	Fla. Stat. § 440.11(1)(b) (the employee must prove, by clear and convincing evidence, that "1. The employer deliberately intended to injure the employee; or 2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.	Jones v. Martin Electronics, Inc., 932 So. 2d 1100, 1105 (Fla. 2006) (holding that the employee's claim is not barred by the exclusivity provision "if the employer's conduct is to the level of intentional conduct substantially certain to result in injury").
Georgia	Exception for employer's intentional torts entirely unrelated to the employment relationship; however, if the animosity motivating the intentional tort arises from the employment relationship, the claim is barred.	Ga. Code Ann. § 34-9-1(4)(Year)("Injury' and 'personal injury' shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee;" therefore, claims arising from such actions are not covered by the statute and are accordingly not barred by the exclusivity provision.).	Baldwin v. Roberts, 442 S.E.2d 272, 273-74 (Ga. Ct. App. 1994) (holding employee's claim against employer for battery when employer struck employee as employee was being escorted from restaurant by police was barred because alleged battery was related to employment and therefore covered by the exclusivity provision of workers' compensation.) See also 12 Ga. Jur. Workers' Compensation § 4:6 Purely Personal Willful and Intentional Acts.

State	Approach	Statute	Case Law
Hawaii	Exception limited to claims for sexual harassment, sexual assault, invasion of privacy related to sexual harassment or sexual assault, and negligent or intentional infliction of emotional distress.	Haw. Rev. Stat. § 386-5 (Year) (providing exclusive remedy "except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought").	Kamaka v. Goodwill Anderson Quinn & Stifel, 176 P.3d 91, 108 (Haw. 2008) ("Based on a plain reading, HRS § 386-5 unambiguously provides that claims for infliction of emotional distress or invasion of privacy are not subject to the exclusivity provision when such claims arise from claims for sexual harassment or sexual assault, in which case a civil action may be brought."). See also 29 U. Haw. L. Rev. 211, Hawaii's Workers' Compensation Scheme: An Employer's License to Kill? (questioning the limited exception to exclusivity provided in Haw. Rev. Stat. § 386-5 (Year)).
Idaho	Wilful Physical Aggression	Idaho Code Ann. § 72-209 (providing that claim is not barred "where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer").	Kearney v. Denker, 760 P.2d 1171, 1173 (Idaho 1988) (internal citation omitted) ("The word 'aggression' connotes 'an offensive action' such as an 'overt hostile attack.' To prove aggression there must be evidence of some offensive action or hostile attack. It is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur.").
Illinois	Purpose/Specific Intent (Judicial)	820 Ill. Comp. Stat. 305/11 (exclusive remedy).	Copass v. Illinois Power Co., 569 N.E.2d 1211, 1215 (Ill. App. Ct. 1991) (holding that an employee must "allege defendants had the specific intent to injure . . ." Allegations that the defendant "possessed a substantial certainty that injury would occur" is insufficient.).

State	Approach	Statute	Case Law
Indiana	Purpose/Specific Intent (Judicial)	Ind. Code § 22-3-2-6 (year) (exclusive remedy).	Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271, 1275, n.5 (Ind. 1994) (rejecting outright the substantial certainty standard and holding that "nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice"); Eichstadt v. Frisch's Restaurants, Inc., 879 N.E.2d 1207, 1210-11 (Ind. Ct. App. 2008)(internal citations omitted)("Before an injury can be said to have been intended by an employer, two requirements must be met. First, the employer itself must have intended the injury . . . Second, the employer must have intended the injury or had actual knowledge that an injury was certain to occur.").
Iowa	*best guess-guess- intentional torts only exception (assault, battery, ect.)	Iowa Code § 85.20 (Year) (exclusive remedy).	Brcka v. St. Paul Travelers Companies, Inc., 366 F.Supp.2d 850, 855 (S.D.Iowa 2005)("Unlike simple dissatisfaction of care claims or negligence actions, intentional torts do not fall within the exclusive remedy provision."); Beard v. Flying J, Inc. 266 F.3d 792 C.A.8 (Iowa),2001.
Kansas	*No exception	Kan. Stat. Ann. § 44-5a07 (exclusive remedy).	Tomlinson v. Owens-Corning Fiberglas Corp., 770 P.2d 833, 838 (Kan. 1989)(quoting Hormann v. New Hampshire Ins. Co., 689 P.2d 837, pincite (Kan. 1984)("As a general rule, exclusive of exceptions created in the Act itself, the Kansas Act's operation is exclusive of all other remedy and liability. Kansas cases have followed the principle that if the Kansas Workmen's Compensation Act affords the worker a remedy for the wrong, the compensation Act is exclusive, thus barring an independent tort action at common law."); Dillard v. Strecker, 877 P.2d 371, 374 (Kan. 1994)(citation omitted)("[T]he provisions of the Act are to be liberally construed to bring workers under the Act whether or not it is desirable for the specific individual's circumstance.").

State	Approach	Statute	Case Law
Kentucky	*Wilful Physical Aggression (may only be an exception for wilfull acts of employee not employer).	Ky. Rev. Stat. Ann. § 342.690 (West Year)(exclusivity "shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director")(emphasis added).	
Louisiana	Substantial Certainty (Judicial)	La. Rev. Stat. Ann. § 23:1032(A)-(B) (establishing workers' compensation as the exclusive remedy except for intentional acts).	Bazley v. Tortorich, 397 So.2d 475, 481 (La. 1981) ("The meaning of 'intent' is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that that result is substantially certain to follow from his conduct, whatever his desire may be as to that result.").
Maine	No Exception for Intentional Torts	Me. Rev. Stat. tit. 39, §§ 104, 408.	Frank v. L.L. Bean, Inc., 352 F.Supp.2d 8, 11 (D.Me. 2005) ("Maine courts have held that this exemption [from tort liability] applies not only to negligence, but to intentional torts as well." Li v. C.N. Brown Co., 645 A.2d 606, 608 (Me. 1994) ("The workers' compensation statute no longer requires injuries to have been accidental to fall within the scope of the Act. See, e.g., P.L.1973, ch. 389 (legislature deleted the words "by accident" from the statute). The Act applies to all work-related injuries and deaths, however caused, not just accidental injuries and deaths.").
Maryland	Purpose/Specific Intent (Statutory)	Md. Code Ann., Labor § 9-509 (West Year) (Establishing exception if employee shows "deliberate intent of the employer to injure or kill the covered employee").	Johnson v. Mountaire Farms of Delmarva, Inc., 503 A.2d 708, 712 (Md. 1984) ("To bypass the exclusivity provided by a workmen's compensation statute such as ours, the complaint must be based upon allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act.").

State	Approach	Statute	Case Law
Massachusetts	*No exception for intentional torts of employer as long as tort arises out of employment relationship.	Mass. Gen. Laws ch. 152, § 24 (Year)(exclusive remedy).	Doe v. Purity Supreme, Inc., 664 N.E.2d 815, 818 (Mass. 1996)(stating that "[e]xcept for certain exceptions . . . intentional torts are covered by the workers' compensation act" and are therefore subject to the exclusivity provision); Fusaro v. Blakely, 661 N.E.2d 1339, 1341 (Mass. App. Ct. 1996)("A claim against a fellow worker for the commission of an intentional tort will be barred by the exclusivity clause of the Workers' Compensation Act, G.L. c. 152, § 24, if committed within the course of the worker's employment and in furtherance of the employer's interest.").
Michigan	Purpose/Specific Intent (Statutory)	Mich. Comp. Laws § 418.131 (Year) ("The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.").	Smith v. Mirror Lite Co., 492 N.W.2d 744, 746 n. 1 (Mich. Ct. App. 1992) ("1987 P.A. 28 amended the exclusive remedy provision of the WDCA. Before the amendment, whether a tort was intentional was determined by applying the 'substantial certainty' standard, whether the employer intended the act that caused the injury and knew that the injury was substantially certain to occur.").
Minnesota	Purpose/Specific Intent (Judicial)	Minn. Stat. § 176.031 ("The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee.").	Gunderson v. Harrington, 632 N.W.2d 695, 703 (Minn. 2001) (requiring a "conscious and deliberate intent to inflict injury" for exception to apply; knowledge to a substantial certainty is insufficient).

State	Approach	Statute	Case Law
Mississippi	Purpose/Specific Intent (Judicial)	Miss. Code Ann. § 71-3-9 (exclusive remedy).	Franklin Corp. v. Tedford, 18 So.3d 215, 221 (Miss. 2009) (internal citation omitted) ("Mississippi is in concurrence with an overwhelming majority of states in requiring an 'actual intent to injure' the employee.").
Missouri	*No Exception for Intentional, Unprovoked Acts of Violence (Statutory); Possible Exception for Purpose/Specific Intent to Injure.	Mo. Rev. Stat. § 287.120(1) (Providing exclusive remedy "for personal injury or death of the employee by accident arising out of and in the course of the employee's employment" and explaining that "'accident' as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person").	McCoy v. Liberty Foundry Co., 635 S.W.2d 60, 62 (Mo. Ct. App. 1982) ("[F]or employer conduct to be actionable as a 'nonaccidental' cause of injury, the employer must intentionally act with the specific purpose of thereby injuring the employee."). <u>But see</u> Massey v. Victor L. Phillips, Co. 827 F.Supp. 597, 599 (W.D.Mo.1993) ("Thus, Missouri courts appear undaunted by the fact that the injury in question is the result of obviously intentional acts . . . In the court's view, these cases bring into doubt the continuing validity of McCoy and similar decisions.).
Montana	Purpose/Specific Intent (Statutory)	Mont. Code Ann. § 39-71-413(1),(3) (year) (establishing an exception to exclusivity for an intentional injury and defining intentional injury as "an injury caused by an intentional and deliberate act that is specifically and actually intended to cause injury to the employee injured and there is actual knowledge that an injury is certain to occur").	Alexander v. Bozeman Motors, Inc., 234 P.3d 880, 886 (Mont. 2010) ("In other words, an 'intentional injury' has two required elements: (1) an intentional and deliberate act specifically and actually intended to cause injury; and (2) actual knowledge of the injury's certainty.").

State	Approach	Statute	Case Law
Nebraska	No Exception for Intentional Torts of Employer (Judicial)	Neb. Rev. Stat. § 48-111 (year) ("exemption given an employee, officer, or director of an employer or insurer shall not apply in any case when the injury or death is proximately caused by the willful and unprovoked physical aggression of such <u>employee, officer, or director</u> ")(emphasis added)	Harsh Intern., Inc. v. Monfort Industries, Inc., 662 N.W.2d 574, 579 (Neb. 2003). (internal citation omitted) ("We have stated that the Act provides the exclusive remedy by the employee against the employer for <u>any</u> injury arising out of and in the course of the employment. Thus, we have held that intentional acts of an employer fall within the scope of the Act.")
Nevada	Purpose/Specific Intent	Nev. Rev. Stat. § 616B.612 (year) (exclusive remedy).	King v. Penrod Drilling Co., 652 F.Supp. 1331,1334 (D. Nev. 1987) (requiring "deliberate intent to injure the employee").
New Hampshire	No Exception for Intentional Torts of Employer (Statutory/Judicial)	N.H. Rev. Stat. Ann. § 281-A:8 (providing that employee's are presumed "to have waived all rights of action whether at common law or by statute or provided under the laws of any other state or otherwise: (a) Against the employer . . . and (b) Except for intentional torts, against any officer, director, agent, servant or employee acting on behalf of the employer").	Karch v. BayBank FSB, 794 A.2d 763, 770 (N.H. 2002.) (emphasis added) ("An employee is entitled to compensation under the Workers' Compensation Law for 'accidental injury or death arising out of and in the course of employment,' RSA 281-A:2, XI, but may not bring a separate tort action against her employer. Indeed, the Workers' Compensation Law expressly provides that an employee subject to that chapter waives the right to bring such a separate action in exchange for the acceptance of benefits. RSA 281-A:8, I(a). We note, however, an employee's waiver in exchange for benefits does not bar intentional tort actions against <u>co-employees</u> . RSA 281-A:8, I(b).")



State	Approach	Statute	Case Law
New Jersey	Substantial Certainty (Judicial); May Require Virtual Certainty	N.J. Stat. Ann. § 34:15-8 (exclusive remedy "except for intentional wrong").	Laidlow v. Hariton Machinery Co., Inc., 790 A.2d 884, 894 (2002) (explaining the Millison two-prong intentional wrong analysis: (1) conduct: subjectively intended to injure or substantially certain to injure (2) context: "the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize"); See also Van Dunk v. Reckson Associates Realty Corp., 2 A.3d 456 (N.J. Super. Ct. App. Div. 2010); Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505, 514 (N.J. 1985) ("We must demand a virtual certainty.").
New Mexico	3-Prong Delgado Claim: Less Exacting Standard than Substantial Certainty	N.M. Stat. Ann. § 52-1-6(E) (1978) (exclusive remedy).	Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148, 1156 (N.M. 2001) (articulating 3 prong test: "(1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury").
New York	*Not sure case makes it sound like substantial certainty but I wrote down true intent in notes... check case.	N.Y. Workers' Compensation Law § 11 (McKinney Year) (The employee must prove that the employer's acts were deliberate and intentional, not merely reckless. Injury resulting from the employer's negligence or recklessness are not exceptions to the exclusive liability rule . . . there must be proof that there was a specific act, or acts, directed at causing harm to the claimant, to take away the defense of workers' compensation as the exclusive remedy of the employee against the employer or co-employee.").	Acevedo v. Consolidated Edison Co. of N.Y., Inc., 596 N.Y.S.2d 68, 71 (N.Y. App. Div. 1993) (internal quotations and citations omitted)("To sufficiently plead an intentional tort that will neutralize the statute's exclusivity there must be alleged an intentional or deliberate act by the employer directed at causing harm to the particular employee. In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury ... A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that a substantial certainty such a result will ensue.").

State	Approach	Statute	Case Law
North Carolina	Substantial Certainty (Judicial); Woodson Claim	N.C. Gen. Stat. § 97-9 (exclusive remedy).	Seymour v. Lenoir County, 567 S.E.2d 799, 801 (N.C. Ct. App. 2002) (quoting Woodson v. Rowland, 407 S.E.2d 222, 228 (N.C. 1991) ("Under a Woodson claim, a plaintiff can bring a civil suit against an employer based on intentional acts where 'an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct.'").
North Dakota	Purpose/ Specific Intent (Judicial)	N.D. Cent. Code § 65-04-28 (exclusive remedy).	Zimmerman v. Valdak Corp., 570 N.W.2d 204, 209 (N.D. 1997)(check name of case) (rejecting the substantial certainty standard outright and holding that "[a]n employer is deemed to have intended to injure if the employer had knowledge an injury was certain to occur and willfully disregarded that knowledge").
Ohio	Purpose/ Specific Intent (Statute uses "substantial certainty" language but defines in a way so that only purpose/ specific intent is sufficient to get claim within exception)	Ohio Rev. Code Ann. § 2745.01(A),(B) (West Year) (providing exception if "the employer committed the tortious act with intent to injure another or with the belief that the injury was substantially certain to occur. (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.	Kaminski v. Metal & Wire Prods. Co., 927 N.E.2d 1066, 1079 (Ohio 2010) (internal quotation and citation omitted) ("When we consider the definition of 'substantial certainty,' it becomes apparent that an employee does not have two ways to prove an intentional tort claim as R.C. 2745.01(A) suggests. The employee's two options of proof become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure. Thus, under R.C. 2745.01, the only way an employee can recover is if the employer acted with the intent to cause injury.").

State	Approach	Statute	Case Law
Oklahoma	Purpose/ Specific Intent (Statutory)	Okla. Stat. tit. 85, § 12 (year) (change format-OLR does diff) (exclusive remedy "except in the case of an intentional tort." Specifies that an intentional tort "exist[s] only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury." A plaintiff's successful demonstration "that the employer had knowledge that such injury was substantially certain to result from its conduct" is insufficient.	Parret v. Unicco, 2005 OK 54, ¶ 2, 127 P.3d 572 (overturned by 85 Okla. Stat. 12.
Oregon	Purpose/ Specific Intent (Statutory)	Or. Rev. Stat. § 656.156(2) (Year) ("If injury or death results to a worker from the deliberate intention of the employer of the worker to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under this chapter, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes.").	Lusk v. Monaco Motor Homes, Inc., 775 P.2d 891, 894 (Or. Ct. App. 1989) ("The statutory exemption applies only if the injury results 'from the deliberate intention of the employer of the worker to produce such injury . . .'. That phrase requires, in addition to the intent that will normally suffice to prove an intentional tort, that the injury be 'deliberate,' in the sense that the employer has had an opportunity to weigh the consequences and to make a conscious choice among possible courses of action, and also that the employer specifically intend 'to produce * * * injury' to someone, although not necessarily to the particular employe[e] who was injured.").

State	Approach	Statute	Case Law
Pennsylvania	No Exception for Intentional Torts of Employer (Judicial)	77 Pa. Cons. Stat. § 481 (Year) (The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employe[e]s.)	Barber v. Pittsburgh Corning Corp., 555 A.2d 766, 770 (Pa. 1989) ("The significance of this provision indicates that the legislature, in its grant of immunity to fellow employees, expressly excluded intentional misconduct. However, in the immunity provided for the employer, under section 303 of the ODA no such exception was engrafted. This omission cannot be lightly ignored. It is obvious that the legislature considered the issue of intentional torts and created an exception to the statutory immunity when intentional harm was caused by the co-employee. The legislature's failure to provide a similar exclusion to the immunity provided for the employer must be deemed to have been deliberate."); Holdampf v. Fidelity & Cas. Co. of N.Y., 793 F.Supp. 111, 113 (W.D. Pa. 1992)("In Poyser v. Newman & Co., 514 Pa. 32, 522 A.2d 548, 550 (1987), the Pennsylvania Supreme Court definitively held that the intentional tort exception to the exclusivity provision, to the extent that it was ever alive in Pennsylvania, was now dead. The court explained and reaffirmed this holding in Barber v. Pittsburgh Corning Corp., 521 Pa. 29, 555 A.2d 766, 770 (1989) ("In this Court's decision in Poyser, supra, we expressly held ... that there was no intentional tort exception to the exclusivity provision of the WCA.").
Rhode Island	No Exception for Intentional Torts of Employer (Judicial)	R.I. Gen. Laws § 28-29-20 (exclusive remedy).	Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 372 (R.I. 2002) ("As both sides note in their briefs, this Court repeatedly has held that there is no wholesale intentional-tort exception to the exclusive-remedy doctrine, as codified in § 28-29-20. Thus, the WCA provides the exclusive remedy for work-related personal injuries "under chapters 29-38 of this title [28]"-even if the injury-causing conduct of the alleged tortfeasor was intentional."); Diaz v. Darnet Corp., 694 A.2d 736, 737 (R.I. 1997) ("[I]n Rhode Island neither the Legislature nor this court has created an intentional tort exception to the mandate of § 28-29-20.").

State	Approach	Statute	Case Law
South Carolina	Purpose/ Specific Intent (Judicial)	S.C. Code Ann. § 42-1-540 (1976) (exclusive remedy).	Peay v. U.S. Silica Co., 437 S.E.2d 64, 65-66 (S.C. 1993)(Explicitly rejecting the substantial certainty standard and holding "that only those injuries inflicted by an employer who acts with a deliberate or specific intent to injure are exempted from the exclusive remedy of workers' compensation coverage").
South Dakota	Substantial Certainty (Judicial)	S.D. Codified Laws § 62-3-1; 62-3-2 (providing exclusive liability for employer and remedy for employee, respectively, "except rights and remedies arising from intentional tort").	Jensen v. Sport Bowl, Inc., 469 N.W.2d 370, 372 (S.D. 1991) (holding the injured employee "must also allege facts that plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of the employer's conduct").
Tennessee	Purpose/ Specific Intent	Tenn. Code Ann. § 50-6-108 (exclusive remedy).	Bishop v. Woodbury Clinical Laboratory, Inc., Slip Copy, 2010 WL 1609949 (M.D. Tenn. 2010)(citing Gonzales v. Alman Constr. Co., 857 S.W.2d 42, 48 (Tenn. Ct. App. 1993)) ("Tennessee law does recognize an exception to this exclusive remedy provision in instances where the employer acts with 'actual intent to injure' the employee.").

State	Approach	Statute	Case Law
Texas	Substantial Certainty	Tex. Lab. Code Ann. § 408.001(B) (West Year) (check cite because of new code) (exclusive remedy except allows suit for "exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence"); Tex. Civ. Prac. & Rem. Code Ann. § 41.001(11) defines "gross negligence" to mean "an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others."	Urdiales v. Concord Technologies Delaware, Inc., 120 S.W.3d 400, 406-07 (Tex. App. 2003) (inteneral quotations and citations omitted) ("Mere negligence or willful negligence will not suffice because the specific intent to inflict injury is lacking. 'Intent' means the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it.").
Utah	Purpose/ Specific Intent (Judicial)	Utah Code Ann. § 34A-2-105 (West Year)(exclusive remedy).	Thomas v. National Semiconductor, Inc., 827 F.Supp. 1550, 1552 (D. Utah 1993)(requiring a showing of "deliberate intent directed to the purpose of inflicting an injury"); Cerka v. Salt Lake County 988 F.Supp. 1420, 1422 (D. Utah 1997) (quoting Lantz v. National Semiconductor Corp., 775 P.2d 937, 940 (Utah Ct. App. 1989))("[F]or a defendant to be held liable for an 'intentional act,' she must have 'manifested a deliberate intent to injure.'").

State	Approach	Statute	Case Law
Vermont	Purpose/ Specific Intent; But Supreme Court has left the door open to the possibility of adopting the substantial certainty standard.	Vt. Stat. Ann. tit. 21, § 622 (exclusive remedy).	Kittell v. Vermont Weatherboard, Inc., 417 A.2d 926, 927 (Vt. 1980)("Nothing short of a specific intent to injure falls outside the scope of the Act."). <u>But see</u> Garger v. Desroches, 974 A.2d 597, 602 n.3 (Vt. 2009)(citing Mead v. Western Slate, Inc., 848 A.2d 257 (Vt. 2004))(declining to address "whether the broadened definition of specific intent identified in Mead [which includes substantial certainty] should be adopted" because the plaintiff did "not allege[] that defendant knew with substantial certainty that injury would result."
Virginia	Purpose/ Specific Intent (Judicial)	Va. Code Ann. § 65.2- 307 (Year)(exclusive remedy).	McGreevy v. Racal-Dana Instruments, Inc., 690 F.Supp. 468, 468 (E.D. Va. 1988)("Thus where an employer commits an intentional tort with the intent to injure an employee, this Court concludes that an action by that employee is not barred by the WCA.").
Washington	Purpose/ Specific Intent: 2 prong Birkliid test	Wash. Rev. Code § 51.24.020 (Year) ("If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.").	Birkliid v. Boeing Co., 904 P.2d 278, 285 (Wash. 1995)(rejecting outright the substantial certainty standard and holding that "the phrase 'deliberate intention' in RCW 51.24.020 means the employer [(1)] had actual knowledge that an injury was certain to occur and [(2)] willfully disregarded that knowledge").

State	Approach	Statute	Case Law
Washington, D.C.	Purpose/Specific Intent (Judicial)	D.C. Code § 32-1504 (Year) (exclusive remedy).	Grillo v. National Bank of Washington, 540 A.2d 743, 744 (D.C. 1988) ("We hold that only injuries specifically intended by the employer to be inflicted on the particular employee who is injured fall outside of the exclusivity provisions of the WCA and that the evidence presented to show the employer's knowledge with substantial certainty that an injury will result from an act does not equate with the specific intent to injure or kill when the injury is caused by the intentional act of a third person."); Feirson v. District of Columbia, 506 F.3d 1063, 1068 (D.C. 2007) (citing Grillo v. National Bank of Washington, 540 A.2d 743, 744 (D.C. 1988)) ("Grillo recognized an intentional injury exception to the District's Workers' Compensation Act (WCA), which applies only when the employer specifically intended to injure the employee.").



State	Approach	Statute	Case Law
West Virginia	Akin to Substantial Certainty (specific intent or 5 statutory requirements)	W. Va. Code § 23-4-2(d)(2) (2002) (fix quotes) (providing exception to exclusivity if employer acted with the "dilate intention" to cause injury. (stating standard of "dilate intention" may only be met if: (1) the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent . . . or" (2) all of the following five (5) conditions are satisfied: (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death; (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition; (C) the specific unsafe working condition was a violation of a state or federal safety law or of a commonly accepted and well-known safety standard within the industry or business of the employer; (D) the employer intentionally exposed an employee to the specific unsafe working condition; and (E) the specific unsafe working condition proximately caused a compensable injury.	

State	Approach	Statute	Case Law
Wisconsin	No Exception for Intentional Torts of Employer (Judicial)	Wis. Stat § 102.03(2) ("Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employee to bring action against any coemployee for an assault intended to cause bodily harm.")	Rivera v. Safford, 377 N.W.2d 187, 189 (Wis. Ct. App. 1985) ("The Worker's Compensation Act, ch. 102, Stats., provides an exclusive remedy against the employer or a coemployee to an employee who is injured while performing service growing out of and incidental to his or her employment, where the accident causing the injury arises out of his or her employment. Sec. 102.03(1)(c), (1)(e), and (2), Stats.; Goranson v. DILHR, 94 Wis.2d 537, 549, 289 N.W.2d 270, 276 (1980) (citation omitted). An employee, however, may bring an action against a coemployee for an assault intended to cause bodily harm. Sec. 102.03(2)."); Aslakson v. Gallagher Bassett Services, Inc., 729 N.W.2d 712 (Wis 2007)(See also Guse v. A.O. Smith Corp., 260 Wis. 403, 406-07, 51 N.W.2d 24 (1952) ("In enacting the Act, the legislature intended to impose upon employers an absolute liability, regardless of fault; and in return for this burden, intended to grant employers immunity from all tort liability on account of injuries to employees."); Vick v. Brown, 38 N.W.2d 716, 719 (1949) ("[The employer's liability] is solely under the workmen's compensation law. There is no liability in tort.")).
Wyoming	No Exception for Intentional Torts of Employer (Judicial)	Wyo. Stat. Ann. § 27-14-104(a) (providing exclusive remedy "unless the <u>employees</u> intentionally act to cause physical harm or injury to the injured employee.") (emphasis added).	Baker v. Wendy's of Montana, Inc., 687 P.2d 885, 888-89 (Wyo. 1984)(internal citation and quotations omitted)(holding that employer's enjoy "absolute immunity from tort actions including the employer's violation of his duty of care whether the negligence is ordinary or culpable . . . [t]his is to say that immunity is absolute . . . Our various interpretations of § 27-12-103(a), W.S.1977, reflect the absolute immunity afforded contributing employers under the worker's compensation laws of Wyoming."). Parker v. Energy Development Co., 691 P.2d 981, 985 (Wyo. 1984)(holding an employer "is absolutely immune from all common-law tort remedies arising out of the injury to or death of the employee-including causes of action for intentional tort or culpable negligence").