NEW JERSEY LAW REVISION COMMISSION

Final Report Regarding the Workers Compensation Act and the Scope of "Intentional Wrong" in N.J.S. 34:15-8

October 19, 2023

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

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Project Summary[1]

The New Jersey Workers' Compensation Act (WCA) provides employees with an "automatic entitlement to certain, but reduced," compensation for workplace injury or death in exchange for "relinquish[ing] their right to pursue common law remedies."[2] New Jersey courts have characterized this exclusive remedy provision as "a historic trade-off."[3] In N.J.S. 34:15-8, the WCA provides an exception for injuries or death resulting from an "intentional wrong," but does not define that term.[4]

The opinion of the Court in *Bove v. AkPharma Inc.*[5] included a detailed discussion of the scope of the "intentional wrong" exception, which brought this issue to the Commission's attention.[6] In *Bove*, the Appellate Division examined the legislative history and common law related to the intentional wrong exception,[7] and reviewed key New Jersey Supreme Court cases: *Millison v. E.I. du Pont de Nemours & Co.*,[8] *Laidlow v. Hariton Machine Co.*,[9] and *Van Dunk v. Reckson Associates Realty Corp*.[10]

Following the release of the Tentative Report in September 2022,[11] outreach was conducted to knowledgeable and interested organizations and individuals.[12] Additional comment was received regarding revised modifications in the September 2023 Draft Final Report after the September 2023 Commission meeting.[13] The near unanimous position of commenters was that modifying N.J.S. 34:15-8 is unnecessary and could potentially disrupt what is currently described as a consistent and predictable area of law.[14]

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[1] Preliminary work on this project was conducted by Alyssa Brandley, during her tenure as Legislative Law Clerk, and Karyn White, during her tenure as Counsel, with the New Jersey Law Revision Commission.
[2] *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 174 (1985).
[3] *Id.*
[4] N.J. STAT. ANN. § 34:15-8 (West 2022).
[5] 460 N.J. Super. 123 (App. Div. 2019), *certif. denied*, 240 N.J. 2, 7 (2019).
[6] *See* N.J. Law Revision Comm'n, *Memorandum Re: The use of "intentional wrong" in N.J.S. 34:15-8 as discussed in* Bove v. AkPharma Inc., *460 N.J. Super. 123 (App. Div. 2019)* (Sept. 15, 2022), www.njlrc.org (last visited Oct. 5, 2023).
[7] *Bove*, 460 N.J. Super. at 139 – 143.
[8] 101 N.J. 161 (1985).
[9] 170 N.J. 602 (2002).
[10] 210 N.J. 449 (2012).
[11] N.J. Law Revision Comm'n, *Tentative Report to Clarify the Scope of "Intentional Wrong" in N.J.S. 34:15-8*, at 14 (Sept. 15, 2022), www.njlrc.org (last visited Oct. 5, 2023) [hereinafter "September 2022 Tentative Report"].
[12] N.J. Law Revision Comm'n, *Draft Final Report Regarding the Workers Compensation Act and the Scope of "Intentional Wrong" in N.J.S. 34:15-8*, at 14 (Sept. 11, 2023), www.njlrc.org (last visited Oct. 5, 2023) [hereinafter "September 2023 Draft Final Report"].
[13] *See* E-Mail from Lisa Chapland, Senior Managing Director of Government Affairs, New Jersey State Bar Association ("NJSBA"), to Whitney G. Schlimbach, Counsel, NJLRC (Oct. 3, 2023, 12:02 PM EST) (on file with NJLRC) [hereinafter "October 3, 2023, E-Mail from Lisa Chapland"]; *see also* Letter from Christine O'Brien, President Insurance Council of New Jersey and Anthony M. Anastasio, President New Jersey Civil Justice Institute, to Whitney Schlimbach, Counsel at NJLRC (Sept. 20, 2023) (on file with NJLRC) [hereinafter "September 2023 ICNJ and NJCJI Comment"].
[14] September 2023 Draft Final Report, *supra* note 12, at 13-16.

During the September 2023 Commission meeting, the Commission expressed preliminary agreement with the position of commenters, but postponed the release of a Final Report until commenters, particularly the Workers Compensation and Civil Trial Bar Sections of the New Jersey State Bar Association (NJSBA), had an opportunity to review and comment on the revised modifications contained in the September 2023 Draft Final Report.[15]

Considering the serious and compelling concerns raised by commenters, the Commission does not recommend modification of N.J.S. 34:15-8 to clarify the scope of the "intentional wrong" exception.

Statute Considered

N.J.S. 34:15-8, entitled "Election surrender of other remedies," provides:

> Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee and for compensation for the employee's death shall bind the employee's personal representatives, surviving spouse and next of kin, as well as the employer, and those conducting the employer's business during bankruptcy or insolvency.
>
> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.[16]

Background

The *Bove* Plaintiff was the Director of Clinical Studies at AkPharma.[17] In 2007, AkPharma's Chief Executive Officer (CEO) suggested that Plaintiff and other employees use a nasal spray that the CEO developed and used to treat his own asthma.[18] Although Plaintiff was aware that the nasal spray did not have FDA approval, he voluntarily used it from 2007 to 2010.[19]

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[15] N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at 4, Sept. 21, 2023, www. njlrc.org (last visited Oct. 5, 2023) ("Vice-Chairman Bunn recommended that the Commission await input from the NJSBA before proceeding with any action related to this project. Chairman Gagliardi agreed with Vice-Chairman Bunn's suggestion. Commissioner Bell aligned with Commissioner Long . . . that the proposed modifications fail to enhance the reader's comprehension of the standard beyond what is already established by the existing case law. . . . Commissioner Hartnett . . . indicat[ed] his willingness to postpone further action until the NJSBA has provided their input.").
[16] N.J. STAT. ANN. § 34:15-8 (emphasis added).
[17] *Bove*, 460 N.J. Super. at 135.
[18] *Id.*
[19] *Id*. at 136.

During that time, he documented the effects of the product and provided his observations to the CEO.[20] When the FDA issued a "full clinical hold letter," Plaintiff discontinued his use of the nasal spray.[21] In 2011, Plaintiff was terminated from AkPharma due to a workforce reduction.[22] Two years later, he was diagnosed with permanent endocrine failure and a tumor in his colon, both of which he attributed to the nasal spray.[23]

Plaintiff filed a workers' compensation claim for his injuries.[24] He also sued his employer for fraudulent concealment, battery, and prima facie tort based on injuries he alleged were caused by the nasal spray.[25] Following an evidentiary hearing, the trial court granted Defendant AkPharma's motion for summary judgment, finding that Plaintiff "did not vault the exclusivity provision of the WCA," and Plaintiff appealed.[26]

Analysis

- ***Bove v. AkPharma***

In *Bove*, the Appellate Division examined the history and purpose of the WCA to determine whether Defendant's conduct fell within the scope of the intentional wrong exception. The Court explained that the WCA "compensates employees for personal injuries caused 'by accident arising out of and in the course of employment' [and] authorizes benefits irrespective of the fault of the employer or contributory negligence and assumption of risk of the employee."[27]

In 1961, the Legislature amended N.J.S. 34:15-8 by adding the intentional wrong exception.[28] Courts gave this language "a narrow construction," reasoning that the "Legislature intended the words . . . to have their commonly understood signification of deliberate intention."[29] The *Bove* Court examined the New Jersey Supreme Court's approach to the intentional wrong exception and reviewed the decisions of *Millison*, *Laidlow*, and *Van Dunk*.[30]

- *Millison v. E.I. du Pont de Nemours & Co.*

Almost twenty-five years after N.J.S. 34:15-8 was amended to include the reference to intentional wrong, the New Jersey Supreme Court addressed the concept in *Millison*, concluding that it "encompassed more than a subjective intention to injure."[31] Prior to *Millison*, demonstrating

[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 136 – 37.
[24] *Id*.
[25] *Id*. at 133.
[26] *Id*. at 137 (internal quotations omitted).
[27] *Id*. at 139 (internal quotation omitted).
[28] *Id*.; *see also* L.1961, c. 2, p. 14, § 1.
[29] *Bove*, 460 N.J. Super. at 140 (quoting *Bryan v. Jeffers*, 103 N.J. Super. 522 & 523-24 (App. Div. 1968) ("'intentional wrong' . . . is [not] equatable with 'gross negligence,' or similar concepts importing constructive intent")).
[30] *Id*. at 140-42.
[31] *Id*. at 141.

an intentional wrong required that "'deliberate intention' be shown."[32] In analyzing whether an intentional wrong had occurred, the *Millison* Court considered the necessary level of risk-exposure experienced by the harmed employee,[33] as well as the context in which an employer's conduct took place.[34]

In *Millison*, Plaintiffs alleged their employer knowingly exposed them to asbestos and concealed the health hazards of the exposure from them.[35] Plaintiffs also alleged that their employer, along with company doctors who conducted regular medical examinations of employees, concealed medical findings indicating that Plaintiffs were already suffering from asbestos-related diseases.[36]

To determine whether the employer had committed an intentional wrong within the meaning of N.J.S. 34:15-8, the *Millison* Court employed a "substantial certainty" standard.[37] Under the substantial certainty standard, "the mere knowledge and appreciation of a risk — something short of substantial certainty — is not intent."[38] The *Millison* Court required "a virtual certainty" to ensure that "the statutory framework of the [WCA] is not circumvented simply because a known risk later blossoms into reality."[39]

In addition, the Court required an examination of "the context in which [the] conduct takes place."[40] When analyzing context, the Court focused on whether "the resulting injury or disease, and the circumstances in which it is inflicted . . . [can] fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act."[41]

Although acknowledging that "knowingly exposing plaintiffs to asbestos clearly amounts to taking risks with employees' health," the *Millison* Court found this level of risk "come[s] up short of the 'substantial certainty' needed to find an intentional wrong."[42] Furthermore, the Court concluded that "the legislature's awareness of occupational diseases as a fact of industrial employment" compelled the conclusion that this harm "must be considered the type of hazard of employment that the legislature anticipated would be compensable under [the WCA]."[43]

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[32] *Millison*, 101 N.J. at 178 (quoting *Jeffers*, 103 *N.J. Super. at* 524).
[33] *Millison*, 101 N.J. at 177.
[34] *Id*. at 179.
[35] *Id*. at 168.
[36] *Id*.
[37] *Id*. at 177.
[38] *Id*. (quoting *W. Prosser and W. Keeton, The Law of Torts*, § 8 at 36 (5th ed. 1984)).
[39] *Id*. at 178.
[40] *Id*. at 179.
[41] *Id*.
[42] *Id*.
[43] *Id*.

The *Millison* Court held, however, that "[a]n employer's fraudulent concealment of diseases already developed is not one of the risks an employee should have to assume."[44] Since "[s]uch intentionally-deceitful action goes beyond the bargain struck by the [WCA]," the *Millison* Court held the substantial certainty standard was satisfied.[45]

- *Laidlow v. Hariton Machine Co.*

Almost two decades after *Millison* was decided, the Supreme Court revisited the "substantial certainty" standard in *Laidlow*.[46] In *Laidlow,* Plaintiff was injured while operating a machine without a safety guard, which his employer had "tied up" to increase "speed and convenience."[47] In addition, the employer had a long-running practice of temporarily placing the safety guard in its proper position while OSHA carried out safety inspections.[48]

Prior to Plaintiff's injury, there were "close-calls," but the unguarded mill was operated "for approximately twelve to thirteen years" without any accidents.[49] The *Laidlow* Court addressed whether the removal of the safety guard gave rise to a "substantial certainty" of harm, in the "absence of any prior injury."[50]

To resolve this issue, the *Laidlow* Court emphasized several key principles from the *Millison* opinion.[51] Although the "narrow and limited approach . . . requir[ing] subjective intention to injure" was rejected, the *Millison* Court left open the question whether removal of a safety device can be sufficiently egregious to find an intentional wrong.[52] The *Laidlow* Court described the "substantial certainty test [as] encompassing acts that the employer knows are substantially certain to produce injury even though, strictly speaking, the employer does not will that result."[53]

The *Laidlow* Court restated the requirements for establishing an intentional wrong as follows:

> (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial

[44] *Id*. at 182.
[45] *Id*.
[46] *Laidlow*, 170 N.J. at 606.
[47] *Id*. at 608.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 610 (comparing Defendant's "position that, under *Millison,* the standard for an intentional wrong requires proof of an employer's subjective intent to injure and that the deliberate removal or alteration of a safety guard does not constitute a 'deliberate intent to injure'" to the opposing position "that *Millison* specifically rejected the notion that an intentional wrong requires a deliberate intent to injure on the part of the employer [and] that *Millison* never declared that removal of a safety device failed to meet the standard for an intentional wrong").
[51] *Id.* at 617.
[52] *Id.*
[53] *Id.*

employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.[54]

Finding both prongs had been met, the *Laidlow* Court held the employer's conduct fell within the scope of the intentional wrong exception in the WCA.[55] The Court found that "the absence of a prior accident does not mean that the employer did not appreciate that its conduct was substantially certain to cause death or injury."[56]

The Court clarified, however, that its holding did not establish a "*per se* rule that [an employer commits an] 'intentional wrong' . . . whenever that employer removes a guard or similar safety device from equipment or machinery, or commits some other OSHA violation."[57]

- *Van Dunk v. Reckson Associates Realty Corp.*

In contrast to *Millison* and *Laidlow*, the *Van Dunk* Court held that Plaintiff did not establish an intentional wrong.[58] In *Van Dunk*, the Plaintiff's injury occurred when an unsecured trench collapsed on him less than five minutes after his supervisor told him to go in to the trench and fix a piece of filter fabric that would not lay flat.[59] The on-site supervisor "readily acknowledged to OSHA that . . . he knew the OSHA requirements and did not follow [them]," [60] and "against his own better judgment [sent Plaintiff into the trench] to perform a brief task and get out."[61] As a result, OSHA issued a "willful violation," meaning the "non-compliance . . . was not an accident or negligence."[62]

Consistent with the considerations in *Laidlow* and *Millison*, the *Van Dunk* Court concluded that "[t]he existence of an uncontested finding of an OSHA safety violation [even one categorized as willful] does not establish the virtual certainty that *Millison* demands."[63] The *Van Dunk* Court distinguished prior, successful intentional wrong claims because they "involved the employer's affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate deceit regarding the condition of the workplace, machine, or . . . the employee's medical condition, knowledge of prior injury or accidents, and previous complaints from employees."[64] The Court also emphasized "the durational aspect of the employer's intentional noncompliance with OSHA

[54] *Id*. at 617.
[55] *Id*. at 622.
[56] *Id*. at 621; *see also Bove*, 460 N.J. Super. at 141 – 42.
[57] *Laidlow*, 170 N.J. at 622 – 23.
[58] *Van Dunk*, 210 N.J. at 452.
[59] *Id*. at 454.
[60] *Id.* at 455.
[61] *Id*. at 472.
[62] *Id.*
[63] *Id*. at 469 – 70.
[64] *Id*. at 471.

requirements or other demonstrations of a longer-term decision to forego required safety devices or practices" in prior cases.[65]

Consequently, although the *Van Dunk* Court held that there was "an exceptional wrong" in that the "employer may have committed a reckless act [or] gross negligence . . . the plaintiff did not satisfy the conduct prong of the substantial-certainty test of *Millison*."[66]

The *Van Dunk* Court also addressed the "context prong."[67] The Court concluded that "the type of mistaken judgment by the employer and ensuing employee accident [in *Van Dunk*] was [not] so far outside the bounds of industrial life as never to be contemplated for inclusion in the Act's exclusivity bar."[68] Despite holding that Plaintiff had not satisfied either prong, the *Van Dunk* Court did not foreclose the possibility that "a single egregiously wrong act by an employer might, in the proper circumstances, satisfy the intentional-wrong standard."[69]

After summarizing the facts and holdings in these three primary Supreme Court cases, the *Bove* court concluded that

> [r]eviewing these cases together, it is apparent that in addition to violations of safety regulations or failure to follow good safety practice, an intentional wrong will be found when it is accompanied by <u>something more</u>, such as deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations.[70]

The *Bove* Court determined that Plaintiff "presented no evidence to support his contention defendants were substantially certain his use of [the nasal spray] would result in injury or death," or even that "his alleged injuries resulted from defendants' actions."[71]

Therefore, the *Bove* Court held that Plaintiff failed to satisfy the substantial certainty standard and establish an intentional wrong.[72]

- **Other New Jersey Supreme Court Cases Addressing "Intentional Wrong"**

In addition to the leading cases of *Millison*, *Laidlow*, and *Van Dunk*, the New Jersey Supreme Court has analyzed the scope of the intentional wrong exception in three additional cases, all issued on the same day in 2003. In two of the cases, *Crippen v. Central Jersey Concrete Pipe*

[65] *Id*.
[66] *Id*. at 472.
[67] *Id*. at 474.
[68] *Id*.
[69] *Id*.
[70] *Bove*, 460 N.J. Super. at 142 (emphasis added).
[71] *Id*. at 145.
[72] *Id*. at 146.

Co.,[73] and *Mull v. Zeta Consumer Products*,[74] the Supreme Court found an intentional wrong.[75] In *Tomeo v. Thomas Whitesell Construction Co.*,[76] however, the Court determined that the plaintiff failed to demonstrate an intentional wrong.[77]

In *Crippen*, an employee suffocated after falling into a hopper filled with sand and gravel.[78] The Supreme Court found that his employer "had knowledge that its deliberate failure to cure . . . OSHA violations" related to "inherently dangerous conditions" for a period of eighteen months was "substantial[ly] certain[to result in] injury or death to one of its employees."[79] The Court held that the employer's conduct and the "intentional[] dece[ption of] OSHA into believing that it had abated the violations[,]" satisfied both the conduct and context prongs of the *Millison* standard.[80]

In *Mull*, the Supreme Court addressed an injury that occurred when a winder machine started up unexpectedly while an employee was unjamming it.[81] The Court rejected the employer's argument that his "lack of deception toward OSHA" warranted a finding that the "conduct" prong was not met.[82] The *Mull* Court found that the employer disengaged safety devices and failed to provide a procedure for halting operation of the winder, despite a prior accident, employee safety complaints, and previous OSHA citations.[83] The Court held that those findings were sufficient to meet both prongs of the substantial certainty test.[84]

Finally, in *Tomeo*, an employee used his hand to clear snow from the chute of a snowblower and was pulled into its propellers, which continued to operate because the safety lever was taped in the disengaged position.[85] The *Tomeo* Court found that, even assuming the employer had taped the safety lever, the employee's act of putting his hand in the chute while the propellers were activated was an "intervening-superceding [*sic*] cause"[86] of the injury, and therefore, he did not establish an intentional wrong by his employer.[87]

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[73] 176 N.J. 397 (2003).
[74] 176 N.J. 385 (2003).
[75] *Crippen*, 176 N.J. at 399; *Mull*, 176 N.J. at 387.
[76] 176 N.J. 366 (2003).
[77] *Tomeo*, 176 N.J. at 367.
[78] *Crippen*, 176 N.J. at 400.
[79] *Id*. at 409.
[80] *Id*. at 410 (finding the employer "effectively precluded OSHA from carrying out its mandate to protect the life and health" of the employees).
[81] *Mull*, 176 N.J. at 387-88.
[82] *Id*. at 392.
[83] *Id*. at 393.
[84] *Id*. at 392.
[85] *Tomeo*, 176 N.J. at 368.
[86] *Id*. at 375.
[87] *Id*. at 377 ("the law does not impose a duty on an employer to prevent an employee from engaging in self-damaging conduct absent a showing that the employer encouraged such conduct or concealed its danger").

- **Appellate Division Cases Addressing "Intentional Wrong"**

In *Van Dunk*, the Supreme Court described the intentional wrong standard as "formidable," a characterization confirmed by the rarity of successful claims at the appellate level.[88] Using the framework developed by the Supreme Court, the Appellate Division has analyzed a multitude of varied fact patterns to determine whether an injured employee has established an intentional wrong and vaulted the exclusivity provision in the WCA.

Many intentional wrong cases addressed injuries caused solely by work-related equipment, usually because the equipment was in a state of disrepair;[89] lacked safety devices or precautions;[90] or was improperly operated.[91] Plaintiffs also commonly alleged injury caused by exposure to toxins or chemicals in the workplace[92] or by the negligent conduct of a third party.[93] When analyzing whether a plaintiff met the intentional wrong standard, appellate courts adhered closely to the language and considerations in *Millison*, *Laidlow*, and *Van Dunk*.

Appellate courts have also held that an employer's acquiescence in bad safety practices was insufficient to demonstrate an intentional wrong, on the basis that "[m]ere knowledge by an employer that a workplace is dangerous does not equate to an intentional wrong."[94] When

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[88] *Van Dunk*, 210 N.J. at 451; s*ee e.g. Mabee v. Borden, Inc.*, 316 N.J. Super. 218, 229 (1998) (observing that "[s]ince the *Millison* decision . . . New Jersey courts have yet to find an employee's allegations of intentional conduct sufficiently flagrant so as to trigger the exception to the exclusivity bar" and holding that Plaintiff's evidence (1) that employer removed safety guard and installed bypass switch to prevent automatic stoppage of labeling machine and (2) of a similar prior injury, satisfied the substantial certainty test); *Soto v. IOC*, 2017 WL 4530602 (N.J. Super. Oct. 11, 2017) (holding that substantial certainty standard was met where, after an explosion was caused by accumulations of combustible dust, employer misrepresented that numerous resulting OSHA violations had been abated, and Plaintiff was injured in subsequent explosion caused by same condition); *Alberto v. N. E. Linen Supply Co.*, 2015 WL 9942207 (N.J. Super. Ct. App. Div. Feb. 1, 2016) (finding that employer knew there was a substantial certainty of injury when he caused two employees to enter wastewater tank to clean it and both were killed almost immediately from exposure to the lethal chemicals inside the tank).

[89] *See generally Wilkinson v. S.B. King & Son, Inc*., 2011 WL 2899075 (N.J. Super. Ct. App. Div. July 21, 2011) (scaffolding collapse); *Verteramo v. Winston Towers 200 Assocs.*, 2006 WL 1509606 (N.J. Super. Ct. App. Div. June 2, 2006) (ladder collapse).

[90] *See generally Lemus v. Caterpillar Corp.*, 2013 WL 2096254 (N.J. Super. Ct. App. Div. May 16, 2013) (dragged into wood grinding machine); *Fitzpatrick v. Vreeland Bros. Landscaping*, 2012 WL 1969949 (N.J. Super. Ct. App. Div. June 4, 2012) (injured while clearing out mower chute); *Wen Xue Shen v. Do Do Plastics Inc. Co.*, 2008 WL 2491884 (N.J. Super. Ct. App. Div. June 24, 2008) (injured while changing heat seal tape on converter machine).

[91] *See generally Botts v. Lafayette Campbell, LLC*, 2018 WL 2122400 (N.J. Super. Ct. App. Div. May 9, 2018) (casket lift cable snapped); *Menkevich v. Delta Tools*, 2012 WL 986995 (N.J. Super. Ct. App. Div. Mar. 26, 2012) (table saw).

[92] *See generally Blackshear v. Syngenta Crop Prot., Inc.*, 2014 WL 4956741 (N.J. Super. Ct. App. Div. Oct. 6, 2014) (exterminator exposed to cancer-causing pesticides); *Kearney v. Bayway Ref. Co.*, 2008 WL 2388415 (N.J. Super. Ct. App. Div. June 13, 2008) (exposed to volatile organic chemicals from leaking valves at oil refinery); *Krzyzanski v. Swepco Tube Corp.*, 2008 WL 2220020 (N.J. Super. Ct. App. Div. May 30, 2008) (exposed to hazardous substances in poorly ventilated area).

[93] *See generally Magnifico v. James*, 2019 WL 6487290 (N.J. Super. Ct. App. Div. Dec. 3, 2019) (co-worker fell asleep while driving and resultant accident injured passenger); *Fendt v. Abrahams*, 2013 WL 1405096 (N.J. Super. Ct. App. Div. Apr. 9, 2013) (construction worker hit by car while directing traffic).

[94] *Van Dunk*, 210 N.J. at 470 (citing *Millison*, 101 N.J. at 177); *see Hocutt v. Minda Supply Co.*, 464 N.J. Super. 361, 382 (App. Div.) (" . . . an employer's longstanding practice of violating an OSHA regulation does not automatically rise to the level of intentional wrong"), *cert. denied*, 244 N.J. 456 (2020).

evaluating an employer's appreciation of risk, courts have considered the following: whether there were prior accidents, close-calls, or safety complaints, of which the employer was aware;[95] whether an employer removed or was aware of the absence of a safety device;[96] and whether there were prior OSHA violations or deception.[97]

Intentional wrong claims often failed because an employer attempted to provide safety training and equipment to its employees, even if insufficient,[98] or responded to employee safety complaints, even if the response was ineffective.[99] Claims were also unsuccessful when a third party's illegal act directly caused the injury,[100] or an employee failed to heed warnings or follow safety instructions.[101] An employer's lack of knowledge of relevant safety issues has also defeated intentional wrong claims, since an employer must know there is a substantial certainty of injury.[102]

The Appellate Division has observed that the "consistent trend of our courts [is] holding the 'intentional wrong' exception in N.J.S.A. 34:15-8 'applicable in only rare and extreme factual circumstances.'"[103]

The common elements in successful intentional wrong cases have been: prior similar

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[95] *See Suarez v. Lee Indus*., 2007 WL 2141505, *5 (N.J. Super. Ct. App. Div. July 27, 2007) ("[Employer] had been using a forklift to raise employees pouring ingredients into the . . . tank for approximately seven years [and d]uring that period, there had not been any accident in which a person fell from the forklift into the tank or onto the ground next to the tank[, nor] evidence of any 'close call' in which such an accident had almost occurred").

[96] *See Calle v. Hitachi Power Tools*, 2009 WL 509850, *6 (N.J. Super. Ct. App. Div. Mar. 3, 2009) ("Plaintiff did not and cannot establish that [his employer] is responsible for removing the safety springs from the [nail gun], and thus, cannot satisfy the 'context' prong by proving the equipment alterations were made . . . with substantial certainty an employee would eventually be injured").

[97] *See Soto*, 2017 WL 4530602, at *8-9 ("[a] reasonable jury can find defendant deliberately deceived OSHA into believing these improvements were being implemented").

[98] *See Blackshear*, 2014 WL 4956741, at *4 ("Plaintiff's proofs . . . at most demonstrate that [the employer], by providing [his employee] inadequate personal protective equipment, knowingly exposed him to cancer-causing pesticides and concealed that information from him . . . [and] are insufficient, as a matter of law, to meet the conduct prong of the substantial-certainty test").

[99] *See West v. Raw Power, Inc*., 2007 WL 957348, *6 (N.J. Super. Ct. App. Div. Apr. 2, 2007) ("even if [the employer's] efforts fell short . . . it did not stand idly by and allow conditions to exist that were substantially certain to result in injury or death to its employees.").

[100] *See Norwood v. Genesis Logistics, Inc.*, 2007 WL 2767999 (N.J. Super. Ct. App. Div. Sept. 25, 2007) (stabbed by co-worker); *see also Fisher v. Sears, Roebuck & Co.*, 363 N.J. Super. 457, 471 (App. Div. 2003) (finding that "illegal act of a third party over whom the employer had no real, much less exclusive, control" was "an intervening-superceding [*sic*] cause").

[101] *See Cong Su v. David's Cookies*, 2009 WL 2426336, *4 (N.J. Super. Ct. App. Div. Aug. 10, 2009) ("a rational factfinder could not conclude that it was virtually certain that a worker would insert his or her hand under the safety guard and inside the machine while it was under power and operating . . . even in the absence of specific training").

[102] *See Est. of Portillo by Montoya v. Bednar Landscaping Servs., Inc.*, 2021 WL 2832913, *8 (N.J. Super. Ct. App. Div. July 8, 2021) ("declin[ing] to establish a new standard of analysis – whether defendants 'willfully ignored' OSHA safety regulations – to satisfy the [context] prong" where employer testified that, prior to trench collapse that killed two employees, "it never occurred to him that the trench could collapse or cause injury to him or others working in the trench" and that "neither he nor any other officer or employee of the company had taken an Occupational Safety and Health Administration (OSHA) safety course"); *see also Bergen v. Able Energy, Inc*., 2009 WL 222943 (N.J. Super. Ct. App. Div. Feb. 2, 2009).

[103] *Bellomy v. Alamo*, 2008 WL 4648348, *6 (N.J. Super. Ct. App. Div. Oct. 14, 2008).

accidents or close-calls;[104] safety complaints or violations;[105] alteration or removal of safety devices and guards;[106] or a deliberate failure to correct unsafe conditions, sometimes accompanied by deception of either employees or those charged with regulating workplace safety, regarding safety conditions.[107] This list is not comprehensive,[108] nor have courts held that any of these examples are *per se* evidence of an intentional wrong.[109]

- **Intentional Wrong in Other States**

Most states provide an exception to the exclusive remedy of workers compensation.[110] The states that do so are fairly evenly split between providing a statutory or a common law exception.[111] States that have codified the exception generally limit its scope to a deliberate or specific intent to injure on the part of the employer.[112] Other states have narrowed the exception to provide relief only when there has been: willful, unprovoked physical aggression;[113] sexual assault or

[104] *Laidlow*, 170 N.J. at 620; *Mull*, 176 N.J. at 388; *Mabee*, 316 N.J. Super. at 222; *Soto*, 2017 WL 4530602, at *1.
[105] *Laidlow*, 170 N.J. at 620; *Mull*, 176 N.J. at 388 - 89; *Crippen*, 176 N.J. at 401 - 03; *Soto*, 2017 WL 4530602, at *1.
[106] *Laidlow*, 170 N.J. at 620; *Mull*, 176 N.J. at 388 - 89; *Mabee*, 316 N.J. Super. at 222 - 23.
[107] *Millison*, 101 N.J. at 182; *Laidlow*, 170 N.J. at 621; *Crippen*, 176 N.J. at 403; *Soto*, 2017 WL 4530602, at *8; *Alberto*, 2015 WL 9942207, at *1, *3 ("[employer] understood that entering the tank had the potential to cause death by asphyxiation" but employees "testified that [employer] was aware that they entered the wastewater tank, and denied [he] had ever instructed them not to do so").
[108] *Laidlow*, 170 N.J. at 621 ("the absence of a prior accident does not mean that the employer did not appreciate that its conduct was substantially certain to cause death or injury"); *see also Mull*, 176 N.J. at 392 (rejecting employer's argument that "lack of deception toward OSHA" warranted finding that "conduct" prong was not met).
[109] *Laidlow*, 170 N.J. at 622 – 23 ("[o]ur holding is not to be understood as establishing a *per se* rule that an employer's conduct equates with an 'intentional wrong' . . . whenever that employer removes a guard or similar safety device . . . or commits some other OSHA violation.").
[110] Kansas, Maine, Massachusetts, Rhode Island, Wisconsin, and Wyoming are the only states that do not provide any exception to the exclusive remedy of workers' compensation.
[111] Twenty states and D.C. provide for an exception only in common law: Alaska, Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, and Vermont. The remaining twenty-four states, including New Jersey, have codified an exception to the exclusive remedy provision.
[112] ALA. CODE § 25-5-53 (West 2022) ("willful conduct"); ARIZ. REV. STAT. ANN. § 23-1022(A) & (B) (West 2022) ("employer's wilful [sic] misconduct" which is "done knowingly and purposely with the direct object of injuring another"); LA. STAT. ANN. § 23:1032 (West 2022) ("an intentional act"); MD. CODE ANN., LAB. & EMPL. § 9-509 (West 2022) ("deliberate intent of the employer to injure or kill"); MICH. COMP. LAWS ANN. § 418.131(1) (West 2022) ("intentional tort" meaning "a deliberate act of the employer and the employer specifically intend[ing] an injury"); MONT. CODE ANN. § 39-71-413(3) (West 2022) ("an intentional and deliberate act that is specifically and actually intended to cause injury" with "actual knowledge that an injury is certain to occur"); N.H. REV. STAT. ANN. § 281-A:8(I)(b) (West 2022) ("intentional torts"); N.D. CENT. CODE ANN. § 65-01-01.1 (West 2022) ("intentional act done with the conscious purpose of inflicting the injury"); OKLA. STAT. ANN. TIT. 85A, § 5(B)(2) (West 2022) ("willful, deliberate, specific intent of the employer to cause such injury"); OR. REV. STAT. ANN. § 656.156(2) (West 2022) ("deliberate intention of the employer of the worker to produce such injury or death"); S.D. CODIFIED LAWS § 62-3-2 ("intentional tort"); WASH. REV. CODE ANN. § 51.24.020 (West 2022) ("deliberate intention of his or her employer to produce such injury"); W. VA. CODE ANN. § 23-4-2(c) (West 2022) ("the deliberate intention of his or her employer to produce the injury or death").
[113] CAL. LAB. CODE § 3602(b)(1) (West 2022) ("willful physical assault by the employer"); IDAHO CODE ANN. § 72-209(3) (West 2022); (KY. REV. STAT. ANN. § 342.690(1) (West 2022); NEB. REV. STAT. ANN. § 48-111 (West 2022).

harassment;[114] or when the injurious conduct is unrelated to work.[115]

Florida is the only state that has codified an exception similar to New Jersey's common law exception focusing on substantial certainty of harm.[116] Florida's exclusive remedy statute provides two exceptions: (1) when an employer "fails to secure payment of compensation as required" by the workers' compensation act, and (2) "[w]hen an employer commits an intentional tort that causes the injury or death of the employee."[117] The Florida statute continues that "an employer's actions shall be deemed to constitute an intentional tort" when the employer "deliberately intended" to injure the employee,[118] or

> 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.[119]

Although the Florida statute and New Jersey's common law on this subject share several similarities, there are significant differences as well. When describing conduct that qualifies as an intentional wrong, the Florida statute employs language similar to that used by the New Jersey courts.[120] Both states require either that the conduct is deliberate or that an employer knows its conduct is almost certain to result in harm to the employee.[121] Additionally, the examples in the Florida statute — "prior similar accidents or . . . explicit warnings" — are commonly cited in New Jersey cases as relevant evidence of an employer's knowledge of a substantial certainty of harm.[122]

The Florida statute, however, diverges significantly from New Jersey common law with respect to the requirement that an employer must conceal or misrepresent the danger to the employee, since deception by an employer is not *necessary* to establish an intentional wrong in

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[114] HAW. REV. STAT. ANN. § 386-5 (West 2022) ("sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto"); VA. CODE ANN. § 65.2-301(B) – (C) (West 2022) ("sexually assaulted and can identify the attacker . . . even if the attacker is the assaulted employee's employer or co-employee" and "nor shall this title bar any action at law, that might otherwise exist, by an employee who is sexually harassed").

[115] 77 PA. STAT. ANN. § 411(1) (West 2022) ("'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe [sic] because of reasons personal to him, and not directed against him as an employe [sic] or because of his employment").

[116] FLA. STAT. ANN. § 440.11 (West 2022).

[117] FLA. STAT. ANN. § 440.11(1)(a) – (b).

[118] FLA. STAT. ANN. § 440.11(1)(b)1.

[119] FLA. STAT. ANN. § 440.11(1)(b)2.

[120] *See Millison*, 101 N.J. at 178 (explaining that "the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution. . . [so w]e must demand a virtual certainty").

[121] *See Laidlow*, 170 N.J. at 614 ("an intentional wrong can be shown not only by proving a subjective desire to injure, but also by a showing, based on all the facts and circumstances of the case, that the employer knew an injury was substantially certain to result").

[122] *Id.* at 621 ("reports of prior accidents like prior 'close-calls' are evidence of an employer's knowledge that death or injury are substantially certain to result, but they are not the only such evidence").

New Jersey.[123] New Jersey common law also does not recognize a requirement that the concealment or deception "prevent the employee from exercising informed judgment about whether to perform the work," as is required by the Florida statute.[124]

Although the substance of the Florida intentional wrong exception is not identical to the New Jersey exception, the structure and language of the Florida statute provided guidance for developing the language set forth in the Appendix.

Outreach

Outreach was conducted to knowledgeable individuals and organizations, including: the New Jersey Department of Labor and Workforce Development; NJM Insurance Group; the New Jersey Council on Safety and Health; the Workers Compensation Section of the New Jersey State Bar Association; the New Jersey Compensation Association; the New Jersey Self-Insurers Association; the Insurance Council of New Jersey; the New Jersey Civil Justice Institute; the attorneys who represented the parties in *Bove v. AkPharma*; the New Jersey Business and Industry Association; and private attorneys with expertise in the area of workers' compensation.

Opposition

Opposition to the proposed modification of N.J.S. 34:15-7 was received in a joint written comment submitted by the Insurance Council of New Jersey (ICNJ) and the New Jersey Civil Justice Institute (NJCJI), and separately from the New Jersey Business and Industry Association (NJBIA).[125] In addition, the New Jersey Manufacturer's Insurance Group (NJM) aligned its official comment with the joint comment of the ICNJ and the NJBIA.[126]

- *Insurance Council of New Jersey and New Jersey Civil Justice Institute Joint Comment*

These organizations first expressed "appreciation [of] the Commission's mandate to improve the quality of New Jersey's statutes," and noted that the Commission's "deliberative

[123] *Mull*, 176 N.J. at 392 ("Although the employer's purported deception in *Laidlow* was a prominent factor in our analysis, we emphasized in that case that no one fact compelled our holding. In that respect, we stated as guidance to future courts and litigants that our disposition in such a case involving removal of safety devices will be grounded in the *totality of the facts* contained in the record.") (internal quotations omitted).
[124] FLA. STAT. ANN. § 440.11(1)(b)2.
[125] Letter from Christine O'Brien, President Insurance Council of New Jersey and Anthony M. Anastasio, President New Jersey Civil Justice Institute, to Whitney Schlimbach, Counsel at NJLRC, at 1 (Nov. 14, 2022) (on file with NJLRC) [hereinafter "November 2022 ICNJ and NJCJI Comment"] ("ICNJ is the leading trade association representing the interests of property and casualty insurers in the state. . . . NJCJI is the leading trade association advocating for the broader business community on matters of law and legal policy.").
[126] E-mail from Andrew Musick, Senior Advisor, Legislative Affairs, on behalf of New Jersey Manufacturers Insurance Group, to Whitney G. Schlimbach, Counsel, NJLRC (Dec. 22, 2022, 9:35 AM EST) (on file with NJLRC) ("NJM's official comments can be aligned with those submitted in the joint statement on the *Draft Tentative Report to Clarify the Scope of "Intentional Wrong" in NJS 34:15-8 ["Report"],* as provided by the ICNJ/NJCJI.").

approach to its mandate is clearly demonstrated by the thoughtful analysis set forth in the Report."[127]

The ICNJ and NJCJI stated, however, that, "given the fact-sensitive nature of determining whether the intentional wrong exception applies to workplace injuries, . . . the proposed amendment does not provide clarification regarding application of the exception above and beyond existing case law."[128] In addition, the organizations specifically objected to "the language set forth in Subsection c(2)(B),"[129] which is "different from the existing common law test" and would therefore, "generate legal uncertainty, which in turn will spawn new litigation."[130]

The ICNJ and NJCJI concluded their comments by "respectfully request[ing] that the Commission decline to recommend any amendments to the WCA to address application of the intentional wrong exception."[131]

- *New Jersey Business and Industry Association Comment*

Opposition to the proposed modifications was also received from the New Jersey Business and Industry Association (NJBIA).[132] The NJBIA echoed the concerns of the ICNJ and NJCJI that the proposed language indicating that an "intentional wrong is 'established when an employee demonstrates that the circumstances and the resulting injury or death are not a known and accepted risk in the industry' . . . could lead to uncertainty and increase litigation by workers."[133]

Therefore, the NJBIA "strongly urge[s] the Law Revision Commission to reconsider this recommendation in order to avoid overburdening the business community and diverting claims from the workers' compensation system."[134]

Alternative Language

On behalf of Ballard Spahr, LLP, the Honorable Roberto Rivera-Soto, who represented the Respondent in *Bove v. AkPharma*, provided detailed comments and alternative proposed language to the Commission.[135] Justice Rivera-Soto suggested that the statutory language "be modified to

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[127] *Id.*
[128] *Id*. at *2.
[129] *See e.g.* September 2022 Tentative Report, *supra* note 11, at 14 ("the circumstances and the resulting injury or death are not a known and accepted risk in the industry").
[130] November 2022 ICNJ and NJCJI Comment, *supra* note 125, at 2.
[131] *Id.*
[132] Memorandum re: NJBIA comments regarding Draft Tentative Report to Clarify the Scope of "Intentional Wrong" in N.J.S. 34:15-8, from Alexis Bailey, NJBIA Vice President of Government Affairs, to the New Jersey Law Revision Commission (Nov. 15, 2022) (on file with the NJLRC).
[133] *Id.* (expressing concern specifically of increased litigation over "the notion that a workplace injury incident occurred as 'a known and accepted risk in the industry'").
[134] *Id.*
[135] Letter from Ballard Spahr, LLP, by Roberto A. Rivera-Soto, to Whitney G. Schlimbach, Counsel at NJLRC (Nov. 22, 2022) (on file with NJLRC).

more closely track the jurisprudentially defined requirements collectively laid out in *Van Dunk . . . , Millison . . . , Laidlow . . . ,* and *Bove . . . .*"[136]

Ballard Spahr suggested that the following alternative language be employed in subsection (c) of N.J.S. 34:15-8:

> c. For purposes of this article, an "intentional wrong" is established when an employee demonstrates by a preponderance of the evidence both the "conduct prong" and the "context prong" of an "intentional wrong" as follows:
>
> > (1) that the employer knowingly exposed the employee to a substantial certainty of injury (the "conduct prong"); and,
> >
> > (2) that the resulting injury (i) is not a fact of life of industrial employment and (ii) must be plainly beyond anything the Legislature intended this Act to immunize (the "context prong").
>
> In the application of the definition of "intentional wrong" set forth in this subsection c., the following principles also govern:
>
> > • A finding of a willful violation under the federal Occupational Safety and Health Act, 15 U.S.C. §651, et seq., and the regulations adopted thereunder is not dispositive if the issue of whether the employer committed an "intentional wrong";
> >
> > • A probability or knowledge that injury or death could result is insufficient to establish an "intentional wrong";
> >
> > • An "intentional wrong" must amount to a virtual certainty that bodily injury or death will result;
> >
> > • Although the failure to take safety precautions may constitute an "exceptional wrong," it is not, standing alone, the type of egregious conduct associated with an "intentional wrong";
> >
> > • An "intentional wrong" will be found when, in addition to violations of safety regulations or the failure to follow good safety practices, it is accompanied by something more, such as deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations; and,
> >
> > • Mere allegations of intentional or negligent torts do not constitute an "intentional wrong."[137]

[136] *Id.* at 1.
[137] *Id.* at 1-2.

With respect to this alternative proposed language, Justice Rivera-Soto noted that "the more detailed provisions of these suggestions will be of much aid to litigants, lawyers and judges alike."[138] Furthermore, he explained that "the greater and more detailed definition of what constitutes an 'intentional wrong' simply codifies that which already appears in our jurisprudence."[139]

Additional Outreach

- *Additional Comments on the September 2022 Tentative Report*

During a September 19, 2023, video call, representatives of the Workers Compensation Section and the Civil Trial Bar Section of the New Jersey State Bar Association informally shared preliminary information that had been discussed by their respective Sections to assist in the Commission's consideration of this issue.[140]

The Workers Compensation Section of the NJSBA, which includes attorneys who represent both employers and employees, suggested that the modifications in the September 2022 Tentative Report were not necessary, given the longstanding and consistent common law on the issue.[141] In addition, the Section expressed concern that changes to the statute could add uncertainty and confusion, and increase litigation.[142]

Within the Civil Trial Bar Section of the NJSBA, there were, on initial consideration, two prevailing positions within the Section.[143] The first aligned with that of the Workers Compensation Section, suggesting that there was no need to amend the statute given the consistency of the law in the area.[144] The second opposed the modifications set forth in the September 2022 Tentative Report, but did not necessarily oppose modifying the statute altogether.[145]

- *Comment on the September 2023 Draft Final Report*

Prior to the September 2023 Commission meeting, additional comment was received from the ICNJ and NJCJI regarding the modifications contained in the September 2023 Draft Final Report.[146] The organizations reiterated the position and concerns expressed in their November

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[138] *Id.* at 3.
[139] *Id*.
[140] Memo re: video call between Lisa Chapland, Senior Managing Director of Government Affairs, NJSBA; Ann DeBellis, Chair Elect Workers' Compensation Section, NJSBA; Frank Viscomi, Member, Civil Trial Bar Section; Laura C. Tharney, Executive Director, NJLRC; and, Whitney G. Schlimbach, Counsel, NJLRC (Sept. 19, 2023) [on file with NJLRC].
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] September 2023 ICNJ and NJCJI Comment, *supra* note 13; *see also* November 2022 ICNJ and NJCJI Comment, *supra* note 125.

2022 joint comment regarding the propriety of modifying N.J.S. 34:15-8.[147] In addition, the organizations provided alternative language in the event that the Commission recommended modifying the statute.[148]

A brief preliminary and informal comment on the September 2023 Draft Final Report was also received from the Workers' Compensation and Civil Trial Bar Sections of the NJSBA.[149] Both Sections maintained their previous positions following a review of the revised modifications contained in the September 2023 Draft Final Report.[150]

Pending Bills

There are no pending bills that address the scope of the intentional wrong exception in N.J.S. 34:15-8.

Conclusion

The WCA provides limited recovery for injuries sustained by employees in the course of their employment in exchange for relinquishing their right to pursue common law legal remedies, except in the case of an intentional wrong. Although the WCA does not define the term, the New Jersey courts, including the Appellate Division in *Bove*, have extensively addressed the scope of the exception.[151]

Given the longstanding and consistent common law regarding the intentional wrong exception, as well as the comments received regarding the proposed modifications in the September 2022 Tentative Report and the September 2023 Draft Final Report,[152] the Commission does not recommend modifications to N.J.S. 34:15-8 at this time.

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[147] September 2023 ICNJ and NJCJI Comment, *supra* note 13, at 1-2.

[148] The alternative language proposed by the ICNJ and NJCJI would have appeared in subsection (c)(2)(B): "the resulting injury and the circumstances of its infliction on the worker must be more than a fact of life of employment in the industry and plainly beyond the scope of the agreement referenced in subsection (a) of this section." *Id.* at 2. The organizations proposed an additional subsection (d), referred to as a "savings clause," reading: "It is the intent of the Legislature that Subsection c. contained above shall not have the effect of abrogating or invalidating any prior judicial decisions or determinations interpreting 'intentional wrong' as contained in prior versions of this Act." *Id.*

[149] *See* October 3, 2023, E-Mail from Lisa Chapland, *supra* note 13.

[150] *Id.* ("Just confirming that upon review of the revised draft of the memo, the positions of the Workers Compensation Section and the Civil Trial Bar Section still stand.").

[151] *See supra* at pp. 4-12.

[152] *See supra* at pp. 14-18.