Michigan Worker's Compensation Act: The Intentional Tort Exception to the Exclusive Remedy Provision

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MICHIGAN WORKER'S* DISABILITY COMPENSATION ACT: THE INTENTIONAL TORT EXCEPTION TO THE EXCLUSIVE REMEDY PROVISION

I. INTRODUCTION

Workers' compensation is a no-fault insurance system designed by state governments to provide medical treatment and to partially replace income to workers who suffer work-related injuries.\(^1\) In return for funding the program, employers are insulated from common law negligence liability by inclusion of a statutory exclusive remedy provision.\(^2\) Courts have long recognized an intentional tort exception to the exclusive remedy provision, however, by holding that the exclusive remedy provision does not immunize employers from liability for intentional torts which they commit against their employees.\(^*\)

Recently, employees have become dissatisfied with the minimal benefits provided through workers' compensation, particularly as compared to the generous compensatory and punitive damage verdicts that have been awarded through common law negligence actions.\(^4\) These dissatisfied em-

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\(^*\) Authors disagree on the punctuation of "worker's." The Michigan Statute places the apostrophe before the "s," as the title indicates. In this note, each title and quote will be punctuated in accordance with the source. Since workers' compensation provides benefits for many injured workers, this note will use the plural possessive form and place the apostrophe after the "s" in all textual references.


2. See generally Beauchamp, 427 Mich. at 8, 398 N.W.2d at 885; B. Small, supra note 1, § 2.4, at 23. See also infra note 74 and accompanying text.

3. See, e.g., Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556, (1916) (which held that the Texas workers' compensation law did not preclude suits for an employer's intentional tort); Richardson v. The Fair, Inc., 124 S.W.2d 885, 886 (Tex. Civ. App. 1939) (employer may not use workers' compensation exclusive remedy provision as a shield from liability for hiring another person to assault employee). See also infra notes 80 & 88-91 and accompanying text.

ployees have attempted to avoid the workers' compensation exclusive remedy provision by petitioning courts to redefine an intentional tort in a broad fashion, thereby expanding the intentional tort exception. Generally, the employee files an intentional tort suit and requests that the court replace the more restrictive "true intentional tort" test with the more liberal "substantial certainty" test as the standard for determining what constitutes an

5. See, e.g., Beauchamp, 427 Mich. at 4, 398 N.W.2d at 883 (plaintiff alleged that employer had intentionally misrepresented and fraudulently concealed the danger of exposure to toxic chemicals); Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) (plaintiff alleged that employer had removed safety equipment); Mandolidis v. Elkins Indus., 246 S.E.2d 907 (W. Va. 1978) (safety equipment removal).

6. 2A A. Larson, The Law of Workmen's Compensation, § 68.15, at 13-61, § 68.13, at 13-36 to -44 (1987) (true intentional tort test requires the plaintiff-employee to prove that the employer intended the injury as well as the act); Beauchamp, 427 Mich. at 19, 398 N.W.2d at 891 ("[T]he employer truly intended the injury as well as the act."); Ghiardi, supra note 4, at 155. "This standard is very stringent and difficult to prove in any situation which falls short of direct assault and battery by an employer." Id. The first reason that the true intentional tort test has been very narrowly construed is that courts have frequently defined intent as the desire to produce a result. See Amchan, Callous Disregard for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers, 34 Lab. L.J. 683, 688 (1983). See, e.g., Johnson v. Mountaire Farms, 305 Md. 246, 258, 503 A.2d 708, 712 (1986). But see 2A A. Larson, supra, § 68.15, at 13-64, -65. It is quite possible to intend a thing without desiring it. Id. If one knows that a particular result will ensue and nevertheless goes ahead, then he may rightfully be said to intend that result, whether he desired it or not. Id. The second reason that the test was narrowly construed was that courts once required that the injurious act must be directed toward a particular person. Courts have generally liberalized the standard to discard that requirement. But see Orzechowski v. Warner-Lambert Co., 92 A.D.2d 110, 113, 460 N.Y.S.2d 64, 66 (1983) (requiring that employer intended to harm a particular employee as recently as 1983).

7. 2A A. Larson, supra note 6, § 68.15, at 13-61 (substantial certainty test requires the plaintiff to prove that the employer "intended the act, but it is enough that he knew that injury was substantially certain to occur from the act"); Beauchamp, 427 Mich. at 21-22, 398 N.W.2d at 891-92. This test is derived from the Restatement (Second) of Torts' definition of intent which reads: "The word 'intent' . . . denote[s] that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965). Courts that adopt the substantial certainty test generally do not view it as a different standard than the true intentional tort test. They simply reject the true intentional tort test, a definition they consider to be excessively strict, and define an intentional tort for workers' compensation purposes in the same way that they define it for general tort purposes. See, e.g., Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985); Ver Bouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983); Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex. 1985). See also 1986 Ohio Legis. Serv. § 4121.80 (Balwin) (set out infra note 162) (defining substantial certainty as deliberate intent). But see Case Note, Workers' Compensation—Intentional Injury Exception to the Exclusive Remedy Provision—An Employer's Intentional Failure to Maintain a Safe Workplace Is Not an Intentional Act Unless the Employer Is Substantially Certain That Such Conduct Would Cause the Injury, 17 St. Mary's L.J. 513, 519 (1986) (where the author declares that the choice of tests is immaterial because the standard of proof is substantially similar under either). Nevertheless, the Supreme Court of Michigan chose to look at the standard as two separate tests. Beauchamp, 427 Mich.
intentional tort exception to the workers' compensation exclusive remedy provision.

On December 23, 1986, the Supreme Court of Michigan held that there was an intentional tort exception to the workers' compensation exclusive remedy rule in Michigan. The court rejected the "true intentional tort" test and adopted the "substantial certainty" test for determining when an employer would be adjudged to have committed an intentional tort. The true intentional tort test requires the plaintiff to prove that the employer intended both the act which caused the injury and the injury itself. The substantial certainty test is satisfied by proof that the employer intended the act and was substantially certain that the injury would occur. Because the true intentional tort test requires evidence that the employer actually intended the injury, this test is more difficult to satisfy.

Five months after the Supreme Court of Michigan adopted the substantial certainty test, the Michigan Legislature amended the Worker's Disability Compensation Act to codify the intentional tort exception. The language used in this recent codification, however, is ambiguous. The stat-

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8. Beauchamp, 427 Mich. at 11, 398 N.W.2d at 886. See also infra note 82 and accompanying text (where the holding is explained).
9. Id. at 25, 398 N.W.2d at 893.
10. See supra note 6.
11. See supra note 7.
12. Ghiaardi, supra note 4, at 155-56.
14. Litigants will argue opposing interpretations just as Senators Dillingham and Cherry did when they presented Senate Bill 67 to the Senate and recommended its adoption. See Michigan Senate, 1987 Journal of the Senate, at 1233-35 (May 14, 1987).

Mr. President, with your permission, because we've had so much deliberation in the past over workers' compensation, I do have a statement that I would like to read before the house involving the exclusive remedy provision. I think it's very important to have this statement made because we want to make sure that we have properly clarified things as Senator DeGrow and I, as Senate Republican conferees, see this. . . . The primary concern of the Senate has been the impact of the Beauchamp vs. Dow Chemical Supreme Court decision on the exclusive remedy provision of the Workers' [sic] Disability Compensation Act. It has been the goal of the Senate to restore the integrity of the exclusive remedy provision and avoid a new window of litigation that would threaten the financial stability of Michigan business and government.

The section 131 statutory language agreed to in conference is designed to restore the complete and absolute status of the exclusive remedy provision in Michigan's workers' compensation law. Under the proposed new language, the one and only exception to the exclusive remedy provision is an action for an intentional tort where the employer intended the injury to the employee. We have been assured by the conferees and by representatives of Governor Blanchard, and it is our intent in proposing this language, that the injured employee may only bring an intentional tort action in a court of law if the em-
ute first defines an intentional tort as “specific intent,”16 which is associated with the true intentional tort test.16 The statute then defines “intent to injure” as actual knowledge that injury is certain to occur and willful disregard of that knowledge.17 The inclusion of the terms “certain” and “willfully disregard” is ambiguous because those terms suggest a broader, more liberal standard than the true intentional tort test.16

The statutory ambiguity requires judicial interpretation to implement the legislative intent.19 Defendant-employers will argue that the legislature

employer knowingly and deliberately injured the employee. An act which is only somewhat certain or likely to cause injury or which has a less than 100 percent certainty of causing an injury to a specific employee does not constitute intent to injure under this language. The employer must know with certainty that a specific employee will be injured in order to constitute an intentional tort.

There has been some concern that an intentional tort exception with too many qualifications might permit a lawsuit if the employer only had knowledge of a workplace condition that could cause injury. It is our intent, in section 131, to establish language which is unqualified and straightforward under which knowledge of a condition does not constitute an exception to the exclusive remedy provision. Only when an employer with specific intent knowingly and deliberately injures a specific employee is there any exception to the general rule.

Id. at 1233-34 (statement of Senator Dillingham).

[A]pparently the decision has been made tonight that we’re to talk to the court. . . . [W]e have rushed headlong to restrict the recent Supreme Court’s Beauchamp decision. . . . It is clear that intentional torts are actionable and not prohibited by the exclusive remedy provision. The change in the standard although narrowing the substantial certainty test does not preclude the specific cases which the Supreme court indicated were actionable under the Beauchamp decision. In Cerna [sic] vs. Statewide Contracts [sic] the facts outlined by the court fall squarely within the new exemplification. In Cerna [sic] there was a deliberate act certainty that an injury would occur and willful disregarding of the knowledge. A similar result would attend in the film recovery [sic] case cited as an example by the court. In that case, the facts showed a deliberate act, certainty of an injury and a willful disregard of a knowledge of an injury.

Id. at 1234-35 (statement of Senator Cherry).


16. See Ghiardi, supra note 4, at 155 (deliberate and specific intent required). See, e.g., Johnson v. Mountaire Farms, 305 Md. 246, 503 A.2d 708 (1986) (in which the court, in declining to expand the exception, stated that the statutory exception requires “actual, specific, and deliberate” intent). Id. at 255, 258, 503 A.2d at 712, 714.


18. See infra note 21 and accompanying text.

19. When a statute is ambiguous, interested parties file suit and each advances the most favorable interpretation. The court must declare which interpretation the legislature meant to enact. See, e.g., Franks v. White Pine Copper Div., 422 Mich. 636, 375 N.W.2d 715 (1985). The court stated that no interpretation is required if the statutory language is clear because legislative intent controls. Id. at 670, 375 N.W.2d at 730. If, however, there is ambiguity or reasonable minds might disagree as to the meaning of the statutory language, the courts must interpret that language for the parties. Id. at 670-71, 375 N.W.2d at 730. See also Evans v. Yankeetown Dock Corp., 491 N.E.2d 969, 971-73 (Ind. 1986) (if a statute is
rejected the substantial certainty test and will base their arguments on the “specific intent” portion of the definition which reflects the true intentional tort test.\textsuperscript{20} Plaintiff-employees, on the other hand, will focus on the second sentence, where the terms “certain” and “willful disregard” are used. Here the plaintiff-employees will argue that in defining specific intent, the legislature chose the word “certain,” which suggests substantial certainty, rather than “intend,” which would have indicated specific intent. The legislature chose the word “certain,” the plaintiff-employees will allege, because the legislature did not mean to adopt the true intentional tort test. These employees will claim that the legislature adopted the substantial certainty test\textsuperscript{21} and codified the court’s definition merely to avoid further enlargement of the exception.\textsuperscript{22}

Due to the enigmatic intentional tort definition in the Michigan Worker’s Disability Compensation Act amendment, neither the parties invoking the statute nor the Michigan courts can adequately decipher the legislative intent.\textsuperscript{23} Employers and employees will exercise their right to test

ambiguous, the court must ascertain and give effect to the legislative intent). In \textit{White Pine}, the court was mistaken in its interpretation. The holding was expressly overruled by the 1987 amendment to the Michigan Worker’s Disability Compensation Act. \textit{See Mich. Comp. Laws Ann. \$ 418.354(17)} (West Supp. 1988).

20. Employers will argue that the legislature adopted the true intentional tort test because the plaintiff-employee’s burden of proof is greater under that test. \textit{See supra} notes 6 & 12 and accompanying text.

21. In addition to arguing that the word “certain” suggests that the legislature meant to codify the substantial certainty test, plaintiff-employees will claim that “willful disregard” suggests another lenient standard, willful and wanton misconduct, which supports their argument that the legislature did not intend to adopt the more restrictive true intentional tort test. Finally, they will claim that “certain” is really no different than substantially certain. \textit{See}, e.g., Del Vecchio v. Bowers, 296 U.S. 280 (1935). In \textit{Del Vecchio}, the Supreme Court, while evaluating the “substantial evidence” required to support a Longshoreman’s and Harbor Worker’s Compensation Act decision, held that “substantial” added nothing to the principle that the decision must be supported by evidence. \textit{Id.} at 286. Citing \textit{Del Vecchio}, employees will argue that “substantial” adds nothing to substantial evidence, meaning the two are the same. Likewise, they will claim that “certain” is the equivalent of substantial certainty, the test already established by the Supreme Court of Michigan.


23. When a statute is ambiguous and the legislative history is sparse, the courts may not be able to correctly ascertain the legislative intent. \textit{See}, e.g., Franks v. White Pine Copper Div., 422 Mich. 636, 375 N.W.2d 715 (1985). An amendment to the Michigan Worker’s Disability Compensation Act stated that workers’ compensation should be co-ordinated. That is, workers’ compensation should be reduced by any amount that injured employees received from other sources, such as unemployment, retirement, and social security. \textit{Franks}, 422 Mich. at 651, 375 N.W.2d at 721. The employers contended that the amendment applied to benefits paid after the act was effective for injuries which occurred before the act’s effective date. \textit{Id.} at
their opposing interpretations in the courts.24 One of the purposes of workers' compensation statutes is to provide a certain remedy in place of the uncertainty, delay, and expense of litigation.25 Because of the ambiguous definition, the Michigan intentional tort exception frustrates that purpose.

This note suggests that the statute should be amended to clarify the standard used to define the intentional tort exception to workers' compensation. The first section will examine the benefits that workers' compensation provides to employees and employers. Also included will be a discussion of the development of the intentional tort exception in Michigan and other states. The following section will explore the tension created by the ambiguous language contained in the intentional tort exception of the Worker's Disability Compensation Act when considered in conjunction with the Supreme Court of Michigan's adoption of the substantial certainty test. The final section will propose an amendment to clarify the Michigan law which adopts the true intentional tort test and provides an alternative method of proof for certain recurring, but difficult-to-prove, situations.

II. DEVELOPMENT OF THE INTENTIONAL TORT EXCEPTION IN MICHIGAN

A. Workers' Compensation Laws and Social Policy Considerations

An understanding of the history of workers' compensation law reveals the importance of the controversy over the definition of the intentional tort exception. At the beginning of the twentieth century, many of the workers who gravitated to factories following the industrial revolution suffered from

644-45, 375 N.W.2d at 718. The employees contended that the amendment applied only to benefits for injuries incurred after the amendment's effective date. Id. at 648-49, 375 N.W.2d at 720. The Supreme Court of Michigan held that the amendment applied to all benefits paid after the effective date regardless of when the injury occurred. Id. at 651, 375 N.W.2d at 721. Franks was erroneously decided however. The 1987 Michigan Worker's Disability Compensation Act amendment stated that Franks was erroneously decided as it applied to injuries incurred before the effective date of the amendment. See Mich. Comp. Laws Ann. § 418.354(17) (West Supp. 1988).

24. The requirement that one must have a basis in the law or a good faith argument for extension infers that a party can litigate a good faith claim when the law is ambiguous. See Fed. R. Civ. Pro. 11.


Historically, the three purposes of worker's compensation were: prompt and predetermined benefits at adequate levels; relief from the uncertainty of recovery and elimination of costly and wasteful litigation; and limited employer and [sic] liability. The five objectives of modern workers' compensation are: broad coverage of employee and [sic] work-related injuries and diseases; substantial protection against interruption of income; provision of sufficient medical care and rehabilitation services; encouragement of safety; and an effective system for delivery of benefits and services.

Id.
serious work-related injuries. The disabled worker could sue his employer for negligence, but under this common law theory the employee seldom recovered a judgment sufficient to cover his medical expenses, let alone support himself and his family during his disability. Commentators have estimated that disabled employees lost approximately eighty percent of their negligence suits under the common law negligence system.

Several factors combined to make this common law negligence system unfair to employees. First, plaintiff-employees usually lost their lawsuits due to the formidable evidentiary burden imposed on them. Under the common law system the employee had to prove that his employer assumed a duty of reasonable care toward him and also had to prove that the employer had breached that duty and thereby caused the plaintiff's injury. Second, employers could assert the defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine. Third, disabled em-


27. Unless the employer voluntarily recompensed the employee, the only way for an employee to receive any compensation was to pursue a common law negligence suit. See generally 1 A. Larson, supra note 6, § 4.30, at 25-28.

28. See infra notes 29 & 39 and accompanying text. See also 1 A. Larson, supra note 6, § 4.50, at 32; Epstein, The Historic Origins and Economic Structure of Workers' Compensation Law, 16 Ga. L. Rev. 775 (1982). The employer owed the employee no duty; like the sovereign, the employer was immune from suit. Id. at 777. The employee was expected to be thankful that he had employment and he was expected to accept all risks. Id.

29. W. Prosser, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on the Law of Torts, § 80, at 572 n.43 (5th ed. 1984) [hereinafter Prosser & Keeton]. Various authorities have estimated that 70-94% of the industrial accidents were uncompensated at common law. Id.

30. 1 A. Larson, supra note 6, § 4.30, at 28. See also Prosser & Keeton, supra note 29, § 80, at 569; Comment, The New Workers' Compensation Law in Ohio: Senate Bill 307 Was No Accident, 20 Akron L. Rev. 491, 493 (1987).

31. 1 A. Larson, supra note 6, § 4.30, at 28.

32. Id.

33. Prosser & Keeton, supra note 29, § 80, at 569. The defendant is not liable if the plaintiff's own negligent conduct contributes to his harm. Id. § 65, at 451-52. Since the plaintiff's conduct does not meet the standard required for his own protection, the law denies him recovery, although the defendant would otherwise be liable. Id.

34. Prosser & Keeton, supra note 29, § 80, at 569. Assumption of risk means that the employee knows the risk is present and understands its nature, and nevertheless freely and voluntarily chooses to incur that risk. Id. § 68, at 486. Employees were expected to accept responsibility for all obvious risks associated with a job or seek other employment. Id. § 80, at 568. Little consideration was given to the fact that frequently a worker's only choices were between equally hazardous jobs or destitution. Id.

35. Prosser & Keeton, supra note 29, § 80, at 569; Note, Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes, 96 Harv. L. Rev. 1641, 1644 (1983). The fellow-servant doctrine states that an employer is not vicariously liable for injuries which one employee inflicts on another employee. Prosser & Keeton, supra note 29,
ployees were without income while they pursued a legal remedy. Finally, if the disabled employee won his negligence suit, most of his modest judgment was consumed by medical bills and attorney’s fees. Consequently, disabled employees often settled out of court for whatever their employers offered as a settlement. Disabled workers thus bore the financial, as well as the physical, burden of industrial accidents.

Social policy considerations compelled the development of a program to aid injured workers. Accidents, it was thought, are an unavoidable incident of industry. Applying that logic, society decided that a person who was injured at work was entitled to payment of his medical expenses and a partial replacement of lost wages. The price of a product could include the cost of a disabling human injury just as the price of the product included the cost of the human energy and raw materials consumed in production.

Legislatures thus developed workers’ compensation programs in response to the public demand to help disabled workers. European countries led the attack, creating the first workers’ compensation programs in the late

§ 80, at 571. Prosser refers to the three defenses as “the unholy trinity” because they defeated so many employees’ suits. Id. § 80, at 569.

36. Prosser & Keeton, supra note 29, § 80, at 572-73 & n.44 (litigation pressured the injured to settle in order to have enough money to live while creating legal fees and other expenses, which often consumed most of the money the plaintiff finally received) (citing to Report of Michigan Employer’s Liability Commission, 16 (1911)).

37. Id. § 80, at 572.

38. Id. § 80, at 572-73.

39. W. Prosser, Handbook of the Law of Torts, § 80, at 530 (4th ed. 1971) (“[b]y far the greater proportion of industrial accidents remained uncompensated, and the burden fell upon the workman, who was least able to support it”).


41. Note, supra note 35, at 1642. See also Epstein, supra note 28, at 815 (asserting that accidents are an “inevitable toll” of production). That theory is still an important part of the workers’ compensation philosophy. See Michigan Senate, Senate Fiscal Agency Bill Analysis, at 5 (May 26, 1987) (stating that “[W]orkers’ compensation systems . . . rest on the belief that in an imperfect world, there are going to be workplace accidents . . . .”). Id. Each Senate Fiscal Agency Bill Analysis contains a disclaimer stating that the Analysis is not authority on legislative intent. This Note will cite the Bill Analyses, however, because they are the best available indicators of legislative intent.

42. See Bohlen, supra note 26, at 328-31; Comment, supra note 26, at 456; 1 A. Larson, supra note 6, § 2.20, at 5-7. The benefits should be bestowed in a dignified manner, not subjecting the employee to starvation, begging, or public or private charity.

43. Note, supra note 35, at 1642; Bohlen, supra note 26, at 330.

44. Bohlen, supra note 26, at 330.

45. Comment, supra note 4, at 455-56 (originally, employers were opposed to workers’ compensation, while workers deemed it a blessing). But see Amchan, supra note 6, at 685. Employers may have seen a trend toward high damage judgments developing and welcomed the workers’ compensation system to block that trend. Id.
nineteenth century.46 The American states soon followed.47 In 1912, Michigan joined the parade of states enacting workers' compensation statutes.48

Workers' compensation was designed as a *quid pro quo* exchange49

46. 1 A. Larson, *supra* note 6, § 5.10, at 33-35, § 57.14(b), at 10-50. Germany enacted a modern workers' compensation law in 1884; England in 1897. *Id.* Twenty countries or provinces enacted workers' compensation laws before the United States. See also Bohlen, *supra* note 26, at 329.


48. See Beauchamp v. Dow Chem. Co., 427 Mich. 1, 8, 398 N.W.2d 882, 885 (1986). Originally, the Michigan law was optional for employers, but their common law defenses were abolished whether they participated in workers' compensation or not. *Id.* The legislature amended the statute to make it mandatory in 1943. *Id.* at 8, 398 N.W.2d at 885.

49. Vieweg, *supra* note 25, at 422-23 (*quid pro quo* exchange of benefits was essential to the formation of workers' compensation programs).
instituted primarily to benefit employees. Under these systems, employees benefit because employers are required to pay benefits to all employees who suffer work-connected, disabling injuries. The relative fault of the employer and the employee is of no consequence in determining eligibility for benefits. In other words, the employee is automatically entitled to benefits for all accidentally incurred disabilities that arise out of and in the course of employment, even when the accident was entirely the result of the employee's own negligence. Conversely, benefits are not increased when the employer is entirely at fault.

50. Bohlen, supra note 26, at 330 (declaring that society abhors the thought of the possibility of throwing a whole family into the pauper class due to an accidental injury to the head of the family, and therefore, the legislature intended that workers' compensation would be a distinct gain to workmen).


53. The employee is entitled to benefits simply by notifying the employer that he suffered an accidental injury at work. If the employer contends that the injury is not work related, and thus is not compensable, the workers' compensation board will set a date for a hearing or mediation. That decision can be appealed to the court of appeals and ultimately to the supreme court of the state. See, e.g., IND. CODE ANN. §§ 22-3-4-5, -6, -7, -8 (West Supp. 1988); MICH. COMP. LAWS ANN. §§ 418.801, .841, .847, .859 (West 1986 & Supp. 1988).

54. Bohlen, supra note 26, at 329; Note, supra note 35, at 1642. The statutes customarily use the term "arising out of and in the course of" to indicate that workers' compensation does not cover injuries which are not related to the employee's job. See also Ghiardi, supra note 4, at 153.

55. Ghiardi, supra note 4, at 151; Comment, supra note 52, at 891; Comment, supra note 30, at 495. Under the common law tort system, the employee could recover only if he proved that the employer was negligent. Today, workers' compensation provides benefits when there was no negligence, when the employer was negligent, or even if the employee was injured as a result of his own negligence.

56. See 2A A. LARSON, supra note 6, § 68.13, at 13-10 (intentional tort exception does not encompass accidental injuries caused by "gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence . . . "). See also W. VA. CODE § 23-4-2(e)(2)(i)
Workers' compensation statutes mandate that employers purchase insurance policies to finance the workers' compensation program.\textsuperscript{57} The cost of the insurance is included in the employer's production costs and is added to the price of the product.\textsuperscript{68} Thus, the cost of injury is distributed to consumers rather than left to fall on the disabled employee.\textsuperscript{69} The employee benefits by receiving payment of his medical expenses and a quick, standardized income without the uncertainty, delay, and expense of litigation.\textsuperscript{60}

To obtain assured workers' compensation benefits, workers' compensation statutes require that the disabled employee relinquish the right to sue for injuries caused by his employer's negligence\textsuperscript{61} and agree to accept income replacement benefits\textsuperscript{62} which are significantly lower than those he might recover in a negligence action.\textsuperscript{63} While the program typically pro-

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vides full medical and rehabilitation coverage, the income is often set at a subsistence level. The income replacement stipend is generally computed as a percentage of the disabled employee's former income, but legislatures usually set a ceiling to control the cost of the system.

When the statutes were enacted, many employers argued that their deterrents under workers' compensation were much greater than their benefits. First, the workers' compensation statute deprived the employer of his common law defenses of contributory negligence, assumption of risk, and the fellow-servant doctrine. In addition, the statute required the employer to compensate employees for all work-connected, disabling injuries. The employers' deterrents under workers' compensation were substantial, considering the fact that the employers' three defenses were enabling them to defeat seventy to ninety-four percent of the employees' negligence suits.
While employers initially opposed workers' compensation laws, they now espouse such statutes due to changes in the law of torts.\textsuperscript{76} First, the statute grants the employer immunity from common law negligence liability for any work-related injury through a provision stating that worker's compensation is the exclusive remedy for work-connected injuries.\textsuperscript{74} The exclusivity provision is a significant benefit because it saves the employer the time and cost of litigation.\textsuperscript{76} In addition, it insulates the employer from all a trend toward enhanced recovery at common law and supported workers' compensation as a way to block that trend).

73. Currently employers are less likely to win negligence suits due to abrogation of their traditional defenses and enhanced tort recovery. Note, supra note 35, at 1645 & nn.28-29. Comparative negligence has replaced contributory negligence in many states. Id. In addition, assumption of risk and the fellow-servant doctrine have been discarded in many jurisdictions. Id.


75. See generally 2 A. Larson, supra note 6, § 68.15, at 13-47 to -68. It would be inequitable to force employers to compensate for all degrees of employee negligence, but allow workers to pursue the more generous tort action for the gross negligence of employers. Legislatures therefore provided employers with immunity from all negligence suits in exchange for extending benefits to employees for all negligent, work-related accidents. Id. See also Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex. 1985). Subjecting employers to liability for accidental injuries, in addition to requiring them to provide workers' compensation, would undermine the workers' compensation system's effectiveness. Id. at 407.
degrees of negligence, including gross, willful, and wanton negligence.\textsuperscript{76} Second, the minimal benefits keep the program cost low and motivate employees to return to work at the earliest opportunity, thus further reducing employers’ costs for employers’ injuries.\textsuperscript{77}

Abusing the limited liability provisions under workers’ compensation statutes, certain employers intentionally committed grievous torts towards their employees\textsuperscript{78} and claimed the exclusive remedy provision as a shield if an injured employee sued.\textsuperscript{79} In response, courts denied immunity to those callous employers by holding that intentional torts constituted an exception to the exclusive remedy provision.\textsuperscript{80} As recently as 1986, however, the Su-

\textsuperscript{76} In fairness to all parties, workers’ compensation statutes even-handedly cover all degrees of negligence of both employers and employees. \textit{See} 2A A. Larson, \textit{supra} note 6, § 68.13, at 13-10. Workers’ compensation immunity covers “gross, wanton, willful, deliberate, intentional, reckless, culpable or malicious negligence, breach of statute, or other misconduct.” \textit{Id.}

\textsuperscript{77} ATLA, \textit{supra} note 4, at 294; 1 A. Larson, \textit{supra} note 6, § 2.60, at 12 (suggesting that higher benefits might encourage malingering).

\textsuperscript{78} \textit{See}, e.g., Serna v. Statewide Contractors, 6 Ariz. App. 12, 429 P.2d 504 (1967); Fowler v. Southern Wiring Co., 104 Ga. App. 401, 122 S.E.2d 157 (1961), \textit{rev’d}, 217 Ga. 727, 124 S.E.2d 739 (1962); Johnson v. Mountaire Farms, 305 Md. 246, 503 A.2d 708 (1984); Mandolidis v. Elkins Indus., 161 W. Va. 695, 246 S.E.2d 907 (1978). In Fowler, the company president ordered a worker to work in an acid vat when the employee refused to disclose the names of workers who attended a union organization meeting. Fowler, 104 Ga. App. at 402, 122 S.E.2d at 159. The employer did not tell the worker to wear rubber gloves. \textit{Id.} at 402, 122 S.E.2d at 159. The employee usually worked in another area of the building and did not know that he should wear protective gloves. \textit{Id.} at 402, 122 S.E.2d at 159. In one of the three cases which were consolidated in Mandolidis, a foreman ordered an employee to work on a table saw which safety inspectors had tagged unsafe to use because it lacked a safety guard. Mandolidis, 161 W. Va. at 707, 246 S.E.2d at 915. The guardless saw cut off two of the employee’s fingers and part of his hand. \textit{Id.} at 707, 246 S.E.2d at 914. In Serna, two construction workers suffocated when 25-foot deep construction ditch collapsed and buried them. Serna, 6 Ariz. App. at 13, 429 P.2d at 505. Safety officials had repeatedly warned the company that the ditch was unsafe and one of the decedents had been buried waist-deep in an earlier cave-in. \textit{Id.} at 14, 429 P.2d at 506. The employer did not slope the sides and place ladders every 20 feet as recommended. \textit{Id.} at 14, 429 P.2d at 506. In Johnson, a 16-year-old boy was electrocuted by a sump pump which the employer had previously reported to OSHA as having been repaired when in fact it had not been. Johnson, 305 Md. at 248, 503 A.2d at 709.

\textsuperscript{79} It is difficult to estimate how many employees did not pursue a common law negligence action because they thought the exclusive remedy doctrine prohibited any suits for their injuries. \textit{See}, e.g., People v. Film Recovery, Nos. 84 C 5064, 83 C 11091 (Cir. Ct. of Cook County, Ill. June 14, 1985). The employers were convicted of murder when a worker died as the result of exposure to chemical fumes. Most of the employees were undocumented Mexican and Polish immigrants who spoke little English. The employees had frequently complained of fumes, to no avail. The chemical bottles contained a warning, but the employers hired only workers who could read little English and removed warning labels from bottles. See sources and description of these unpublished cases \textit{infra} note 183.

\textsuperscript{80} \textit{See}, e.g., Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556 (1916); Richardson v. The Fair, Inc., 124 S.W.2d 885 (Tex. Civ. App. 1939). \textit{See also} Note,
supreme Court of Michigan had not ruled whether Michigan workers' compensation law included an intentional tort exception.\textsuperscript{81}

B. The Supreme Court of Michigan Recognized the Intentional Tort Exception

In December 1986, the Supreme Court of Michigan established the intentional tort exception to the exclusive remedy provision in \textit{Beauchamp v. Dow Chemical Co.}.\textsuperscript{82} Prior to \textit{Beauchamp}, the Michigan Court of Appeals had issued inconsistent holdings in response to the question of whether Michigan workers' compensation contained an exception for intentional torts.\textsuperscript{83} In \textit{Beauchamp}, the court reviewed the history and goals of workers' compensation,\textsuperscript{84} reviewed earlier Michigan decisions,\textsuperscript{85} considered the positions taken by other jurisdictions,\textsuperscript{86} and concluded that the legislature did not intend to immunize employers from liability for intentional torts.\textsuperscript{87}

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81. Neither the Michigan Legislature nor the Supreme Court of Michigan had expressly exempted intentional torts from the exclusive remedy rule. \textit{See infra} note 83.

82. 427 Mich. 1, 398 N.W.2d 882 (1986). Ronald Beauchamp, a research chemist, alleged physical and mental injury caused by workplace exposure to "agent orange". \textit{Id.} at 5-6, 398 N.W.2d at 883. He alleged that his employer, Dow Chemical Company, intentionally misrepresented and fraudulently concealed the potential danger, intentionally assaulted him, intentionally inflicted emotional distress, and breached its contract to provide safe working conditions. \textit{Id.} at 5-6, 398 N.W.2d at 883. The Supreme Court of Michigan held that the contract case was barred by the exclusive remedy provision of workers' compensation, but remanded for further proceedings on the intentional tort claims. \textit{Id.} at 27, 398 N.W.2d at 894.

83. Although the Supreme Court of Michigan had not addressed the intentional tort exception, the Michigan Court of Appeals had. \textit{See}, \textit{e.g.}, \textit{Shutt v. Lado}, 138 Mich. App. 433, 360 N.W.2d 214 (1984) (allowed an employee to sue for false imprisonment and intentional infliction of emotional distress in addition to settling the assault and battery claims when her employer locked her in his office and beat her); \textit{Barnes v. Double Seal Glass Co.}, 129 Mich. App. 66, 341 N.W.2d 812 (1983) (allowed parents of deceased employee a separate right of action for intentional infliction of emotional distress when they alleged that the employer allowed their 16 year-old son to die because death benefits were less expensive than workers' compensation benefits, but workers' compensation exclusivity barred any claims on behalf of the deceased); \textit{Genson v. Bofors-Lakeway, Inc.}, 122 Mich. App. 470, 478, 322 N.W.2d 507, 510 (1983) (stated that there was no intentional tort exception in Michigan). \textit{See also Leonard v. All-Pro Equities, Inc.}, 149 Mich. App. 1, 386 N.W.2d 159 (1986). \textit{Leonard}, decided the same year as \textit{Beauchamp}, stated that the existence of an intentional tort exception was questionable, but if there was one, the true intentional tort test would be the standard. \textit{Id.} at 5-7, 386 N.W.2d at 161-62.

84. \textit{Beauchamp}, 427 Mich. at 6-11, 398 N.W.2d 884-86.

85. \textit{Id.} at 11-14, 398 N.W.2d at 886-88.

86. \textit{Id.} at 17-25, 398 N.W.2d at 889-91.

87. \textit{Id.} at 14-17, 398 N.W.2d at 888-89. The court had to utilize a circuituous method due to the statutory langue. \textit{See infra} notes 93-94 and accompanying text.
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The decision of the Supreme Court of Michigan recognizing the intentional tort exception was consistent with judicial action in other states. Various courts had allowed employees to avoid workers' compensation exclusivity and sue at common law for an intentional tort on three separate theories. The first and most frequently used theory stated that the inherently nonaccidental nature of an intentional tort removed it from the area of workers' compensation's exclusive coverage. Second, courts held that the intentionally tortious act did not arise out of and in the course of employment and therefore the worker's compensation exclusivity rule did not bar such a common law tort action. The third theory held that the intentional tort severed the employer-employee relationship. In Beauchamp, the Supreme Court of Michigan relied on the nonaccidental nature of an intentional tort. Although the word "accident" had been deleted from the Michigan Worker's Disability Compensation Act, the court evaluated legislative intent and held that intentional torts were outside the exclusivity provision.

Beauchamp had necessarily claimed that the injury was accidental when he filed for and received workers' compensation benefits. The validity of allowing an employee to claim benefits and subsequently file an intentional tort action is one of the disputed points in the intentional tort controversy. Some courts have allowed the employee to process his workers'

89. 2A A. Larson, supra note 6, § 68.11 at 13-2; Vieweg, supra note 25, at 424 (the nonaccidental nature of the injury is the most notable theory).
90. 2A A. Larson, supra note 6, § 68.11 at 13-2 (an intentional tort is, by its nature, not an accident); Note, supra note 80, at 674 n.118. See also National Can, 503 N.E.2d at 1232 (denying exception for intentional torts would pervert workers' compensation act's purpose). But see id. at 1234 (Conover, P.J., concurring: only the legislature should make such policy decisions). See also Shearer v. Homestake Mining Co., 557 F. Supp. 549, 553 (D.S.D. 1983) (to utilize this theory, the statute must use the word "accident" rather than "injury").
91. 2A A. Larson, supra note 6, § 68.11, at 13-4; Note, supra note 80, at 674. See, e.g., Magliulo v. Superior Court, 47 Cal. App. 3d 760, 778, 121 Cal. Rptr. 621, 635 (1975); Evans, 491 N.E.2d at 973; Blankenship v. Cincinnati Milacron Chem. Co., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).
92. 2A A. Larson, supra note 6, § 68.11 at 13-2. The theory was highly fictitious because seriously injured employees who were only partially disabled often continued to work for the employer. See also Shearer, 557 F. Supp. at 553.
94. Beauchamp, 427 Mich. at 10, 398 N.W.2d at 886. The court concluded that the word "accident" had been deleted from the act to allow employees to collect for occupational disease, not to immunize employers for intentional torts. Id. at 10, 398 N.W.2d at 886.
95. Id. at 10, 398 N.W.2d at 886.
96. The theory is that an employee may not file for workers' compensation, alleging the injury was accidental, and then file a common law suit, alleging the same injury was intentionally inflicted. See, e.g., Carter v. Superior Court, 142 Cal. App. 2d 350, 298 P.2d 598, 601.
compensation claim, collect benefits, and still sue for an intentional tort, but other courts have held that the employee must elect his remedy.

Recognizing the intentional tort exception to the exclusive remedy rule did not resolve *Beauchamp*. A question remained concerning the standard for determining when an employer had committed an intentional tort. Should the court apply the true intentional tort test or the substantial certainty test?

C. The Supreme Court of Michigan Defined the Standard for the Intentional Tort Exception

In *Beauchamp*, the Supreme Court of Michigan also clarified the proper standard for determining whether an employer had committed an intentional tort. The court evaluated the available standards, considered positions taken by other jurisdictions, and held that the appropriate standard was the substantial certainty test. The decision constituted a reversal because the Michigan Court of Appeals had stated, in dicta, that if there was an intentional tort exception in Michigan, the test would be the true intentional tort test.

The propriety of adopting a test which is less restrictive than true intent has been a hotly disputed issue among commentators in recent years. Some commentators focus on the need to deter irresponsible employer mis-


98. See cases cited supra note 96.

99. The true intentional tort test requires the plaintiff to present convincing evidence that the employer intended both the act and the resultant injury. See supra note 6.

100. Under the substantial certainty test, the plaintiff must prove that the employer intended the act which caused injury, but he need only prove that the employer was substantially certain that the injury would occur. See supra note 7.


102. Id. at 19-25, 398 N.W.2d at 891-93.

103. Id. at 25, 398 N.W.2d at 893. See also supra note 7.

104. Leonard v. All-Pro Equities, Inc., 149 Mich. App. 1, 386 N.W.2d 159 (1986) (holding that the Supreme Court of Michigan had not ruled that there was an exception, but if there was, it was the true intentional tort test and the plaintiff could not meet that test). See also Beauchamp v. Dow Chem. Co., 140 Mich. App. 699, 364 N.W.2d 286 (1984).
conduct and advocate a willful and wanton negligence standard.\(^\text{105}\) Others favor adoption of the Restatement (Second) of Torts' definition which promotes the substantial certainty test.\(^\text{106}\) Still others declare that workers' compensation was designed as a *quid pro quo* exchange of benefits, and the system must abide by the true intentional tort test rather than enlarging the exception by comparing it to the contemporary tort law standard.\(^\text{107}\) Those favoring the true intentional tort standard argue that a more lenient standard would upset the balance which the legislature originally established\(^\text{108}\) and might disadvantage employers so greatly that the workers' compensation system would collapse.\(^\text{109}\)

Commentators who support the adoption of a more lenient standard, such as substantial certainty, point out that workers' compensation laws were enacted to provide injured employees more equitable compensation than the common law negligence theory.\(^\text{110}\) Workers' compensation presently operates to the disadvantage of employees due to changes in tort law since the statutes were enacted.\(^\text{111}\) These commentators argue that the substantial certainty standard should be adopted to provide fair compensation to employees,\(^\text{112}\) consistent with the original goals of workers' compensa-

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105. *See generally* Comment, *supra* note 52, at 904-05. The difference between negligence and willful torts is one of kind, not merely of degree. *Id.* The actor's state of mind is the crucial element and willful negligence is more akin to intentional torts than to mere negligence. *Id.*

106. Case Note, *supra* note 7, at 520-22 (approving the court's decision in Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex. 1985)).

107. 2A A. Larson, *supra* note 6, § 68.15, at 13-68; Epstein, *supra* note 28, at 818 (must limit the intentional tort exception to the narrowest possible scope).

108. 2A A. Larson, *supra* note 6, § 68.13, at 13-68 (system requires an arbitrary rule, even if it produces "injustice" in some marginal cases).

109. The National Commission on State Workmen's Compensation Laws omitted "limited employer liability" from the list of modern workmen's compensation objectives in its 1972 report. *See* Vieweg, *supra* note 25, at 422. That omission may signal the demise of workers' compensation because the system cannot survive without a strong exclusive remedy system. *Id.* at 423, 434. *Cf.* Ghiaerti, *supra* note 4, at 179 (despite warnings that recognition of imaginative tort attacks on the exclusive remedy doctrine could undermine workers' compensation, the system is presently holding its own due to strict judicial interpretation of the intentional tort exception). *See also* Reed Tool, 689 S.W.2d at 407 (the continued effectiveness of the workers' compensation system depends on maintenance of a strong exclusive remedy provision).


111. Although benefits are swift and certain, they are much smaller than the verdicts available in negligence suits. *See* Comment, *supra* note 4, at 455; Comment, *supra* note 52, at 906; ATLA, *supra* note 4, at 295 (author hopes we will see the end of the exclusive remedy rule).

112. Note, *supra* note 35, at 1654 (workers' compensation benefits which merely enable
tion. In cases where the exclusive remedy provision operates to insulate the employer from liability for either gross negligence or willful and wanton negligence, the minimal benefits available under workers’ compensation allow the employer to injure employees carelessly and with impunity.

In addition to those commentator’s recommendations, courts in other states have evaluated the tests and reached differing conclusions on the appropriateness of adopting the substantial certainty test. Some of those decisions hold that “substantial certainty” is simply a specie of evidence and not a separate test. Others define intentional torts as including those which meet the “substantial certainty” standard in accord with the Restatement (Second) of Torts. Finally, some courts have declined employees’ requests to extend the exception’s definition. Some judges have stated that enlarging the exception was a matter which the legislature should address, rather than the court. Despite the commentators’ recommendations and the plaintiffs’ requests, few courts have adopted the substantial certainty test.

disabled employees to stave off destitution are inequitable).

113. *Id.* at 1446-48 (would also serve the original deterrent purpose by allowing recovery more frequently).

114. Comment, *supra* note 52, at 904-05. Workers’ compensation is a strict liability or no-fault plan which covers both the employer’s and the employee’s willful and wanton negligence. *Id.*

115. *See generally* Bohyer, *supra* note 110, at 161; Comment, *supra* note 110 at 162. The increase in the insurance premium is not enough to serve as a deterrent. *Id.* The costs of coverage for grossly negligent employers’ claims are spread over the non-negligent employers too. *See Amchan, supra* note 6, at 687.


118. Johnson v. Mountaire Farms, 305 Md. 246, 503 A.2d 708 (1986) (declining to follow *Blankenship* and *Mandolidis* in extending the definition of an intentional tort to include substantial certainty). *Id.* at 252-53, 503 A.2d at 711.

119. Some judges state that extension of existing law involves policy considerations and is properly addressed by the legislature rather than by the courts. *See, e.g.*, National Can Corp. v. Jovanovich, 503 N.E.2d 1224, 1234 (Ind. App. 1987) (Conover, P.J., concurring).

120. 2A A. LARSON, *supra* note 6, § 68.11, at 13-8; Ghiardi, *supra* note 24, at 157, 160. *But see* Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985) “[W]hatsoever formulation is used represents a conscious effort to impose severe restrictions on the exception, bringing it as close to ‘subjective desire to injure’ as the nuances of language will permit, while at the same time recognizing the problems of proof inherent in any attempt to demonstrate subjective intent.” *Id.* at 173, 501 A.2d at 511. After making this statement, the New Jersey Supreme Court adopted the substantial certainty test and defined intent in accord with the Restatement (Second) of Torts. *Id.* at 178, 501 A.2d at 514.
III. Codification of the Intentional Tort Exception to the Exclusive Remedy Rule of the Michigan Worker's Disability Compensation Act

A. The Michigan Legislature Codified an Ambiguous Standard for Determining an Intentional Tort

The Michigan Legislature codified the intentional tort exception in an amendment to the Worker's Disability Compensation Act on May 14, 1987.\(^{121}\) The amendment was enacted just five months after Beauchamp.\(^{122}\) The legislature’s committee minutes, as well as the timing of the amendment, suggest that the amendment was a response to Beauchamp.\(^{123}\) How-

121. Mich. Comp. Laws Ann. § 418.131 (West 1988) (set out infra note 128). The Act also amended other portions of the Michigan Worker’s Disability Compensation Act. First, the amendment redefined “disability” and “reasonable employment” in a manner calculated to reduce workers’ compensation costs to industry and government. The disability section states: As used in this chapter, “disability” means a limitation of an employee’s wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.


The reasonable employment section reads as follows:

“Reasonable employment”, as used in this section, means work that is within the employee’s capacity to perform that poses no clear and proximate threat to that employee’s health and safety, and that is within a reasonable distance from that employee’s residence. The employee’s capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training.


The amendment also provides that persons receiving disability benefits shall be given priority by the Michigan Employment Security Commission and directs the bureau to terminate benefits if the employee refuses reasonable employment.

(6) A carrier shall notify the Michigan employment security commission of the name of any injured employee who is unemployed and to which the carrier is paying benefits under this act.

(7) The Michigan employment security commission shall give priority to finding employment for those persons whose names are supplied to the commission under subsection (6).

(8) The Michigan employment security commission shall notify the bureau in writing of the name of any employee who refuses any bona fide offer of reasonable employment. Upon notification to the bureau, the bureau shall notify the carrier who shall terminate the benefits of the employee pursuant to subsection (5)(a).


The final section of the amendment provides for co-ordination of benefits, reducing benefits if the disabled employee is receiving benefits such as social security, pension or retirement payments. See Mich. Comp. Laws Ann. § 418.354(1) (West Supp. 1988).

122. Beauchamp was decided December 23, 1986. Inclusion of the intentional tort codification is notable because the legislature could have let Beauchamp stand and waited to see if employees would file numerous or frivolous suits in an attempt to enlarge the intentional tort exception. Instead, the legislature codified and thereby limited the exception at the first opportunity.

123. During meetings of the Senate Committee on Human Resources and Senior Cit-
ever, the statutory language is ambiguous, neither confirming nor clearly overruling *Beauchamp*. The phraseology used in the statute is neither the traditional language of the true intentional tort standard, nor that which is usually associated with the substantial certainty test. Instead, the statutory language is a hybrid which combines words and phrases commonly associated with each test.

An early draft of the amendment included language that would have clearly established the true intentional tort test because it stated that in order to be chargeable with an intentional tort, the employer must deliberately intend the act as well as the resultant injury, disability, or death.

zens, which sponsored the workers' compensation amendment, the committee heard from Ed Welch, Director of the Worker's Disability Bureau; and representatives from the Michigan Construction Industry; the National Federation of Independent Businesses; the Employers' Association of Detroit; the Michigan Merchants; the Michigan State Chamber [of Commerce]; the AFL-CIO; and the United Auto Workers. All referred directly to either the *Beauchamp* decision or the exclusive remedy provision and voiced their concerns regarding the proposed amendment. See Michigan Senate, Minutes of Meetings of the Committee on Human Resources and Senior Citizens (Feb. 24, Mar. 3, and Mar. 10, 1987). In a memorandum to the Michigan Senate, Senators Dillingham and DeGrow reported that it had been the senate's goal to restore the integrity of the exclusive remedy. See Memorandum to the Michigan Senate from Senate Bill 67 Conference Fred Dillingham and Dan DeGrow (May 14, 1987). A brief summary to the Senate Republican Staff stated that *Beauchamp* was reversed. See Memorandum to Senate Republican Staff from Jurgen Skoppek (May 19, 1987). But see infra note 125 (the legislature specifically stated that *Franks v. White Pine Copper Division* was erroneously decided but made no such statement about *Beauchamp*).

124. See supra note 14 and text accompanying notes 14-18.

125. The amendment specifically overruled *Franks v. White Pine Copper Div.,* 422 Mich. 636, 375 N.W.2d 715 (1985). See Mich. Comp. Laws Ann. § 354(17) (West Supp. 1988). The statute, however, does not mention *Beauchamp* by name. See supra note 123 (stating that *Beauchamp* is reversed). Perhaps the Michigan Legislature, like Ohio and West Virginia, attempted to adopt a strict test, but allow an exception for grievous employer misconduct. See infra notes 162 & 196 (setting out the statutes) and notes 173 & 201 (describing the type of grievous misconduct) and accompanying text.

126. "Deliberate intent" or "specific intent" would indicate the true intentional tort test if the amendment did not define it further. See Ghiardi, supra note 4, at 155.

127. See supra note 7.

128. The statute reads:

Sec. 131 (1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. 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. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.


129. The February 18, 1987 proposal read:

Sec. 131 (1) Except as otherwise provided in subsection (2) and section 132, the right to
That language would plainly indicate that the supporters of the bill intended to reverse the portion of *Beauchamp* that adopted the substantial certainty test, but would affirm the holding that the Michigan workers' compensation system contains an intentional tort exception to the exclusive remedy provision. However, the legislature altered the definition of an intentional tort before enacting the bill, and created the ambiguous definition. The change in the statutory language and the inclusion of the word "certain" and the term "willfully disregards" implies that the legislature contemplated a strict test but did not intend to totally reject *Beauchamp*.

The legislature may have codified the test's definition merely to prevent subsequent enlargement of the exception by judicial decision. The Su-

the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for any physical or mental injury, regardless of the source of the injury or the manner in which the injury occurred, and the employer shall not be liable for civil damages under any other act or at common law with regard to a physical or mental injury.

Sec. 132 (1) Where the employer deliberately intended both the acts giving rise to such injury, disability, or death and intended the resultant injury, disability, or death, the employee or the employee's personal representative shall be permitted an action for civil damages as a result of the employer's intentional tort.

(2) The filing of a claim for, or receipt of, any benefits pursuant to this act precludes an employee, the employee's spouse, dependents, or estate from any other remedy including an action for civil damages as provided in subsection (1) against the employer for the same injury, disease, or death.

(3) Any claim of an intentional tort shall be brought within 2 years after the employee's death or the date on which the employee knew or through the exercise of reasonable diligence should have known of the injury, disease, or condition, whichever date occurs first.


130. The first rule of statutory construction is that the legislative intent governs. The court must construe the statute if it is ambiguous, but will not advance its own interpretation if the statutory language is clear. See Franks v. White Pine Copper Div., 422 Mich. 636, 670, 375 N.W.2d 715, 730 (1985).

131. *Id.* The legislature would affirm the existence of an intentional tort exception by codifying, but rejects the substantial certainty test by defining an intentional tort differently, even if it did not expressly overrule *Beauchamp*.

132. *See supra* notes 128 & 129 and accompanying text.

133. Michigan acted in accord with other state legislatures. *See infra* notes 162 & 196 and accompanying text (Ohio and West Virginia also amended their statutes and created a restrictive test after their state supreme courts adopted more lenient tests). The only difference is that Michigan did not wait several years to act, allowing increased litigation during the interim.

134. When codifying the intentional tort exception, the Ohio and West Virginia Legislatures provided exceptions for the particular types of cases that their courts had addressed when they adopted the more lenient standard. The statutory exceptions prevent employees from instigating suits in an attempt to enlarge the exception by judicial decision. *See infra* note 163 (describing the cases in which the Ohio courts adopted the substantial certainty test) and 164 (describing the types of intentional tort cases which are clearly prohibited by the Ohio amend-
premum Court of Michigan stated in *Beauchamp* that the substantial certainty test is susceptible to enlargement of substantial risk.\(^{135}\) Although the court did not define substantial risk, the tone of the discussion clearly indicates that the court was prohibiting further expansion of the exception. The court cautioned that *Beauchamp* was not to be construed as merely one step in broadening the exception;\(^{138}\) since successive broadening decisions would eventually cause the exception to swallow up the exclusive remedy rule.\(^{137}\) Construing the intentional tort exception too broadly would subject employers to double jeopardy: employers would have to provide workers’ compensation benefits for injuries caused by even gross employee negligence,\(^{138}\) yet would have to defend common law negligence actions and pay judgments for injuries involving employer negligence.\(^{139}\) By codifying the definition, the legislature prohibited further expansion of the standard and protected the employer from the possibility of this form of double liability.\(^{140}\)

The amendment also precluded employees from attempting to enlarge the exception by requiring the plaintiff-employee to prove that the employer had actual knowledge that the injury was certain to occur.\(^{141}\) Thus, plain-

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\(^{135}\) See also infra note 201 (describing the case in which the West Virginia court adopted a more lenient standard for the intentional tort exception).

\(^{136}\) See *Beauchamp* v. Dow Chem. Co., 427 Mich. 1, 25-26, 398 N.W.2d 882, 893 (1986). Neither the Michigan Supreme Court nor Prosser defined substantial risk; apparently the court was merely cautioning against further enlargement of the exception.

\(^{137}\) See id. at 25-26, 398 N.W.2d at 893. See also Boyer v. Louisville Ladder Co., 157 Mich. App. 716, 403 N.W.2d 210 (1987). *Boyer* was the only case decided by the Michigan Court of Appeals during the interval between the time the Michigan Supreme Court adopted the substantial certainty test and the date the Michigan Legislature codified the intentional tort exception. The court found that the plaintiff-employee’s injury in a fall caused by his employer’s failure to provide the promised safety cable for scaffold did not constitute an intentional tort and granted the employer’s motion for summary disposition. *Id.* at 720, 403 N.W.2d at 212. “A result is intended if the act is done with the purposes of accomplishing the result or with knowledge that to a substantial certainty such a result will ensue.” *Id.* at 719, 403 N.W.2d at 211. One case, of course, does not prove that subsequent decisions would not have enlarged the exception.

\(^{138}\) See generally National Can Corp. v. Jovanovich, 503 N.E.2d 1224, 1234 (Ind. App. 1987) (Conover, P.J., concurring: unless the legislature amends the statute, exclusivity extends even to intentional torts); *Beauchamp*, 427 Mich. at 25-26, 398 N.W.2d at 893.

\(^{139}\) See generally 2A A. Larson, *supra* note 6, § 68.13, at 13-10 to -44.

\(^{140}\) See *supra* notes 19 & 22 and accompanying text (explaining rules of statutory construction).


Acquaintance with fact or truth . . . actual knowledge, notice or information; assurance of fact or proposition founded on perception by senses, or intuition; clear perception of
tiffs may not meet their burden of proof by alleging that the employer had
constructive knowledge.142 The combination of the "actual knowledge" and
"specific intent" requirements suggests that the legislature intended to
adopt the restrictive true intentional tort test.143

The legislature also provided that the court should determine as a
question of law whether an intentional tort exists, thereby further re-
straining attempts to expand the intentional tort exception.144 The provision
enables the court to dismiss the case or issue a summary judgment in ap-
propriate situations.145 Employers thus avoid problems of excessive jury
sympathy and identification with injured employees.146 The Michigan Leg-
islature's decision to make the intentional tort determination a question of
law further curtailed the expansion of the intentional exception.

Although the amendment to the Worker's Disability Compensation
Act is ambiguous it at least units the intentional tort exception to the sub-


142. See BLACK'S LAW DICTIONARY 284 (5th ed. 1983), defining constructive knowl-
edge in this manner: "If one by exercise of reasonable care would have known a fact, he is
deemed to have had constructive knowledge of such fact; e.g., matters of public record." Id.
143. In each case, the legislature is choosing the strictest available standard. See supra
note 12 and accompanying text (explaining that the true intentional tort test is a more strin-
gent standard than the substantial certainty test).
145. This provision promotes the goal of reducing litigation costs by permitting early
dismissal. See Note, In the Wake of Mandolidis: A Case Study of Recent Trials Brought
Under the Mandolidis Theory—Courts Are Grappling With Procedural Uncertainties and Ju-
dies Are Awarding Exorbitant Damages for Plaintiffs, 84 W. Va. L. Rev. 893 (1982). In
West Virginia, courts were reluctant to dismiss cases or issue summary judgment because
Mandolidis suggested that the determination was a jury question. Id. at 928. The West Vir-
ginia amendment includes a section expressly allowing dismissal or summary judgment. See
Legislative Service Commission § 4121.80(C) (Baldwin) (set out infra note 162).
146. Jurors may be confused by jury instructions or they may choose to ignore them.
See Note, supra note 145, at 915 n.157. In an affidavit, a former juror reported experiencing
the kind of problems which are inherent in a jury trial. During deliberation, she admitted to
being confused about the nature of punitive damages, but other jurors dissuaded her from
asking the judge to explain because, they said, that would make them all look stupid. Id. The
others told her that they must grant punitive damages because the case involved the coal
mining industry and would open the way for other miners to get more than workers' compen-
sation limited benefits. Id. The other jurors also said the plaintiff would need a large damage
award to pay his attorney fees and to reimburse the workers' compensation fund for benefits he
had received. Id. Finally, while this juror was in the restroom, the other jurors voted to grant a
large punitive damages award. Id. See infra note 200 for a summary of the facts in Cline, the
ststantial certainty test. Yet the statutory language requiring specific intent and allowing the court to determine whether an intentional tort exists infers that the Michigan Legislature meant to further restrict the intentional tort exception. Therefore, an examination of the legislative history may shed light on the scope of the legislature's intended standard.

B. Policy Considerations that Influenced the Michigan Legislature's Decision to Codify the Intentional Tort Exception

Legislative materials indicate that the Michigan Legislature drafted the ambiguous intentional tort definition in an effort to balance the opposing interests of industry and labor. The legislature was concerned about the effect that the Michigan Supreme Court decision that adopted the substantial certainty test might have on the Michigan business community. Senate committee meeting notes reveal that workers' compensation rates are eighteen percent higher in Michigan than in the other Great Lakes states. In addition, during the 1980s, Michigan has suffered one of the highest unemployment rates in the nation.

147. At Senate committee meetings, speakers presented the problems of injured employees who must be adequately compensated for intentional torts, and business organizations that are concerned about the high cost of Michigan workers' compensation coverage. See supra note 123.


149. See Michigan Senate, Senate Fiscal Agency Bill Analysis 4 (May 26, 1987).

According to a 1984 poll of the Michigan Manufacturers Association membership, worker's compensation was the number one disincentive to doing business in Michigan. Michigan's costs are among the highest in the nation and appear particularly unfavorable when compared with other Great Lakes states. According to the report of Professor Theodore J. St. Antoine (appointed by the Governor to review the workers' compensation system), Michigan's insurance rates remain about 18% higher than the average of the rest of the Great Lakes states . . . . By addressing the definition of “disability” and strengthening the exclusive remedy provision, the bill significantly would enhance Michigan's economic prospects by decreasing workers' compensation costs.

Id.

150. While workers' compensation and unemployment are separate programs, production costs are higher when the employer provides higher benefits for both programs than employers in other states provide. Unemployment has been a continuing problem in Michigan during the 1980s. See Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 393 (107th ed. 1987). In 1982, the Michigan unemployment rate was the highest in the nation (15.5%) and it was fourth highest in the nation in 1985 (9.9%). Id. See also Outlook for the Auto Industry and Its Impact on Employment, Industries, and Communities Dependent Upon It: Hearing Before the Subcommittee on Economic Development of the House of Representatives Committee on Public Works and Transportation, 97th Cong., 1st Sess. (1981) (at Lansing, Mich.).
costs to industry and government. Committee notes suggest that the Michigan Legislature meant to indicate to industry that Michigan is serious about providing a more favorable business climate by amending the workers' compensation statute in a manner which would provide more competitively priced labor.161

While protecting business, the Michigan Legislature was also concerned about the state's legitimate concern for the safety of its citizens. Michigan promotes the health and safety of its citizens by recognizing the employees' right to sue for intentional torts at common law because tort suits may subject employers to the deterrent effect of punitive damages.162 One of the goals of allowing intentional tort actions for workplace accidents is to deter unsafe working conditions by assessing damages which are more than the cost of making the workplace safe.163 The Michigan Legislature recognized the need to define the intentional tort exception expansively enough so that employers would not be allowed to use workers' compensation to "cost out" employees' injuries.164

Despite these sometimes depressing statistics, Gov. Milliken laid a major economic development program before the legislature last September. It was designed to eliminate the two major barriers to business growth in Michigan: the high cost of excesses in worker's compensation and unemployment insurance demonstrably much higher than in other states.

*Id. at 12* (Statement of Dr. Gerald H. Miller, Director, Michigan Department of Management and Budget). See also *supra* note 149 (stating that in 1987 Michigan was still struggling with labor costs that were higher than other states).

151. The 1987 Michigan amendment redefined "disability" and codified the intentional tort exception. See *MICHIGAN SENATE, SENATE FISCAL AGENCY BILL ANALYSIS 2* (May 26, 1987). The supporting argument for changing the definition of "disability" stated:

Further, redefining 'disability' would send an important message to the business and manufacturing community that Michigan is serious about reforming its system and reducing employer costs. It would make a positive change in the perception others have of our law, its impact on employers, and our intentions to mitigate that impact. Having the same definition as other states would help us argue our competitive position and send a signal that Michigan is capable of responding constructively to changes in the economy.

*Id.* at 5-6.

152. Cf. Comment, *supra* note 52, at 905-06 (allowing employers immunity for willful misconduct does little to deter them from maintaining an unsafe workplace).

153. See also Bohyer, *supra* note 110, at 160-61. It is imperative that the workers' compensation system allow injured employees a tort action so that the employer will either make the work environment safe or suffer the economic consequences. *Id.* Insurance companies cannot seek indemnification against the employer due to the exclusive remedy rule; they can only increase the rates to all insureds. *Id.* Rising rates are a concern to careful employers, but have not effectively decreased reckless employer misconduct. *Id.* Accord, Amcan, *supra* note 6, at 687 (asserting that the workers' compensation system aids those employers "who are inclined to be careless" to the detriment of those who are careful).

After evaluating the opposing employer and employee interests, the Michigan Legislature drafted an intentional tort definition which attempted to protect both industry and labor.\textsuperscript{155} Unfortunately, the ambiguous language used in the definition provides little guidance to indicate where the legislature decided to draw the line on intentional torts.\textsuperscript{156} Therefore, litigation will likely increase for several years while the Michigan courts interpret the statutory definition.\textsuperscript{157}

\textit{C. Comparison of the Michigan Statute to Statutes of Other Jurisdictions}

The problems with the Michigan amendment’s codification of the intentional tort exception are most effectively explained through comparison to the statutes and experiences of other jurisdictions,\textsuperscript{158} notably Ohio and


It would be nice to think that employers are impelled by humane motives to consider the health and safety of their employees as the paramount concern. But the unfortunate truth is that business reacts best to hopes of profit maximization. Where some employers can avoid more costly protections for their employees without incurring additional liability, they usually will do so. Employers generally will act only if given the monetary incentive to do so. \textit{Id.}

\textsuperscript{155} \textit{See supra} note 123 (identifying groups who voiced their concerns to the Michigan Legislature).
\textsuperscript{156} \textit{See supra} note 14 (Senators Dillingham and Cherry attempt to provide the courts with insight into legislative intent).
\textsuperscript{157} \textit{See supra} note 19 (stating that when the statutory language is ambiguous, the courts must ascertain and give effect to the legislature’s intent).
\textsuperscript{158} Two approaches will not be discussed in detail because they provide little more relief than the true intentional tort test. The first approach is used in Arizona, which allows an intentional tort exception for willful and wanton employer misconduct, but defines willful and wanton misconduct as an act done deliberately and purposely with the direct object of injuring another. The result is that a standard which initially appears more lenient than the true intentional tort test is, in effect, no different. The statute reads as follows:

A. The right to recover compensation pursuant to this chapter for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer or any co-employee acting in the scope of his employment, and against the employer’s workers’ compensation insurance carrier or administrative service representative, except as provided by § 23-906 [allows election of remedies], and except that if the injury is caused by the employer’s wilful misconduct, or in the case of a co-employee by the co-employee’s wilful misconduct, and the act causing the injury is the personal act of the employer, or in the case of a co-employee the personal act of the co-employee, . . . and the act indicates a wilful disregard of the life, limb or bodily safety of the employees, the injured employee may either claim compensation or maintain an action at law for damages against the person or entity alleged to have engaged in the wilful misconduct.

B. “Wilful misconduct” as used in this section means an act done knowingly and pur-
West Virginia. Like Michigan, those states amended their workers' compensation statutes to resolve the intentional tort dilemma after state supreme court decisions enlarged the exception. Problems arising from judicially established standards persuaded these legislatures to codify and define the exception in order to preserve the exclusive remedy provision. An analysis of those statutes will provide suggestions for more effective legislation in Michigan.

1. The Ohio Response to the Intentional Tort Quagmire

The Ohio statute represents one approach to the problem of delineating the true intentional tort exception. Ohio codified this exception by amendment in 1986, following decisions by the Ohio Supreme Court which

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posely with the direct object of injuring another.


See, e.g., Serna v. Statewide Contractors, Inc., 6 Ariz. App. 12, 429 P.2d 504 (1967). Two employees were killed when a 25-foot deep ditch they were digging caved in and buried them. Id. at 13, 429 P.2d at 505. The ditch had previously caved in once, burying one of the dependents to his waist. Id. at 13, 429 P.2d at 505. During the five months before the second cave-in, the employers had ignored repeated warnings by safety inspectors that the sides of the ditch should be sloped and shored and escape ladders should be placed every 25 feet. Id. at 14, 429 P.2d at 506. The court "regrettfully" held that the facts did not bring the plaintiffs (widows and children of the dependents) within the statutory exception. Id. at 16, 429 P.2d at 508. Serna is one of the cases that the Supreme Court of Michigan used to illustrate a situation which would satisfy the substantial certainty standard. See Beauchamp v. Dow Chem. Co., 427 Mich. 1, 25, 398 N.W.2d 882, 893 (1986). The second approach allows additional benefits within the workers' compensation system for employer misconduct. See, e.g., ARK. STAT. ANN. § 11-9-503 (1987) (allows 25% increase in benefits); CAL. LAB. CODE § 4553 (West 1989) (50% increase for serious and willful employer misconduct); KY. REV. STAT. ANN. § 342.165 (Baldwin 1986) (15% increase); MASS. GEN. LAWS ANN. ch. 152, § 28 (West 1988) (100% increase for employer's serious and willful misconduct); MO. ANN. STAT. § 287.120(4) (Vernon 1988) (15% increase); N.M. STAT. ANN. § 52-1-10 (1981) (10% increase); N.C. GEN. STAT. § 97-12 (1985) (10% increase); UTAH CODE ANN. § 35-1-12 (1988) (15% increase); WIS. STAT. ANN. § 102.57 (West 1988) (15% increase).

159. See infra note 162 (Ohio amended its statute to clarify the intentional tort exception in 1986) and infra note 190 (West Virginia similarly amended its statute in 1983).

160. The Ohio Legislature was responding to Blankenship v. Cincinnati Milacron Chems. Co., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982) and Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) (see cases described infra note 163); West Virginia was responding to Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 (W. Va. 1978) (see description infra note 201).

161. See infra notes 163 and 199-201 and accompanying text.

162. The statute reads as follows:

(A) If injury, occupational disease, or death results to any employee from the intentional tort of his employer, the employee or the dependents of a deceased employee have the right to receive workers' compensation benefits under Chapter 4123 of the Revised Code and have a cause of action against the employer for an excess of damages over the amount received or receivable under Chapter 4123 of the Revised Code. . . . All defenses are preserved for and shall be available to the employer in defending against an
action brought under this section... In no event shall any action be brought pursuant to this section more than two years after the occurrence of the act constituting the alleged intentional tort.

(B) It is declared that... the establishment of the workers' compensation system is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which compensates even though the injury or death of an employee may be caused by his own fault or the fault of a co-employee; that the immunity established in Section 35, Article II of the Ohio Constitution and sections 4123.74 and 4123.741 of the Revised Code is an essential aspect of Ohio's workers' compensation system; that the intent of the legislature in providing immunity from common law suit is to protect those so immunized from litigation outside the workers' compensation system except as herein expressly provided; and that it is the legislative intent to promote prompt judicial resolution of the question of whether a suit based upon a claim of an intentional tort prosecuted under the asserted authority of this section is or is not an intentional tort and therefore is or is not prohibited by the immunity granted under Section 35, Article II of the Ohio Constitution and Chapter 4123 of the Revised Code.

(C) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under Chapter 4123 of the Revised Code, the court shall dismiss the action:

(1) upon motion for summary judgment, if it finds, pursuant to Rule 56 of the Rules of Civil Procedure the facts required to be proved by division (B) of this section do not exist;

(2) upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find the facts required to be proven.

(D) In any action brought pursuant to this section, the court is limited to a determination as to whether or not the employer is liable for damages on the basis that the employer committed an intentional tort. If the court determines that the employee or his estate is entitled to an award under this section and that determination has become final, the industrial commission shall, after hearing, determine what amount of damages should be awarded. For that purpose, the commission has original jurisdiction. In making that determination, the commission shall consider the compensation and benefits payable under Chapter 4123 of the Revised Code and the net financial loss to the employee caused by the employers intentional tort. In no event shall the total amount to be received by the employee or his estate from the intentional tort award be less than fifty per cent of no more than three times the total compensation receivable pursuant to Chapter 4123 of the Revised Code, but in no event may an award under this section exceed one million dollars. Payments of an award made pursuant to this section shall be from the intentional tort fund. All legal fees, including attorney fees as fixed by the industrial commission, incurred by the employer in defending an action brought pursuant to this section shall be paid by the intentional tort fund.

(G) As used in this section:

(1) "intentional tort" is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur. Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.
adopted the substantial certainty test and permitted litigation which would test the limits of the standard. Because the intentional tort definition in the Ohio statute is equally as ambiguous as that in the Michigan statute, the Ohio statute exemplifies the difficulty that legislatures face when developing a statutory definition of an intentional tort. The Ohio statute also reflects the Ohio Legislature's reluctance to choose either the

"Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

1986 Ohio Legis. Serv. § 4121.80 (Baldwin).

163. Blankenship and Jones were particularly important. In Blankenship, employees alleged that their employers knowingly exposed them to chemical fumes which caused pain, discomfort, and emotional distress which would extend into the indefinite future. Blankenship, 69 Ohio St. 2d at 608, 433 N.E.2d at 573. The case had been dismissed and the Ohio Supreme Court held that the lower court had insufficient facts before it to determine that dismissal was appropriate. Id. at 616, 433 N.E.2d at 578. In effect, the court granted the plaintiffs an opportunity to prove their case. Jones, which consolidated three cases, went considerably further. In one of those cases, the decedent's job included clearing a coal conveyor system. Jones, 15 Ohio St. 3d at 91, 472 N.E.2d at 1048. The employer used a blow torch to cut the sheet metal safety guard off the chute and a pulley subsequently caught the employee's hand and drew him in. Id. at 91, 472 N.E.2d at 1048. He was found an hour later, severely injured, and later died as a result of his injuries. Id. at 91, 472 N.E.2d at 1048. The court held that specific intent to injure was not an essential element, reversed summary judgment, and remanded for trial under the substantial certainty test. Id. at 95, 472 N.E.2d at 1051. Thus, the court adopted the substantial certainty test.

164. See, e.g., Bryant v. Lawson Milk Co., 22 Ohio App. 3d 69, 488 N.E.2d 934 (1985) (an unassailant beat and raped a convenience store night shift employee). Based on Jones, the court remanded for a trial as an intentional tort by the employer. Id. at 72-73, 488 N.E.2d at 939. See also Helton v. King Kwik Minit Mkt., Inc., 24 Ohio Misc. 2d 34, 495 N.E.2d 62 (1985). Helton was another case where the employee sued for an intentional tort after being raped during the night shift. Id. at 35, 495 N.E.2d at 63. The employer did not permit women to work the night shift unless they requested it. Id. at 35, 495 N.E.2d at 63. The court held that rape was not substantially certain when only seven assaults or molestations had occurred in eighty-nine stores in five years. Id. at 36-37, 495 N.E.2d at 64. Although the court issued summary judgment for the defendant, he was forced to defend a lawsuit for an intentional tort because a third party attacked the employee. Id. at 36, 495 N.E.2d at 63-64. The case is illustrative of the type of cases that are instituted to test the limits of the exception when a vague, more lenient standard is established.

165. See infra notes 168-69 and accompanying text. See also supra notes 14 & 16 and text accompanying notes 14-18.

166. See supra note 25 (enumerating the objectives of workers' compensation statutes). See also Blankenship v. Cincinnati Milacron Chems. Co., 69 Ohio St. 2d at 615, 433 N.E.2d at 577. In Blankenship, the court held that promoting a safe and injury free work environment is an avowed purpose of Ohio workers' compensation. Id. at 615, 433 N.E.2d at 577. The court further held that granting the employer immunity for conduct which displays a lack of concern for employee health does not promote this purpose because the employer can commit intentional acts with impunity knowing that at the very most his workers' compensation premiums may rise slightly. Id. at 615, 433 N.E.2d at 577. In addition, the court noted that workers' compensation is based on insurance principles, which do not protect policy holders from intentional torts. Id. at 615, 433 N.E.2d at 577. Therefore workers' compensation should not protect employers from intentional torts.
true intentional tort test or the substantial certainty test, a vacillation clearly evident in the Michigan statute as well. The Ohio Legislature initially adopted the more liberal substantial certainty test, and then contradicted itself by restrictively defining substantial certainty as a deliberate intent to injure. The Ohio amendment, like Michigan’s, uses terminology that is an incomprehensible mixture of the phrases of the two tests.

Although the Ohio statute’s definition of an intentional tort is virtually a riddle, the statute is superior to Michigan’s statute because it provides a presumption of an intentional tort in two problematic situations. The employee must establish that the employer either deliberately removed an equipment safety guard or deliberately misrepresented the toxic or hazardous nature of chemicals to which the employee was exposed. If the employee is injured as a result of either situation, the statute creates a rebuttable presumption that the employer committed an intentional tort.

An Ohio employee with evidence that his employer intentionally removed a safety guard, unlike a similarly situated Michigan employee, is aided by the presumption which shifts the burden of producing evidence to the employer. If the employer produces no evidence in rebuttal, the employee must win. For example, consider an employee who works near a conveyor. Assume that the employer, in order to hasten production, removes a guard which was designed to prevent the conveyor from catching the employee’s clothing and pulling him in. Then consider that the conveyor entraps the employee and disables him. When the employee presents evi-

167. See supra text accompanying notes 14-18.
168. An intentional tort is “an act committed with the intent to injure or committed with the belief that injury is substantially certain to occur.” OHIO REV. CODE ANN. § 4121.80(G)(1) (Baldwin Supp. 1987) (set out supra note 162).
169. Substantial certainty “means that the employer acts with deliberate intent to cause . . . injury, disease, condition, or death.” OHIO REV. CODE ANN. § 4121.80(G)(1) (Baldwin Supp. 1987) (set out supra note 162). In the controversy between the true intentional tort test and the substantial certainty test, the Ohio Legislature has gone full circle, because deliberate intent is traditionally associated with the true intentional tort test. See Ghiardi, supra note 12, at 155 (stating that deliberate intent is identified with the true intentional tort test).
173. See generally E. CLEARY, MCCORMICK ON EVIDENCE, §§ 343-45, at 968-87 (3d ed. 1984). A presumption shifts the burden of producing evidence and possibly the burden of persuasion, as well. Id. at 968.
174. If the defendant produces no evidence, the judge will instruct the jury to find for the plaintiff. Id. at 344, 973-74.
175. The example is based on one of the three cases combined in Jones. Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) (see facts described supra note 163).
dence that the employer deliberately removed the safety guard, the
presumption is triggered, shifting the burden of producing evidence to the
employer. In the hypothetical, the employer has no rebuttal evidence be-
cause he removed the safety guard to increase production. The presump-
tion, therefore, entitles the plaintiff to a directed verdict. By enacting this
statutory presumption, the Ohio Legislature, unlike the Michigan Legis-
late, has motivated employers to improve workplace environments by noti-
fying employers that it will not tolerate the removal of safety equipment.

The Ohio statute, unlike Michigan's statute, simultaneously protects
employers against frivolous suits. The legislature has deterred frivolous
suits by placing the initial burden of presenting evidence that the employer
intentionally removed or failed to install safety equipment on the plain-
tiff. In this manner, the Ohio provision protects the employer who negli-

The presumption provided in the amendment codifies the exact situation presented in Jones. Therefore the effect of the amendment is to prevent expansion of the intentional tort exception and increased litigation in an attempt to test the exception's limits, rather than to overrule Jones. The court was liberal in Jones, allowing the representative to sue for an intentional tort after collecting workers' compensation, a practice which had been prohibited in some jurisdictions.

176. See supra notes 172-74.
177. The presumption should be a significant factor in improving industrial safety be-
cause the publication of the statute forewarns employers that they are subject to significant financial liability anytime deliberate removal of an equipment safety guard causes injury to an employee. See generally note 153-54 and accompanying text.

178. First, employees whose injuries do not meet the standard will not attempt to evade workers' compensation and pursue an intentional tort action for other workplace injuries. The Ohio Legislature has decided to limit the presumption to these two situations because removal of safety equipment and exposure to hazardous substances are common manufacturing problems which must be deterred. By contrast there is no presumption of an employer's inten-
tional tort when a third party rapes an employee while she is working. Clearly the legislature is indicating that there is less intent in allowing an unsafe condition, than in creating one. See, e.g., McKinley v. Holiday Inn, 115 Mich. App. 160, 320 N.W.2d 329 (1982); Bryant v. Law-
son Milk Co., 22 Ohio App. 3d 69, 488 N.E.2d 934 (1985); Helton v. Minit Mkt., Inc., 24 Ohio Misc. 2d 63, 495 N.E.2d 63 (1986). In McKinley, a hotel maid alleged that the employer
knew her position as hotel maid was dangerous, and the maid sued her employer when a hotel
guest raped her. Id. at 161, 320 N.W.2d at 330. The court held that the hotel was negligent in
assigning her to work alone but had not committed an intentional tort. Id. at 165, 320 N.W.2d
at 332. Workers' compensation was her exclusive remedy. Id. at 166, 320 N.W.2d at 332.
Second, the plaintiff knows that he must present preliminary evidence of deliberate employer
action. See Black's Law Dictionary 384 (5th ed. 1983). Deliberate means "carefully con-
sidered . . . [with]ilful rather than merely intentional." Id.

179. "Deliberate removal of an equipment safety guard or deliberate misrepresentation
of toxic or hazardous nature of chemical is evidence . . . ." Ohio Rev. Code Ann. § 4121.80(G)(1) (Baldwin Supp. 1987) (set out supra note 162). The plaintiff must initially
present that evidence. For examples of the types of conduct which satisfies the statute, see
Griffin v. George's, Inc., 267 Ark. 91, 589 S.W.2d 24 (1979) (employee was killed when he fell
into a grain auger from which the employer had removed a guard) and Jones, 15 Ohio St. 3d
90, 472 N.E.2d 1046 (facts described supra note 163).
gently failed to foresee the need to install safety guards because his employee will not be able to present evidence of intent.\textsuperscript{180}

The Ohio statute is unsatisfactory with respect to chemically induced illnesses and death.\textsuperscript{181} The presumption is not triggered until the employer deliberately misrepresents the chemical's dangerous nature.\textsuperscript{182} The employer, however, has no reason to deliberately misrepresent the hazardous nature of the substance until the employee complains about fumes, a stinging sensation, or some other noticeable physical effect. Thus, the statute only assists employees who complain and are falsely reassured by their employers' deliberate misrepresentations.\textsuperscript{183} The presumption does not aid those employees who do not complain because they are not aware that the chemical is a health threat.\textsuperscript{184} In that situation, the employer will have no

\textsuperscript{180} Accidents are an unavoidable incident of production. Workers' compensation is designed to provide compensation for negligently caused work-related accidents. Just as it provides exclusive coverage when an employee negligently injures himself, it is the exclusive remedy when an employer negligently injures an employee. \textit{See supra} notes 41 & 76.

\textsuperscript{181} The problem is that the employer must make a deliberate misrepresentation to trigger the presumption. \textit{Ohio Rev. Code Ann.} \S 4121.80(G)(1) (Baldwin Supp. 1987) (set out supra note 162).

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{See, e.g., People v. Film Recovery,} Nos. 84-C-5064, 83-C-11091 (Cir. Ct. of Cook County, Ill. June 14, 1985), \textit{appeal filed,} Nos. 85-C-184, 85-C-1952 (Ill. App. Ct. July 1, 1985). The case is unreported but has been discussed extensively by various authors. \textit{See, e.g., Magnuson & Leviton, Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.,} 62 \textit{Notre Dame L. Rev.} 913 (1987); \textit{Burnett, Corporate Murder Verdict May Not Become Trend, Say Legal Experts, Occupational Health & Safety,} Oct. 1985, at 22; \textit{Beauchamp v. Dow Chem. Co.,} 427 Mich. 1, 398 N.W.2d 882 (1986); 2A A. Larson, \textit{supra} note 6, \S 68.15, at 13-62. In \textit{Film Recovery,} the employees complained daily that cyanide solutions and fumes caused nausea, dizziness, headaches, and burning and itching of their skin. Magnuson & Leviton, \textit{supra} at 914. The company president admitted that he knew how dangerous the cyanide fumes and solutions were and that he was at the plant daily and knew employees were sick. Burnett, \textit{supra} at 24. Most of the employees were undocumented Hispanics and Poles who spoke and read little or no English. \textit{Id.} at 22; \textit{Beauchamp,} 427 Mich. at 23, 398 N.W.2d at 892. The employers also removed the warning labels from the cyanide containers in case anyone could read English. Burnett, \textit{supra} at 22. When an inspector warned that the operation had outgrown the building, the employers moved the executive offices and enlarged operations. \textit{Beauchamp,} 427 Mich. at 24, 398 N.W.2d at 892-93. \textit{Film Recovery,} a murder/manslaughter case, exemplifies the type of employer misconduct for which the decedent's representatives could bring an intentional tort action under the Ohio intentional tort exception. \textit{See also} Kofron v. Amoco Chem. Co., 441 A.2d 226 (Del. 1982) (employer knew how dangerous asbestos was, but told employees that it was safe to work near it).

\textsuperscript{184} \textit{See, e.g., Beauchamp v. Dow Chem. Co.,} 427 Mich. 1, 398 N.W.2d 882 (1986). A research chemist was exposed to "agent orange" at work and filed suit 14 years later. \textit{Id.} at 4 & n.1, 398 N.W.2d at 883 & n.1. The critical question would be whether the company made deliberate misrepresentations to the plaintiff. There is no indication that Ronald Beauchamp was aware of the danger when he was exposed. There was also no evidence whether the employer had knowledge because the case involved an appeal of defendant-employer's summary judgment.
reason to deliberately misrepresent the hazard and the presumption in favor of the employee will not be triggered.185

One might argue that the deliberate misrepresentation requirement is necessary to protect employers from frivolous suits, a basic goal of workers' compensation.186 However, the litigation prevention goal would be served equally well by providing a presumption of an intentional tort whenever an employer knowingly exposes an employee to a toxic substance.187 Concurrently, a knowing exposure presumption would protect those employers who were not cognizant of the chemical's dangerous nature because the employee cannot prove that such an employer knowingly exposed him to danger.188

The employer's disregard of employee health is equally reprehensible when the employer knowingly exposes the noncomplaining employee to a known toxic substance as when the employer deliberately misrepresents the nature of a toxic chemical. Thus, the deliberate misrepresentation requirement in the Ohio statute weakens a provision which is potentially a strong deterrent to reprehensible employer activity.189

The Ohio statute, in contrast to the Michigan amendment, explicitly provides the employer with several benefits to balance the benefit extended to employees by the presumption. The statute first protects the employer against runaway damage awards by submitting only the liability issue to the jury, reserving the damage determination to the industrial commission.190 Second, the statute sets a ceiling on the amount of damages.191

185. Not only will employers avoid anything that might be considered a deliberate misrepresentation, they will be motivated to shred any records that would prove that they had knowledge of any hazard. Thus their knowledge of the hazard cannot be revealed through discovery in a case in which a judge might be inclined to rule that simply exposing employees to dangerous chemicals constituted a deliberate misrepresentation that the chemicals were safe. See generally U.S. Companies Pay Increasing Attention to Destroying Files, The Wall Street Journal, Sept. 2, 1987, at 1, col. 1.

186. Vieweg, supra note 25, at 422 and accompanying text (reporting that limited employer liability was one of three original goals of workers' compensation).

187. Consider, for example, exposure to asbestos. Employers would not be guilty of an intentional tort until they learned of the danger to employees. But if the employer continued to use the product after he knew of the danger, perhaps because of the expense involved in replacing the substance, he would be chargeable with an intentional tort. See, e.g., Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); Millison v. E.I. du Pont de Nemours, 101 N.J. 161, 501 A.2d 506 (1985).

188. See cases cited supra note 187 (employer chargeable with intentional tort for exposure after he learned of danger, but not for original injury).

189. See generally Amchan, supra note 6, at 687-88.


Third, the statute directs the industrial commission to review attorneys' fees, which enables the agency to control attorneys' fees and prevents attorneys from encouraging litigation in weak cases.\textsuperscript{192} Finally, the statute creates an intentional tort fund to pay the damage awards and attorneys' fees.\textsuperscript{193}

The statute also conserves judicial resources by providing a policy statement which stresses legislative support for the exclusive remedy provision\textsuperscript{194} and explicitly provides for summary judgment and directed verdict when warranted.\textsuperscript{195} Unlike Michigan, the Ohio statute spells out the balancing of the employee's gain through the creation of the rebuttable presumption against the employer's gain by providing for a ceiling on benefits and establishment of the tort fund.

2. The West Virginia Legislature's Response to Increased Litigation and High Damage Awards

The West Virginia Legislature, like the Michigan and Ohio Legislatures, amended its statute to codify and define the intentional tort exception.\textsuperscript{196} The Act overruled the West Virginia Supreme Court's establish-


\textsuperscript{194} See Ohio Rev. Code Ann. § 4121.80(B) (Baldwin Supp. 1987) (set out supra note 162).


\textsuperscript{196} The statute reads:

(2) The immunity from suit provided under this section and under section six-a [§ 23-2-6a], article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention." This requirement may be satisfied only if:

(i) It is proved that such employer or person against whom liability is asserted 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 and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(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 had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working
ment of the willful, wanton, and reckless misconduct standard for intentional torts. The legislature first declared that the true intentional tort test would be the standard in an effort to reduce litigation and excessive damage awards. The West Virginia Legislature, unlike Michi-

condition;

(C) That such specific unsafe working condition was a violation of a state of federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

(ii) In cases alleging liability under the provisions of the preceding paragraph (ii):

(A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;

(B) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it shall find, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court shall determine that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraph [sic] (A) through (E) of the preceding paragraph (ii) . . . .


198. See W. VA. CODE § 23-4-2(e)(2)(i) (1985) (set out supra note 196) (intentional tort requires a "consciously, subjectively, and deliberately formed intention . . . ").

199. See generally Note, supra note 145. Following the Mandolidis decision, which adopted willful, wanton, and reckless misconduct as the standard, plaintiffs had instituted litigation to test the limits of the exception. Id. Courts were reluctant to issue summary judgment because the Mandolidis opinion suggested that willful and wanton negligence was a jury question. See also supra note 146 (juror's affidavit explaining how one substantial verdict was determined). See also infra note 200 (explaining Cline v. Joy Mfg. Co., 310 S.E.2d 835 (W. Va. 1983)). But see 2A A. LARSON, supra note 6, § 68.15, at 13-48 (stating that the West Virginia courts construed the exception narrowly). The disagreement between the two commentators is explained by the different times at which they evaluated the courts' response. The note was written after several trial court decisions whereas Professor Larson's evaluation was written after final disposition of those cases. Although the exclusive remedy provision was ultimately protected, the employers were required to go to considerable expense defending the suit and pursuing the appeals.


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gan's, also provided an alternate five-part method of proof for cases in which the employer knowingly exposed the employee to unsafe working conditions which caused injury or death.\textsuperscript{201} The employee must present evidence that the employer knew a dangerous condition existed, that he subjectively appreciated the risk of serious injury, that he violated a safety code or industry practice, that he nevertheless exposed the employee to the known danger, and that the dangerous condition consequently injured the employee.\textsuperscript{202}

Although helpful to plaintiffs, the alternate method of proof is severely limited by the requirement that the employer must violate a safety code or industry practice.\textsuperscript{203} The statute does not burden the plaintiff by requiring evidence that the employer had been cited for violation of a safety code, but it does require the plaintiff to prove that the employer violated a rule of the safety statute, code, or regulation.\textsuperscript{204} Unfortunately, many of the safety codes and rules are vague or ambiguous so in practice an employer may not be held liable if he has not been cited for a violation.\textsuperscript{205} Thus, in many situations, employers may continue unsafe practices until they are cited for a violation, with little fear of liability for intentional tort suits.\textsuperscript{206} The requirement of violating an industry practice is also detrimental to employees because employers are insulated from liability for maintaining unsafe work-

standing outside it. \textit{Id.} at 836. From that position, he could not trigger the cut-off switches. \textit{Id.} at 837. The court stated that there was no evidence on the record that he was ordered to operate the machine in that manner. \textit{Id.} at 839-40. The jury verdict of four million dollars was three times the mining company's assets. \textit{See Note, supra} note 145, at 928 n.216. The verdict was reversed and remanded for new trial because the evidence as a matter of law was insufficient to support it. \textit{Cline}, 310 S.E.2d at 841.

201. The test mirrored the situation presented in one of the cases presented in Mandolidis. Mandolidis v. Elkins Indus., 161 W. Va. 695, 264 S.E.2d 907 (1978). Other workers had been injured by a table saw before the plaintiff was injured; safety officials had tagged the saw as inoperable, but supervisors had removed the tag and ordered Mandolidis to operate it. Mandolidis was made to believe that he would be fired if he refused to operate the saw, and the saw severed two fingers and part of his hand. \textit{Id.} at 707, 246 S.E.2d at 914. In addition, when another employee complained about the saw after Mandolidis was injured, the supervisor replied: "So what? He's getting compensation." \textit{Id.} at 710, 246 S.E.2d at 916.

202. \textit{See} W. Va. Code § 23-4-2(c)(2)(ii) (1985) (set out \textit{supra} note 196). \textit{See also} Handley v. Union Carbide Corp., 620 F. Supp. 428 (S.D.W. Va. 1985). Applying the statute as written, the court denied recovery to a plaintiff suffering a rare lung disease which required him to use oxygen at all times. \textit{Id.} at 444. The plaintiff-employee had worked transferring chemicals to storage tanks at the plant and alleged that the employer acted with deliberate intent, in exposing him to chemicals which caused his disease. \textit{Id.} at 430. The court held that the employee failed to show that his employer breached an industry standard on some allegations and that his employer had knowledge on other allegations. \textit{Id.} at 435.


204. \textit{Id.}

205. Amchan, \textit{supra} note 6, at 689-90.

206. \textit{See id.} at 686-87 (stating that strong incentives are needed to motivate employers to improve workplace safety).
ing conditions as long as the industry generally conforms to the same standard.\textsuperscript{207} Hence, the statute does not sufficiently prompt the industry to improve safety practices.\textsuperscript{208} While the West Virginia statute, unlike the Michigan statute, clearly defines the intentional tort exception, it fails to promote a safe work environment because it defines the exception very narrowly.

The West Virginia statute protects employer interests by prohibiting punitive damages for the unsafe working conditions suit.\textsuperscript{209} West Virginia also provides a policy statement supporting the exclusive remedy\textsuperscript{210} and a specific provision for summary judgment and directed verdict.\textsuperscript{211} Michigan, by contrast, has no guidance regarding amount of awards, no policy statement and no explicit summary judgment or directed verdict provision.\textsuperscript{212}

IV. PROPOSED AMENDMENT TO CLARIFY THE INTENTIONAL TORT EXCEPTION TO THE EXCLUSIVE REMEDY PROVISION OF THE MICHIGAN WORKER'S DISABILITY COMPENSATION ACT

The recent amendment to the Michigan Worker's Disability Compensation Act codifying and defining the intentional tort exception is ambiguous, neither affirming nor overruling the Michigan Supreme Court decision which previously adopted the substantial certainty test.\textsuperscript{213} Instead, the definition combines terminology associated with both the restrictive true intentional tort test and the more expansive substantial certainty test.\textsuperscript{214} The ambiguous definition thus creates uncertainty and requires judicial interpretation.

Relying on the ambiguous definition of specific intent, employees may request the court to interpret the statutory definition as the substantial certainty test thereby allowing them to avoid workers' compensation's limited benefits and pursue full compensatory and punitive damages through an

\begin{itemize}
  \item \textsuperscript{207} See generally Amchan, supra note 6, at 689.
  \item \textsuperscript{208} Id. at 686-87.
  \item \textsuperscript{209} See W. Va. Code § 23-4-2(c)(2)(iii)(A) (1985) (set out supra note 196). See supra note 200 (had been problems with unreasonably high awards, which were often reversed on appeal, but nevertheless forced defendant to litigate).
  \item \textsuperscript{210} See W. Va. Code § 23-4-2(c)(1) (1985) ("in enacting the immunity provisions of this chapter, the legislature intended to create a legislative standard . . . of more narrow application . . . than the common law tort system . . . ").
  \item \textsuperscript{212} The Michigan statute states that the existence of an intentional tort is a question of law for the court to determine. See Mich. Comp. Laws Ann. § 418.131 (West Supp. 1988). The legislature presumably meant that summary judgment or directed verdict should be granted, when appropriate, but the intent is not as clear as West Virginia's express provision.
  \item \textsuperscript{213} See supra notes 14, 123-25 & 128 and accompanying text.
  \item \textsuperscript{214} See supra note 14 and text accompanying notes 14-18.
\end{itemize}
intentional tort suit.\textsuperscript{215} Employees will argue that the expansive definition is needed to fairly compensate them and to deter employers from allowing dangerous work conditions to exist.\textsuperscript{216} Employers will argue that the "specific intent" portion of the statute codified the true intentional tort standard and thus immunized employers from tort liability except when they act with the express purpose of injuring an employee.\textsuperscript{217} Employers will argue that the more restrictive definition is necessary to prevent excessive litigation and maintain competitive production costs.\textsuperscript{218} The ambiguous definition will, therefore, frustrate the workers' compensation goals of providing quick, standardized benefits and eliminating litigation.\textsuperscript{219}

In construing the intentional tort definition, the court will initially look at the statutory language and will conclude that it is ambiguous.\textsuperscript{220} The legislative history will not assist the court in ascertaining legislative intent because the committee minutes, bill analysis, and senate journal merely indicate that the legislature was balancing Michigan's duty to protect its citizens from harm against the state's need to reduce labor costs, attract business, and provide jobs.\textsuperscript{221} Neither the legislative history nor the statutory language adequately informs the court where the legislature meant to draw the line in defining an intentional tort.\textsuperscript{222}

A solution that would benefit both Michigan workers and employers would be to adopt a two-party statutory definition that combines the best elements of the intentional tort definitions in the West Virginia and Ohio statutes. Michigan should initially draft a definition similar to the one utilized by West Virginia, which establishes the true intentional tort as the standard, but clarifies that intent to injure should not be construed to require a desire to injure.\textsuperscript{223} Michigan should, however, reject West Virginia's alternate five-part method of proving an intentional tort, which is too closely linked to standard business practices and governmental inspections to effectively motivate employers to provide a safe work environment.

A presumption, similar to the one in the Ohio statute, should be included as an alternate method of proof for those problematic areas involving safety equipment removal and exposure to hazardous or toxic chemicals.\textsuperscript{224} Michigan should reject Ohio's deliberate misrepresentation

\textsuperscript{215} See supra notes 4, 7, & 61-68 and accompanying text.
\textsuperscript{216} See supra notes 111-15 & 152-54 and accompanying text.
\textsuperscript{217} See supra notes 6 & 15-16 and accompanying text.
\textsuperscript{218} See supra notes 148-51 and accompanying text.
\textsuperscript{219} See supra notes 23-25 and accompanying text.
\textsuperscript{220} See supra notes 14-22 and accompanying text.
\textsuperscript{221} See supra notes 147-54 and accompanying text.
\textsuperscript{222} See supra note 14.
\textsuperscript{223} See W. VA. CODE § 23-4-2(c)(2) (1985) (set out supra note 196).
\textsuperscript{224} See OHIO REV. CODE ANN. § 4121.80(G)(1) (Baldwin Supp. 1987) (set out supra
requirement because it denies assistance to employees who did not complain because they were not aware of the chemical's nature and, therefore, were not reassured by means of a deliberate misrepresentation. Instead, Michigan should only require that an employer deliberately expose an employee to a chemical which the employer knows or reasonably should know to be hazardous or toxic.

The severity of the injury and the method of proof should determine which type of damages are available to the plaintiff. Punitive damages should be permitted only when the employer exhibited a deliberate intent to injure (which would fulfill the true intentional tort standard) and thereby caused permanent total disability or death. Michigan's generous workers' compensation benefits are adequate compensation for partial and temporary injuries. When the presumption that removal or omission of safety equipment or exposure to hazardous chemicals is the method of establishing liability, the intent to injure is less clear. Punitive damages should not be allowed in these cases because the employer may have only intended to produce his product or increase production. Nevertheless, the employer's misconduct is egregious, and the employee or his representative should be permitted to recover full compensatory damages if the employee is killed or permanently and totally disabled. Thus, permanently and totally disabled employees, or the representatives of deceased employees, will receive full compensation for those types of injuries which occur most frequently in modern industry and will, in addition, be permitted exemplary damages for traditional intentional injuries.

The proposed amendment will create an intentional tort exception which is slightly larger than the true intentional tort. The proposed definition, including the alternate method, should be construed to be narrower than the substantial certainty test. The exception, as proposed, would not be subject to enlargement to substantial risk.

The proposed amendment to the Michigan Worker's Disability Compensation Act is as follows:
Sec. XXX (1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist when an employee is injured as the result of a deliberate act of the employer or his agent, and the employer specifically intended an injury. Specific intent, however, does not require that the employer desired to cause injury, disease, or death or that injury, disease, or death was the only motive for the act. The specific intent requirement is satisfied if the plaintiff presents convinc-

\footnote{See supra note 66.}
ing evidence:

(a) That the employer acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury, disease, or death to an employee; or

(b) That the employer exposed employees to a substance when the employer knew or reasonably should have known that there was a high degree of likelihood that such exposure would cause serious injury and the exposure consequently killed or permanently and totally disabled the employee; or

(c) That the employer has deliberately removed or omitted installing safety equipment on machinery on which the employee was subsequently killed or permanently and totally disabled.

(2) Proof of (b) or (c) shall create a presumption that the employer intended to injure the employee. The presumption may be rebutted by evidence that the employer was not aware of the toxicity of the substance or by evidence that the employer removed the safety equipment for another good and reasonable cause.

(3) Compensatory damages shall be available for (b) or (c). Punitive damages shall not be available for (b) or (c). Both punitive and compensatory damages shall be available for (a).

(4) The issue of whether an act was an intentional tort shall be a question of law for the court. The court shall issue summary judgment or direct a verdict when appropriate.

(5) This subsection shall not enlarge or reduce rights under law.

(6) As used in this section and section 827, "employee" includes the person injured, his or her personal representatives and any other person to whom a claim accrues by reason of injury to or death of the employee. "Employer" includes the employers' insurer, a service agent to a self-insured employer and the accident fund insofar as they furnish or fail to furnish safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract.

V. CONCLUSION

The ambiguous language of the Michigan Worker's Disability Compensation Act's definition of an intentional tort will increase litigation. Employers may legitimately request the court to interpret the definition as the true intentional tort test and employees have grounds for asserting that the legislature adopted the more liberal substantial certainty test. The court will refer to the legislative history of the amendment defining the inten- tional tort exception in an attempt to interpret the statute. The court will
discover that the legislature was attempting to balance the interests of employees and employers, but will discover no conclusive indication of how the legislature finally delineated the intentional tort exception's boundaries.

The Michigan Legislature should amend the statute to clarify the intentional tort definition. The intentional tort exception should include a two-part definition initially adopting the true intentional tort test; that is, a specific intent to injure. In addition, the statute should provide a presumption of an intentional tort when an employer deliberately removes or fails to install an equipment safety guard or deliberately exposes an employee to a chemical which the employer knows to be toxic or hazardous to human health. The proposed amendment will provide guidelines to allow adequate compensation for intentional torts and will decrease litigation.

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