

8-29-2016

Workers' Compensation Law & the Remedial Waiver

Mary Kati Haupt

Follow this and additional works at: <https://lawpublications.barry.edu/barryrev>



Part of the [Jurisprudence Commons](#), and the [Other Law Commons](#)

Recommended Citation

Mary Kati Haupt (2016) "Workers' Compensation Law & the Remedial Waiver," *Barry Law Review*: Vol. 21 : Iss. 2 , Article 4.
Available at: <https://lawpublications.barry.edu/barryrev/vol21/iss2/4>

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Barry Law Review by an authorized editor of Digital Commons @ Barry Law.

WORKERS' COMPENSATION LAW & THE REMEDIAL WAIVER

Mary "Kati" Haupt*

INTRODUCTION

State workers' compensation schemes are long-standing systems that facilitate efficient markets by identifying the parameters of employer liability for workplace injuries and granting certainty in recovery for injured employees. Workers' compensation represents an administrative remedy where no-fault coverage is provided for employee work-related injuries, the amount of the remedy being determined by the type and severity of the harm.¹ These statutory systems represent a basic trade-off where, in return for employer strict liability for employee injuries, employees waive the right to common-law actions against an employer for negligence.² Placing the transaction costs in the employment context on "the employer-injurer, rather than on the employee-victim, is likely to lead to a greater recognition of accident costs and to greater incentives toward accident avoidance."³

This article discusses these systems by first looking into the history of workers' compensation and the reasons for the laws' implementation. Second, this article discusses current approaches to applying these statutes, and, using Florida as an example, explores the harsh remedial results that may follow based on the strict statutory schemes. Third, this article considers a way to classify this remedy within theoretical models that facilitate an understanding of how states have developed and implemented the workers' compensation systems. Fourth, this article examines the policy implications of these systems, particularly within such theoretical framework; it looks to how the exclusivity of this remedy and its narrow exception for intentional wrongdoing impairs employees' rights to recovery in particular situations. Finally, this article concludes that while statutory workers' compensation schemes provide the appropriate remedy on paper, the harsh results in the laws' application demonstrate that the definition of the intentional tort exception should be revised to loosen the restrictive remedial waiver.

* Mary "Kati" Haupt, J.D., Barry University Dwayne O. Andreas School of Law.

1. Joni Hersch & W. Kip Viscusi, *Assessing the Insurance Role of Tort Liability After Calabresi*, 77 J. L. & CONTEMP. PROBS. 135, 144 (2014).

2. Peter D. Webster & Christine Davis Graves, *A Primer on the Intentional-Tort Exception to Employers' Workers' Compensation Immunity*, 88 No. 10 FLA. BAR. J. 14, 15 (2014); see also Hersch & Viscusi, *supra* note 1, at 140 ("The distinctive feature of workers' compensation is that unlike conventional tort liability, it is a no-fault compensation system whereby all work injuries are compensated irrespective of worker fault or company negligence.").

3. Guido Calabresi, *Torts-The Law of the Mixed Society*, 56 TEX. L. REV. 519, 520-21 n.6 (1978).

I. HISTORY AND APPLICATION OF WORKERS' COMPENSATION LAWS

Millions of American employees are involved in work-related injuries every year.⁴ Under traditional common-law principles, employees possessed ineffective means to pursue claims against employers that would allow recovery for injury-related medical expenses or to facilitate income replacement.⁵ The lack of adequate remedies led to the early American workers' compensation laws.⁶ These laws were implemented due to the unavailability of tort remedies resulting from what is coined the "unholy trinity" of common-law tort defenses: contributory negligence, assumption of risk, and the fellow servant rule.⁷ The creation of workers' compensation systems began in Europe in the late 1870s, and the system's implementation in the United States emerged in the beginning of the 1900s.⁸

Workers' compensation is administered by each individual state.⁹ Currently, all fifty states and the District of Columbia have workers' compensation statutes in place.¹⁰ The main purpose of these laws is to prescribe a definite remedy for employee injuries resulting during the course and scope of employment.¹¹ Workers' compensation systems embody an arrangement between the parties that seemingly facilitates each party's conflicting interests.¹² An employer is held strictly liable for its employees' work-related injuries, and employees in turn surrender separate or distinct causes of action against the employer: "receipt of certain and expeditious payments becomes the sole and exclusive remedy for the injury."¹³

Present-day workers' compensation statutes require that employers choose to directly pay for employee accidents, to contract with private insurance companies to maintain such coverage, or to pay premiums to an applicable state's workers' compensation fund.¹⁴ These statutes typically provide that compensation be measured by an average weekly wage and the type and length of time of the

4. See GUIDE TO HR POLICIES AND PROCEDURES MANUALS § 5:4 (2015) (commentary: history of workers' compensation laws).

5. *Id.*

6. *Id.*

7. Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 409 n.15 (1988); see also Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHOPAEDIC J. 106, 106 (1999) (discussing that under contributory negligence principles, an employee's recovery was barred by any negligence on his/her own part, the fellow servant rule barred recovery if the negligence was at all contributable in portion or entirety to a fellow employee, and assumption of risk principles held that employees knew the risk of employment and accepted it by signing his/her employment contract).

8. Mark R. Whitmore, Note, *Denying Scholarship Athletes Workers' Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 767 (1991) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 80, at 573 (5th ed. 1984)).

9. See Hersch & Viscusi, *supra* note 1.

10. Whitmore, *supra* note 8, at 767.

11. See *id.* at 768–70 (explaining that "[p]rior to the advent of workers' compensation, eighty percent of all industrial accident claims failed or left the plaintiff uncompensated [and that this] occurred primarily because of plaintiffs' difficulties in overcoming their employers' formidable tort defenses: contributory negligence, assumption of risk, and the fellow servant doctrine").

12. STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS § 21:5 (2016).

13. *Id.*

14. Whitmore, *supra* note 8, at 779–80.

injuries.¹⁵ Benefit levels are associated with different types of work-related injuries based on predetermined payment schedules, and these systems address the income loss associated with the injury but do not account for pain and suffering or legal expenses.¹⁶

Workers' compensation schemes provide an exclusive remedy for work-related injuries,¹⁷ with limited exceptions, including an exception if the employer neglects to carry workers' compensation insurance or if the employer commits an intentional tort that results in an employee's injury or death.¹⁸ Under this exclusive remedy provision, employers waive common-law tort defenses; however, the regime also provides that an employee may not sue the employer in tort (i.e., for the employer's negligence), and the employee's exclusive remedy is to accept the statutory compensation for any resultant injury.¹⁹ Thus, the compensation is a "mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer through the medium of insurance whose premiums are passed on in the cost of the product."²⁰

Today, although each state's laws are distinct, all of the schemes possess the same attributes: the laws create a mandatory statutory program that provides employees protection for work-related injuries without regard to the fault of the parties.²¹ The structure of a state's workers' compensation scheme usually is as follows:

The typical state act include[s] the following features: (1) negligence and fault of the employer and employee [are] immaterial to recover, (2) common law suits against the employer [are] barred, (3) medical expenses [are] capped at a percentage of the employee's wage, (4) an administrative agency r[uns] the system with relaxed

15. Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1133–34 (1982).

16. Hersch & Viscusi, *supra* note 1, at 140.

17. See King, *supra* note 7, at 416 ("The exclusive remedy rule determines under what circumstances an employee's remedy against his employer, his co-employees, and the workers' compensation insurer is limited to workers' compensation, and when that employee may proceed against such entities or individuals under other theories of liability such as common-law tort.")

18. Joseph A. Page, *Selecting the Remedy*, 3 AM. JUR. TRIALS § 1, at 637 (2016) (originally published in 1964).

19. See, e.g., FLA. STAT. ANN. § 440.015 (West 2015) ("The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike."); see also Whitmore, *supra* note 8, at 771–72 (discussing further that these provisions apply to employees and not to independent contractors, and that the injury must arise from fulfilling the terms of an employment agreement); Estreicher, *supra* note 15, at 1134 ("The statutes reflected a compromise: the employee was assured a fairly certain recovery, but had to forfeit any civil action and the chance, however unlikely, of obtaining more from a jury.")

20. Martha S. Davis, *Rape in the Workplace*, 41 S.D. L. REV. 411, 414 (1996) (citing ARTHUR LARSON, WORKERS' COMPENSATION LAW: CASES, MATERIALS AND TEXT § 1.00, at 1 (Matthew Bender & Co., 2nd ed. 1992)).

21. See GUIDE TO HR POLICIES AND PROCEDURES MANUALS § 5:4, *supra* note 4 ("Under these laws, injured or ill employees are only required to show that their condition arose out of and in the course of their employment."); see also Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 207 n.4 (6th Cir. 2004) (describing the "ordinary shorthand" meaning of the workers' compensation laws as: "a statutorily created insurance system that allows employees to receive fixed benefits, without regard to fault, for work-related injuries").

rules of procedure to facilitate prompt compensation, and (5) state court review of agency decisions occur[s] on a deferential basis.²²

The workers' compensation system is highly beneficial because it guarantees employees the right to recover for workplace injuries, grants certainty to employers about the extent of their liability, and provides efficiency for the process.²³ Indeed, "one might expect that making the employment relationship less confrontational would also help to preserve the employment relationship, thus facilitating the return to work of employees who have suffered an injury."²⁴ However, one area of concern is that the remedy is exclusive, and although there is an exception in most states for intentional torts, this exception has become seemingly impossible to prove.²⁵

II. CURRENT STATUTORY SCHEMES

Many states provide for the intentional tort exception via the state's workers' compensation statute.²⁶ Yet, the word "intentional" does not carry the same connotations in the workers' compensation context as it does at common law.²⁷ "Intentional" at common law means not only purposeful acts, but "also situations in which the actor knows with substantial certainty that harm will occur."²⁸ However, the interpretation by the majority of states is that intent within the workers' compensation arena only covers an employer's "purposeful intent to cause the harm that actually occurred."²⁹

22. See *Harper*, 392 F.3d at 207 n.4 (citing *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995)).

23. See John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 FLA. ST. U. L. REV. 491, 517 (2001) ("In Florida, workers' compensation law plays an important social role due to the fact that it 'assures the quick and efficient delivery of disability and medical benefits to an injured worker and facilitate[s] the worker's return to gainful employment at a reasonable cost to the employer.' For the provision of workers' compensation benefits to be effective, employers and employees alike must renounce some of their common law rights and defenses under the law and look to workers' compensation as the exclusive remedy for qualifying workplace injuries.") (internal citations omitted).

24. Hersch & Viscusi, *supra* note 1, at 140.

25. See Michelle Gorton, Comment, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 ENVTL. L. 811, 811-12 (2000) (arguing that the "workers' compensation system's requirement of an employer's 'deliberate intent' to injure a worker has been twisted by courts and legislatures so that workers can almost never access the civil legal system when they have been hurt at work, even if their employer has acted egregiously. With low risks of civil suits or criminal charges and only a small chance of inspection or serious penalty by regulatory agencies, the temptation and market pressure is there for employers to choose to save money rather than provide a safe workplace."). *But see* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 809 (1982) ("threat to the viability of workers' compensation . . . concerns the various judicial efforts to dismantle the exclusive remedy protection that the system affords the employer"); King, *supra* note 7, at 416 ("An effective and predictable exclusive remedy rule that limits employers' tort liability to their employees is a cornerstone of a viable workers' compensation system.")

26. See 1 JON GELMAN, *MODERN WORKERS COMPENSATION* § 102:13 (2016) (citing Alaska, California, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, Nevada, North Carolina, Oklahoma, Ohio, Oregon, South Dakota, Texas, Washington, and West Virginia as examples).

27. Gorton, *supra* note 25, at 820.

28. *Id.* (citing KEETON ET AL., *supra* note 8, at 572 n.43).

29. *Id.* (citing *Davis v. U.S. Emp'rs Council, Inc.*, 934 P.2d 1142, 1150 (Or. Ct. App. 1997) (stating that the plaintiff "must prove that his employer withheld safety measures because it wished to injure him"))

When an employee is harmed by the intentional conduct of his or her employer, an election of remedies must be made.³⁰ If the employee chooses to seek redress for the intentional wrong of the employer through the workers' compensation scheme, he or she waives the right to sue in tort.³¹ Nonetheless, some states still find that the exclusive remedy provision does not bar an employee's claim against the employer for defamation³² or false imprisonment.³³ However, in most circumstances, courts have found that the employee has failed to prove that the cause of action falls within the intentional tort exception.³⁴

A. Florida

Adoption of the intentional tort exception to the workers' compensation scheme has arisen both through the legislative process as well as through court opinions.³⁵ In Florida, for example, the state supreme court initially created the exception for employers' intentional wrongs.³⁶ In *Turner v. PCR, Inc.*, the court stated that notwithstanding employers' general immunity from tort claims under the workers' compensation scheme, Florida case law previously had recognized an intentional tort exception.³⁷ Thus, the court held that it was reaffirming this holding, and "as have our district courts and many jurisdictions around the country, that workers' compensation law does not protect an employer from liability for an intentional tort against an employee."³⁸

The court further defined what the intentional tort exception included and identified two independent grounds where an intentional tort cause of action may exist.³⁹ First, an employee may bring an intentional tort suit when "an employer deliberately intended to injure an employee."⁴⁰ Second, a cause of action may exist

30. See GELMAN, *supra* note 26 (noting that "in order to maintain the two separate causes of action, the employer's intentional act must be separable from the compensation claim and produce an independent injury"); see also 9 PATRICK JOHN MCGINLEY, 9 WEST'S FLORIDA PRACTICE SERIES § 6A:9 (2015 ed. 2015) ("A worker who sues his employer at common law has elected his remedy under Fla. Stat. § 440.11(1)"). *Id.* (Indeed: "[W]hen summary judgment is entered against [the employee] in the common law action, he may not then pursue a workers' compensation claim against the employer who has failed to secure compensation benefits. The election of remedies matures, 'when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other' The summary judgment rendered in the circuit court was obviously efficacious. Therefore, the election matured when the judgment was entered.").

31. GELMAN, *supra* note 26.

32. See *id.* (listing cases from Georgia, Indiana, New York, Pennsylvania, South Carolina, Utah, and Virginia all holding that the applicable state's workers' compensation scheme did not bar claims for defamation).

33. See *id.* (noting that California and Massachusetts courts have held that the workers' compensation exclusive remedy provision does not bar claims for false imprisonment).

34. See Webster & Graves, *supra* note 2.

35. See, e.g., *Beauchamp v. Dow Chem. Co.*, 398 N.W.2d 882, 889 (Mich. 1986) ("Because the Legislature intended to limit and diffuse liability for accidental injury by no means suggests the Legislature intended to limit and diffuse liability for intentional torts. Accidents are an inevitable part of industrial production, intentional torts by employers are not.").

36. See *Turner v. PCR, Inc.*, 754 So. 2d 683, 684–85 (Fla. 2000).

37. *Id.* at 686 (citing *Eller v. Shova*, 630 So. 2d 537, 539 (Fla. 1993)).

38. *Id.* at 687 (citing *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97 (Fla. Dist. Ct. App. 1990); *Clark v. Gumby's Pizza Sys., Inc.*, 674 So. 2d 902, 904 (Fla. Dist. Ct. App. 1996); see also 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation* §§ 68.11–68.15 (Desk. Ed. 1999)).

39. *Id.* at 688–89.

40. *Id.* at 688.

when “the employer’s conduct was ‘substantially certain’ to result in injury or death to the employee.”⁴¹ The court explicitly recognized that other jurisdictions had rejected the “substantial certainty” test and replaced it with a “virtual certainty” test.⁴² Yet, the court declined to adopt the more rigid standard.⁴³

After the court’s holding in *Turner*, the Florida Legislature enacted an amendment to section 440.11(1) of the Florida Statutes, which created the statutory intentional-tort exception to workers’ compensation immunity.⁴⁴ The Florida workers’ compensation statute provides, in the portion relevant to coverage, that:

The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries.⁴⁵

The Florida Legislature has further provided for the applicable “exclusive remedy” of workers’ compensation:

The liability of an employer prescribed in § 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death⁴⁶

In 2003, the Florida Legislature added the statutory provision that included an intentional tort exception that differed significantly from the state supreme court’s holding in *Turner*.⁴⁷ The intentional tort exception retains the first avenue crafted by the state supreme court and allows for employee recovery if the “employer deliberately intended to injure the employee.”⁴⁸ However, the second prong of the test, the “substantial certainty” test adopted by the court, was changed significantly, and the statute now provides relief only if the employer’s conduct was knowingly

41. *Turner*, 754 So. 2d at 688–89 (explaining that this is an objective standard: “it is apparent that adoption of a subjective analysis would result in the virtual elimination of the alternative test for liability . . . we conclude that adoption of an objective standard is more in accord with the policy of the alternative test”).

42. *Id.* at n.4.

43. *Id.*

44. See FLA. STAT. § 440.11(1)(b)(1) (2015).

45. *Id.* § 440.09(1).

46. *Id.* § 440.11(1).

47. *Id.* § 440.11(1)(b)(1)–(2).

48. *Id.* § 440.11(1)(b)(1).

“virtually certain to result in injury or death”; the employee was not aware of the risk; and the employer either “deliberately concealed or misrepresented the danger.”⁴⁹ If the employee claims an intentional tort exception, the employee must prove these elements by clear and convincing evidence.⁵⁰

Thus, the Florida Legislature “fundamentally changed the nature of that immunity from the court-created immunity” in several significant ways.⁵¹ Not only did the legislature heighten the evidentiary burden to clear and convincing evidence, the statutory standard is also subjective rather than objective, and the legislature rejected the “substantial certainty” test and replaced it with the “virtual certainty” test.⁵² Thus, employees waive any negligence—and most intentional tort—claims they may have against their employer the moment they begin employment.

B. Harsh Results

An example of the harsh application of the current Florida statutory scheme is *R.L. Haines Construction, LLC v. Santamaria*.⁵³ An employee was killed while working on a construction site when a two-thousand pound steel column struck him.⁵⁴ The employee worked on installation of these columns, which he could not install until an epoxy adhesive cured for seventy-two hours.⁵⁵ Despite the curing instructions, R.L. Haines instructed the decedent and other employees to install columns after the adhesive had only been drying for forty-four hours.⁵⁶ The employees installed four columns, and while the decedent was tightening a wire on one of the columns, it fell and killed him.⁵⁷

The decedent’s spouse filed a wrongful death action against the general contractor, R.L. Haines, and other defendants.⁵⁸ R.L. Haines asserted an immunity defense per the workers’ compensation statute, but the trial court held that the company’s conduct fell within the intentional tort exception.⁵⁹ The majority of a Fifth District Court of Appeal panel reversed, holding that the contractor’s conduct did not meet the “virtual certainty” standard.⁶⁰ The court noted that “the test is not whether the injury was preventable,”⁶¹ but instead it is whether “it was virtually certain that the decedent would be injured or killed as a result of the resumption of

49. *Id.* § 440.11(1)(b)(2).

50. FLA. STAT. § 440.11(1)(b).

51. *See Webster & Graves, supra* note 2.

52. *Id.*

53. *R.L. Haines Constr., LLC v. Santamaria*, 161 So. 3d 528, 532 (Fla. Dist. Ct. App. 2014) *review denied*, 171 So. 3d 120 (Fla. 2015) (noting that the “virtually certain” standard is “extremely difficult to overcome”); *see also Webster & Graves, supra* note 2 (“As several courts have noted, the effect of the amendment has been to create a significantly higher hurdle that employees seeking to overcome workers’ compensation immunity must surmount.”).

54. *R.L. Haines Constr.*, 161 So. 3d at 529.

55. *Id.* at 529–30.

56. *Id.* at 530.

57. *Id.*

58. *Id.* at 529.

59. *Id.* The jury awarded the decedent’s spouse a total of 2.4 million dollars. *Id.* at 530.

60. *R.L. Haines Constr.*, 161 So. 3d at 534.

61. *Id.* at 533 (citing *Vallejos v. Lan Cargo, S.A.*, 116 So. 3d 545, 554 (Fla. Dist. Ct. App. 2013)).

work before the epoxy had fully cured.”⁶² The court also stated that “[i]t would erode the statutory standard for overcoming workers’ compensation immunity to indulge an inference of virtual certainty from the fact that the employee was injured or killed.”⁶³ Thus, the panel reversed the jury verdict in favor of the decedent’s spouse, holding that “absent clear and convincing evidence that the decedent’s death was virtually certain to occur as a result of [R.L. Haines’s] conduct, the verdicts [could not] stand.”⁶⁴

One judge dissented from the *R.L. Haines* opinion, noting that while the statutory requirement of “virtual certainty” sets the burden high, it “does not mean that it is, or should be, illusory or unattainable.”⁶⁵ The dissent relied on additional facts that were absent from the majority opinion, including that the project manager knew a bolt had moved, which would not have happened if the epoxy was properly mixed and allowed to cure for the appropriate amount of time.⁶⁶ Moreover, the project manager did not inform the project engineer, and knowledge that a bolt had moved would have been a “red flag” of installation failure.⁶⁷ Further, a project manager testified that under these conditions, the likelihood of employee injury was “more than certain.”⁶⁸ Accordingly, the dissent found that “sufficient evidence supported the conclusion that the employer received ‘explicit warnings specifically identifying a known danger.’”⁶⁹ Therefore, the dissent would have held that the decision to submit the issue of “virtual certainty” to the jury was within the province of the trial judge, and the jury’s finding that the contractor’s conduct was virtually certain to result in injury or death should have been upheld.⁷⁰

R.L. Haines demonstrates that Florida courts applying the 2003 amendment believe that the intentional tort exception is an extremely high standard.⁷¹ No opinion written subsequent to the statutory amendment concludes that an employee is entitled to recover under the “virtual certainty” test, and most frequently, the appellate court is affirming summary judgment in favor of the employer.⁷²

III. CLASSIFYING THE REMEDY

To understand the structure of the workers’ compensation scheme, one way to discern how legislatures and courts alike have fashioned these workers’ compensation statutes as exclusive remedies lies in the transaction costs associated

62. *Id.*

63. *Id.* at 533–34.

64. *Id.* at 534.

65. *Id.* (Cohen, J., dissenting).

66. *R.L. Haines Constr.*, 161 So. 3d at 535 (Cohen, J., dissenting).

67. *Id.*

68. *Id.*

69. *Id.* (citing FLA. STAT. § 440.11(1)(b)(2) (2010)).

70. *Id.* at 535–36 (“In my view, sufficient evidence supported the conclusion that the employer received ‘explicit warnings specifically identifying a known danger.’”).

71. Webster & Graves, *supra* note 2.

72. *Id.* (referencing *List Indus., Inc. v. Dalien*, 107 So. 3d 470, 471, 474 (Fla. Dist. Ct. App. 2013), *review denied*, 122 So. 3d 867 (Fla. 2013); *Gorham v. Zachry Indus., Inc.*, 105 So. 3d 629, 634 (Fla. Dist. Ct. App. 2013); *Boston v. Publix Super Mkts., Inc.*, 112 So. 3d 654, 657–58, 660 (Fla. Dist. Ct. App. 2013); *Vallejos v. Lan Cargo, S.A.*, 116 So. 3d 545, 554–56 (Fla. Dist. Ct. App. 2013); *R.L. Haines Constr.*, 161 So. 3d at 530, 533–34).

with work-related injuries. First, there are the costs related to the rights of the employees to be compensated for such injuries and related expenses.⁷³ Second, there are the costs associated with the rights of the employer to have predictable and efficient outcomes when an employee is injured in its workplace.⁷⁴ The balance of these transaction costs can be illustrated through the theoretical model provided by Guido Calabresi and A. Douglas Melamed.⁷⁵ An additional way to view the boundaries of the remedies under workers' compensation law is a model provided by Daryl Levinson, and assessing how the rights and remedies are interrelated.⁷⁶

A. Property v. Liability Rule Protections

Under Calabresi and Melamed's approach, there are two leading types of protections for entitlements or individual rights: property rules and liability rules.⁷⁷ Property rules apply to individual entitlements that cannot be taken away from the owner without the owner's consent.⁷⁸ This rule "gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value."⁷⁹ The property rules apply when transaction costs are low because with low transaction costs, negotiation is available.⁸⁰ Liability rules, on the other hand, generally govern when transaction costs are high.⁸¹ When transaction

73. See, e.g., Estreicher, *supra* note 15, at 1134.

74. Sidney A. Shapiro, *The Necessity of OSHA*, 8 KAN. J.L. & PUB. POL'Y 22, 23, 28 (1999) ("An employer determines the extent of its efforts to prevent occupational injuries and illnesses by comparing the cost of prevention with the cost of not reducing these risks.")

75. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); see also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-01, 517 (1961).

76. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999).

77. Calabresi & Melamed, *supra* note 75, at 1092.

78. *Id.*; see also Michael I. Krauss, *Property Rules vs. Liability Rules*, in ENCYCLOPEDIA OF LAW & ECONOMICS 782, 786-87 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), <http://encyclo.findlaw.com/3800book.pdf> (explaining that "[e]ntitlement holders who believe their rights are protected by a property rule typically insist that they are the victims, not the cause, of damage: otherwise, their rights would be trumped by utility- or wealth-maximizing constraints, which is contrary to the very notion of property-rule protection").

79. Calabresi & Melamed, *supra* note 75, at 1092.

80. See *id.*; see also Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 980 (1996) ("Transaction costs include the cost of defining the entitlement, determining its value, and bargaining over its transfer. These costs are likely to be low in areas where the scope of the holder's claim is easily delineated, such as the boundary to a piece of land. The power to enjoin a taking forces the nonholder to meet the asking price in order to transfer the good from the holder. In the absence of such protection the nonholder would be able to expropriate part of the value of the holder's entitlement.")

81. Calabresi & Melamed, *supra* note 75, at 1119; see also *id.* at 1093 (discussing liability versus property protections, and reasoning that it is relevant to look at if there is an inclination "slightly to prefer one over another and the first is considerably more expensive to enforce than the second"). Moreover, Calabresi & Melamed discuss the fact that administrative efficiency is relevant to choosing whether an entitlement is subject to property or liability rules based on all of the pertinent considerations. See *id.*; see also Krauss, *supra* note 78, at 786 ("To the extent entitlements are protected by liability rules, rights (and therefore causation) are inherently contingent; the cause of an injury is the efficient avoider of the injury. The cheaper-cost avoider of a loss will always be said to have caused the loss if entitlements are protected by liability rules.")

costs are high for both parties, a liability rule provides the more appropriate remedy as negotiation will not lead to a Pareto optimal outcome.⁸²

One factor pertinent in the transaction-cost analysis is the need to “minimize the administrative costs of enforcement.”⁸³ Yet, administrative efficiency is simply one factor to consider in the overall economic analysis to determine the efficiency of transactions.⁸⁴ Calabresi subsequently explained the practicality of the liability rule approach:

If ideologically mixed, liability rules are also intensely practical. They enable actions to take place when contractual behavior, before harm, would not be feasible. Damages after harm replace such unfeasible agreements. And they permit control of behavior that could only at too great an expense be governed collectively. By varying the size of the applicable damages according to the various circumstances involved, the collective decision makers can go a long way toward enforcing their views without engaging in minutiae of control that would not be worthwhile.⁸⁵

Thus, “the liability rule is an essential part of the social structure and of the law. And that is so in any number of areas of law, including, of course, torts.”⁸⁶

To illustrate applicability of the doctrine to the workers’ compensation context,⁸⁷ assume that an employee has an entitlement to a cause of action in tort for negligence against an employer. Under the applicable state’s workers’ compensation provision, an employee waives this cause of action via statute by beginning employment and has an exclusive remedy for any harm suffered from the negligence of his employer—workers’ compensation. Therefore, because an employee’s cause of action dissipates before the employee ever incurs the right—indeed, at the moment the employment contract is signed—the employee’s entitlement has converted into an entitlement protected by a liability rule (i.e., to receive the amount of monetary damages provided for in the state’s workers’ compensation scheme, regardless of the employee’s wish to sue in tort).

Market inhibition and the efficiency of transactions in the employment context dictate this outcome, based on the history and the framework of the employer-employee relationship. The reason this is important is that the analysis determines that an employee does not have a property right in maintaining causes of action

82. Calabresi & Melamed, *supra* note 75, at 1119. Calabresi & Melamed discuss Pareto optimality in terms of economic efficiency: “Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.” *See id.* at 1093–94.

83. *Id.* at 1093.

84. *Id.*

85. Calabresi, *supra* note 3, at 529.

86. Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 7 *LAW & CONTEMP. PROBS.* 1, 12 (2014).

87. It is noted that Calabresi also discusses workers’ compensation from an economic perspective of the “allocation of resources” and “loss-distribution” theories. For this discussion, see Calabresi, *supra* note 75, at 500, 517.

against their employers, except within the statutory exceptions, because societal transaction costs have determined that a liability rule applies.

Therefore, the statutorily mandated workers' compensation damages provide the appropriate remedy for common work-related injuries under liability rule protections. Arguably, this analysis also explains why state legislatures choose to carve out an intentional tort exception to the workers' compensation statutes. By doing so, states have determined that an employee may maintain his right to his bodily integrity in refusing to consent to willful or intentional injury. However, due to the transaction costs implicated in the employment context, to meet the intentional tort exception, legislatures demand that the employee meet a higher evidentiary standard to demonstrate that he or she meets the strict test.⁸⁸

Thus, the intentional tort exception provides heightened liability rule protections to a portion of work-related injuries for public policy reasons, and once this protection is implicated, it becomes an election of remedies issue.⁸⁹ This means that the employee must choose to either accept the statutory workers' compensation as his exclusive remedy, or waive such coverage and choose to sue in tort.⁹⁰ Accordingly, an employee's "complaint that he would have demanded more will not avail him once the objectively determined value is set."⁹¹ And ideally, the workers' compensation system based on this model "internalize[s] expected costs to all potential injurers and potential victims in a way that would minimize the cost of accidents."⁹²

B. Rights Essentialism, Remedial Equilibration, and Remedial Deterrence

Calabresi and Melamed's model, distinguishing property and liability type protections for certain rights, implicates an additional concept called the rights essentialism theory.⁹³ The rights essentialism theory initially identifies the right and then identifies the appropriate judicial application of the right.⁹⁴ Viewed separately from the remedy, the right "is then corrupted by being forced into a remedial apparatus that translates the right into an operational rule applied to the facts of the real world."⁹⁵ However, under an approach discussed by Daryl Levinson, rights essentialism is not the most accurate model, and Levinson provides a new theory

88. See, e.g., *R.L. Haines Constr., LLC v. Santamaria*, 161 So. 3d 528, 534 (Fla. Dist. Ct. App. 2014) *review denied*, 171 So. 3d 120 (Fla. 2015).

89. MCGINLEY, *supra* note 30.

90. *Id.*

91. Calabresi & Melamed, *supra* note 75, at 1092.

92. Steven G. Medema, *Debating Law's Irrelevance: Legal Scholarship and the Coase Theorem in the 1960s*, 2 TEX. A&M L. REV. 159, 178 (2014).

93. Levinson, *supra* note 76, at 858 (discussing that like constitutional law, contract law also implicates the idea that rights and remedies are "functionally inseparable," interdependent, and "inextricably intertwined," as recognized by Calabresi and Melamed).

94. *Id.* It is noted that Levinson's approach to defining the scope of remedies takes the form of a constitutional law analysis; however, Levinson's article also usefully compares and contrasts constitutional law with the private law of contract and tort, with comparisons to Calabresi and Melamed's theory of property and liability rules, useful for comparison in the workers' compensation context. *Id.*

95. *Id.*

with a more applicable approach to remedies law called “remedial equilibration.”⁹⁶ Under the remedial equilibration model: “[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”⁹⁷ Indeed, as applied to Calabresi and Melamed’s approach,

a ‘right’ . . . enforced by a liability rule means something different than one enforced by a property rule, and that deciding who has a right (or, in Cathedral terms, an “entitlement”) is often less important than deciding how that right should be protected in order to best facilitate efficient transfers.⁹⁸

In the workers’ compensation context, application of the remedial equilibration model demonstrates that the right interrelates with the remedy, that is, the right to workers’ compensation relief under a negligence theory necessarily ties the liability rule protection for the right into a remedial equilibration model. Rights essentialists would view the right as separate from the remedy: that the employee has a job, and if the employer intentionally injures him, then the employee would have a remedy of suing his employer in tort. However, remedial equilibration demonstrates that it is meaningless to talk about a distinction between rights and remedies: an employee has a right to sue in tort if his employer intentionally injures him. Nonetheless, the employee’s right to sue his employer in tort for intentional wrongdoings is meaningless if the remedy is inaccessible.⁹⁹ Certainly, if a right never results in a remedy, the right is irrelevant.

Accordingly, an additional theory applicable to analyze the narrowness of the intentional tort exception is remedial deterrence.¹⁰⁰ This doctrine assumes that raising the “price” of violating a right by giving greater remedial protection would result in fewer violations of the right.¹⁰¹ Therefore, Levinson posits that the way for courts to lessen the number of rights’ violations is to diminish the right in the first place.¹⁰² A corollary is that courts can also lower the “price” of the violations by limiting the remedies available.¹⁰³ And, although the application of remedial deterrence may be difficult to apply based on fact-specific factors,¹⁰⁴ the “general

96. See *id.* Levinson explains that: “The rights-essentialist picture, in which courts begin with the pure, Platonic ideal of a constitutional right and only then pragmatically apply the right through the vehicles of implementation and remediation, bears little resemblance to the actual judicial practice of rights-construction.” *Id.* at 873.

97. Levinson, *supra* note 76, at 858.

98. *Id.* at 859.

99. As a logical extension of the dissent in *R.L. Haines*, the exception for intentionality should not be impossible to overcome—that is why there is an existence of an intentional-tort exception to the workers’ compensation scheme. See *R.L. Haines Constr., LLC v. Santamaria*, 161 So. 3d 528, 534 (Fla. Dist. Ct. App. 2014) (Cohen, J., dissenting).

100. For a detailed discussion on remedial deterrence in the constitutional context, see Levinson, *supra* note 76, at 889–900.

101. *Id.* at 889.

102. *Id.*

103. *Id.*

104. See *id.* at 890 (“Individual examples of remedial deterrence are difficult to document with great confidence because claiming that a right would be different if a different remedy followed entails a counterfactual

point [is] that remedial consequences exert an important influence over the shape and existence” of rights.¹⁰⁵ Therefore, courts will construe rights in a way to avoid undesirable remedial consequences.¹⁰⁶

As applied to the right to recovery under the intentional wrongdoing exception to most state workers' compensation schemes, the remedial deterrence model provides one avenue of explanation for why courts construe the applicable statutes narrowly. It provides a model that demonstrates that courts are likely to define the right restrictively, given the unpredictability of the outcomes for allowing such claims to proceed. This not only helps persuade the employee to choose to elect workers' compensation as his or her remedy,¹⁰⁷ but also limits the right in a way that promotes the policy behind implementing workers' compensation regimes in the first place.¹⁰⁸ Thus, this model effectively describes why and how courts have limited and narrowly construed an employee's right to sue under the intentional tort exception to workers' compensation systems.

IV. POLICY CONSIDERATIONS

Once it is determined what type of remedial protection applies, one can begin to analyze how courts analyze issues that arise in the workers' compensation arena. Of previous constitutional concern was the Due Process Clause, but the Supreme Court of the United States has resolved this issue in favor of the constitutionality of workers' compensation schemes.¹⁰⁹ The argument was that workers' compensation statutes were unconstitutional because these regimes abrogate both an individual's right to file a lawsuit in tort and the right to a jury trial.¹¹⁰ In 1917, the Supreme Court upheld New York's Workman's Compensation Law, finding that the legislature could alter such common law rights in compliance with the Fourteenth Amendment if the legislature provides a “reasonably just substitute.”¹¹¹ The Court clarified that “[t]his, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable.”¹¹²

claim that is ordinarily highly speculative: that the right would have been *A* rather than *B* if the remedy had been *X* rather than *Y*.”)

105. *Id.*

106. Levinson, *supra* note 76, at 885.

107. Once an employee elects his remedy by suing the employer in tort for an intentional wrongdoing, the employee has waived his right to collect under the workers' compensation scheme. *See* MCGINLEY, *supra* note 30 (citing *Chiang v. Wildcat Groves, Inc.*, 703 So. 2d 1083 (Fla. Dist. Ct. App. 1997)).

108. *See* Burnett, *supra* note 23, at 491 (discussing the policy reasons for implementing workers' compensation statutes in the United States).

109. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 208 (1917).

110. *See* Deborah G. Kohl, *Tackling the Elephant in the Room: Exclusive Remedy*, LEXISNEXIS LEGAL NEWSROOM: WORKERS COMPENSATION L. (Mar. 11, 2015, 10:41 PM), <http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2015/03/11/tackling-the-elephant-in-the-room-exclusive-remedy.aspx#sthash.LIX4CJVN.dpuf>.

111. *White*, 243 U.S. at 201.

112. *Id.* at 205.

A. General Policy Concerns and the Intentional Tort Exception

Today, two main concerns arise within the workers' compensation field—the amount of compensation given to the injured employee under the exclusive remedial provision¹¹³ and the scope of the intentional tort exception.¹¹⁴ The under-compensation concern begs the question: “[W]hen do statutory changes result in such a manifest violation of the social bargain that the only answer is to void the exclusive remedy doctrine and reinstate the tort remedy?”¹¹⁵ The full answer to this question is beyond the scope of this paper; however, it should be noted that over the previous thirteen years, thirty-three state legislatures “have cut benefits, made it more difficult to qualify for benefits or given employers more control over medical treatment.”¹¹⁶ Yet, the employer’s intentional wrong raises the most concern because “[u]nlike ordinary negligence, intentional harms introduce an element of moral hazard that is very difficult to control by a set of rules designed for accidents.”¹¹⁷

Recently in Florida, the constitutionality of the exclusivity of the remedy under the workers' compensation statute has been attacked, albeit unsuccessfully.¹¹⁸ This provision has also been challenged in various other states.¹¹⁹ However, as the exclusive remedy is ostensibly the most appropriate approach to ensure efficient compensation for injured employees while promoting an effective market by providing clarity for the employer, it is likely that with its long history and its current application, this remedy will remain exclusive for employees injured by an

113. See Kohl, *supra* note 110. “When is the replacement for the tort system a reasonable alternative?” *Id.* “[A]t what dollar level do you draw the line below which a system is providing an unconstitutional level of benefits and reversion to tort law is the only remedy?” *Id.* “At what level has the legislature gone so far as to impinge on the social bargain and tread on due process?” *Id.*; see also Shapiro, *supra* note 74, at 28 (“In most states, there is an inverse relationship between the seriousness of an injury and the amount of compensation. The compensation for fatalities is often less than the amount paid for temporary and permanent disabilities. Statutorily prescribed formulas limit compensation for temporary disabilities to less than the direct wage losses of better paid employees. Worse, compensation for permanent partial disability payments often does not equal the total wage loss of any employee. Finally, there is no compensation for the loss of fringe benefits or nonpecuniary losses to workers and their families.”).

114. See Gorton, *supra* note 25, at 811.

115. *Id.*

116. Howard Berkes, *Opt-Out Plans Let Companies Work Without Workers' Comp*, NPR (Oct. 15, 2015, 7:07 AM), <http://www.npr.org/2015/10/14/448544926/texas-oklahoma-permit-companies-to-dump-worker-compensation-plans>.

117. Epstein, *supra* note 25, at 814. Epstein argues that employer’s intentional torts possibly should not be directed into the tort system as if the workers’ compensation laws did not exist. *Id.* He rejects this approach as inferior, arguing for an alternative of additional fines assessed to the employer through existing workers’ compensation statutes for intentional wrongs to employees. See *id.* (“The advantages of this approach are two. First, it keeps the entire case within the workers’ compensation system, so that there is no need to worry about the coordination of tort and compensation actions. Second, it protects the system against the indirect erosion that occurs when the intent requirement is attenuated to include mental states that are insufficient to support either criminal punishment or . . . punitive damages.”).

118. See *Florida v. Fla. Workers' Advocates*, 167 So. 3d 500, 501 (Fla. Dist. Ct. App. 2015). Due to procedural issues, the appellate court reversed the trial court’s holding that section 440.11 of the Florida Statutes (i.e., the “exclusiveness of liability” provision) was facially unconstitutional under both the United States and Florida Constitutions. *Id.* The appellate court therefore never reached the merits of the claim. See *id.* at 506.

119. See, e.g., *McKinnon v. W. Sugar Coop. Corp.*, 225 P.3d 1221, 1222 (Mont. 2010); *Mo. Alliance for Retired Ams. v. Dep’t of Labor Indus. Relations*, 277 S.W.3d 670, 673 (Mo. 2009).

employer's negligence. But, the exception to this exclusivity—the right to sue for an intentional tort—is more controversial.

As discussed above in Section II, the Florida statutory scheme outlining this exception and the subsequent Florida case law demonstrate the harsh results in the application of the intentional wrongdoing exception.¹²⁰ Indeed, workers' compensation schemes that provide an exception for intentional wrongs by employers who act with "deliberate intent" or "virtual certainty" that their conduct will result in injury or death have "been twisted by courts and legislatures so that workers can almost never access the civil legal system when they have been hurt at work, even if their employer has acted egregiously."¹²¹ Employers are able to capitalize on this and choose to save money rather than provide a safe workplace because of the low risks of an employee having a successful civil claim.¹²² Because the current approach to the intentional wrongdoing exception to workers' compensation schemes essentially eviscerates any remedy for the employee, these systems should be revisited.

B. Employer Opt-Out Programs

Another concerning mechanism crafted by two individual states to date are employee opt-out programs. In Texas, for example, employers are not required to participate in the state's workers' compensation program; they are free to "opt out" of it.¹²³ Texas refers to those employers that choose to opt out of workers' compensation as "non-subscribers."¹²⁴ The Texas Department of Insurance explains that such nonsubscribers are not immune from lawsuits by employees and thus could be subject to high damage awards if sued by an employee for negligence.¹²⁵ On the contrary, if an employer participates in the workers' compensation program, Texas law limits the employer's liability and sets a statutory cap on damages, dictating that such compensation is the exclusive remedy for the employee.¹²⁶

However, despite the ostensible risk Texas employers seem to be taking by opting out of the workers' compensation scheme, it actually proves to be more cost effective for these employers. These plans "almost universally have lower benefits, more restrictions and virtually no independent oversight."¹²⁷ Under these schemes,

120. See *supra* Part II.A–B for a discussion of the Florida workers' compensation statute and subsequent case: R.L. Haines Constr., LLC v. Santamaria, 161 So. 3d 528 (Fla. Dist. Ct. App. 2014) *review denied*, 171 So. 3d 120 (Fla. 2015).

121. Gorton, *supra* note 25, at 811.

122. *Id.*

123. See *Workers' Compensation Insurance*, TEX. DEP'T INS., <http://www.tdi.texas.gov/consumer/wc.html> (last visited Mar. 2, 2016).

124. See *Information for Workers' Compensation Non-subscribers*, TEX. DEP'T INS., <http://www.tdi.texas.gov/wc/employer/cb007.html> (last visited Mar. 2, 2016).

125. *Id.*

126. *Id.*

127. Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA (Oct. 14, 2015), <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp> (explaining that these opt-out programs are "why McDonald's doesn't cover carpal tunnel syndrome and why Brookdale Senior Living, the nation's largest chain of assisted living facilities, doesn't cover most bacterial

employers are not required to submit any documentation to the state about the coverage provided because Texas does not regulate opt-out programs.¹²⁸ Indeed, employers have been fighting bills for several years that would require them to share this data.¹²⁹

Oklahoma similarly enacted an opt-out-of-workers'-compensation statute last year.¹³⁰ Tennessee and South Carolina are also considering implementing such plans.¹³¹ Moreover, several leading company executives are campaigning to have laws passed "in as many as a dozen states" within the next ten years.¹³² These plans "give employers almost complete control over the medical and legal process after workers get injured," including choosing doctors, settling claims, and forcing the employees to accept the settlement at the employer's whim.¹³³ To be sure, the employees can appeal the employer's decision, but most often, the employee has agreed to a binding decision by a committee set up by the employer.¹³⁴ Even without such committees, most often the employee has consented to the employer's program as his sole remedy when he began employment.¹³⁵

C. Recommendation

Both the exclusive remedy provision, with its exception for intentional wrongdoings, and the opt-out systems in place in Texas and Oklahoma implicate a further issue within the remedial context, the concept of remedial substantiation. This theory holds that "the cash value of a right is often nothing more than what the courts will do if the right is violated"—the remedies that are available determine the right.¹³⁶ Therefore, if a person has no remedy, discussion of the violation of a right is meaningless because the perceived right is no right at all without a remedy.¹³⁷ Thus, both issues "bring into question the basic fundamental social bargain that made workers' compensation systems possible in the first place."¹³⁸

Accordingly, at least this author posits that because a right means nothing without a remedy—indeed under the principles of remedial equilibration and particularly within the theory of remedial substantiation—that reform is necessary in the area of workers' compensation. Specifically, the intentional tort exception needs to be revised so the remedy is not illusory. Reform could be accomplished, in Florida for example, by revisiting the Florida Legislature's 2003 amendment to the workers' compensation statute and reinstating the broader test fashioned by the state

infections. Why Taco Bell can accompany injured workers to doctors' appointments and Sears can deny benefits if workers don't report injuries by the end of their shifts").

128. *Id.*

129. *Id.*

130. Berkes, *supra* note 116.

131. Grabell & Berkes, *supra* note 127.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Levinson, *supra* note 76, at 887–88.

137. *See id.* at 888.

138. *See Kohl, supra* note 110.

supreme court. The test for whether an employee may maintain a cause of action against an employer for intentional misconduct should comport with common law principles of intent. Therefore, the test should be whether the employer's conduct was substantially certain to result in injury or death for the employee. Tests that align more closely with common law principles have been successfully implemented in several states,¹³⁹ and there is also a wide body of common law for courts to follow to implement this standard.

The "substantial certainty" test is the more appropriate standard, as demonstrated by the states' compensation systems that currently provide that this is the appropriate test.¹⁴⁰ Indeed, "[d]espite critics' warnings about the floodgates opening up and the workers' compensation system losing all meaning, the expansion has been very limited."¹⁴¹ In only a few instances, "containing the most egregious employer actions," have employees been able to recover under this "expanded" standard.¹⁴² Moreover, cases decided in Florida subsequent to the state supreme court's holding, but prior to the legislature's 2003 amendment, demonstrate that the "substantial certainty" standard is more workable.¹⁴³

Applying a "substantial certainty" test will facilitate a system that does not strip employees of their right to sue for an intentional wrongdoing by removing the remedy, as the current system does. Employees should have access to the legal system when an employer acts egregiously, and the scope of the remedy should not be limited to the subjective standard of an employer's knowledge that its conduct is "virtually certain" to result in injury or death. Moreover, the statutory opt-out schemes often dwindle any liability-type protections into nothing, and therefore these systems should be revisited to ensure that employees are not left without a remedy for workplace-related injuries.

CONCLUSION

The exclusive remedy doctrine is a "fundamental building block of the workers' compensation system."¹⁴⁴ Indeed, an effective and predictable exclusive remedy

139. Gorton, *supra* note 25, at 841 (citing Ohio, Michigan, West Virginia, Louisiana, and North Carolina as examples).

140. *Id.*

141. *Id.* (citing Melissa F. Ross, Comment, *Ripples in Treacherous Waters: A Consideration of the Effects of North Carolina's Intentional Tort Exception to Workers' Compensation*, 31 WAKE FOREST L. REV. 513 (1996) (documenting North Carolina's experience)).

142. *Id.* (citing Ross, *supra* note 141, at 554).

143. Under this standard, Florida courts focused on the specific facts of each case and found that sometimes recovery was appropriate, while in other circumstances recovery was not available for the employee under the intentional tort exception, but applying the substantial certainty test. *See, e.g.*, EAC USA, Inc. v. Kawa, 805 So. 2d 1, 5 (Fla. Dist. Ct. App. 2001) (finding that the employer's actions were substantially certain to result in injury to the employee, applying the *Turner* objective substantial certainty test). *But see* Garrick v. Publix Super Mkts., Inc., 798 So. 2d 875, 879 (Fla. Dist. Ct. App. 2001) (applying the objective standard set forth in *Turner*, the Fourth District Court of Appeals held that the complaint did not contain allegations of ultimate facts that would support a jury's verdict that the employer's conduct was substantially certain to result in injury to the employee); Pacheco v. Power & Light Co., 784 So. 2d 1159, 1163 (Fla. Dist. Ct. App. 2001) (denying recovery and noting that "that the cases which have actually applied the *Turner* doctrine, especially *Turner* itself, have characteristically involved a degree of deliberate or willful indifference to employee safety which simply [did] not exist in [that] case").

144. Kohl, *supra* note 110.

doctrine that limits employer liability for employee injuries is necessary for a viable workers' compensation system.¹⁴⁵ This remains true even though an employee loses his or her right to sue in tort or to have a jury trial.¹⁴⁶ However, if an employee's right to sue in tort for intentional wrongdoings by the employer never results in recovery, the liability rule protections afforded to such employee are rendered meaningless.

A different system is not the answer; workers' compensation statutes as an exclusive remedy for common workplace injuries facilitate outcomes that are more efficient for employees and provide a level of certainty to employers.¹⁴⁷ Indeed, turning to an alternative system "is not one which any of the participants . . . from employee to employer to insurer to legislature should lightly enter into without forethought and consideration of all of the potential consequences."¹⁴⁸ Yet, the exclusive remedy provision should not encompass intentional wrongdoings by an employer that the employer knows or is "substantially certain" will result in injury or death to its employee. Because a right without a remedy is not a right at all,¹⁴⁹ as Florida case law demonstrates, the exception to the system for intentional wrongdoings should be revisited.

145. King, *supra* note 7, at 416.

146. See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 195–96 (1917).

147. See King, *supra* note 7, at 416.

148. Kohl, *supra* note 110.

149. Indeed, under the principles of remedial substantiation, if the cash value of a right is zero, the right really does not exist at all. See Levinson, *supra* note 76. Moreover, under the principles of remedial deterrence, if the legislature provides the more appropriate exception to the exclusive remedy doctrine of "substantial certainty" rather than "virtual certainty," courts will be less likely to construe an employee's right so narrowly that it does not allow for recovery, and rather it will result in the remedy being accessible for intentional wrongdoings by the employer.