

**To:** New Jersey Law Revision Commission  
**From:** Alyssa Brandley, Legislative Law Clerk  
**Re:** The use of “intentional wrong” in N.J.S. 34:15-8 as discussed in *Bove v. AkPharma Inc.*, 460 N.J. Super. 123 (App. Div. 2019)  
**Date:** March 08, 2021

## MEMORANDUM

### Executive Summary

The New Jersey Workers’ Compensation Act (“WCA” or the “Act”) provides insurance to employees who are injured while in the course of their employment in exchange for employer immunity from liability. In 1961, the Act was amended to include the phrase “intentional wrong” to provide an exception to the WCA’s exclusivity bar.

The scope of the “intentional wrong” exception was addressed in *Bove v. AkPharma Inc.*,<sup>1</sup> in which the Appellate Division considered the Legislature’s use of the phrase “intentional wrong” as opposed to “intentional tort” in the 1961 amendment.<sup>2</sup> In the absence of a definition for “intentional wrong,” the Appellate Division examined the New Jersey Supreme Court’s two prong test set forth in *Millison v. E.I. du Pont de Numours & Co.*<sup>3</sup>

### Statute Considered

N.J.S. 34:15-8 provides:

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee and for compensation for the employee's death shall bind the employee's personal representatives, surviving spouse and next of kin, as well as the employer, and those conducting the employer's business during bankruptcy or insolvency.

If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for *intentional wrong*.<sup>4</sup>

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<sup>1</sup> *Bove v. AkPharma Inc.*, 460 N.J. Super. 123 (App. Div. 2019), *cert. denied*, 240 N.J. 7 (2019), and *cert. denied*, 240 N.J. 2 (2019).

<sup>2</sup> *Id.* at 140.

<sup>3</sup> *Id.* at 141 (citing *Millison*, 101 N.J. 161, 178 (1985)).

<sup>4</sup> N.J. STAT. ANN. § 34:15-8 (West 2021).

## Background

In *Bove v. AkPharma Inc.*, the Plaintiff brought suit against his employer for fraudulent concealment, battery, and prima facie tort in connection with his use of a prescription nasal spray during a clinical study.<sup>5</sup> Before filing suit, the Plaintiff had filed a workers' compensation claim for his injuries in November 2013, and again in August of 2014.<sup>6</sup>

In 2003, the Plaintiff was hired by the CEO of AkPharma Inc. on a part-time basis.<sup>7</sup> Soon thereafter, the Plaintiff became a full-time employee, the Director of Clinical Studies at AkPharma.<sup>8</sup> In 2007, the Plaintiff became engaged in conversations with the CEO regarding a nasal spray that the CEO had developed and used himself. The CEO claimed that the product helped him with his asthma and encouraged the Plaintiff and other employees to use the spray.<sup>9</sup> The Plaintiff voluntarily used the product from 2007 until it was discontinued in 2010.<sup>10</sup> The Plaintiff was not forced to use the product, but he did not know that it lacked FDA-approval.<sup>11</sup>

In 2011, the Plaintiff was terminated from AkPharma due to a workforce reduction.<sup>12</sup> Two years later, he was diagnosed with permanent endocrine failure and a tumor in his colon.<sup>13</sup> The Plaintiff concluded that his diagnosis was the result of his prior use of the nasal spray while employed at AkPharma.<sup>14</sup>

After a five-day evidentiary hearing, the trial court dismissed the Plaintiff's complaint citing the WCA's exclusivity bar.<sup>15</sup> Specifically, the trial court noted that the Plaintiff failed to show that the CEO "knew his actions were substantially certain to result in injury or death to the Plaintiff, or that the Plaintiff's injuries and the circumstances of their infliction were more than a fact of life of industrial employment and beyond what the Legislature intended the WCA to immunize."<sup>16</sup> The Plaintiff appealed.<sup>17</sup>

## Analysis

The WCA is an implied "trade-off" designed to provide automatic limited recovery for employees injured during the course of their employment in exchange for voluntarily giving up their rights to pursue common law remedies for those injuries.<sup>18</sup>

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<sup>5</sup> 460 N.J. Super. 123, 133.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> In August of 2010, AkPharma received a full clinical hold letter from the FDA halting studies. AkPharma then decided to discontinue development in an effort to avoid incurring additional expenses. *Id.*

<sup>11</sup> *Id.* at 136.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The Plaintiff did not provide any medical professional reports linking his conditions to the drug. *Id.* at 136-137.

<sup>15</sup> *Id.* at 134.

<sup>16</sup> *Id.* at 137.

<sup>17</sup> *Id.* at 133.

<sup>18</sup> *Id.* at 139.

While the Act does not contain a definition for the term “intentional wrong,” the Court noted that the first definition of the term appeared in *Bryan v. Jeffers*, in which the appellate court held that the Legislature intended the term to include a “deliberate intention.”<sup>19</sup>

The *Bove* Court, however, focused on the New Jersey Supreme Court’s definition of the term in the case of *Millison v. E.I. du Pont de Nemours & Co.*<sup>20</sup> In *Millison*, the employer was found to have committed an intentional wrong under the Act as a result of its fraudulent concealment of the fact that its employees were suffering from asbestos-related diseases.<sup>21</sup> The *Millison* Court emphasized that defining intentional wrong too broadly would risk eliminating the exclusivity provision of the Act, and that an intent to injure cannot be enough.<sup>22</sup> Instead, the *Millison* Court adopted a more stringent “substantial certainty” standard to establish the commission of an intentional wrong.<sup>23</sup>

Pursuant to this standard, a plaintiff must establish that (1) the employer knowingly exposed the employee to a substantial certainty of injury, and that (2) the resulting injury is not a “fact of life of industrial employment” but rather “plainly beyond anything the legislature” intended the Act to immunize.<sup>24</sup> Since *Millison*, it has not been entirely clear what constitutes an intentional wrong<sup>25</sup>; simply that an intentional wrong will be found when accompanied by “something more.”<sup>26</sup>

In *Bove*, the Court found that “something more” was missing, as the intentional wrong cannot be coextensive with the elements of common law torts, such as battery and fraud. Instead, the requirement of “something more” entails “deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations.”<sup>27</sup> Based on the facts presented in *Bove*, there was no evidence that the CEO was “substantially certain” that injury or death would be suffered by the Plaintiff in connection with his use of the pharmaceutical.<sup>28</sup> Thus, the Court dismissed the Plaintiff’s complaint, finding that there was no conduct warranting a civil suit under the *Millison* standard of an “intentional wrong.”<sup>29</sup>

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<sup>19</sup> *Id.* at 140.

<sup>20</sup> *Id.* at 140-41.

<sup>21</sup> *Id.* at 141.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Compare *Laidlow v. Harion Mach. Co., Inc.*, 170 N.J. 609 (2002) (finding that an intentional wrong had been committed where an employee tied a safety guard on a rolling mill and released it only when OSHA inspectors were present even though no prior injuries had occurred) with *Van Dunk v. Reckson Associates Realty Corp.*, 210 N.J. 449 (2012) (finding that a willful violation under OSHA is not dispositive as to whether an intentional wrong has been committed). *Id.* at 141-142.

<sup>26</sup> *Id.* at 142-143.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 144. The Court also notes that the Plaintiff further failed to prove that his injuries resulted from the Defendants’ actions. *Id.* at 145.

<sup>29</sup> *Id.* at 146.

### **Pending Legislation**

There does not appear to be any legislation pending in the current legislative session involving N.J.S. 34:15-8.

### **Conclusion**

The New Jersey Workers' Compensation Act provides limited recovery for injuries sustained by employees in the course of their employment in exchange for relinquishing their right to pursue legal remedies for their injuries. There is an express exception to this exclusivity bar. Pursuant to N.J.S. 34:15-8, liability can be imposed for "intentional wrongs," but the Act fails to specify what that term encompasses or how it relates to intentional torts.

Staff requests authorization to conduct additional research and outreach to determine whether it would be useful to clarify the definition of "intentional wrongs" in N.J.S. 34:15-8.