NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report to Clarify the Scope of "Intentional Wrong" in N.J.S. 34:15-8

September 5, 2022

The New Jersey Law Revision Commission is required to "[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it" and to propose to the Legislature revisions to the statutes to "remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions." *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **November 14, 2022**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary[1]

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

In *Bove v. AkPharma Inc.*,[5] the Appellate Division held the intentional wrong exception did not apply to an employee whose injuries were allegedly caused by his use of a nasal spray developed and provided to him by his employer.[6] The *Bove* court engaged in a detailed discussion of the legislative history and common law defining the scope of the intentional wrong exception,[7] reviewing three key New Jersey Supreme Court cases: *Millison v. E.I. du Pont de Nemours & Co.*,[8] *Laidlow v. Hariton Machine Co.*,[9] and *Van Dunk v. Reckson Associates Realty Corp*.[10]

Proposed modifications to N.J.S. 34:15-8 are intended to clarify the scope of the intentional wrong exception to the exclusive remedy provision in the WCA, consistent with its legislative history and the interpretation of the statutory language by New Jersey courts.

Statute Considered

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

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

[1] Preliminary work on this project was conducted by Alyssa Brandley, during her tenure as Legislative Law Clerk, and Karyn White, during her tenure as Counsel, with the New Jersey Law Revision Commission.
[2] *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 174 (1985).
[3] *Id.*
[4] N.J. STAT. ANN. § 34:15-8 (West 2022).
[5] 460 N.J. Super. 123 (App. Div. 2019), *cert. denied*, 240 N.J. 7 (2019), *and cert. denied*, 240 N.J. 2 (2019).
[6] *Id*. at 135.
[7] *Id*. at 139 – 143.
[8] 101 N.J. 161 (1985).
[9] 170 N.J. 602 (2002).
[10] 210 N.J. 449 (2012).

act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.[11]

Background

The *Bove* Plaintiff was the Director of Clinical Studies at AkPharma.[12] In 2007, AkPharma's Chief Executive Officer (CEO) suggested that the Plaintiff and other employees use a nasal spray that the CEO developed and used to treat his own asthma.[13] Although Plaintiff was aware that the nasal spray did not have FDA approval, he voluntarily used it from 2007 to 2010.[14]

During that time, he documented the effects of the product and provided his observations to the CEO.[15] When the FDA issued a "full clinical hold letter," Plaintiff discontinued his use of the nasal spray.[16] In 2011, Plaintiff was terminated from AkPharma due to a workforce reduction.[17] Two years later, he was diagnosed with permanent endocrine failure and a tumor in his colon, both of which he attributed to the nasal spray.[18]

Plaintiff sued his employer for fraudulent concealment, battery, and prima facie tort based on injuries he alleged were caused by the nasal spray.[19] He also filed a workers' compensation claim for his injuries.[20] Following an evidentiary hearing in the lawsuit, the trial court granted Defendant AkPharma's motion for summary judgment, finding that the Plaintiff "did not vault the exclusivity provision of the WCA," and Plaintiff appealed.[21]

Analysis

- ***Bove v. AkPharma***

The *Bove* Court examined the history and purpose of the WCA to determine whether the Defendant's conduct fell within the scope of the intentional wrong exception. The Court explained that the WCA "compensates employees for personal injuries caused 'by accident arising out of and in the course of employment' [and] authorizes benefits irrespective of the fault of the employer or contributory negligence and assumption of risk of the employee."[22]

In 1961, the Legislature amended N.J.S. 34:15-8 by adding the intentional wrong exception.[23] Courts gave this language "a narrow construction," reasoning that the "Legislature

[11] N.J. STAT. ANN. § 34:15-8 (emphasis added).
[12] *Bove*, 460 N.J. Super. at 135.
[13] *Id.*
[14] *Id.* at 136.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 136 – 37.
[19] *Id.* at 133.
[20] *Id.*
[21] *Id.* at 137 (internal quotations omitted).
[22] *Id.* at 139 (internal quotation omitted).
[23] *Id.*; *see also* L.1961, c. 2, p. 14, § 1.

intended the words . . . to have their commonly understood signification of deliberate intention."[24] The *Bove* Court examined the approach to the intentional wrong exception in the Supreme Court decisions of *Millison*, *Laidlow*, and *Van Dunk*.[25]

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

Almost twenty-five years after N.J.S. 34:15-8 was amended, the New Jersey Supreme Court addressed the concept of intentional wrong in *Millison*, concluding that it "encompassed more than a subjective intention to injure."[26] Prior to *Millison*, demonstrating an intentional wrong required that "'deliberate intention' be shown."[27] In analyzing whether an intentional wrong had occurred, the *Millison* Court considered the necessary level of risk-exposure experienced by the harmed employee,[28] as well as the context in which an employer's conduct takes place.[29]

In *Millison*, Plaintiffs alleged their employer knowingly exposed them to asbestos and concealed the health hazards of the exposure from them.[30] Plaintiffs also alleged that their employer, along with company doctors who conducted regular medical examinations of employees, concealed medical findings indicating that Plaintiffs were already suffering from asbestos-related diseases.[31]

To determine whether the employer had committed an intentional wrong within the meaning of N.J.S. 34:15-8, the *Millison* Court employed a substantial certainty standard.[32] Under the substantial certainty standard, "the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent."[33] The *Millison* Court required "a virtual certainty" to ensure that "the statutory framework of the [WCA] is not circumvented simply because a known risk later blossoms into reality."[34]

In addition, the Court required an examination of "the context in which [the] conduct takes place…."[35] When analyzing context, the Court indicated the focus was on whether "the resulting injury or disease, and the circumstances in which it is inflicted… [can] be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act."[36]

Although acknowledging that "knowingly exposing plaintiffs to asbestos clearly amounts to taking risks with employees' health," the *Millison* Court held this level of risk "come[s] up short

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[24] *Bove*, 460 N.J. Super. at 140 (quoting *Bryan v. Jeffers*, 103 N.J. Super. 522, 523 - 24 (App. Div. 1968) ("'intentional wrong' . . . is [not] equatable with 'gross negligence,' or similar concepts importing constructive intent")).
[25] *Id*. at 140 – 42.
[26] *Id*. at 141.
[27] *Millison*, 101 N.J. at 178 (quoting *Bryan v. Jeffers*, 103 N.J. Super. 522, 524 (App. Div. 1968)).
[28] *Millison*, 101 N.J. at 177.
[29] *Id*. at 179.
[30] *Id*. at 168.
[31] *Id*.
[32] *Id*. at 177.
[33] *Id*. (quoting *W. Prosser and W. Keeton, The Law of Torts*, § 8 at 36 (5th ed. 1984)).
[34] *Id*. at 178.
[35] *Id*. at 179.
[36] *Id*.

of the 'substantial certainty' needed to find an intentional wrong."[37] Furthermore, the Court concluded that "the legislature's awareness of occupational diseases as a fact of industrial employment" compelled the conclusion that this harm "must be considered the type of hazard of employment that the legislature anticipated would be compensable under [the WCA]."[38]

The *Millison* Court also held, however, that "[a]n employer's fraudulent concealment of diseases already developed is not one of the risks an employee should have to assume."[39] Since "[s]uch intentionally-deceitful action goes beyond the bargain struck by the [WCA]," the *Millison* Court held the substantial certainty standard was satisfied.[40]

- *Laidlow v. Hariton Machine Co.*

Almost two decades later, in *Laidlow*, the Supreme Court reaffirmed the elements of the "substantial certainty" standard developed in *Millison*.[41] The *Laidlow* Court also clarified whether the "removal of a safety guard fails to meet the intentional wrong standard [in] the absence of any prior injury."[42]

In *Laidlow*, the employer not only tied up a safety guard to move it out of the way and increase "speed and convenience," but also had a long-running practice of temporarily replacing the safety guard while OSHA carried out safety inspections.[43] Prior to Plaintiff's injury, there were "close-calls," but the unguarded mill was operated "for approximately twelve to thirteen years" without any accidents.[44] The *Laidlow* Court therefore addressed whether the removal of the safety guard gave rise to a "substantial certainty" of harm, in the "absence of any prior injury."[45]

To resolve this issue, the *Laidlow* Court emphasized several key principles from the *Millison* opinion.[46] Although the "narrow and limited approach . . . requir[ing] subjective intention to injure" was rejected, the *Millison* Court left open the question whether removal of a safety device can be sufficiently egregious to find an intentional wrong.[47] The *Laidlow* Court described

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 182.
[40] *Id.*
[41] *Laidlow*, 170 N.J. at 606.
[42] *Id.* at 610 (comparing Defendant's "position that, under *Millison*, the standard for an intentional wrong requires proof of an employer's subjective intent to injure and that the deliberate removal or alteration of a safety guard does not constitute a 'deliberate intent to injure'" to the opposing position "that *Millison* specifically rejected the notion that an intentional wrong requires a deliberate intent to injure on the part of the employer [and] that *Millison* never declared that removal of a safety device failed to meet the standard for an intentional wrong").
[43] *Id.* at 608.
[44] *Id.*
[45] *Id.* at 610.
[46] *Id.* at 617.
[47] *Id.* ("If these decisions seem rather strict, one must remind oneself that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. *The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.*").

the "substantial certainty test [as] encompassing acts that the employer knows are substantially certain to produce injury even though, strictly speaking, the employer does not will that result."[48]

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

> (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.[49]

Finding both prongs had been met, the *Laidlow* Court held the employer's conduct fell within the scope of the intentional wrong exception in the WCA.[50] The Court found that "the absence of a prior accident does not mean that the employer did not appreciate that its conduct was substantially certain to cause death or injury."[51]

The Court clarified, however, that is holding did not establish a "*per se* rule that [an employer commits an] 'intentional wrong' . . . whenever that employer removes a guard or similar safety device from equipment or machinery, or commits some other OSHA violation."[52]

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

In contrast to *Millison* and *Laidlow*, the *Van Dunk* Court found Plaintiff had not established an intentional wrong.[53] In that case, the Plaintiff's injury occurred when an unsecured trench collapsed on him less than five minutes after he entered it to fix a piece of filter fabric that would not lay flat.[54] The on-site supervisor "readily acknowledged to OSHA that . . . he knew the OSHA requirements and did not follow [them]," [55] and "against his own better judgment [sent Plaintiff into the trench] to perform a brief task and get out."[56] As a result, OSHA issued a "willful violation," meaning the "non-compliance . . . was not an accident or negligence."[57]

In keeping with the considerations in *Laidlow* and *Millison*, the *Van Dunk* Court concluded that "[t]he existence of an uncontested finding of an OSHA safety violation [even one categorized as willful] does not establish the virtual certainty that *Millison* demands."[58] The *Van Dunk* Court distinguished prior, successful intentional wrong claims because they "involved the employer's affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate

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[48] *Id.*
[49] *Id.* at 617.
[50] *Id.* at 622.
[51] *Id.* at 621; *see also Bove*, 460 N.J. Super. at 141 – 42.
[52] *Id.* at 622 – 23.
[53] *Van Dunk*, 210 N.J. at 452.
[54] *Id.* at 454.
[55] *Id.* at 455.
[56] *Id.* at 472.
[57] *Id.*
[58] *Id.* at 469 – 70.

deceit regarding the condition of the workplace, machine, or . . . the employee's medical condition, knowledge of prior injury or accidents, and previous complaints from employees."[59] The Court also emphasized "the durational aspect of the employer's intentional noncompliance with OSHA requirements or other demonstrations of a longer-term decision to forego required safety devices or practices" in prior cases.[60]

Consequently, although the *Van Dunk* Court held that there was "an exceptional wrong" in that the "employer may have committed a reckless act [or] gross negligence . . . the plaintiff did not satisfy the conduct prong of the substantial-certainty test of *Millison*."[61]

The *Van Dunk* Court then addressed the "context prong."[62] The Court concluded that "the type of mistaken judgment by the employer and ensuing employee accident [in *Van Dunk*] was [not] so far outside the bounds of industrial life as never to be contemplated for inclusion in the Act's exclusivity bar."[63] Despite holding that Plaintiff had not satisfied either prong, the *Van Dunk* Court did not foreclose the possibility that "a single egregiously wrong act by an employer might, in the proper circumstances, satisfy the intentional-wrong standard."[64]

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

> [r]eviewing these cases together, it is apparent that in addition to violations of safety regulations or failure to follow good safety practice, an intentional wrong will be found when it is accompanied by <u>something more</u>, such as deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations.[65]

The *Bove* Court determined that Plaintiff "presented no evidence to support his contention defendants were substantially certain his use of NasoCell would result in injury or death," or even that "his alleged injuries resulted from defendants' actions."[66]

Therefore, the *Bove* court held that Plaintiff failed to satisfy the substantial certainty standard and establish an intentional wrong.[67]

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

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

[59] *Id.* at 471.
[60] *Id.*
[61] *Id.* at 472.
[62] *Id.* at 474.
[63] *Id.*
[64] *Id.*
[65] *Bove*, 460 N.J. Super. at 142 (emphasis added).
[66] *Id.* at 145.
[67] *Id.* at 146.

Co.,[68] and *Mull v. Zeta Consumer Products*,[69] the Supreme Court found an intentional wrong. In *Tomeo v. Thomas Whitesell Construction Co.*,[70] however, the Court determined that the plaintiff failed to demonstrate an intentional wrong.

In *Crippen*, an employee suffocated after falling into a hopper filled with sand and gravel.[71] The Supreme Court found that his employer "had knowledge that its deliberate failure to cure . . . OSHA violations" related to "inherently dangerous conditions" for a period of 18 months was "substantial[ly] certain[to result in] injury or death to one of its employees."[72] The Court held that the employer's conduct and the "intentional[] dece[ption of] OSHA into believing that it had abated the violations[,]" satisfied both the conduct and context prongs of the *Millison* standard.[73]

In *Mull*, the Supreme Court addressed an injury that occurred when a winder machine started up unexpectedly while an employee was unjamming it.[74] The Court rejected the employer's argument that his "lack of deception toward OSHA" warranted a finding that the "conduct" prong was not met.[75] The *Mull* Court found that the employer disengaged safety devices and failed to provide a procedure for halting operation of the winder, despite a prior accident, employee safety complaints, and previous OSHA citations. The Court held that those findings were sufficient to meet both prongs of the substantial certainty test.[76]

Finally, in *Tomeo*, an employee used his hand to clear snow from the chute of a snowblower and was pulled into its propellers, which continued to operate because the safety lever was taped in the disengaged position.[77] The *Tomeo* Court found that, even assuming the employer had taped the safety lever, the employee's act of putting his hand in the chute while the propellers were activated was an "intervening-superceding [*sic*] cause"[78] of the injury, and therefore, he did not establish an intentional wrong by his employer.[79]

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

In *Van Dunk*, the Supreme Court described the intentional wrong standard as "formidable," a characterization confirmed by the rarity of successful claims at the appellate level.[80] Using the

[68] 176 N.J. 397, 399 (2003).
[69] 176 N.J. 385, 387 (2003).
[70] 176 N.J. 366, 367 (2003).
[71] *Crippen*, 176 N.J. at 400.
[72] *Id*. at 409.
[73] *Id*. at 410 (finding the employer "effectively precluded OSHA from carrying out its mandate to protect the life and health" of the employees).
[74] *Mull*, 176 N.J. at 387 – 88.
[75] *Id*. at 392.
[76] *Id*.
[77] *Tomeo*, 176 N.J. at 368.
[78] *Id*. at 375.
[79] *Id*. at 377 ("the law does not impose a duty on an employer to prevent an employee from engaging in self-damaging conduct absent a showing that the employer encouraged such conduct or concealed its danger").
[80] *Van Dunk*, 210 N.J. at 451; s*ee e.g. Mabee v. Borden, Inc.*, 316 N.J. Super. 218, 229 (1998) (observing that "[s]ince the *Millison* decision . . . New Jersey courts have yet to find an employee's allegations of intentional conduct sufficiently flagrant so as to trigger the exception to the exclusivity bar" and holding that Plaintiff's evidence (1) that employer removed safety guard and installed bypass switch to prevent automatic stoppage of labeling machine and

framework developed by the Supreme Court, the Appellate Division has analyzed a multitude of varied fact patterns to determine whether an injured employee has established an intentional wrong and vaulted the exclusivity provision in the WCA.

Many intentional wrong cases addressed injuries caused solely by work-related equipment, usually because the equipment was in a state of disrepair;[81] lacked safety devices or precautions;[82] or was improperly operated.[83] Plaintiffs also commonly alleged injury caused by exposure to toxins or chemicals in the workplace[84] or by the negligent conduct of a third party.[85] When analyzing whether a plaintiff met the intentional wrong standard, appellate courts adhered closely to the language and considerations in *Millison*, *Laidlow*, and *Van Dunk*.

Appellate courts have repeatedly held that an employer's acquiescence in bad safety practices was insufficient to demonstrate an intentional wrong, on the basis that "[m]ere knowledge by an employer that a workplace is dangerous does not equate to an intentional wrong."[86] When considering an employer's appreciation of risk, courts have considered the following: whether there were prior accidents, close-calls, or safety complaints, of which the employer was aware;[87] whether an employer removed or was aware of the absence of a safety

(2) of a similar prior injury, satisfied the substantial certainty test); *Soto v. IOC*, 2017 WL 4530602 (N.J. Super. Oct. 11, 2017) (holding that substantial certainty standard was met where, after an explosion was caused by accumulations of combustible dust, employer misrepresented that numerous resulting OSHA violations had been abated, and Plaintiff was injured in subsequent explosion caused by same condition); *Alberto v. N. E. Linen Supply Co.*, 2015 WL 9942207 (N.J. Super. Ct. App. Div. Feb. 1, 2016) (finding that employer knew there was a substantial certainty of injury when he caused two employees to enter wastewater tank to clean it and both were killed almost immediately from exposure to the lethal chemicals inside the tank).

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

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

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

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

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

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

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

device;[88] and whether there were prior OSHA violations or deception.[89]

Intentional wrong claims often failed because an employer attempted to provide safety training and equipment to its employees, even if insufficient,[90] or responded to employee safety complaints, even if the response was ineffective.[91] Claims were also unsuccessful when a third party's illegal act directly caused the injury,[92] or an employee failed to heed warnings or follow safety instructions.[93] An employer's lack of knowledge of relevant safety issues has also defeated intentional wrong claims, since an employer must know there is a substantial certainty of injury.[94]

The Appellate Division has observed that the "consistent trend of our courts [is] holding the 'intentional wrong' exception in N.J.S.A. 34:15-8 'applicable in only rare and extreme factual circumstances.'"[95]

The common elements in successful intentional wrong cases have been: prior similar accidents or close-calls;[96] safety complaints or violations;[97] alteration or removal of safety devices and guards;[98] or a deliberate failure to correct unsafe conditions, sometimes accompanied by deception of either employees or those charged with regulating workplace safety, regarding safety

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

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

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

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

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

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

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

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

[96] *Laidlow*, 170 N.J. at 620; *Mull*, 176 N.J. at 388; *Mabee*, 316 N.J. Super. at 222; *Soto*, 2017 WL 4530602, at *1.

[97] *Laidlow*, 170 N.J. at 620; *Mull*, 176 N.J. at 388 - 89; *Crippen*, 176 N.J. at 401 - 03; *Soto*, 2017 WL 4530602, at *1.

[98] *Laidlow*, 170 N.J. at 620; *Mull*, 176 N.J. at 388 - 89; *Mabee*, 316 N.J. Super. at 222 - 23.

conditions.[99] This list is not comprehensive,[100] nor have courts held that any of these examples are *per se* evidence of an intentional wrong.[101]

- **Intentional Wrong in Other States**

Most states provide an exception to the exclusive remedy of workers compensation.[102] The states that do so are fairly evenly split between providing a statutory or common law exception.[103] States that have codified the exception generally limit its scope to a deliberate or specific intent to injure on the part of the employer.[104] Other states have narrowed the exception to provide relief only when there has been: willful, unprovoked physical aggression;[105] sexual assault or harassment;[106] or when the injurious conduct is unrelated to work.[107]

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[99] *Millison*, 101 N.J. at 182; *Laidlow*, 170 N.J. at 621; *Crippen*, 176 N.J. at 403; *Soto*, 2017 WL 4530602, at *8; *Alberto*, 2015 WL 9942207, at *1, *3 ("[employer] understood that entering the tank had the potential to cause death by asphyxiation" but employees "testified that [employer] was aware that they entered the wastewater tank, and denied [he] had ever instructed them not to do so").

[100] *Laidlow*, 170 N.J. at 621 ("the absence of a prior accident does not mean that the employer did not appreciate that its conduct was substantially certain to cause death or injury"); *see also Mull*, 176 N.J. at 392 (rejecting employer's argument that "lack of deception toward OSHA" warranted finding that "conduct" prong was not met).

[101] *Laidlow*, 170 N.J. at 622 – 23 ("[o]ur holding is not to be understood as establishing a *per se* rule that an employer's conduct equates with an 'intentional wrong' . . . whenever that employer removes a guard or similar safety device . . . or commits some other OSHA violation.").

[102] Kansas, Maine, Massachusetts, Rhode Island, Wisconsin, and Wyoming are the only states that do not provide any exception to the exclusive remedy of workers' compensation.

[103] Twenty states and D.C. provide for an exception only in common law: Alaska, Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, and Vermont. The remaining twenty-four states, including New Jersey, have codified an exception to the exclusive remedy provision.

[104] ALA. CODE § 25-5-53 (West 2022) ("willful conduct"); ARIZ. REV. STAT. ANN. § 23-1022(A) & (B) (West 2022) ("employer's wilful [sic] misconduct" which is "done knowingly and purposely with the direct object of injuring another"); LA. STAT. ANN. § 23:1032 (West 2022) ("an intentional act"); MD. CODE ANN., LAB. & EMPL. § 9-509 (West 2022) ("deliberate intent of the employer to injure or kill"); MICH. COMP. LAWS ANN. § 418.131(1) (West 2022) ("intentional tort" meaning "a deliberate act of the employer and the employer specifically intend[ing] an injury"); MONT. CODE ANN. § 39-71-413(3) (West 2022) ("an intentional and deliberate act that is specifically and actually intended to cause injury" with "actual knowledge that an injury is certain to occur"); N.H. REV. STAT. ANN. § 281-A:8(I)(b) (West 2022) ("intentional torts"); N.D. CENT. CODE ANN. § 65-01-01.1 (West 2022) ("intentional act done with the conscious purpose of inflicting the injury"); OKLA. STAT. ANN. TIT. 85A, § 5(B)(2) (West 2022) ("willful, deliberate, specific intent of the employer to cause such injury"); OR. REV. STAT. ANN. § 656.156(2) (West 2022) ("deliberate intention of the employer of the worker to produce such injury or death"); S.D. CODIFIED LAWS § 62-3-2 ("intentional tort"); WASH. REV. CODE ANN. § 51.24.020 (West 2022) ("deliberate intention of his or her employer to produce such injury"); W. VA. CODE ANN. § 23-4-2(c) (West 2022) ("the deliberate intention of his or her employer to produce the injury or death").

[105] CAL. LAB. CODE § 3602(b)(1) (West 2022) ("willful physical assault by the employer"); IDAHO CODE ANN. § 72-209(3) (West 2022); (KY. REV. STAT. ANN. § 342.690(1) (West 2022); NEB. REV. STAT. ANN. § 48-111 (West 2022).

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

[107] 77 PA. STAT. ANN. § 411(1) (West 2022) ("'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe [sic] because of reasons personal to him, and not directed against him as an employe [sic] or because of his employment").

Florida is the only state that has codified an exception similar to New Jersey's common law exception of substantial certainty of harm.[108] Florida's exclusive remedy statute provides two exceptions: (1) when an employer "fails to secure payment of compensation as required" by the workers' compensation act, and (2) "[w]hen an employer commits an intentional tort that causes the injury or death of the employee."[109] The Florida statute continues that "an employer's actions shall be deemed to constitute an intentional tort" when the employer "deliberately intended" to injure the employee,[110] or

> engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.[111]

Although the Florida statute and New Jersey's common law on this subject share several similarities, there are significant differences, as well. When describing conduct which qualifies as an intentional wrong, the Florida statute employs similar language to that used by the New Jersey courts.[112] Both states require either that the conduct is deliberate or an employer knows its conduct is almost certain to result in harm to the employee.[113] Additionally, the examples in the Florida statute – "prior similar accidents or . . . explicit warnings" - are commonly cited in New Jersey cases as relevant evidence of an employer's knowledge of a substantial certainty of harm.[114]

However, the Florida statute diverges significantly from New Jersey common law with respect to the requirement that an employer must conceal or misrepresent the danger to the employee, as deception by an employer is *not* necessary to establish an intentional wrong in New Jersey.[115] New Jersey common law also does not recognize a requirement that the concealment or deception "prevent the employee from exercising informed judgment about whether to perform the work," as is required by the Florida statute.[116]

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[108] FLA. STAT. ANN. § 440.11 (West 2022).
[109] FLA. STAT. ANN. § 440.11(1)(a) – (b).
[110] FLA. STAT. ANN. § 440.11(1)(b)1.
[111] FLA. STAT. ANN. § 440.11(1)(b)2.
[112] *See Millison*, 101 N.J. at 178 (explaining that "the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution. . . [so w]e must demand a virtual certainty").
[113] *See Laidlow*, 170 N.J. at 614 ("an intentional wrong can be shown not only by proving a subjective desire to injure, but also by a showing, based on all the facts and circumstances of the case, that the employer knew an injury was substantially certain to result").
[114] *Id.* at 621 ("reports of prior accidents like prior 'close-calls' are evidence of an employer's knowledge that death or injury are substantially certain to result, but they are not the only such evidence").
[115] *Mull*, 176 N.J. at 392 ("Although the employer's purported deception in *Laidlow* was a prominent factor in our analysis, we emphasized in that case that no one fact compelled our holding. In that respect, we stated as guidance to future courts and litigants that our disposition in such a case involving removal of safety devices will be grounded in the *totality of the facts* contained in the record.") (internal quotations omitted).
[116] FLA. STAT. ANN. § 440.11(1)(b)2.

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

Pending Bills

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

Conclusion

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

The proposed modifications set forth in the Appendix add language to N.J.S. 34:15-8 intended to clarify the scope of the "intentional wrong" exception, consistent with decisions of the New Jersey Supreme Court and the New Jersey Superior Court, Appellate Division.

Appendix

34:15-8. Election surrender of other remedies

a. An agreement described in section 34:15-7 ~~Such agreement~~ shall be:

(1) 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,~~

(2) an acceptance of all the provisions of this article~~,~~; and,

(3) 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.

b. 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[117] as the person injured or killed, except for an intentional wrong, as set forth in subsection c..

c. For purposes of this article, an "intentional wrong" is established when an employee demonstrates that:

(1) a person in the same employ deliberately intended to injure the employee;[118] or

(2) (A) the employer[119] engaged in conduct knowing that it was substantially certain to result in an employee's injury or death; and,

(B) the circumstances and the resulting injury or death are not a known and accepted risk in the industry.[120]

Comment

The proposed modifications divide the statute into lettered and numbered sections to make it easier more accessible, consistent with modern statutory drafting structure.

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[117] *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 185 (1985) ("We are convinced that the intentional wrongs of an employer as well as those of co-employees fall outside of the boundaries of the Compensation Act.").

[118] *Id.* at 170 ("in order to satisfy the Compensation Act's definition of 'intentional wrong,' claimants have heretofore been required to show a deliberate intention to injure").

[119] There do not appear to be any cases addressing a situation where a co-employee's conduct was subject to the substantial certainty test. There are numerous cases in which a co-employee is the cause of the harm, but the substantial certainty standard historically focuses only on an employer's conduct in those circumstances.

[120] *Laidlow v. Hariton Mach. Co.*, 170 N.J. 602, 617 (2002) ("[U]nder *Millison*, in order for an employer's act to lose the cloak of immunity of *N.J.S.A.* 34:15–8, two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize."). *But see infra* at p.17.

Subsection a.

In the first paragraph of N.J.S. 34:15-8, re-labeled subsection a., the proposed modifications replace "such agreement" with the language "an agreement as described in section 34:15-7."

N.J.S. 34:15-7 is entitled "Compensation by agreement" and provides that:

> [w]hen employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article[,] compensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of employment shall be made by the employer without regard to the negligence of the employer.[121]

As originally enacted in 1911, N.J.S. 34:15-7 immediately preceded N.J.S. 34:15-8, making clear that the agreement referenced by "such agreement" in N.J.S. 34:15-8 referred to that described in N.J.S. 34:15-7.[122] However, in the intervening years, three statutes were added: N.J.S. 34:15-7.1,[123] 7.2,[124] and 7.3,[125] obscuring the connection between the language "such agreement" in N.J.S. 34:15-8 and the agreement between an employer and employee described in N.J.S. 34:15-7.

Subsection b.

The second paragraph of N.J.S. 34:15-8, which contains the language added in 1961 to specify that injuries or death caused by a co-worker fall within the WCA except for an "intentional wrong,"[126] is re-labeled as subsection b. The proposed modifications also add the language "as set forth in subsection c.," to clarify that application of the intentional wrong exception is subject to the requirements articulated in subsection c.

Subsection c.

The proposed modifications add a new subsection – subsection c. – setting forth the standard an employee must satisfy to establish an intentional wrong. First, the proposed language "for the purposes of this article" limits the definition of "intentional wrong" to Article 2 ("Elective Compensation") of the WCA.[127]

Additionally, rather than set forth a definition of "intentional wrong," the proposed language articulates the evidentiary requirements for establishing an intentional wrong. The *Millison* Court explained that the substantial certainty standard is "not so much . . . a substantive test itself nor . . . a substitute for a subjective desire to injure, [but] a specie of evidence that will satisfy the requirement . . . that 'deliberate intention' be shown."[128]

Next, the proposed modifications subdivide subsection c. into two additional subsections to clearly separate the two available avenues for establishing an "intentional wrong," as described by New Jersey courts.[129]

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[121] N.J. STAT. ANN. § 34:15-7 (West 2022).
[122] L. 1911, c. 95, §§ 7-8, eff. July 4, 1911.
[123] L. 1956, c. 141, p. 579, § 9, eff. Jan. 1, 1957.
[124] L. 1979, c. 283, § 3, eff. Jan. 10, 1980.
[125] L. 1987, c. 382, § 1, eff. Jan. 8, 1988.
[126] L. 1961, c. 2, § 1, eff. Feb. 9, 1961.
[127] The term "intentional wrong" appears in four statutes in Title 59 under the New Jersey Tort Claims Act, and in one statute in Title 44 in the chapter titled "Assistance for Dependent Children, Other Persons and Families."
[128] *Millison*, 101 N.J. at 178.
[129] *Laidlow*, 170 N.J. at 613 ("What is critical, and what often has been misunderstood, is that we cited Professor Larson and the cases relying on his approach for informational, not precedential, purposes. *Millison*, in fact, specifically rejected Professor Larson's thesis that in order to obtain redress outside the Workers' Compensation Act an employee must prove that the employer subjectively desired to harm him. In place of Larson's theory, we adopted Dean Prosser's broader approach to the concept of intentional wrong. Under Prosser's approach, an intentional wrong

- Deliberate Intention to Injure

First, the proposed language in subsection c.(1) sets forth the intentional wrong standard that predominated prior to the New Jersey Supreme Court's decision in *Millison*. The proposed language in subsection c.(1) requires first that the harm is caused by "a person in the same employ," mirroring the language used in subsection b., which sets forth that liability shall not attach "for any act or omission occurring while such person was in the same employ as the person injured or killed."[130]

The proposed language requires that the actor "deliberately intended to injure the employee." This language is drawn from the *Millison* Court's description of the original intentional wrong standard: "in order to satisfy the Compensation Act's definition of 'intentional wrong,' claimants have heretofore been required to show a deliberate intention to injure."[131]

- Substantial Certainty

The proposed language in subsection c.(2) incorporates the substantial certainty standard that was promulgated in *Millison* and affirmed in subsequent Supreme Court decisions. The proposed modifications also subdivide subsection c.(2) into two further subsections to separately address the "conduct" and "context" prongs of the *Millison* standard.[132]

  - "Conduct" Prong

The proposed language corresponds to the summary of the substantial certainty standard in the *Laidlow* decision.[133] With respect to the "conduct" prong, the *Laidlow* Court stated that "the employer must know that his actions are substantially certain to result in injury or death to the employee," and the proposed language is largely identical.

  - "Context" Prong

The proposed language articulating the "context" prong, although derived from the language employed in *Laidlow* and *Millison*, was altered to eliminate the colloquial phrase "a fact of life," as well as the direct reference to the Legislature's intent.[134] Rather than "more than a fact of life of industrial employment," the proposed language

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is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm.") (emphasis added).

[130] N.J. STAT. ANN. § 34:15-8 (emphasis added).

[131] *Millison*, 101 N.J. at 170.

[132] *Id.* at 179 ("Courts must examine not only the conduct of the employer, but also the context in which that conduct takes place . . . ").

[133] *Laidlow*, 170 N.J. at 617 ("(1) the employer must know that his actions are substantially certain to result in injury or death to the employee . . . ").

[134] *Id.* ("(2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize."); *Millison*, 101 N.J. at 179 ("[M]ay the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act?"); *see Van Dunk v. Reckson Assocs. Realty Corp.*, 210 N.J. 449, 473 (2012) ("As for the context prong, we bear in mind that *Millison* enunciated a unitary test.").

requires the risk be "known and accepted . . . in the industry,"[135] to include other employment contexts beyond "industrial."[136]

Given the narrowness of the intentional wrong exception, Staff considered a formulation of subsection c.(2)(A) that included a non-exhaustive list of conduct that has been repeatedly recognized by New Jersey courts as giving rise to a substantial certainty of harm.[137] In subsection c.(2)(B), Staff also considered language employed by the Appellate Division that conveys the rarity of circumstances that qualify under the "context" prong of the analysis.[138]

This alternative formulation provides in subsection c.(2)(A) that employer conduct giving rise to a substantial certainty of harm may include: (i) affirmative acts that defeat safety devices; (ii) willful failure to remedy safety violations; or (iii) deception of employees or workplace safety regulators regarding workplace safety.[139] In addition, in subsection c.(2)(B) the circumstances and resulting harm to an employee must be "extreme or unusual" in the industry.[140]

[135] *See e.g. Est. of Sellino v. Pinto Bros. Disposal, LLC*, 2013 WL 5300076, *5 (N.J. Super. Ct. App. Div. Sept. 23, 2013) (finding the context prong unsatisfied because "the type of fatal accident that occurred here is a known danger in the industry").

[136] *See e.g. Kibler v. Roxbury Bd. of Educ.*, 392 N.J. Super. 45 (App. Div. 2007) (teacher was injured at school by students engaged in a fistfight with each other); *McGovern v. Resorts Int'l Hotel, Inc*., 306 N.J. Super. 174 (App. Div. 1997) (security employee was shot during robbery at casino); *Allen v. MB Mut. Holding Co.*, 2019 WL 2395913 (N.J. Super. Ct. App. Div. June 6, 2019) (bank employee claimed injuries based on mold contamination in her office); *West v. Raw Power, Inc.*, 2007 WL 957348 (N.J. Super. Ct. App. Div. Apr. 2, 2007) (HomeDepot employees claimed injuries based on fuel fumes from rental equipment).

[137] An employer altered or disabled a safety device in *Laidlow*, *Mull*, and *Mabee*, and failed to remedy safety violations in *Crippen* and *Soto*. The employer deceived employees regarding safety conditions in *Millison* and *Alberto*, and deceived workplace safety regulators in *Laidlow*, *Crippen*, and *Soto*.

[138] *Kibler*, 392 N.J. Super. at 55 ("[S]tudent fighting, while undesirable and surely to be discouraged, is within the milieu of circumstances that the Legislature would envision occurring from time to time in our schools. Although we are reluctant to label such altercations as a 'fact of life,' we do not perceive them as being so extreme or unusual to equate the incident that caused plaintiff's fall to an intentional wrong.") (emphasis added); *Fisher v. Sears, Roebuck & Co*., 363 N.J. Super. 457, 472 (App. Div. 2003) ("[a]s to the conduct prong, lacking here are the egregious circumstances that characterized the *Laidlow–Mull–Crippen* trilogy") (emphasis added).

[139] *Bove v. AkPharma Inc.*, 460 N.J. Super. 123, 142 (App. Div. 2019) ("Reviewing these cases together, it is apparent that in addition to violations of safety regulations or failure to follow good safety practice, an intentional wrong will be found when it is accompanied by something more, such as deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations.") (emphasis added).

[140] *Kibler*, 392 N.J. Super. at 55 (App. Div. 2007) ("[S]tudent fighting, while undesirable and surely to be discouraged, is within the milieu of circumstances that the Legislature would envision occurring from time to time in our schools. Although we are reluctant to label such altercations as a 'fact of life,' we do not perceive them as being so extreme or unusual to equate the incident that caused plaintiff's fall to an intentional wrong.") (emphasis added).