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THE SUBSTANTIAL CERTAINTY EXCEPTION TO WORKERS' COMPENSATION

MICHAEL DORAN*

I. INTRODUCTION

In the wake of the industrial revolution and corresponding increase in on-the-job accidents, most states swiftly enacted workers' compensation plans. North Carolina adopted its Workers' Compensation Act [Act] in 1929. The social policy behind compensation plans is to provide workers with efficient and certain benefits for work related accidents without requiring the injured worker to prove negligence or overcome employer defenses such as contributory negligence, assumption of the risk and the fellow-servant rule. In exchange for these defined, albeit limited, compensation benefits, employees give up their common law right to sue the employer for negligence. In general terms, the Act provides the sole and exclusive remedy for employees injured in the course of employment. These tradeoffs provide the basic compromise

* Michael Doran is a practicing attorney in Salisbury, North Carolina with the firm of Wallace and Whitley and concentrates in the areas of personal injury, civil litigation, Woodson claims, and appellate practice. He appeared as appellate counsel for the plaintiff in the case of Owens v. Deal after the first decision of the North Carolina Court of Appeals. He received his B.A. from Davidson College, and J.D. from Wake Forest.

1. Many thanks to Bob Sar and the Editorial Staff of the Campbell Law Review, who provided invaluable assistance with respect to preparation of the Introduction to this Article and the research with respect to treatment of this issue in jurisdictions other than North Carolina, as noted infra part II.D. and footnotes 180-93.


and framework of workers' compensation legislation. The negligent employer enjoys protection from large jury verdicts and the injured employee enjoys certain recovery for work related injuries.

Over the past several years, North Carolina courts created three significant exceptions to the exclusivity of Worker's Compensation benefits. In these areas an injured worker can maintain a civil lawsuit for conduct deemed more egregious than mere negligence. The early Warner v. Leder\(^6\) and Essisk v. Lexington\(^7\) decisions made clear that a common law tort action exists for an employer's intentional injuries.\(^8\) Wesley v. Lea\(^9\) extended the intentional injury exception to those committed by a co-employee. Explaining the policy behind the intentional injury exception, the Pleasant\(^10\) court stated:

> [S]ince negligence connotes unconscious inadvertence, allowing injured workers to sue co-employees would not reduce injuries caused by ordinary negligence. The same cannot be said in cases involving intentional torts. . . . Permitting an injured worker to bring an action against a co-employee for an intentional tort places responsibility upon the tortfeasor where it belongs. Since the commission of an intentional tort includes a constructive or actual intent to injure, allowing an injured co-worker to sue the tortfeasor serves as a deterrent against future misconduct.\(^11\)

Reasoning that these same policy reasons should apply to similar situations, the Pleasant court created the second exception by extending an injured employee's ability to pursue a civil suit against his co-employee for willful, wanton and reckless negligence.\(^12\) The court specifically declined to address "whether an employer may be sued for similar conduct."\(^13\) Finally, in August 1991, the North Carolina Supreme Court announced the landmark decision of Woodson v. Rowland\(^14\) creating the third, and most significant exception to the exclusivity of the Workers' Compensation Act - that of substantial certainty.

Allowing civil recovery outside the Workers' Compensation Act for injuries which are substantially certain to occur is a logical

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10. 312 N.C. 710, 325 S.E.2d 244 (1985).
11. Id. at 716-17, 325 S.E.2d at 249.
12. Id.
13. Id. at 717, 325 S.E.2d at 250.
progression from the rule that the Act does not preclude recovery for intentional injuries. Prosser states, "Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired but also to those which the actor believes are substantially certain to follow from what he does." 15 This understanding forms the basis of constructive intent and allows recognition of discernible, differentiated categories of tortious actions. If the different types of tortious actions are thought of as a continuum, intentional actions are at the highest end of the scale progressing next to substantial certainty, then to willful, wanton or reckless negligence, and finally to mere negligence. 16 Separating these categories, North Carolina defines willful negligence as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." 17 The terms wanton and reckless are synonymous and are defined as "an act manifesting a reckless disregard for the rights and safety of others." 18

By establishing the substantial certainty standard, the Woodson court expressly adopted the views espoused five years earlier by Justice Martin's dissenting opinion in Barrino v. Radiator Specialty Co. 19 During the past four years since the Woodson decision, the courts, both state and federal, have struggled with application of the substantial certainty standard. This Article attempts to point toward the correct definition and application of the substantial certainty liability standard, recognizing its foundation in the Woodson and Barrino decisions. This Article also will point out the apparent misapplications of the standard in decisions handed down after Woodson. Finally, in light of the

16. "As the probability that a [certain] consequence will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence." Id.; see also Woodson, 329 N.C. at 341, 407 S.E.2d at 229.
North Carolina Supreme Court's *per curiam* decision in *Owens v. W.K. Deal Printing, Inc.*, which appears to illustrate the court's disapproval of the definition and application of substantial certainty contained in decisions from other courts, this Article will attempt to forecast the direction of future decisions involving this theory of civil liability.

II. DEFINING SUBSTANTIAL CERTAINTY

The *Woodson* majority held:

[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Courts, commentators and attorneys have given this oft-quoted holding the shorthand designation of the substantial certainty standard. When someone speaks of pursuing a *Woodson* claim, they are attempting to prove substantial certainty.

There appear to be four distinct elements necessary to prove substantial certainty:

1. Intentional misconduct;
2. Knowledge that the misconduct is substantially certain to cause serious injury or death;
3. Substantial certainty that the misconduct will result in serious injury or death to an employee; and
4. An employee is injured or killed by that misconduct.

It appears that some of the confusion relating to application of the substantial certainty standard arises from a failure to address each of these elements separately. Importantly, the distinction between the first two elements largely creates the difference between substantial certainty and an intentional tort. The first element involves express or specific intent to perform an act. The second element requires subjective knowledge by the actor, knowl-

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21. Id.
22. Justice Exum wrote for the majority. Justice (now Chief Justice) Mitchell and Justice Meyer dissented on the creation of the substantial certainty standard but joined in part of the opinion not related to this issue.
23. Id. at 340-41, 407 S.E.2d at 228.
edge which may be inferred from other circumstances, that the
consequences of the act are substantially certain to cause injury.
These two elements connect the intent to act with the injurious
consequences of the act. Blurring the distinction between the first
two elements gives rise to the implication that an intentional tort
must be proved. The third and fourth elements mandate that an
objective determination assure that the action taken was substan-
tially certain to produce the injury and actual injury results.

A. Substantial Certainty in the North Carolina Supreme Court


Since Justice Martin's dissent in Barrino formed the basis for the North Carolina Supreme Court's eventual adoption of the
substantial certainty standard, this case should be viewed as a
classic articulation of substantial certainty. For Justice Martin,
the court had to determine "whether the trial court erred in grant-
ing summary judgment for the defendant employer in view of evi-
dence put forth by the plaintiff which creates a genuine issue of
material fact concerning the defendant's subjective intent." The
plaintiff's factual allegations of the defendant's conduct appear in
the lower court's opinion:

1. covering meters designed to detect dangerous gas and vapor
levels in defendant's plant with plastic bags to render them
ina operative;
2. turning off, on the day of the explosion, alarms designed to
warn of dangerous gas and vapor levels in defendant's plant, and
instructing employees to continue or to resume working despite
the alarms;
3. installing and operating equipment used in storing and han-
dling explosive gas without the inspections and approvals
required by law;

24. Judicial misinterpretation of Woodson has led some courts to the
erroneous conclusion that there is no distinction between substantial certainty
and intentional torts. See, e.g., Travelers Ins. Co. v. Noble Oil Services, Inc., 42
obligated to defend or indemnify insured for Woodson claim because the
insurance policy excluded coverage for intentional torts.).
26. See supra note 18 and accompanying text.
27. Barrino, 315 N.C. at 517, 340 S.E.2d at 305. The majority justices viewed
the issue as "whether the North Carolina Workers' Compensation Act provides
the exclusive remedy for an employee injured by the willful, wanton, and reckless
negligence of his employer." Id.
4. using equipment which lacked explosion-proof safeguards to prevent sparks in an explosion-prone atmosphere in violation of the National Electrical Code and the Occupational Safety and Health Act of North Carolina; and
5. in general, failing to provide a safe work place.28

From these allegations, Justice Martin stated:

The only reasonable explanation for the corporation's actions in concealing and dismantling the warning devices is that it intended for its employees to be subjected to extremely hazardous working conditions and to the probable consequences of working in such conditions, including serious injury or death.29

Justice Martin saw two primary reasons for denying the defendant's summary judgment motion. First, as a procedural matter, summary judgment cannot be granted with material facts in controversy.30 Under the exceptions to the Act's exclusivity existing at the time the court confronted Barrino, if the employer committed an intentional tort, the plaintiff could maintain a civil suit.31 Since the evidence conflicted as to the defendant's intent, a genuine issue of material fact existed making summary judgment improper.32 Second, when viewed in a light most favorable to the nonmoving plaintiff, the evidence shows the "defendant's deliberate failure to observe even basic safety laws."33 Thus, the plaintiff's injuries were, at the least, substantially certain to occur.34 He also compared the degrees of culpability between this situation and that of Pleasant and concluded that since the defendant's conduct was much more offensive and likely to cause injury, since the Pleasant plaintiff was allowed to avoid the exclusivity of the Act, surely this plaintiff should also fall outside the Act.35 In doing so, Justice Martin carefully recognized the differ-

29. Barrino, 315 N.C. at 518, 340 S.E.2d at 305.
31. See generally Pleasant, 312 N.C. 710, 325 S.E.2d 244.
33. Barrino, 315 N.C. at 518, 340 S.E.2d at 305.
34. Id.
ence between intent, as shown by substantial certainty, and an intentional tort. 36

The facts contained in Barrino satisfy the substantial certainty test outlined in the Woodson decision when considering each of the four elements separately. Covering meters with plastic bags, turning off alarms, installing and operating equipment without the inspections and approvals required by law obviously evidences intentional misconduct. Knowledge of the substantial certainty of injury arises not only from inference, but also by the government requirement of safety devices. Moreover, the safety devices in place, such as meters and alarms, were rendered inoperative by the employer, which again shows subjective knowledge of the safety hazards. Substantial certainty of injury appears to arise from using equipment which lacked explosion-proof safeguards in an explosion-prone atmosphere. Finally, injury did in fact occur.

2. Woodson v. Rowland

The plaintiff presented compelling facts in Woodson, 37 which may have necessitated the court to reconsider its ruling in Barrino. A trench cave-in killed the plaintiff’s decedent, Thomas Alfred Spouse, while he worked for Morris Rowland Utility, a construction subcontracting company. 38 At the point of the trench cave-in, the trench’s depth reached fourteen feet and spanned four feet in width. 39 In the absence of adequate sloping, shoring or bracing of the trench, The Occupational Safety and Health Act of North Carolina and corresponding safety regulations mandated

36. “For plaintiff to prove that defendant’s conduct was intentionally tortious does not require a showing that the defendant corporation intended that plaintiff’s daughter would be the particular victim or that death, as opposed to some lesser harm would be the result.” Id.; see also Fallins v. Insurance Co., 247 N.C. 72, 100 S.E.2d 214 (1957).


38. It should also be noted that the Barrino “majority” was actually a plurality, with two Justices concurring on the grounds that the Barrino plaintiff lost her right to avoid the exclusivity provisions of the Workers’ Compensation Act by having accepted Workers’ Compensation Death Benefits from the employer. In Woodson, the plaintiff had not received any Workers’ Compensation benefits at the time the case was presented to the supreme court for decision.

39. Id. at 336, 407 S.E.2d at 226.
use of a safety device, such as a trench box. No such safety devices were put in place.

The court did not engage in a separate discussion of the first element, intentional misconduct. It can be inferred from the court’s recitation of the facts that the employer’s intentional misconduct clearly involved the decision to disregard the safety rules mandating use of a trench box during the course of the trenching activities. Adding to the offensiveness of the misconduct, Morris Rowland provided a trench box to the Davidson and Jones subcontractor crew after their supervisor ordered his crew to discontinue working because the trenches were not sloped, shored or braced and needed a trench box. Regarding the second element of the test, the employer’s knowledge, the court stated that the employer’s “state of mind can be inferred.” The court summarized the following facts as sufficient to infer knowledge of the substantial certainty that the trench would cave in:

Morris Rowland was capable of discerning extremely hazardous ditches. His career had been excavating different kinds of soil. He knew the attendant risks. He had been cited at least four times in six and one-half years immediately preceding this incident for violating multiple safety regulations governing trenching procedures. He was aware of safety regulations designed to protect trench diggers from serious injury or death. He knew he was not following these regulations in digging the trench in question.

The court also added that the emphatic testimony of Davidson and Jones’ foreman Lynn Craig, that the trench was unsafe and that he would never put a worker in it, could lead jurors to the conclusion that Morris Rowland shared Mr. Craig’s knowledge of substantial certainty. The plaintiff presented expert testimony to show the third element, substantial certainty that the trench would cave in under the circumstances. Thus, finding all requirements satisfied, the court adopted the substantial cer-

40. N.C. GEN. STAT. § 95-136(g) (1993); 13 N.C. ADMIN. CODE tit. 7E.1400, cited by Woodson, 329 N.C. at 335, 407 S.E.2d at 225.
41. Woodson, 329 N.C. at 336, 407 S.E.2d at 226.
42. “Morris Rowland and the project supervisor, Elmer Fry, discussed whether to use the trench box in their ditch. They decided not to use it. . . .” Id. at 335, 407 S.E.2d at 225.
43. Id.
44. Id. at 336, 407 S.E.2d at 226.
45. Id. at 345, 407 S.E.2d at 231-32.
46. Id. at 346, 407 S.E.2d at 232.
47. Id. at 345, 407 S.E.2d at 231.
tainty standard as an exception to the Workers’ Compensation Act. 48

3. Pendergrass v. Card Care, Inc.

The Pendergrass 49 plaintiffs, Donald Ray Pendergrass and his wife, Sarah Pendergrass, brought suit against his employer, Texfli, after serious injuries occurred to his arm while operating a piece of machinery. 50 The plaintiff claimed, inter alia, that the intentional misconduct of two co-employees, Gibson and Lake, rose to a sufficient level to warrant Texfli’s vicarious liability under the wilful, wanton, Pleasant standard. 51 The court of appeals affirmed the trial court’s dismissal, 52 and the supreme court affirmed the court of appeals. 53

Much of the supreme court’s opinion dealt with a factual analysis under the lesser “misconduct standard” announced in Pleasant, 54 which requires a showing of “willful, reckless and wanton negligence of the fellow employees” 55 to avoid the exclusivity bar of the Act. In holding in favor of the co-employee defendants on this issue, the court explained:

Although they may have known certain dangerous parts of the machine were unguarded, we do not believe this supports an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so. 56

After determining the allegations of the complaint failed to establish willful, reckless or wanton misconduct, the court summarily dispensed with the claim against the employer because of the higher substantial certainty standard involved. 57 The court observed that claims against the employer must involve “conduct . . . so egregious as to be tantamount to an intentional tort.” 58 Perhaps the court felt compelled to consider inferences of substantial

48. Id. at 334, 407 S.E.2d at 230.
50. Id.
51. Id.
54. 312 N.C. 710, 325 S.E.2d 244.
55. Id. at 710, 424 S.E.2d at 246.
56. Pendergrass, 333 N.C. at 238, 424 S.E.2d at 394 (emphasis added).
57. Id. at 239, 424 S.E.2d 395.
58. Id. at 239, 424 S.E.2d at 395.
certainty due to a lack of an express allegation in the complaint to that effect. The court's opinion, however, fails to recognize the distinction apparent in Barrino and Woodson between intentionally injurious behavior, i.e., substantial certainty, and the Pleasant wilful, wanton, misconduct standard. Although these three exceptions to the Act can be visualized as a continuum, they are separate theories of liability and must be analyzed independently. A failure to follow OSHA regulations would appear to satisfy the intentional misconduct element. Similarly, it is reasonable to assume that testimony could have been presented to show failure to follow these regulations was objectively substantially certain to produce injury. Thus, while not clearly evident in the court's opinion, the plaintiff appears to have stumbled in presenting allegations in the complaint of the employer's subjective knowledge of the substantial certainty of injury.

B. Substantial Certainty in the North Carolina Court of Appeals


The Dunleavy case has an extensive litigation history. The complaint was filed prior to the decision rendered in Woodson. The trial court granted summary judgment for the defendants and the plaintiff appealed. The court of appeals affirmed and the supreme court granted discretionary review solely for the purpose of remanding the case back to the court of appeals for reconsideration in view of the Woodson decision. The court of appeals followed suit and remanded "the trial court's order granting summary judgment for Company... for a de novo hearing in light of the Woodson decision.

59. While it is difficult to imagine conduct which would generate substantial certainty liability that is not also willful, wanton or reckless, an independent analysis of each theory decreases the likelihood of misapplying the standards. In Pendergrass, the court reasoned that neither willful, wanton or reckless conduct, nor substantial certainty existed because Gibson and Lake neither intended injury nor were manifestly indifferent to the consequences of their actions. By not engaging in a separate analysis of the substantial certainty test, and by mentioning that Woodson claims were "tantamount to an intentional tort," the court appears to have inadvertently signaled the lower courts that Woodson claims would be considered and viewed as intentional torts. See infra part III.

62. Id.
of *Woodson*. Subsequently, the trial court again granted summary judgment, followed by another appeal. The April 5, 1994, decision rendered by the court of appeals affirmed summary judgment for the defendant employer.

The court determined the plaintiff failed to present sufficient evidence of substantial certainty through a factual comparison with *Woodson*, rather than by application of the *Woodson* legal standard. Judge Johnson, writing for the court, observed:

Some key differences between the facts in *Woodson* and the instant case are the following: In *Woodson*, the employer had been cited four times in the previous six and a half years for violating regulations governing trenching safety procedures; in the instant case, the employer had one previous citation relating to trenching procedures. In *Woodson*, the employer was at the job site when the accident occurred; in the instant case, Robert Yates was not in town the day of the accident and Douglas B. Yates stopped by the site briefly the morning of the accident. In *Woodson*, the general contractor's foreman working the previous day on a separate trench that was not sloped, shored or braced, refused to let his men work until they had a trench box, and yet the employer ordered his crew to work; in the instant case, employer's foreman, Mr. Baynes, a man with many years experience in the field, believed the soil was stable and had no reason to believe otherwise. In *Woodson*, a trench box was available for use on the day of the accident and the employer chose not to use it; in the instant case, the employers had ordered trench boxes for the site but they had not yet arrived. In *Woodson*, the employer knew the trench had a depth of fourteen feet; in the instant case, employer's foreman, Mr. Baynes, had traveled to another part of the job site believing that the crew would not complete enough work to exceed a depth of five feet in the trench before he returned. Finally, in *Woodson*, the employer consciously, intentionally and personally ordered the decedent to work in the fourteen-foot trench; in the instant case, employer's foreman, Baynes, did not consciously, intentionally and personally order decedent to work in a portion of the trench which was somewhere between five and eight feet.

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65. Dunleavy, 114 N.C. App. at 203, 442 S.E.2d at 57. The plaintiff chose not to pursue any further appeals following the April 5, 1994, decision, according to plaintiff's counsel.
66. Id.
67. Id. at 201-02, 442 S.E.2d at 55-56.
Because this case also involved a trench cave-in, it lent itself to a fact by fact comparison to the *Woodson* decision. Although the court presents an accurate factual comparison between the two cases, factual comparisons lend little to the proper application of the substantial certainty standard of liability. When taken away from the legal principles and definitive elements of substantial certainty, the facts of *Woodson* would never be exactly matched by another case.

Moreover, the *Woodson* court pointed to many of the same facts cited in *Dunleavy* as evidence of the employer's knowledge of substantial certainty. First and foremost, the *Woodson* court felt the experience of the employer's foreman would establish knowledge: "Morris Rowland was capable of discerning extremely hazardous ditches. *His career had been excavating* different kinds of soil. *He knew the attendant risks.*" Morris Rowland presented evidence that he and his project supervisor, Elmer Fry, "believed the soil was packed hard enough so the trench would not cave in." Yet, the supreme court expressly held that "[n]either we, nor later the jury, need accept his characterization of his state of mind at face value."

Similarly in *Dunleavy*, the facts appear to support a finding of the employer's subjective knowledge of substantial certainty. The trench digging crew in question was "a new and inexperienced pipe crew." During the afternoon work with the trench, "the trench was not to exceed five feet in depth." Government regulations mandate that trenches exceeding five feet in depth comply with additional safety procedures. The defendant had a policy of using "trench boxes or sloping] the sides of a trench when conditions warranted such action, including whenever the depth of a trench exceeded five feet. . . ." Yet, while the digging progressed, the experienced foreman left the inexperienced crew unsupervised for such a length of time that the trench depth exceeded five feet at the time of the fatal cave-in. It seems the court attached too much importance to the foreman's absence from the work site as

68. See *supra* notes 34-44 and accompanying text.
70. *Id.* at 335, 407 S.E.2d at 225.
71. *Id.* at 345, 407 S.E.2d at 231.
72. *Dunleavy*, 114 N.C. App. at 198, 442 S.E.2d at 54.
73. *Id.*
74. *Id.* at 198-99, 442 S.E.2d at 54.
75. *Id.*
76. *Id.* at 199, 442 S.E.2d at 54.
mitigating against *Woodson* liability when, in fact, the foreman's absence appears to have been a substantial factor in the misconduct which resulted in the workers' death.

Since the court did not undertake an elemental analysis of substantial certainty, the court's opinion does not clearly explain why the plaintiff's claim failed. The result is particularly confusing in light of the summary judgment standard of review presumably applied to the defendant's motion. Perhaps substantial certainty did not arise because the employer's intentional misconduct was simply the act of leaving an inexperienced crew unsupervised and the mere lack of supervision was not substantially certain to cause serious injury or death. Perhaps the fact that the trench exceeded five feet in depth was unintentional, amounting only to ordinary negligence. It would appear irrefutable, however, that vertical trenches exceeding five feet in depth are substantially certain to cave-in and cause serious injury or death, in view of the extensive safety regulations and the employer's own workplace safety rules, as discussed in *Dunleavy*.

Examining the facts through the lens of legal analysis produces a more satisfying resolution to the problem. Ordering trench boxes shows the foreman's knowledge of their necessity. Allowing work to proceed without the trench boxes, in violation of government regulation and company policy satisfies the knowledge and objective substantial certainty elements. Injury occurred. The main weakness in the plaintiff's claim appears to be whether the employer intentionally, or through mere inadvertence, allowed the trenching to progress without supervision or safety measures after the trench exceeded five feet.

2. **Powell v. S & G Prestress Co.**

On April 19, 1994, the court of appeals published its decision in *Powell* just two weeks after handing down *Dunleavy*. The plaintiff's decedent, Timothy Powell, died on his second day on the job after being crushed under the wheels of a slow-moving crane used at the work site. *S & G Prestress* had hired fifteen temporary employees, including Mr. Powell. All temporary employees received a hard hat and safety glasses, but none of them received safety training nor the company's safety manual. Mr. Powell's

78. *Id.* at 322, 442 S.E.2d at 145.
79. *Id.* at 321, 442 S.E.2d at 144.
80. *Id.*
job assignment placed him in a work space where a crane, with no
tire guards, passed within 36 inches of his body, frequently behind
his back. 81 Although the crane had a warning alarm to provide
notice to workers of its movement, the alarm did not ring loud
enough to be heard in the work space. 82 Plaintiff's evidence
showed the work site violated industry safety standards. 83 After
the accident, the North Carolina Department of Labor cited the
employer for violations of several regulations and imposed fines
totaling $1,540.84 Prior to this accident, the government had
twice cited the defendant for violating safety regulations. 85 The
trial court granted defendant's motion for summary judgment and
the court of appeals affirmed. 86

As part of the factual showing at the summary judgment
hearing, plaintiff presented an affidavit from an apparent expert
in the crane industry, which stated in relevant part:

[M]y conclusion is that the procedures and practices that were
being followed by Prestress violated industry-wide standards
regarding operation of cranes in proximity to workers; that new
and inexperienced workers were placed into a work environment
that was unsafe even for experienced personnel, that Prestress did
not observe such common industry rules such as maintaining clear
passage and aisle ways in obstructed fashion, and that Prestress
did not maintain barriers between dangerous machinery, i.e.,
cranes and its workers working within 36-40 inches of same, and
thereby created an extremely and exceedingly high likelihood that
the crane would come into contact with the workers and based
upon the facts that existed, such was substantially certain to
occur. . . . 87

81. Id. at 329, 442 S.E.2d at 149.
82. Id.
83. Id.
84. Id. at 323, 442 S.E.2d at 146. Two violations were under N.C. Gen. Stat.
§ 95-129(1) (1993), for failing to furnish employees conditions of employment and
a place of employment free from recognized hazards likely to cause death or
serious injury. In sum, S & G Prestress received four citations, three of which
were serious in the court's view. Id.
85. In 1979, for failing to provide a railing and footwalk on a crane under 29
C.F.R. § 1910.179(d)(2) and (3) and 29 C.F.R. § 1910.23(c)(1). In 1983, for failing
to provide for a minimum clearance of ten feet between the top of a crane and a
power line under 29 C.F.R. § 1910.180(j)(1). The 1983 violation caused the death
of an employee. Powell, 114 N.C. App. at 323-24, 442 S.E.2d at 146.
86. Id. at 321, 442 S.E.2d at 144. Judge Wynn dissented.
87. Id. at 324, 442 S.E.2d at 146 (emphasis added).
Notwithstanding the expert opinion of substantial certainty, the court focused on the second element, the employer's subjective knowledge, and found the evidence to be lacking. The court determined the defendant did not know its conduct was substantially certain to cause injury by applying the "bomb throwing" illustration contained in the Restatement (Second) of Torts. The Restatement provides:

A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that this act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

As noted by Judge Wynn, using this illustration to define the Woodson substantial certainty standard sets "a higher standard than that actually applied by the Court in Woodson." Although the Woodson court cited to the Restatement, it did not expressly adopt the bomb throwing definition for substantial certainty. In fact, the Woodson court made no reference at all to the bomb throwing illustration.


On August 2, 1994, the court of appeals decided Mickles v. Duke Power Co. The court again referenced the Restatement's bomb throwing illustration as defining the Woodson substantial certainty standard. However, the court went on to unanimously hold plaintiff's evidence sufficient to survive summary judgment. In Mickles, plaintiff's decedent died when he fell approximately 100 feet from a large electric transmission tower while employed by Duke Power. At the time of the fall, Mr. Mickles was secured to the tower by a body belt and a pole strap, but had no backup safety device. Evidence attributed the fall to a phe-
nomenon known as "roll out," the disengagement of a safety snap from the body belt.97

The Mickles facts seem as compelling as those in Woodson with respect to the second element of the claim, the employer's knowledge. The power industry clearly recognized the danger of "roll out."98 Duke Power had experienced at least two prior incidents of "roll out" resulting in the death of one worker in 1975 and rendering another worker a paraplegic in 1990.99 Mr. Mickles fell to his death just eleven months after the last Duke Power "roll out."100 Furthermore, Duke Power's investigative reports of the earlier incidents "indicate that company officials were aware of the danger posed by the possibility of roll out."101 Duke Power went so far as to notify manufacturers of the equipment of the problems with the body belt and pole strap, but continued to provide them to their workers.102

Perhaps the most damning evidence of employer knowledge was the memorandum sent to Duke Power's legal department by John Francis, Duke Power's Manager of Health and Safety Affairs. The memorandum was issued shortly after the 1990 accident and it also appears to supply sufficient evidence of intentional misconduct. The court summarized the memorandum as follows:

Francis expressed his opinion that roll out was caused by a size incompatibility between the D-ring and safety snap. He also observed that body belt and safety snaps made by different manufacturers might be incompatible. Despite these observations, Francis stated that an additional safety device known as a fall arrest system 'may not be the way to go.' . . . According to Francis' memorandum: (1) this would be the same thing as telling linemen that roll out was a 'recognized hazard'; and (2) such a position would be in direct conflict with what Duke Power and other utilities had argued during the development of certain OSHA safety regulations.103

The opinion goes on to reference other damaging facts showing Duke Power's intentional misconduct and extensive knowledge, which appears to be overkill in view of the safety director's

97. Id. at 626, 446 S.E.2d at 371.
98. Id. at 628, 446 S.E.2d at 372.
99. Id. at 628, 446 S.E.2d at 372.
100. Id. at 625, 446 S.E.2d at 370.
101. Id. at 628, 446 S.E.2d at 372.
102. Id. at 630, 446 S.E.2d at 372-73.
103. Id. at 629-30, 446 S.E.2d at 373.
memorandum. Duke Power's decision to film a safety movie the day of the accident covering Mr. Mickles' crew added irony to the employer's knowledge of the danger. Given these tragic events, the court reasoned that, at the least, there was a conflict in the evidence as to each element of substantial certainty to deny the defendant's summary judgment motion.


In Echols, the plaintiff, Cynthia Echols, was injured when a molding machine crushed her hand as she reached under a safety gate to remove a plastic part. Plaintiff brought suit against Zarn alleging substantial certainty. She also alleged that the willful, wanton and reckless conduct of her supervisor, Edith Barnett, entitled her to recovery under the Pleasant exception to the Act. On September 30, 1994, the court of appeals affirmed the trial court's issuance of summary judgment for the defendants on both theories.

Plaintiff stated that Zarn assigned her to operate a molding machine that she did not know how to operate. Zarn's supervisor, Edith Barnett, instructed plaintiff how to operate the machine after plaintiff experienced a great deal of difficulty. Plaintiff contended that Barnett demonstrated and instructed her to reach under the safety gate, rather than opening the safety gate, to remove plastic parts. The defendant's Vice President of Human Resources, who was also the head of Zarn's safety committee, testified in her deposition that reaching under the safety gate violated company safety rules. The defendant disputed plaintiff's evidence as to the nature and extent of Barnett's instructions and

104. Id. at 631, 446 S.E.2d at 374.
106. Id.
107. Id.
108. Id.
109. Id. at 367, 448 S.E.2d at 291. This case has particular significance because of Judge Greene's partial dissent on the Pleasant misconduct allegation. Although Judge Greene determined no substantial certainty claim existed, he felt plaintiff's evidence raised a jury question against the supervisor as willful, wanton or reckless conduct. Id. at 378, 448 S.E.2d at 297.
110. Id. at 367, 448 S.E.2d at 291.
111. Id. at 367-68, 448 S.E.2d at 291.
112. Id. at 368, 448 S.E.2d at 291.
113. Id. at 369, 448 S.E.2d at 292.
offered evidence of written safety rules which prohibited bypassing the safety devices.\textsuperscript{114}

Since plaintiff brought suit against Barnett alleging a claim under \textit{Pleasant} along with the substantial certainty claim against Zarn, the court addressed the claim against Barnett under the lesser standard first.\textsuperscript{115} While the court considered the evidence sufficient to show negligence on the part of Barnett, the court felt that the negligence was less egregious than the facts presented in \textit{Pendergrass}.\textsuperscript{116} However, the court engaged in a thorough and helpful analysis of what behavior constitutes willful, wanton and reckless behavior.\textsuperscript{117}

Turning to the substantial certainty claim, the court principally followed the analysis set forth in \textit{Powell v. S \& G Prestress Co.},\textsuperscript{118} including reliance on the Restatement's bomb throwing example.\textsuperscript{119} The court concluded that the evidence against the employer was insufficient to demonstrate intentional misconduct because "there is no evidence that anyone employed by Zarn directed plaintiff to place her hand into the mold area."\textsuperscript{120} The court also relied upon the absence of a breach of government regulations to support its conclusion. Since the court did not break down its reasoning into the elements required for substantial certainty, it is unclear how the absence of breaking government laws impacts \textit{Woodson} liability. If the plaintiff's allegations are true, the company knowingly violated internal rules and safety policies.\textsuperscript{121}

\begin{footnotesize}
\begin{enumerate}
\item 114. \textit{Id.}
\item 115. \textit{Id.} at 371-77, 448 S.E.2d at 293-96.
\item 116. \textit{Id.} at 376, 448 S.E.2d at 296.
\item 117. \textit{Id.} at 371-76, 448 S.E.2d at 293-96.
\item 118. 114 N.C. App. 319, 442 S.E.2d 143 (1994).
\item 119. \textit{Echols}, 116 N.C. App. at 378, 448 S.E.2d at 297.
\item 120. \textit{Id.} at 380, 448 S.E.2d at 298.
\item 121. "[P]laintiff's evidence in its most favorable light tends to show that Zarn adopted the safety rule that 'only authorized mechanics and maintenance personnel may reach around or otherwise bypass a safety guard when working on machinery or equipment' and that Zarn knew of the practice of supervisors training employees to reach under the safety gate to retrieve the products that had fallen out of the mold." \textit{Id.} at 379, 448 S.E.2d at 298.
\end{enumerate}
\end{footnotesize}
C. Substantial Certainty in the Federal Courts

1. Travelers Insurance Co. v. Noble Oil Services, Inc.

In Travelers, the Fourth Circuit Court of Appeals upheld the district court's decision affirming judgment on the pleadings for the defendant, Travelers Insurance Company. Russell Wayne Matthes, an employee of Noble Oil Services, Inc., brought a state court action against his employer based upon a Woodson substantial certainty theory of recovery after being injured in a truck explosion. Noble Oil notified its insurer, Travelers Insurance Company, of the claim and asked that the insurer defend and indemnify Noble Oil from the prospective liability arising from the lawsuit. The Travelers' insurance policy contained an exclusion from coverage for "bodily injury intentionally caused or aggravated by [Noble]." Travelers filed a declaratory judgment action essentially seeking to enforce the exclusion. The district court granted judgment on the pleadings for Travelers holding that the policy's intentional injury exclusion relieved Travelers of the duty to defend or indemnify Noble under the policy.

The Fourth Circuit agreed with the trial court's conclusion that "in order to allege a cause of action under Woodson and circumvent the workers' compensation law the plaintiff must necessarily allege that the injury as well as the act was intentional." In so holding, the court quoted one portion of the Woodson decision:

One who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends the results for purposes of tort liability.

This analysis, like that of the North Carolina Court of Appeals in the Powell, Mickles and Echols cases, treats the substantial cer-

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122. Travelers Ins. Co. v. Noble Oil Serv., Inc., 42 F.3d 1386 (4th Cir. 1994), released in full-text at No. 94-1598, 1994 U.S. App. LEXIS 34397 at *1. This is a per curiam, unpublished opinion. Pursuant to the Rules of the Fourth Circuit Court of Appeals, "citation of this Court's unpublished decisions . . . is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." Fed. R. App. P. 36.
123. Travelers, at *1.
124. Id.
125. Id. at *2 (emphasis added).
126. Id. at *4.
127. Id. quoting Memorandum of Decision at 7.
128. Woodson, 329 N.C. at 341, 407 S.E.2d at 229 (emphasis added); see also Travelers, at *3.
tainty test as an intentional tort standard. This is particularly clear when considering the wording of the exclusion contained in the Traverlers’ policy: “bodily injury intentionally caused.” Yet, the whole point of the Woodson decision is that intent to injure is not necessary for purposes of substantial certainty tort liability.129 The substantial certainty of injury, notwithstanding the absence of intent to injure, produces Woodson liability and an exception to the Act’s exclusivity provisions. Stated otherwise, an injury which is substantially certain to occur is nonetheless an unintended injury.

2. Zocco v. United States

The plaintiff, Scott Zocco, originally framed his suit as a negligence action against Zocco’s employer, Lawrence Brawely, who had not procured workers’ compensation insurance for his employees, and the general contractor, Deggeller Attractions, who hired Brawley.130 The United States Army hired Deggeller to operate the 1988 Fair at Fort Bragg Army Base in Fayetteville, North Carolina.131 Deggeller hired Brawley as a subcontractor to operate two rides.132 Brawley hired Zocco, who was seventeen years old at the time, to work on the rides.133 During the course of tightening the bolts on a ride, part of the ride bumped Zocco and caused him to fall through a canvass tarp onto the asphalt pavement ten feet below.134 The accident produced serious injury to Zocco.135 Defendant Deggeller raised the defense of the Workers’ Compensation Act contending that it was Zocco’s “statutory employer” because it provided workers’ compensation insurance covering Brawley’s employees and it had not required Brawley to procure such insurance.136 The trial court initially denied summary judgment because a material issue of fact existed as to whether Deggeller’s workers’ compensation carrier provided coverage for Brawley’s employees.137 By the time the matter came on for trial in February 1992, the insurer acknowledged coverage for Zocco’s

129. Woodson, 329 N.C. at 330, 407 S.E.2d at 222.
131. Id. at 596.
132. Id.
133. Id. at 597.
134. Id.
135. Id.
136. Id. at 598. See also N.C. GEN. STAT. § 97-19 (Supp. 1994).
injuries and the trial court decided to reconsider the summary judgment motion rather than proceed with trial. Upon reconsideration, the trial court determined that Deggeller was Zocco’s ‘statutory’ employer for purposes of the Act, and dismissed the negligence claims for lack of subject matter jurisdiction. Zocco sought to preserve his civil remedy by contending his injury fell within the substantial certainty exception recently established in Woodson. The trial court granted Deggeller’s summary judgment motion on this issue.

The court determined that a Woodson claim did not lie against Deggeller because the “forecast of evidence is wholly insufficient that Deggeller knew that serious injury or death was substantially certain to result. . . .” Zocco alleged that the ride he was working on did not comply with federal safety regulations and that Deggeller knew of this defect. Further, Zocco relied upon N.C. Gen. Stat. § 95-111.1 to provide a presumption of substantial certainty:

[Although most amusement devices are free from defect and operated in a safe manner, those which are not impose a substantial probability of serious and preventable injury to the public.]

The court did not engage in an elemental analysis of substantial certainty, instead concluding that the evidence was “wholly insufficient” in comparison to the facts contained in Woodson. It appears the court felt that the fact that Deggeller received neither notice nor warning of any type of safety violation presented an insurmountable barrier to establishing knowledge of substantial certainty. The court stated that a legislative presumption of “substantial probability” was not sufficient to show substantial certainty of injury.

138. Id. at 599.
139. Id. at 603.
140. Id.
141. Id. at 604.
142. Id.
143. The alleged regulatory breach was the failure to comply with 29 C.F.R. Part 1910.23(c) which provides that every platform four feet or more above ground level be guarded by railing. The ride was nine to ten feet above the ground and did not have a railing. Zocco, 791 F. Supp. at 603.
144. N.C. GEN. STAT. § 95-111.1 (1994).
146. Id. at 604.
3. Hodge v. Weyerhaeuser Co.

In Hodge, the employee-plaintiff, Donald Wayne Hodge, was seriously injured when he fell from the sixth floor through a chute which had been covered with plastic. A supervisor directed the covering of the chutes but Hodge had no knowledge of their presence. As a result of the accident, the employer received a citation for a serious violation from the North Carolina Department of Labor Division of Occupational Safety and Health for either failing to adequately cover the chute openings or failing to provide safety belts and life lines to employees required to work above the chutes. Hodge filed suit alleging substantial certainty against his employer, Southeast Technical Coating, and the owner of the premises, Weyerhaeuser Corporation. Southeast moved for summary judgment and the trial court denied the motion.

The court engaged in a factual comparison between Woodson and Hodge’s claim rather than discuss the four elements of substantial certainty and, instead, identified four “Woodson factors” to be considered:

1. prior OSHA violations;
2. testimony from a supervisor of another company at the work site that the work arrangements were unsafe;
3. presence of the employee’s supervisor at the work site with the opportunity to observe the safety hazards; and
4. an express direction by the employer that the workers perform their job without required safety procedures.

The court found the first two “Woodson factors” absent because the employer had not previously been cited for OSHA violations and no “independent supervisor” gave testimony that the work area was unsafe. However, the court found the other two “Woodson factors” present because Southeast’s supervisor was present at the work site with an opportunity to observe the safety

148. Id.
149. Id.
150. Id. at *3.
151. Id. at *1.
152. Id.
153. Id. at *3-4.
154. Id. at *3.
hazards and the employer directed workers to proceed without required safety procedures.\textsuperscript{155} From this, the court concluded:

[T]wo factors from Woodson favor Southeast and two factors favor the plaintiff. Combining the evenly divided Woodson factors with a view of the record as a whole which is most favorable to the plaintiff, the court finds it must deny Southeast's motion for summary judgment. The court notes that Bragg, Southeast's supervisor, was aware of the safety violations. . . and that an OSHA report stated that death was the likely consequence of a fall such as the one experienced by the plaintiff.\textsuperscript{156}

While this was an improper analysis relying too heavily on factual matching, the same result appears justified when considering the elements required for substantial certainty. First, regarding intentional misconduct, the opinion states “[t]he chutes were covered with the plastic at the direction of Southeast's supervisor of the Weyerhaeuser job, Larry Bragg.\textsuperscript{157} This violated safety regulations. Second, employer knowledge can be inferred from the employer's presence at the job site.\textsuperscript{158} Mr. Bragg "was aware of the safety violations at the Weyerhaeuser site. . . .“\textsuperscript{159} Third, regarding substantial certainty of serious injury or death, the court found it unnecessary to rule on the admissibility of expert opinion testimony submitted by plaintiff in the form of an affidavit and found, instead, that "an OSHA report stated that death was the likely consequence of a fall such as the one experience by plaintiff."\textsuperscript{160} As to the fourth element, “[p]laintiff fell approximately seventy feet down the chute and sustained fractures of his hip, leg and jaw. As a result, he is totally disabled."\textsuperscript{161}


In Mitchell,\textsuperscript{162} an uncovered moving chain on a machine struck plaintiff as she worked.\textsuperscript{163} Plaintiff filed suit against her employer alleging substantial certainty. The defendant, Perdue, filed a motion for judgment on the pleadings pursuant to Rule

\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at *1.
\textsuperscript{158} See Woodson, 329 N.C. at 330, 407 S.E.2d at 222.
\textsuperscript{159} Hodge, at *2.
\textsuperscript{160} Id. at *3.
\textsuperscript{161} Id. at *1.
\textsuperscript{163} Id. at 2.
12(c) of the Federal Rules of Civil Procedure and the court granted the motion.\textsuperscript{164}

The machine ordinarily had a guard covering the fast moving chain, but the guard was “missing” on the day of plaintiff’s injury.\textsuperscript{165} The accident occurred as she braced against the machine to stabilize herself as she reached down to pick up three chickens that had fallen on the floor.\textsuperscript{166} Plaintiff’s hand did not come in contact with the chain while she was operating the machine. Four days prior to the accident, state inspectors cited Perdue for a lack of a safety guard on the very same machine that caused the injuries.\textsuperscript{167}

The trial court began its analysis by considering the first two Woodson elements separately. The court found intentional misconduct present by the fact that the company received a safety violation four days earlier for lack of a guard and had not corrected this violation.\textsuperscript{168} These facts also established the second element of the claim: “that defendant knew of the dangerous situation.”\textsuperscript{169} However, the trial court then determined that the specific mechanism or act producing the injury - reaching over to pick chickens off the floor and bracing against the machine - was a random act.\textsuperscript{170} As such, the court determined that the employer could not have been substantially certain that such a random act would occur.\textsuperscript{171} The court buttressed its conclusion by pointing out that there were no random acts in Woodson.\textsuperscript{172}

This “random act” analysis appears to depart from a proper application of the substantial certainty standard. While there may not have been any random acts involved in Woodson, there certainly were in Barrino.\textsuperscript{173} In Barrino, a spark set off the explosion.\textsuperscript{174} It appears the court would have reached a different conclusion had the Plaintiff been injured while operating the machine or had the court considered the facts in Barrino.

\textsuperscript{164} Id. at 3.
\textsuperscript{165} Id. at 2.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 6.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 7.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} 315 N.C. 500, 340 S.E.2d 295 (1986).
\textsuperscript{174} Id.
5. Reed v. Georgia-Pacific Corp.

In Reed, while plaintiff attempted to clear a “plug-up” of a running machine, the machine caught and mangled her leg. Subsequently, she brought suit alleging substantial certainty and the trial court granted summary judgment for the defendant. Plaintiff presented evidence that she attempted to clear the “plug-up” in the manner by which her employer had ordered.

The trial court engaged in factual comparison, rather than separately reviewing the substantial certainty elements. Furthermore, the court classified the claim as “an intentional tort as defined by the narrowly construed Woodson exception.” The court stated the key facts as:

[Plaintiff and other employees had safely used the same procedure to clear plug-ups many times before plaintiff’s injury . . . Defendant has established that it has not been cited for safety violations relating to its dryers during the 10 years of operation of the facility in which plaintiff worked. No other employee of defendant has been injured while attempting to clear a plug-up using the procedure plaintiff was using at the time of her injury.]

From the court’s discussion, it is difficult to determine whether the employer engaged in any intentional acts of misconduct - the first element of substantial certainty. However, the opinion only notes selected portions of the plaintiff's expert witness' deposition. None of these excerpts include an opinion that the procedure for clearing plug-ups, as described by plaintiff, was hazardous or that it violated any safety regulations. None of the excerpts include an opinion that the procedure followed was substantially certain to cause serious injury or death.

In similar fashion as the Mitchell court, the court concluded its discussion with a method for distinguishing these facts from those in Woodson, the “intervening act” analysis:

Plaintiff’s expert further testified that there are five ways a dryer operator could be injured while clearing a wood jam in the described manner . . . All five of these situations require an intervening event. A Woodson claim does not rely on an intervening event. In Woodson, the employee merely entered a trench that

175. Reed v. Georgia-Pacific Corp., No. 93-341-CIV-5-BR, slip op. (E.D.N.C. April 22, 1994).
176. Id. at 2.
177. Id. at 4-7.
178. Id. at 7 (emphasis added).
179. Id.
was so inherently dangerous that it collapsed without any intervening event.\textsuperscript{180}

This clearly misapplies the substantial certainty standard when considering Barrino. In Barrino, the spark causing the explosion obviously constitutes an intervening event. Moreover, the creation of the spark did not involve intentional misconduct on the part of the employer.

\subsection*{D. Substantial Certainty in Other States}

States have taken several different approaches to resolving whether the substantial certainty standard falls outside the exclusivity of workers' compensation legislation. A majority of states such as Idaho,\textsuperscript{181} Illinois,\textsuperscript{182} New Mexico,\textsuperscript{183} Pennsylvania,\textsuperscript{184} South Carolina,\textsuperscript{185} Utah,\textsuperscript{186} and the District of Columbia\textsuperscript{187} simply refuse to adopt substantial certainty as an exception to exclusivity.\textsuperscript{188} Indiana,\textsuperscript{189} Louisiana,\textsuperscript{190} Mississippi,\textsuperscript{191} and New

\begin{itemize}
  \item \textsuperscript{180} Id. at 8.
  \item \textsuperscript{181} See Kearney v. Denker, 760 P.2d 1171 (Idaho 1988).
  \item \textsuperscript{183} See Johnson Controls World Serv., Inc. v. Barnes, 847 P.2d 761 (N.M. Ct. App. 1993).
  \item \textsuperscript{184} See Barber v. Pittsburgh Corning Corp., 555 A.2d 766 (Pa. 1989).
  \item \textsuperscript{185} See Peay v. U.S. Silica Co., 437 S.E.2d 64 (S.C. 1993).
  \item \textsuperscript{186} See Lantz v. National Semiconductor Corp., 775 P.2d 937 (Utah 1989).
  \item \textsuperscript{188} Professor Larson agrees with the majority approach and argues:
    [Common law liability] cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.
    A complaint, to survive a motion to dismiss, must do more than merely allege intentional injury as an exception to the general exclusiveness rule; it must allege facts that add up to a deliberate intent to bring about injury.
    Id. at 13-46.
  \item \textsuperscript{189} See Brown v. Westinghouse Elec. Corp., 803 S.W.2d 610 (Mo. Ct. App.) (applying Indiana law).
  \item \textsuperscript{190} See Jasmin v. HNV Cent. Riverfront Corp., 642 So.2d 311 (La. Ct. App. 1994).
  \item \textsuperscript{191} See Pester v. David New Drilling Co., 642 So.2d 344 (Miss. 1994).
\end{itemize}
Jersey,\textsuperscript{192} consider substantial certainty as another way of proving an intentional injury rather than a distinct and separate exception to exclusivity. Alabama allows suits against co-employees under the substantial certainty standard.\textsuperscript{193} Although not unique in judicial reasoning,\textsuperscript{194} North Carolina appears to be the only state to continue applying the substantial certainty standard as an independent ground for liability.

III. SUBSTANTIAL CERTAINTY, 1995 AND BEYOND

In the recent case of \textit{Owens v. W.K. Deal Printing, Inc.},\textsuperscript{195} the North Carolina Supreme Court took the opportunity to briefly expound upon a per curiam reversal of the court of appeals.\textsuperscript{196} Apparently intent to set the record straight as to how to define and apply the \textit{Woodson} standard of liability, the court stated:

\textit{We reemphasize that plaintiffs in \textit{Woodson} actions need only establish that the employer intentionally engaged in misconduct and that the employer knew that such misconduct was 'substantially certain' to cause serious injury or death and, thus, the conduct was 'so egregious as to be tantamount to an intentional tort.'}\textsuperscript{197}

This clarification cannot be understated because it reinforces the wisdom of an elemental approach to judging substantial certainty. While North Carolina may be unique in its treatment of substantial certainty, there can be no doubt that this basis for liability exists separately and distinctly from the exceptions for intentional torts and willful, wanton or reckless negligence. A plaintiff falls under the \textit{Woodson} exception if he proves: (1) intentional miscon-
duct; (2) employer knowledge of substantial certainty; (3) substantial certainty in fact; and (4) injury or death.

After the supreme court's *Pendergrass* decision, a trend for analyzing substantial certainty claims emerged in the court of appeals which focused almost exclusively on factual comparisons with *Woodson*, rather than by application of the substantial certainty doctrine. Federal court decisions have employed a variety of interpretations of the *Woodson* decision. Most noteworthy is the *Travelers Ins. Co. V. Noble Oil Services, Inc.* case due to the express equation asserted between substantial certainty and intentional torts and the implications for both employers and employees under the court's holding precluding the insurance company's liability. Other federal courts adopted several "buzz word" tests, such as the "intervening act" analysis in *Reed v. Georgia-Pacific Corp.*, the "random act" test in *Mitchell v. Perdue Foods, Inc.*, and the "Woodson factors" balancing rationale of *Hodge v. Weyerhaeuser Co.*

Most recent cases have transcended to yet a new, higher standard than that actually created in *Woodson* by confusing and classifying plaintiff's claims as "intentional torts," stating that *Woodson* claims are "tantamount to intentional torts," and reciting the "bomb throwing" illustration set forth in the Restatement. In this respect, *Powell v. S & G Prestress Co.* established troublesome precedent by the court's reliance on the Restatement bomb throwing illustration. The factual scenario set forth in that illustration describes an intentional tort. It demonstrates a specific intent to kill B, with the injury to C being sub-

200. No. 93-341-CIV-5-BR, slip op. (E.D.N.C. April 22, 1994).
201. No. 93 CV 00014, slip op. (M.D.N.C. May 14, 1993).
203. "Based on defendant's answer and clincher agreement which stated the injury was accidental, the burden then shifted to plaintiff to present a forecast of evidence to support her claim that the injury was also the result of an intentional tort committed by defendant employer." *Owens*, 113 N.C. App. at 327, 438 S.E.2d at 442 (1994).
substantially certain to follow under the circumstances. This principle is more analogous to the concept of transferred intent to injure an otherwise innocent bystander or unintended victim and is not applicable to the Woodson substantial certainty standard, where no intent to injure is required. The Powell decision is pending before the North Carolina Supreme Court on appeal of right based on Judge Wynn's dissent.

Since the court of appeals has not been analyzing substantial certainty claims by checking the presence of the four elements, it is not surprising that in only the Mickles v. Duke Power Co. case has the plaintiff survived summary judgment. In Mickles, the particularly strong facts evidencing the extreme danger of roll out and the defendant's knowledge of the danger creates a good case for satisfying the intentional injury exception. Thus, when the court applied the bomb throwing standard, the plaintiff's case survived under the guise of a substantial certainty analysis.

Likewise, too much emphasis has been placed upon whether federal or state safety violations were issued for the accident. In Echols v. Zarn, Inc., although plaintiff alleged the company breached internal safety policies, the court stated that no governmental safety regulations were breached and affirmed judgment for the defendant. In Zocco v. United States, although the plaintiff alleged the defendant's knowledge of regulatory noncompliance, the court appears to have resolved this issue in favor of the defendant because no violations were actually issued. Making out a prima facie case for substantial certainty does not require showing breach of government safety regulations. Furthermore, a company's voluntary adaptation of safety regulations certainly evidences at least an equal knowledge of a danger as with those dangers eventually discovered and regulated by the government.

The remarks in Owens suggest the court has recognized these misapplications of the substantial certainty standard. The Powell, Mickles and Echols cases are currently pending before the North Carolina Supreme Court on appeal of right based on Judge Wynn's dissent.

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211. *Id.* at 379, 448 S.E.2d at 297.


213. *Id.* *See also* Reed, No. 93-341-CIV-5-BR, slip op. (E.D.N.C. April 22, 1994).
North Carolina Supreme Court on appeal. In light of the confusing and erroneous treatments given to substantial certainty claims by the lower state and federal courts, it would be wise to evaluate these cases anew following an elemental approach. In this manner potential claims would be evaluated under legal standards which are applicable to many situations, rather than by the limited factual comparisons employed by the courts thus far.

IV. CONCLUSION

The North Carolina Supreme Court carved out a limited exception to the exclusivity provisions of the Workers' Compensation Act when it adopted the substantial certainty standard of liability in Woodson v. Rowland. Since then, the courts have struggled to identify a bright line test for determining when a case meets the substantial certainty standard of liability. The federal courts have adopted buzz word tests, such as the "intervening act" analysis in Reed, the "random act" test in Mitchell and the "Woodson factors" balancing rationale in Hodge. The North Carolina Court of Appeals has settled on the Restatement's bomb throwing illustration.

Along the way, the attempt to use these bright line tests has created confusion. The factual analysis of Woodson and the Barrino dissent required by substantial certainty has evolved into a factual comparison between the case under review and the Woodson case. A more appropriate analysis would consider the four elements of substantial certainty separately and identify the facts which support each element. Erroneous reliance on inconsequential facts, such as safety law violations, would decrease. This approach would lead to a uniform application of the doctrine rather than a rigid limitation of the substantial certainty standard to the facts presented in Woodson.

All in all, too much emphasis has been placed on the Woodson facts, too little emphasis on the Barrino facts, and very limited discussion of the elements of the claim has occurred. The combined effect of the reported decisions is that the substantial certainty standard of liability remains in a state of substantial uncertainty. The supreme court's Owens addendum takes the first step towards clarifying the doctrine. Decisions in the Powell, Mickles and Echols cases should complete the process.