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Louisiana Workers Compensation

Chapter 2

Exclusive Remedy

History

The Workers' Compensation program is a social compromise whereby the employer provides insurance coverage for injuries occurring in the workplace regardless of fault in exchange for the employee's waiver of tort liability. The basic rule of worker's compensation is you either get workers' compensation or you have a right to tort recovery. This theory is known as exclusive remedy.

Under the theory of exclusive remedy the injured worker waives his tort claims against his employer and also his co-workers. If for example, two construction workers are working for ABC Construction. One is responsible for securing the ladder and fails to do so, the second employee climbs the ladders which collapses and falls causing injury to the second employee. The injured workers exclusive remedy is workers' compensation from his employer, ABC Construction. He cannot sue his employer, ABC Construction, for negligently training the first employee or not providing proper equipment for the job. Additionally, the injured worker cannot sue his co-worker who is responsible and negligent in securing the ladder.

Exclusive remedy applies to employers and co-workers but it does not apply to third parties. A third party by definition is any party from whom workers' compensation cannot be recovered. In the above example, if ACME Ladder Company negligently built the ladder and caused it to fall injuring ABC Construction worker number two, worker number two can recover workers' compensation his employer, ABC Construction, but he cannot recover

workers' compensation from ACME Ladder. There is no employment relationship between the injured worker and ACME Ladder. Therefore, the injured worker can sue ACME Ladder in tort while also collecting workers' compensation benefits from his employer, ABC Construction.

Definition

The exclusive remedy provision is contained in La. R.S.-LSA 23:1032:

> §1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws
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> A.(1)(a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages, including but not limited to punitive or exemplary damages, unless such rights, remedies, and damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee, his personal representatives, dependents, or relations, as against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.
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> (b) This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.
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> (2) For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business, or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.
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> B. Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.
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> C. The immunity from civil liability provided by this Section shall not extend to:

(1) Any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and

(2) To the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section.

Amended by Acts 1976, No. 147, §1; Acts 1989, No. 454, §2, eff. Jan. 1, 1990; Acts 1995, No. 432, §1, eff. June 17, 1995.

Intentional Act Exception

The exclusive remedy provision states that an employee cannot sue his employer in tort, but there is one exception. If the employer commits an intentional tort against the employee, the employee can collect workers' compensation and also sue the employer in tort for the intentional injury. Two important questions arise in this situation: first, what is an intentional tort? And; secondly, was the intentional tort done in the course and scope of the actor's employment? Prior to the amendments in 1976, a co-worker was not immune from a tort suit and thus, an action based on intent, or negligence, or strict liability theories, was recognized against the co-employee. The 1976 amendments eliminated co-employee actions all together, with one exception, that being intentional tort.

When the legislature enacted La. R.S. 23:1023(B) in 1976 to exclude liability for all tort damages with the exception of intentional act, there was much debate about whether this should be a narrow or broad exception. Amendments to the act were defeated which contained language grossly negligent or deliberate act. As such, the courts have narrowly interpreted the intentional act provision to its traditional definition of intent as either act of desire of the consequence of one's actions or knowledge to a substantial certainty that the consequence will follow the act. *Malone* and *Johnson* discuss intentional acts and their treaties as follows:

> The traditional definition is simply a way of relieving the claimant of the difficulty of trying to establish subjective state of mind (desiring the consequences), if he can show substantial certainty that the consequences will follow the act. The ladder takes the case out of the realm of possibility or risk (which are negligence terms), and expresses the concept that an actor which a certainty cannot be believed if he denies that he knew the consequences would follow. In human experience, we know that specific consequences are substantially certain to follow some acts. If the actor throws a bomb into an office occupied of a two persons, but swears he only "intended" to hurt one of them, we must conclude that he is nonetheless guilty of an intentional tort as to the other. Since he knows to a virtual certainty that harmful consequences will follow his conduct, regardless of his subjective desire". §365 at p. 212.

In *Meyer v. Valentine Sugars, Inc.*, 444 So.2d 618 (La. 1984) the Louisiana Supreme Court stated that the claimant must prove that the person who acted either (1) consciously desired the physical result of his act or (2) knew that the result was substantially certain to follow from that conduct". *Id.* at 621.

In *Babin v. Edwards*, 456 So.2d 659 (La. Ct. App. 1st Cir. 1984), *writ denied*, 460 So.2d 604 (La. 1984) a trial court awarded a large sum to injured workers who claimed to have been injured by their supervisor's intentional act. The injured workers claimed that their supervisor knowingly required them to weld on large steel plates that had not been adequately secured for the welding process. There was also evidence of some prior run-ins between the claimant and supervisors. The Court of Appeals held:

> In sum, in order to avoid the exclusive remedy of workers' compensation, a defendant must act with an *intent* to injure the plaintiff. This intent can be shown either by proving that the defendant acted with a desire to harm plaintiff or by proving that the defendant acted with knowledge of facts that from his act plaintiff's injury was substantially certain to follow, 444 So.2d at 622 "substantially certain" is a method of proving that the act was intentional. *Fallow* makes it clear that this is not an alternative to "intentional act". It is a method of proving that the act was intentional. *Fallow* makes it clear that this is the correct interpretation of La. R.S. 23:1032.

The Court of Appeal concluded that the injured workers had not established the supervisor's objective desire that they be injured or that it was substantially certain that the injury would follow their conduct.

When an employee is injured in the course and scope of employment, and, in additional to compensation benefits, seeks tort recovery because of an intentional act, the potential for double recovery exists. Louisiana courts have resolved this issue by holding that he employer found to have committed an intentional act is entitled to a credit for all workers' compensation benefits paid against his tort liability for the intentional act.

Cases Finding Intentional Torts:

The forcing welders to work in unventilated area after they reported bloody noses and blurred vision was an intentional act. *Abney v. Exxon Corp*., 98-0911 (La. App. 1st Cir. 9/24/99), 755 So 2d 983, *writ denied*, 1999-3053 (La.) 753 So.2d 216.

Ordering an employee into area of toxic fumes may be an intentional act. The first worker went in and was overcome by fumes (workers compensation liability). The second worker sent into area was also overcome by fumes (workers compensation and intentional tort liability). *Belgard v. American Freightways, Inc.*, 99-1067 (La. App. 3d Cir. 12/29/99), 755 So2d 982.

Ordering employee to return to ditch that supervisor knew was in danger of caving in was intentional act. *Jones v. Thomas*, 426 So2d 609 (La. 1983).

Cases Not Finding Intentional Torts:

Petitioner alleged that a co-employee intentionally ran a red light at an intersection after seeing no traffic, which resulted in a vehicular collision and passenger's injuries. The court directed a verdict denying liability because there had been no showing that defendant either "intended to cause the result or it was believed that the result was substantially certain to follow." This was notwithstanding the rather high probability that a collision could occur by running a red light. There was the same potential that the driver would be injured as the passenger/plaintiff while the driver wanted to run the red light, he did not want to be injured. *McQuire v. Honeycutt*, 387 So.2d 674 (La. App. 3d Cir. 1980) *writ refused*, 397 So.2d 1364 (La. 1981)

Allegations of deficiently designed machinery and disregarding OSHA safety provisions are insufficient. *Cortez v. Hooker Chemical and Plastics Corp*., 402 So.2d 249 (La. App. 4th Cir. 1981).

Gross negligence in trying out an untested work procedure and disregard for safety regulations or safety equipment is not sufficient. *Williams v. Gervais F. Favrot Co., Inc.*, 573 So.2d 533 (La. App. 4th Cir.); *Davis v. Southern Louisiana Insulations*, 539 So.2d 922 (La. App. 4th Cir. 1989).

Failure to maintain safe conditions at work or where an employer allows or requires employees to operate a dangerous piece of equipment is not an intentional tort. *Dycus v. Martin Marietta Corp.*, 568 So.2d 592 (La. 4th Cir. 1990).

The refusal to assist an employee in performing strenuous work is insufficient. *Tapia v. Schwegmann Giant Supermarkets, supra.*

The failure to provide sufficient training in the use of dangerous equipment with a history of malfunctioning is insufficient. *Maddie v. Plastic Supply and Fabrication, Inc.*, 434 So.2d 158 (La. App. 5th Cir. 1983), *writ denied*, 435 So.2d 445 (La. 1983) [plaintiff was injured by malfunctioning power saw]; *Carrier v. Grey Wolf Drilling Co*., 00-C-1335 (La. 1/17/01), 776 So2d 439.

A reasonable expectation or anticipation of injury or death is insufficient. *Reagan v. Olinkraft*, 408 So.2d 937 (La. App. 2d Cir. 1981); *Eitmann v. West*, 411 So.2d 1127 (La. App. 4th Cir. 1982).

Even conduct that can be considered reckless or wanton by an employer is not sufficient. The court granted summary judgment in a case where plaintiff, a painter, requested a safety line to accommodate his work on a scaffold on the first day of the job. Plaintiff's supervisor refused the request, citing time requirements as an excuse. Plaintiff subsequently fell from the scaffold, sustaining injury and brought an intentional tort suit. The court recognized the difference between conduct that would, with reasonable probability, lead to an accident and conduct which was substantially certain to result in an accident. Finding even that a high degree of probability is not sufficient to conclude that the defendant actually intended the consequences of his act, the appellate court affirmed summary judgment dismissing the claim. *Taylor v. Metropolitan Erection Co.*, 496 So.2d 1184 (La. App. 5th Cir. 1986). See also, Temple v. J & S Communication Contractors et. al., 35,247-CW, 35,257-CW (La. App. 2d Cir. 1/25/02), 805 So2d 1263.

In evaluating the conduct at issue, the courts have recognized the significant difference between whether a fact is "substantially certain" or "reasonably probable." Certain is defined as incapable of failing, while probable deals with facts that arise from fairly, though not absolutely adequate, convincing, conclusive, intrinsic or extrinsic evidence or support. *Jacobsen v. Southeast Distributors, Inc.*, 413 So.2d 995 (La. App. 4th Cir. 1982), *writ denied*, 415 So.2d 953 (La. 1982).