

THE ENIGMA OF WORKERS' COMPENSATION
IMMUNITY: A CALL TO THE LEGISLATURE
FOR A STATUTORILY DEFINED
INTENTIONAL TORT EXCEPTION

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I. INTRODUCTION

Like many states in this nation, the State of Florida has enacted a comprehensive set of workers' compensation laws "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful employment at a reasonable cost to the employer."¹ Florida's workers' compensation system "is based on a mutual renunciation of common-law rights and defenses by employers and employees alike."² A critical aspect of this mutual renunciation of rights is the concept of

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1. FLA. STAT. § 440.015 (2000).
2. *Id.*

workers' compensation exclusivity or workers' compensation immunity.³ In simple terms, Florida's workers' compensation exclusivity statute provides tort immunity to an employer when an employee is injured within the course of his or her employment, so long as the employer has a valid workers' compensation policy in place.⁴ The Supreme Court of Florida in *Mullarkey v. Florida Feed Mills, Inc.*⁵ has explained the rationale:

[T]he concept of exclusiveness of remedy embodied in Fla.Stat. § 440.11, F.S.A. appears to be a rational mechanism for making the compensation system work in accord with the purposes of the Act. In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments. Similarly, the employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay, and uncertainty of a claim in litigation.⁶

Although workers' compensation immunity protects an employer from most work-related tort lawsuits, the exclusivity provision of section 440.11, *Florida Statutes*, does not insulate an employer from intentional tort lawsuits brought by employees.⁷ In other words, "employers are provided with immunity from suit by their employees so long as the employer has not engaged in any intentional act designed to result in or that is substantially certain to result in injury or death to the employee."⁸ While the Florida Legislature has not statutorily mandated an intentional tort exception to the exclusivity provision of section 440.11, the Florida Supreme Court has held that such an exception is logically part of Florida's workers' compensation scheme.⁹ Given this fact, courts in Florida have been largely, if not exclusively, responsible for defining the parameters of the intentional tort exception to workers' compensation immunity.¹⁰ In forming this judicially created exception, courts in Florida have been less than sure as to what actually constitutes an intentional tort.¹¹ In fact, the Supreme Court of Florida has recently reversed some of its own rulings that define the scope of the intentional tort exception to workers' compen-

3. See *id.* § 440.11.

4. See John T. Burnett & Kyle L. Redfearn, *Workers' Compensation Immunity and Intentional Torts: How To Be "Substantially Certain" in Defending Your Case*, TRIAL ADVOC. Q., Spring, 1999, at 15, 15.

5. 268 So. 2d 363 (Fla. 1972).

6. *Id.* at 365.

7. See *Eller v. Shova*, 630 So. 2d 537, 539 (Fla. 1993).

8. *Id.*

9. See *Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000).

10. See *infra* Part III.B.

11. See *infra* Part III.B.

sation immunity.¹² At the heart of the confusion over what constitutes an intentional tort under Florida workers' compensation law is the phrase "substantially certain to result in injury or death" as used by the Supreme Court of Florida in *Fisher v. Shenandoah General Construction Co.*¹³ and *Lawton v. Alpine Engineered Products, Inc.*¹⁴ In those cases, the supreme court implied that an employer is provided immunity from suit by his or her employees so long as the employer has not engaged in any intentional act designed to result in, or that is substantially certain to result in, injury or death to the employee.¹⁵ Subsequent to those opinions, Florida courts have embraced various views as to what "substantially certain to result in injury or death to the employee" actually means.¹⁶ Even with the Florida Supreme Court's recent attempt in *Turner v. PCR, Inc.* to clarify what "substantially certain" means in the context of workers' compensation immunity, the exact definition of the term still remains vague.¹⁷ Due to this confusion as to what constitutes an intentional tort under Florida's workers' compensation law, this Article suggests that the Florida Legislature enact a statutory intentional tort exception to the exclusivity provisions found in section 440.11, *Florida Statutes*.

Part II of this Article explores the policies behind workers' compensation immunity and the rise of the intentional tort exception. Part III discusses the statutory and common law development of exceptions to workers' compensation immunity in Florida and examines the changes in the court-created "substantial certainty" standard. Part IV deals with recent court opinions that have attempted to clarify what constitutes an intentional tort and specifically examines the Florida Supreme Court's recent holding in *Turner v. PCR, Inc.* Part IV also addresses the continued uncertainty as to what "substantially certain to result in injury or death to the employee" means. Finally, Part V argues for a statutorily defined intentional tort exception to the exclusivity provisions found in section 440.11, *Florida Statutes*. Part V also proposes a definition that could be used in a statutory intentional tort exception and shows how that proposed definition is workable in the context of past Florida cases.

12. See *Turner*, 754 So. 2d at 687.

13. 498 So. 2d 882 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

14. 498 So. 2d 879 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8; see also Burnett & Redfearn, *supra* note 4, at 15 (noting that the term "substantially certain" is often misconstrued in the workers' compensation arena).

15. See *Fisher*, 498 So. 2d at 883; *Lawton*, 498 So. 2d at 880.

16. See *infra* Part III.B.

17. See *infra* Part III.B.

II. THE POLICIES BEHIND WORKERS' COMPENSATION IMMUNITY AND THE RISE OF AN INTENTIONAL TORT EXCEPTION

A. *Policies Behind Workers' Compensation Immunity*

As noted above, the workers' compensation system in Florida is based in part on a renunciation of common law rights and defenses by employers. In exchange for those common law rights and defenses, "the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments."¹⁸ A logical concomitant to this exchange of rights is the concept of an exclusive remedy for injured employees.¹⁹ In other words, before an employer can be asked to accept virtual strict liability as to workplace injuries, the employer must first be afforded some sort of immunity from tort actions based on such injuries. Acknowledging this reality, the Florida Legislature has mandated that, as a general rule, workers' compensation is an injured worker's exclusive remedy for qualifying workplace injuries.²⁰ Specifically, section 440.11, *Florida Statutes*, states in pertinent part that, "[t]he liability of an employer prescribed in [the workers' compensation statute] shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee . . . on account of [a covered] injury or death"²¹

In addition to protecting an employer from tort lawsuits based on certain workplace injuries, the exclusivity of workers' compensation also extends to coemployees and supervisory employees in certain circumstances.²² Much like employers, coemployees of an injured worker are generally protected from tort lawsuits based on qualifying workplace injuries unless they act with "willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death."²³ Supervisory or managerial employees are provided similar immunity as long as they do not act in a manner that would constitute a violation of the law punishable by a term of sixty days of imprisonment as set forth in section 775.082, *Florida Statutes*.²⁴

Although the immunity provided to coemployees and managerial/supervisory employees is limited on the face of the exclusivity statute itself, there is no similar limitation of employer liability

18. *Mullarkey v. Feed Mills, Inc.*, 268 So. 2d 363, 366 (Fla. 1972).

19. *See* FLA. STAT. § 440.11 (2000).

20. *See id.*

21. *Id.* § 440.11(1).

22. *See id.*

23. *Id.*

24. *See id.*

found in the statute.²⁵ In other words, while employee immunity is limited by the standards of gross negligence and culpable negligence, an employer's workers' compensation immunity is not specifically limited on the face of section 440.11. Therefore, it would appear that the plain language of the workers' compensation immunity statute would shield an employer from tort liability even if the employer had engaged in conduct that was intentionally designed to injure its employees. In 1986, Florida's Fourth District Court of Appeal certified the following question to the Florida Supreme Court in two companion cases: "Does the Florida workers' compensation law preclude actions by employees against their corporate employers for intentional torts even though the injuries were incurred within the scope of their employment?"²⁶

In both of the cases in which this question was certified, the supreme court refused to provide an answer to the question as asked.²⁷ Rather, the supreme court restated the certified question and determined that as a matter of law, the conduct at issue in the certified cases did not constitute an intentional tort.²⁸ In other words, the supreme court found that there was no need to determine whether an intentional tort falls within the scope of workers' compensation immunity because the conduct at issue in the two certified cases did not rise to the level of an intentional tort.²⁹ Although the supreme court did not answer the fundamental question underlying the two certified cases, it did provide a rough definition as to what constitutes an intentional tort under Florida workers' compensation law. In fact, the two opinions in *Lawton* and *Fisher* gave birth to the "substantially certain to result in injury or death to the employee" standard that is the subject of this Article.

B. *The Rise of an Intentional Tort Exception to Workers' Compensation Immunity*

In *Fisher* the court recognized that an intentional tort is usually based on a deliberate intent to injure another.³⁰ However, in most employment situations, "one can safely assume that employers will not engage in conduct that is designed to intentionally injure an em-

25. See *id.* This observation goes only to the conduct limitations (i.e., gross negligence and culpable negligence) found in the exclusivity statute and not to other immunity limitations based on nonconduct factors such as the existence of a valid workers' compensation policy.

26. *Fisher v. Shenandoah General Constr. Co.*, 498 So. 2d 882, 882 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8; *Lawton v. Alpine Engineered Prods., Inc.*, 498 So. 2d 879, 880 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

27. See cases cited *supra* note 26.

28. See *Fisher*, 498 So. 2d at 884; *Lawton*, 498 So. 2d at 881.

29. See *Lawton*, 498 So. 2d at 881.

30. See *Fisher*, 498 So. 2d at 883.

ployee.”³¹ Nonetheless, while most employers do not intentionally try to hurt their employees, some employers engage in conduct that is so dangerous that an intent to injure can be inferred from their conduct.³² In light of this fact, the court in *Fisher* turned to the precepts of traditional tort law as stated in the matter of *Spivey v. Battaglia*³³ to define an intentional tort.³⁴ In *Spivey*, the Florida Supreme Court decided whether an unsolicited hug given to a plaintiff constituted a battery when the person who gave the hug did not have any actual intent to injure the plaintiff but injured her nonetheless.³⁵ Holding that the hug in question did not constitute a battery, the court in *Spivey* stated that “[w]here a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it.”³⁶ Adopting the logic behind the court’s decision in *Spivey*, the court in *Fisher* further defined the concept of “substantial certainty” using the words of Professor Prosser:

“[T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless and wanton, but is not an intentional wrong.”³⁷

In *Lawton* the supreme court reiterated the language cited above from *Spivey* and Professor Prosser by citing to its decision in *Fisher*.³⁸ However, the court in *Lawton* stated that the “substantially certain” standard expressed in *Fisher* “requires more than a strong probability of injury. It requires virtual certainty.”³⁹ Thus, while the court in *Lawton* and *Fisher* did not determine whether suits for intentional torts are barred by employers’ workers’ compensation immunity, the court did give a rough definition as to what constitutes an intentional tort under workers’ compensation law, and it gave two factual examples of what is not intentional behavior on the part of an employer.

Despite the supreme court’s reluctance to decide the issue of whether workers’ compensation immunity barred suits for inten-

31. Burnett & Redfearn, *supra* note 4, at 15.

32. *See id.* at 16.

33. 258 So. 2d 815 (Fla. 1972).

34. *See Fisher*, 498 So. 2d at 883 (citing *Spivey*).

35. *See Spivey*, 258 So. 2d at 817.

36. *Id.*

37. *Fisher*, 498 So. 2d at 884 (quoting PROSSER & KEETON ON TORTS 36 (5th ed. 1984)).

38. *See Lawton v. Alpine Engineered Prods., Inc.*, 879, 880 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

39. *Id.* The court in *Fisher* also spoke generally in terms of virtual certainty, *see Fisher*, 498 So. 2d at 884, but the court in *Lawton* announced this requirement in more express terms.

tional injury, Justice James C. Adkins, in his dissent in *Fisher*, argued that when read in conjunction with the rest of the workers' compensation statute, section 440.11 clearly does not provide immunity for employers against intentional-injury tort lawsuits.⁴⁰ Noting that sections 440.09(1) and 440.02(14) limit compensation to accidents arising out of and in the course of employment, Justice Adkins contended that an intentional tort can never be accidental and thus can never be within the purview of the workers' compensation exclusivity provision.⁴¹ Additionally, Justice Adkins noted that with the exception of Delaware, no state in the nation prohibits an employee from bringing an intentional tort action due to a workers' compensation exclusivity provision.⁴² Notwithstanding Justice Adkins' dissent on the issue, however, the question of whether Florida's exclusivity statute bars intentional tort claims was officially left open until 1994, when the supreme court issued its opinion in *Eller v. Shova*.⁴³

In *Eller*, the supreme court relied on its prior holdings in *Lawton* and *Fisher* and stated that there is an intentional tort exception to workers' compensation immunity in Florida.⁴⁴ In doing so, the court adopted the "substantially certain" language that was used in *Fisher* and *Lawton* as part of what constitutes an excluded intentional tort.⁴⁵ Subsequent to the court's opinion in *Eller*, the Florida district courts of appeal have never seriously questioned the propriety of the supreme court's proclamation of an intentional tort exception to workers' compensation immunity.⁴⁶ In fact, the Supreme Court of Florida still relies on its opinion in *Eller* to support its intentional tort exception.⁴⁷ As noted above, however, such an exception has never been codified by the Florida Legislature in the workers' compensation statutes.⁴⁸

40. See *Fisher*, 498 So. 2d at 885 (Adkins, J., dissenting).

41. See *id.*

42. See *id.*

43. 630 So. 2d 537 (Fla. 1994).

44. *Eller*, 630 So. 2d at 539. The court's reliance on *Lawton* and *Fisher* as support for an intentional tort exception is curious due to the fact that the court in *Lawton* and *Fisher* specifically refused to address the intentional tort exception issue.

45. See *id.*

46. See *Turner v. PCR, Inc.*, 754 So. 2d 683, 687 (Fla. 2000). However, in an opinion prior to *Eller*, Judge Michael E. Allen noted, in concurrence, that reliance on *Fisher* and *Lawton* for support of an intentional tort exception was misplaced. See *Timones v. Excel Indus.*, 631 So. 2d 331 (Fla. 1st DCA 1994) (Allen, J., concurring).

47. See *Turner*, 754 So. 2d at 686.

48. See FLA. STAT. § 440.01-.60 (2000). It is interesting to note that in the past, the Florida Legislature has amended the workers' compensation exclusivity provision in response to the supreme court's interpretation of immunity under section 440.11. See *Eller*, 630 So. 2d at 540 (discussing the so-called Streeter Amendment of 1988, which "provide[d] for heightened immunity to policymaking types of employees by raising the degree of negligence necessary to maintain a civil tort action against such employees from gross negligence to culpable negligence when those employees are engaged in managerial or policymaking decisions"). In light of this fact, one could argue that through its silence, the legis-

III. WORKERS' COMPENSATION IMMUNITY AND THE DEVELOPMENT OF IMMUNITY EXCEPTIONS

As seen above, workers' compensation immunity in Florida is not without its limits. Since the passage of workers' compensation legislation in Florida, statutory and common law exceptions have been created to temper the exclusivity of the workers' compensation remedy. To better understand the development of the common law intentional tort exception for employers, one must first look to the statutory exceptions to immunity that have been mandated by the Florida Legislature.

A. *Statutory Exceptions to Workers' Compensation Immunity*

To appreciate the statutory exceptions to workers' compensation immunity in Florida, one must begin with a fictional baseline proposition that employers and their employees are completely immune from all tort suits arising from workplace injuries that qualify for workers' compensation payments under the law. With this fictional base in mind, the first statutory exception to workers' compensation immunity relates to employees who are injured by their coworkers. As noted above, coemployees of an injured worker are generally protected from tort lawsuits based on qualifying workplace injuries unless they act with "willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death."⁴⁹ As a general matter, courts in Florida have had little trouble in applying the coemployee immunity exception and have defined the statute's reference to gross negligence as "an act or omission that a reasonable, prudent person would know is likely to result in injury to another."⁵⁰

The second statutory exception to workers' compensation immunity relates to managerial and supervisory employees. Supervisory or managerial employees are provided tort immunity as long as they do not act in a manner that would constitute a violation of the law punishable by a term of sixty days or more of imprisonment as set forth

lature has approved the supreme court's creation of an intentional tort exception to workers' compensation immunity in Florida. Assuming the merits of such an argument, this Article asserts that a legislatively defined intentional tort exception is needed to provide clarity as to the scope of that exception under the law.

49. FLA. STAT. § 440.11(1) (2000).

50. *Turner*, 754 So. 2d at 687 n.3 (quoting *Eller*, 630 So. 2d at 541 n.3);. Prior to the 1988 amendment to section 440.11, courts typically defined gross negligence as follows: (1) a composite of circumstances that constitute imminent or clear and present danger amounting to more than normal and usual peril; (2) predicated on a showing of chargeable knowledge or awareness of the imminent danger; and (3) a conscious disregard of consequences. *See, e.g.*, *Kline v. Rubio*, 652 So. 2d 964, 965 (Fla. 3d DCA 1995); *Foreman v. Russo*, 624 So. 2d 333, 335 (Fla. 4th DCA 1993).

in section 775.082, *Florida Statutes*.⁵¹ This immunity is often referred to as the “culpable negligence” exception to workers’ compensation immunity.⁵² To hold a supervisory employee liable in tort for compensable workplace injuries, an employee must prove that the supervisor, through culpable negligence, actively inflicted injury on the employee.⁵³ Florida case law has defined culpable negligence as being “of a gross and flagrant character which evinces a reckless disregard for the safety of others. It is that entire want of care which raises a presumption of indifference to consequences.”⁵⁴

Given the explanations of the two statutory exceptions discussed above, it can be argued that a reader of the plain language of section 440.11, *Florida Statutes*, would be left with the following assumptions:

- (1) an employer who has a valid workers’ compensation policy in place is immune from all tort suits brought by employees who are injured in the course and scope of their employment; and
- (2) a supervisory or managerial employee of such an employer is immune from tort suits brought by employees who are injured in the course and scope of their employment so long as the managerial or supervisory employee does not actively inflict injury on the employee in question through negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others and which raises a presumption of indifference to consequences; and
- (3) a coemployee is immune from tort lawsuits based on injuries sustained by other employees who are injured in the course and scope of their employment so long as the coemployee does not act with willful and wanton disregard, unprovoked physical aggression, or with gross negligence that a reasonable, prudent person would know is likely to result in injury to another.

Although the second and third assumptions noted above are correct under Florida law, the assumption that an employer is immune from *all* tort suits brought by employees who are injured in the course and scope of their employment is not. This is so because of the supreme court’s intentional tort exception to employer immunity.

51. See FLA. STAT. § 440.11(1) (2000). This immunity also applies to “any sole proprietor, partner, corporate officer or director, . . . or other person who in the scope of his or her employment duties acts in a managerial or policymaking capacity.” *Id.*

52. See *e.g.*, *Kennedy v. Moree*, 650 So. 2d 1102, 1106 (Fla. 4th DCA 1995); *Emergency One, Inc. v. Keffer*, 652 So. 2d 1233, 1235 (Fla. 1st DCA 1995).

53. See *Kennedy*, 650 So. 2d at 1107.

54. *Ross v. Baker*, 632 So. 2d 224, 226 (Fla. 2d DCA 1994), *quoted in Kennedy*, 650 So. 2d at 1107.

B. *The Intentional Tort Exception to Employer Immunity*

With the birth of the intentional tort exception to employer immunity explored above, the development of the definition of that exception in Florida court opinions must now be examined.

1. *The Definitive Cases*

As noted above, the two cases that initially attempted to define the intentional tort exception to workers' compensation immunity are *Fisher* and *Lawton*. Also noted above, the supreme court in *Fisher* and *Lawton* defined an intentional tort as any intentional act designed to result in, or that is "substantially certain to result in injury or death" to the employee.⁵⁵ Despite the use of the term "substantially certain" in *Fisher* and *Lawton*, however, the supreme court spoke in terms of "virtual certainty" in both of those opinions.⁵⁶ Thus, after the opinions in *Fisher* and *Lawton*, the definition of an intentional tort, as that term relates to workers' compensation immunity, could be understood as any intentional act designed to result in, or that is substantially certain (meaning virtually certain) to result in, injury or death to the employee. Standing alone, this definition of an intentional tort does little to explain what "substantially certain" or "virtually certain" actually mean. To be sure, after *Fisher* and *Lawton*, all that was known was that "substantial" or "virtual" certainty means more than a "strong probability of injury," greater than "gross[ly] negligenc[e]" conduct, and greater than "reckless and wanton" conduct.⁵⁷ More instructive than the actual definitions provided by the court in *Fisher* and *Lawton*, however, are the facts of the *Fisher* case, in light of the court's holding that no intentional tort was committed in that matter.

In *Fisher*, the plaintiff's complaint alleged that the defendant-employer required its employees to enter pipes that contained poisonous gases in order to clean the pipes with high pressure hoses.⁵⁸ The plaintiff further alleged that the employer failed to provide its employees with oxygen masks, gas detection equipment, rescue equipment, and other safety equipment required under federal law.⁵⁹ Additionally, the complaint in *Fisher* alleged that the employer forced its employees to deliberately evade safety inspections so as to prevent the company from being cited for safety violations.⁶⁰ As a re-

55. *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 883 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8; *Lawton v. Alpine Engineered Prods., Inc.* 498 So. 2d 879, 880 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

56. *See Lawton*, 498 So. 2d at 880; *Fisher*, 498 So. 2d at 884.

57. *Fisher*, 498 So. 2d at 883-84; *Lawton*, 498 So. 2d at 881.

58. *See Fisher*, 498 So. 2d at 883.

59. *See id.*

60. *See id.*

sult of the employer's actions, the complaint alleged, an employee, Shaun E. Fisher, died from inhaling noxious methane gas.⁶¹ Despite these apparently atrocious facts, the court in *Fisher* held that, even if true, the allegations of the plaintiff's complaint did not rise to the level of an intentional tort.⁶² Thus, the court in *Fisher* set a high factual standard as to what constitutes "substantial" or "virtual" certainty of injury or death under Florida workers' compensation law.

After the supreme court's decision in *Fisher*, two appellate courts issued opinions in which the courts found an intentional tort exception to workers' compensation immunity. Specifically, the First District Court of Appeal in *Cunningham v. Anchor Hocking Corp.*⁶³ and the Third District Court of Appeal in *Connelly v. Arrow Air, Inc.*⁶⁴ found that an employer's conduct was substantially certain to result in injury or death to an employee.⁶⁵

In *Cunningham*, the plaintiffs alleged that their employer engaged in the following acts: (1) diverting a smokestack so that fumes would flow into, rather than outside of, the plant where the employees worked; (2) periodically turning off the plant ventilation system; (3) removing warning labels on toxic substance containers; (4) misrepresenting the toxic nature of substances; (5) knowingly refusing to provide safety equipment; and (6) misrepresenting the need for safety equipment and the dangers associated with working at a certain plant.⁶⁶ In holding that the employer's conduct rose to the level of an intentional tort, the court in *Cunningham* distinguished its case from the supreme court's opinion in *Fisher*:

The present case differs from *Fisher*, wherein the complaint alleged that "in all probability" injury would result to the employee from a one-time exposure to a dangerous gas. Here, the allegations are that injury was "a substantial certainty" and that there was repeated, continued exposure that was intentionally increased and worsened by [the employer's] deliberate and malicious conduct.⁶⁷

Thus, according to the First District Court in *Cunningham*, "substantial or virtual certainty" appears to require "repeated" and "continued" conduct that is "deliberate and malicious" and sounding in "fraud and deceit."⁶⁸

In *Connelly*, the evidence before the court suggested that the employer of the deceased plaintiffs engaged in the following conduct: (1)

61. *See id.*

62. *See id.* at 884.

63. 558 So. 2d 93 (Fla. 1st DCA 1990).

64. 568 So. 2d 448 (Fla. 3d DCA 1990).

65. *See Cunningham*, 558 So. 2d at 97; *Connelly*, 568 So. 2d at 451.

66. *See Cunningham*, 558 So. 2d at 96.

67. *Id.* at 97.

68. *Id.*

intentionally misstating the weight capacity of an aircraft; (2) intentionally and repeatedly keeping its aircraft in a defective condition; (3) concealing actual flight loads which resulted in reduced thrust and erroneous fuel calculations; (4) ignoring reports of imminent equipment failure; and (5) economically coercing employees to fly in violation of Federal Aviation Association regulations.⁶⁹ Eventually, one of the employer's airplanes crashed as a result of the conduct listed above, and the court found that the employer had engaged in conduct that was substantially certain to result in injury or death to its employees.⁷⁰ Much like the First District Court in *Cunningham*, the Third District Court in *Connelly* appeared to base its finding of "substantially certain" conduct on, *inter alia*, the fact that the employer in that matter routinely engaged in highly irresponsible behavior that was rooted in deceit and misrepresentation.⁷¹ In fact, the court in *Connelly* specifically connected the withholding of information to the substantially certain standard:

[W]here the employer, as in this case, withholds from an employee, knowledge of a defect or hazard which poses a grave threat of injury so that the employee is not permitted to exercise an informed judgment whether to perform the assigned task, the employer will be considered to have acted in a "belief that harm is substantially certain to occur."⁷²

The opinions in *Connelly* and *Cunningham* were the first post-*Lawton/Fisher* cases to give factual examples of what constitutes "substantial" or "virtual" certainty under the supreme court's intentional tort exception. Thus, by taking the supreme court's opinions in *Fisher* and *Lawton* together with the district courts' opinions in *Connelly* and *Cunningham*, "substantially certain" conduct can be defined as conduct that has "more than a strong probability of injury,"⁷³ that is greater than "gross[ly] neglig[en]t[er];"⁷⁴ that is greater than "reckless or wanton;"⁷⁵ that arises from "repeated, continued" conduct;⁷⁶ or that has an element of deceit that prevents an employee from "exercis[ing] an informed judgment whether to perform [an] assigned task."⁷⁷

69. See *Connelly*, 568 So. 2d at 449.

70. See *id.* at 451.

71. See *id.*

72. *Id.* (quoting *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046, 1052 (1984)).

73. *Lawton v. Alpine Engineered Prods, Inc.*, 498 So. 2d 879, 880 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

74. *Id.* at 881.

75. *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 884 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

76. *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97 (Fla. 1st DCA 1990).

77. *Connelly*, 568 So. 2d at 451.

2. *The Formative Cases*

After the opinions in *Lawton*, *Fisher*, *Connelly*, and *Cunningham*, Florida courts were left with an enigmatic and multifaceted definition of what constitutes conduct that is substantially or virtually certain to result in injury or death. Florida courts were also left with two factual examples of what constituted an intentional tort and two factual examples of what did not constitute intentional behavior. In the wake of those four decisions, the district-level appellate courts in Florida from 1991 to late 1998 consistently held that various employer conduct did not rise to the level of an intentional tort under the “substantially certain” standard.⁷⁸ Those opinions are based on various sets of logic and reasoning. In ruling that an employer’s conduct did not rise to the level of an intentional tort via the “substantially certain” standard, some courts relied on the absence of deceitful conduct by the employer.⁷⁹ Other courts relied on the strong “virtual certainty” language used by the supreme court in *Lawton* and *Fisher*,⁸⁰ while others based their decisions on somewhat novel grounds.⁸¹

Notwithstanding the lack of uniformity in reasoning among courts when evaluating alleged intentional behavior on the part of employ-

78. See *Turner v. PCR, Inc.*, 732 So. 2d 342 (Fla. 1st DCA 1998), *quashed*, 754 So. 2d 683 (Fla. 2000); *Williamson v. Water Mania, Inc.*, 721 So. 2d 372 (Fla. 5th DCA 1998); *Wilks v. Boston Whaler, Inc.*, 691 So. 2d 629 (Fla. 5th DCA 1997); *Gustafson’s Dairy, Inc. v. Phiel*, 681 So. 2d 786 (Fla. 1st DCA 1996), *holding limited in not relevant part by* *Hastings v. Demming*, 694 So. 2d 718 (1997); *Walton Dodge Chrysler-Plymouth Jeep & Eagle, Inc. v. H.C. Hodges Cash & Carry, Inc.*, 679 So. 2d 827 (Fla. 1st DCA 1996), *abrogated by* *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000); *Clark v. Gumby’s Pizza Sys., Inc.*, 674 So. 2d 902 (Fla. 1st DCA 1996), *abrogated by* *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000); *Subileau v. Southern Forming, Inc.*, 664 So. 2d 11 (Fla. 3d DCA 1995); *Mekamy Oaks, Inc. v. Snyder*, 659 So. 2d 1290 (Fla. 5th DCA 1995); *United Parcel Serv. v. Welsh*, 659 So. 2d 1234 (Fla. 5th DCA 1995), *abrogated by* *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000); *Thompson v. Coker Fuel, Inc.*, 659 So. 2d 1128 (Fla. 2d DCA 1995), *abrogated by* *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000); *Kenann & Sons Demolition, Inc. v. Dipaolo*, 653 So. 2d 1130 (Fla. 4th DCA 1995), *abrogated by* *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000); *General Motors Acceptance Corp. v. David*, 632 So. 2d 123 (Fla. 1st DCA 1994); *Timones v. Excel Indus.*; 631 So. 2d 331 (Fla. 1st DCA 1994); *Mirabal v. Cachurra Corp.*, 580 So. 2d 285 (Fla. 3d DCA 1991).

79. See, e.g., *Emergency One, Inc. v. Keffer*, 652 So. 2d 1233, 1235 (Fla. 1st DCA 1995) (noting no intentional misrepresentation to employee); *Thompson*, 659 So. 2d at 1130 (noting that the employer did not deceive the injured employee); *General Motors Acceptance Corp.*, 632 So. 2d at 126 (noting the elements of deceit in *Cunningham* and *Connelly*); *Timones*, 631 So. 2d at 333 (same).

80. See, e.g., *Kenann & Sons Demolition, Inc.*, 653 So. 2d at 1132 (recognizing that the virtual certainty standard is used by courts that have found intentional behavior); *Mirabal*, 580 So. 2d at 286 (stating that the “substantially certain” standard requires virtual certainty of injury or death).

81. See, e.g., *Williamson*, 721 So. 2d at 375 (implying that some sort of employer premeditation is required under the “substantially certain” standard); *Walton Dodge Chrysler-Plymouth Jeep & Eagle, Inc.*, 679 So. 2d at 830 (implying that the “substantially certain” standard requires affirmative acts by the employer that increase the risk of harm to the employee).

ers, a common theme eventually developed in workers' compensation immunity cases. Although court opinions dealing with workers' compensation immunity differ as to their legal reasoning regarding the "substantially certain" standard, almost every court dealing with the topic turned to the opinions in *Connelly*, *Cunningham*, and *Fisher* for factual examples as to what does and does not constitute an intentional tort under workers' compensation law.⁸² In other words, while Florida courts may not have been sure what "substantially certain" means as a matter of law, many courts depended on the opinions in *Connelly*, *Cunningham*, and *Fisher* to decide what constitutes an intentional tort as a matter of fact.⁸³ By combining varying legal definitions of "substantially certain" with the factual situations set forth in *Fisher*, *Cunningham*, and *Connelly*, post-1990 courts in Florida created a very high burden for employees to overcome when challenging their employers' workers' compensation immunity.⁸⁴

Despite the overwhelming majority of Florida court opinions that refused to find intentional torts under the "substantially certain" standard between 1991 and late 1998, the Fifth District Court of Appeal issued two opinions within that timeframe which found that an employer's alleged conduct did rise to the level of "substantial certainty."⁸⁵ In *Belhomme v. Rigal Plastics, Inc.*,⁸⁶ the court held that a material issue of disputed fact existed as to whether an employer's conduct was substantially certain to result in injury or death, due to the fact that the employer had removed one safety device from a plastics manufacturing machine.⁸⁷ Unfortunately, the court in *Belhomme* did not expound on the reasoning behind its ruling, so the opinion is of little academic value.

In *Myrick v. Luhrs Corporation*,⁸⁸ the court found that a plaintiff's complaint sufficiently alleged behavior that was substantially certain to result in injury or death to an employee.⁸⁹ Specifically, the court in *Myrick* stated:

Reading Myrick's complaint most strongly in his favor as we must do, he alleged his employer deliberately removed or disabled five essential safety devices designed to allow an operator to run the saw without exposing himself to certain danger. Myrick also al-

82. See, e.g., *Wilks*, 691 So. 2d at 631; *Gustafson's Dairy, Inc.*, 681 So. 2d at 790; *Walton Dodge Chrysler-Plymouth Jeep & Eagle, Inc.*, 679 So. 2d at 830; *Subileau*, 664 So. 2d at 12; *Kenann & Sons Demolition, Inc.*, 653 So. 2d at 1131; *General Motors Acceptance Corp.*, 632 So. 2d at 125; *Timones*, 631 So. 2d at 333.

83. See cases cited *supra* note 78.

84. See cases cited *supra* note 78.

85. See *Myrick v. Luhrs Corp.*, 689 So. 2d 416 (Fla. 5th DCA 1997); *Belhomme v. Rigal Plastics, Inc.*, 625 So. 2d 118 (Fla. 5th DCA 1993).

86. 625 So. 2d 118.

87. See *id.*

88. 689 So. 2d 416.

89. See *id.* at 419.

leged that he had no knowledge or warning he was being exposed to danger by merely operating the saw. From these allegations, one can infer some cover-up on the part of the employer.⁹⁰

Referring to its opinion in *Belhomme*, the court in *Myrick* implied that if the removal of one safety switch from a dangerous machine raises an issue of material fact as to whether an employer's behavior is substantially certain to result in injury, the removal of several safety switches accompanied by inferred deceit must state a claim in tort that would abrogate workers' compensation immunity.⁹¹ As noted by Judge Emerson R. Thompson Jr. in his dissent in *Myrick*, however, the court's opinions in *Belhomme* and *Myrick* appear misplaced in light of other Fifth District opinions and opinions written by other Florida courts.⁹² In fact, the *Belhomme* and *Myrick* opinions appear to be anomalous and are admittedly "close cases" at best.⁹³ However, the opinions in *Belhomme* and *Myrick* aptly demonstrate the varying legal expectations and standards brought about by the Florida Supreme Court's ill-defined exception to employers' workers' compensation immunity.

IV. *TURNER V. PCR, INC.* AND THE CONTINUED UNCERTAINTY AS TO WHAT "SUBSTANTIALLY CERTAIN" MEANS

A. *Turner v. PCR, Inc.*

Recently, in *Turner v. PCR, Inc.*,⁹⁴ the following question was certified to the Florida Supreme Court:

Is an expert's affidavit, expressing the opinion that an employer exhibited a deliberate intent to injure or engaged in conduct substantially certain to result in injury or death to an employee, sufficient to constitute a factual dispute, thus precluding summary judgment on the issue of workers' compensation immunity?⁹⁵

In response to the certified question, the supreme court stated that "in order to determine whether expert affidavits preclude summary judgment, we must first decide what a claimant-employee must show when attempting to prove the commission of an intentional tort by an employer in order to avoid an otherwise valid workers' compensation defense."⁹⁶ With this said, the court went on to state, "we

90. *Id.*

91. *See id.*

92. *See id.* (Thompson, J., dissenting) (citing *J.B. Coxwell Contracting, Inc. v. Shafer*, 663 So. 2d 659 (Fla. 5th DCA 1995); *Kline v. Rubino*, 652 So. 2d 964 (Fla. 3d DCA 1995); and *Timones v. Excel Indus.*, 631 So. 2d 331 (Fla. 1st DCA 1994)).

93. *See Myrick*, 689 So. 2d at 418 (stating that "[t]his is a close case").

94. 754 So. 2d 683 (Fla. 2000).

95. *Id.* at 684.

96. *Id.*

recognize and reaffirm the existence of an intentional tort exception to an employer's immunity, and hold that the conduct of the employer must be evaluated under an objective standard."⁹⁷ In fact, the supreme court in *Turner* specifically reaffirmed its creation of the intentional tort exception in *Eller* and its adoption of the "substantially certain" standard in *Fisher* and *Lawton*.⁹⁸ However, in an unexpected move, the supreme court receded from its opinions in *Fisher* and *Lawton* to the extent that those opinions suggest that "substantially certain to cause injury or death" means "virtually certain to cause injury or death."⁹⁹ The court also receded from its factual holdings in *Fisher* and *Lawton* to the extent that those opinions did not find behavior sufficient to constitute an intentional tort under the "substantially certain" standard.¹⁰⁰ Thus, in two passing footnotes, the supreme court in *Turner* overruled every case in Florida that has relied on the "virtual certainty" standard in *Fisher* and *Lawton* and/or every opinion that has relied on *Fisher* and *Lawton*'s factual determinations that certain behavior does not rise to the level of "substantial certainty." In addition to receding from *Fisher* and *Lawton*, the court in *Turner* stated as follows:

Although we continue to find that "substantial certainty" requires a showing greater than "gross negligence," we emphasize that the appropriate standard is "substantial certainty," not the heightened "virtual certainty" standard. As noted earlier, we upheld legislation in *Eller* that created an exception to a managerial coemployee's immunity when the coemployee acted with culpable negligence. *That culpable negligence exception is not unlike the "substantial certainty of injury" exception we recognized in Fisher and Lawton.*¹⁰¹

In other words, as opposed to the "virtual certainty" standard that the supreme court wrote of in *Fisher* and *Lawton*, the present members of the supreme court now equate the "substantially certain" standard to the supervisory/managerial culpable negligence standard in section 440.11(1). After setting forth this new view of "substantially certain to cause injury or death," the court in *Turner* went on hold that the employer's conduct at issue in that case raised a mate-

97. *Id.*

98. *See id.* at 687.

99. *See id.* at 687 n.4. The contention that this was an unexpected move from the court is based on the fact that the "virtual certainty" language in *Fisher* and *Lawton* had remained viable for 14 years without comment from the supreme court and the fact that many courts relied on the "virtual certainty" language as the basis for upholding workers' compensation immunity. *See cases cited supra*, note 78.

100. *See Turner*, 754 So. 2d at 691 n.8.

101. *Id.* at 687 n.4 (emphasis added) (internal citations omitted).

rial issue for a jury to decide.¹⁰² Like many Florida courts before it, the court in *Turner* relied on the facts of *Connelly* and *Cunningham* to justify its finding of “substantially certain” behavior, thereby fortifying *Connelly* and *Cunningham*’s positions as the de facto “gauges” of intentional behavior in workers’ compensation law.¹⁰³

*B. The Continued Uncertainty as to What
“Substantially Certain” Means*

With the supreme court’s decision in *Turner*, it seems that “substantially certain to cause injury or death” now means behavior: (1) that is akin to behavior that demonstrates a reckless indifference to the safety of injured employees (that is, culpable negligence);¹⁰⁴ (2) that arises from “repeated and continued” conduct;¹⁰⁵ and (3) that has an element of deceit that prevents an employee from “exercis[ing] an informed judgment whether to perform [an] assigned task.”¹⁰⁶ Despite this somewhat tortured definition that can be extrapolated from the court’s opinion in *Turner*, the supreme court’s recent attempt to clarify the meaning of “substantially certain to cause injury or death” falls short of being helpful. For example, the following questions, among others, remain unanswered after *Turner*:

- (1) Does behavior akin to culpable negligence, without an element of deceit, but with repeated and continued conduct, constitute an intentional tort?
- (2) Does behavior akin to culpable negligence, with an element of deceit, but without repeated and continued conduct, constitute an intentional tort?
- (3) Does behavior akin to culpable negligence, without an element of deceit, and without repeated and continued conduct, constitute an intentional tort?
- (4) What exactly is behavior akin to culpable negligence?

102. See *id.* The court in *Turner* also took great pains to note that the standard by which “substantial certainty” is evaluated is an objective standard. To justify its discussion of this seemingly apparent fact, the court cited to two district-level opinions that arguably required “true intent” to injure rather than objective evaluations of the circumstances. See *id.* at 688. To the extent that the objectivity of the “substantial certainty” standard was ever an actual issue, the court’s discussion of objectivity in *Turner* is correct. See 2 ARTHUR LARSON & LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION* § 68.15(c) (desk ed. 1999).

103. See *Turner*, 754 So. 2d at 690. For the proposition that *Connelly* and *Cunningham* are the de facto “gauges” of intentional behavior under Florida workers’ compensation law, see *supra* Part III.B.1.

104. See *Turner*, 754 So. 2d at 688 n.4, 689 n.5.

105. *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97 (Fla. 1st DCA 1990). This reasoning from *Cunningham* was adopted by the court in *Turner*. See *Turner*, 754 So. 2d at 690.

106. *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 451 (Fla. 3d DCA 1990). This reasoning from *Connelly* was adopted by the court in *Turner*. See *Turner*, 754 So. 2d at 690.

Review of post-*Turner* court opinions that have addressed workers' compensation immunity to date evidences the remaining confusion as to what constitutes an intentional tort. For example, in *Holderbaum v. ITCO Holding Co.*,¹⁰⁷ the court held that although the behavior at issue in that case may have been "perhaps grossly or even culpably [negligent]," the behavior was not substantially certain to result in injury or death.¹⁰⁸ With the supreme court's pronouncement in *Turner* that "substantially certain" conduct is "not unlike" culpable negligence,¹⁰⁹ one must wonder whether the court in *Holderbaum* was correct in drawing a distinction between culpable negligence and "substantial certainty." Another example of confusion can be found in *Gerth v. Wilson*.¹¹⁰ A mere two months after the supreme court's opinion in *Turner*, the Second District Court of Appeal certified a question to the supreme court regarding the scope of workers' compensation immunity.¹¹¹ Thus, it appears that fourteen years after the intentional tort exception to an employer's workers' compensation immunity was contemplated in *Fisher* and *Lawton*, employers and employees in Florida still have no real understanding of what constitutes an intentional tort under the "substantially certain" standard. With this in mind, a legislatively defined exception to an employer's workers' compensation immunity appears to be in order.

V. A CALL TO THE LEGISLATURE FOR A STATUTORILY DEFINED INTENTIONAL TORT EXCEPTION

As argued above, courts in Florida do not have a workable definition of what constitutes an intentional tort under workers' compensation law. Given this fact, employers and employees in Florida cannot reasonably depend on the exclusivity of the workers' compensation remedy, and this uncertainty goes against the legislative intent of the workers' compensation statute.¹¹² Also as argued above, the courts in Florida have varied in their application of the intentional tort exception to employer immunity, and this lack of consistency

107. 753 So. 2d 699 (Fla. 3d DCA 2000), *cert. denied*, 2000 Fla. LEXIS 2269 (Fla. Nov. 7, 2000).

108. *Id.* at 700.

109. *Turner*, 754 So. 2d at 687 n.4.

110. 774 So. 2d 5 (Fla. 2d DCA 2000).

111. *See id.* at 7. The certified question in *Gerth* asks the supreme court whether an OSHA violation abrogates workers' compensation immunity if the violation in question subjects the employer to a term of imprisonment exceeding 60 days. *See id.*

112. *See* FLA. STAT. § 440.015 (2000) (stating that the policy behind workers' compensation law is to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful employment at a reasonable cost to the employer").

goes against the very nature of the judicial system.¹¹³ With these problems in mind, a logical solution appears to be a statutorily defined exception for intentional torts committed by employers.

A. *The Percentage Definition*

With the need for a legislatively defined exception to workers' compensation employer immunity argued, the remaining question is how a statutory exception should be defined.¹¹⁴ Although many intentional tort exceptions are possible, this Article advances what can be called a "percentage definition" of intentional tort behavior. To appreciate such a definition, one must first explore the nature of behavior that is classified as intentional.

As noted by the Florida Supreme Court in *Spivey*, "the distinction between intent and negligence boils down to a matter of degree."¹¹⁵ At the high end of the culpability spectrum is behavior that is intentionally designed to harm another.¹¹⁶ For the purposes of this argument, actual intent to injure is classified with a 100% culpability rating. At the low end of culpability is behavior that unintentionally causes injury due to carelessness or negligence.¹¹⁷ Assume that simple negligence can be classified with a 20% culpability rating. Somewhere on the scale between actual intent to injure and negligence lies unintentional behavior that is so culpable that "[actual] intent [to injure] is legally implied and [the behavior] becomes assault rather than unintentional negligence."¹¹⁸

With the aforementioned assumptions made, one can classify implied intentional behavior as conduct that does not reach the 100% level of actual intent, but comes so close to it that the law will assume that the conduct was intentional. How much culpability is appropriate before imputing intentional conduct? Surely if actual intent is 100%, then implied intent should be at least 90%. This sort of "percentage rating" exercise forms the foundation of this Article's proposed definition of an intentional tort exception to workers' compensation employer immunity.

If one were to take the percentage rating system used above and apply it to the "substantially certain to cause injury or death" stan-

113. See *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1349 (6th Cir. 1992) (stating that our judicial system is "founded on the premise that justice and consistency are related ideas"); *supra* Parts III and IV.

114. This comment presupposes that an intentional tort exception to an employer's workers' compensation immunity is desirable. Although an argument can be made that intentional torts should fall within the purview of workers' compensation immunity, such normative arguments are beyond the scope of this Article.

115. *Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972).

116. See *id.*

117. See *id.*

118. *Id.*

dard used by Florida courts in evaluating workers' compensation immunity, one could arrive at a percentage figure that better explains what constitutes an excluded intentional tort. For example, the phrase "substantially certain to occur" might be fairly defined as an event that has at least a 75% chance of occurring.¹¹⁹ Thus, the phrase "substantially certain to result in injury or death" can be read as "75% certain to cause injury or death."

The problem with this definition of substantial certainty is that a 75% chance of injury does not square with the assumed 90% level of culpability used to define implied intentional behavior above. In other words, if one views implied intentional behavior as behavior that is almost as culpable as actual intentional behavior (90% culpability out of 100%), then it does not logically follow that a 75% chance of injury can be equated with an implied intent to injure an employee. What this also suggests is that "substantial certainty" simply does not rise to a level of implied intent.

The phrase "virtually certain to occur," however, *can* be fairly defined as an event that has at least a 90% chance of occurring.¹²⁰ If one reads "substantially certain to cause injury or death" as "virtually certain to cause injury or death," then the 90% chance of an employee being injured or killed squares with the 90% culpability rating given to implied intentional behavior. Stated another way, if one views implied intentional behavior as behavior that is almost as culpable as actual intentional behavior (90% culpability out of 100%), then it logically follows that a 90% chance of injury can be equated with an implied intent to injure an employee.¹²¹ In fact, this equality between virtual certainty and implied intent could explain the supreme court's earlier use of the term "virtual certainty" in further defining

119. See, e.g., *People v. Hall*, 999 P.2d 207, 218 (Colo. Ct. App. 2000) (equating a substantial risk of death with a 75% percent chance of death); *Eagle v. North Dakota Workers' Compensation Bureau*, 583 N.W.2d 97, 102 (N.D. 1998) (referencing a statute that finds substantial gainful employment as 75%); *Davis v. O'Hara*, No. 92-3314-I, 2000 WL 336749, at *1 (Tenn. Ct. App. 2000) (referencing a regulation that finds substantial compliance as 75% compliance); *Taylor v. Shigaki*, 930 P.2d 340, 344 (Wash. Ct. App. 1997) (finding substantial performance of a contract when an opening settlement offer comprised 75% of insurance policy limits).

120. See, e.g., *Kohl v. Woodhaven Learning Ctr.*, 865 F.2d 930, 937 (8th Cir. 1989) (stating that a 90% protection rate of immunization eliminated virtually any potential harm).

121. The author is aware that a quantified culpability percentage and a percentage chance of injury are not necessarily co-equal. For example, an employer with an actual intent to injure has a 100% culpability rating even if the employer attempts to injure an employee in a manner that has a very low percentage chance of actually causing injury. In such a case, an employer with actual intent could be held criminally responsible for attempting to injure an employee, even if the employee was not actually injured. In the realm of implied intent and workers' compensation immunity, however, implied intent is primarily driven by the degree of risk associated with an employer's conduct, thus making the degree of risk and culpability interrelated.

the phrase “substantially certain to cause injury or death” in *Fisher* and *Lawton*.¹²²

With the fundamental precepts of a “percentage definition” of implied intentional behavior defined, a proposed intentional tort exception to employer workers’ compensation immunity can be offered. Further, the 90% culpability rating seems most appropriate for defining implied intentional behavior; in turn, 90% seems more aptly described as “virtually certain.” Thus, the following intentional tort exception should be used in section 440.11, *Florida Statutes*:

Pursuant to this section, employers are provided with immunity from suit by their employees so long as the employer has not engaged in any intentional act designed to result in or that is virtually certain to result in serious injury or death to the employee. An act is considered to be virtually certain to result in serious injury or death to an employee when that act will result in serious injury or death 90% of the times that the act is done.¹²³

With this proposed definition stated, however, some additional questions arise. As noted in Part IV.B., the current *Turner* definition of “substantially certain to cause injury or death” is behavior that: (1) is akin to behavior that demonstrates a reckless indifference to the safety of injured employees (that is, culpable negligence);¹²⁴ (2) arises from “repeated and continued” conduct;¹²⁵ and (3) has an element of deceit that prevents an employee from “exercis[ing] an informed judgment whether to perform [an] assigned task.”¹²⁶ Although the proposed “percentage definition” detailed above vitiates subsection (1) of the *Turner* definition, the elements of deceit and continued conduct in subsections (2) and (3) must be addressed.

122. See *Lawton v. Alpine Engineered Prods., Inc.*, 498 So. 2d 879, 880 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8; *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 884 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

123. This proposed definition may raise concerns with some readers due to the fact that an actual percentage is used to quantify the term “virtual certainty.” Specifically, some might argue that using a percentage will invite a “war of experts” in which plaintiffs’ experts proffer that conduct was 90% certain to cause injury while defense experts claim that the relevant conduct was below 90%. While such concerns may or may not be well-founded, the author asserts that a numeric quantification would serve as a stable guidepost that courts could use to determine substantial and/or virtual certainty, rather than the current system of “I know it when I see it.” Under the current court-created intentional tort exception, one judge may view “substantially certain” conduct as conduct that is more likely than not to result in injury (51%) while another judge may view such conduct as imminent and sure to occur (99%). With the proposed percentage exception, the two hypothetical judges above could issue consistent rulings by relying on a legislative definition within section 440.11.

124. See *Turner v. PCR, Inc.*, 754 So. 2d 683, 688 n.4, 689 n.5 (Fla. 2000).

125. *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97 (Fla. 1st DCA 1990). This reasoning from *Cunningham* was adopted by the court in *Turner*. See *Turner*, 754 So. 2d at 690.

126. See *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 451 (Fla. 3d DCA 1990). This reasoning from *Connelly* was adopted by the court in *Turner*. See *Turner*, 754 So. 2d at 690.

1. *Repeated and Continued Conduct*

As discussed above, the court in *Connelly* suggested that “substantially certain” conduct must be coupled with an element of repeated and continued actions on the part of an employer.¹²⁷ Under the statutory intentional tort exception proposed in this Article, continued and repeated conduct by the employer might or might not factor into a court’s determination of whether certain behavior was virtually certain to result in injury or death. For instance, an employer may repeatedly ask its employees to work in conditions that have a 50% chance of resulting in injury or death. But under the proposed provision, no matter how many times an employer asks its employees to work in such conditions, the employer’s conduct would never rise to the level of virtual certainty; a 50% chance of risk will not equal a 90% chance of risk no matter how many times an employee is exposed to that risk. On the other hand, if an employer engages in repeated and continued conduct that acts to *increase* an employee’s risk of injury each time the employer acts, such repeated and continued conduct could eventually result in virtual certainty. An example of such behavior would be where an employer asks an employee to fly an airplane that is low on oil. The risk of flying the aircraft with low oil may initially be a 60% chance of injury or death, but each time the employer has the employee fly, the risk increases by 5%. As the increased risk of injury to the employee draws closer to the 90% virtual certainty mark, the employer’s repeated and continued conduct moves closer to being an intentional tort. Therefore, rather than being an independent element of an implied intentional tort, repeated and continued behavior on the part of an employer is merely a factor in determining the risk of harm to an employee under the proposed statutory definition.

2. *Elements of Deceit*

The third apparent element of the *Turner* definition of “substantially certain” is that an employer’s conduct must have an element of deceit that prevents an employee from “exercis[ing] an informed judgment whether to perform [an] assigned task.”¹²⁸ In the statutory exception proposed in this Article, however, deceit or misrepresentation by an employer is merely a factor to be considered in determining virtual certainty, much like the issue of repeated and continued behavior discussed above. For example, suppose that an employer asks an employee to engage in activity that has a 75% chance of in-

127. See *Connelly*, 568 So. 2d at 451.

128. *Id.*; see also *Turner*, 754 So. 2d at 690; cases cited *supra* note 78.

jury or death. This act alone would not meet the 90% virtual certainty standard.

If, however, the employer conceals the risks associated with the activity so that the employee cannot exercise informed judgment as to how to safely perform the task or whether to perform the assigned task at all, then the risk of injury to the employee may, but may not be enhanced to the virtual certainty standard. A good example would be where an employer asks an employee to mix certain volatile chemicals together and lies to the employee by telling her that the mixture will not be toxic. Although mixing the chemicals while wearing protective equipment has, say, a 50% chance of causing injury or death, the employer's lie by causing the employee to forgo the use of protective gear, might raise the risk of injury or death to as much as 95%. In this scenario, the employer would be liable for an intentional tort due to the fact that his or her misrepresentation caused the risk of injury to increase to 95%. In other words, concealment, misrepresentation, or deceit may raise the risk of injury associated with a given task from below 90% to 90% or greater. Therefore, deceitful employer behavior can easily be factored into a court's "virtual certainty" evaluation.¹²⁹

B. The Percentage Definition Applied to Past Florida Cases

With a proposed intentional tort exception set forth, a question remains as to how a percentage definition of intentional behavior would work in real life. By taking factual scenarios from past workers' compensation immunity cases in Florida and applying the exception proposed herein, one can see how a proposed percentage definition would work in practice.

1. Virtual Certainty Without Deceit or Repeated Conduct

As noted above, the "virtual certainty" standard proposed in this Article would require a 90% chance of serious injury or death to defeat an employer's workers' compensation immunity. With a slight modification, the facts found in *Fisher* present an excellent example of what would constitute virtual certainty without any acts of deceit or repeated and continuous conduct. Recall that in *Fisher*, the plaintiff's complaint alleged that the defendant-employer required its employees to enter pipes that contained poisonous gases in order to

129. It is important to note that under the exception proposed in this Article, deceitful conduct in and of itself does not lead to an intentional tort. In some cases, an employer may tell numerous lies and make numerous misrepresentations, but the risk of injury to an employee may still remain very low. This author asserts that this distinction is an important one, but it is not clear under Florida's current intentional tort exception to workers' compensation immunity.

clean the pipes with high-pressure hoses.¹³⁰ The plaintiff further alleged that the employer failed to provide its employees with oxygen masks, gas detection equipment, rescue equipment, and other safety equipment required under federal law.¹³¹ Assume, however, that the poisonous gas in *Fisher* was cyanide as opposed to methane gas. Assume further that the employees in *Fisher* knew that the pipes contained toxic gases, and that their employer had forced the employees to clean the pipes “just this once” under the threat of termination. In such a case, any reasonable judge would find that the employer in the modified *Fisher* scenario had subjected its employees to a virtual certainty of injury or death. First, as a matter of mere common sense, most reasonable laymen would likely believe that subjecting an unprotected human to cyanide gas fumes in a close-quartered environment would result in injury or death at least 90 out of 100 times.¹³² Secondly, a plaintiff in the aforementioned scenario could use expert testimony to prove that of 100 persons subjected to concentrated cyanide gas, 90 would die.¹³³ Although the application of the 90% standard in this example requires the use of some subjective “gut feelings,” a percentage definition provides a stable guidepost that can be used to focus intuitive evaluations made by judges and juries.¹³⁴

2. *Virtual Certainty via Continued and Repeated Behavior*

In *Connelly*, the evidence before the court suggested that the employer of the deceased plaintiffs engaged in the following acts: (1) intentionally misstating the weight capacity of an aircraft; (2) intentionally and repeatedly keeping its aircraft in a defective condition; (3) concealing actual flight loads which resulted in reduced thrust and erroneous fuel calculations; (4) ignoring reports of imminent equipment failure; and (5) economically coercing employees to fly in violation of Federal Aviation Association regulations.¹³⁵ To illustrate

130. See *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 883 (Fla. 1986), *overruled in part by Turner*, 754 So. 2d at 691 n.8.

131. See *id.*

132. Admittedly, the author has no evidence to support this proposition. However, the assertion made here seems to be pure common sense, just as one might reasonably assume that at least 90 persons out of 100 jumping off of the Empire State Building would die.

133. The use of expert testimony to help prove implied intentional torts is not a novel proposition in Florida workers' compensation law. In fact, the plaintiffs in *Turner* used expert testimony to help establish their case. See *Turner v. PCR, Inc.*, 754 So. 2d 683, 684 (Fla. 2000).

134. A good analogue is the use of the “preponderance of the evidence” standard in civil cases. Simply asking a jury to find whether a case has been proven by a preponderance of the evidence invites the same problematic subjectivity that has plagued the “substantially certain” standard used by Florida courts in deciding workers' compensation immunity questions. However, if the same jury is instructed that a preponderance of the evidence is more than 50%, the chance of varying decisions is minimized.

135. *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 449 (Fla. 3d DCA 1990).

how the proposed standard might be applied to these facts, first assume that each time the employer forced its employees to fly in an aircraft, the chance of injury or death to the employees was 65%. In such a scenario, the employer's behavior would not rise to the level of virtual certainty and thus would never constitute an intentional tort. While the employer's repeated behavior might constitute culpable *negligence* (meaning a "reckless indifference" to the employees' safety),¹³⁶ it would not constitute *implied intent* to injure the employees under the virtual certainty standard.¹³⁷

However, assume that the *Connelly* employer's failure to address continued reports of imminent equipment failure on its airplanes increased the risk associated with each flight by 5%. Each time that the crew was forced to fly the defective aircraft, the employer's conduct would move closer to being an intentional tort. When and if the airplane in question finally crashed, a judge or jury could look at the totality of the employer's behavior to determine whether the risk of the final flight had risen to 90% or greater. Obviously, expert testimony could be used to substantiate the per flight increase of risk that would be added to the base risk of flying a defective aircraft.

3. *Virtual Certainty via Deceit*

In some workplace situations, employees may be forced to work with dangerous chemicals or substances. The risk of working with such substances may be high, but the use of precaution and proper protective gear may lower that risk to acceptable levels. In *Cunningham*, as discussed above, the employer removed warning labels on toxic substances, misrepresented the toxic nature of substances to its employees, knowingly provided inadequate safety equipment to its employees, and misrepresented the level of toxic substances present in its plant.¹³⁸ Assume for the sake of argument that the risk of injury from working with the toxic substances in *Cunningham* was 25% if protective gear were used and proper precautions were taken. Further assume that the risk of injury *without* protective gear and precautions was 95%. By misrepresenting the need for safety equipment and precautions to its employees, the employer in this scenario would have prevented the employees from reducing their 95% exposure to serious injury down to 25%, and it would thus be liable in tort.

136. See *Turner v. PCR, Inc.*, 754 So. 2d 683, 689 n.5 (Fla. 2000).

137. One must keep in mind that indifference to injury and an intent to injure are two different things. Although being indifferent to whether an employee is injured is reprehensible, it is not, by definition, the same as actual or implied intent to injure.

138. *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 96 (Fla. 1st DCA 1990).

4. *No Virtual Certainty*

In *Mekamy Oaks, Inc. v. Snyder*,¹³⁹ an employee, Leon Snyder, used a riding lawn mower in the normal course of his employment as a groundskeeper.¹⁴⁰ At some point, the lawn mower in question began losing power, and Snyder's supervisor told him that a malfunctioning safety switch on the mower was causing the power loss.¹⁴¹ After determining the origin of the power loss, Snyder's supervisor told him that he was going to remove the safety switch to solve the problem.¹⁴² Snyder remarked to his supervisor that someone could be injured by operating the mower without the safety switch but continued to use the mower for several days after the switch was removed without incident.¹⁴³ Some time after the switch was removed, however, Snyder operated the mower on a sloped surface and the mower reared up and ejected Snyder causing the mower blade to cut his foot.¹⁴⁴ Snyder contended that the safety switch that had been removed would have prevented his injuries.¹⁴⁵

In the factual scenario above, it can be argued that there was not a 90% chance of serious injury or death to Snyder and thus no intentional tort under workers' compensation law.¹⁴⁶ Put in simple terms, the average person's experience with riding lawnmowers is that they rarely rear up and eject the rider at an angle which causes the rider's foot to be exposed to the blade that is housed on the underside of the mower. In *Mekamy Oaks*, Snyder's accident appears to have been a fluke in that the injury was predicated on the following combination of facts: (1) he drove the subject lawnmower on a sloped surface which caused the mower to rear up; (2) the rearing action caused him to be ejected; (3) the rearing action exposed the mower blade at an angle that crossed Snyder's trajectory as he fell from the mower; and (4) Snyder's exposure to the blade was sufficient to cause serious injury.¹⁴⁷ In such a case, an expert could be used to testify as to the

139. 659 So. 2d 1290 (Fla. 5th DCA 1995).

140. *Id.* at 1291.

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

146. Again, the author has no hard evidence to support this position but instead relies on a reasonable "gut feeling" based on the proposed virtual certainty standard. Although relying on "gut feelings" is not an ideal method of administering justice, the court in *Mekamy Oaks* appeared to do just that, considering that the opinion gives no commentary to support its holding that Snyder's employer did not commit an intentional tort. *See id.* With the proposed percentage definition of virtual certainty, the court in *Mekamy Oaks* could have expressed its intuitive decision in quantifiable percentage-of-risk terms, rather than simply finding—without comment—that the behavior in question did not rise to the level of an intentional tort.

147. *See id.*

unlikelihood of all four of these events coming together and the cumulative risk of serious injury if they did.

As seen from the four examples above, the application of the percentage definition offered in this Article yields logical results that are consistent with the policies behind Florida's workers' compensation law. When applied to "real life" workers' compensation immunity cases, the proposed virtual certainty definition minimizes the need for unbridled subjective court decisions and provides a stable evidentiary standard that can be developed with expert testimony.

VI. CONCLUSION

In Florida, workers' compensation law plays an important social role due to the fact that it "assure[s] the quick and efficient delivery of disability and medical benefits to an injured worker and facilitate[s] the worker's return to gainful employment at a reasonable cost to the employer."¹⁴⁸ For the provision of workers' compensation benefits to be effective, employers and employees alike must renounce some of their common law rights and defenses under the law and look to workers' compensation as the exclusive remedy for qualifying workplace injuries.¹⁴⁹

With this fact in mind, the exclusivity provisions found in Florida's workers' compensation statutes must be applied consistently and with equal force to both employers and employees. Under the current court-created intentional tort exception to an employer's immunity, employers and employees in Florida have no reasonable certainty as to the scope of the workers' compensation remedy. This uncertainty degrades the policies behind workers' compensation law.

Instead of relying on the ill-defined and subjective intentional tort exception created by the Florida Supreme Court, the Florida Legislature should enact an intentional tort exception that can be applied in a fair and consistent manner. Adopting a standard that requires a probability of 90% to show "virtual certainty to cause serious injury or death," the legislature could provide clear, objective guidance as to what sort of behavior constitutes an implied intentional tort that would abrogate an employer's workers' compensation immunity. With such a statutorily defined exception in place, courts in Florida could evaluate the exclusivity of the workers' compensation remedy in a fair and consistent manner that furthers the policies that lie at the heart of workers' compensation law.

148. FLA. STAT. § 440.015 (2000).

149. *See id.*