

PRODUCTS LIABILITY

The 'Millison' Exception for Injuries During Employment

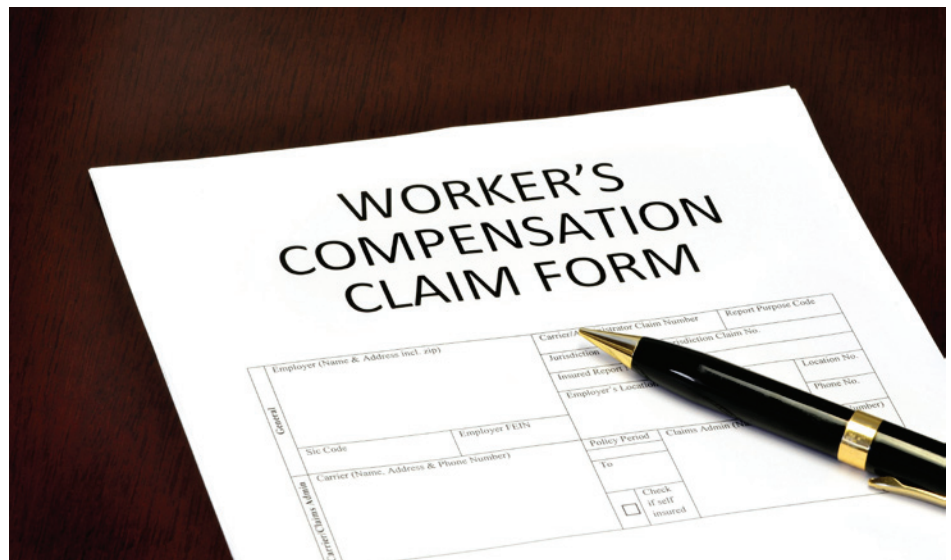
The evolution from Laidlow to Van Dunk

Edward J. Fanning Jr., David R. Kott,
Jean P. Patterson and Christopher A. Rojao

The New Jersey Workers' Compensation Act (WCA) provides the exclusive remedy for claims against an employer for injuries sustained during employment. In exchange for providing certain payment without regard to fault, employers are provided immunity from tort liability arising out of an employee's on-the-job injuries. That immunity, commonly referred to as the exclusivity bar, can only be overcome if the employee can show that the employer committed an "intentional wrong." Several cases centered on the issue of what constitutes an "intentional wrong." Those cases have gradually eroded the immunity afforded to employers under the WCA by expanding the definition of "intentional wrong." However, in *Van Dunk v. Reckson Associates Realty Corp.*, 210 N.J. 449 (2010), the court reversed course and reaffirmed the underlying principles of *Millison*, holding that not every deliberate act by an employer that leads to an employee injury is an intentional wrong.

The court first addressed the intentional wrong provision in *Millison v. E.I.*

Fanning is a partner at McCarter & English in Newark and chairman of its products liability group. He represented Sears, Roebuck & Co. in Fisher v. Sears, Roebuck & Co., discussed in this article. Kott is a partner with the firm with extensive jury trial experience in the area of products liability. Patterson and Rojao are associates in the firm's products liability group.



Dupont de Nemours & Co., 101 N.J. 161 (1985), where it articulated a two-prong test for determining whether an employer's conduct is sufficiently egregious to circumvent the statutory bar. First, the employer must possess a "substantial certainty" that harm will result from its action. The court explained that "mere knowledge and appreciation of a risk—even the strong probability of a risk—will come up short of the 'substantial certainty' needed to find an intentional wrong." In addition to satisfying that "conduct prong," a plaintiff-employee bears the burden of establishing a second "context prong," requiring that the injury and the surrounding circumstances are "plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the [Workers'] Compensation Act" and not simply "a fact of life of industrial employment[.]" *Id.* at 179.

In *Millison*, the plaintiffs were former du Pont employees who were exposed to asbestos while working at du Pont industrial plants. The plaintiffs' complaint alleged that du Pont and its company doctors knew the health risks associated with asbestos exposure, and deliberately exposed plaintiffs to asbestos without informing them of those risks. The plaintiffs also alleged that du Pont and its doctors became aware that the plaintiffs had contracted serious illnesses due to their exposure and fraudulently concealed that information. Applying the two-prong test, the court first held that knowingly exposing employees to asbestos was not an "intentional wrong" because du Pont did not act with substantial certainty that harm would result and because occupational disease was a fact of life of industrial employment. However, the court found a valid cause of action against du Pont for the plaintiffs' second

claim, concealment of the plaintiffs' illnesses. The court distinguished between "tolerating in the workplace conditions that will result in a certain number of injuries or illnesses, and, ... actively misleading the employees who have already fallen victim to those risks of the workplace." *Id.* at 182. Importantly, the court would return to this concept of "actively misleading" in *Van Dunk*.

Nearly two decades later, in *Laidlow v. Hariton Machinery*, 170 N.J. 602 (2002), the court was called upon to resolve conflicting interpretations of the *Millison* test in a case involving the removal of a safety guard from a dangerous piece of machinery. In *Laidlow*, the plaintiff was seriously injured when his hand became caught in a rolling mill. For 13 years, the employer disengaged the rolling mill's safety guard, engaging it only when Occupational Safety and Health Administration (OSHA) inspectors came to the plant. On two occasions, the plaintiff and a co-worker reported that their hands were nearly crushed by the machine, and the plaintiff repeatedly asked to reinstall the guards.

In finding for the plaintiff, the court explained that a subjective intent to injure was not necessary to establish an intentional wrong; it was sufficient that the employer knew an injury was substantially certain to result. Significant to the court's decision were the "prior close-calls, the seriousness of any potential injury that could occur, Laidlow's complaints about the absent guard," and the employer's "deliberate and systematic deception of OSHA." *Id.* at 622. With respect to the context prong, the court held that the legislature could not have considered the employer's conduct to be a fact of life of industrial employment. Yet, the court explicitly declined to adopt a per se rule that removal of safety devices or OSHA violations constitute an intentional wrong. That open-ended opinion laid the groundwork for several safety device removal lawsuits.

Most notably, in 2003, the court handed down a trilogy of decisions addressing—and effectively expanding—the circumstances under which an employer's conduct would constitute an intentional wrong.

In *Crippen v. Central Jersey Concrete Pipe Co.*, 176 N.J. 397, 409 (2003), the court reversed summary judgment in favor of an employer, holding that a jury could conclude that the employer was aware that its deliberate failure to resolve past OSHA violations was substantially certain to cause serious injury or death to an employee. In that case, the plaintiff was killed when he fell off an unsecured ladder perched on top of a narrow wooden plank into a sand hopper. Eighteen months earlier, OSHA cited the employer for several violations, which the employer failed to correct, despite representing to OSHA that the violations were being addressed. In fact,

the defendant's Environmental Health and Safety Manager testified in another proceeding that he knew there was a substantial certainty that an employee could die due to the unsecured OSHA violations. *Id.* at 403.

Similarly, in *Mull v. Zeta Consumer Products*, 176 N.J. 385 (2003), the court held that the employer's deactivation of a safety interlock device on a "winder" machine, which caused the plaintiff's injury, precluded summary judgment in favor of the employer. The court noted that the employer had knowledge of the machine's dangerous condition due to earlier accidents, employee complaints, and OSHA citations. Absent from *Mull*, however, was any allegation that the employer attempted to deceive OSHA. *Id.* at 392 (explaining that "no one fact" compelled the court's holding in *Laidlow*, rather, the decision was based on the totality of the circumstances).

Providing balance to *Crippen* and *Mull*, the court in *Tomeo v. Thomas Whitesell Construction Co.*, 176 N.J. 366 (2003), held that an employer's conduct in taping down a safety lever on a snow blower was not an intentional wrong. According to the court, the key distinction was that the snow blower was a consumer product—not an industrial machine—with warning labels intended to prevent the very injuries the plaintiff sustained. The court reasoned that the plaintiff should have been aware of the obvious risks associated with placing his hands into the snow blower's chute, and, therefore, the plaintiff's claim was barred by the WCA. The court further noted that, assuming the employer had deactivated the safety lever, the employer's conduct was at most "grossly negligent," which could not satisfy the conduct prong of *Millison*.

The *Crippen-Mull-Tomeo* trilogy implied that a deliberate failure to cure an OSHA violation constitutes an intentional wrong regardless of the obviousness of the risk involved, but that an employee's disregard of a conspicuous risk will undercut his claim even where the employer's conduct is grossly negligent.

As the court was deciding the safety device removal cases, lower courts were busy interpreting *Millison* in the non-industrial context. In that context, courts were unwilling to find an intentional wrong where an employer knowingly put an employee at risk, but lacked exclusive control over the harm inflicted on that employee. See, e.g., *Fisher v. Sears, Roebuck & Co.*, 363 N.J. Super. 457 (App. Div. 2003); *McGovern v. Resorts Int'l Hotel*, 306 N.J. Super. 174 (App. Div. 1997). In *Fisher*, the court summarily dismissed a civil action against Sears by a guard who was fatally shot in a nighttime robbery while transferring money from a Sears store to a nearby building. For six months before the accident, Sears allegedly failed to comply with a company policy requiring transfers to

be made during daylight hours and requiring at least two guards to effectuate such transfers. The court held that Sears' alleged failure to follow corporate policy was not an intentional wrong, because it was not a virtual certainty an employee would be injured. The court further held that dangerous activity "is a fact of life for security guards and the type of hazard of employment that the legislature anticipated would be compensable."

Most recently, in *Van Dunk*, the court arguably retreated from its earlier rulings in *Laidlow*, *Crippen* and *Mull*, concluding that not every "willful" OSHA violation constitutes an intentional wrong. In *Van Dunk*, the plaintiff sustained serious injuries when a trench collapsed at a construction site. The plaintiff was instructed to go into the trench by his supervisor, knowingly in violation of OSHA safety regulations and without the protective systems required for using trenches. An OSHA investigation found that the employer committed a "willful violation" and imposed a \$50,000 fine. In concluding that the employer's conduct did not constitute an intentional wrong, the court distinguished *Van Dunk* from the "more egregious circumstances" involving intentional and persistent misconduct. *Van Dunk*, 210 N.J. at 471. The court emphasized that *Millison*, *Laidlow*, *Crippen* and *Mull* all involved an employer's affirmative act of removing a safety device, prior OSHA violations or deliberate deceit regarding the condition of the workplace. Furthermore, the court found that a trench collapse at a construction site was not "so far outside the bounds of industrial life as never to be contemplated for inclusion in the Act's exclusivity bar." *Id.* at 474.

The *Van Dunk* decision undoubtedly brings the intentional wrong standard into greater focus by articulating what had been implied in other cases; namely, that there must be some affirmative action or active concealment by the employer, which makes a workplace injury or death substantially certain to occur. In other words, after *Van Dunk*, the "conduct" prong of *Millison* is satisfied only where an employer's deliberate act or noncompliance creates a risk of harm or an employer purposefully conceals a risk of harm, and the employer does so with a virtual certainty that harm will result. As demonstrated by the lineage of cases interpreting *Millison*, that "virtual certainty" can be established by previous OSHA violations, ignored employee complaints and prior close calls. Conversely, where the risk realized is created by an instrumentality not squarely within the employer's control, employers will likely continue to enjoy immunity no matter how serious or certain the resultant injury. With respect to the context prong, cases like *McGovern* and *Fisher* make clear that *Millison* applies with equal force to commercial workplace injuries. •