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ALERT

NEW JERSEY SUPREME COURT HOLDS THAT “WILLFUL” OSHA VIOLATION DOES NOT REMOVE CLOAK OF PROTECTION PROVIDED TO EMPLOYERS BY WORKERS’ COMPENSATION ACT

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On June 26, 2012, in *Van Dunk v. Reckson Associates Realty Corp.*, the New Jersey Supreme Court reaffirmed the “formidable” hurdle employees need to jump over before an employer can be held liable in tort for an employee’s workplace injury.

The New Jersey Workers’ Compensation Act (Act) requires payment, without regard to fault, to an employee who sustains workplace injuries. In exchange for this remedy, the employer is generally immune from liability and the employee surrenders all other forms of relief, including the right to sue the employer. However, this exclusive-remedy requirement can be overcome if the injury was the result of the employer’s “intentional wrong.” The intentional wrong test is met where: (1) the employer knows that its actions are substantially certain to result in injury or death to the employee; and (2) the resulting injury is (a) more than a fact of life of industrial employment and (b) beyond anything the legislature intended the Workers’ Compensation Act to immunize.

Against that legal framework, the Court assessed the following facts in *Van Dunk*. On August 10, 2004, Van Dunk was working for defendant James Construction Company (James) as a laborer assisting in site-preparation work on a construction project. James was excavating a 20 foot trench to relocate a dewatering

sump in a retention pond. The task had been affected by thunderstorms and heavy rain, and rain was again expected later that day, creating a motivation to complete the sump relocation before the rain arrived. As the crew worked, filter fabric that was being laid in the trench from outside the trench became tangled. Van Dunk volunteered to go into the trench to straighten the filter fabric, but the project superintendent told him not to do so because of risks attributable to the ground conditions. However, as problems persisted with laying the filter fabric, the project superintendent told Van Dunk to go into the trench and straighten out the fabric. In so doing, the supervisor admittedly, and knowingly, violated OSHA regulations, which prohibit workers from entering a trench that is deeper than five feet without appropriate protective systems. Shortly after Van Dunk entered the trench, it caved in, burying him to his chest, and causing multiple injuries.

Following the accident, OSHA investigated and concluded that James had committed a “willful” violation, the most serious form of OSHA violation.

In August 2006, Van Dunk and his wife filed a lawsuit against the general contractor, James and others for damages arising out of his injuries from the trench collapse. The trial court granted James’s motion for summary judgment after concluding that Van Dunk

failed to show that James's conduct met the intentional-wrong standard for overcoming the exclusive-remedy provision of the Workers' Compensation Act. The Appellate Division reversed, holding that Van Dunk had produced sufficient evidence to show that James had committed an intentional wrong.

The New Jersey Supreme Court reversed the Appellate Division, concluding that the employer's conduct fell short of an intentional wrong, and therefore, the action was barred as to the employer.

In so concluding, the Court explained that a "willful" OSHA violation is but one factor to be considered in the intentional wrong analysis. To give it more weight, the Court noted, would put in the hands of OSHA inspectors responsibility for determining what the Legislature meant by an "intentional wrong."

The Court reiterated that a probability or knowledge that injury or death can result is not sufficient to demonstrate an intentional wrong. Nor does a showing of "gross negligence" or reckless conduct suffice. Instead, an intentional wrong must amount to a "virtual certainty that bodily injury or death will result."

Applied to the facts of Van Dunk, the Court explained that the James on-site supervisor made a

quick, poor decision sending Van Dunk into the trench, violating safety protocol. However, the supervisor's conduct was not substantially certain to lead to injury or death. In the Supreme Court's words, while the wrong was "exceptional," it was not "intentional."

In sum, and much to the disappointment of the plaintiffs' bar, the New Jersey Supreme Court did not use Van Dunk as a vehicle to expand the reach of the intentional wrong exception to the workers' compensation exclusivity bar. Indeed, as it was before Van Dunk, it remains the rare and extreme factual circumstance that will overcome the exclusivity bar.

Nevertheless, it is important for employers to familiarize themselves, and comply with the OSHA regulations that govern their business, train employees on safety protocol, discipline employees who violate safety protocol, provide employees with avenues to address safety issues, and take appropriate action to promptly redress employee safety concerns and/or OSHA citations.

If you have questions about this Alert, please contact Ian W. Siminoff at 973.994.7507 or isiminoff@foxrothschild.com or any member of Fox Rothschild's [Labor and Employment Department](#).



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