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Workers' Compensation: Exclusivity, Common Law Remedies, and the Reconsideration of the Actual Intent Test - Delgado v. Phelps Dodge Chino, Inc.

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WORKERS' COMPENSATION: Exclusivity, Common Law Remedies, and the Reconsideration of the Actual Intent Test—*Delgado v. Phelps Dodge Chino, Inc.*

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I. INTRODUCTION

In *Delgado v. Phelps Dodge Chino, Inc.*,[1] the New Mexico Supreme Court overruled the use of the "actual intent test"[2] as the sole test to determine when an employee may overcome the Workers' Compensation Act[3] exclusivity provisions and use common law remedies against an employer for injuries sustained as a result of non-accidental employer behavior. The court held that employees may use common law tort remedies when "an employer willfully *or* intentionally injures a worker."[4] In adopting "willfulness" as behavior sufficient to overcome the Act's exclusivity provision, the court expanded an employee's ability to recover in tort by lowering the level of employer misconduct required to escape exclusivity, while preserving the intent of the Act by subjecting both employers and employees to the same standard of conduct and the equivalent consequences for misconduct.[5] This Note discusses the historical context of the New Mexico workers' compensation system, examines the *Delgado* court's rationale, provides a critical analysis of the court's reasoning, and explores the implications of the *Delgado* decision on the future of workers' compensation litigation in New Mexico.

II. STATEMENT OF THE CASE

After the death of her husband, plaintiff Michelle Delgado, as personal representative, individually, and as the mother of Danielle and Gabrielle Delgado, sued Phelps Dodge Chino (Chino), her husband's employer, and two of its employees.[6]

Mr. Delgado worked at the Phelps Dodge smelting plant in Hurley, New Mexico, for two years. The smelting plant distills copper ore from unusable rock, called "slag," by superheating the unprocessed rock to a temperature in excess of 2,000 degrees Fahrenheit. The ore rises to the top, where it is collected, while the slag moves to the bottom of the furnace, where it drains though a valve called a "skim hole." The slag then passes down a chute into a fifteen-foot-tall cauldron called a

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1. 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

2. The court expressly overruled the following cases in which the "actual intent" test had been adopted and followed as law in New Mexico: Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995); Flores v. Danfelser, 127 N.M. 571, 985 P.2d 173 (Ct. App. 1999); Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 847 P.2d 761 (Ct. App. 1993); Maestas v. El Paso Natural Gas Co., 110 N.M. 609, 798 P.2d 210 (Ct. App. 1990); Gallegos v. Chastain, 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981); Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).

3. N.M. STAT. ANN. §§ 52-1-1 to -70 (1991 Repl. Pamp. & Supp. 2001); N.M. STAT. ANN. § 52-5-1 (1991 Repl. Pamp. & Supp. 2001).

4. *Delgado*, 2001-NMSC-034 ¶ 1, 131 N.M. at ___, 34 P.3d at 1149 (emphasis added).

5. *See id.*

6. Unless otherwise cited, all factual and procedural information is from *Delgado*, 2001-NMSC-034 ¶¶ 1-11, 131 N.M. at ___, 34 P.3d at 1150-52.

"ladle," which is in a tunnel below the furnace. Usually, when the ladle reaches three-quarters of its thirty-five-ton capacity, workers use a "mudgun" to fill the skim hole with clay, stopping the flow of the molten slag. An employee in a specially designed truck, called a "kress haul," then enters the tunnel to lift and remove the ladle.

On June 30, 1998, Mr. Delgado's crew was working under the supervision of Mike Burkett and Charlie White and was being pressured to work harder to compensate for the loss of production and revenue incurred after a recent ten-day shutdown. Suddenly, the crew experienced a dangerous emergency situation known as a "runaway." The ladle had reached three-quarters of its capacity, but the flowing slag could not be stopped because the mudgun was inoperable and manual efforts to close the skim hole had failed. To make matters worse, the consistency of the slag caused it to flow at an extraordinarily fast rate, resulting in the worst runaway situation many of the workers had ever seen.

Chino could have shut down the furnace, allowing for safe removal of the ladle. Instead, because of the prior ten-day shutdown and to avoid another shutdown and economic loss, Chino ordered Delgado to enter the tunnel on the kress haul and remove the ladle while the molten slag was flowing over the brim. Delgado had never operated a kress haul under emergency conditions, and as he entered the tunnel and saw the molten slag overflowing, he radioed White and told him that he was neither qualified nor able to perform the removal and requested assistance. White insisted he proceed and denied his request for assistance.

Delgado entered the tunnel. He emerged from the smoke-filled tunnel engulfed in flames. Delgado asked co-workers, "Why did they send me in there?...I told them I couldn't do it. They made me do it anyway. Charlie sent me in."[7] Delgado suffered third-degree burns and died three weeks later.

The plaintiff brought claims of wrongful death, loss of consortium, prima facie tort, and intentional infliction of emotional distress against defendants Phelps Dodge Chino, White, and Burkett. The plaintiff argued that Chino acted intentionally with knowledge that Delgado would be seriously injured or killed as a result of their actions. Chino moved to dismiss,[8] arguing it was immune from suit by virtue of the exclusivity provision of the Workers' Compensation Act.[9]

The trial court granted Chino's motion to dismiss, stating that the "plaintiff only established that the defendant did engage in a series of deliberate or intentional acts that it knew or should have known would almost certainly result in injury or death to Delgado, but the complaint falls short of alleging they actually intended to harm him."[10] The plaintiff appealed the trial court's ruling. The New Mexico Court of Appeals affirmed the trial court's ruling, citing *Johnson Controls World Services, Inc. v. Barnes*[11] and Professor Arthur Larson's treatise[12] holding that "[t]he Act

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7. *Id.* ¶ 5, 131 N.M. at ___, 34 P.3d at 1151.
8. N.M. R. CIV. P. 1-012(B)(6).
9. N.M. STAT. ANN. § 52-1-9 (1991 Repl. Pamp. & Supp. 2001).
10. *Delgado*, 2001-NMSC-034 ¶ 7, 131 N.M. at ___, 34 P.3d at 1151.
11. *See* Delgado v. Phelps Dodge, No. 20,972, slip op. at 5 (N.M. Ct. App. May 3, 2000) (citing Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 119, 847 P.2d 761, 764 (Ct. App. 1993)).
12. *See id.* (citing ARTHUR LARSON & LEX K. LARSON, 6 LARSON'S WORKERS' COMPENSATION LAW §

provides an employer immunity from tort liability unless the worker's injury stems from the employer's 'actual intent' to injure the worker."[13] The court of appeals agreed with the trial court's determination that plaintiff failed to allege facts sufficient to establish actual intent.[14]

After certiorari was granted, the plaintiff requested that the Supreme Court adopt a test in which the bar of exclusivity would be lifted when the employer knows that its conduct is substantially certain to result in the worker's injury or death, even if the employer did not actually intend harm to the worker. In reversing both the trial court and the court of appeals, the New Mexico Supreme Court held that the actual intent test unfairly favors employers and rejected it as the sole test to raise the bar of exclusivity.[15] The court did not adopt the plaintiff's proposed substantial certainty test, but established a new test and held that employees are permitted to use common law tort remedies when "an employer willfully or intentionally injures a worker."[16]

III. BACKGROUND

The Workers' Compensation Act, adopted by the New Mexico Legislature in 1917,[17] provides employers with immunity from common law suits brought by employees accidentally injured in the scope and course of their employment. Although the Act has undergone periodic revisions,[18] the exclusivity provisions remain the cornerstone of the Act. The basis of recovery under the Act is that the injury sustained must be accidental.[19] As long as the injury sustained is accidental and the other recovery requirements of the Act are satisfied,[20] both the employer and employee are governed exclusively by the Act.[21] The Act does not define "accident" or what constitutes non-accidental injury for which the employee can escape the exclusivity provision and sue in a common law cause of action. However, the Act provides that an employee's injury will be non-compensable under the Act if it is due to intoxication or is willfully or intentionally self-inflicted.[22] These provisions are possible indications of what non-accidental behavior is for both the employee and employer.

103.03 (2000)).

13. *See id.*

14. *Id.*

15. *See* Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034 ¶ 23, 131 N.M. 272, ___, 34 P.3d 1148, 1155.

16. *Id.* ¶ 8, 131 N.M. at ___, 34 P.3d at 1151.

17. New Mexico Laws 1917, Ch. 83, codified at N.M. STAT. ANN. §§ 52-1-1 to -70 (1991 Repl. Pamp. & Supp. 2001).

18. The Act was amended in part in 1986, 1987, and 1990. The amended sections primarily focused on the distinction between partial disability and total disability and other related matters. The Act's exclusivity provisions have not been amended recently. N.M. STAT. ANN. § 52-1-9 was last amended in 1973, and N.M. STAT. ANN. § 52-1-11 was last amended in 1989. *See also* Eldridge v. Circle K Corp., 123 N.M. 145, 148, 934 P.2d 1074, 1077 (Ct. App. 1997).

19. N.M. STAT. ANN. §§ 52-1-6, -8, -9 (1991 Repl. Pamp. & Supp. 2001).

20. N.M. STAT. ANN. § 51-1-9 (1991 Repl. Pamp. & Supp. 2001) (requiring that the injury be accidental, that the employer have complied with the act, that the employee be performing service arising out of and in the course of his employment, and that the injury be proximately caused by the accident arising out of and in the course of his employment and not be intentionally self-inflicted).

21. *Id.*; *see also* Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924).

22. N.M. STAT. ANN. § 51-1-11 (1991 Repl. Pamp. & Supp. 2001).

The judiciary must review the statute and determine the underlying intent and purpose of the legislature[23] and, therefore, determine when exceptions to the exclusivity provisions exist. Currently, three exceptions to the Act's exclusivity provisions exist.[24] In carving out these exceptions, the focus of the New Mexico Supreme Court and Court of Appeals has been to define accidental or non-accidental conduct. In doing so, the courts have used the ordinary meaning of accident[25] and held that, for the bar of exclusivity to be lifted, the injury sustained must be non-accidental and, therefore, intentional.[26] The courts thus had to define "intentional" for purposes of the exclusivity provision, which neither defines the term nor specifically uses the term. In a line of cases beginning in 1979, the courts defined "intentional," or non-accidental, for purposes of the Act as the "actual intent" of the employer to injure the employee.[27] The requirements of the actual intent test proved to be difficult for an injured employee to establish. In practice, it granted employers blanket immunity from suit even if they knew that an injury would result, so long as they hoped it would not.

The New Mexico Supreme Court in *Delgado* revisited the issue of what constitutes an accidental injury. The court determined that the intended uniformity of the Act required that both employers and employees be held to the same standard of conduct when determining the application of the Act's exclusivity provisions.[28] Therefore, the court held that the state of mind sufficient to deny an employee benefits under the Act[29] should be applied to the employer's conduct when determining if an injury was non-accidental and thereby outside the coverage of the Act's exclusivity provisions.[30]

A. The Policy Underlying the Workers' Compensation Act

The New Mexico Workers' Compensation system reflects a legislative balancing between employers and employees. The Act "is based on a mutual renunciation of common law rights and defenses by employers and employees alike."[31] The employee gives up the right to sue the employer under the common law in exchange

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23. Baca v. Complete Drywall Co., 2002-NMCA-002 ¶¶ 12, 13, ___ N.M. ___, ___, 38 P.2d 181, 184.

24. Coates v. Wal-Mart Stores, Inc., 127 N.M. 47, 52, 976 P.2d 999, 1004 (1999). ("A claim falls outside the WCA for work-related injuries if: 1) the injuries do not arise out of employment, 2) substantial evidence exists that the employer intended to injure the worker, and 3) the injuries are not those compensable under the act.") (internal citations omitted). This Note focuses only on the second exception to the Act's exclusivity provisions.

25. *See* Cisneros v. Molycorp, Inc., 107 N.M. 788, 791, 765 P.2d 761, 764 (Ct. App. 1988) (defining accident as "an unlooked-for mishap or some untoward event that is not expected or designed"); *see also* Aranbula v. Banner Mining Co., 49 N.M. 253, 258, 161 P.2d 867, 870 (1945).

26. *See generally* Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995); Flores v. Danfelser, 1999-NMCA-091 127 N.M. 571, 985 P.2d 173; Johnson Controls World Services v. Barnes, 115 N.M. 116, 847 P.2d 761 (Ct. App. 1993); Maestas v. El Paso Natural Gas Co., 110 N.M. 609, 798 P.2d 210 (Ct. App. 1990); Gallegos v. Chastain, 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981); Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).

27. *Coleman*, 120 N.M. at 652-53, 905 P.2d at 192-93; *Flores*, 127 N.M. at 573-76, 985 P.2d at 177-78; *Johnson Controls*, 115 N.M. at 119, 847 P.2d at 764; *Maestas*, 110 N.M. at 611, 798 P.2d at 212; *Gallegos*, 95 N.M. at 553, 624 P.2d at 62; *Sanford*, 92 N.M. at 748, 594 P.2d at 1204.

28. *Delgado*, 2001-NMSC-034 ¶ 23, 131 N.M. at ___, 34 P.3d at 1155.

29. N.M. STAT. ANN. § 52-1-11 (1991 Repl. Pamp. & Supp. 2001).

30. *Delgado*, 2001-NMSC-034 ¶ 14, 131 N.M. at ___, 34 P.3d at 1152.

31. N.M. STAT. ANN. § 52-5-1 (1991 Repl. Pamp. & Supp. 2001).

for quick compensation without enduring the rigors of litigation and proving fault.[32] The Act assures the employer that an employee injured, even by the employer's own negligence, is limited to compensation under the Act.[33]

The legislature adopted the Act to "substitute a more humanitarian and economical system of compensation for injured workmen or their dependants in case of their death."[34] In addition, the Act was designed to substitute a more uniform scale of compensation in cases of accidental injury and to provide recovery for an injured employee without the time, expense, and difficulty of proving negligence.[35] Furthermore, the policy premiums paid by the employer to insure compensation for an accidentally injured employee are absorbed by the consumer in the cost of the products and services and are viewed as part of the cost of doing business.[36]

The Act, as demonstrated in Section 52-5-1,[37] also seeks to ensure the uniform and equal application of its provisions to both employers and employees. Until *Delgado,* the courts had not thoroughly analyzed the equality principle underlying the Act and had based their decisions strictly on the "accident" requirement and exclusivity provisions of the Act.[38]

The policies and protections granted to both employers and employees underlying the Act are compromised by the actual intent test. The Act provides expedient compensation to employees accidentally injured in the scope of their employment. Still, application of the exclusivity provisions as a bar to common law action by an employee in the case of non-accidental injury has produced much controversy and litigation. The legislature created the Act to provide compensation for injured employees without subjecting them to the rigors of common law actions and employer's affirmative defenses.[39] Over time, however, the Act's exclusivity provisions, construed to deny an employee common law relief unless the employer actually intended to cause the injury, placed employees in the situation the legislature sought to prohibit in adopting the compensation system. As a result, in practice, the actual intent test limited an intentionally injured employee to the recovery under the Act. Thus, when an employee sustains a non-accidental injury to which the actual intent test applies, the protections granted by and the policies underlying the compensation system are compromised.

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32. Gonzales v. Chino Copper Co, 29 N.M. 228, 229, 222 P. 903, 904 (1924).
33. N.M. STAT. ANN. § 52-1-9 (1991 Repl. Pamp. & Supp. 2001).
34. *Gonzales*, 29 N.M. at 232, 222 P. at 904-05.
35. *Id.* at 232, 222 P. at 905.
36. *Id.* at 233, 222 P. at 905.
37. N.M. STAT. ANN. § 52-5-1 (1991 Repl. Pamp. & Supp. 2001).
38. *See generally* Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995); Flores v. Danfelser, 1999-NMCA-091 127 N.M. 571, 985 P.2d 173; Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 847 P.2d 761 (Ct. App. 1993); Maestas v. El Paso Natural Gas Co., 110 N.M. 609, 798 P.2d 210 (Ct. App. 1990); Gallegos v. Chastain, 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981); Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).
39. *See Gonzales*, 29 N.M. at 232, 222 P. at 904-05 (1924).

B. The Origins of the Actual Intent Test

The New Mexico Court of Appeals introduced the actual intent test in *Sanford v. Presto Mfg. Co.*[40] In *Sanford*, the plaintiff sued her employer, outside the Act, for damages sustained in an alleged battery.[41] The defendant had installed a new oven for coating small appliances with Teflon.[42] The plaintiff alleged that the use of the oven created toxic fumes, that she was exposed to the fumes while working, and that the defendant knew of the fumes and did nothing to remedy the situation.[43] The defendant moved to dismiss on the basis that the plaintiff's exclusive remedy was under the Act. The complaint alleged that the defendant intentionally permitted a dangerous work condition to exist and that the defendant intentionally tolerated a dangerous condition.[44]

The court recognized that the plaintiff could recover in tort if she suffered an intentional injury at the hands of her employer.[45] Relying on other jurisdictions and Professor Larson's treatise on workers' compensation law,[46] the court ruled that the plaintiff must prove an actual intent to injure by her employer to raise the bar of exclusivity provided by the Act.[47] The court stated that the requisite intent to be alleged and proved is a "deliberate infliction of harm."[48] The court held that the facts as alleged in the complaint were insufficient to prove actual intent because the injuries suffered by the plaintiff, as a result of the working conditions, were accidental within the meaning of the Act.[49]

The court of appeals next addressed the issue of actual intent in *Gallegos v. Chastain*.[50] In *Gallegos*, the plaintiff alleged he was injured when a fellow employee committed a battery upon him while the two were working together.[51] The plaintiff argued that the alleged battery resulted from the failure of the defendant to take reasonable precautions to prevent physical harm from supervisory personnel and that the defendant intended to injure him.[52] The court relied on the rule articulated in *Sanford*, stating, "the basis for the employer's liability outside the act is an actual intent to injure."[53] The court held that, for the plaintiff's claims to succeed, he must have a factual basis that supports the employer's actual intent to injure him.[54] In *Gallegos*, the plaintiff only alleged that an intentional tort had occurred, without

40. 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).
41. *Id.* at 747, 594 P.2d at 1203.
42. *Id.*
43. *Id.*
44. *Id.* at 748, 594 P.2d at 1204.
45. *Id.*
46. *See* LARSON, *supra* note 12, § 103.03, at 103-7 ("[T]he common law liability of the employer...cannot be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct of the employer short of conscious and deliberate intent directed to the purpose of inflicting an injury.")
47. *Sanford*, 92 N.M. at 748, 594 P.2d at 1204.
48. *Id.*
49. *Id.*
50. 95 N.M. 551, 624 P.2d 60 (Ct. App. 1981).
51. *Id.* at 552, 624 P.2d at 61.
52. *Id.* at 554, 624 P.2d at 63.
53. *Id.* at 553, 624 P.2d at 62.
54. *Id.* at 554, 624 P.2d at 63.

pleading facts specific to prove actual intent to harm. The court found such pleading to be insufficient.[55]

Ten years after *Gallegos*, the court of appeals again addressed the issue of an employer's actual intent to injure in *Maestas v. El Paso Natural Gas Co.*[56] In *Maestas*, a welder sued his employer for personal injures resulting from an on-the-job explosion that occurred after the employer allegedly directed him to place a highly explosive mixture in a pipe that plaintiff was welding.[57] In his complaint, the plaintiff alleged that the defendant intentionally, willfully, and wantonly caused his injuries by directing him to place the mixture in the pipe.[58]

In *Maestas*, the plaintiff relied on *Sanford* and argued that his injures fell within the rule that common law claims are limited to "injuries deliberately inflicted [by the employer]."[59] The court agreed that the test is actual intent but found the plaintiff's injuries were accidental and, therefore, covered by the Act.[60] The court further found that the matters pleaded in the complaint did not support a claim for intentional tort.[61] In *Maestas*, the complaint stated that the "employer knew" the work situation was dangerous. The court did not accept the plaintiff's argument and found that knowledge by the employer that inherently dangerous working conditions exist is insufficient to allow the injured employee to pursue a claim against his employer outside the Act, because it does not satisfy the actual intent to injure test.[62]

In 1993, the court of appeals firmly endorsed the use of the actual intent test as the sole test to determine when the Act's bar of exclusivity would be lifted. In *Johnson Controls World Services v. Barnes*,[63] the court held that, for an employee to impose tort liability on his employer, he must "plead and prove an actual intent to injure the employee on the part of the employer."[64]

The plaintiff was employed by the defendant as a heavy equipment operator. He was injured when the defendant directed him to operate a trackhoe machine and remove several underground storage tanks that previously stored petroleum and other hazardous substances for Los Alamos National Laboratory.[65] The plaintiff was injured when he was splashed with toxic liquid that remained in one of the tanks he was ordered to remove.[66] The plaintiff alleged that the defendant intentionally engaged in unsafe work practices by failing to provide him with appropriate protective clothing and eyewear, falsely informing him that the tanks were completely drained, and ordering him to perform the work even though the employer was aware that physical injury was "substantially certain to result."[67]

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55. *Id.*
56. 110 N.M. 609, 798 P.2d 210 (Ct. App. 1990).
57. *Id.* at 610, 798 P.2d at 211.
58. *Id.* at 610-11, 798 P.2d at 211-12.
59. *Id.* at 611, 798 P.2d at 212.
60. *Id.*
61. *Id.* at 612, 798 P.2d at 213.
62. *Id.*
63. 115 N.M. 116, 847 P.2d 761 (Ct. App. 1993).
64. *Id.* at 122, 847 P.2d at 767.
65. *Id.* at 117, 847 P.2d at 762.
66. *Id.*
67. *Id.*

The defendant argued that the actual intent test was established law in New Mexico and in line with the policy supporting the Act's preference for exclusivity.[68] The court rejected the proposal to expand actual intent to include conduct that was "substantially certain" to result in injury and reaffirmed the use of the actual intent test as the sole test to raise the bar of exclusivity.[69]

In affirming the use of the actual intent test, the court discussed at length the previously discussed cases, reaffirming that the law in this area is well established.[70] In support of the actual intent test, the court relied on the Act's requirement of an accident and sought to distinguish accidents from non-accidents.[71] The court relied on the words "accidentally sustained" as found within the Act[72] and defined the phrase as "injury or death arising from an unintended or unexpected event."[73] In doing so, the court created a standard in which an accident is anything less than the actual intent of the employer to injure the employee. Thus, "[a]n injury may unintentionally result even though an employer set the stage for the injury by deceiving or misrepresenting the facts to the worker."[74]

The court stated, "The majority of jurisdictions that have considered this question appear to agree that a mere showing of misrepresentation or deceit is insufficient to defeat the exclusivity provisions."[75] In support of the actual intent test, the court created a two-part test to determine when the bar of exclusivity will be raised.[76] The court must first ask, "Did the employer intend to commit the alleged act?"[77] Second, the court must inquire whether "the circumstances support a reasonable inference that the employer directly intended to harm the worker."[78] The second inquiry involves an examination of the true intent of the employer.[79]

In applying the test, the court accepted the plaintiff's allegation that the defendant falsely informed him of the condition of the pipes on the day of the injury and that he was ordered to take the pipes out before they were disconnected,[80] thereby satisfying the first prong of the test. To determine whether the second prong had been met, the court looked to the plaintiff's description of the incident to see if it was an "accident" or if the incident was the "deliberate consequence[] of [the defendant's] behavior."[81] Based on the plaintiff's description of the incident the court found it unreasonable to believe that the defendant actually intended the injury to occur.[82] In addition, the court found that, even if the defendant's conduct

68. *Id.* at 118, 847 P.2d at 762.
69. *Id.*
70. *Id.* at 118-19, 847 P.2d at 762-63.
71. *Id.* at 118, 847 P.2d at 762.
72. N.M. STAT. ANN. § 52-1-9 (1991 Repl. Pamp. & Supp. 2001).
73. *Johnson Controls*, 115 N.M. at 121, 847 P.2d at 766 (citing Aranbula v. Banner Min. Co., 49 N.M. 253, 161 P.2d 867 (1945); and Bufalino v. Safeway Stores, Inc., 98 N.M. 560, 650 P.2d 844 (Ct. App. 1982)).
74. *Id.*
75. *Id.* (citing LARSON, *supra* note 12, § 103.03, at 103-7).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

amounted to fraudulent misrepresentation, the facts did not prove the defendant's conduct was "equivalent to a left jab to the chin."[83]

The court stated, "Absent an allegation in the complaint asserting that the injury sustained by Plaintiff was intentionally inflicted [by the defendant]...the language of Section 52-1-9...is determinative of this issue."[84] The court reversed and remanded the action to the district court, requiring that the cause of action be dismissed.[85] The court of appeals affirmed the requirement of fact-specific pleading, calling for the plaintiff to plead and prove the employer's actual intent to injure the employee.[86] As a result of the decision in *Johnson Controls*, employers covered by the Act were shielded from liability unless the employee could sufficiently plead and prove his injury was the intended consequence of the employer's acts or omissions.

The New Mexico Court of Appeals, guided by the New Mexico Supreme Court's initial declaration of the Act as the exclusive remedy for work-related accidents in *Gonzales*,[87] has been the main source of interpretation of the Act's exclusivity provisions. The New Mexico Supreme Court has given much deference to the court of appeals' decisions adopting the actual intent test. The supreme court has occasionally addressed exclusivity, however, and the intent required for an employee to sue his or her employer in tort.[88] Especially important to the understanding of its decision in *Delgado* is *Coates v. Wal-Mart Stores, Inc.*[89]

In *Coates*, the supreme court slightly modified the actual intent test. There, the plaintiffs brought claims of negligent supervision and intentional infliction of

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83. *Id.* (citing Sanford v. Presto Mfg. Co., 92 N.M. 746, 748, 594 P.2d 1202, 1204 (Ct. App. 1979); and LARSON, *supra* note 12, § 103.03, at 103-9).

84. *Johnson Controls*, 115 N.M. at 121, 847 P.2d at 765.

85. *Id.* at 122, 847 P.2d at 767.

86. *Id.*

87. *See* Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924).

88. Coleman v. Eddy Potash Inc., 120 N.M. 645, 905 P.2d 185 (1995). In *Coleman*, which was decided two years after *Johnson Controls*, the plaintiff was injured when a vertical conveyor belt manlift she was riding malfunctioned and she fell sixty feet to the ground. *Id.* at 647, 905 P.2d at 187. The plaintiff sought recovery under the Act for the personal injuries she suffered, but brought suit against her employer for intentional and negligent spoliation of evidence based on the employer's alleged disassembly, replacement, and loss of parts from the machine that caused her injuries. *Id.* The plaintiff alleged that the disassembly and loss of parts prejudiced her ability to recover against other defendants on product liability claims, which is expressly permitted by N.M. STAT. ANN. § 52-1-6(E) (1991 Repl. Pamp. & Supp. 2001). *Id.* The court cited the relevant exclusivity provisions of the Act, concluding that "the compensation remedy provided in the Act is exclusive of all other remedies against the employer for the same injury." *Id.* at 652, 905 P.2d at 192. The court, again relying on Larson, found that if an injury is not included within the Act's coverage formula, the exclusivity provisions do not apply. *Id.* Therefore, if a claim cannot be equated with recovery for personal injuries, it does not fall within the coverage of the Act. *Id.* In *Coleman*, the claim of spoliation of evidence fell outside the coverage of the Act, because the claim is not connected to the accident that resulted in personal injury. *Id.* at 653, 905 P.2d at 193. The court, in discussing the exceptions to the Act's exclusivity provisions, approvingly cited both Larson and *Johnson Controls*, and reiterated that an exception to the exclusivity provisions exists for intentional injuries inflicted on a worker by the employer and that the test in such cases is whether the injury stems from an actual intent to injure the worker. *Id.* The court held "that a worker's claim against his employer for intentional spoliation of evidence is not barred by the Act's exclusivity provisions." *Id.* The court based its holding on its definition of the tort of intentional spoliation of evidence, which requires an actual intent on the defendant's part to harm the plaintiff's economic interests. As a result of this decision, a worker could bring a claim in tort for non-physical injuries sustained as a result of, or in conjunction with, an accidental work related injury without fear of the Act's exclusivity provisions, so long as the injury, physical or not, was non-accidental, and, therefore, intentional. *See also* Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

89. 127 N.M. 47, 976 P.2d 999 (1999). Justice Franchini concurred in part and dissented in part; however, his dissenting opinion dealt with evidentiary issues and not the exclusivity issue addressed by the majority.

emotional distress against the defendant relating to alleged sexual harassment by another employee.[90] The plaintiffs claimed that their supervisor sexually harassed them over the course of a year, and that the defendant knew of the harassment and failed to protect them.[91] The defendant argued that the Act's exclusivity provision barred the plaintiff's tort claims.[92] In addition, the defendant argued that the Act provides employees with the exclusive remedy for *any* personal injury sustained in the workplace.[93] The court disagreed with the defendant's position, stating that "the exclusivity provision is not an absolute bar" and the Act covers only injuries that fall within its coverage.[94]

The court relied on New Mexico case law, stating that there are three occasions in which a claim for work-related injuries falls outside the Act.[95] The first is when injuries do not arise out of employment, the second is when the plaintiff has substantial evidence to prove the employer intended to injure the employee, and the third is when the injuries are non-compensable under the Act.[96]

The court found that all three exceptions existed in *Coates*.[97] The court first held that injuries caused by sexual harassment do not arise out of employment.[98] The court, relying on the policy underlying sexual harassment claims, found that, "although the plaintiff's injury may have been causally related to her employment, sexual harassment does not amount to an accident 'arising out of her employment' under the [Act]."[99]

Second, the court found that sexual harassment is not an "accident" that invokes the coverage of the Act.[100] Because sexual harassment cannot be viewed as an unintended or unexpected event and is a form of discrimination that is not acceptable in society, employers must be responsible for maintaining a workplace free from sexual harassment.[101] As a result, the court held the Act's exclusivity provisions do not apply to an employee seeking a remedy outside the Act for claims of sexual harassment.[102] In addition to sexual harassment not being an accident, the supreme court found that the plaintiffs alleged and presented sufficient evidence to show that the defendant acted intentionally.[103] The court, however, deviated from the actual intent or deliberate infliction of harm test laid out by the court of appeals

90. *Id.* at 50, 976 P.2d at 1002.
91. *Id.*
92. *Id.* at 52, 976 P.2d at 1004.
93. *Id.*
94. *Id.*
95. *Id.* (citing *Cox*, 115 N.M. at 337-38, 850 P.2d at 1040-41; *Johnson Controls*, 115 N.M. at 118, 847 P.2d at 763; and *Sebella*, 121 N.M. at 599, 915 P.2d at 904).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 53, 976 P.2d at 1003 (citing *Cox*, 115 N.M. at 338, 850 P.2d at 1041).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 53, 976 P.2d at 1004 (citing Beavers v. Johnson Controls World Services, Inc., 120 N.M. 343, 901 P.2d 761 (Ct. App. 1995)). *Beavers* also relied on Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 118, 847 P.2d 761, 763 (Ct. App. 1993) (stating, "an employer must have actual intent to injure the employee.").

in *Johnson Controls* and found that knowledge of the harassment and failure to remedy the situation was sufficient to show intentional behavior.[104]

Without overruling or expressly distinguishing precedent, the court implicitly altered the actual intent test to include knowledge of the injury and failure to remedy on the part of the employer, at least in cases where the injury does not arise out of employment. The opinion, however, did not make clear the application of the knowledge component in the context of cases in which a non-accidental workplace injury occurs, as in *Johnson Controls* where the employer misrepresented the situation to the employee and knew an injury was substantially certain to occur.

Several months later, without reference to the supreme court's decision in *Coates*, the court of appeals again addressed the application of the actual intent test as a barrier to recovery outside the bounds of the Act's exclusivity provisions. In *Flores v. Danfelser*,[105] the plaintiff sued her employer for personal injuries sustained when a third party attacked and stabbed her while she was at work in her office.[106] The plaintiff's complaint alleged that the defendant made a deliberate and intentional policy decision to allow third parties access to employee office areas and that the defendant knew of the dangers of allowing public access to the office areas.[107] In this case, the court once again applied the actual intent test to determine if the plaintiff's claims were barred by the Act's exclusivity provisions. In *Flores,* the court determined that the proper inquiry was not whether the defendant knew or should have known that the plaintiff might be injured by a third party, but whether the defendant had actual intent to injure her.[108]

The court, relying on its decision in *Sanford*,[109] on Professor Larson's treatise,[110] and on *Johnson Controls*,[111] held that "the litmus test for determining whether a worker's injury is controlled by the exclusivity rules is whether such injury stems from an actual intent on the part of the employer, or his or her alter ego, to injure the worker."[112] The court affirmed the district court's dismissal of the case because neither the pleadings nor the record supported a claim of actual intent to injure.[113]

In sum, on the eve of the *Delgado* decision, the law regarding an employee's ability to escape the Act's exclusivity provisions and seek common law relief was well established and required a showing of actual intent to injure on the part of the employer. The New Mexico Supreme Court's decision in *Coates*, however, created an inconsistency in the actual intent test that opened the door for its potential application to cases involving an employee's personal injuries.

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104. *Coates*, 127 N.M. at 54, 976 P.2d at 1004.
105. 127 N.M. 571, 985 P.2d 173 (Ct. App. 1999).
106. *Id.* at 573-74, 985 P.2d at 175-76.
107. *Id.* at 574, 985 P.2d at 176.
108. *Id.* at 575, 985 P.2d at 177.
109. Sanford v. Presto Mfg. Co., 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979).
110. *See* LARSON, *supra* note 12, § 103.03, at 103-7 ("Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist...willfully failing to furnish a safe work place...this still falls short of the kind of actual intention to injure that robs the injury of accidental character.").
111. Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 847 P.2d 761 (Ct. App. 1993).
112. *See Flores*, 127 N.M. at 577, 985 P.2d at 179.
113. *Id.*

IV. RATIONALE

In each of the prior New Mexico cases, the plaintiffs sought to pursue tort claims outside the bounds of the Act's exclusivity provisions. In *Delgado*, the New Mexico Supreme Court found that, while the plaintiff presented the type of case previously barred by the exclusivity provisions of the Act, the policy and intent underlying the Act, and the recent inconsistency in the actual intent test, necessitated reevaluation of the Act's exclusivity provisions.[114] The court articulated three reasons for the reevaluation of the actual intent test.[115] First, the Act declares that "the Workers' Compensation Act...[is] not to be given broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand."[116] The court noted that the principle articulated in Section 52-5-1 prohibited interpretation in favor of either party and found that in its prior application the actual intent test favors employers.[117] Second, the court found that the actual intent test provides immunity to employers in all cases except those "especially rare, practically unprovable instances in which it is the employer's purpose to injure the employee."[118] The court reasoned that New Mexico should not support the policy this standard creates.[119] Finally, the court, seeking to provide uniform law on the subject, relied on its decision in *Coates* in which the court implicitly rejected the actual intent test.[120]

A. *Workers' Compensation Act Requires Uniformity*

The court noted that the policy underlying the New Mexico Workers' Compensation Act is to provide a scheme of compensation that offers benefits to both employers and employees.[121] The Act represents the "result of a bargain struck between employers and employees. In return for the loss of a common law tort claim for accidents arising out of the scope of the employment, [the Act] ensures that workers are provided some compensation."[122] In 1990, the legislature amended the Act to include Section 52-5-1, which memorializes the legislative intent by stating the "bargain" is based on "a mutual renunciation of common law rights and defenses by employers and employees alike."[123] The court took notice of the potential for abuse of this system by both employers and employees. Without the language of

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114. Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

115. *Id.* ¶¶ 17-19, 131 N.M. at ___, 34 P.3d at 1154.

116. *Id.* ¶ 17, 131 N.M. at ___, 34 P.3d at 1154 (quoting N.M. STAT. ANN. § 52-5-1 (1991 Repl. Pamp. & Supp. 2001)).

117. *Id.*

118. *Id.* ¶ 18, 131 N.M. at ___, 34 P.3d at 1154.

119. *Id.*

120. *Id.* ¶ 19, 131 N.M. at ___, 34 P.3d at 1154 (citing Coates v. Wal-Mart Stores, Inc., 127 N.M. 47, 52-53, 976 P.2d 999, 1004-05 (1999), which held that an employer acted intentionally because it knew of the situation and failed to prevent further injury from occurring).

121. *Delgado*, 2001-NMSC-034 ¶ 12, 131 N.M. at ___, 34 P.3d at 1152.

122. *Id.* (citing *Coates*, 127 N.M. at 47, 976 P.2d at 999; and Kent Nowlin Const. Co. v. Gutierrez, 99 N.M. 389, 390, 658 P.2d 1116, 1117 (1982) (describing exclusivity as striking a "balance between the worker's need for expeditious payment and the employer's need to limit liability")).

123. N.M. STAT. ANN. § 52-5-1 (1991 Repl. Pamp. & Supp. 2001).

Section 52-1-2,[124] which allows for compensation only when workers are injured by accidents related to employment, an employee could seek recovery for a self-induced injury, and an employer, weighing economic considerations, could avoid tort liability for injury intentionally inflicted on the employee.[125]

With the policy of uniform application of the Act's exclusivity provisions as the backdrop, the court began its analysis of the legislative intent of the Act in the context of accidental and non-accidental injuries. Without legislative guidance as to what type of employer misconduct constitutes non-accidental injury, the court based its finding on the established common law definition of accident[126] and Section 52-1-11, which provides three circumstances under which an employees' injury is non-accidental and therefore non-compensable.[127]

The Act provides that an employee's injury will be non-compensable if it is due to intoxication or if it is willfully or intentionally self-inflicted.[128] The court found that this section in the Act evidenced the legislature's intent to bar recovery for injuries resulting from these three forms of employee misconduct.[129] Thus, the court found that the legislature clearly intended to extend the employers' benefit of immunity from tort liability, like the employees' benefit of expedited compensation, only to injuries accidentally sustained.[130] Due to the Act's lack of a provision providing a definition of misconduct that will render the employer liable outside the coverage of the Act, the court found that the legislature intended for the same type of misconduct that renders an employee's injury non-compensable to also render an employer's behavior non-accidental.[131]

B. Actual Intent Test Too Restrictive

Again with the Act's uniform application requirement as its backdrop, the court reevaluated previous interpretations of the term "accident" and the application of the actual intent test. The plaintiff argued that the *Johnson Controls* court misinterpreted the term "accident."[132] In *Johnson Controls*, the court equated non-accidental conduct with the "actual intent to injure" and determined that anything less was accidental within the meaning of the Act.[133] In *Delgado*, the court agreed with the plaintiff's argument that the actual intent test unduly restricted the plain meaning of

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124. N.M. STAT. ANN. § 52-1-2 (1991 Repl. Pamp. & Supp. 2001).

125. *Delgado*, 2001-NMSC-034 ¶ 13, 131 N.M. at ___, 34 P.3d at 1153.

126. *Id.* ¶ 14, 131 N.M. at ___, 34 P.3d at 1153 (citing Cisneros v. Molycorp, Inc., 107 N.M. 788, 791, 765 P.2d 761, 764 (Ct. App. 1988) (stating "accident" means "an unlooked-for mishap or some untoward event that is not expected or designed")).

127. N.M. STAT. ANN. § 52-1-11 (1991 Repl. Pamp. & Supp. 2001).

128. *Id.*

129. *Delgado*, 2001-NMSC-034 ¶ 14, 131 N.M. at ___, 34 P.3d at 1153.

130. *Id.*

131. *Id.* ¶ 24, 131 N.M. at ___, 34 P.3d at 1155.

132. *Id.* ¶ 9, 131 N.M. at ___, 34 P.3d at 1151. *See also* Appellant's Brief in Chief at 11 (arguing that "*Johnson Controls* eliminated from the Act's plain definition of "accidental injury" the foreseeable consequences of an employer's wrongful conduct and created a virtually unprovable definition of "intentional acts" applicable only to employers and no other similarly situated defendants—civil or criminal").

133. *See* Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 122, 847 P.2d 761, 767 (Ct. App. 1993).

"accident."[134] As a result, the court found that the Act requires uniform application of the exclusivity provisions to both employers and employees, and that the actual intent test improperly "favors employers."[135]

The court also considered past decisions in which it defined "accident" and found that the term should be given its ordinary meaning.[136] In conjunction with its understanding of the ordinary meaning of "accident," the court relied on Section 52-1-11, which outlines the circumstances that will render an employee's behavior non-accidental.[137]

Absent legislative guidance, the New Mexico courts continually relied on Professor Larson's authoritative treatise on workers' compensation law.[138] As a result of this reliance, the court adopted the actual intent test.[139] The *Delgado* court noted that the actual intent test was adopted without providing a critical analysis of the legal rationale supporting its adoption.[140] In *Delgado*, the court analyzed Professor Larson's argument and found that the actual intent test directly contradicted the Act's underlying policy.[141]

Professor Larson's definition of "accident" precludes recovery outside the Act if the injury is caused by any employer misconduct short of conscious, deliberate intent to inflict an injury.[142] The court attacked Larson's rationale for the actual intent test[143] by relying on the Act's provision that requires an examination of the degree of gravity of the employee's conduct to determine recovery under the Act.[144]

The court found that in practice the actual intent test favors employers because under the Act an employee's willful behavior that results in injury is sufficient to deny the employee compensation.[145] Conversely, the actual intent test granted employers immunity from common law suit even if their willful behavior resulted in injury, because the injury was considered accidental for purposes of the Act. The

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134. *Delgado*, 2001-NMSC-034 ¶ 14, 131 N.M. at ___, 34 P.3d at 1153.

135. *Id.* ¶ 17, 131 N.M. at ___, 34 P.3d at 1153.

136. *Id.* ¶ 14, 131 N.M. at ___, 34 P.3d at 1152 (stating accident means "an unlooked-for mishap or some untoward event that is not expected or designed").

137. N.M. STAT. ANN. § 51-1-11 (1991 Repl. Pamp. & Supp. 2001).

138. *See generally* LARSON, *supra* note 12.

139. *See* Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 122, 847 P.2d 761, 767 (Ct. App. 1993).

140. *Delgado*, 2001-NMSC-034 ¶ 16, 131 N.M. at ___, 34 P.3d at 1153.

141. *Id.*

142. *See* LARSON, *supra* note 12, § 103.03, at 103-7 (stating, "the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury").

143. *Delgado*, 2001-NMSC-034 ¶ 22, 131 N.M. at ___, 34 P.3d at 1155 (citing LARSON, *supra* note 12, § 103.03, at 103-9 ("If these decisions [applying the actual intent test] seem rather strict, one must remind oneself that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of the intentional versus accidental quality of the precise injury producing event. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.")).

144. N.M. STAT. ANN. § 52-1-1 to -11 (1991 Repl. Pamp. & Supp. 2001).

145. *Delgado*, 2001-NMSC-034 ¶ 22, 131 N.M. at ___, 34 P.3d at 1155.

court determined it could not allow this imbalance to continue in light of the purpose of the Act as stated in Section 52-5-1.[146]

The court found that Professor Larson's reasoning lacked substance, and this finding reaffirmed the court's concern about the inequality produced by the actual intent test.[147] The court found that the actual intent test unfairly burdens employees and is therefore outside the intent of the Act.[148]

The court held that the Act required uniformity.[149] Therefore, withholding compensation for an employee's willful conduct while upholding employer immunity, unless the employer desired the consequences of its acts, was contrary to the purpose of the Act.[150] The court expressly overruled the line of cases that required the plaintiff to show an actual intent to injure.[151] The court found that the bias the actual intent test produces "violates the explicit mandate of Section 52-5-1, which demands equal treatment of workers and employers. In keeping with Section 52-5-1, we hereby disabuse New Mexico courts of the notion that an employer will be deprived of tort immunity only when the employer actually intends to injure the worker."[152]

The court held "that the same standard of conduct that our Legislature deemed non-accidental for purposes of depriving a worker of compensation must determine whether an employer's misconduct renders an injury non-accidental for purposes of exclusivity."[153] The court further held that "when an employer intentionally inflicts *or* willfully causes a worker to suffer an injury that would otherwise be exclusively compensable under the Act, that employer may not enjoy the benefits of exclusivity, and the worker may sue in tort."[154]

The court recognized that in addition to the intended uniformity of the Act, and the violation of public policy resulting from the actual intent test, its decision in *Coates* created an uncertainty in the law regarding the actual intent test.[155] Because in *Coates* the court found intent based on knowledge and failure to act to prevent harm, the court reevaluated the strict application of the actual intent test.[156] The court found that the use of the actual intent test as applied in *Coates* was the correct application of the definition of non-accidental that the legislature intended.[157]

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146. *Id.*

147. *Id.* ¶ 21, 131 N.M. at ___, 34 P.3d at 1155.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* ¶ 23, 131 N.M. at ___, 34 P.3d at 1155. The court expressly overruled all the cases discussed at length in Section III except for its decision in Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

152. *Delgado*, 2001-NMSC-034 ¶ 23, 131 N.M. at ___, 34 P.3d at 1155.

153. *Id.* ¶ 24, 131 N.M. at ___, 34 P.3d at 1156.

154. *Id.*

155. *Id.* ¶ 19, 131 N.M. at ___, 34 P.3d at 1154 (citing *Coates*, 127 N.M. at 53-54, 976 P.2d at 1005-06, in which the court implicitly rejected the actual intent test).

156. *Id.*

157. *Id.*

C. *The Willfulness Test Established*

Renouncing the sole use of the actual intent test, the court adopted a willfulness test in order to equate both employer and employee misconduct under the exclusivity provisions.[158] The court held that willfulness renders a worker's injury non-accidental and, therefore, outside the scope of the Act when

> (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker, (2) the worker or employer expects the intentional act or omission to result in the injury or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.[159]

The court's willfulness test combined definitions from two previously decided New Mexico cases to create the first and second prongs of the current test.[160] The third prong mirrors the causation requirement of the Act.[161] The court stated that the first prong of the test represents an "objective threshold question."[162] Under this prong, the plaintiff need prove only that a reasonable person would expect the employee's injury to flow from the employer's intentional act or omission.[163] However, the court allowed the employer to present evidence of just cause or excuse to negate common law liability.[164]

The second prong of the test requires "an examination into the subjective state of mind of the worker or employer."[165] The subjectivity prong requires the fact finder to look into the mind of the defendant at the time of the incident and determine if the defendant sufficiently considered and recognized the potential consequences of his or her actions.[166] If the worker or employer engaged in the act without considering the consequences, that prong is satisfied. If the worker or employer did consider the consequences, the second prong is satisfied only when the worker or employer expected the injury to occur.[167] If the plaintiff cannot prove the subjective state of mind of the employer, the plaintiff can, alternatively, prove that the act was committed with utter disregard for the consequences.[168]

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158. *Id.*

159. *Id.* ¶ 26, 131 N.M. at ___, 34 P.3d at 1156.

160. *Id.* ¶ 27, 131 N.M. at ___, 34 P.3d at 1156 (citing Tallman v. Arkansas Best Freight, 108 N.M. 124, 133, 767 P.2d 363, 372 (Ct. App. 1988), which stated that willfulness "requires that the worker have knowledge of the peril and that ability to foresee the injury for which willful misconduct is to blame"). *See also* Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 714, 496 P.2d 1106, 1110 (Ct. App. 1972) (stating that willful conduct means "the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences").

161. *Delgado*, 2001-NMSC-034 ¶ 27, 131 N.M. at ___, 34 P.3d at 1156; N.M. STAT. ANN. § 52-1-11 (1991 Repl. Pamp. & Supp. 2001).

162. *Delgado*, 2001-NMSC-034 ¶ 27, 131 N.M. at ___, 34 P.3d at 1156.

163. *Id.*

164. *Id.*

165. *Id.* ¶ 28, 131 N.M. at ___, 34 P.3d at 1156.

166. *Id.*

167. *Id.*

168. *Id.*

The third prong encompasses the requirement of Section 52-1-11 that, in order to render a worker's injury non-compensable, willfulness must "cause" the injury.[169] The court interpreted this causation requirement as proximate cause.[170]

Finally, the court addressed the defendant's argument that any deviation from the actual intent test will "visit an undue hardship upon employers in this State and wreak havoc with New Mexico's workers' compensation system."[171] In response, the court stated, "Because we do not believe that the Act was ever intended to immunize employers from liability for intentional torts, we fail to see the hardship that our holding visits upon employers."[172] Furthermore, the court stated, "we seriously doubt that employers are willfully injuring their employees with such frequency that the consequence of our decision to expose such employers to tort liability will be to 'wreak havoc' with the workers' compensation system."[173] In recognizing the potential implications of the opinion, the court in its final statement said, "The greater the impact of this opinion has on the workers' compensation system, the more profound will have been its need."[174]

V. ANALYSIS

The *Delgado* decision was needed to ensure uniform treatment of both employers and employees under the Act. *Delgado*, however, represents a major retreat from the previous law governing the Act's exclusivity provisions. The effect of the opinion on employee tort actions outside the compensation system is unclear. While policy considerations support the court's reasoning, the court's interpretation of the legislative intent underlying the Act requires a critical analysis. In addition, the opinion leaves unanswered several questions with regard to the applicability of the willfulness test in future cases.

A. Do New Mexico Principles of Statutory Interpretation Support the Court's Uniformity Rationale?

The court's decision in *Delgado* hinges on the fact that the actual intent test created a disparity between what misconduct was sufficient for an employee to be denied coverage under the exclusivity provisions and what misconduct was sufficient for an employer to escape liability outside of the Act. Relying on Section 52-5-1, the court determined that the Act demands the equal treatment of workers and employers.[175] The general policy of uniform application underlying the holding in *Delgado* is consistent with the court's historic construction of the statute, as well as Section 52-5-1.

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169. *Id.* ¶ 29, 131 N.M. at ___, 34 P.3d at 1156.

170. *Id. See also* N.M. U.J.I. CIV. 13-305 ("Proximate cause of an injury is that when in a natural and continuous sequence [unbroken by intervening cause] produces the injury and without which the injury would not have occurred. It need not be the only cause, not the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.")

171. *Delgado*, 2001-NMSC-034 ¶ 30, 131N.M. at ___, 34 P.3d at 1156.

172. *Id.*

173. *Id.* ¶ 31, 131 N.M. at ___, 34 P.3d at 1157.

174. *Id.*

175. *Id.* ¶ 23, 131 N.M. at ___, 34 P.3d at 1154.

The issue that arises as a result of the court's reasoning in *Delgado* is whether the principles of statutory construction permit the court to infer legislative intent by borrowing language from one provision and using it to construe a particular term in a related provision. In creating the willfulness test, the court relied on Section 52-1-11, which requires that compensation be denied under the Act for an employee's willful, intentional, or intoxicated misconduct resulting in injury.[176] In doing so, the court found that the level of misconduct required for an employee to be denied coverage is the same level of misconduct that will subject the employer to common law liability.[177]

The New Mexico Court of Appeals recently reiterated the general rules of statutory construction that apply to the Act.[178] The *Delgado* opinion follows these four principles of statutory construction.[179] The four principles, however, do not directly mention what principles are to be applied when the language of two related sections differs. In *Klineline v. Blackhurst*,[180] the New Mexico Supreme Court addressed this question, stating, "Although we cannot add a requirement that is not provided for in the statute, and cannot read into it language that is not there, we do read the act in its entirety and construe each part in connection with every other to produce a harmonious whole."[181]

Under the *Klineline* principle, an argument could be made that the court inserted the terms "intentional" and "willful" into Section 52-1-9 based on the requirements laid out in Section 52-1-11. The court does not add language to the Act, however, but uses the terms in Section 52-1-11 to assist it in determining the meaning of "accidentally sustained," as used in Section 52-1-9 to produce a harmonious reading of the Act.[182]

In *Delgado*, the court was guided by Section 52-5-1. Because the actual intent test in its application favors employers, the court's determination that uniformity

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176. N.M. STAT. ANN. § 52-1-11 (1991 Repl. Pamp. & Supp. 2001). The *Delgado* court, however, relying on Section 52-1-11 to create a uniform standard of applicable misconduct, focused on only two of the three types of employee misconduct that will render their claim self-inflicted and therefore non-compensable. The court did not address the issue of whether an employee injured by an intoxicated employer would be permitted to escape the bar of exclusivity. It may not be necessary to prove willful or intentional if the employer was intoxicated.

177. *Delgado*, 2001-NMSC-034 ¶ 24, 131 N.M. at ___, 34 P.3d at 1155.

178. Baca v. Complete Drywall Co., 2002-NMCA-002 ¶ 13, 131 N.M. 413, 38 P.3d 181, 184 (2002), *cert. denied*, 131 N.M. 564, 40 P.3d 1008 (2002). The court stated first "that the primary goal is to give effect to the intent of the legislature;" second that "we examine the language of the statute, giving the words their ordinary meanings;" third "[w]hen the sections are part of a larger act, like the Workers' Compensation Act, we examine the act in its entirety, construing each section in connection with every other section;" and fourth the sections "should be considered together to produce a harmonious whole." *Id.* ¶ 13, 131 N.M. at ___, 38 P.3d at 184 (internal quotation marks omitted).

179. The court viewed the exclusivity provisions together to create a harmonious whole, uniform application of the Act, by relying on the ordinary meaning of accident, while insuring the legislative intent memorialized in Section 52-5-1 was its primary guide.

180. 106 N.M. 732, 749 P.2d 1111 (1988).

181. *Id.* at 735, 749 P.2d at 1114.

182. In the event the opinion is to be understood as having inserted "willful and intentional" into the Act, the court of appeals recently said in State v. Romero, 2000-NMCA-029 ¶ 28, 128 N.M. 806, 812, 999 P.2d 1044, 1050, that "words can be added and words in a statute can be read as though they were omitted, if that is necessary to effect legislative intent and prevent an absurd and unreasonable meaning." As a result, the *Delgado* court's reasoning is valid, even in the event it is found that the court added language to the Act. If the court did not add the words "willful and intentional" to Section 52-1-9, the court could not give effect to the legislative intent underlying the Act, which would cause an absurd and unreasonable result.

requires that non-accidental be given the same meaning in both sections 52-1-11 and 52-1-9 is consistent with principles of statutory construction. When examining sections 52-1-11 and 52-1-9 in light of Section 52-5-1, the court was required to define non-accidental as willful and intentional to give effect to the legislative intent underlying the Act. Due to the enactment of Section 52-5-1, the court's construction of non-accidental as "willful" is a fair and reasonable interpretation of the Act and does not violate the principles of statutory construction. Therefore, the *Delgado* court's reasoning on this issue is sound and supported by the enactment of Section 52-5-1.

B. Does the Delgado Opinion Adopt or Reject the "Substantially Certain to Occur" Test?

In support of the abolition of the actual intent test,[183] the plaintiff asked the court to adopt a test of "intentional" that "would lift the bar of exclusivity when the employer knows that its conduct is 'substantially certain' to result in the worker's serious injury or death."[184] The plaintiff's argument derived from the *Restatement (Second) of Torts* Section 8, which states that "intent is used...to denote that the actor desires to cause consequences of his act, or that he believes the consequences are substantially certain to result from it."[185] It is unclear if the court adopted or rejected the plaintiff's argument to incorporate the alternative "substantial certainty" test into its definition of intentional. The court held that "when an employer intentionally *or* willfully causes a worker to suffer an injury, the injured worker may sue in tort."[186] Therefore, any conduct that is intentional *or* willful, under the test articulated in *Delgado*, is non-accidental and falls outside the coverage of the Act.

While the focus of the opinion is on the willfulness test, it is important to briefly revisit what is meant by the word "intentional" after *Delgado*. The opinion makes clear that the court abolished the "actual intent" test as the *sole* test. A showing of intentional misconduct (actual intent) on the part of the employer still will permit an employee to file a common law action.

Although the *Delgado* opinion does not discuss or adopt the alternative "substantial certainty" test articulated by the plaintiff, it may be logical to infer that the "substantially certain to occur/result" test the plaintiff was seeking has been incorporated into the *Delgado* holding, based on the *Restatement*'s definition of intent.[187] As a result, the court in its holding may have adopted the meaning of intent as used elsewhere in the law of torts. If so, then the substantial certainty test the plaintiff was seeking was likely incorporated into the understanding of intentional act and may be a valid argument in the future. In addition, the focus of the *Restatement*'s definition of intent is not on the act itself, but on the consequences of the act.[188] Focusing on the consequences of the intentional act or omission is consistent with the court's requirements under the willfulness test, which requires

183. *Delgado*, 2001-NMSC-034 ¶ 9, 131 N.M. at ___, 34 P.3d at 1152.
184. *Id.*
185. RESTATEMENT (SECOND) OF TORTS § 8A (1965).
186. *Delgado*, 2001-NMSC-034 ¶ 24, 131 N.M. at ___, 34 P.3d at 1155.
187. RESTATEMENT (SECOND) OF TORTS § 8A (1965).
188. *Id.* at cmt.a.

both an objective and subjective analysis of the consequences resulting from the employer's act or omission.[189]

Because "substantial certainty" requires more proof than the willfulness test,[190] but less than the actual intent test, it is possible that the court impliedly incorporated it as sufficient to overcome the Act's exclusivity provisions. Therefore, if an employee is seeking to sue his or her employer outside the scope of the Act, it may be advisable to plead all three levels of employer misconduct: actual intent to harm, substantially certain to occur/result, and willfulness.

C. Willfulness Test Analyzed

The court's three-prong willfulness test[191] left several questions unanswered with regard to the future applicability of the test. The court introduced the willfulness test by stating that it combined two previous methods for defining willfulness for purposes of the Act.[192] As a result, the *Delgado* willfulness test contains both an objective and a subjective test.

Under the first prong, the employer's behavior will be considered willful when "the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker."[193] The objective nature of this requirement poses no problem. The question left open, however, is what constitutes "just cause or excuse."

The court noted that for people who hold certain jobs, such as firefighters and police officers, the first prong might otherwise be met, but that the conduct at issue would not meet the prong's requirement because a just cause or excuse may exist.[194] By recognizing that in certain employment positions, under some circumstances, an employee may be directed to engage in an act that is expected to result in injury, the court acknowledges that emergency situations that involve the saving of lives or property may constitute just cause or excuse.[195]

The opinion does not make clear if economic justifications for an employer's conduct will ever constitute just cause or excuse. One of the reasons underlying the court's abolition of the actual intent test, however, was that "it encourages

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189. *Delgado*, 2001-NMSC-034 ¶ 26-28, 131 N.M. at ___, 34 P.3d at 1156.

190. *See* RESTATEMENT (SECOND) OF TORTS § 8A cmt. b, illus. 1. (1965) ("Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness.... [A]s the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence."). Illustration 1 provides the following example of substantial certainty: "A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort." *Id.*

191. *Delgado*, 2001-NMSC-034 ¶ 26, 131 N.M. at ___, 34 P.3d at 1156.

192. *Id.* (quoting Tallman v. Arkansas Best Freight, 108 N.M. 124, 133, 767 P.2d 363, 372 (Ct. App. 1988) (stating willfulness "requires that the worker have knowledge of the peril and the ability to foresee the injury for which willful misconduct is to blame"); also citing Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 714, 496 P.2d 1106, 1110 (Ct. App. 1972) (stating willful misconduct means "the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences")).

193. *Delgado*, 2001-NMSC-034 ¶ 26, 131 N.M. at ___, 34 P.3d at 1156.

194. *Id.* ¶ 27, 131 N.M. at ___, 34 P.3d at 1156.

195. *Id.*

employers, motivated by economic gain, to knowingly subject a worker to injury in the name of profit making."[196] The court strongly disapproved of the cost-benefit policy the actual intent test promoted. As a result, economic considerations will most likely not constitute just cause or excuse. The New Mexico courts will have to carve out a definition of "just cause or excuse" when construing this prong.

Under the second prong, the employer's behavior will be considered willful when "the worker or employer expects the intentional act or omission to result in the injury or has utterly disregarded the consequences."[197] The subjective element of this prong requires the fact finder to examine the state of mind of the employer.[198]

There are several questions left unanswered by the second prong. The first is the meaning of the term "expects." The second is whether *the* particularized injury needs to be considered in the consequences or if it is enough to consider that *an* injury may result from the employer's conduct. The final question left unanswered is the meaning of "utter disregard."

The first element requires that "the worker or employer "expects" the intentional act or omission to result in the injury suffered."[199] *Webster's Dictionary* defines "expect" as "to look for (mentally), to look forward to, as to something that is believed to be about to happen or come."[200] This definition indicates an anticipatory response more than a subjective understanding of the possible consequences of an act or omission that the prong requires.

A more helpful definition is found in *Merriam-Webster's Collegiate Dictionary*, which defines "expects" as to "consider probable or certain."[201] This definition appears to be more in line with the policies articulated by the court. By virtue of the term "probable" provided in the above definition, "expects" may mean more likely than not, as used in the preponderance of the evidence standard for civil actions.[202] Due to the general inexplicit nature of the term "expects," this too will be a question the New Mexico courts must resolve in the future application of the *Delgado* test.

The second question left unanswered by this prong is how the fact finder will determine the employer's subjective state of mind. The prong requires the fact finder to examine the state of mind of the employer and determine if the employer considered the consequences of the act or omission.[203] The court stated that, if "the worker or employer did consider the consequences of the act or omission, this prong would be satisfied only when the worker or employer expected the injury to occur."[204] The court clarified what behavior would not satisfy the requirement, stating, "It will not be enough, for example, to prove that the worker or employer

196. *Id.* ¶ 18, 131 N.M. at ___, 34 P.3d at 1154.
197. *Id.* ¶ 26, 131 N.M. at ___, 34 P.3d at 1156.
198. *Id.*
199. *Id.*
200. WEBSTER'S INTERNATIONAL DICTIONARY 799 (3d ed. 1981).
201. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 407 (10th ed. 2001).
202. N.M. U.J.I. CIV. 13-304; Campbell v. Campbell, 62 N.M. 330, 341, 310 P.2d 266, 273 (1957) (stating that "preponderance of the evidence" simply means the greater weight of the evidence); Lumpkins v. McPhee, 59 N.M. 442, 453, 286 P.2d 299, 306 (1955) ("A party is said to have established his case by a preponderance of the evidence when the evidence tips the scales in favor of the party on whom rests the burden of proof, even though it barely tips them.").
203. *Delgado*, 2001-NMSC-034 ¶ 28, 131 N.M. at ___, 34 P.3d at 1156.
204. *Id.*

considered the consequences and negligently failed to expect the worker's injury to be among them."[205]

The court did not make clear if *the* specific injury need be considered by the employer, or if it is sufficient that the employer considered the consequences of its conduct and that *an* injury was among the possible consequences.[206] The answer to this question is unclear. In determining proximate cause and the foreseeability of injury, however, New Mexico is an "*an*" injury state.[207] If the plaintiff is foreseeable and within the zone of danger, *the specific injury* that ensues as a result of negligent or intentional misconduct need not be foreseeable.[208] The New Mexico courts must determine whether this law will apply to *Delgado* issues.[209]

The final question the subjectivity prong raises is what is the meaning of "utter disregard" in the context of the willfulness test. The court did not define what would constitute "utter disregard" but did state that a lack of consideration of the consequences of an act or omission would satisfy the requirements of this prong.[210]

As to whether willful behavior encompasses intentional acts without regard for the consequences, or "utter disregard," the court of appeals spoke in *Rivero v. The Lovington Country Club.*[211] In *Rivero*, the court found that "willful" or "malicious," for purposes of determining a landowner's conduct resulting in injury, encompassed intentional acts performed without regard for the consequences.[212] The court found that its definition, including utter disregard, was consistent with the definition of

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205. *Id.*

206. If a defendant admits to directing a plaintiff to undertake an activity likely to result in an injury but weighed the consequences and foresaw only that injury x and injury y would occur and failed to consider that injury z could occur, is that enough to fail the test and keep exclusivity intact?

207. *See* Calkins v. Cox Estates, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990); *see also* Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. Ct. App. 1928).

208. *Calkins*, 110 N.M. at 61, 792 P.2d at 38. In addition, N.M. U.J.I. CIV. 13-1827, punitive damages, defines willful conduct as "the intentional doing of an act with knowledge that harm may result." The U.J.I. definition denotes that the subjective thoughts of the actor are considered, but the exact consequences of the intentional act need not necessarily be foreseeable. The subjective test articulated by the court, however, appears to require the actor to consider the consequences of his/her act in the context of the foreseeability of *the* injury sustained.

209. Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000). *Turner* addressed the subjective versus objective tests, and determined that when evaluating whether an employer's act or omission was "substantially certain to occur," the courts should apply an objective standard. *Id.* at 689. The court found that "[t]o hold otherwise would encourage a practice of willful blindness on the part of employers who could ignore conditions that under an objective test would be found to be dangerous, and later claim lack of subjective knowledge or intent to harm an employee." *Id.* at 691. The *Turner* court reasoned that the subjective test provided too much protection to employers and, thus, had the effect of returning to the actual intent test it had previously abolished. *Id.* at 688. *Delgado* is distinguishable from *Turner* on both factual and legal grounds because the *Delgado* court provided the "utter disregard" portion of the test in conjunction with the subjective portion of the test. *Delgado*, 2001-NMSC-034 ¶ 26, 131 N.M. at ___, 34 P.3d at 1156. The question that follows is, can the plaintiff allege the employer's subjective knowledge that the injury would result, and in the alternative allege the employer acted with utter disregard?

210. *Delgado*, 2001-NMSC-034 ¶ 27, 131 N.M. at ___, 34 P.3d at 1156. A possible answer can be found in NEW MEXICO UNIFORM JURY INSTRUCTION 13-1827. It does not define "utter disregard," but the term "utter indifference" is used in the definition of wanton conduct. N.M. U.J.I. CIV. 13-1827. It does define wanton conduct as "the doing of an act with utter indifference to or conscious disregard for a person's" rights or safety. *Id.* The definition of utter indifference, as a conscious disregard for a person's rights or safety, appears to mirror the court's language in *Delgado*, in which the subjective prong is met if the employer never considers the consequences of his acts or omissions that result in injury.

211. 124 N.M. 273, 949 P.2d 287 (Ct. App. 1997).

212. *Id.* at 275, 949 P.2d at 289.

willful provided in *Black's Law Dictionary*, which defined willful to include "acts done with indifference to the natural consequences."[213]

If utter disregard means "acts done with indifference or conscious disregard for the consequences" in that context, then it most likely carries the same meaning in the context of the *Delgado* test. As a result, if the plaintiff can prove that the employer acted with conscious disregard, meaning the employer did not consider the consequences of his conduct, then this prong is satisfied. However, it is not clear what type of evidence, without questioning the employer as to his or her thoughts, will be sufficient to prove utter disregard. Would lack of just cause or excuse be sufficient to infer or prove utter disregard? The court's placement of the word "or" after the first requirement suggests that the plaintiff need not prove both subjective expectation of injury and utter disregard for the consequences. However, pleading both elements of the subjective test in the alternative may be advisable.

The requirement of the third prong is causation, which the court has defined as proximate cause.[214] The court found the causation requirement to be proximate cause based on the interpretation of that section by the court of appeals.[215] The Act does not define proximate cause. As a result, traditional tort principles and definitions will apply.[216]

In sum, the court's interpretation of the Act's uniformity requirement is valid under the rules of statutory construction. In addition, it is possible the court adopted by incorporation the "substantial certainty" test the plaintiff sought. Furthermore, several aspects of the application of the test remain unresolved. All of these issues necessitate resolution by New Mexico courts in the future application of the *Delgado* test.

VI. IMPLICATIONS

A. *Practical Considerations of the Delgado Opinion*

The *Delgado* opinion left unanswered several questions regarding the procedural ramifications of the opinion, including the election of remedies and the doctrine of collateral estoppel. Furthermore, the practical effects of the newly created law on the

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213. *Id.* at 276, 949 P.2d at 290 (citing BLACK'S LAW DICTIONARY 1599 (6th ed. 1990)).

214. *Delgado*, 2001-NMSC-034 ¶ 29, 131 N.M. at ___, 34 P.3d at 1156.

215. *Id.* (relying on N.M. STAT. ANN § 52-1-11 (1991 Repl. Pamp. & Supp. 2001); and citing Mitchum v. Triple S Trucking, 113 N.M. 85, 89, 823 P.2d 327, 331 (Ct. App. 1991) (stating that scrutiny of Section 52-1-11 indicates that the New Mexico Legislature, in enacting legislation establishing the affirmative defense of intoxication, followed the approach taken by a majority of states requiring proof that the worker's intoxication constituted a proximate cause of his or her injury)).

216. N.M. U.J.I. CIV. 13-305 (" A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by intervening cause] produces the injury and without which the injury would not have occurred. It need not be the only cause, not the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury."). *See also* N.M. U.J.I. CIV. 13-306 (defining independent intervening cause); Torres v. El Paso Electric Co., 127 N.M. 729, 739, 987 P.2d 386, 396 (1999) (stating that independent intervening cause is an affirmative defense to a claim of intentional tort). In addition, proximate cause is a question of fact to be determined by the jury. *See* Calkins v. Cox Estates, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990). Therefore, the judge on a motion for summary judgment can only determine the sufficiency of the evidence and not whether proximate cause exists. *See generally* Bartlett v. Mirabal, 128 N.M. 830, 999 P.2d 1062 (Ct. App. 2000).

insurance industry remain unclear. In addition, *Delgado*, by addressing the lack of legislative guidance as to what constitutes a non-accidental injury,[217] spurred a legislative response in the 2002 session that may lead to further legislative action in 2003.

B. Procedural Implications of Delgado

As a result of the *Delgado* decision, an injured worker may encounter two possible issues. The first is the potential effect of the decision on an employee's ability to file alternatively a compensation claim and a common law action. Must the employee elect to recover under the Act, or can the employee file for recovery under the Act as well as concurrently file an intentional tort action in district court? The second question pertains to the role of the doctrine of collateral estoppel with regard to a district court's determination of the injury as "accidental" and, therefore, within the coverage of the Act.

Eldridge v. Circle K Corp.[218] answers the question of whether an employee may file both compensation and common law actions. In *Eldridge*, the decedent's employer filed a compensation action pursuant to Section 52-5-5(A)[219] requesting benefits be paid under the Act to the decedent's estate. The decedent's estate objected to the filing of the claim, because it was seeking common law relief alleging the decedent's death was the result of the employer's intentional misconduct.[220] The workers' compensation judge determined the estate failed to establish that the employer committed an intentional wrong; therefore, the Act was the exclusive remedy for the estate.[221]

The issue addressed in *Eldridge* was whether the workers' compensation judge or the district court has primary jurisdiction to determine whether an injury is intentional.[222] At issue was whether the decedent's death was accidental or caused by the intentional misconduct of his employer.[223] The court held that when an employee asserts a cause of action based in common law for a non-accidental injury caused by the employer, the district court "should make the initial determination of jurisdiction."[224] The workers' compensation judge is required to defer to the district court.[225] The court found that, upon the claimant's request, the workers' compensation judge should defer or suspend action until a court resolves the issue of the nature of the tort claim.[226] If the claimant's tort action fails, then the workers' compensation proceeding may continue.[227]

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217. *Delgado*, 2001-NMSC-034 ¶¶ 1, 14, 131 N.M. at ___, 34 P.3d at 1151-54.

218. 123 N.M. 145, 934 P.2d 1074 (Ct. App. 1997).

219. *Id.* at 146-47, 934 P.2d at 1075-76 (citing N.M. STAT. ANN. § 52-5-5(A) (1991 Repl. Pamp. & Supp. 1996) (stating that when a dispute arises under the Workers' Compensation Act "*any* party may file a claim with the director" no sooner than thirty-one days from the date of injury") (emphasis added).

220. *Eldridge*, 123 N.M. at 147, 934 P.2d at 1076.

221. *Id.*

222. *Id.* at 151, 934 P.2d at 1080.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

As a result, an employee seeking to file a common law action against his or her employer under *Delgado* does not lose the right to alternatively seek recovery under the Act if the court determines the employer's conduct was accidental.[228] Therefore, when an employee asserts a claim of intentional or willful misconduct on the part of the employer, the employee should follow the filing provisions of the Act,[229] provide the workers' compensation judge with information on the common law cause of action, request a suspension of the proceedings under the Act, and file the complaint with the court. If the employee follows the procedure provided by the court in *Eldridge*, and has a cause of action against the employer for intentional or willful infliction of the injury, the workers' compensation judge must defer to the district court's determination of the issue. Upon final resolution by the district court, the employee will either dismiss the compensation action or return to the workers' compensation judge for determination of remedies under the Act.

The second question that arises under both *Delgado* and *Eldridge* pertains to the effect of the doctrine of collateral estoppel.[230] The district courts have primary jurisdiction to apply *Delgado* in cases in which the employee alleges intentional or willful misconduct by an employer.[231] As a result, the court can find that the alleged act was accidental and, therefore, subject to the Act's exclusivity provisions.

The issue that arises is whether the doctrine of collateral estoppel requires the workers' compensation judge to apply the district court's determination of the injury as accidental. Can the employer at a workers' compensation proceeding assert he or she acted intentionally, thereby denying the employee recovery under the Act? Alternatively, could an employee use the determination of "accidental injury" to prohibit the employer from asserting its affirmative defenses under the Act?

Collateral estoppel bars the relitigation of ultimate facts or issues that are actually litigated and necessarily decided in a prior action.[232] With regard to an employer's ability to assert the defense of intentional misconduct under the Act, the claim would be collaterally estopped as a result of the trial court's determination of the injury as accidental.[233] The issue of whether the employer's conduct was intentional or accidental would have been actually litigated and necessarily decided in order for the court to rule. The doctrine of collateral estoppel would prevent an employer from relitigating the matter before the court or the workers' compensation judge.

Conversely, the employer will be able to raise the defense that an employee was injured by intoxication, intentional misconduct, or willfulness. These issues will not have been actually litigated or necessarily determined in the trial court when the district court rules that the injury was accidental, and thus the sole remedy is

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228. *See id.*

229. N.M. STAT. ANN. §§ 52-5-5 to -9; §§ 52-1-29 to -31 (1991 Repl. Pamp. & Supp. 2001).

230. The doctrine of collateral estoppel bars the relitigation of ultimate facts or issues that are actually litigated and necessarily decided in a prior action. *See* Silva v. State, 106 N.M. 472, 474, 745 P.2d 380, 381 (1987); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980) (Under collateral estoppel, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

231. *Eldridge*, 123 N.M. at 151, 934 P.2d at 1080.

232. *See* Silva v. State, 106 N.M. 472, 474, 745 P.2d 380, 381 (1987); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980).

233. *See* Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

workers' compensation.[234] Because the Act provides the employer with affirmative defenses, the issues decided by the workers' compensation judge are distinctly different from those necessarily decided by the trial court. Therefore, the employer is not denied its affirmative defenses under the Act, because the district court would not have actually litigated or necessarily decided an employer's affirmative defense issues.

C. General Liability Insurance versus Workers' Compensation Coverage

The Act mandates that all employers in New Mexico who meet the requirements of Section 52-1-2 carry workers' compensation insurance coverage.[235] In addition to workers' compensation insurance, most employers carry a form of general liability insurance to cover negligence-based civil liability claims brought by employees or third parties.[236]

Generally, businesses carry commercial general liability insurance, which provides coverage for liability incurred as a result of unintentional and unexpected personal injury or property damage.[237] A commercial general liability insurance policy does not insure against all claims.[238] Most commercial general liability insurance policies provide coverage for an "occurrence,"[239] which is defined in part as "an accident."[240] As a general rule, commercial general liability insurance policies exclude coverage for an insured's intentional misconduct.[241]

Most insurance policies exclude coverage for intentional misconduct because coverage for intentional torts violates public policy.[242] As a result, an employer most likely cannot contract for insurance to cover damage judgments when intentional misconduct is alleged and proved. The Supreme Court of New Mexico has held, however, that insurance contracts can provide coverage for punitive damages.[243] Punishment is the goal of punitive damages. If an individual can purchase a policy to cover damages for punishment, it may be possible for an employer to purchase additional insurance to cover willful misconduct.

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234. *See id.*

235. N.M. STAT. ANN. § 52-1-2 (1991 Repl. Pamp. & Supp. 2001).

236. Joseph P. Monteleone, *Coverage Issues Under Commercial General Liability and Directors' and Officers' Liability Policies*. 18 W. NEW ENG. L. REV. 47, 49 (1996).

237. Sam P. Rynearson, *Exclusion of Expected or Intended Personal Injury or Property Damage under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, THE COMPREHENSIVE GENERAL LIABILITY POLICY: A CRITIQUE OF SELECTED PROVISIONS 3-21 (Arthur J. Liederman ed. 1985).

238. Francis J. Mootz, *Principles of Insurance Coverage: A Guide for the Employment Lawyer*, 18 W. NEW ENG. L. REV. 5, 17 (1996).

239. *See* Rynearson, *supra* note 237, at 3 (stating The National Bureau of Casualty Underwriters and the Mutual Insurance Rating bureau defines "occurrence" as "an accident, including injurious exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured").

240. *Id.*

241. *See* Mootz, *supra* note 238, at 14.

242. Safeco Ins. Co. of America, Inc. v. McKenna, 90 N.M. 516, 519, 565 P.2d 1033, 1036 (1977); *see also* Martin Paskind, *Review of Firm's Liability Coverage Is Vital*, ALBUQUERQUE J., Dec. 3, 2001, at Business Outlook 5; MARK S. RHODES, THE LAW OF COMMERCIAL INSURANCE 2 (Standard Publishing).

243. Baker v. Armstrong, 106 N.M. 395, 398, 744 P.2d 170, 173 (1987).

In *Wolff v. General Casualty Co. of America*,[244] the court held that there is no public policy in New Mexico that requires denial of coverage for "*willful* acts."[245] In *Wolff*, the court declined to extend the general policy prohibiting insurance coverage for intentional torts to unexpected injuries.[246] As a result, it is possible that an employer may now purchase coverage for its willful acts under *Delgado* but be precluded from purchasing coverage for its intentional torts. This result is so because other cases provide that coverage for intentional misconduct violates public policy and may not be purchased at any price.[247]

Before and after *Delgado*, insurance coverage may be available for punitive damages,[248] and for willful misconduct,[249] but not for intentional torts. As a result, it would be advisable for an employee to request a special verdict form,[250] requesting the fact finder to determine if the misconduct was intentional, willful, or both. If the fact finder concludes that the employer's misconduct was intentional, the damage award will most likely be paid out of the pocket of the employer. If the fact finder determines that the employer is guilty of willful misconduct, and coverage for such acts is permitted and was purchased, then the employer's insurance company will most likely pay the damages. It is unclear what the result will be, however, if the fact finder determines both intentional and willful misconduct, when a policy covering willful misconduct exists. The employee may need to consider these issues if he or she anticipates that the recovery of damages may be difficult or if the employer may be judgment-proof.

The expense of paying premiums for extended general liability insurance for willful misconduct is an effect the *Delgado* decision could impose on New Mexico employers. As Justice Franchini stated in the opinion, however,

> [W]e seriously doubt that employers are willfully injuring their workers with such frequency that the consequence of our decision to expose such employers to tort liability will be to wreak havoc with the...system. If New Mexico employers are intentionally or willfully injuring their employees at such a frequency that coverage for such acts will amount to undue economic hardship, then the need for the opinion was great.[251]

It would be advisable for employers who fear potential exposure as a result of the *Delgado* willfulness test to meet with their general liability carrier to discuss the possibilities available for polices that provide coverage for willful misconduct.

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244. 68 N.M. 292, 361 P.2d 330 (1961).

245. *Id.* at 298, 361 P.2d at 335.

246. *Baker*, 106 N.M. at 397, 744 P.2d at 172 (commenting on the holding in *Wolff*).

247. *See generally* Sena v. Travelers Insurance Co., 801 F. Supp 471 (D.N.M. 1992); Knowles v. United Services Automobile Assoc., 113 N.M. 703, 832 P.2d 394 (1992); Safeco Insurance Co. v. McKenna, 90 N.M. 516, 565 P.2d 1033 (1977).

248. *Baker*, 106 N.M. at 397, 744 P.2d at 172.

249. *Wolff*, 68 N.M. at 298, 361 P.2d at 335.

250. N.M. R. Civ. P. 1-049.

251. *Delgado*, 2001-NMSC-034 ¶¶ 31, 34 131 N.M. at ___, 34 P.3d 1156-57.

D. Legislative Response to the Delgado Opinion

During the 2002 session of the New Mexico Legislature, which followed the *Delgado* decision by only three months, the Senate proposed and passed a joint memorial[252] "requesting the New Mexico Legislative Council to refer to the appropriate interim committee a study of the Workers' Compensation Laws and Practices,"[253] which had not been the subject of oversight or study for more than seven years.[254] The joint memorial mandated that if such committee be formed, it examine the Act, the New Mexico Constitution, and court decisions governing workers' compensation laws in New Mexico.[255] After passage in the Senate, the joint memorial was tabled in the House of Representatives on February 14, 2002,[256] the last day of the 2002 regular session.

The proposed joint memorial may have been enacted in response to the *Delgado* court's abolition of the actual intent test as the sole test to raise the bar of exclusivity. It is likely that the Act will be at the center of debate in the 2003 legislative session. The legislature will consider whether to eliminate all but the actual intent test, expand actual intent by including "substantially certain to occur/result" into the definition of intentional, or expressly incorporate into the Act the intentional/willfulness test established in *Delgado*.

If the legislature reinstates the actual intent test as applied prior to *Delgado*,[257] a constitutional challenge on the grounds of violation of equal protection, due process, and right to trial by jury will likely follow. In addition, promoting a policy of employer protectionism at the expense of New Mexico employees and their families may not be popular with the citizens of New Mexico.[258]

VII. CONCLUSION

In *Delgado v. Phelps Dodge Chino, Inc.*, the New Mexico Supreme Court overruled the cases in which the actual intent test was the sole test used to raise the Act's bar of exclusivity. The court rejected the conclusion that actual intent was the intended meaning of non-accidental in the New Mexico Workers' Compensation Act. As a result, an employer has greater exposure to common law actions resulting

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252. S. J. MEM. 24, 45th Leg. (N.M. 2002).

253. *Id.*

254. *Id.*

255. *Id.*

256. NEW MEXICO STATE LEGISLATURE BILL FINDER, *at* http://legis.state.nm.us/session02.asp?chamber=S&type=JM&number=24 (Feb. 5, 2002).

257. *See* Johnson Controls World Services, Inc. v. Barnes, 115 N.M. 116, 847 P.2d 761 (Ct. App. 1993).

258. The argument in favor of incorporating the *Delgado* test into the Act is that a policy of employer protectionism is not a policy the legislature or the citizens of New Mexico should accept or promote. Conversely, the argument in support of legislatively reinstating the actual intent test is one based in the theory of economic development in New Mexico. An argument surely will be made that if New Mexico permits its employees to sue outside the Act, either businesses in the state will go bankrupt or New Mexico will fail to attract new businesses. In response to such an argument, it should be noted that New Mexico, while in the minority, is not the first state to abolish the use of the actual intent test. Eight states, including Florida, New Jersey, North Carolina, Texas, and Louisiana, have all adopted the substantially certain to occur test, which their state legislatures subsequently memorialized in each respective act. In addition, four states, West Virginia, California, Michigan, and Washington, adopted either the substantial certainty test or a willfulness test. The legislative reaction in these states has been mixed. *See* LARSON, *supra* note 12, § 103.04(D), at D103-32 to -40.

from the willful infliction of injury on an employee. Additionally, the adoption of the willfulness test ensures the Act's intended uniform application to both employers and employees, which supports the policies underlying the adoption of the Act.