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**WORKER'S COMPENSATION—Using the Exclusive Remedy Provision as a Shield for an Employer's Intentional Acts Against Employees. *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885 (Wyo. 1984).**

In 1982, Melodi Baker and Lorraine Bell were employed at the Wendy's restaurant in Sheridan, Wyoming, which was managed by defendant Scott Smith.<sup>1</sup> Both women alleged that while they were at the worksite Smith touched their buttocks and breasts in a lewd, offensive and sexual manner, simulated sexual acts with brooms, microphones or plastic hoses in their presence, told Ms. Bell her mother performed certain lewd sexual acts in hell, and told Ms. Baker she should perform oral sex on male customers. Appellants also alleged that Smith and his wife dressed up a store dummy to look as if the dummy had performed a sexual act. Baker and Bell claimed to have suffered emotional injuries as the result of Smith's assaults, batteries and the intentional infliction of emotional distress.

Smith denied touching Ms. Bell, Ms. Baker or any other female employee on the buttocks and making outrageous statements to Ms. Bell. He denied telling Ms. Baker to perform oral sex with male customers, but admitted that such a suggestion would be characteristic of him. He did admit simulating various sexual acts and constructing the dummy. Smith acknowledged that he was aware Baker and Bell objected to his behavior and that it was extremely upsetting to them. When the behavior continued, these incidents were reported to the regional manager. No investigation of the charges was conducted other than a normal inspection of the restaurant.<sup>2</sup>

Baker and Bell filed a complaint in Sheridan County District Court against Smith, Wendy's International, Inc., and Wendy's of Montana, Inc. for alleged assaults and batteries and the intentional infliction of emotional distress. Wendy's moved for summary judgment on the ground that the injuries suffered were covered by Wyoming's Worker's Compensation Act, which would be the exclusive remedy available to appellants. The motion was granted, and the action against Smith was stayed pending appeal. Appellants brought two issues on appeal to the Wyoming Supreme Court. First, they contended that Wendy's was vicariously liable for Smith's actions.<sup>3</sup> Second, they contended that the exclusive remedy provision<sup>4</sup> of the Wyoming Worker's Compensation Act did not extend

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1. Brief of Appellant at 1, *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885 (Wyo. 1984) [hereinafter *Employee's Brief*].

2. *Employee's Brief*, *supra* note 1, at 3-11. Ms. Bell alleged that her work duties were changed to less desirable ones, that she was not paid for performing required work, and that she was persuaded by Smith to quit as the solution to his problems, all as a result of having complained to Smith's superiors. Also, a notice was posted at the worksite informing all employees that taking complaints to the manager's superiors would result in termination of employment.

3. This issue is outside the scope of this casenote.

4. WYO. STAT. § 27-12-103(a) (1977) provides:

The rights and remedies provided in this act . . . for an employee and his dependents for injuries incurred in extrahazardous employments are in lieu

to “intentional torts of assault and battery and intentional outrageous conduct inflicting emotional distress. . . .”<sup>5</sup> The Wyoming Supreme Court rejected both arguments and affirmed the summary judgment for Wendy’s.

This note will examine the court’s holding that injuries caused by an employer’s intentional, harmful actions fall within the scope of worker’s compensation. After considering two approaches by which the court might have reached a different conclusion, this note will recommend that the legislature make changes in the Worker’s Compensation Act.

#### BACKGROUND

When the concept of worker’s compensation was developed, a bargain was struck between the employee and employer: the employee gave up his right to sue the employer for negligent and accidental wrongs in return for guaranteed compensation for disabling injuries that “presumably affects earning power.”<sup>6</sup> To recover under worker’s compensation, the worker does not have to prove the elements of negligence such as duty, breach of duty, and actual harm.<sup>7</sup> The worker’s compensation remedy, however, is the exclusive avenue of relief for those injuries falling within its scope. This eliminates the threat to the employer of paying twice for an injury—once through insurance payments to worker’s compensation, and again in a lawsuit brought by the employee.

Professor Larson’s treatise on workmen’s compensation law is often relied upon in several jurisdictions, including Wyoming.<sup>8</sup> In defining the nature and scope of the exclusiveness principle, Professor Larson explains that “[t]he compensation remedy is exclusive of all other remedies by the employee or his dependents against the employer and insurance carrier for the same injury, if the injury falls within the coverage formula of the act.”<sup>9</sup> The Wyoming Supreme Court follows this broad definition of exclusive remedy. The court’s position was expressed most succinctly in *Jordan v. Delta Drilling Company* where the court stated “as a general proposition, the exclusive remedy of the Wyoming worker’s compensation laws is the only remedy available unless the employment was unlawful or illegal.”<sup>10</sup> The court has consistently applied the exclusive remedy provision.

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of all other rights and remedies against any employer making contributions required by this act, or his employees acting within the scope of their employment unless the employees are culpably negligent, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

5. Employee’s Brief, *supra* note 1, at 15.

6. 1 A. LARSON, WORKMEN’S COMPENSATION LAW § 2.40, at 10 (1985).

7. *Baker v. Wendy’s of Montana, Inc.*, 687 P.2d 885, 888 (Wyo. 1984). There is no relationship between the author and the plaintiff Melodi Baker.

8. *See, e.g., id.* at 891; *Stimson v. Michigan Bell Telephone Company*, 77 Mich. App. 361, 258 N.W.2d 227 (1977).

9. 2A A. LARSON, WORKMEN’S COMPENSATION LAW § 65.00, at 12-1 (1985).

10. *Jordan v. Delta Drilling Co.*, 541 P.2d 39, 48 (Wyo. 1975).

Traditionally, the only injuries covered by worker's compensation were those so disabling that a worker was unable to continue earning a wage.<sup>11</sup> Usually these were physical injuries.<sup>12</sup> But in *Consolidated Freightways v. Drake*,<sup>13</sup> a 1984 decision, the Wyoming Supreme Court determined that mental injuries are also compensable under worker's compensation. In that case, Drake, an extra-board truck driver, alleged that he suffered a mental breakdown as a result of sustained tension and frustration from his work situation. The court held Drake's injuries were compensable under worker's compensation because his injuries resulted "from a situation of greater dimensions than the day-to-day mental stresses and tensions which are part of daily life."<sup>14</sup> The court determined that this was compatible with the statutory definition of "injury."<sup>15</sup>

In recent years many jurisdictions have had to deal with the exclusive remedy doctrine in relation to compensability of mental and emotional injuries, yet their results have been inconsistent. Opinions from courts that have addressed their state's exclusive remedy provision can best be summarized by one court's observation that "[t]he development of case law in the area of the remedies available to employees who are injured by the intentionally tortious conduct of their employers has had a checkered course."<sup>16</sup> This is an understatement.

A cross section of cases from Michigan, California, and Wisconsin illustrates the diversity of judicial holdings regarding the compensability of the intentional infliction of emotional distress. These states, like Wyoming, have recently been struggling with this issue. Michigan courts have held that intentionally inflicted emotional distress is covered by their worker's compensation laws along with other non-physical injuries. In *Stimson v. Michigan Bell Telephone Company*,<sup>17</sup> the Michigan Court of Appeals held that the exclusive remedy provision barred an action for the non-physical tort of sex discrimination. The court noted that such a non-physical tort usually falls outside the scope of the exclusive remedy provision. The court noted, however, that since the plaintiff's mental injuries were compensable under Michigan's worker's compensation law, it was her exclusive remedy.

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11. 1 LARSON, *supra* note 6, § 2.40, at 10.

12. Not all physical injuries are compensable. Facial disfigurement, for example, is not necessarily covered if it does not bar a worker from obtaining and keeping employment. *Id.* at 10-11.

13. 678 P.2d 874 (Wyo. 1984). For further analysis of this case see Note, *A Confusing Double Standard for Mental Injuries*, 20 LAND & WATER L. REV. 287 (1985).

14. *Consolidated Freightways*, 678 P.2d at 877.

15. *Id.* at 877. WYO. STAT. § 27-12-102(a)(xii) (1977) provides:

"Injury" means any harmful change in the human organism other than normal aging, and includes damage to or loss of a prosthetic appliance and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer, incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business.

16. *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 204, 155 Cal. Rptr. 486, 491 (1979).

17. 77 Mich. App. 361, 258 N.W.2d 227 (1977).

The United States District Court for the district of Michigan reiterated the *Stimson* holding in *Schroeder v. Dayton-Hudson Corporation*.<sup>18</sup> Michigan's exclusive remedy provision barred a civil action because the physical injuries resulting from the alleged sex discrimination were compensable. The Michigan Court of Appeals relied on both *Stimson* and *Schroeder* when it extended this line of reasoning from sex discrimination cases to a case involving the intentional infliction of emotional distress.<sup>19</sup> This parallels the Wyoming decision in *Wendy's*.

Unlike Michigan, California courts have had difficulty interpreting their worker's compensation exclusive remedy provision when the claimed injury allegedly resulted from the intentional infliction of mental or emotional distress. One California district court concluded that the intentional infliction of emotional distress constituted an implied exception to the exclusive remedy provision when the injuries sustained were mental. In *Renteria v. County of Orange*, the district court held that the plaintiff, suffering mental injuries, was not barred by the exclusive remedy provision because there was no decisional or statutory authority stating his injuries were compensable.<sup>20</sup> The court expressed concern that in the area of intentional injury the "no-fault" worker's compensation system would not be a deterrent to intentional wrongdoing. The court noted it would "be ironic if the Workers' Compensation Act . . . were to be interpreted to shield the employer" from the "mental suffering caused [to an employee] by extreme and outrageous misconduct by [that] employer."<sup>21</sup>

Other California courts, however, agree with the holdings from Michigan and hold that physical injuries resulting from the intentional infliction of emotional distress are covered by worker's compensation. In *Gates v. Trans Video Corp.*, for example, a jury verdict for monetary compensation for the plaintiff was overturned on appeal.<sup>22</sup> The appellate court held that the plaintiff suffered physical injuries as a result of the intentional infliction of emotional distress, and since the physical injuries were compensable under California's Worker's Compensation law, the exclusive remedy provision applied. The *Gates* court distinguished *Renteria* by

18. 456 F. Supp. 652 (E.D. Mich. 1978).

19. *Cowan v. Federal Mogul Corporation*, 86 Mich. App. 619, 273 N.W.2d 487 (1977). The reasoning followed by Michigan and other jurisdictions has been criticized for extending the realm of worker's compensation coverage to intentional torts. See, e.g., Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641 (1983); Note, *Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890 (1983).

20. *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

21. *Id.* at 452. In 1980, a California appellate court held that the exclusive remedy provision was not a bar to plaintiff's suit because defendants acted outside the scope and course of their employment. In *Lagies v. Copley*, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980), a newspaper reporter brought a cause of action against two officials of the newspaper, alleging intentional infliction of emotional distress. Specifically, he alleged that the two officials abused their positions of authority by denying him advancements and conspiring to defame him. The court noted that the relevant section of the California Workers' Compensation law required that the employer must be acting within the scope of his employment in order for the injury to be covered.

22. 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979).

noting that even though the employee in that case had suffered mental injuries, he was still able to seek gainful employment, unlike the plaintiff in *Gates*.<sup>23</sup>

California courts are not alone in holding that intentionally inflicted injuries fall outside the scope of worker's compensation. A United States district court in Wisconsin dealt with the federal statute relating to compensation for federal employees injured in a work-connected situation in *Sullivan v. United States*.<sup>24</sup> Plaintiff's cause of action was dismissed on other grounds, but the court said defendant's argument that the exclusive remedy provision acted as a bar to plaintiff's action was incorrect. The court construed the federal statute<sup>25</sup> to cover only those injuries which were the result of accident and disease and stated further that the statute "does not appear to include such claims as are presented here for discrimination, mental distress, or loss of employment."<sup>26</sup>

#### THE PRINCIPAL CASE

In *Wendy's*, the Wyoming Supreme Court traced the history of worker's compensation law in Wyoming by starting with the 1914 Wyoming constitutional amendment<sup>27</sup> authorizing the establishment of an Industrial Accident Fund. This act paved the way for legislation the following year which established worker's compensation laws. The court emphasized that the "nature of the law in question is that of an industrial insurance act."<sup>28</sup> Thus, the court noted, worker's compensation liabilities fall under contract law and not tort concepts.

In *Wendy's*, the court addressed appellants' claim that their case should be removed from worker's compensation law because the law does not allow absolute immunity for employers for the "intentional torts of assault and battery and intentional outrageous conduct inflicting emotional distress committed by a supervisory agent. . . ."<sup>29</sup> The court noted

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23. *Id.* at 205, 155 Cal. Rptr. at 492.

24. 428 F. Supp. 79 (E.D. Wis. 1977).

25. 5 U.S.C. § 8101 (1982); 39 U.S.C. § 1005(c) (1982).

26. *Sullivan*, 428 F. Supp. at 81.

27. WYO. CONST. art. 10, § 4 was amended to read as follows:

No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void. As to all extra hazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be fixed by law according to proper classifications to each person injured in such employment or to the dependent families of such as die as the result of such injuries, except in case of injuries due solely to the culpable negligence of the injured employee. Such fund or funds shall be accumulated, paid into the state treasury and maintained in such manner as may be provided by law. The right of each employee to compensation from such fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to such fund in favor of any person or persons by reason of any such injuries or death.

28. *Wendy's*, 687 P.2d at 888.

29. *Id.* at 889.

appellants' contention that intentional and obscene conduct was not an "accident" under worker's compensation.<sup>30</sup>

The court held that the single issue to be decided was whether the claimed injury was covered by worker's compensation. The court relied on its holding in *Consolidated Freightways* to determine that the mental injuries suffered by appellants were compensable under the Wyoming statute. Therefore, the exclusive remedy provision barred any other action against the employer.

Finally, the court ruled that a causal connection existed between appellants' injuries and their employment. The court viewed the connection as being so obvious that an in-depth analysis was not necessary.

#### ANALYSIS

It should be observed at the outset that the court's holding in *Wendy's* appears to be reasonable. Yet it produced the absurd result that two women who had been intentionally harassed and sexually assaulted by a work supervisor were not allowed to sue the company which employed him because the assaults occurred at work. Justice Brown articulated concern about the ramifications of this result in *Parker v. Energy Development Co.*, a case argued just two weeks after *Wendy's*.<sup>31</sup> In his specially concurring opinion in *Parker*, Justice Brown noted that an employer could intentionally kill an employee at the worksite and then plead immunity from civil liability under the exclusive remedy provision of worker's compensation. As the worker is at the worksite, and the sustained injury is compensable, the worker or his heirs would be barred from bringing an action for injury or wrongful death against the employer. Under these circumstances, the worker's compensation remedy is woefully inadequate and inappropriate.

A more equitable result might have been reached in the *Wendy's* case had the court considered either of two different approaches. The first approach the court might have followed concerns the relationship between the injuries the women sustained and their job duties. The court, stating that the "nexus" test had been met, found that the injuries were work connected and hence that worker's compensation was the exclusive remedy.<sup>32</sup> The nexus referred to by the court is a causal connection between the injury suffered by an employee and some "condition, activity,

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30. *Id.* Appellants' other contentions were that mental anxiety was not an injury under worker's compensation and that the injuries did not arise out of their employment even though it was in the course of employment.

31. *Parker v. Energy Development Co.*, 691 P.2d 981 (Wyo. 1984). This case addressed an employee's physical injuries suffered as a result of the employer's alleged culpable negligence. The majority stated that if the injury was work-related and in all other respects compensable under worker's compensation, then the employer "was absolutely immune from all common-law tort remedies arising out of the injury to or death of the employee—including a cause of action for intentional tort or culpable negligence." *Id.* at 985. Justice Brown, who did not take part in the *Wendy's* decision, noted that if he had participated, he would have dissented. Brown concurred with the *Parker* decision because he believed the defendant did not act intentionally. *Id.* at 988 (Brown, J., specially concurring).

32. *Wendy's*, 687 P.2d at 892 (citing *In re Willey*, 571 P.2d 248 (Wyo. 1977)).

environment or requirement of the employment."<sup>33</sup> While this standard seems broad enough to encompass virtually any injury which occurs at work, a narrower reading of the nexus test might be in order.

The cases cited by the court as illustrative of work related injuries are distinguishable from the facts in *Wendy's* in that the workers in those cases suffered injuries while performing tasks clearly related to the duties and responsibilities of their job. In *Consolidated Freightways*, for example, the mental injuries the plaintiff suffered were a result of exceptional stresses related to the duty of a truck driver being on call twenty-four hours a day.<sup>34</sup> In another case, a woman was hospitalized and diagnosed as being schizophrenic after being treated in a rude and brusque manner by her employer over an extended period of time because she could not keep up with her increased responsibilities.<sup>35</sup> In *Todd v. Goostree*, the plaintiff suffered a nervous breakdown from the heavy workload.<sup>36</sup> In yet another case the worker suffered a disabling psychosis because he could not keep up with job procedures and performance requirements.<sup>37</sup>

These cases have a common thread—the mental, nervous or emotional injuries resulted from work duties the employees were to perform. This element is missing from *Wendy's*. Baker and Bell were at the worksite but their injuries did not result from the performance of either assigned or implied work duties. Nor was Smith performing his assigned or implied duties when he pinched and fondled the workers under his supervision. The court referred to the verbal abuse and offensive manners of Smith as the creation of an "employment condition characterized by pressures and tensions beyond those usually experienced by employees."<sup>38</sup> Yet this view ignores the fact that Smith intentionally created this condition, actions which took him outside the scope of his employment. In light of these circumstances, the nexus test should require more than mere presence of the employee at the worksite.

Notwithstanding the circumstances in *Wendy's*, the court's construction of the nexus test seems to be compatible with the Worker's Compensation Act. The pertinent statutory language provides that the injury must arise "out of and in the course of employment while at work in or about the premises" and be "incurred while at work in places where the employer's business requires an employee's presence. . . ."<sup>39</sup> In construing this requirement, the court has gone as far as holding that worker's compensation was available for an employee who was injured while on a break at work.<sup>40</sup> The result in the *Wendy's* case hardly seems surprising, given the language of the statute and the court's disposition to read it literally.

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33. *In re Willey*, 571 P.2d 248, 250 (Wyo. 1977).

34. *Consolidated Freightways*, 678 P.2d at 876.

35. *Swiss Colony, Inc. v. Dep't of Industry, Labor and Human Relations*, 72 Wis. 2d 46, 240 N.W.2d 128 (1976).

36. *Todd v. Goostree*, 493 S.W.2d 411 (Mo. 1973).

37. *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960).

38. *Wendy's*, 687 P.2d at 891.

39. WYO. STAT. § 27-12-102(a)(xii) (1977).

40. *Rocky Mountain Tank and Steel Co. v. Rager*, 423 P.2d 645 (Wyo. 1967).

The second approach by which the court might have reached a different result involves the distinction between accidental and intentional injuries. In *Wendy's*, the court did not focus on the intentional nature of the assault, battery, and infliction of emotional distress. Instead, the court stated that the test for determining whether the exclusive remedy provision bars an employee's common law action against an employer was whether the injuries were compensable under the Act.<sup>41</sup> If the injuries are compensable, worker's compensation provides the exclusive remedy. This test, however, bypasses what should be a vital step—determination of whether the injury was sustained from an intentional act on the part of the employer or was accidental in nature.

The Wyoming law is clearly intended to cover accidental, not intentionally caused, injuries. Though the relevant section<sup>42</sup> of the Wyoming Worker's Compensation Act does not specifically mention that an "accident" must occur for an employee to be covered by its provisions, several cases decided by the Wyoming Supreme Court have interpreted the Act to be in the nature of an industrial accident insurance. The court first made reference to the scope of worker's compensation as being in the "nature of accident insurance" in the 1918 case of *Zancanelli v. Central Coal and Coke Company*.<sup>43</sup> In *Meyer v. Kendig*, a 1982 decision, the court reiterated that "[w]orker's compensation laws were enacted as a form of industrial insurance for victims of industrial accidents. . . ."<sup>44</sup> The court also uses this language in the *Wendy's* decision.<sup>45</sup> Allowing intentional torts to fall under the guise of "accidents" destroys the integrity of the program.

The Wyoming Supreme Court has pointed out that the proper source of changes in worker's compensation law is the legislature,<sup>46</sup> and it refuses to deviate from what appear to be clear statutory guidelines. Given the indication in *Wendy's* that the court will construe Wyoming's worker's compensation laws as covering even intentionally inflicted injuries, reform must come from the legislature. It is thus up to the legislature to adopt language eliminating intentional torts from worker's compensation coverage. Arizona, for example, excludes willful misconduct from the exclusive remedy provision of its worker's compensation act.<sup>47</sup> In Arizona,

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41. The exact language from the opinion is: "The test for determining whether the exclusive-remedy provisions of the Worker's Compensation Act operate to prevent actions against covered employers for intentional acts of employees is whether or not the claimed injury would be compensable under the Act." *Wendy's*, 687 P.2d at 889.

42. WYO. STAT. § 27-12-102(a)(xii) (1977).

43. 25 Wyo. 511, 523, 173 P. 981, 989 (1918).

44. 641 P.2d 1235, 1238 (Wyo. 1982).

45. *Wendy's*, 687 P.2d at 887.

46. *In re Sikora*, 57 Wyo. 57, 112 P.2d 557 (1941).

47. ARIZ. REV. STAT. ANN. § 23-1022 A-B (Supp. 1985) provides:

A. The right to recover compensation pursuant to this chapter for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer or any co-employee acting in the scope of his employment, and against the employer's workers' compensation insurance carrier or administrative service representative, except as provided by § 23-906, and except that if the injury is caused by the employer's willful misconduct, or in the case of a co-employee by the co-employee's willful misconduct, and the act caus-

a worker who is injured through the willful misconduct of an employer or co-employee has the option of filing a worker's compensation claim or maintaining an action at law for damages against the wrongdoer. Under such a statute, the suit for damages brought by Baker and Bell might not have been precluded.

#### CONCLUSION

The Wyoming Supreme Court's long history of providing a liberal construction of the Worker's Compensation Act demonstrates a concern for the welfare of the worker. The court's literal application of the work connectedness provision and its failure to distinguish intentionally caused injuries from accidental injuries does not, however, promote the welfare of the worker in cases such as *Wendy's*. As long as the statutory language remains unchanged, the court will continue to reach inequitable results in intentional injury cases.

Legislation on these issues would provide needed guidance for the court. Statutory provisions addressing employer misconduct and willful intent to cause injury have been enacted in other states. Such legislation in Wyoming would reestablish the original purpose of worker's compensation.

BARBARA A. BAKER

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ing the injury is the personal act of the employer, or in the case of a co-employee the personal act of the co-employee, or if the employer is a partnership, on the part of the partner, or if a corporation, on the part of an elective officer of the corporation, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, the injured employee may either claim compensation or maintain an action at law for damages against the person or entity alleged to have engaged in the wilful misconduct.

B. "Wilful misconduct" as used in this section means an act done knowingly and purposely with the direct object of injuring another.