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SUBROGATING EMPLOYEES' INTENTIONAL ACT DAMAGE RECOVERIES FROM AN EMPLOYER OR CO-EMPLOYEE

The *quid pro quo* premise underlying the social compromise known as workers' compensation is simple: an employee injured at work receives no-fault medical expenses and wage replacement indemnity benefits and, in exchange, the employer is given protection from employee lawsuits and a statutory right to be reimbursed from the tortfeasor who actually caused the work-related injury. This is the employee's *exclusive remedy* against the employer, who enjoys immunity from tort liability for the injuries. The Exclusive Remedy Rule prevents injured employees from suing their employers and usually prevents culpable third parties from bringing a third-party action against the employer for contribution. Even though every state allows the employee to bring a lawsuit against "third parties" (persons or entities other than the employer or employee), workers' compensation benefits are the *sole remedy* available to the employee. If and when the employee makes a third-party recovery, the employer's workers' compensation carrier is granted a statutory right of subrogation and/or reimbursement of the benefits it paid. If that were the end of the story, however, this article would not be necessary.

The Exclusive Remedy Rule has been under assault since the mid-20th Century, with trial lawyers' lobby groups and labor organizations arguing strenuously that courts and legislatures should craft various exceptions to the rule. One such exception that has become quite common is allowing an injured employee to sue the employer for an intentional act or assault by the employer or a co-employee against the injured employee. For example, in Louisiana, this exception was created by the Louisiana Legislature in 1976. La. R.S. § 23:1032. In Texas, a cause of action for an intentional act is guaranteed to the employee by the Texas Constitution and cannot be taken away by the Legislature. Tex. Const. art. I, § 13; *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665 (Tex. 1981).

Not all states took the bait, however. Many states still grant the employer exclusive remedy protection even when their actions constitute an intentional act or even gross negligence. Today, 43 states provide for an intentional act exception to the Exclusive Remedy Rule. Colorado, Delaware, Georgia, Hawaii, Iowa, Rhode Island, and possibly Idaho remain states which do not allow an injured employee to sue the employer even if there is an intentional act.

In states where a tort action is allowed by the employee against an employer for injuries caused by an assault or an intentional act, a dilemma arose as to whether the employer or its workers' compensation carrier should be allowed rights of subrogation and/or reimbursement, such that it would effectively be receiving reimbursement for the workers' compensation benefits it just got done paying, from its own insured – the employer. Over time, some states began to allow such rights of subrogation and/or reimbursement, while others have not. In an equally large number of states, the issue has yet to be decided. It is important for claims and subrogation professionals to know such rights are available to the insurance carrier, and when they are not. The concept of allowing an insurance company to recover benefits it pays under a policy of workers' compensation insurance directly from its own insured is perplexing, and seemingly in violation of the Anti-Subrogation Rule.

The Anti-Subrogation Rule is a long-standing common law defense to subrogation. It states that a subrogated insurance company standing in the shoes of its insured cannot bring a subrogation action against or sue its own insured to recover its claim payments. Sometimes known as the "suing your own insured" defense, the Anti-Subrogation Rule was originally developed based on the logical premise that, because the carrier stands in the shoes of its insured, it would essentially be suing itself. Therefore, no right of subrogation can arise in favor of an insurance company against its own insured. *Wager v. Providence Ins. Co.*, 150 U.S. 99 (1893). This seemingly simple concept has many tentacles and each state has developed their own bodies of law with regard to how and when the rule will be

applied, setting forth numerous exceptions and rules regarding its application. For a chart on how the Anti-Subrogation Rule is treated in all 50 states, see [HERE](#).

Notwithstanding the Anti-Subrogation Rule, some states willingly allow an employer or its workers' compensation carrier to seek reimbursement from a tort damage payment made by the employer – its own insured – as a result of an intentional tort or an assault committed by the employer. States such as California straddle the fence by allowing the amount of compensation otherwise payable to the employee to be increased by 50%, together with costs and expenses not to exceed \$250, where the employee is injured by reason of the serious and willful misconduct of the employer. Cal. Lab. Code § 4553.

In other states, such as Florida, the workers' compensation carrier is allowed to seek recovery of its subrogation interest even out of a tort recovery by the employee against the employer. *Jones v. Martin Electronics, Inc.*, 932 So.2d 1100, 1108 (Fla. 2006). States such as Idaho have not yet clearly answered the question.

Effective workers' compensation subrogation requires a complete knowledge of all aspects of workers' compensation law, and an aggressive recovery program must necessarily involve a carrier holding out its hand for reimbursement from an employer whose intentional acts caused the work-related injury. Knowing when and under what circumstances this can be done is an obvious necessity of successful subrogation.

The following 50-state summary details the law in every state with regard to when and whether an employee can proceed with a lawsuit against an employer whose intentional act has resulted in a work-related accident. It also contains any available law or precedent with regard to whether the workers' compensation carrier is also entitled to be reimbursed from such a tort recovery for its workers' compensation lien.

ALABAMA

An employer remains immune from suit even if it acts intentionally. Ala. Stat. § 25-5-11(a). Section 25–5–11 authorizes the injured employee to bring an action against “any party other than the employer” who is also legally responsible for the injury, and provides:

(b) If personal injury or death to any employee results from the willful conduct ... of any officer, director, agent, or employee of the same employer ..., the employee shall have a cause of action against the person....

In *Ex parte McCartney Constr. Co.*, 720 So.2d 910 (Ala. 1998), an injured employee sued a co-employee and his employer for damages, alleging they intentionally and willfully failed to provide him with a safe workplace. The Supreme Court held that the employer was entitled to immunity, even in light of the alleged intentional act, while the co-employee was not.

There is no clear answer in Alabama law regarding whether a workers' compensation carrier is allowed to be reimbursed for its claim payments out of an employee's recovery against a co-employee for committing an intentional act.

ALASKA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. An employer who commits an intentional tort is considered a third party. *Elliott v. Brown*, 569 P.2d 1323 (Alaska 1977). All compensation benefits received by employee, who was injured due to employer's intentional tort, should be applied against any damages recovered from a common lawsuit against the employer. *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250 (Alaska 1976).

Alaska Statutes § 23.30.015(g) provides that the employee shall promptly pay to the employer out of the third-party recovery all amounts paid out by the employer or compensation carrier, insofar as the recovery is sufficient after deducting all litigation costs and expenses. *Cooper v. Argonaut Ins. Companies*, 556 P.2d 525 (Alaska 1976).

ARIZONA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. The carrier may take the tort claim payment (in this case a settlement for wrongful death action) into account when determining the amount of worker's compensation. *Worthington v. Indus. Comm'n of Ariz.*, 338 P.2d 363 (1959) (case dealing mainly with course and scope of employment).

A carrier may assert a lien on a third-party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action. *Aitken v. Indus. Comm'n of Ariz.*, 904 P.2d 456 (1995).

ARKANSAS

Employer is not a "third party" against whom workers' compensation insurer, as subrogee of injured employee, could maintain tort action for recovery of benefits paid to employee. *Zenith Ins. Co. v. VNE, Inc.*, 965 S.W.2d 805 (1998). A negligent co-employee is regarded as a third party and, therefore, is subject to tort suit by a co-employee. *Brown v. Finney*, 932 S.W.2d 769 (1996).

The purpose of the Arkansas workers' compensation statute is to protect the rights of both the employee and compensation carrier. *Travelers Ins. Co. v. McCluskey*, 483 S.W.2d 179 (1972).

CALIFORNIA

California does not include the "by accident" language in its workers' compensation act; instead, it provides compensation for an employer's intentional tort whenever the assault is "fairly traceable to an incident of the employment." *Azevedo v. Industrial Accident Comm'n*, 243 Cal.App.2d 370, 52 Cal. Rptr. 283 (1966).

The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed \$250, where the employee is injured by reason of the serious and willful misconduct of the employer. Cal. Lab. Code § 4553.

COLORADO

A claim of an intentional tort does not avoid the applicability of the Colorado Workmen's Compensation Act. *Eason v. Frontier Air Lines, Inc.*, 636 F.2d 293 (10th Cir. 1981).

CONNECTICUT

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Where employer paid employee workmen's compensation after employee was injured while working on employer's machinery, employer's workmen's compensation liability was exclusive remedy against it and employer could not be impleaded as third-party defendant in employee's subsequent suit against manufacturer of safety equipment in absence of any special relationship between employer and manufacturer. *Therrien v. Safeguard Mfg. Co.*, (1979) 408 A.2d 273 (1979).

In an equitable subrogation action, the workers' compensation insurer steps into the shoes of the insured employer, and, consequently, the insurer will not be able to assert any greater rights than could the employer if it had brought the action. Conn. Gen. Stat. Ann. § 31-293(a); *Pacific Ins. Co., Ltd. v. Champion Steel, LLC*, 146 A.3d 975 (Conn. 2016).

DELAWARE

Delaware's Exclusive Remedy Rule prevents third-party action from being filed against an employer or co-employee even for intentional torts. *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226 (Del. 1982).

DISTRICT OF COLUMBIA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Only injuries specifically intended by employer to be inflicted on particular employee fall outside of exclusivity provisions of Workers' Compensation Act, and evidence that employer's knowledge with substantial certainty that injury will result from acts does not equate with specific intent to injure or kill when injury is caused by intentional act of third person. D.C. Code 1981, §§ 36-301(12), 36-304. *Grillo v. Nat'l Bank of Washington*, 540 A.2d 743 (D.C. 1988).

FLORIDA

After judgment is entered against a tortfeasor (in this case an employer who has committed an intentional tort against their employee) and in favor of the injured employee, the workers' compensation coverage will be reimbursed from liability damages for benefits paid because of the injury. Even if the employee is entitled to damages not covered under worker's compensation (such as damages for pain and suffering), the carrier will be refunded or credited for amounts previously paid. *Jones v. Martin Electronics, Inc.*, 932 So.2d 1100, 1108 (Fla. 2006).

GEORGIA

When an employee's injuries are compensable under the Act, the employee is absolutely barred from pursuing a common law tort action to recover for such injuries, even if they resulted from intentional misconduct on the part of the employer. *Kellogg Co. v. Pinkston*, 558 S.E.2d 423 (2001).

HAWAII

Hawaii's Worker's Compensation Law does not provide a general exception to allow intentional tort claims against an employer. *Adams v. Dole Food Co.*, 323 P.3d 122 (Ct. App. 2014).

IDAHO

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. The Idaho Workmen's Compensation Law excludes all other rights and remedies under the common law or otherwise against an employer based on an intentional tort. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778, 784 (D. Idaho 1975).

(3) The exemption from liability given to an employer by this section shall not apply in any case where the injury or death is proximately caused by the willful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto. Idaho Code Ann. § 72-209(3).

ILLINOIS

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. If a plaintiff seeks to bring a common law action against his employer for an intentional tort based upon the actions of his co-employee or employer, the plaintiff's claim will be barred by the exclusivity provisions of the Act if plaintiff has filed for and received workers' compensation benefits. *James v. Caterpillar Inc.*, 611 N.E.2d 95 (1993).

An employee may bring suit against his or her employer alleging intentional tort while also pursuing a workers' comp claim, but once the employee actually receives compensation under the Act, this acceptance precludes recovering in the tort case. *Locasto v. City of Chicago*, 50 N.E.3d 718, 722, *appeal denied*, 60 N.E.3d 874 (Ill. 2016).

INDIANA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. The exclusivity provision is expressly limited to personal injury or

death arising out of and in the course of employment which occurs “by accident.” Because we believe an injury occurs “by accident” only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act. *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271 (Ind. 1994).

Workers’ compensation statutes provide that the employer or its insurance carrier will be reimbursed from the recovery available from the tortfeasor to the extent it has or will pay compensation. *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 374 (Ind. 2010). Indiana State Supreme Court held that the estates of the two deceased employees could make a claim for compensation under the Kentucky Workers’ Compensation Act, even though the employer had no workers’ compensation insurance, and that the death benefits would be paid to them by the uninsured employer’s fund, which would be granted a statutory subrogation right against the uninsured employer. *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528 (Ky. 2005).

IOWA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Fatal injuries sustained by employee arose out of and in the course of employment, and thus, exclusivity provision of Workers’ Compensation Act barred negligent supervision claim brought by employee. *Estate of Harris v. Papa John’s Pizza*, 2004, 679 N.W.2d 673, on remand 2004 WL 4967321. Intentional torts committed by co-workers remained actionable despite the workers’ compensation system. *Beard v. Flying J, Inc.*, 266 F.3d 792, 803 (8th Cir. 2001). Exclusivity provision of workers’ compensation law, under which employees could receive compensation from employers for injuries negligently inflicted only through workers’ comp, did not apply to intentional tort claims against employer. I.C.A. § 85.20; *Brcka v. St. Paul Travelers Companies, Inc.*, 366 F. Supp.2d 850 (S.D. Iowa 2005).

KANSAS

Kansas has strong exclusive remedy to prevent civil action even in cases involving intentional torts. *Rajala v. Doresky*, 661 P.2d 1251 (1983).

KENTUCKY

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. The provisions of K.R.S. § 342.610(4) give an injured worker the option of pursuing a claim for workers’ compensation benefits or of pursuing a claim for damages in a civil action “[i]f injury or death results to an employee through the deliberate intention of his employer to produce such injury or death....” However, this statutory provision is inapplicable where there has been no allegation of injury through deliberate intention. *OKN Constr. Co., LLC v. Isaacs*, 2014 WL 4384158 (Ky. Ct. App. 2014).

LOUISIANA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act. La. Stat. Ann. § 23:1032 (B).

MAINE

There is no exception to exclusive remedy for an employer’s intentional tort. *Li v. C.N. Brown Co.*, 645 A.2d 606 (Me. 1994); *Cole v. Chandler*, 752 A.2d 1189 (2000); *Frank v. L.L. Bean, Inc.*, 352 F. Supp.2d 8 (D. Me. 2005).

MARYLAND

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Maryland’s high court has unequivocally held that this intentional tort exception to the Act’s normal exclusivity rule requires proof of the employer’s “actual, specific and deliberate intent to injure the employee.” *Johnson v. Mountaire, Farms of Delmarva*, 503 A.2d 708 (1986).

MASSACHUSETTS

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. A suit for an intentional tort in the course of the employment relationship is barred by the exclusivity provision of the Workmen's Compensation Act, unless the employee has reserved a right of action pursuant to G.L. c. 152, § 24. *Anzalone v. Massachusetts Bay Transp. Auth.*, 526 N.E.2d 246 (1988); *Doe v. Purity Supreme, Inc.*, 664 N.E.2d 815 (1996); *Estate of Moulton v. Puopolo*, 5 N.E.3d 908 (2014).

MICHIGAN

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. There is no right to reimbursement for payments which are substituted for payments made due to the no-fault benefits (no-fault motor vehicle liability act) otherwise payable to an employee injured in the course of their employment. *Great American Ins. Co. v. Queen*, 300 N.W.2d 895 (Mich. 1980). However, the No-Fault Act's grant of immunity does not extend to tort liability arising from a defendant's intentional conduct. *Gray v. Chrostowski*, 828 N.W.2d 435 (2012).

MINNESOTA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Employee injured due to the negligence of their employer, under a settlement agreement, precluded the judicial establishment of the liability of his employer, the employer's insurer is not deprived of its subrogation and credit under Minn. Stat. § 176.061, subd. 6 (1976); *Sargent v. Preston-Haglin Constr. Co.*, 304 N.W.2d 625 (Minn. 1981). Intentional tort exception to exclusive remedy provision under Workers' Compensation Act did not apply to impose liability on employer for assault and battery, and other claims, based on injuries sustained by employee he received from co-employees; employer did not harbor conscious or deliberate intent to inflict injury, and management was not involved. *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434 (Minn. 2004).

There is one exception to an employer's immunity from tort actions under workers' compensation, which allows the employee to sue his or her employer if the employer has willfully assaulted and injured the employee (the "intentional injury exception"). *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746 (Minn. 2005).

MISSISSIPPI

When an employee receives a settlement to end a civil suit against his employer, that amount is a credit against the amount owed by the employer and carrier in a workers' compensation proceeding. *Sawyer v. Head, Dependents of*, 510 So.2d 472 (Miss. 1987).

MISSOURI

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

MONTANA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

NEBRASKA

Nebraska does not recognize any intentional act exception; even an egregious intentional act by the employer may be a covered "accident." *Estate of Teague by & through Martinosky v. Crossroads Coop. Ass'n*, 834 N.W.2d 236 (2013).

NEVADA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Injured employee's acceptance of State Industrial Insurance System (SIIS) award for permanent partial disability acted as an accord and satisfaction of common law rights, thereby destroying employee's common law right of action against his employer for intentional tort. N.R.S. 616A.020, subd. 1; *Advanced Countertop Design, Inc. v. Second Judicial Dist. Court of State ex rel. County of Washoe*, 984 P.2d 756 (Nev. 1999).

NEW HAMPSHIRE

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

NEW JERSEY

Where an injured employee who settles an intentional tort claim with their employer, the compensation carrier is entitled to its statutory lien against any settlement proceeds from the employer (also true for co-employees). *Calalpa v Dae Ryung Co., Inc.*, 814 A.2d 1130 (N.J. Super A.D. 2003).

NEW MEXICO

In the event of a successful intentional tort action, the employer's workers' compensation carrier would be subrogated to any recovery in tort to obtain reimbursement for benefits actually paid. *Salazar v. Torres*, 158 P.3d 449 (N.M. 2007).

NEW YORK

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. An employer or co-employee who commits an intentional tort against an employee is not protected by the Exclusive Remedy Doctrine. N.Y. Workers' Comp. Law § 11 & § 29 (McKinney). To the extent that employee may recover damages from co-worker for intentional tort, employee's recovery may be subject to recoupment by the workers' compensation carrier, where workers' compensation benefits have been paid based on same event. *Hanford v. Plaza Packaging Corp.*, 811 N.E.2d 30 (N.Y. 2004).

NORTH CAROLINA

Double recovery should be avoided by requiring the claimant who recovers civilly against his employer to reimburse the workers' compensation carrier to the extent the carrier paid workers' compensation benefits, or by permitting the carrier to become subrogated to the claimant's civil claim to the extent of benefits paid. *Woodson v. Rowland*, 407 S.E.2d 222 (1991). There is a lot of negative treatment for this case mostly involving the definition of an intentional act. Double recovery should be avoided by requiring the claimant who recovers civilly against his employer to reimburse the workers' compensation carrier to the extent the carrier paid workers' compensation benefits, or by permitting the carrier to become subrogated to the claimant's civil claim to the extent of benefits paid. *Edwards v. GE Lighting Sys., Inc.*, 668 S.E.2d 114 (2008).

NORTH DAKOTA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

OHIO

Employers are considered third parties. The Ohio Bureau of Worker's Compensation (BWC) has a right to subrogation against an employer when it involves an intentional tort action. R.C. § 4123.93(C) defines "third party" as an "individual, private insurer, public or private entity ... that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter." R.C. § 4123.931(I) provides that the statutory subrogation

right of recovery, “applies to, but is not limited to, all of the following ... (3) amounts recoverable from an intentional tort action.” *McKinney v. Omni Die Casting, Inc.*, 2017 WL 2256803.

Excluding a “private entity” from the scope of R.C. § 4123.93(C) simply because the private entity is the claimant’s employer also directly contradicts the unambiguous language of R.C. § 4123.931(I)(3) which specifically provides subrogation rights apply to intentional tort actions. *Id.* The BWC is not the equivalent of a private insurance company. In a typical insurance subrogation case, an insurer’s subrogation claim is based on the negligence of the tortfeasor and is derivative of the insured’s rights. The BWC’s subrogation right instead arises from the Workers’ Compensation Act itself. The Ohio Supreme Court found workers’ compensation subrogation “cannot be analogized to a typical insurance subrogation.” *Ohio Bur. of Workers’ Comp. v. McKinley*, 956 N.E.2d 814 (Ohio 2011); *see also, Figley v. Ivex Protective Packaging, Inc.*, 70 N.E.3d 12 (2016).

OKLAHOMA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Trial court allowed the workers’ compensation carrier to intervene in the action against employer for an alleged unprovoked altercation with an employee. The insurance carrier asserted that it had paid approximately \$103,000 in benefits to plaintiff and sought to protect its subrogation rights. *Armstrong v. Carr*, 77 P.3d 598 (Okla. Civ. App. Div. 2, 2003).

OREGON

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

PENNSYLVANIA

Pennsylvania Supreme Court definitively held that the intentional tort exception to the exclusivity provision, to the extent that it was ever alive in Pennsylvania, was now dead. *Holdampf v. Fidelity & Cas. Co. of New York*, 793 F.Supp. 111 (W.D. Pa. 1992).

RHODE ISLAND

There is no intentional tort exception in Rhode Island’s worker’s compensation statutes. *Diaz v. Darmet Corp.*, 694 A.2d 736 (R.I. 1997).

SOUTH CAROLINA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

SOUTH DAKOTA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

TENNESSEE

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

TEXAS

Even if the plaintiff recovers from the employer for gross negligence in a death case, the employer is not considered a “third party” for purposes of subrogation and the carrier cannot be reimbursed for its benefit payments from such a recovery. *Gentry v. Flint Eng’g & Constr. Co, Inc.*, 76 F.3d 95 (5th Cir. 1996). “Third persons” includes all persons other than the injured person’s own employer and classes of persons treated the same as the employer for this purpose by

statute or judicial decision. Interpretation of third-party to include employers would permit tort suits against employers and would place this provision in direct conflict with the exclusive remedy provision in § 408.001(a).

UTAH

To prevent an inconsistent recovery, a worker who recovers civilly against his employer may no longer receive workers' compensation benefits and must reimburse the workers' compensation carrier to the extent the carrier paid workers' compensation benefits, or by permitting the carrier to become subrogated to the claimant's civil claim to the extent of benefits paid. *Helf v. Chevron U.S.A. Inc.*, 361 P.3d 63 (Utah 2015).

VERMONT

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

VIRGINIA

The worker's compensation carrier has subrogation rights against "any other party" other than the employer and co-employees. *Jeneary v. Com.*, 551 S.E.2d 321 (2001).

WASHINGTON

See Wash. Rev. Code Ann. § 51.24.020. No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee.

WEST VIRGINIA

No case directly answering if compensation carriers can gain a subrogation interest against an employer who has committed an intentional tort against an employee. Where the injury or death is caused by the action of a third party (not the employer), the injured employee can sue and collect damages from the negligent third party. *Mooney v. Eastern Associated Coal Corp.*, 326 S.E.2d 427 (W.Va. 1984).

WISCONSIN

Even an intentionally inflicted injury is deemed an accident and falls within Wisconsin's Worker's Compensation Act. *Jadofsky v. Iowa Kemper Ins. Co.*, 355 N.W.2d 550 (Ct. App. 1984). Wisconsin's Worker's Compensation Act allows an employee to bring action against any co-employee for an assault intended to cause bodily harm. Wis. Stat. Ann. § 102.03. Regardless of whether the co-employee's conduct can be imputed to the employer under agency law, a third-party suit against the employer is still barred by the Exclusive Remedy Rule. *Stefanski v. R.A. Zehetner & Assocs., Inc.*, 855 F. Supp. 1030 (E.D. Wis. 1994).

WYOMING

An employer's immunity is absolute regardless of whether the behavior amounted to culpable negligence or an intentional tort. *Mauch v. Stanley Structures, Inc.*, 641 P.2d 1247 (Wyo. 1982).

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