

640.46 EMPLOYMENT RELATIONSHIP—LIABILITY OF EMPLOYER FOR  
INJURY TO EMPLOYEE—EXCEPTION TO WORKERS' COMPENSATION  
EXCLUSION.<sup>1</sup>

*NOTE WELL: In most cases, the plaintiff's status as an employee is stipulated. If the plaintiff's employee status is not stipulated, the jury must find it as a fact. In that situation, the Court must first submit the employment status issue to the jury using N.C.P.I.—Civil 640.00.*

The (*state number*) issue reads:

“Was the plaintiff [injured] [killed] by conduct intentionally engaged in by the defendant with the knowledge that the conduct was substantially certain to cause serious injury or death to an employee?”<sup>2</sup>

(You will answer this issue only if you have answered the (*state number*) issue regarding the plaintiff's employment status “Yes” in favor of the plaintiff.)<sup>3</sup>

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, two things:

First, that the defendant<sup>4</sup> intentionally engaged in conduct knowing that it was substantially certain to cause serious injury or death to an employee.<sup>5</sup> Actual intent to cause serious injury or death is not necessary.<sup>6</sup> However, the employer's conduct must be more than willful, wanton or reckless.<sup>7</sup>

Second, the conduct intentionally engaged in by the defendant caused the plaintiff's injury or death. A “cause” is an event or occurrence which in a natural and continuous sequence produces a person's injury or death.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that

the plaintiff was [injured] [killed] by conduct intentionally engaged in by the defendant with the knowledge that it was substantially certain to cause serious injury or death to an employee, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1 The Worker's Compensation Act, N.C. Gen. Stat. § 97-1 *et seq.*, excludes employers from liability for an employee's "personal injury or death by accident . . . ." N.C. Gen. Stat. §§ 97-9 and 97-10.1. However, the Act does not "relieve employers of civil liability for intentional torts which result in injury or death to employees." *Woodson v. Rowland*, 329 N.C. 330, 338-339, 407 S.E.2d 222, 227 (1991). Cautioning against expanding the "narrow holding" of *Woodson* beyond the specifics of that case, the Supreme Court of North Carolina has explained that the *Woodson* exception, "applies only in the most egregious cases of employer misconduct," and that "such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death." *Blue v. Mountaire Farms, Inc.*, \_\_\_ N.C. App. \_\_\_ 786 S.E.2d 393, 399 (2016) (quoting *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003)).

2 *Woodson*, 329 N.C. at 340, 407 S.E.2d at 228.

3 See NOTE WELL above.

4 Note that liability under *Woodson v. Rowland* not only attaches to corporate employers whose conduct meets the "substantial certainty" standard, but to officers, employees or agents of a corporate employer whose individual conduct meets that standard. *Woodson*, 329 N.C. at 347-348, 407 S.E.2d at 232-233.

5 *Woodson*, 329 N.C. at 341, 407 S.E.2d at 229.

6 *Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995); *Rose v. Isenhour Brick & Tile Co.*, 344 N.C. 153, 159, 472 S.E.2d 774, 778 (1996); *Powell v. S&G Prestress Co.*, 342 N.C. 182, 183, 463 S.E.2d 79, 80 (1995) (*per curiam*); *Echols v. Zarn, Inc.*, 342 N.C. 184, 185, 463 S.E.2d 228, 229 (1995) (*per curiam*); *Bullins v. Abitibi-Price Corp.*, 124 N.C. App. 530, 533, 477 S.E.2d 691, 692-693 (1996), *review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

7 *Woodson*, 329 N.C. at 341, 407 S.E.2d at 229-230; *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993). A *Woodson* action is based on conduct that is "tantamount to an intentional tort," *id.*, but the Supreme Court has taken pains to point out that it is not an "intentional tort" in the true sense of that term. *Owens v. W. K. Deal Printing, Inc.*, 339 N.C. 603, 604, 453 S.E.2d 160, 161 (1995) (*per curiam*); *Kolbinsky v. Paramount Home, Inc.*, 126 N.C. App. 533, 535, 485 S.E.2d 900, 902, *review denied*, 347 N.C. 267, 493 S.E.2d 457 (1997). "[I]ntent is broader than a desire to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow." *Woodson*, 329

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N.C. at 341, 407 S.E.2d at 229, quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen,  
*Prosser and Keeton on Torts*, § 8, at 35 (5th ed. 1984).