Finalizing the Grand Compromise in West Virginia Workers' Compensation: Repeal Deliberate Intent

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FINALIZING THE GRAND COMPROMISE IN WEST VIRGINIA WORKERS' COMPENSATION: REPEAL DELIBERATE INTENT

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I. INTRODUCTION

The origins of compensating workers for their work-related injuries dates back to ancient times. The Code of Hammurabi, ancient Greek, Roman, Arab, and Chinese law provided for payments for lost body parts. "For example . . . loss of a joint of the thumb was worth one-half the value of a finger. The loss of a penis was compensated by the amount of length lost, and the value of an ear was based on its surface area." Workers' compensation in America developed out of the Industrial Revolution with the first workers' compensation program established in Wisconsin in 1911. The final state, Mississippi, adopted a program in 1948.

Workers' compensation is an insurance system set up to hold employers strictly liable for the workplace injuries of their employees. In return for employers being held strictly liable, employees are barred from bringing common law tort claims against their employers. Thus, it is a no-fault system of compensation. Deliberate intent statutes, however, carve out an exception to the bar of employees bringing a common law cause of action. Employees are allowed to sue an employer and have to prove that the employer acted with a "deliberate intention" to cause the injury to the employee.

This Note explores the implications of deliberate intent within West Virginia workers' compensation legislation and inevitably argues that the state Legislature should repeal deliberate intent as a means to draw businesses into the state. Deliberate intent hurts businesses because they are at risk for more liability than they would be in other states. To attract business to the state, West Virginia should repeal its statutory deliberate intent exception and make workers' compensation the exclusive remedy for workplace injury, thus bringing the state into line with the similar approaches of several of the surrounding states. To illustrate that West Virginia has long had it wrong on deliberate intent, that an exclusive workers' compensation remedy is not a novel or bad idea, and to explore other concepts of workers' compensation, the laws of Pennsylvania, Ohio, Maryland, Virginia, and Kentucky (collectively, the "Surrounding States")

2 Id.
3 Id.
4 Id. at 108.
5 Id.
6 Workers' Compensation, BLACK'S LAW DICTIONARY (10th ed. 2014).
7 Id.
8 See 9 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (Matthew Bender, rev. ed. 2015).
9 See id.
are examined. By examining the Surrounding States' workers' compensation frameworks, it becomes evident that West Virginia has long been at a disadvantage with its neighbors, who are the most likely competitors for attracting business. The stimulus for this Note is based on the action and controversy surrounding the First Session of the 82nd Legislature of West Virginia wherein it passed reform for deliberate intention as stated in West Virginia Code section 23-4-2. 10 Although the Legislature passed a reform bill, this Note suggests that the reform is not enough to bring West Virginia in line with its geographic competition because employers still have too much common law liability to employees.

Accordingly, the major issue addressed in this Note is how West Virginia can improve its business environment through workplace safety law reform. Secondly, did the Legislature get it wrong or right in the new deliberate intent statute? To solve this problem, there is no need to reinvent the wheel.

First, Part II will provide a brief history of workers' compensation and deliberate intention exceptions will be discussed to provide an overview of what workers' compensation is, how it works, and how deliberate intent statutes fit into the scheme. Then, this Note will provide a brief history and the current status of each states' deliberate intention law. From this discussion, various workers' compensation schemes will be observed to illustrate that West Virginia needs to align itself with the Surrounding States to be competitive in the business market. Finally, Part III will focus on how West Virginia courts will handle the new law and argue that the Legislature should repeal the deliberate intent exception to workers' compensation. This Note will also take into consideration sympathies from both the plaintiff and defense bar, employees and employers, the legislative and judicial branches, and good government in general.

II. BACKGROUND

This part begins with a historical background of workers' compensation and deliberate intent, generally, to provide insight on this area of the law. Section B will then discuss West Virginia’s deliberate intent jurisprudence and the evolution of its law with particular focus on the infamous Mandolidis v. Elkins Indus., Inc., 11 decision. Section C then discusses the Surrounding States to demonstrate other states’ frameworks for workers' compensation, different laws, and new ideas. This discussion will also illustrate West Virginia's disadvantage in regards to labor law and ways that West Virginia can improve its law.

10 To illustrate the controversy, in a conversation with a plaintiff's attorney, I was told that the statute "creates a higher standard than first-degree murder." Likewise, in conversation with a defense lawyer the sympathies were that the statute "doesn't do enough."

A. Historical Background

This section will first provide a brief overview of workers’ compensation and deliberate intent to provide a rudimentary basis of typical workers’ compensation acts, majority and minority rules, and how deliberate intent fits within the workers’ compensation scheme.

1. A Brief Overview of Workers’ Compensation

Workers’ compensation is a system that compensates workers for injuries or death sustained from their course of employment. In return for this no-fault based system, workers generally forfeit their right to sue their employers for these injuries.

Prior to the enactment of the Workmen’s Compensation Act, an employee’s sole remedy against his employer for injuries sustained during the course of his employment was to bring a common law suit against his employer. Because these suits were subject to the employer’s defense of contributory negligence, assumption of risk, and the fellow servant rule, the majority of industrial accidents remained uncompensated.

The typical workers’ compensation act has eight features: (1) an injured employee is automatically entitled to benefits; (2) fault is largely immaterial; (3) independent contractors are not covered; (4) benefits available and amounts recoverable are set forth; (5) the employee and dependents give up their common law rights to sue; (6) the right to sue third persons remains; (7) administrative boards are set up; and (8) employers are required to have insurance.

2. A Brief Overview of Deliberate Intention

Fifteen states, including West Virginia, Maryland, and Kentucky, have a statutory exception to the exclusivity provision of workers’ compensation law to provide employees with a common law cause of action against an employer.
causing intentional injury.\textsuperscript{19} For clarification, because some states use deliberate intentional injury and intentional tort interchangeably,\textsuperscript{20} intentional tort will refer to the common law tort of battery. Whereas, deliberate intentional injury will refer to, for example, an instance where an employer knows a working condition is unsafe but nonetheless orders employees into the area. Ten states,\textsuperscript{21} including Pennsylvania and Virginia, do not recognize this exception, while other states have judicially recognized exceptions.\textsuperscript{22}

One legal theory behind having this exception is that an employer cannot allege an injury was an “accident” when in fact it was intentionally committed.\textsuperscript{23} A second theory is that by committing an intentional tort, the employer “severed the employment relationship.”\textsuperscript{24} Lastly is the theory that the injury did not “arise out of the employment.”\textsuperscript{25} Aside from these legal theories, moral obligations have also been used to justify the exception.\textsuperscript{26}

The majority rule is that the deliberate intent exception cannot be used to include “accidental injuries caused by the gross, wanton, willful, 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 injury.”\textsuperscript{27} However, in 1978 West Virginia became the first jurisdiction to depart from the “actual intent” standard.\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{19}] Id.
\item[\textsuperscript{20}] See infra Part II.C.2.
\item[\textsuperscript{21}] Alabama, Georgia, Indiana, Maine, Nebraska, New Hampshire, Pennsylvania, Rhode Island, Virginia, and Wyoming. Larsson, supra note 8, § 103.01 n.4.
\item[\textsuperscript{22}] Id. § 103.01.
\item[\textsuperscript{23}] Id.
\item[\textsuperscript{24}] Id.
\item[\textsuperscript{25}] Id. (referring to this theory as the “the most fictitious theory of all”).
\item[\textsuperscript{26}] Id.
\item[\textsuperscript{27}] Id. § 103.03.
\item[\textsuperscript{28}] Id. § 103.04; see also infra Part II.B.
\end{itemize}
\end{footnotesize}
B. West Virginia Workers’ Compensation and Deliberate Intent: Almost Heaven for Injured Workers

The Legislature of West Virginia first introduced a deliberate intention statute in 1913, and it was signed into law by Governor Henry Hatfield. The statute provided that

[i]f injury or death result to an employe[e] from the deliberate intention of his employer to produce such injury or death, the employe[e], the widow, widower, child or dependent of the employe[e] shall have the privilege to take under this act, and also have cause of action against the employer as if this act had not been enacted, for any excess of damages over the amount received or receivable under this act.

The statute has been amended numerous times in the last 100 years. Deliberate intention did not have a statutory definition or standard until West Virginia Code section 23-4-2 was amended in 1983. Prior to 1983, deliberate intention was interpreted by the courts with a definition from the 1934...
case *Maynard v. Island Creek Coal Co.* The court held that in a deliberate intention action, "[a]llegations . . . of gross negligence by the employer do not constitute deliberate intention . . . [A]t the very least, there must be alleged facts from which the natural and probable consequence reasonably to be anticipated would be death or serious injury to the employee affected thereby."  

The Supreme Court of Appeals of West Virginia modified this definition in 1936 in *Allen v. Raleigh-Wyoming Mining Co.*, holding that "a specific intent on the part of the employer to produce the injury must be shown to support a recovery in such case." Here, the court relied on rulings made in the states of Washington and Oregon. It did so because Washington first adopted its deliberate intention statute in 1911. West Virginia and Oregon adopted their statutes, virtually identical to the Washington law, in 1913. This standard was supplanted in 1951 in *Brewer v. Appalachian Constructors, Inc.* There, the court held that in a deliberate intention action, the employee must "allege facts showing, or clearly implying, such intent; negligence, however wanton, does not supply such intent." The last decision consistent with the court’s higher standard to prove deliberate intention was in 1976 with *Eisnaugle v. Booth.* The court held that "[n]either gross negligence nor wanton misconduct are such as to constitute deliberate intention as contemplated by [the statute]." The overarching theme to this string of early cases is that to prove deliberate intention, the employee must make a showing of a sort of *mens rea* on the part of the employer.

In 1978, the definition of deliberate intention changed drastically with the holding of *Mandolidis v. Elkins Industries, Inc.* The plaintiff, James

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35 175 S.E. 70 (W. Va. 1934).
36 *Id.* at Syl. Pt. 1.
38 *Id.* at Syl. Pt. 1.
39 *Id.* at 613–14.
40 *Id.* at 613.
41 *See id.*
42 65 S.E.2d 87 (W. Va. 1951), overruled by Mandolidis, 246 S.E.2d 907.
43 *Id.* at Syl. Pt. 3.
44 226 S.E.2d 259 (W. Va. 1976), overruled by Mandolidis, 246 S.E.2d 907.
45 *Id.* at Syl. Pt. 2.
46 *See Eisnaugle,* 226 S.E.2d 259; *Brewer,* 65 S.E.2d 87; *Allen,* 186 S.E. 612; *Maynard v. Island Creek Coal Co.,* 175 S.E. 70 (W. Va. 1934).
Manolidis,48 was injured by operating a table saw without a safety guard, a safety violation known about by his employer.49 The court held, with Justice Darrell McGraw50 writing, that “[u]nder [section] 23-4-2 an employer is subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in wilful, wanton, and reckless misconduct,”51 thereby expressly overruling Allen, Brewer, and Eisnaugle.52 The court reasoned that the “workmen’s compensation system completely supplanted the common law tort system only with respect to [n]egligently caused industrial accidents.”53 McGraw criticized the holding in Brewer because the reasoning was adopted from the Washington and Oregon courts, who interpret deliberate intent by looking at the states’ murder statutes.54 He further reasoned that because West Virginia recognizes distinctions in negligent conduct, “when death or injury results from wilful, wanton or reckless misconduct such death or injury is no longer accidental in any meaningful sense of the word, and must be taken as having been inflicted with deliberate intention for the purposes of the workmen’s compensation act.”55

In 1983, the Legislature amended section 26-4-2 to supplant the standard adopted in Mandolidis by stating that it intended a “more narrow application” than “willful, wanton and reckless misconduct.”56 The Legislature then amended the law stating specific requirements of when an employer acts with deliberate

48 Tom D. Miller, Mandolidis Case, W. VA. ENCYCLOPEDIA (Oct. 8, 2010), http://www.wvencyclopedia.org/articles/1485. The title of the case is actually a misspelling of the plaintiff’s name.
49 Mandolidis, 246 S.E.2d at 915.
51 Syl. Pt. 1, Mandolidis, 246 S.E.2d at 909 (emphasis added).
52 Id.
53 Id. at 913.
54 Id.
55 Id. at 914.
intention, which have remained intact with additions made culminating in the 2015 amendment.\textsuperscript{57}

As previously discussed, in 2015, the Legislature again heightened the standard of deliberate intention.\textsuperscript{58} A comparison of the 2005 version of the deliberate intention statute with the 2015 amended version reveals striking similarities.\textsuperscript{59} The 2015 version of West Virginia Code section 23-4-2(d)(1)–(2)(B)(i) are verbatim to those of the 2005 version.\textsuperscript{60} The major differences contained in in the 2015 version of the law can be broken down into three sections—(1) the actual knowledge provision, (2) the specific unsafe working condition provision, and (3) the injury provision.\textsuperscript{61} Subpart (C) of the 2015 version is an addition relating to the requirement of an expert opinion and other evidentiary and procedural burdens that are not the focus of this Note. Each provision will be discussed in Part III to compare and contrast the 2015 version with the 2005 version\textsuperscript{62} of the deliberate intent statute. Pack your bags for a jurisprudential road trip of the Surrounding States.

\textbf{C. Evolution of Laws in Surrounding States}

Section C will begin the discussion of the Surrounding States. The purpose for discussing the Surrounding States is because they are West Virginia’s geographic competitors for business. Because they are competitors, their systems of workers’ compensation must be demonstrated. Examining the workers’ compensation systems and deliberate intent frameworks of the Surrounding States reveals that West Virginia is at a disadvantage and that systems exist where workers’ compensation is an exclusive remedy for workplace injury, whether it is \textit{per se} or \textit{de facto}.

\begin{footnotesize}
\begin{itemize}
\item[58] See W. VA. CODE ANN. § 23-4-2.
\item[61] See W. VA. CODE ANN. § 23-4-2(d)(2)(B)(II)–(III).
\item[62] 2005 was the last time the law was amended prior to 2015. See \textit{supra} note 33.
\end{itemize}
\end{footnotesize}
1. Pennsylvania: The Quaker State Doesn’t Believe in Conflict

Pennsylvania does not have a specific statutory exclusion for deliberate intention under its workers’ compensation statute. The exclusivity provision in the code states that “[t]he liability of an employer under this act shall be exclusive and in place of any and all other liability to such employe[e].” However, a narrow exception was judicially recognized in interpreting the statute as it existed prior to 1972.

In Readinger v. Gottschall, the Superior Court of Pennsylvania held that an intentional tort by the employer against the employee was compensable outside of the workers’ compensation statute. The plaintiff was injured when her and her two employers got into an argument over the amount of her final paycheck. The argument turned physical and the plaintiff was pushed out of the door, stumbled outside, and cracked something in her back. The plaintiff filed an action for trespass on the case for this assault. The court further held that workers’ compensation only covered accidents and that there was “no intention that deliberate injury to an employe[e] by his employer [wa]s intended to be covered.” This case was not taken up by Pennsylvania’s highest court, thus the “intentional tort” exception to Pennsylvania workers’ compensation remained somewhat unclear.

In 1972, nine years after Readinger, the Pennsylvania General Assembly amended the state’s workers’ compensation statute by removing “accident” and replacing it with “in the course of employment.” This change likely removed the validity of the intentional tort exception, as stated in Readinger. The current Pennsylvania statute reads as follows:

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64 See 77 PA. CONS. STAT. § 481 (2016).
65 Id.
68 Id. at 696.
69 Id. at 695.
70 Id.
71 Id.
72 Id. at 696.
74 Id. at 771–72.
75 Id.
The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employee[s], his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2)2 or occupational disease as defined in section 108.76

2. Ohio: The Buckeyes Aren’t the Only Nuts77

Ohio has a statutory exclusion to workers’ compensation claims for deliberate intent by the employer78 and has a constitutional provision authorizing the establishment of a workers’ compensation program.79 This provision states in relevant part that “[s]uch compensation shall be in lieu of all other rights to compensation, or damages . . . and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute.”80 Ohio courts and the Legislature have gone back and forth with rulings and amendments concerning the workers’ compensation law since its inception.81

In 1934, the Supreme Court of Ohio held that open liability of employers had been abolished.82 However, in 1939, the court in Triff v. National Bronze & Aluminum Foundry Co. expressly overruled this holding and ruled that “[t]he right of action of an employee for the negligence of his employer directly resulting in a non-compensable occupational disease has not been taken away.”83 This decision was handed down on March 22, 1939.84 On May 25, 1939, the Ohio General Assembly amended the workers’ compensation law to eliminate the liability announced in Triff.85

76 77 PA. CONS. STAT. § 481 (2016).
77 The Ohio State University uses the buckeye as its mascot. Traditions, OHIO ST. U., http://www.ohiostatebuckeyes.com/trads/buckeye.html (last visited Mar. 24, 2017). A buckeye is a nut. Id. The “other nuts” refer to the back and forth between the Ohio legislature and Supreme Court.
78 See OHIO REV. CODE ANN. §2745.01 (West 2016).
79 OHIO CONST. art. II, § 35.
80 Id.
84 Id. at 232.
In 1982, the Supreme Court of Ohio announced its decision in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* The court heard arguments on whether an intentional tort by an employer was covered under the workers' compensation statute. The court held, relying in part on the liberal construction clause in the statute, that by using the phrase “in the course of employment,” the Legislature “has expressly limited the scope of compensability” and that the courts were free to determine what risks are incidental of employment. Therefore, “[a]n employee is not precluded by [the Constitution] or [statute] from enforcing his common law remedies against his employer for an intentional tort.” The court went on to define an intentional tort as “an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.”

In 1986, the General Assembly, in response to the above “substantially certain to occur” language, enacted a statute defining “substantially certain” to require that the employer act with “deliberate intent to cause an employee to suffer injury, disease, condition, or death.” However, in *Brady v. Saftey-Kleen Corp.*, the court held that the Legislature exceeded its authority pursuant to sections 34 and 35 of the Ohio Constitution in enacting this statute, and it was thus unconstitutional, the common law cause of action remaining intact. The back and forth between the Supreme Court and General Assembly continued when the Legislature again passed a law to overrule the court's analysis in *Fyffe v. Jeno’s, Inc.* wherein the court outlined the elements of deliberate intent to be

1. knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
2. knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to

87 *Id.* (The court was only hearing an appeal of the granting of a motion for summary judgment. Thus, the nature of the intentional tort was not discussed as it is an issue of fact).
88 See *Ohio Rev. Code Ann.* §4123.95 (West 2016).
89 *Blankenship*, 433 N.E.2d at 576.
90 *Id.* at Syl. Pt. 1.
95 570 N.E.2d 1108 (Ohio 1991).
the employee will be a substantial certainty; and (3) that the
employer, under such circumstances, and with such knowledge,
did act to require the employee to continue to perform the
dangerous task. 96

The 1995 law passed in response to this holding defined an employer intentional
tort as "an act committed by an employer in which the employer deliberately and
intentionally injures, causes an occupational disease of, or causes the death of an
employee." 97 This law was again held to be unconstitutional. 98 The General
Assembly then passed the current version of Ohio’s employer deliberate
intention statute in 2004 which states that a common law action can be brought,
but “the employer shall not be liable unless the plaintiff proves that the employer
committed the tortious act with the intent to injure another or with the belief that
the injury was substantially certain to occur.” 99 Furthermore, deliberate removal
of safety equipment or misrepresentation of toxic substances “creates a
rebuttable presumption that the removal or misrepresentation was committed
with intent to injure another if an injury or an occupational disease or condition
occurs as a direct result.” 100

The Supreme Court of Ohio and the Ohio General Assembly now appear
to be at peace over how to define an employer’s intentional tort. The deliberate
intention statute survived a constitutional challenge in Kaminski v. Metal & Wire
Products Co. 101 In finding the statute constitutional, the court found other
considerations to rationalize its holding. 102 One of these considerations is that the
court recognizes that the Ohio deliberate intention statute “appears to harmonize
the law of this state with the law that governs a clear majority of jurisdictions”
and that it “by no means places Ohio outside the national mainstream relative to
employer intentional torts and the exclusivity of the workers’ compensation
remedy.” 103

96 Id. at Syl. Pt. 1.
99 OHIO REV. CODE ANN. § 2745.01(A) (West 2016).
100 Id. § 2745.01(C).
101 927 N.E.2d 1066 (Ohio 2010).
102 Id. at 1088.
103 Id.
Maryland has a statutory exclusion from workers’ compensation for the deliberately intentional acts of the employer. Like many other states that enacted workers’ compensation statutes in the early twentieth century, Maryland passed its statute in 1914. The first deliberate intention statute in Maryland has remained largely unchanged and reads as follows:

If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, children, or dependents of the employee shall have the privilege either to take under this article [or] to have [a] cause of action against such employer, as if this article had not been passed.

The Court of Appeals of Maryland was first confronted with the deliberate intention statute in Mayor of Hagerstown v. Schreiner. There the court held, without defining “deliberate intention,” that “[a]s against an employer who has provided the insurance and who has not ‘from deliberate intention produced such injury or death,’ the remedy by compensation under the act is exclusive.”

By and large, the Court of Appeals has not had to address the deliberate intention issue frequently. Perhaps the leading case in the area, at least as it pertains to this Note, is Johnson v. Mountaire Farms of Delmarva, Inc. In Johnson, the court was asked to find that in order for the deliberate intention statute to apply, two elements must be satisfied: (1) establish that the employer intentionally did the act that caused the injury and (2) the employer’s requisite intention includes willful, wanton, and reckless conduct. The facts of the case are that a 16-year-old boy was working on a farm and was asked to operate a pump submerged in liquid. Prior to this task, the employer was cited by the Maryland Occupational Safety and Health Administration (“MOSHA”) because the same pump had defects in electrical components. The employer then

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104 WEDDING CRASHERS (Tapestry Films 2005).
105 See MD. CODE ANN., LAB. & EMPL. § 9-509(d) (West 2016).
107 Mayor of Hagerstown v. Schreiner, 109 A. 464, 465 (Md. 1920) (quoting then existing section 45 article 101 of the Maryland Code).
108 Id.
109 Id.
110 503 A.2d 708 (Md. 1986).
111 Id. at 712.
112 Id. at 709.
113 Id.
falsely informed MOSHA that the defects had been corrected.\textsuperscript{114} The boy was electrocuted.\textsuperscript{115}

This case was the first time the Maryland court was tasked with elaborating on what “deliberate intention” means.\textsuperscript{116} In searching for this answer, the court noted that in the vast majority of jurisdictions deliberate intention means “the formation by the employer of a specific intention to cause injury or death combined with some action aimed at accomplishing such result, as opposed to mere employer negligence or gross negligence.”\textsuperscript{117} The court also noted the two minority jurisdictions where courts have held otherwise:\textsuperscript{118} West Virginia in \textit{Mandolidis}\textsuperscript{119} and Ohio in \textit{Blankenship v. Cincinnati Milacron Chemicals, Inc.}\textsuperscript{120} Essentially, the court was asked to adopt the minority view.\textsuperscript{121} The court declined to follow the minority view, holding that “an employer has acted with ‘deliberate intention’ pursuant to [the statute] only where that employer had determined to injure an employee or employees within the same class and used some means to accomplish this goal.”\textsuperscript{122}

Although Maryland does not recognize willful, wanton, or reckless conduct as falling within the deliberate intention exception to workers’ compensation, it does recognize an intentional tort exception.\textsuperscript{123} In \textit{Federated Department Stores, Inc. v. Le},\textsuperscript{124} the issue was whether the intentional tort claims of false arrest, intentional infliction of emotional distress, and defamation were included in the deliberate intention exception.\textsuperscript{125} The caveat of the case was that the alleged tortfeasor against the employee was another employee, being the regional director of security.\textsuperscript{126} The court had to interpret prior cases\textsuperscript{127} holding that an employee could recover from the intentional torts of a co-employee only if that employee was the “alter ego” of the employer.\textsuperscript{128} The court concluded that

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 711.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} 246 S.E.2d 907, 914 (W. Va. 1978).
\textsuperscript{120} 433 N.E.2d 572, 576 (Ohio 1982).
\textsuperscript{121} Johnson, 503 A.2d at 711.
\textsuperscript{122} Id. at 714.
\textsuperscript{123} See, \textit{e.g.}, Federated Dep’t Stores, Inc. v. Le, 595 A.2d 1067, 1072 (Md. 1991).
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 1068–69.
\textsuperscript{126} Id. at 1070.
\textsuperscript{128} \textit{Federated Dept. Stores, Inc.}, 595 A.2d at 1069.
if alleged acts are encompassed by the workers’ compensation statute, the deliberate intention exception would apply to the facts of this case.\textsuperscript{129}

The current deliberate intention statute in Maryland provides for essentially the same thing as the original statute, but uses more gender-neutral language and outlines that a plaintiff may “(1) bring a claim for compensation under this title; or (2) bring an action for damages against the employer.”\textsuperscript{130}

4. Virginia is for Lovers\textsuperscript{131}

Unlike West Virginia, Virginia does not have a deliberate intention exception to its workers’ compensation statute.\textsuperscript{132} Instead, Virginia law focuses on the elements of its workers’ compensation statute: (1) the injury was by accident, (2) arising out of, and (3) in the course of employment.\textsuperscript{133} Thus, Virginia courts do not focus on an exception to the workers’ compensation statute but rather the applicability of the statute. “Put simply, when the injury falls within the purview of [the workers’ compensation statute], the exclusivity provision applies. . . . However, when the injury does not arise out of or occur in the course of the employment, the exclusivity provision does not apply.”\textsuperscript{134} Because Virginia does not offer anything new or novel, it is only offered here for the proposition that a state can use workers’ compensation as the exclusive remedy for workplace injuries.

5. Kentucky: Blue Moon for Deliberate Intent Claims\textsuperscript{135}

Kentucky does have a statutory exception to its workers’ compensation law for injuries caused by the deliberate intention of an employer.\textsuperscript{136} Kentucky passed its first workers’ compensation act in 1914.\textsuperscript{137} This statute was declared unconstitutional in \textit{Kentucky State Journal Co. v. Workers’ Compensation

\begin{footnotes}
\item[129] Id. at 1075.
\item[130] MD. CODE ANN., LAB. & EMPL. § 9-509 (West 2016).
\item[132] See VA. CODE ANN. § 65.2-307 (2016).
\item[135] BILL MONROE, BLUE MOON OF KENTUCKY (Columbia Records 1947). Kentucky rules in favor of a deliberate intent claim “once in a blue moon.”
\item[136] See KY. REV. STAT. ANN. § 342.610(4) (West 2016).
\end{footnotes}
Board because it impaired compensation for personal injury. In 1916, a new workers’ compensation act was passed providing for voluntary acceptance of the act by employees. Today, the act provides for voluntary rejection by employees. The 1916 version of the workers’ compensation act contained a deliberate intention exception, which read as follows:

that if injury or death result to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent as herein defined shall receive the amount provided in this act in a lump sum to be used, if they so desire to prosecute the employer, and said dependents shall be permitted to bring suit against said employer for any amount they may desire; that if injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents as herein defined shall have the privilege to take under this act, or in lieu thereof, to have a cause of action at law against such employer as if this act had not been passed . . .

Kentucky’s deliberate intent statute has remained almost entirely unchanged throughout its history.

The deliberate intention section of the act was not interpreted by Kentucky’s highest court until 1955 in Fryman v. Electric Steam Radiator Corp. In Fryman, an employee was injured while operating a metal press machine. The employee alleged in his complaint that the employer was aware of the unsafe working condition of the machine and knew that the machine would...
“trip” and was not properly maintained. The employee alleged that because the employer had this knowledge and the employee was still required to operate the machine, his injury was caused by the deliberate intent of his employer. The court rejected the employee’s theory stating that “[t]he phrase ‘deliberate intention’ implies that the employer must have determined to injure the employee.” Because this was the first time the court interpreted the deliberate intention exception, it looked to other states, including West Virginia, with similar statutory schemes. The court concluded that these states all require a specific intent to injure for an employee to qualify under the deliberate intention exception. Lastly, the court indicated that the Legislature did not spell out the meaning of “deliberate intent,” but that the statute was clear and unambiguous.

A more current example of how Kentucky’s highest court examines deliberate intent claims is illustrated by Moore v. Environmental Construction Corp. In Moore, an employee was killed by asphyxiation when a trench he was working in collapsed on top of him. The evidence produced at trial showed that the employer failed to take proper safety precautions as required by the Kentucky Occupational Safety and Health Administration. A jury returned a verdict in favor of the employee, but the trial judge granted a motion for judgment notwithstanding the verdict. The motion was upheld. On appeal, the employee relied on an “inferred intent” theory used in homicide cases. The court dispensed with this theory stating that the employer lacked the requisite intentional and vicious acts of a homicide case to eliminate the possibility of an accident. Therefore, the inferred intent approach cannot be used to infer deliberate intent. Lastly, the court stated that “[i]t must be remembered that it’s not the depravity of the employer’s conduct that is being

147 Id.
148 Id.
149 Id. (alteration in original) (emphasis added).
150 Id. at 27. Of importance to this Note, the court cited to Brewer v. Appalachian Constructors, Inc., 65 S.E. 2d 87 (W. Va. 1951).
151 Fryman, 277 S.W.2d at 27.
152 Id.
153 147 S.W.3d 13 (Ky. 2004).
154 Id. at 14.
155 Id. at 18.
156 Id. at 14.
157 Id. at 16.
158 Id. at 19.
159 Id.
160 Id.
tested, but the narrow issue of the intentional versus the accidental quality of the precise injury."\textsuperscript{161}

Although the holding of Fryman, as affirmed by Moore, is still the law in Kentucky which requires a showing of determined intent by an employer to injure an employee to qualify under the deliberate intention exception, there was a significant divide in the Moore court.\textsuperscript{162} The decision was four to three with Chief Justice Joseph Lambert writing for the minority.\textsuperscript{163} In his dissent, Justice Lambert said that the evidence did reveal deliberate actions by the employer.\textsuperscript{164} He concluded his dissent by stating that

\begin{quote}
[the deliberate intention statute] allows recovery outside of the exclusive remedy provision of the Workers' Compensation Act upon a showing of intent. The legislature has not eliminated liability when employers act egregiously and cause the death or serious injury of employees. But, this Court has effectively immunized employers from payment of damages despite egregious behavior by a draconian construction of the statute. Instead of analyzing this case as a civil action for damages and allowing the jury to draw proper inferences, the majority has held Appellants to a standard that would be appropriate for a homicide prosecution.\textsuperscript{165}
\end{quote}

III. ANALYSIS

Deliberate intent hurts West Virginia businesses because they are at risk for more liability than they would be in other states.\textsuperscript{166} After a review of West Virginia's deliberate intent statute and delving into similar statutes in the Surrounding States, along with how courts in each state interpret the statute, it is this Note's position that the current version of West Virginia Code section 23-4-2 will not accomplish what the Legislature intended. The Legislature's intent for passing this law was a part of a comprehensive agenda to reform the justice system in West Virginia, particularly as it pertains to torts.\textsuperscript{167} As an alternative

\begin{footnotes}
\footnote{161} Id. (quoting Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 922 n.3 (W. Va. 1978) (Neely, J., dissenting)).
\footnote{162} See id.
\footnote{163} Id. at 20–22.
\footnote{164} Id. at 20 (Lambert, C.J., dissenting).
\footnote{165} Id. at 22 (alteration in original).
\footnote{166} It would be difficult to find a direct correlation between business growth and deliberate intent laws, as many confounding variables are present. Currently, no such empirical data exists. The proposition of this Note is that in a check list of pros and cons, West Virginia would have one less negative against it as employers decide where to locate business.
\end{footnotes}
to the 2015 amendments, this Note argues that the Legislature should mimic other states, particularly Pennsylvania\textsuperscript{168} and Virginia,\textsuperscript{169} by repealing the deliberate intent exception and making workers' compensation the exclusive remedy for workplace injury, thus accomplishing the legislative goal of reforming tort jurisprudence and improving the business climate.

This part will address the inadequacies of the current deliberate intent statute by focusing on how West Virginia courts might interpret the law to reveal that the Legislature's desired change will not be accomplished and to show that the proposed method would succeed. This part will also discuss the varying interests at stake in the proposed change to deliberate intent by balancing those interests. Lastly, this part will address West Virginia's business climate and why the proposed change will better position West Virginia with the Surrounding States to be more competitive in attracting and maintaining businesses in the state.

A. Expected West Virginia Court Interpretation of the 2015 Statute

Although the amended version of West Virginia Code section 23-4-2 is a longer and more specific statute than its predecessor, this Note argues that the new law will lead to many substantive changes in how West Virginia courts will interpret it. This would not be the first time the Legislature issued its intent for a law only to have the courts either overrule or blindly disregard the Legislature's intent.\textsuperscript{170} After all, West Virginia is labeled as a "judicial hell-hole," not a legislative hell-hole.\textsuperscript{171}

The 2015 version of West Virginia Code sections 23-4-2(d)(1)–(2)(B)(i) is verbatim of the 2003 version.\textsuperscript{172} As noted previously, the major differences contained in subpart B of the 2015 version of the law will be broken down into three sections—(1) the actual knowledge provision, (2) the specific unsafe working condition provision, and (3) the injury provision. Each provision will be discussed in turn to compare and contrast the 2015 version with the 2003 version\textsuperscript{173} of the deliberate intent statute to show how West Virginia courts might interpret the changes.

\textsuperscript{168} See discussion supra Section II.B.C.1.
\textsuperscript{169} See discussion supra Section II.B.C.4.
\textsuperscript{170} See supra text accompanying notes 47–55.
\textsuperscript{173} 2003 was the last time the provisions in Subpart B remained unchanged before being amended in 2005. Another amendment occurred in 2015, but the provisions in Subpart B did not change. See supra text accompanying note 33.
1. The Actual Knowledge Provision

The 2003 version of the statute states that the employer must only have a “subjective realization and an appreciation” of a specific unsafe working condition. The first difference in the 2015 version of the deliberate intent law is at section 23-4-2(d)(2)(B)(ii). This paragraph states that “the employer, prior to the injury, had actual knowledge of the specific unsafe working condition . . . .” How will a West Virginia court rule on an employer having “actual knowledge?”

The statute provides some guidance to actual knowledge in three subparts to section 23-4-2(d)(2)(B)(ii). First, it provides that actual knowledge must be specifically proven and that evidence of an intentional failure to conduct an inspection may be used to show this failure. Second, it provides that proof that a supervisor should have known of the danger is not enough to show actual knowledge. Lastly, any prior accidents or near misses must be proven by documentary or other credible evidence.

The Maryland case of Johnson illustrates that this requirement of actual knowledge is really not that much higher of a standard than a subjective realization and appreciation of the danger standard. In Johnson, the employer had actual knowledge of a specific unsafe working condition: electrical wires on a pump were frayed. The employer was cited for this unsafe working condition by a state regulatory agency. When an employee was nonetheless electrocuted and killed by this very pump, under Maryland law, the employee’s family was barred from a common law action.

Taking these facts and applying them to the actual knowledge provision of West Virginia’s deliberate intent statute, a common law action would still remain for the employee’s family. The actual knowledge element would be satisfied because the employer was written a citation for a specific unsafe working condition. Also, an intentional failure to conduct an inspection could be used to prove actual knowledge because the employer wrote to the citation-

176 Id.
177 See id.
178 Id. § 23-4-2(d)(2)(B)(i)(I).
179 Id. § 23-4-2(d)(2)(B)(i)(II).
180 Id. § 23-4-2(d)(2)(B)(i)(III).
183 Johnson, 503 A.2d at 709; see supra text accompanying notes 110–15.
184 Johnson, 503 A.2d at 709; see supra text accompanying notes 110–18.
185 Johnson, 503 A.2d at 709; see supra text accompanying notes 110–18.
issuing agency indicating that the condition had been corrected.\textsuperscript{186} Lastly, if the citation itself is admissible into evidence, actual knowledge would be proven by all three provisions of the code. Thus, in West Virginia, this case would have the same result under the old and new versions of the deliberate intent statute.

2. The Specific Unsafe Working Condition Provision

The specific unsafe working condition found in West Virginia Code section 23-4-2(d)(2)(B)(iii) is essentially the same as the provision in the prior version.\textsuperscript{187} The unsafe working condition must be a violation of a safety law or a commonly accepted safety standard in the industry.\textsuperscript{188} The language in the 2015 version of the law applying to a violation of state or federal law or regulation is not any more specific than the 2005 version.\textsuperscript{189} Both require that the law or regulation be specifically applicable to the unsafe working condition.\textsuperscript{190} However, the new version goes on to specify what industry safety standards are. The statute provides that the commonly accepted and well-known safety standard must be a “consensus written rule or standard promulgated by the industry . . . such as an organization comprised of industry members.”\textsuperscript{191}

Although the 2015 version of the statute is a little stricter when it comes to industry safety standards, the burden is really not that much higher. With industries searching for a competitive advantage, they are increasing efficiency.\textsuperscript{192} One way of increasing efficiency is to streamline production and processes.\textsuperscript{193} This cookie-cutter approach leads to systems created by industry professionals, which are often written down. For example, the International Organization for Standardization (“ISO”)\textsuperscript{194} is one method companies are adopting to increase efficiency.\textsuperscript{195} ISO is a system that a business can use so that

\textsuperscript{186} See supra text accompanying notes 110–18.
\textsuperscript{188} See W. VA. CODE ANN. § 23-4-2(d)(2)(B)(iii).
\textsuperscript{191} W. VA. CODE ANN. § 23-4-2(d)(2)(B)(iii)(I).
\textsuperscript{192} See Bruce Greenwald and Judd Kahn, All Strategy is Local, HARV. BUS. REV. (Sept. 2005), https://hbr.org/2005/09/all-strategy-is-local.
employees can look up any method or procedure to perform any task across the entire company.\textsuperscript{196} Included in these methods and procedures are necessary safety precautions that should be followed while performing said task.\textsuperscript{197} Thus, an industrial safety standard has been created and written by industry members. Because the industry safety standard burden is not that much higher and because a violation of safety law is not any different, deliberate intent under the old and new versions of the law would end in the same result.

3. The Injury Provision

Perhaps the greatest change to the deliberate intent law is found at section 23-4-2(d)(2)(B)(v) which relates to the actual injury.\textsuperscript{198} The 2003 version of the law only requires that “the employee exposed suffered serious injury or death as a direct and proximate result of the specific unsafe working condition.”\textsuperscript{199} The language in the 2015 version is very similar, only adding the adjective “compensable” to injury or death as defined by West Virginia Code section 23-4-1.\textsuperscript{200} However, in the 2015 version, the law continues on to further define what injuries can be compensated through the deliberate intent exception.\textsuperscript{201}

First, the injury cannot be a preexisting condition.\textsuperscript{202} Secondly, the injury must (1) result in at least a 13\% impairment as final award in the workers’ compensation insurance claim, (2) result in permanent damage, and (3) have objective medical evidence to support a diagnosis.\textsuperscript{203} Alternatively, the injury qualifies if it is likely to result in death within 18 months from the date of filing the complaint.\textsuperscript{204} The statute then defines that injuries with no impairment rating can be established by showing permanent serious disfigurement, loss of any bodily organ, and other conditions.\textsuperscript{205} The statute continues on with a paragraph about black lung disease.\textsuperscript{206}

\textsuperscript{196} Telephone Interview with Jeremy Balchak, Quality Control Supervisor, Johnson Matthey, Inc. (Jan. 31, 2016).
\textsuperscript{197} Id.
\textsuperscript{201} W. VA. CODE ANN. § 23-4-2(d)(2)(B)(v).
\textsuperscript{202} Id. § 23-4-2(d)(2)(B)(v)(I).
\textsuperscript{203} Id. § 23-4-2(d)(2)(B)(v)(I)(a)-(b).
\textsuperscript{204} Id. § 23-4-2(d)(2)(B)(v)(II).
\textsuperscript{205} Id.
\textsuperscript{206} See id. § 23-4-2(d)(2)(B)(v)(III)-(IV).
Although the definitions of what injuries are compensable under a common law action are more specifically defined in the 2015 version, it seems that most injuries would satisfy the standard easily, leaving the most fervent disputes to arguing whether an employer had the requisite "deliberate intent." Even though the higher standard for injury could remove some claims out of the court system, it probably does not do enough to substantially alter the effect of deliberate intent claims in West Virginia.

Accordingly, because the three major revisions in the deliberate intent law, denominated the actual knowledge, specific unsafe working condition, and injury provisions have not significantly reformed the law, West Virginia courts are likely to rely on past precedent and make similar applications of the statutory deliberate intent exception to workers’ compensation exclusivity. Under the proposed method of making workers’ compensation the exclusive remedy, all claims would be covered under insurance, taking away any influence the courts may have.

B. Proposal to Repeal the Statute and Increase Premiums

Because West Virginia’s deliberate intent statute puts West Virginia at a disadvantage, and because the Legislature’s attempt to reform the act is insufficient to make the needed change, this Note proposes that the West Virginia Legislature repeal the deliberate intent statute. In doing so, workers’ compensation premiums should increase slightly in order for insurance companies to cover more claims and pay higher settlements for the most serious injuries and injuries that might have occurred under suspicious circumstance. Also, the Legislature should make it clear that workers’ compensation will not cover instances where the common law tort of battery is committed. This exclusion is mainly designed to cover instances of rape.

In light of the fact that the proposed method of making workers’ compensation the exclusive remedy for workplace injuries by repealing the deliberate intent statute would be a drastic reform, it is important to consider whose interests are most at stake. These interested groups include employees, employers, the Legislature, the judiciary, and lawyers. Each group of interested parties will be discussed by weighing the pros and cons for each group under both the current law and the proposed change of repealing the law entirely.

1. How the Proposal Will Affect Interested Parties

This section will discuss how the interests of various groups will be affected by a repeal of the deliberate intent statute. The interested groups are employees, employers, the Legislature, the judiciary, and lawyers.
i. Employees vs. Employers

Obviously, the group with the greatest interest at stake concerning the proposed legislation to repeal deliberate intent is the workers. The same is true for the proposed legislation to repeal deliberate intent. An employee would lose the ability to sue his employer at law in almost all situations. This could be especially troublesome to an informed employee who knows that this common law right even exists. And this proposal could be even more troublesome in a state where a lot of people are employed in manual-labor jobs. However, employees would not be left without any reprieve.

Assuming that the deliberate intent statute is repealed and workers’ compensation is the exclusive remedy for workplace injury, what is an employee to do to protect himself? One solution is to call on the union to bargain for workplace-safety guarantees. For example, a union member could serve as a company watchdog to ensure that safety violations are not rampantly occurring. This member could serve side-by-side with the company safety representative. This dichotomy would ensure transparency that safety protocols are being followed, potential hazards are remedied, and if a safety violation does occur that it was truly an accident reasonable in the industry at hand.

A second safeguard for employees would be to lobby the Legislature, as the unions likely would, to increase whistle-blower laws. For example, if an employee reasonably believes he is being sent into a hazardous situation, he can politely decline and report the incident. Reporting procedures could be implemented by statute or by regulation. If the regulatory agency believes that the employee was correct in refusing to complete the task, any retaliation by the employer would be forbidden by law. Multiple instances of “refusal to work” reports could put the employer on a list for more frequent inspections. This is a self-policing mechanism that requires well-informed employees to know their rights and to be willing to act.

There would be one remnant of a situation where an employee should be able to maintain a common law cause of action against an employer—an intentional tort. This would cover the common law tort of battery. If an employer strikes, rapes, or otherwise puts an employee in reasonable fear that he will be battered, that employee would be able sue to the employer because it is not “in the course of and resulting from their covered employment.”

The group that is likely to benefit the most from the proposed change is the employers, but the change will not come free-of-charge. The most viable way to make the proposed change is to increase workers’ compensation insurance

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207 For this Note, labor unions are included in the group denominated “employees” as the union is charged with representing the workers’ interests.

208 W. VA. CODE ANN. § 23-4-1 (LexisNexis 2015).
This will allow for more claims to be paid out to injured workers and more serious claims to receive greater compensation awards. The grand scheme of workers' compensation is that employers are required to pay into the workers' compensation system. In exchange for this, employers are not able to be sued by employees injured at their worksite. Similarly, in exchange for even less common law liability, employers will have to pay a little bit more.

The proposed safeguards for employees may or may not be met with resistance from employers. The most likely proposal to win support from employers would be the strengthening of whistle-blower laws. This proposal would be more of an incentive to employers to keep workers safe and happy. Additionally, as mentioned above, this proposal would require informed employees with more training. It would provide an opportunity for employers to have more training sessions and to have a workforce that is engaged, alert, and critical of procedures. All of these factors would lead to a more productive workforce and find deficiencies in production to increase efficiency, thus, leading to costs savings and more profit.

This proposal would also disincentive unionization, a plus for employers. If companies fail to self-police, well-informed employees will seek an organization that can better represent their interests—the union. Furthermore, the self-policing mechanism would help to keep government regulators at bay. Alternatively, employers are not likely to buy into the union safety representative because it would yield too much control outside of the company's organization. Therefore, there are options for a viable system that safeguards employees, as well as benefit employers, should the deliberate intent statute be repealed.

### ii. Legislature vs. Judiciary

Part of the stimulus for this Note was the actions taken by the Legislature of West Virginia to reform deliberate intent. Therefore, it is important to discuss some of the practical considerations needed to effectuate the proposal of repealing deliberate intent. The Legislature has already shown that it is ready and

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209 See Larson, supra note 12, at § 1.01. Workers' compensation can be thought of as a bargained for exchange contract. In order to modify the contract, there needs to be consideration. Restatement (Second) of Contracts § 273 (Am. Law Inst. 1981). Such consideration is employers pay more for employees to have less common law rights to sue.

210 Larson, supra note 12, at § 1.01.


willing to pass a controversial law if it feels it is best for West Virginia.\footnote{214}{Hoppy Kercheval, \textit{Legal Reform Bill Draws Emotional Testimony at Capitol}, \textit{MetroNews} (Jan. 21, 2015, 4:26 PM), \url{http://wvmetronews.com/2015/01/21/legal-reform-bill-draws-emotional-testimony-at-capitol/}.} The proposed change would not be any different, as it would face a great deal of resistance from labor groups and trial lawyers. However, as discussed above, the Legislature intended to reduce deliberate intent claims, but the law it passed is not likely to succeed in the manner that the Legislature had hoped for.\footnote{215}{See discussion \textit{supra} Part III.A.} Accordingly, the Legislature should take its initial intent a step further.

In the 2014 election, Republicans reaped monumental gains in both houses of the state Legislature, reclaiming both houses for the first time since 1931.\footnote{216}{Chris Dickerson, \textit{Update: Republicans Gain Control of W. Va. House, Senate}, \textit{W. Va. Rec.} (Nov. 6, 2014, 7:50 AM), \url{http://wvrecord.com/stories/510587978-update-republicans-gain-control-of-w-va-house-senate}.} This success and change in the majority party led to many of the tort reform bills that came out of the Legislature that year.\footnote{217}{Chris Dickerson, \textit{Tort Reform Highlights Session}, \textit{W. Va. Rec.} (Mar. 17, 2015, 1:46 PM), \url{http://wvrecord.com/stories/510588603-tort-reform-highlights-session}.} However, Republicans are not guaranteed to remain in control. Any laws that they want to enact to have a lasting effect on West Virginia would have to be passed while Republican sentiment is strong in West Virginia.

As previously mentioned, a repeal of deliberate intent is likely to be met with heavy resistance by labor groups. This will be the Legislature’s toughest hurdle to pass a repeal bill. However, it can be done. The Legislature could just run it through relying on the Republican majority and faith that the Republicans can remain in power despite what labor groups and Democrats throw at them in the next election.

However, a more diplomatic and compromised approach would be to piggy-back the deliberate intent reform bill with the right-to-work law.\footnote{218}{W. Va. Code Ann. § 21-5G-1–7 (LexisNexis 2016); Jeff Jenkins, \textit{Tomblin’s Vetoes Short-Lived; Right to Work, Repeal of Prevailing Wage Now Law}, \textit{MetroNews} (Feb. 12, 2016, 12:54 PM), \url{http://wvmetronews.com/2016/02/12/tomblins-vetoes-last-only-a-few-hours-right-to-work-repeal-of-prevailing-wage-now-law/}.} The right-to-work bill could have more popularity with the electorate because it is part of a nationwide trend that garners media coverage,\footnote{219}{Jeffrey M. Jones, \textit{Americans Approve of Unions but Support “Right to Work,”} \textit{Gallup} (Aug. 28, 2014), \url{http://www.gallup.com/poll/175556/americans-approve-unions-support-right-work.aspx}.} whereas deliberate intent is a more technical, legal bill that the public knows less about.

As mentioned above, workers could use the union as a safeguard for not having a deliberate intent statute. Now that the right-to-work bill is law, the likely
result is a decrease in union membership.\footnote{Hoppy Kercheval, \emph{Right Time for Right-to-Work?} \textit{MetroNews} (Nov. 19, 2015, 12:25 AM), http://wvmetronews.com/2015/11/19/right-time-for-right-to-work/.} The unions could then use the repeal of deliberate intent as an incentive to retain union membership.

Lastly, the Legislature's interest comes down to separation of powers. It has the power and duty to make laws as it deems fit and to express its intent as to what a law should mean. It is evident from the past that courts can change their minds.\footnote{See discussion supra Part II.B.} One year a law means one thing and the next year the very same law could mean something completely opposite.\footnote{See supra text accompanying notes 42–47.} If the Legislature truly desires to pass a law that means something, it should do so unequivocally.

It was the Supreme Court of Appeals that put West Virginia in the minority view of states holding that deliberate intent does not actually mean "deliberate intent."\footnote{See supra text accompanying notes 18–19.} This is but one rule of law that earned West Virginia its title as a judicial hellhole.\footnote{Chris Dickerson, \emph{W. Va. Supreme Court Listed Third on Judicial Hellhole List}, \textit{W. VA. REC.} (Dec. 16, 2014, 12:00 AM), http://wvrecord.com/stories/510588164-w-va-supreme-court-listed-third-on-judicial-hellhole-list/.} Ironically enough, a year after passing reform to deliberate intent, West Virginia has improved its ranking on the list of judicial hellholes.\footnote{Matt Maccaro, \emph{West Virginia No Longer on ATR’S Judicial Hellhole List}, \textit{MetroNews} (Dec. 17, 2015, 12:01 AM), http://wvmetronews.com/2015/12/17/west-virginia-no-longer-on-atr-s-judicial-hellhole-list/.}

As discussed previously, the West Virginia judiciary, under the current deliberate intent law, is in a similar position as before the 2015 version was passed.\footnote{See discussion supra Part III.A.} Additionally, with the possibility that Darrell McGraw, the author of the \textit{Mandolidis} decision, could get elected to West Virginia's highest court again,\footnote{See Kercheval, supra note 50.} the need for the proposed repeal of deliberate intent is illustrated. If the Legislature does pass the repeal, West Virginia courts could be left with very little power to interpret the law to find an exception to workers' compensation.\footnote{Assuming that the Supreme Court of Appeals of West Virginia wants to maintain the status quo deliberate intent in West Virginia.}

However, the courts may have some wiggle room with the workers' compensation coverage itself relying on the "in the course of and resulting from their covered employment"\footnote{W. VA. CODE ANN. § 23-4-1 (LexisNexis 2015).} language. This would be a similar approach to that taken by the Ohio courts in the 1980s.\footnote{See supra Part II.C.2.} As discussed previously, this language would be the remnant to allow an employee to sue an employer for the intentional
torts of assault and battery.\textsuperscript{231} If the Legislature fails to expressly address this language, West Virginia courts could use this language to include negligent actions, similar to those found in Mandolidis.\textsuperscript{232} The worst case scenario is for West Virginia to again mimic Ohio and get in a back-and-fourth constitutional\textsuperscript{233} battle between the Legislature and the Supreme Court of Appeals.\textsuperscript{234}

### iii. Plaintiffs’ Counsel vs. Defense Counsel

A third group with an interest at stake in the proposed repeal of deliberate intent is lawyers, especially lawyers representing injured people. Under the past deliberate intent laws, and likely the current law, employees were left with a common law remedy for workplace injury.\textsuperscript{235} To pursue this claim, the injured worker would need to retain the services of an attorney to navigate the legal system, whereas an injured worker would be more likely to navigate the workers’ compensation system claim pro se. Under the proposal, the common law remedy would be eliminated and the need for an attorney greatly reduced.

The removal of the common law remedy will impact plaintiffs’ lawyers because, under the common law remedy, the defendants are exposed to more liability, thus awards can be greater than what would be covered by insurance. With a deep-pocketed defendant fully exposed, injured workers and their attorneys, with a one-third contingency fee, can walk away quite wealthy. A $3 million verdict against Wal-Mart, Coca-Cola, Consol Energy, or some other dream defendant would be a thing of the past.

However, plaintiffs’ lawyers will not be put out of business. Under the proposal, the frequency of insurance claims would increase with payouts being a little larger. Thus, there is still money on the table up for grabs. Plaintiffs’ attorneys are clever and they “will just think of something else to sue over.”\textsuperscript{236} Additionally, they can just restructure their advertising campaigns to market to injured workers filing for workers’ compensation insurance claims. To assist in navigating through the insurance system, the attorneys can make sure that their clients are receiving the maximum amount possible. They might have to reduce

\begin{itemize}
\item \textsuperscript{231} \textit{See supra} text accompanying note 20.
\item \textsuperscript{232} \textit{See supra} text accompanying notes 47–55.
\item \textsuperscript{233} A review of the Constitution of West Virginia is outside the scope of this Note and any constitutional questions will not be addressed.
\item \textsuperscript{234} \textit{See supra} Part II.C.2. Going forward, judges will now be elected on a non-partisan basis during the primary election. Mandi Cardosi, \textit{Nonpartisan Election of Judges Becomes Law in WV}, ST. J. (June 8, 2015), http://www.theet.com/statejournal/news/nonpartisan-election-of-judges-becomes-law-in-wv/article_77314d55-3cf4-5f44-9bb3-dbc0e9f0fa28.html. It is yet to be seen how this new system will impact the court and if or how it will impact any existing opinions and sentiments of the court.
\item \textsuperscript{235} \textit{See supra} Part III.A.
\item \textsuperscript{236} Interview with Anonymous Attorney, in Morgantown, W. Va. (Feb. 12, 2015).
\end{itemize}
their contingency fees to one-fourth, but it would be the Wal-Mart model of practicing law: a lot of small profits over a few big profits.

On the other side of the aisle are the defense attorneys. Their stake in the game will not be as greatly impacted by a repeal of deliberate intent, but there will still be some changes. Defense litigators are the most likely group of defense lawyers to be affected by the repeal of deliberate intent. Without the possibility of going to court to defend an employer, billable hours preparing for depositions, hearings, and trial will be greatly reduced. Although, with the common law assault and battery torts exception, there could still be the potential for litigation, and a bifurcated litigation at that, as that type of claim may require a criminal defense as well.237

The repeal will benefit defense lawyers working exclusively in workers’ compensation as insurance claims will increase, and with more plaintiffs’ lawyers working the claims, the need for more defense attorneys will only increase. The repeal would also be an opportunity for more in-house counsel for the insurance companies to handle the increase in claims. However, the greatest need for defense counsel might exist before any injury even occurs. Under the proposal that could lead to heightened whistle-blower laws or even a union safety representative onsite, compliance with safety laws before the fact and labor negotiations would be a valuable advice for employers to retain.

Furthermore, attorneys on both sides will play a critical role in lobbying for and against the proposed change. All-in-all, the legal community will adapt to its surroundings and will find a way to give advice to clients regardless of which side of the “v” the attorneys are on.

2. How the Proposal Will Affect Business Climate

A repeal of deliberate intent in West Virginia will further position West Virginia to be competitive in garnering new businesses and retaining old ones. The comparison to the Surrounding States reveals that if a worker were to be injured on the job, his greatest chance of maintaining a common law cause of action against his employer would be in West Virginia. This is a fact companies would be well aware of and could factor into its decision on where to locate a new facility.

As the trend in mining coal in West Virginia continues to decline, West Virginia needs to be attractive to industries that have a choice of where to locate.238 These new industries are likely to be technology, manufacturing, and distribution.239 West Virginia is geographically located central to most of

238 Meaning, for example, that coal companies can only operate where coal exists.
America’s population centers. This is a crucial element for West Virginia to succeed in attracting new businesses. But, West Virginia has borders and the difference—geographically—of a business choosing to locate in Wheeling or Ohio and Pennsylvania or Huntington and Kentucky is not that great. Under the proposal to eliminate deliberate intent, West Virginia would have one less negative in a company’s pros and cons list and would be more competitive with its Surrounding States because West Virginia’s workers’ compensation law would be more comparable to the majority rule. Of course, there are other factors like taxes, which can be addressed in another Note, and topography, but in terms of labor and employment law and workers’ compensation, West Virginia would at least be an equal with the Surrounding States.

Another factor that a repeal of deliberate intent could address is West Virginia’s challenge of having an educated workforce.\(^\text{240}\) As mentioned above, a positive to employers is that a repeal of deliberate intent would require employees to be better informed and more aware of their surroundings.\(^\text{241}\) The repeal does not address formal education, but it does address on-the-job learning which is just as valuable as a diploma. Knowing what to look for, how systems work, and what systems work the best is a skill that cannot be learned any other way than by practicing it.

A repeal of deliberate intent is but a start to putting West Virginia on the right track to attract new business and keep existing ones by alleviating employer liability for injured workers who should otherwise be covered under workers’ compensation, but have managed to skirt around it by a poor Supreme Court of Appeals decision and a Legislature that has failed to fully remedy that decision.

IV. CONCLUSION

Deliberate intent hurts businesses because they are at risk for more liability than they would be in other states. To attract business to the state, West Virginia should repeal its statutory deliberate intent exception and make workers’ compensation the exclusive remedy for workplace injury, thus bringing the state into line with the similar approaches of several of the Surrounding States.

The Legislature of West Virginia should repeal West Virginia Code section 23-4-2, the deliberate intent exception to workers’ compensation. In addition, the Legislature should add language to West Virginia Code section 23-4-1 to make it clear that workers’ compensation is to be the exclusive remedy for workplace injuries.

Last, the Legislature will need to ensure that employers’ workers’ compensation insurance premiums are increased to allow for more claims and


\(^{241}\) See supra Part III.B.1.i.
higher dollar amounts to be paid. This solution is a remedy to make West Virginia more competitive in attracting new business and retaining existing businesses, as it will put West Virginia on a more level playing field with its Surrounding States in terms of workplace safety and employment law.

Thus, if an injured worker injures his penis, he will not only be compensated for the "length loss,"\textsuperscript{242} but also supplied with a prescription for Viagra.

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\textsuperscript{242} \textit{See supra} note 3 and accompanying text.

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