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DELIBERATE INTENTION CLAIMS BASED ON THIRD-PARTY CRIMINAL ACTS:
BLAKE V. JOHN SKIDMORE TRUCK STOP, INC.

Philip R. Strauss

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I. INTRODUCTION

In Blake v. John Skidmore Truck Stop, Inc., the West Virginia Supreme Court of Appeals held that the “Mandolidis” or “deliberate intention” exception to an employer’s immunity (under the West Virginia Workers’ Compensation Act) for workplace injuries could be applied to an employee’s injury that was ostensibly caused by a third-party criminal act. Aside from clarifying that employees and other persons may be liable for third-party criminal acts in some circumstances, the Blake decision also will have an impact on the evolution of workplace security standards and the general application of the “deliberate intention” exception by courts in West Virginia.

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1 493 S.E.2d 887 (W. Va. 1997).
2 W. VA. CODE §§ 23-1-1 to 23-6-1 (1994 & Supp.).
II. THE “DELIBERATE INTENTION” EXCEPTION

A “Mandolidis” or “deliberate intention” claim refers to a claim in which an employee sues her employer for a workplace injury that was in whole or in part caused by the employer’s “deliberate intention” to subject such employee to some workplace hazard. Typically, under the Workers Compensation Act, the employer is immune from the employee’s suit. Where a jury finds that there is deliberate intention on the part of the employer, however, the court applies an exception and the employer loses such immunity. This deliberate intention exception has existed since the inception of the Workers Compensation Act. Originally, the rule’s interpretation was based on case law that developed after the West Virginia Supreme Court of Appeals’ seminal decision in Mandolidis v. Elkins Industries, Inc. In 1983, however, the West Virginia legislature codified and liberalized the interpretation in Mandolidis, holding that an injured employee may prove an employer’s deliberate intention as a “specific intent” or as an intention to subject the employee to an “unsafe working condition,” the latter of which requires the plaintiff employee to satisfy each element of a five-part test.  

3 Id.
6 The “deliberate intention” exception is defined and codified, including the five-part test, as follows:
The immunity from suit provided under [West Virginia Code § 23-2-4(c)(1) and § 23-2-6a] may be lost only if the employer or person against whom liability is asserted acted with “deliberate intention.” This requirement may be satisfied only if:
(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct;
or
(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:
(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;
(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and
(E) That such employee so exposed suffered serious injury or death as a direct and
The West Virginia Supreme Court of Appeals recently expressed its preference for the term “deliberate intention” in lieu of “Mandolidis”:

[w]e are aware that the entire bench and bar of this State are tempted to use the term ‘Mandolidis’ as a euphemism for a deliberate intention injury. Because we have now assigned the Mandolidis opinion as a relic of the common law with no relevance in our current workers’ compensation jurisprudence, it might be an appropriate time to introduce ‘deliberate intention’ into our lexicon of causes of action instead of ‘Mandolidis’ — it no longer exists!

In recognition of the statutory preemption of Mandolidis, this Article will use the term “deliberate intention claim” or “deliberate intention exception.”

III. BLAKE v. JOHN SKIDMORE TRUCK STOP, INC.

A. The Court’s Holding in Blake

In Blake, the Court held that a third-party criminal act could be the basis of a deliberate intention claim. Thelma Blake was working as a cashier at the Party and Beverage Store in Flatwoods, West Virginia in 1989, when she was brutally stabbed by an unknown assailant during a robbery.Blake sued her employer, John Skidmore Truck Stop, Inc. (“Skidmore”), which defended on the grounds that it was immune under the Workers Compensation Act. Blake argued that Skidmore’s failure to provide basic security measures constituted deliberate intention to subject her to an unsafe working condition — the risk of third-party criminal acts — and thus vitiated Skidmore’s immunity. The trial court denied Skidmore’s pretrial motions and allowed the case to proceed to trial. At the close of Blake’s case, the trial court granted Skidmore’s motion for a directed verdict, reasoning that the deliberate intention exception did not apply to third-party criminal acts: “[L]isten, I am sustaining this [motion for a directed verdict] on the fact it was a product of a crime... [I] don’t think that [Mandolidis] covers victims of crime.”

The Supreme Court of Appeals reversed and remanded the case, holding that “[t]he fact that an employee suffers injuries as the result of the criminal act of a third party does not itself preclude the assertion of a deliberate intention cause of action against an employer.” The Court went on to find that Blake set forth suffi-
cient evidence of deliberate intention to avoid a directed verdict.\textsuperscript{12}

Although Thelma Blake ultimately did not prevail,\textsuperscript{13} her case clarified that deliberate intention claims may be based on injuries that are caused by third-party criminal acts. This was not clear prior to the Blake decision; an earlier case in the United States Court of Appeals for the Fourth Circuit had cast some doubt upon this proposition. In Stapleton v. Ashland Oil, Inc.,\textsuperscript{14} the Fourth Circuit affirmed a district court’s grant of summary judgment where a convenience store cashier was robbed and raped. While the Blake trial court found Stapleton persuasive, the Supreme Court was unmoved by the Stapleton court’s analysis: “[W]e obviously are not bound by that decision. Moreover . . . [the Stapleton court] did not say that it is impossible for an employee to maintain a deliberate intention course of action against an employer for injuries sustained by the criminal acts of a third party.”\textsuperscript{15}

In declining to adopt a “per se rule that under no circumstance can a criminal act by a third party form the basis of a deliberate intention claim,”\textsuperscript{16} the Blake court was persuaded by several arguments in the absence of binding West Virginia precedent. First, it found nothing to suggest such an “unyielding” result in the statute,\textsuperscript{17} and opined that to declare an exclusion for criminal acts “would improperly intrude into the legislative arena.”\textsuperscript{18} Indeed, the Court noted that it had recently declined to declare an exclusion to a landlord’s liability to a tenant for injuries caused by third-party criminal acts.\textsuperscript{19} Second, the Court cited cases outside West Virginia holding that “a claim may be stated against an employer when an employee is injured or killed by a third party’s criminal acts.”\textsuperscript{20} While none of the cited cases involved an analogue of the deliberate intention exception, the cited courts recognized both the foreseeability of, and an employer’s liability for, third-party criminal acts.\textsuperscript{21} Finally, the Court stressed that the legislature’s 1983 revisions liberalized the deliberate intention standard, providing a “wide opportunity” for the plaintiff to assert her claim.\textsuperscript{22}

The Court thereafter evaluated whether Blake established sufficient evi-

\textsuperscript{12} Id. at 890.

\textsuperscript{13} Upon retrial, the jury found that Skidmore did not have the requisite deliberate intention and returned a verdict for Skidmore. . .  

\textsuperscript{14} 774 F.2d 622, 623 (4th Cir. 1985).

\textsuperscript{15} Blake, 493 S.E.2d at 893 n.13.

\textsuperscript{16} Id. at 893.

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 893-94.

\textsuperscript{19} Id. at 894 & n.14 (citing Miller v. Whitworth, 455 S.E.2d 821 (W. Va. 1995)).

\textsuperscript{20} Blake, 493 S.E.2d at 894.


\textsuperscript{22} Blake, 493 S.E.2d at 892, 895 n.18.
idence of each of the five parts of the deliberate intention test\textsuperscript{23} to survive a motion for a directed verdict. At trial, Blake’s evidence sought to establish

that there was a total lack of security in the Store and that lack of security resulted in Mrs. Blake’s injuries. . . . (1) there were no limitations on the amount of money [Blake] should keep in the cash register; (2) customers could stand directly behind her when she [was] using the cash register; (4) [sic] she could not see out any windows when she was standing at the cash register; (5) there was no “drop safe” in the Store; (6) the area was not lit well after dark; and (7) she did not recall being instructed by the manager of the Store that she was to hand over the money in the cash register in the event of the robbery.\textsuperscript{24}

Based upon this evidence and the testimony of Blake’s expert, the Blake court reasoned that Blake had presented evidence that (1) the Party and Beverage Store constituted a “specific unsafe working condition” that violated industry standards; (2) such condition presented a high degree of risk and a strong probability of serious injury or death; (3) Blake’s injuries were a direct and proximate result of such condition; (4) Skidmore had a subjective realization and appreciation of such condition; and (5) Skidmore intentionally subjected Blake to such condition.\textsuperscript{25} Accordingly, the Court held that “the trial court erred when it directed a verdict in favor of [Skidmore].”\textsuperscript{26}

B. Blake’s Impact on Workplace Security

Blake will have an impact on standards of workplace security in the convenience store industry. Thelma Blake did not base her deliberate intention claim on Skidmore’s failure to avail itself of modern security technology (such as video cameras or alarm systems linked to law enforcement dispatch services). Rather, Blake contended that Skidmore had failed to avail itself of bare minimum (and inexpensive) security devices and practices such as limiting the amount of money in a cash register at any time, keeping cash in a safe, using a counter to separate the cashier from the customers, ensuring that activities inside the store were visible outside the store, adequately lighting the store, and properly training the employees.\textsuperscript{27} The failure to provide these basic security measures was, in the opinion of an expert witness, a breach of industry standards.\textsuperscript{28} Presumably, as technological advances become standardized in West Virginia, the bare minimum standards will increase, as will the safety of employees and consumers in convenience stores.

\textsuperscript{23} See supra n. 8.
\textsuperscript{24} Blake, 493 S.E.2d at 895-96.
\textsuperscript{25} Id. at 896-97.
\textsuperscript{26} Id. at 897.
\textsuperscript{27} Id. at 895-96.
\textsuperscript{28} Id. at 895 n.19, 896 & n.24.
C. Blake’s Impact on Liability for Third-Party Criminal Acts

In *Blake*, the Court continued its recognition that persons may be liable in tort for the criminal activities of third parties. It cited a 1995 case in which it "declined to delineate . . . a bright-line rule with respect to a landlord’s liability for injuries resulting from third party criminal conduct." In cases involving liability for third-party criminal acts, the Court has opted for case-by-case determination, recognizing both that "such injuries can be foreseeable and that a cause of action may exist under some circumstances" and that it "cannot use clairvoyant powers to eliminate every conceivable circumstance which could give rise to a cause of action in the future."

D. Blake’s Impact on “Deliberate Intention” Cases

*Blake* represents the Court’s increasing willingness to apply the deliberate intention exception in situations other than those involving “typical” workplace injuries (e.g., those caused by a wood saw without a guard, a portal bus with defective brakes or unsecured support beams). *Blake* involves an “atypical” injury, similar to an injury caused by hot-grease disposal practices. With *Blake* extending the exception to third-party criminal acts, plaintiffs suffering atypical injuries as a result of acts by their employers will be able to avail themselves of the deliberate intention exception.

*Blake* also appears representative of a trend in favor of employees. The end of the 1996-97 term and the beginning of the 1997-98 term for the West Virginia Supreme Court of Appeals favored plaintiffs asserting deliberate intention claims. The *Blake* decision came between ostensibly similar decisions reversing trial court grants of summary judgment for employers. In *Harmon v. Elkay Mining Co.*, a plaintiff-employee asserted a deliberate intention claim against his employer based on improper inspection and maintenance of a truck. The Supreme Court of Appeals reversed the trial court’s grant of summary judgment for the employer. Similarly,

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29 *Blake*, 493 S.E.2d at 894 n.14 (citing Miller v. Whitworth, 455 S.E.2d 821 (W. Va. 1995)).
30 *Id*. at 895.
31 *Id*. at 894 n.14.
36 *See* Blake, 493 S.E.2d 887.
38 *Id*. at 868.
in *Costilow v. Elkay Mining Co.*, the decedent-employee’s estate asserted a deliberate intention claim against the decedent’s employer based on violations of industry standards applicable to clearing vegetation on a steep incline using a bulldozer. Again, the Supreme Court of Appeals reversed the trial court’s grant of summary judgment for the employer.\(^{40}\)

E. Justice Maynard’s Dissent

Through *Blake, Costilow and Harmon*, one lone voice on the Court cautioned against judicial activism. Justice Maynard wrote a single dissent to *Costilow* and *Blake*, opining that those decisions usurped the trial court’s authority to dispose of “meritless” actions that do not satisfy the deliberate intention criteria, but do amount to “gross negligence.”\(^{41}\) Justice Maynard lodged a similar dissent in *Harmon*.\(^{42}\)

This author is sympathetic to Justice Maynard’s position in cases that second guess or, to use Justice Maynard’s term, “disregard”\(^{43}\) a trial judge’s exercise of discretion inherent in ruling on dispositive motions, but the *Blake* decision is distinguishable insofar as neither *Costilow* nor *Harmon* involved a pure question of law. The trial courts evaluating the evidence in *Costilow* and *Harmon* certainly understood that an employer could, under some set of facts, be liable under a deliberate intention theory for negligent maintenance of a truck\(^{44}\) or for causing employees to engage in dangerous activities on steep inclines.\(^{45}\)

In contrast, *Blake* presented a threshold issue “whether injuries resulting from the criminal acts of a third party can ever give rise to a claim under the deliberate intention exception.”\(^{46}\) While the *Blake* court went on to reverse the trial court’s grant of a directed verdict, it did so in a situation where the trial court had based its analysis of the evidence upon an erroneous legal proposition.\(^{47}\) “I think [plaintiff’s] evidence is excellent, I have no quarrel with the evidence you produced, except I don’t think that [Mandolidis] covers victims of crime.”\(^{48}\) Thus, *Blake* does not represent the appellate usurpation of trial-court discretion against

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40 Id. at 412.
41 See *Blake*, 493 S.E.2d at 897-99 (Maynard, J., dissenting); *Costilow*, 488 S.E.2d at 412-14 (Maynard, J., dissenting).
42 See *Harmon*, 500 S.E.2d at 868-70 (Maynard, J., dissenting).
43 *Blake*, 493 S.E.2d at 898 (Maynard, J., dissenting).
46 *Blake*, 493 S.E.2d at 890 (emphasis added).
which Justice Maynard rallied in his 1997 dissents. Indeed, in *Blake*, Justice Maynard dissented:

> similarly, this court’s decision in [*Blake*] guarantees that another meritless action, rightfully dismissed by the circuit court, will now go to trial. I dissent because I believe that the appellants failed to produce sufficient evidence to establish that the appellee acted with deliberate intention to defeat the appellee’s motion for a directed verdict.49

Ironically, given the *Blake* trial judge’s view of the evidence, which was “excellent” and with which the judge had “no quarrel,” Justice Maynard’s dissent itself attempts to usurp the discretion of the trial judge and to substitute his own interpretation of the evidence.

IV. CONCLUSION

Although Thelma Blake did not win her case against her employer, her case will have profound effects for the safety of convenience store employees, for persons whose actions facilitate third-party criminal acts, for persons sustaining atypical workplace injuries because of their employers’ deliberate intentions, and for persons seeking to challenge trial judges’ use of dispositive motions.

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49 *Blake*, 493 S.E. 2d at 898-99 (Maynard, J., dissenting).