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An Analysis of Johns-Manville Products Corp. v. Superior Court: Recovery by an Employee Against an Employer for Fraudulent Conduct

The California Supreme Court held in *Johns-Manville Products Corp. v. Superior Court*¹ that workers' compensation² is an employee's exclusive remedy for fraud³ committed by an employer, directed at the employee, which results in a physical injury to the employee. Under this holding, an employer in California may intentionally misrepresent the safety of the work environment to his or her employees; the employee is precluded from seeking recovery for resulting injuries beyond that provided by the workers' compensation scheme.

In *Johns-Manville*, an employer allegedly misrepresented to employees the safety of asbestos in the work environment. The employer then allegedly made a second misrepresentation to the state, and to doctors retained to treat the employees, that the level of employee exposure to asbestos was below the maximum level prescribed by the state. The court held that employees could recover at law for injuries that were the result of the second misrepresentation to the state and to the doctors,⁴ but that civil recovery for injuries that were the result of the first misrepresentation to the employees was barred by the exclusiv-

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1. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).
2. Workers' compensation is in effect mandatory insurance on which employers pay premiums for the benefit of their employees. An employer may obtain this insurance from an authorized insurer, or an employer may elect, with the state's consent, to self-insure, in which case the employer must deposit with the state a surety bond, securities, or cash sufficient to secure potential liability. Cal. Lab. Code §§ 3700, 3701 (West Supp. 1981).
3. Employer fraud may be defined as a misrepresentation of a material fact by an employer, made with knowledge of its falsity and with the intent that the employee rely upon the misrepresentation. See Restatement (Second) of Torts §§ 525, 557A (1977). This Comment discusses only employer fraud resulting in physical injuries. As nonphysical injuries are not disabling and thus are noncompensable under the workers' compensation scheme, at least one court has concluded that workers' compensation was not intended to shield employers from liability for such injuries. See Renteria v. County of Orange, 82 Cal. App. 3d 883, 147 Cal. Rptr. 447 (1978) (employee allowed to seek damages in civil action for intentional infliction of emotional distress unaccompanied by physical injury).
4. 27 Cal. 3d at 477-79, 612 P.2d at 955-56, 165 Cal. Rptr. at 865-66.
ity provision of workers' compensation.5

This Comment first examines the structure of California's workers' compensation system, and discusses the legislative history of California's workers' compensation laws and the case law prior to Johns-Manville. Following an explanation of the court's opinion, the Comment criticizes Johns-Manville and suggests alternative interpretations of California's workers' compensation laws and their rationale. The Comment concludes that employer fraud that results in personal injury to an employee arising in the course and scope of employment should be compensable both through the workers' compensation scheme and through the courts,6 and that a set-off should be allowed for the administrative award.7

The California Workers' Compensation System

California's workers' compensation system provides for monetary compensation to an employee whose injury arises out of and in the course and scope of employment.8 An employee need not show negligence9 on the part of the employer to recover.10 On the other hand, an employee is precluded from pursuing a civil action for damages flowing from the injury, because of the exclusivity provision of the workers' compensation law.11

7. Such a set-off was allowed in Williams v. International Paper Co., 129 Cal. App. 3d 810, 165 Cal. Rptr. at 863 (1982). Intentional torts, such as intentional infliction of emotional distress, see Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978), and assault and battery, see Magliulio v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975), have provided a basis for civil recovery despite the exclusivity provision. See generally Comment, Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule, 33 Hastings L.J. 263 (1981). The doctrine of dual capacity permits actions at law against employers who deal with employees in a second capacity based on the independent duties and liabilities of one who assumes that capacity. See Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952).
9. Ordinary negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct reckless or disregardful of an interest of others." Restatement (Second) of Torts § 282 (1965).
10. Cal. Lab. Code § 3600 (West Supp. 1981). Liability will not arise under the workers' compensation scheme, however, if injury results from an employee's use of alcohol or drugs, from self-infliction, or from a fight in which the injured employee is the aggressor. Id.
11. Id. § 3601 (West Supp. 1981); Johns-Manville Prods. Corp. v. Superior Court, 27
Under the workers’ compensation scheme, the employer is required to pay premiums to the compensation fund for the benefit of the employee. Compensation to an employee is available for lost wages and medical expenses under the workers’ compensation law, but not for pain and suffering or punitive damages. This limitation exists because workers’ compensation was not intended to compensate a worker completely, but rather to make him or her well enough to return to employment. Moreover, benefits are fixed at an employee’s wage level at the time of the injury.

Additional compensation is available to an employee in cases of “serious and willful” misconduct by the employer under section 4553 of the California Labor Code. An employee who has suffered an injury as a result of such employer misconduct may apply to the Workers’ Compensation Appeals Board for a sum equal to one-half of the workers’ compensation award, but not to exceed $10,000. This award is intended only as extra compensation, not as punitive damages. The availability of section 4553 awards has had a deterrent effect upon egregious employer conduct because an employer cannot insure against the

Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863. Employers originally thought that workers’ compensation would turn out to be expensive and they opposed it.

12. See note 2 supra.
14. “As for physical pain and suffering, unless it interferes with earning capacity, no allowance can be made in a compensation award; nevertheless, a common-law suit for pain and suffering for a work-connected injury will not lie.” 2A Larson, supra note 6, at § 65.20.
17. The Restatement equates “wanton and willful” misconduct with “recklessness” and defines recklessness as when the actor “does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” Restatement (Second) of Torts § 500 (1965). The Restatement does not define “gross negligence,” but refers the reader to “recklessness.”
18. Cal. Lab. Code § 4553 (West Supp. 1981): “The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and willful misconduct of any of the following:

(a) The employer, or his managing representative . . .
(b) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

But such increase of award shall in no event exceed . . . $10,000; together with costs and expenses incident to the procurement of such awards, not to exceed . . . $250.”
19. Id.
20. E. Clemons Horst Co. v. Industrial Acc. Comm’n, 184 Cal. 180, 192-93, 193 P. 105, 110 (1920); see also Johns-Manville Prods. Corp. v. Superior Court, 27 Cal. 3d at 478 n.12, 612 P.2d at 956 n.12, 165 Cal. Rptr. at 866 n.12.
award. Serious and willful employer misconduct that warrants a section 4553 award, however, may be difficult to prove.

By contrast, the civil system allows full compensation for physical injuries caused by an employer's tortious conduct, including awards for pain and suffering, and punitive damages. Civil judgments, however, are not granted as swiftly as administrative workers' compensation awards, and the employee must prove some tortious conduct to recover. Nevertheless, as civil remedies are broader in scope and may be set at a rate higher than that of worker's compensation, the civil system may have a greater deterrent effect upon potential tortfeasors.

Legislative History

Three sets of workers' compensation statutes have been enacted in California: the Roseberry Act of 1911, the Boynton Act of 1913, and the current law, the Workers' Compensation Insurance and Safety Act of 1917. The Roseberry Act and the Boynton Act permitted employees to elect a civil remedy for injuries caused by an employer's gross negligence or willful misconduct. Those Acts, therefore, provided that workers' compensation would be the exclusive remedy for employee injuries that arose through no fault of the employer or that were the result of ordinary negligence by the employer, but permitted a civil remedy for more serious employer misconduct.

The Workers' Compensation Insurance and Safety Act, passed in

21. Although insurance may cover the cost of defending a "serious and willful" action, including attorneys' fees for both the original adjudication and appellate proceedings, it cannot cover the $10,000 fine. Cal. Ins. Code § 11661 (West 1972).
22. See, e.g., American Smelting & Refining Co. v. Worker's Comp. Appeals Bd., 79 Cal. App. 3d 615, 622-23, 144 Cal. Rptr. 898, 902 (1978) (when an employer is unaware of any previous machinery mishaps, no serious and willful misconduct will lie).
23. The following damages are compensable civilly: past and future physical and mental pain, past and future medical expenses, loss of earning capacity, permanent disability, permanent disfigurement, and loss of consortium. See generally Restatement (Second) of Torts, §§ 901-932 (1979). Of the above, only past and present medical expenses are available through workers' compensation. Cal. Lab. Code §§ 4600-4605 (West 1971 & Supp. 1981); see also id. § 3209.
24. "[The workers' compensation] system balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer." Johns-Manville Prods. Corp. v. Superior Court, 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.
1917, provided that awards made under workers' compensation constituted an employee's exclusive remedy for injuries arising in the course and scope of employment.\(^\text{29}\) The right of an employee to bring a civil action in the event of the employer's gross negligence or willful misconduct was omitted. The 1917 Act instead provided for a fifty percent increase in compensation when an employer's "serious and willful" misconduct resulted in the employee's injury.\(^\text{30}\) Exemplary damages were not provided for in the 1917 Act.\(^\text{31}\)

**Case Law**

The first California Supreme Court case to interpret section 4553, the "serious and willful" provision, was *E. Clemons Horst Co. v. Industrial Accident Commission*.\(^\text{32}\) In Horst, one of the employee's duties was to keep a potato slicer unclogged. The employee was injured by the slicer as she attempted to fix it. The Industrial Accident Commission granted a section 4553 award against the employer, finding that its failure to maintain a safe workplace constituted serious and willful misconduct. The employer appealed, claiming that section 4553 awards were intended only for intentional tortious misconduct.

The California Supreme Court upheld the Commission's award, holding that there need not be proof of actual knowledge on the part of the employer of a dangerous condition for serious and willful misconduct to exist.\(^\text{33}\) The court stated that "serious" misconduct is "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees,"\(^\text{34}\) and that such misconduct is "willful" if "the circumstances surrounding the act of commission or omission are such as 'evidence a reckless disregard for the safety of others and a willingness to inflict the injury complained of.'"\(^\text{35}\)

Thus, employer misconduct similar to gross negligence or recklessness is "serious and willful misconduct." The *Horst* court, however, did not state whether intentional torts would also be classified as serious and willful misconduct.

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\(^{31}\) Doubts were expressed about the absence of a choice of remedies in the new worker's compensation system. See Note, *Workmen's Compensation Act: Serious and Wilful Misconduct of Employer*, 9 CALIF. L. REV. 352 (1921).

\(^{32}\) 184 Cal. 180, 193 P. 105 (1920).

\(^{33}\) Id. at 188-89, 193 P. at 108-09.

\(^{34}\) Id. at 189, 193 P. at 108.

\(^{35}\) Id. at 189, 193 P. at 109 (quoting Louisville N.A. & C. Ry. v. Bryan, 107 Ind. 51, 53, 7 N.E. 807, 808 (1886)).
In *Mercer-Fraser Co. v. Industrial Accident Commission*, the California Supreme Court seemed to expand the definition of serious and willful misconduct to include intentional torts. In *Mercer-Fraser*, a contractor had failed to erect enough sway lines to prevent a building from collapsing. When the building collapsed, several employees were killed. Although the contractor had been warned that the winds at the time of the accident were extraordinarily strong, the court found that the contractor was only negligent and therefore denied the plaintiff a section 4553 award.

The *Mercer-Fraser* court defined serious and willful misconduct as conduct that

necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom.

Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences.

As the employer in *Mercer-Fraser* was only negligent, it had committed no serious and willful misconduct, as defined either by this court or by the *Horst* court. Thus, the *Mercer-Fraser* court's expansion of the *Horst* definition to include intentional torts is merely dictum.

In *Magliulio v. Superior Court*, the California Court of Appeal applied the *Horst* definition to conclude that "'serious and willful misconduct' is that which falls between ordinary negligence and an intentional act." In *Magliulio*, an employee brought a civil suit against her employer for an alleged workplace assault and battery, seeking compensatory and punitive damages. The court concluded that the exclusivity provision of the California workers' compensation system did not bar a civil suit if the employer "personally intentionally inflicts an injury on the person of his employee." As the court construed section 4553 awards to be available only for misconduct falling between ordinary negligence and an intentional act, and as punitive damages may be awarded for an oppressive or malicious assault, the court concluded that "the Legislature did not intend the provisions now found in section 4553 to be a substitute for the relief which could be afforded for an intentional assault."

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36. 40 Cal. 2d 102, 251 P.2d 955 (1953).
37. Id. at 124-26, 251 P.2d at 967-68.
40. Id. at 778-779, 121 Cal. Rptr. at 635.
41. Id. at 769, 121 Cal. Rptr. at 628.
43. 47 Cal. App. 3d at 779, 121 Cal. Rptr. at 635.
It is uncertain, however, whether the reasoning of *Magliulo* can be extended to other employer intentional torts, such as fraudulent concealment of workplace hazards. The question is whether such torts are so related to the employment as to be covered by workers' compensation. Workers' compensation is the exclusive remedy for workplace injuries "proximately caused by the employment." In holding that civil suits for intentional employer misconduct are not barred, the *Magliulo* court relied, in part, on its conclusion that "an intentional assault...is of questionable relationship to general conditions of employment."

Prior to *Johns-Manville*, only two California cases considered the relationship of employer concealment of workplace hazards to workers' compensation, and the question whether an employee could bring a civil suit against an employer for concealment of workplace hazards. In *Buttner v. American Bell Telephone Co.*, the employer allegedly misrepresented the nature of carbon tetrachloride, a hazardous substance, to an employee who was subsequently injured by the substance. The court held that workers' compensation was the exclusive remedy for all physical injuries arising out of and in the course and scope of employment, "irrespective of the manner in which they might occur."

The court noted that section 4553 provided additional compensation for serious and willful misconduct.

In *Wright v. FMC Corp.*, an employee charged his employer with concealment and misrepresentation of the hazards of chemicals used in the workplace. In a three-paragraph opinion, the court relied solely on *Buttner* to hold that the employee was limited to his workers' compensation remedy.

Thus, prior to *Johns-Manville*, courts held that employer concealment of workplace hazards fell within the scope of the workers' compensation system. Under this analysis, employer concealment of workplace hazards, although an intentional tort, is covered by workers' compensation and section 4553; civil suits are barred.

**Johns-Manville Products Corp. v. Superior Court**

In *Johns-Manville*, an employee sought civil recovery for an industrial disease incurred as a result of exposure to asbestos. The plaintiff,

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44. CAL. LAB. CODE § 3600(c) (West Supp. 1981); see id. § 3601.
47. Id. at 584, 107 P.2d at 441.
48. Id.
50. Id. at 779, 146 Cal. Rptr. at 740.
51. "Industrial diseases" are infirmities that result from exposure to a hazardous substance, such as asbestos.
Reba Rudkin, a Johns-Manville employee for twenty-nine years, alleged as the initial fraud that the defendant company knew of the dangerous effects of asbestos, chose to expose its employees to asbestos regardless of this knowledge, and then misrepresented to its employees that the carcinogen was harmless. In addition, Rudkin alleged as a second fraud that Johns-Manville "fraudulently concealed from him, and from the doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue working under hazardous conditions."  

Rudkin sought compensatory and punitive damages for his physical injuries. Johns-Manville moved for a judgment on the pleadings, asserting that the action was barred by Labor Code section 3601, which makes workers' compensation the exclusive remedy for work-related injuries. The lower court let the plaintiff's complaint stand, and the employer then petitioned for a writ of mandate setting aside the trial court's order.

The California Supreme Court agreed with Johns-Manville in part, ruling that, as a matter of law, the employer was not liable in a civil action for the injuries that resulted from the initial fraud. The court held, however, that Rudkin did state a cause of action for that portion of the injury that resulted from the second fraud, the company's alleged concealment of the nature and cause of Rudkin's condition. The court stated that, had the defendant merely "concealed from [the plaintiff] that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law."

In reaching its decision, the court gave considerable weight to its interpretation of the legislative intent of California's workers' compensation law. Noting that section 4553 was added to the workers' compensation laws at the same time that the employee's choice of remedies

52. 27 Cal. 3d at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.
53. Id. at 469-70, 612 P.2d at 950-51, 165 Cal. Rptr. at 860-61.
55. Rudkin died of lung cancer shortly after the petition for writ of mandate was filed, but the issues presented were not rendered moot because, as the supreme court noted, "an action for personal injuries survives the death of the plaintiff." Id. at 470, 612 P.2d at 951, 165 Cal. Rptr. at 861.
56. Id. at 474, 612 P.2d at 954, 165 Cal. Rptr. at 864.
57. Id. at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.
58. Id. at 475-76, 612 P.2d at 954, 165 Cal. Rptr. at 864.
59. "In sum, the provisions of section 4553 were designed to penalize intentional misconduct of an employer, and the injuries which result from such acts are compensable under that section." Id. at 473, 612 P.2d at 953, 165 Cal. Rptr. at 863.
was deleted,\textsuperscript{60} the court concluded that these changes were intended to eliminate civil compensation for all work-related employee injuries. The section 4553 award for the serious and willful misconduct of the employer “was a substitute for the previous right of an employee to bring an action at law.”\textsuperscript{61} The court rejected the plaintiff’s argument that serious and willful misconduct did not include intentional misconduct. Relying upon \textit{Mercer-Fraser Co. v. Industrial Accident Commission},\textsuperscript{62} the court found that intentional misconduct was included in section 4553, and held that the initial fraud, an intentional tort, was compensable exclusively under workers’ compensation.\textsuperscript{63}

Despite its refusal in \textit{Johns-Manville} to permit a civil recovery for the initial fraud, the court did allow an exception to the exclusivity of workers’ compensation for the second “aggravating” fraud.\textsuperscript{64} Holding that Rudkin did state a cause of action at law for this injury, the court justified the exception on several grounds. First, the court noted that permitting an action at law only for aggravation of an industrial disease through employer fraud, as opposed to permitting civil recovery for all injuries caused by employer fraud, would not “open up a Pandora’s box of actions at law seeking damages for numerous industrial diseases” because actions for such aggravating fraud would not be numerous.\textsuperscript{65}

Second, the court noted that the injury occurring as a result of the secondary fraud was actually an “aggravation of the disease, as distinct from the hazards of the employment which caused [the plaintiff] to

\textsuperscript{60}See notes 25-31 & accompanying text \textit{supra}.

\textsuperscript{61} \textit{Id.} at 472, 612 P.2d at 952, 165 Cal. Rptr. at 862.

\textsuperscript{62} 40 Cal. 2d 102, 251 P.2d 955 (1953).

\textsuperscript{63} 27 Cal. 3d at 472-73, 612 P.2d at 952-53, 165 Cal. Rptr. at 862-63.

\textsuperscript{64} \textit{Id.} at 475-78, 612 P.2d at 954-56, 165 Cal. Rptr. at 864-66. Justice Clark dissented in \textit{Johns-Manville}, stating that no exception to the rule of exclusivity should be allowed. He argued that allowing recovery would discourage employers from retaining physicians, because they would be held liable for failing to give their physicians information about the hazards of the workplace. \textit{Id.} at 480, 612 P.2d at 957, 165 Cal. Rptr. at 867 (Clark, J., dissenting). He maintained that the employee must fit within one of the statutory exemptions to maintain an action at law. \textit{Id.} at 482, 612 P.2d at 959, 165 Cal. Rptr. at 868. He further argued that the previous exceptions to the exclusivity rule of workers’ compensation concerning an employee’s ability to recover in a civil suit for a work-related assault and battery and intentional infliction of emotional distress, see note 7 \textit{supra}, were based on the statutory language of the workers’ compensation laws. \textit{Id.} at 485, 612 P.2d at 960, 165 Cal. Rptr. at 870. Justice Clark explained that the assault and battery exception was justified by California Labor Code § 3601(a)(1) (West Supp. 1981), which allows an employee to bring an action at law for a work-related assault and battery committed by a co-employee. \textit{Id.} He explained the intentional infliction of emotional distress exception by reasoning that the lack of a workers’ compensation remedy for purely nonphysical injuries implied an exception to the exclusivity rule for torts that result in a nonphysical injury. \textit{Id.} at 485-86, 612 P.2d at 960-61, 165 Cal. Rptr. at 870.

\textsuperscript{65} 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.
contract the disease."\textsuperscript{66} The court relied on \textit{Unruh v. Truck Insurance Exchange}\textsuperscript{67} for the proposition that the intentional aggravation of an industrial injury is compensable at law.

Third, the \textit{Johns-Manville} court noted that the employee could not have "contemplated" the aggravating fraud on the part of the employer.\textsuperscript{68} The court reasoned that, if an employee cannot contemplate an injury at the time employment commences, the employee does not surrender his or her right to bring an action at law for that injury merely by accepting employment.\textsuperscript{69} The court, however, did not address the issue whether an employee can be expected to contemplate that an employer would perpetrate the initial fraud that resulted in physical injury.

Finally, the \textit{Johns-Manville} court cited the "blameworthiness" of the defendant's actions as a reason for allowing civil recovery for the aggravation of an injury by employer fraud. Characterizing the alleged secondary fraud as "blameworthy," "egregious," and "flagrant," the court indicated that such conduct violates public policy and therefore should be discouraged through the threat of punitive damages.\textsuperscript{70} Thus, the court justified this exception to the exclusive remedy rule.\textsuperscript{71}

\textbf{Johns-Manville's Analysis of Legislative Intent}

The California Supreme Court's basis for concluding in \textit{Johns-Manville} that the legislature intended for intentional torts committed by employers to be covered exclusively by workers' compensation was that the legislature deleted the employee's choice of remedies to redress an injury caused by the employer's gross negligence or willful misconduct when it adopted section 4553.\textsuperscript{72} The court did not adequately consider the possibility that the legislature intended that section 4553 be the exclusive remedy only for grossly negligent or reckless misconduct, and that employees still be able to maintain a private right of action for intentional employer misconduct.

The key factor in deciding whether the legislature intended that a civil remedy be allowed for intentional employer torts is whether the legislature failed to include a remedy within the workers' compensation system and thereby implied, by omission, a civil remedy. The issue

\textsuperscript{66} \textit{Id.} at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.
\textsuperscript{67} 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).
\textsuperscript{68} 27 Cal. 3d at 477, 612 P.2d at 955-56, 165 Cal. Rptr. at 865.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} The court indicated that the defendant's second fraud in this case was more blameworthy than that of the defendant in \textit{Unruh}. \textit{Id.} at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} 27 Cal. 3d at 471-72, 612 P.2d at 951-52, 165 Cal. Rptr. at 861-62.
thus becomes whether the legislature intended the "serious and willful" awards of section 4553 to provide a remedy for intentional torts.

The exclusive remedy provision of California workers' compensation law, California Labor Code section 3601, provides that, when the conditions for recovery of workers' compensation, are met, such compensation will be "the exclusive remedy for injury or death of an employee against an employer." 73 This broad exclusivity rule must be read, however, in conjunction with section 3600, which describes the conditions of workers' compensation, and provides in part:

Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course and scope of employment . . . . 74

The legislature is authorized by article XIV, section 4 of the California Constitution to provide for workers' compensation "irrespective of the fault of any party." 75 Had the legislature intended that intentional torts be compensable exclusively under the workers' compensation system, it could have specified that workers' compensation would be the exclusive remedy for employee injury "without regard to fault." Section 3600 does not refer to intentional tortious misconduct on the part of the employer, and its express reference to employer negligence implies that the legislature intended that workers' compensation would not be the exclusive remedy for intentional employer misconduct.

The Johns-Manville court concluded that the legislature intended section 4553, the serious and willful misconduct provision, to be an employee's sole remedy for intentional employer misconduct. 76 In reaching this conclusion, the court relied on dicta from Mercer-Fraser Co. v. Industrial Accident Commission, 77 which interpreted "serious and willful misconduct" to include deliberate, intentional, and wanton conduct. 78

The Johns-Manville court, however, failed to consider the court's definition of serious and willful misconduct in E. Clemens Horst Co. v. Industrial Accident Commission, 79 which implied that serious and willful misconduct included only gross negligence and recklessness. 80 Al-

74. Id. § 3600 (emphasis added).
76. 27 Cal. 3d at 472-73, 612 P.2d at 952-53, 165 Cal. Rptr. at 862.
77. 40 Cal. 2d 102, 251 P.2d 955 (1953).
78. Id. at 117, 251 P.2d at 962. See notes 36-38 & accompanying text supra.
79. 184 Cal. 180, 193 P. 105 (1920).
80. Id. at 188-89, 193 P. at 108-09. See notes 32-35 & accompanying text supra.
though *Horst* did not expressly state that serious and willful misconduct did not include intentional torts, its discussion referred only to negligent and reckless conduct. *Horst* was decided in 1920, only three years after the enactment of California’s present workers’ compensation law. As there are no surviving records of legislative hearings, *Horst*’s definition of the scope of the serious and willful misconduct provision should be accorded substantial weight.

If the *Horst* definition of serious and willful misconduct were adopted, then section 4553 would provide a remedy only for grossly negligent or reckless misconduct. Intentional misconduct would not be included. Thus, an employee still could pursue a private right of action for intentional misconduct.

**Reliance on Case Law**

The court in *Johns-Manville* relied on *Buttner v. American Bell Telephone Co.* and *Wright v. FMC Corp.* for the proposition that civil recovery against an employer for fraudulent concealment and misrepresentation of workplace hazards is barred by the exclusivity provision of the workers’ compensation law. As the plaintiff in *Buttner* sought only compensatory damages, however, the *Buttner* court expressly declined to decide whether, despite the exclusivity rule, an employee might be allowed to bring a civil action for punitive or exemplary damages. *Buttner* referred to the discussion of punitive damages in *E. Clemens Horst Co. v. Industrial Accident Commission*. In *Horst*, the California Supreme Court concluded that punitive damages could not constitutionally be awarded under the workers’ compensation law, but indicated that the legislature could provide for employee recovery of punitive damages in legal actions. Thus, *Buttner* and *Horst* left open the possibility that an employee could sue an employer at law for punitive damages for injuries sustained as a result of an employer’s fraudulent conduct.

The plaintiff in *Johns-Manville* sought to recover punitive damages from his employer. Relying on *Buttner*, the *Johns-Manville* court stated that civil recovery for employer fraud is barred. This reliance is misplaced because *Buttner* held only that compensation, not punitive damages, is recoverable exclusively within workers’ compensation. As

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81. See notes 25-31 & accompanying text supra.
85. 27 Cal. 3d at 473-74, 612 P.2d at 955, 165 Cal. Rptr. at 865.
86. 41 Cal. App. 2d at 585, 107 P.2d at 443.
87. 184 Cal. 180, 193 P. 105 (1920).
88. Id. at 192, 193 P. at 110.
Wright relied only on Buttner to support the same proposition,\textsuperscript{89} Wright also provides little precedent for Johns-Manville.

Another example of the Johns-Manville court’s misplaced reliance on precedent is its use of Unruh v. Truck Insurance Exchange\textsuperscript{90} to support the proposition that only the aggravation of an industrial injury caused by fraudulent conduct is compensable at law. The Johns-Manville court stated that allegations made by the plaintiff that he was suffering from a disease because of his employer’s misrepresentations to a third party were “sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of the employment which caused him to contract the disease.”\textsuperscript{91}

In Unruh, the plaintiff was “befriended” by an investigator for the employer’s insurance company, who had been hired to get pictures of the plaintiff that would show that she was not as severely injured as she claimed. The investigator took the plaintiff to Disneyland, where he violently shook a rope bridge upon which she was standing while a confederate surreptitiously photographed her. When these photographs were produced at her workers’ compensation hearing, the plaintiff suffered severe emotional distress. She sued her employer’s insurer for damages for the distress. The court held that, although an employer’s insurer generally may not be sued at law as a “person other than the employer” for purposes of workers’ compensation,\textsuperscript{92} this injury was distinct from the plaintiff’s industrial injury and therefore was compensable in a civil action.\textsuperscript{93}

Although the Unruh court drew a distinction between hazards of employment that result from intentional tortious conduct on the part of the employer and hazards that result from later employer conduct, Unruh involved the occurrence of two separate and distinct injuries. In Johns-Manville, on the other hand, one continuous injury resulted from the fraud. In Unruh the aggravating injury was separate and distinct from the original injury, causal outside of employment hours, and was inflicted for reasons different from those for which the original injury had been inflicted. In Johns-Manville, however, the “aggravating injury” was merely a continuation of the original injury. In addition, the aggravating injury was caused with the same intent as the original injury—to conceal the danger of asbestos. As it would be difficult to separate the injuries in Johns-Manville and as the injuries arose out of

\textsuperscript{89} See notes 49-50 & accompanying text supra.
\textsuperscript{90} 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).
\textsuperscript{91} 27 Cal. 3d at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.
\textsuperscript{92} 7 Cal. 3d at 627, 498 P.2d at 1071, 102 Cal. Rptr. at 823. CAL. LAB. CODE § 3852 (West 1971) provides: “The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death as against any person other than the employer.”
\textsuperscript{93} 7 Cal. 3d at 630, 498 P.2d at 1073, 102 Cal. Rptr. at 825.
the same transaction and with an identical ill intent, the employee should be able to seek redress for the entire injury in an action at law.

Criteria for Civil Recovery

The *Johns-Manville* opinion set forth certain criteria for civil recovery, relying on false assumptions concerning the employer-employee relationship. These criteria are inadequate to protect an employee from an employer's intentional tortious conduct.

In reaching its conclusion that the plaintiff could recover for the second fraud, the *Johns-Manville* court reasoned that "it is inconceivable that plaintiff contemplated [that the] defendant would . . . intentionally conceal the knowledge that he had contracted a serious disease from the work environment, thereby aggravating the disease, and [that] by accepting employment he would surrender his right to damages at law for such conduct."\(^94\) By denying recovery to Rudkin for the initial fraud, which was a conscious failure to warn Rudkin of the dangers of the environment, the court implied that employees may be held to contemplate at the time they accept employment that their employers might conceal from them hidden dangers of the work environment. Employees, however, do not reasonably contemplate that employers will conceal knowledge of hidden dangers. A more realistic assumption is that an employer will notify employees and protect them against latent dangers that may present serious hazards to health.

Another weakness of the *Johns-Manville* opinion is that the court did not distinguish between a failure to ensure a safe workplace and an intentional concealment of workplace hazards.\(^95\) The failure to ensure a safe work environment may involve only a negligent omission or lack of awareness. Even a "deliberate failure"\(^96\) to ensure safety is not considered an intentional tort.\(^97\) A deliberate misrepresentation or concealment of hazards, however, involves the intentional torts of fraud and deceit. The court should have made this distinction and considered the possible consequences that would flow from it.

The court could have distinguished the failure to ensure safety from the misrepresentation of hazards, allowing civil recovery for the latter, more serious conduct.\(^98\) Employers should not be shielded from civil liability for misrepresenting and concealing workplace hazards.

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\(^94\) 27 Cal. 3d at 477, 612 P.2d at 955-56, 165 Cal. Rptr. at 865-66.
\(^95\)  See id. at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.
\(^96\)  Id.
\(^97\)  See 2A LARSON, *supra* note 6, at § 68.13. The court of appeal reversed a jury verdict for the plaintiff in Williams v. International Paper Co., 129 Cal. App. 3d 810, 165 Cal. Rptr. at 863-866, relying exclusively on *Johns-Manville*. The employer in Williams was aware of the dangerous condition of its sawdust piles. These piles spontaneously combusted, injuring the employee. The court denied recovery to the employee, citing *Johns-Manville*.
\(^98\)  Many states built their workers' compensation systems around the concept of "acci-
The *Johns-Manville* court justified its exception to the exclusivity provision by noting the blameworthiness of the employer’s conduct.\(^9\) This justification, however, is equally applicable to other tortious conduct of an employer. The court attempted to distinguish the blameworthiness of Johns-Manville’s second fraud on the ground that it was more serious than the employer’s conduct in *Unruh*, in which the defendant insurance company, in investigating a claim of industrial injury, committed the tort of intentional infliction of emotional distress.\(^10\) In *Johns-Manville*, the court determined that Johns-Manville’s conduct in committing the second fraud, as alleged in the complaint, was so “egregious and the societal interest in deterring similar conduct in the future is so great that there is justification for awarding punitive damages.”\(^11\)

Although it is difficult to rank “blameworthy” acts by degrees of culpability, the court’s distinction among the employer’s alleged initial fraud in *Johns-Manville*, the acts alleged in *Unruh*, and the second fraud in *Johns-Manville* is inadequate. The court’s characterization of the second fraud as “blameworthy,” “egregious,” and “flagrant”\(^12\) offers no meaningful standard for distinguishing the initial fraud from the second fraud. If, however, blameworthiness of conduct is to be the benchmark for allowing a recovery at law, then a civil recovery should be allowed for the initial fraudulent action in *Johns-Manville* because it was substantially more culpable than many actions that have resulted only in a section 4553 award. For example, the court in *Rogers Material Co. v. Industrial Accident Commission*\(^13\) awarded a “serious and willful” misconduct award against an employer who told an employee not to wash a cement truck in motion, but who failed to discipline the employee for violating that rule. The court in *Erickson v. Workmens’ Compensation Appeals Board*\(^14\) also granted a section 4553 “serious and willful” award against an employer who posted a warning to employees not to clean certain machines while they were moving. When an employee was injured while cleaning a machine in motion, the court granted the award, noting that an employer is guilty of willful misconduct when his or her actions demonstrate “that he deliberately failed to act for the safety of his employees, knowing that his failure would probably result in injury to them.”\(^15\)

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9. 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.
10. *Id.*
11. *Id.*
12. *Id.*
15. *Id.* at 394, 90 Cal. Rptr. at 709.
The conduct in *Rogers* and *Erickson*, classified by those courts as "serious and willful," is less culpable than the employer misconduct involved in *Johns-Manville*. These situations both involve obvious dangers, of which the workers had notice. In effect, California courts have been granting "serious and willful" misconduct awards for acts of employer gross negligence. In denying civil recovery for the initial fraud of misrepresenting the nature of asbestos to its employees, the *Johns-Manville* court limited the employee's recovery to a section 4553 award at most. The court granted the same remedy for the intentional tort of fraud, which the employer can consciously cause or prevent, as it did for the negligent and grossly negligent torts described in *Rogers* and *Erickson*, which the employer did not consciously commit. As an employer has control over the commission of an intentional tort such as fraud, it is inconsistent and inequitable that employer fraud be given the same treatment by the law as mere gross negligence.

Public Policy and Economic Reasons for Civil Recovery

Public policy considerations also favor a result different from the one reached by the *Johns-Manville* court. The workers' compensation system cannot remedy intentional torts, because of its inability fully to compensate employees. Under workers' compensation, only medical expenses and lost wages are compensable. This limitation is particularly harsh when an employee's injury was caused by the intentional tort of employer fraud. Although an employer who committed fraud might be subject to the section 4553 award for "serious and willful" misconduct, that award is limited to $10,000, an amount that may be far less than the civil damages otherwise available to the plaintiff.

Permitting a civil recovery in addition to the more expeditious workers' compensation remedy would more fully compensate an employee whose injury was caused by the tortious misconduct of the employer in those situations in which the employer's deliberate acts determined whether the injury would occur. Moreover, requiring

106. See notes 9, 17 supra.
107. Employers and employees should be treated equally. "A much more lenient attitude has been taken toward the conduct of employers in their disregard of the safety of their workers than toward the worker's disregard of his own security." Note, *Serious and Wilful Misconduct Clauses of California Workmen's Compensation Act*, 22 CALIF. L. REV. 432, 436 (1934).
109. See 2A LARSON, supra note 6, at § 65.20.
110. This "cumulative remedy" approach was rejected in Williams v. International Paper Co., 129 Cal. App. 3d 810, — Cal. Rptr. — (1982). In theory at least, it is assumed that employees bargain for the safety of the work environment. Dangerous work environments require higher pay. When an employer misrepresents workplace safety conditions, an employee is likely to settle for a lower wage. To make such a decision, an employee must have accurate information. If the hazard is too risky for the wage offered, the employee should be
employers to compensate employees for injuries occurring in the workplace may reduce the number of injuries that occur.\textsuperscript{111}

Although the \textit{Johns-Manville} court stated that the current system has achieved a "delicate balance" between the cost of workers' compensation to the employers and the benefits to the employees,\textsuperscript{112} the workers' compensation system, as construed in \textit{Johns-Manville}, may tip the scales in favor of the fraudulent employer, because honest employers who maintain safe equipment and working conditions arguably bear the economic burden of other employers' fraud in the form of higher insurance premiums. As the state imposes a maximum rate on workers' compensation premiums,\textsuperscript{113} the rates of the employers with no workers' compensation claims for fraudulent conduct are increased to help pay the claims of defrauded employees who have suffered injury.\textsuperscript{114} In addition, to the extent that one purpose of the workers' compensation system is to protect employers from excessive liability, that protection should be forfeited when the employer acts egregiously to defraud an employee and causes a serious injury.

Another public policy consideration that favors allowing civil recovery for an employer's fraudulent conduct is that such recoveries may have the effect of deterring that conduct. Because of the limited scope of compensation provided by a workers' compensation award, the award may have little deterrent effect on employers who choose to commit fraud against their employees rather than to take the steps necessary to make the workplace adequately safe. This problem is particularly acute when the section 4553 award is less than the cost of maintaining a safe work environment. Although these awards are paid by the employer and cannot be insured against, section 4553 awards are limited to $10,000.


\textsuperscript{112} 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.


\textsuperscript{114} The effect of the limitation on employer liability under workers' compensation is to turn the issue of industrial safety into a matter of economics. This would not be the case if a civil remedy were available.

The disincentives to maintaining a safe work environment could be alleviated to some extent by removing the statutory ceiling on workers' compensation insurance premiums. Merely lifting the lid on premiums would put out of business those employers who are running dangerous operations. Increasing premiums for an excessive number of accidents also works to make it costly for employers to maintain a hazardous condition. Unfortunately, merely lifting the ceiling on insurance premiums does not compensate the victimized employee; it only disposes of the economic argument against California's present workers' compensation system.
Conclusion

California law provides an inadequate remedy for victims of employer fraud that results in injury to an employee. The court in *Johns-Manville* held that, if an employer intentionally misrepresents to an employee the safety of the workplace, the victim of the misrepresentation is limited to a workers' compensation remedy. Workers' compensation does not allow for full compensation or punitive damages, but only for lost wages and medical expenses, and is limited by the employee's wage level at the time of the accident.

*Johns-Manville* failed to give adequate consideration to the possibility that the legislature did not intend that employee-victims of employer fraud be limited to the workers' compensation remedy. The court also failed to distinguish employer failure to ensure a safe workplace from employer misrepresentation and concealment of workplace hazards. The court allowed recovery for the second aggravating fraud, but failed to offer adequate reasons for allowing recovery only for the second fraud.

Public policy and economic considerations favor allowing civil recovery for employer fraud, with a set-off for the worker's compensation award. The deterrent effect of workers' compensation is not as great as that of the civil system. Moreover, affording an employer protection from civil liability may provide an economic incentive to employers to defraud employees rather than to maintain a safe work environment. Thus, employer fraud that results in a physical injury to an employee should be compensable at law.

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