Workers’ Compensation Acts and Exceptions to the Exclusivity Bar

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<td>Alabama</td>
<td>Ala. Code § 25-5-53 (1975) (exclusive remedy).</td>
<td>1) Tortious conduct committed outside the course of the claimants’ employment, such as fraud or outrage. * Dual Persona doctrine judicially recognized, but no court has ruled on a set of facts to which this doctrine applies.</td>
<td>* Ex Parte Progress Rail Services Corp., 869 So.2d 459, 465 (Ala. 2003) (reinforcing the principle of complete employer immunity, even in cases of willful conduct). * Raines v. Browning-Ferris Industries of Alabama, Inc., 638 So. 2d 459, 473 (Ala. 2003) (providing exception for “tortious conduct committed outside the course of the claimant’s employment, such as fraud or outrage.”).</td>
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<td>Alaska</td>
<td>Alaska Stat. § 23.3.3055 (2004) (exclusive remedy).</td>
<td>1) Intentional torts committed by the employer.</td>
<td>* Bowen v. Goodyear Tire &amp; Rubber Co., 516 So. 2d 570, 571 (Ala. 1987) (“This Court has recognized that the doctrine of dual capacity may remove the exclusivity of the Workmen’s Compensation Act. . . . The decisive test to determine if the dual-capacity doctrine is invocable is not whether the second function or capacity of the employer is different and separate from the first. Rather, the test is whether the employer’s conduct in the second role or capacity has generated obligations that are unrelated to those from the company’s or individual’s first role as an employer. If the obligations are related, the doctrine is not applicable.”); * but see Cool Temp, Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co., 148 So.3d 448, 458 n.74 (Ala. Civ. App. 2013) (“Neither this court nor our supreme court has ever expressly adopted the dual-capacity doctrine, although that doctrine has been discussed and rejected due to factual considerations numerous times.”).</td>
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### State | Statute | Exceptions | Case Law
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**Arizona**


  - * Dual Persona doctrine judicially recognized.
  - Statutory Exception
    1) Personal and “willful misconduct” by employer, defined as “act done knowingly and purposely with the direct object of injuring another.”
    2) Insured can elect to reject coverage before any injury.
    3) Employer fails to secure coverage
    - If the injured accepts compensation under the

**Case Law**


- *Huf v. Arctic Alaska Drilling Co.*, 890 P.2d 579, 580 (Alaska 1995) (enforcing the dual persona doctrine as a way to remove partnership liability in situations where an individual partner acts negligently “outside of and not in the course of partnership business.”).

- *Serna v. Statewide Contractors Inc.*, 429 P.2d 504, 507 (Ariz. Ct. App. 1967) (“Gross negligence, or wantonness amounting to gross negligence, is not sufficient to constitute a ‘willful act’ under our statutory definition. It must be shown that the negligence or wantonness was accompanied by the intent to inflict an injury upon another person.”)


- *Gamez v. Brush Wellman, Inc.*, 34 P. 3d 375, 378 (Ariz. Ct. App. 2001) (A willful misconduct action includes four elements: (1) the employer’s willful misconduct must have been the cause of the employee’s injury, (2) the willful misconduct must have been "an act done . . . knowingly and purposely with the direct object of injuring another," (3) the act that caused the injury must have been the personal act of the employer, and

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1 The Substantial Certainty test is a very high standard where an “employer’s violation of safety standards constituted an intentional tort where the employer knowingly subjects an employee to something dangerous with knowledge that harm would be a substantial certainty.” *Fenner v. Municipality of Anchorage*, 53 P.3d 573, 577 (Alaska 2002).

2 The dual persona doctrine provides that: “[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal persona.”
## Workers Compensation Acts and Exceptions to the Exclusivity Bar

June 23, 2016

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<td>* Frisby v. Milbank Mfg. Co., 688 F. 3d 540, 542 (8th Cir. 2012) (“[A]n employee may sue the employer in tort for an injury not covered by the Act, such as an intentional tort or one not committed during the course of employment.”).</td>
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<td>Guerrero v. OK Foods, Inc., 230 S.W.3d 296, 336 (Ark. Ct. App. 2006) (narrowly defining the intentional tort exception as an act “committed with an actual, specific, and deliberate intent on the part of the employer to injure the employee, and that the employee's complaint must be based upon allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act.” The court refused to follow the substantial certainty test.).</td>
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<td>California</td>
<td>Cal. Lab. Code § 3602 (1982) (exclusive remedy with three exceptions set forth in §§ 3602, 2706, and 4558).</td>
<td>Statutory Exceptions: 1) “Injury or death is proximately caused by a willful physical assault by the employer.” 2) “Injury is aggravated by the employer's fraudulent</td>
<td>Fermino v. Fedco. Inc., 872 P.2d 559, 570 (Cal. 1994) (holding that the § 3602 exceptions are “not intended to provide an exhaustive list of exceptions to the exclusivity rule,” including false imprisonment).</td>
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<td>LeFiell Manufacturing Co. v. Superior Court, 282 P. 3d 1242 (Cal. Sup. Ct. 2012) (holding that a claim of loss of consortium on behalf of the spouse of a worker who suffers an industrial injury falling within an exception is</td>
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<sup>3</sup> Deemed unconstitutional insofar as it granted tort immunity to a prime contractor who is not a statutory employer. Merez v. Squire Court Ltd., 114 S.W.3d 184, 185 (Ark. 2003).
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|        | concealment of the existence of the injury and its connection with the employment.” 3) “Injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.” | barred under derivative injury and the workers' compensation exclusivity rules as the exceptions are narrowly construed).  

* Ashdown v. Ameron Int’l. Corp., 83 Cal. Rptr. 2d 20, 25 (Cal. Ct. App. 2000) (“Since 1982, the dual capacity exception to the general exclusivity of the workers' compensation remedy has been limited to the narrow factual circumstances presented where the employee's injury was caused by the employer's product, which itself was provided to the employee not by the employer, but by an independent third person who obtained the product from the employer for valuable consideration.”).  

* Dual Persona doctrine judicially recognized in very limited circumstances. |


* Dual Persona doctrine judicially recognized in |  

* Schwindt v. Hershey Foods Corp., 81 P.3d 1144, 1146-47 (Colo. App. 2003) (rejecting the substantial certainty standard and holding that the exception applies “if the employer deliberately intended to cause the injury.”).  

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<td>Connecticut</td>
<td>Conn. Gen. Stat. § 31-284 (1996) (exclusive remedy)</td>
<td>1) Intentional tort or when the employer has engaged in willful or serious misconduct.</td>
<td>McClain v. Pfizer, Inc., 692 F. Supp.2d 229, 243 (D. Conn. 2010) (quoting Suarez v. Dickmont Plastics Corp., 698 A.2d 838, 840-41 (1997), “A plaintiff employee [can] establish an intentional tort claim ... by proving either [(1)] that the employer actually intended to injure the plaintiff (actual intent standard) or [(2)] that the employer intentionally created a dangerous condition that made the plaintiff’s injuries substantially certain to occur (substantial certainty standard).”).</td>
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<td>Florida</td>
<td>Fla. Stat. § 440.11 (1)(b) (2003) (exclusive remedy with exception)</td>
<td>Statutory Exception: 1) Intentional tort, so far as the employee can prove “by clear and convincing evidence, that: 1. The employer deliberately intended to</td>
<td>Hunt v. Corrections Corp. of America, 38 So.3d 173, 175 (Fla. Dist. Ct. App. 2010) (citing Aravena v. Miami-Dade County, 929 So.2d 1163, 1167 (Fla. 2006), stating that there exists an exception for “unrelated works.” The Florida Supreme Court has explained the exception as follows: “The immunity afforded to the employer under section 440.11(1) also extends to ‘each employee of the employer when such employee is acting in furtherance of the employer’s business.’ However, this coemployee</td>
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<td>injure the employee; or 2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.”</td>
<td>immunity does not apply to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, . . . [or] to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.” The injured can then bring suit against the employer through <em>respondeat superior</em> if the co-employee is acting within the scope of employment.).</td>
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<td>2) If the employer fails to secure payment through the Act for compensation</td>
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<td>Case Law: 3) Unrelated works doctrine for co-</td>
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<td>Gorham v. Zachry Industrial Inc., 105 So.3d 629, 634 (Fla. Dist. Ct. App. 2013) (“[T]he mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent. The defendant who acts in the belief of consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.”).</td>
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<td>Percy v. Falcon Fabricators, Inc., 584 So.2d 17, 18 (Fla. Dist. Ct. App. 1991) (“We join those jurisdictions that have adopted the dual persona doctrine and hold that an injured employee may sue her employer in tort when that employer is the corporate successor of the manufacturer of the defective product that caused the injury, and the product was manufactured before the corporate merger.”)</td>
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<td>Georgia</td>
<td>Ga. Code § 34-9-11 (2015) (exclusive remedy)</td>
<td>1) Intentional torts entirely unrelated to the employment relationship. If the motivation of the intentional tort arises from employment, the claim is barred.</td>
<td>Coca-Cola v. Parker, 677 S.E.2d 361, 363 (Ga. Ct. App. 2009) (holding that an intentional infliction of emotional distress is barred by the exclusive remedy doctrine of the Georgia Workers’ Compensation Act, because the injury was incurred in the course of employment). Baldwin v. Roberts, 442 S.E.2d 272, 273-74 (Ga. Ct. App. 1994) (“In cases where an employee is injured in a physical altercation with another person [including the employer] occurring on the job but stemming from personal animosity, [her] injuries will nevertheless be considered compensable under the Workers' Compensation Act if it is shown that the animosity arose from reasons related to the employee's performance of [her] work-related duties. Conversely, if the animosity giving rise to the assault stemmed from reasons not related to the injured employee's performance of [her] work, then [her] injuries will not be considered compensable under the Act.”).-no instructive authority on dual persona/capacity doctrine. (Many courts have rejected it in certain circumstances, but never on the whole has the Supreme Court made a decision regarding the doctrine’s application.)</td>
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| Idaho | Idaho Code § 72-209 (1971) (exclusive remedy with exception). | Statutory Exception 1) Injury or death is proximately caused by the willful and unprovoked physical aggression of the employer, its officers, agents, servants or employees. This exemption is only applicable “to the aggressor and shall not be imputed to the employer unless provoked or authorized by the employer, or the employer was a party committed by an employer, and therefore refused to acknowledge any other exceptions to employer immunity). | Kearney v. Denker, 760 P.2d 1171, 1174 (Idaho 1988) (“The word ‘aggression’ connotes ‘an offensive action’ such as an ‘overt hostile attack.’ Webster's Third New International Dictionary 41 (1969). To prove aggression there must be evidence of some offensive action or hostile attack. It is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur.”).  
|        |         | infliction of emotional distress or invasion of privacy related thereto.” *Court refusing to judicially create an exception where the legislature has remained silent. | Kamaka v. Goodwill Anderson Quinn & Stifel, 176 P.3d 91, 108 (Haw. 2008) (“Based on a plain reading, HRS § 386–5 unambiguously provides that claims for infliction of emotional distress or invasion of privacy are not subject to the exclusivity provision when such claims arise from claims for sexual harassment or sexual assault, in which case a civil action may be brought.”).  
Estate of Coates v. Pacific Engineering, 791 P.2d 1257, 1259 (Haw. 1990) (rejecting the dual persona doctrine and nearly every other exception to the exclusivity of Workers’ Compensation). |
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<td>Illinois</td>
<td>820 Ill. Comp. Stat. 305/11 (2012) (exclusive remedy).</td>
<td>1) Non-accidental injuries, meaning intentional tort committed by the employer or an agent of the employer that was commanded or authorized by the employer to do so. 2) Injuries not arising out of employment. 3) Injury not received during the course of employment. 4) Injury not compensable under the Workers’ Compensation Act.</td>
<td>* Dual Capacity doctrine judicially recognized. Meerby v. Marshall Field and Co., 564 N.E.2d 1222, 1226 (Ill. 1990) (“These sections bar an employee from bringing a common law cause of action against his or her employer unless the employee-plaintiff proves: (1) that the injury was not accidental; (2) that the injury did not arise from his or her employment; (3) that the injury was not received during the course of employment; or (4) that the injury was not compensable under the Act. . . . The exclusivity provisions will not bar a common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer.”). Copass v. Illinois Power Co., 569 N.E.2d 1211, 1215 (Ill. App. Ct. 1991) (holding that the “plaintiff is required to allege defendants had the specific intent to injure.”). Garland v. Morgan Stanley &amp; Co., 996 N.E.2d 188, 201 (Ill. App. Ct. 2013) (enforcing a two prong test to determine whether an employer was acting in dual capacity).</td>
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<td>Indiana</td>
<td>Ind. Code § 22-3-2 (1994) (exclusive remedy).</td>
<td>1) Intentional torts where the employer intended the injury or had actual knowledge that an injury was certain to occur.</td>
<td>Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271, 1273 (Ind. 1994) (rejecting the substantial certainty standard, and holding that “nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice.”).</td>
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4 Under the dual capacity doctrine exception, “an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.” 2A Arthur Larson, Workmen’s Compensation 72.80, at 14-112 (1976).
## Workers Compensation Acts and Exceptions to the Exclusivity Bar

### Iowa

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Cincinnati Ins. Cos. v. Kirk, 801 N.W.2d 856, 859 (Iowa Ct. App. 2011) (“[T]his exclusivity principle is limited to matters surrounding a job-related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of an employer’s insurer.”).  


### Kansas

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| **Kentucky**  | **Ky. Rev. Stat. Ann. § 342.690 (1983)**<br>(exclusive remedy with exemption) | employees within the provisions of the act.”<br>*Wanton acts by the employer are not construed to fall outside of the language of the statute.<br>* Dual Persona doctrine judicially recognized in very limited circumstances | *Lawrence v. Phillips Petroleum Co.*, 627 P.2d 1168, 1168 (Kan. Ct. App. 1981) (“If the injury of an employee who is under the workmen's compensation act is in other respects ‘a personal injury by accident arising out of and in the course of employment,’ the fact that such injury was occasioned by acts or conduct constituting wantonness on the part of the employer does not take such injury out from under the act, and a common-law action to recover damages for such injury will not lie.”).<br>
*Meade v. Arnold*, 643 F. Supp.2d 913, 917 (E.D. Ky. 2009) (tailoring narrowly the exception under Ky. Rev. Stat. Ann. § 342.610(4) to require deliberate intent to hurt the employee, meaning “the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent. . . . Knowledge of the risk of harm . . . did not demonstrate the deliberate intent required for the exception to apply.”).<br>
Statutory Exceptions:<br>1) Ky. Rev. Stat. Ann. § 342.690 states, “the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.”<br>2) Ky. Rev. Stat. Ann. |
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| Louisiana  | La. Rev. Stat. Ann. § 23:1032(A)-(B) (1994) (exclusive remedy). | 340.610(4) states that an injured or deceased employee may choose to bring an action in tort, instead of a workers' compensation claim, “[i]f injury or death results to an employee through the deliberate intention of his employer to produce such injury or death.” | *Broussard v. Smith*, 999 So. 2d 1171, 1174 (La. Ct. App. 2008) (“The ‘intentional act’ loophole is the only exception to the Workers Compensation Act, and courts interpret this exception narrowly. . . . In order to prevail in a case [the plaintiff] must show . . . an intentional action which was ‘substantially certain’ to result in injury to the plaintiff. . . . Substantially certain has been held to mean ‘nearly inevitable,’ ‘virtually sure,’ and ‘incapable of failing.’”).  

*Jasmin v. HNV Cent. Riverfront Corp.*, 642 So. 2d 311, 312 (La. Ct. App. 1994) (“‘Intent’ in this context means that the defendant consciously desired to bring about the physical result of his act or believed it was substantially certain to follow from his conduct.”).  

*Claudio v. Silla Cooling Systems*, 55 So.3d 902, 906 (La. Ct. App. 2010) (“La.R.S. 23:1032 bars suits by employees against their employers, and those others grouped with employers, such as officers and stockholders, under a dual capacity theory. In such a case, ‘an employer's second capacity is inextricably intertwined with his capacity as employer.’”). |
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<td>Maine</td>
<td>Me. Rev. Stat. tit. 39 §§ 104, 408 (1995, 1993) (exclusive remedy).</td>
<td>None * Dual Persona doctrine judicially recognized. *Court refusing to judicially create an exception where the legislature has remained silent.</td>
<td>Li v. C.N. Brown Co., 645 A. 2d 606,608-09 (Me. 1994) (“We have been reluctant to engrai... broadly construed workers' compensation exclusivity and immunity provisions.”).</td>
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<td>Statutory exceptions: 1) Deliberate intent of the employer to injure or kill the covered employee. Can only receive benefits from the Act, or from damages. 2) Employer fails to secure compensation through the Act.</td>
<td>Searway v. Rainey, 709 A.2d 735, 737 (Me. 1998) (declining to create a judicial exemption to the exclusivity and immunity sections of the Act for intentional torts). Samson v. DiConzo, 669 A.2d 760, 762 (Me. 1996) (“We have applied the doctrine when an employer occupies a dual legal relationship with employees.”) see also LaBelle v. Crepeau, 593 A.2d 653 (Me. 1991) (same).</td>
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| Maryland| Md. Code Ann. Lab. & Empl. § 9-509 (1991) (exclusive remedy with exception). | Statutory exceptions: 1) Deliberate intent of the employer to injure or kill the covered employee. Can only receive benefits from the Act, or from damages. 2) Employer fails to secure compensation through the Act. | Great Atlantic & Pacific Tea Co. v. Imbrauglio, 697 A.2d 885, 889 (Md. 1997) (“[E]mployers are immune, save for two exceptions, from suit by their employees for work-related injuries.”). Gantt v. Security, USA, 356 F.3d 547, 555 (4th Cir. 2004) (holding that “th[e] intentional tort exception to the Act's normal exclusivity rule requires proof of the employer's 'actual, specific and deliberate intent to injure the employee'. . . . Proof of an employer's 'willful, wanton, or reckless conduct' even when that conduct is 'undertaken with a knowledge and appreciation of a high risk to another' does not suffice.’”). Suburban Hospital, Inc. v. Kirson, 763 A.2d 185, 202 (Md. 2000) (rejecting...
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<td>the application of the dual capacity doctrine, stating that it would do “considerable violence to the language employed by the General Assembly.”)</td>
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<td><strong>Massachusetts</strong></td>
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<td><strong>Estate of Moulton v. Puopolo</strong>, 5 N.E.3d 908, 975 (Mass. 2014) (“Compensation under the act is the exclusive remedy for injuries to an employee suffered in the course of employment, regardless of the wrongfulness of the employer's conduct, Foley v. Polaroid Corp., 381 Mass. 545, 551–552, 413 N.E.2d 711 (1980), or the foreseeability of harm. See Saab v. Massachusetts CVS Pharmacy, LLC, 452 Mass. 564, 567, 896 N.E.2d 615 (2008) (Saab). . . While an employee need not forgo the right to bring common-law tort claims against her employer, and may instead waive any compensation payments under the act, an employee so choosing must notify the employer in writing, at the time of hire, that she does not waive the common-law right of action”).</td>
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<td>Braga v. Gentyle Group, Inc., 420 F.3d 35, 41 (1st Cir. 2005) (“While the Supreme Judicial Court of Massachusetts ‘alluded favorably to the [dual persona] theory’ in Gurry [Gurry v. Cumberland Farms, 550 N.E.2d 127, (1990)], it has ‘never explicitly adopted’ it, much less established its scope or set parameters for it. No Massachusetts court has considered whether Gurry should be extended to circumstances like these, where an employer's predecessor merely owned defective equipment when it merged with the employer and an employee was later injured by that equipment.”).</td>
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<td><strong>Michigan</strong></td>
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<td><strong>Minnesota</strong></td>
<td>Minn. Stat. § 176.031 (1986) (exclusive remedy with exception).</td>
<td>deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.”&lt;br&gt; * Dual capacity doctrine judicially recognized.</td>
<td>subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur.”.</td>
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| | 1) If the employer fails to obtain insurance or coverage, the injured may maintain an action in the courts for damages, or claim compensation from the Act. | **Case Law:**<br>2) Intentional tort through malicious and deliberate intent. | **Case Law:**<br>Bagby v. Detroit Edison Co., 865 N.W.2d 59, 62 (Mich. Ct. App. 2014) (“Constructive, implied, or imputed knowledge does not satisfy this actual knowledge requirement. In addition, ‘[a]n employer's knowledge of general risks is insufficient to establish an intentional tort.’”).

Howard v. White, 523 N.W. 2d 220, 221 (Mich. 1994) (“The dual-capacity doctrine is recognized in Michigan. In some circumstances, an employee may bring a civil action against the employer for a work-related injury caused by the employer in a role other than employer.”).

Parker v. Tharp, 409 N.W.2d 915, 918 (Minn. 1987) (“The Supreme Court has carved out a narrow exception to the exclusive nature of the worker's compensation laws. See, e.g., Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930) (holding that an employer who intentionally and maliciously assaulted an employee could not avoid common law liability on the ground that worker's compensation was available). If the employer displays “malicious or deliberate intent,” an employee has the option of suing for damages at common law or proceeding under the worker's compensation statutes.”).

Gunderson v. Harrington, 632 N.W.2d 695, 703 (Minn. 2001) (requiring a “conscious and deliberate intent to inflict injury” for the intentional tort exception to apply).
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<td>Statutory Exception: 1) If employer fails to secure payment of compensation as required by this Act the injured may elect to claim compensation through the Act or through action at law for damages. Case Law: 2) Intentional tort.</td>
<td><em>Franklin Corp. v. Tedford, 18 So.3d 215, 221 (Miss. 2009)</em> (holding that <em>&quot;[a] mere willful and malicious act remains insufficient to give rise to the exception under the Act,&quot;</em> and that <em>&quot;[t]he employee also must establish that the egregious act was accompanied by an ‘actual intent to injure’ in order to except the Act’s grant of exclusivity.&quot;</em>).</td>
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<td>Missouri</td>
<td>Mo. Rev. Stat. § 287.120 (2014) (exclusive remedy).</td>
<td>1) Nonaccidental causes of injury requiring the employer to act with the specific purpose of injuring the employee.</td>
<td><em>Russel v. Orr, 700 So.2d 619, 625 (Miss. 1997)</em> (refusing to adopt the dual capacity doctrine in the case of employer supplied medical services).</td>
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<td><em>Speck v. Union Elec. Co., 741 S.W.2d 280, 283 (Mo. Ct. App. 1987)</em> (<em>“Intentional injury inflicted by the employer in person on his employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that his intentional act was an ‘accidental’ injury and so under the exclusive provisions of the compensation act. . . . We believe that when an employer acts intentionally and is substantially certain that injury to an employee will result, the employer has a specific purpose to inflict injury.”</em>).</td>
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<td>Nebraska</td>
<td>Neb. Rev. Stat. §§ 48-101 (1971), 48-111 (1986) (exclusive remedy with Willful and unprovoked physical aggression of employee, officer, or</td>
<td>Estate of Teague v. Crossroads Cooperative Ass’n, 834 N.W.2d 236, 245 (Neb. 2013) (declining to adopt an exception for intentional conduct by the employer, stating “[e]mployees injured by the employer's willful negligence will be compensated under the Act, but employees injured by</td>
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### Workers Compensation Acts and Exceptions to the Exclusivity Bar

**June 23, 2016**

Tressler LLP  
2016 19

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Intentional acts by the employer are included under the definition “accident” to keep the focus of the inquiry on whether the injury arose out of and in the course of employment, rather than the state of mind of the employer. Their own willful negligence will not be compensated under the Act.”

*Howsden v. Roper’s Real Estate Co.*, 805 N.W.2d 640, 644 (Neb. 2011) (“We have discussed these [dual capacity/persona] doctrines in the past, although we have had no occasion to adopt or reject them.”).

**Exception**: Director. This exception does not apply to the employer.

1) Deliberate and specific intent to injure on the part of the employer only. This exception excludes agents of the employer.

- **King v. Penrod Drilling Co.**, 652 F.Supp. 1331, 1335 (D. Nev. 1987) (“[A] common-law action may not be brought by an employee against an employer for personal injuries unless the employer acted with a deliberate intent to injure the employee.”).
- **Fanders v. Riverside Resort & Casino**, 245 P.3d 1159, 1163 (Nev. 2010) (“This court has recognized, however, that an employee may avoid the workers’ compensation exclusive remedy provisions when an employer ‘deliberately and specifically intended to injure [the employee].’ . . . A viable intentional tort claim, which subjects an employer to liability outside of the workers’ compensation statute, requires the employee to plead facts in his or her complaint that establish ‘the deliberate intent to bring about the injury.’”).
- **Harris v. Rio Hotel & Casino, Inc.**, 25 P.3d 206, 212 (Nev. 2001) (“This
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| New Hampshire | N.H. Rev. Stat. Ann. § 281-A:8 (2016) (exclusive remedy with exception) | Statutory Exception: 1) “Intentional torts, against any officer, director, agent, servant or employee acting on behalf of the employer or the employer's insurance carrier or an association or group providing self-insurance to a number of employers.” This does not include employers.  
*Dual capacity doctrine judicially recognized. | court in *Noland* and subsequent cases directly reaching the issue rejected the [dual capacity] doctrine, citing the broad-based immunity provided under the NIIA.”).  
*Karch v. BayBank FSB*, 794 A.2d 763, 770 (N.H. 2002) (“An employee is entitled to compensation under the Workers’ Compensation Law for ‘accidental injury or death arising out of and in the course of employment,’ RSA 281-A:2, XI, but may not bring a separate tort action against her employer. Indeed, the Workers’ Compensation Law expressly provides that an employee subject to that chapter waives the right to bring such a separate action in exchange for the acceptance of benefits. RSA 281-A:8, I(a). We note, however, an employee’s waiver in exchange for benefits does not bar intentional tort actions against co-employees. RSA 281-A:8, I(b).”).  
*Ryan v. Hiller*, 639 A.2d 258, 260 (N.H. 1994) (“The cases in which we have previously performed a dual capacity analysis have all been employer immunity cases, and we agree with the courts of several States that the dual capacity doctrine is an exception to employer immunity, but not co-employee immunity.”). |
*Dual persona doctrine judicially recognized.                                             | *Laidlow v. Hariton Machinery Co.*, 790 A.2d 884, 894 (N.J. 2002) (“[I]n order for an employer’s act to lose the cloak of immunity of N.J.S.A. 34:15-8, two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.”).  
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<td>New Mexico</td>
<td>N.M. Stat. Ann. § 52-1-9 (1973) (exclusive remedy).</td>
<td>1) Willful and intentional conduct.</td>
<td>Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148, 1156 (N.M. 2001) (“Willfulness renders a worker’s injury non-accidental, and therefore outside the scope of the Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.”).</td>
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<td>*Dual persona doctrine judicially recognized.</td>
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<td>New Mexico</td>
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<td>Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1213 (10th Cir. 2006) (“Under New Mexico law, when an employer willfully or intentionally injures a worker, that employer, like a worker who commits the same misconduct, loses the rights afforded by the Workers Compensation Act.”).</td>
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## Workers Compensation Acts and Exceptions to the Exclusivity Bar

**June 23, 2016**

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|               | [Image](#)                                  | may elect to claim compensation through the Act or through action at law for damages. | *Case Law:*
|               |                                              | 2) Intentional and deliberate acts.                                          |                                               |
|               |                                              | *Acevedo v. Consolidated Edison Co. of New York, 189 A.D.2d 497, 501 (N.Y. App. Div. 1993)* (“In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury. . . . A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue.”). |
|               |                                              | Billy v. Consolidated Mach. Tool Corp., 412 N.E.2d 879, 883 (declaring the dual capacity doctrine as unsound, in that it violates the exclusivity provision of the Workers’ Compensation law). |
|               |                                              | *Woodson v. Rowland,* 407 S.E.2d 222, 228 (N.C. 1991) (“We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.”). |
|               |                                              | *Anderson v. Piedmont Aviation, Inc.,* 68 F.Supp.2d 682, 688 n.3 (M.D.N.C. 1999) (conceding that North Carolina has not accepted the dual persona doctrine). |
|               |                                              | *Zimmerman by Zimmerman v. Valdak Corp.,* 570 N.W.2d 204, 209 (N.D. 1997) (“We conclude the North Dakota Workers’ Compensation Act does not preclude recovery for true intentional injuries and an employee can . . .”). |
### Workers Compensation Acts and Exceptions to the Exclusivity Bar

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<td>Ohio</td>
<td>Ohio Rev. Code Ann. § 4123.74 (1953) (exclusive remedy), Ohio Rev. Code Ann. § 2745.01 (2005) (exception).</td>
<td>Statutory Exception: 1) &quot;(A) . . . [T]ortious act with the intent to injure another or with the belief that the injury was substantially certain to occur. (B) As used in this section, “substantially certain” means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. (C) Deliberate removal by an employer of an equipment safety guard&quot;</td>
<td><strong>Houdek v. ThyssenKrupp Materials N.A., Inc.,</strong> 983 N.E.2d 1253, 1258 (Ohio 2012) (“[T]he common-law liability of the employer cannot, under the almost unanimous rule, be stretched 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 an injury.”).</td>
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<td><strong>Hoyle v. DTJ Ents., Inc.,</strong> 36 N.E.3d 122, 127 (Ohio 2015) (“Thus, the two options of proof [under R.C. 2745.01(A) ] become: (1) the employer acted with intent to injure or (2) the employer acted with deliberate intent to injure.”).</td>
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|       |         |            | **Catalano v. Lorain,** 832 N.E.2d 134, 137-38 (Ohio Ct. App. 2005) (“In order for the dual-capacity doctrine to apply, there must be an allegation and showing that the employer occupied two independent and unrelated relationships with the employee, that at the time of these roles of the
or deliberate misrepresentation of a toxic or hazardous substance 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.”

*Dual capacity doctrine judicially recognized.

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| Oklahoma   | Okla. Stat. tit. 85A, § 5 (2014) (exclusive remedy with exceptions).    | Statutory Exceptions: 1) If employer fails to secure payment of compensation as required by this Act the injured may elect to claim compensation through the Act or through action at law for damages. 2) Intentional tort. “An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific | *McDonald v. Weatherford Artificial Lift Systems, LLC, No. CIV-15-301-C (W.D. Okla. 2015) (“The Act allows for two exceptions to the exclusive remedy provision of § 5: when (1) an employer fails to pay compensation that is rightfully due to the employee pursuant to this Act; or (2) the employer committed an intentional tort.”).  


But see Weber v. Armco, Inc., 663 P.2d 1221, 1226 (Okla. 1983) (“There are circumstances in which application of the dual-capacity doctrine is appropriate.”). |
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  - Or. Rev. Stat. § 656.018 has 4 exceptions:  
  1) “If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition;”  
  2) “If the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the intent of the employer to cause such injury.” Substantial certainty of injury is not enough.  
  *Dual capacity doctrine judicially recognized, but no court has ruled on a set of facts to which this doctrine applies. |
  - Or. Rev. Stat. § 656.156 (1965) (exceptions) | - no instructive authority on dual persona/capacity doctrine | - no instructive authority on dual persona/capacity doctrine | - no instructive authority on dual persona/capacity doctrine |
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|       |         | same or related objectives””  
3) “If the failure of the employer to comply with a notice posted pursuant to ORS 654.082 is a substantial factor in causing the injury, disease, symptom complex or similar condition;” or  
4) “If the negligence of a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition and the negligence occurs outside of the capacity that qualifies the person for exemption under this section.”  
5) Or. Rev. Stat. § 656.156 states that injury through deliberate intent of the employer allows the injured to receive |
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| Pennsylvania | 77 Pa. Cons. Stat. § 481 (1974) (exclusive remedy). | 1) Personal animus/third party attack requiring the injured to assert that his injuries are not work-related, but based on personal reasons. (coworker only, not employer)  
2) Fraudulent misrepresentation on the part of the employer, which resulted in aggravation of a work related injury. | *Krasevic v. Goodwill Indus. of Central Pennsylvania, Inc.*, 764 A.2d 561, 565 (Pa. Super. Ct. 2000) (“According to our Supreme Court, under the third party attack exception, the exclusivity provision of the Act ‘does not preclude damage recoveries by an employee, based upon employer negligence in maintaining a safe workplace, if such negligence is associated with injuries inflicted by a co-worker for purely personal reasons.’ The Court further stated: ‘The act excludes from its coverage attacks upon an employee whether or not they occur while he is pursuing his employer’s business and whether or not they are caused by the condition of the employer's premises or by the operation of his business or affairs thereon so long as the reasons for the attack are purely personal to the assailant. In such a case, the plaintiff is permitted to pursue his common-law remedy.’”).  
*Martin v. Lancaster Battery Co.*, 606 A.2d 444, 448 (Pa. 1992) (holding that fraudulent misrepresentation resulting in aggravation of a work related injury is not barred by the exclusivity doctrine, stating “[t]here is a difference between employers who tolerate workplace conditions that will result in a certain number of injuries or illnesses and those who actively mislead employees already suffering as the victims of workplace hazards, thereby precluding such employees from limiting their contact with the hazard and from receiving prompt medical attention and
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<td>Rhode Island</td>
<td>R.I. Gen. Laws § 28-29-20 (1938) (exclusive remedy with exception).</td>
<td>Statutory Exception: 1) R.I. Gen. Laws § 28-36-10 states that an employer that fails to comply with the Act shall be liable for compensation to any injured employee. Case Law 2) Certain intangible injuries, such as defamation, that does not fall under the Act.</td>
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<td>*Court refusing to judicially create an exception where the legislature has remained silent.</td>
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<td>-no instructive authority on dual persona/capacity doctrine</td>
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<td>South Dakota</td>
<td>S.D. Codified Laws § 62-3-2 (2008)</td>
<td>Statutory Exception: 1) Intentional tort</td>
<td><em>Mendenall v. Anderson Hardwood Floors, Inc.</em>, 738 S.E.2d 251, 253 (S.C. 2013) (“Under the ‘dual capacity’ doctrine, an employer becomes vulnerable to suit as a third party ‘if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent to those imposed on him as employer.’”).</td>
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<td>Tennessee</td>
<td>Tenn. Code. Ann. § 50-6-108 (2013)</td>
<td>1) Intentional tort</td>
<td><em>Jensen v. Sport Bowl, Inc.</em>, 469 N.W.2d 370, 371 (S.D. 1991) (“The worker must also allege facts that plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of employer’s conduct.”).</td>
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<td><em>McMillan v. Mueller</em>, 695 N.W.2d 217, 222 (S.D. 2005) (“In prior case law, three elements have been helpful in determining if the employer acted intentionally. Those elements include: 1) whether the employer had actual knowledge of the dangerous condition; 2) if there was a substantial certainty that injury was to occur; and 3) the employer still required the employee to perform.”).</td>
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<td><em>Rodgers v. GCA Services Group, Inc.</em>, No. W2012-01173-COA-R3-CV (Tenn. Ct. App. Feb. 13, 2013) (“Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully and unlawfully violating a safety statute, this still falls short of the kind of actual...”)).</td>
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<td>Texas</td>
<td>Tex. Lab. Code Ann. § 408.001 (2005) (exclusive remedy with exception).</td>
<td>Statutory Exception: 1) Death caused by the intentional act or omission of the employer or by the employer's gross negligence. Gross negligence is defined under Tex. Civ. Prac. &amp; Rem. Code Ann. § 41.001, to include an act or omission: “(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk.”</td>
<td>Urdiales v. Concord Technologies Delaware, Inc. 120 S.W.3d 400, 404 (Tex. App. 2003) (“[T]he purpose of the ‘personal animosity’ exception is to exclude from coverage of the Act those injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment. Whenever conditions attached to the place of employment or otherwise incident to the employment are factors in a catastrophic combination, the consequent injury arises out of the employment.”).</td>
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*intention* to injure that robs the injury of accidental character…. Rather, the definition of actual intent is the actual intent to injure the employee.”).

*McCallister v. Methodist Hospital of Memphis*, 550 S.W.2d 240, 246 (Tenn. 1977) (rejecting the dual capacity doctrine).

Id. At 406-07 (internal quotations omitted) (“Falling within the intentional injury exception are direct assaults by the employer on an employee. Mere negligence or willful negligence will not suffice because the specific intent to inflict injury is lacking. Intent means the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).

Union Carbide Corp v. Smith, 313 S.W.3d 370, 383 (Tex. Ct. App. 2009) (refusing to adopt a version of the dual persona doctrine until the Texas Supreme Court decides to do so).
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<td>2) Personal animosity.</td>
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<td>3) Intentional Tort.</td>
<td>Helf v. Chevron U.S.A., 203 P.3d 962, 970 (Utah 2009) (“[T]he ‘intent to injure’ standard distinguishes between intentional acts resulting in unknown or unexpected injuries, which are covered under the Act by workers’ compensation, and intentional acts resulting in known or expected injuries, which fall within the intentional injury exception. . . . We therefore hold that the ‘intent to injure’ standard requires a specific mental state in which the actor knew or expected that injury would be the consequence of his action. To demonstrate intent, a plaintiff may show that the actor desired the consequences of his actions, or that the actor believed the consequences were virtually certain to result.”).</td>
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<td>*Dual capacity doctrine judicially recognized, but</td>
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|        |                                              |                                                                             | Garger v. Desroches, 974 A.2d 597, 601-02 (Vt. 2009) (declaring that to meet the standard set out in Mead v. Western Slate, 848 A.2d 257 (Vt. 2004) the “defendant must have either had a specific intent to injure or have known with substantial certainty that injury would result, for the
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<td>Virginia</td>
<td>Va. Code Ann. §§ 65.2-307 (2015) (exclusive remedy), 65.2-309 (2004) (exception), 65.2-301 (1992) (exception)</td>
<td>the single case it was recognized in was recently superseded by statute.</td>
<td>exclusivity provision not to bar plaintiff’s claim.” The Court refused to address whether the standard in Mead ought to be adopted).</td>
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<td>Statutory Exception: 1) “Other party.” 2) Sexual assault by employer or employee.</td>
<td>Clean Sweet Professional Parking Lot Maintenance Inc. v. Talley, 591 S.E.2d 79, 81 (Va. 2004) (“The only exception to this exclusivity provision is provided in Code § 65.2-309(A) permitting an action to be maintained against an ‘other party.’ ‘[T]o be an other party, a defendant must have been a stranger to the trade, occupation, or business in which the employee was engaged when he was injured.’”).</td>
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<td>Ayers v. Stoneman, 33 Va. Cir. 314, *2 (VA. Cir. Ct. 1994) (“An intentional tort committed by an employer against an employee is indeed an ‘accident’ and within the scope of the Act and a common law claim is therefore barred. The proper test for determining whether an incident is an ‘accident’ is whether it ‘is unusual and not expected by the person to whom it happens.’”).</td>
<td>-no instructive authority on dual persona/capacity doctrine.</td>
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<td>Washington</td>
<td>Wash. Rev. Code § 51.04.010 (1911) (exclusive remedy); §</td>
<td>Statutory Exception: 1) Intentional tort through the deliberate</td>
<td>Gorman v. Garlock, Inc., 118 P.3d 311, 317 (Wash. 2005) (“Deliberate intention,’ according to this court, means the employer had actual knowledge that an injury was certain to occur and willfully disregarded</td>
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1) If the employer fails to secure payment through the Act for compensation, injured has option to secure compensation through the Act or action at law for damages.  
2) “If the injury, loss or death occurred during the actual performance of consultation services and was caused by the active negligence of the carrier, its agent or employees which was the proximate cause of the injury, death or loss.” | Grillo v. National Bank of Washington, 540 A.2d 743, 744 (D.C. 1988) (“We hold that only injuries specifically intended by the employer to be inflicted on the particular employee who is injured fall outside of the exclusivity provisions of the WCA and that the evidence presented to show the employer’s knowledge with substantial certainty that an injury will result from an act does not equate with the specific intent to injure or kill when the injury is caused by the intentional act of a third person.”).  
Vanzant v. Washington Metropolitan Area Transit Authority, 557 F. Supp.2d 113, 117 (D.D.C. 2008) (“The only injuries that fall outside the scope of the WCA are ‘injuries specifically intended by the employer to be inflicted on the particular employee who is injured.’ Thus, the WCA specifically covers injuries that are the result of willful and intentional conduct of either a fellow employee or a third party, so long as the employer did not intend those parties' actions.”).  
-no authority on dual persona/capacity doctrine |
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
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</thead>
<tbody>
<tr>
<td>Wisconsin</td>
<td>Wis. Stat. § 102.03 (2015) (exclusive remedy).</td>
<td>None</td>
<td>* Intentional acts by the employer are included under the definition of “accident.” * Dual capacity doctrine judicially recognized.</td>
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<td><a href="https://scholar.google.com/scholar_case?case=6049305291639917850&amp;hl=en&amp;as_sdt=0%2C5&amp;as_ylo=1990&amp;as_yhi=1990&amp;as_vis=1&amp;q=Jenson+v.+Employers+Mut.+Cas.+Co.+453+N.W.2d+165%2C+166+(Wis.+Ct.+App.+1990)+%22Intentional+acts+are+covered+by+the+WCA.+Despite+the+apparently+limiting+language+of+the+Act%2C+our+courts+have+interpreted+the+term+%27accident%27+to+include+intentional+acts.+%27Under+the+Worker%27s+Compensation+Act+even+an+intentionally+inflicted+injury+is+deemed+an+accident.%22">Jenson v. Employers Mut. Cas. Co.</a></td>
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<td>Wyoming</td>
<td>Wyo. Stat. Ann § 27-14-104 (1995) (exclusive remedy)</td>
<td>None&lt;br&gt;*Intentional acts by the employer are included under the definition “injury.”</td>
<td>Baker v. Wendy’s of Montana, 687 P.2d 885, 889 (Wyo. 1984) (“If the appellants' allegations of harm constitute ‘injury’ as conceived by the Act, and if it was inflicted when the appellants were within the scope of their employment, there cannot be an independent right of action against Wendy's because that company is the contributing employer of the appellants and would therefore be absolutely immune from suit.”).&lt;br&gt;Wyo. Stat. Ann. § 27-14-102 (“‘Injury’ means any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business.”).&lt;br&gt;-no authority on dual persona/capacity doctrine</td>
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