STONE APPEALS COURT

STONE MUTUAL INSURANCE COMPANY, Defendant-Appellant, v. Calvin ANDREASEN, Plaintiff-Appellee.	)	No. ST-24-03

Calvin ANDREASEN, Plaintiff-Appellant, v. STONE UNIVERSITY, Defendant-Appellee.	)	

Before Di Lorenzo, Tyman, and Wong, J.J.

OPINION

Di Lorenzo, J.

Calvin "Cal" Andreasen filed a claim for worker's compensation benefits with the Workers' Compensation Agency ("WCA") under the Stone Workers' Compensation Act ("Act") after being injured while playing football as a student athlete for Stone University ("StoneU"). The Act entitles "an employee, who receives a personal injury arising out of and in the course of employment . . . to be paid compensation as provided in this act." Stone Workers' Compensation Act, St. G.L. § 3300.1(a) (2024). StoneU's workers' compensation claims are handled by a third-party insurance company, Stone Mutual Insurance Company ("Stone Mutual"). Stone Mutual denied Andreasen's initial workers' compensation claim; Andreasen appealed that denial to the WCA. After a hearing, an administrative law judge denied Andreasen's claim for compensation,

finding that Andreasen "was not an employee of StoneU" but rather "a scholarship student athlete" and thus not entitled to benefits under the Act. Andreasen appealed that decision to the full WCA Board. The WCA Board reversed the administrative judge's decision, finding that Andreasen was an employee of StoneU at the time of injury and ordering Stone Mutual to pay Andreasen's claim. Stone Mutual timely appealed the WCA Board's decision to this Court.

While his claim was working its way through the WCA process, Andreasen also sued StoneU, contending that his injury was caused by his football coach's actions. Specifically, Andreasen brought this lawsuit pursuant to the intentional tort provision of the Act, which permits an injured employee to bring a tort claim against their employer while also pursuing workers' compensation under the Act. As soon as the WCA Board held that the Act applied to Andreasen and ordered Stone Mutual to pay Andreasen's claim, StoneU timely moved for summary judgment, arguing that Andreasen's claims were barred by the Act because the coach's actions did not amount to an intentional tort. While Stone Mutual's appeal on the workers' compensation claim was still pending, the trial court granted summary judgment for StoneU, holding that the coach's actions were not "substantially certain" to harm Andreasen, barring Andreasen's claim. Andreasen appealed to this Court on the grounds that the trial court used an incorrect definition of "substantially certain" in its analysis.

These appeals involve novel legal questions, the answers to which will directly impact the other claim at issue; they arise from the factual same circumstances and concern the same underlying statute. As such, pursuant to the Stone Rules of Appellate Procedure, on this Court's own motion, this Court has consolidated Stone Mutual's appeal from the WCA Board's decision and Andreasen's appeal from the trial court's decision granting of summary judgment to StoneU.

For the reasons stated below, this Court AFFIRMS the WCA Board's decision that Andreasen is an employee under the Act. This Court REVERSES the trial court's order granting summary judgment for StoneU and REMANDS to the trial court for further proceedings.

Facts and Background

Calvin "Cal" Andreasen was a student-athlete at Stone University ("StoneU"), a private university that is a member institution of the National Collegiate Athletic Association ("NCAA"). The NCAA, a governing body for collegiate athletics, publishes a yearly NCAA D1 Manual that establishes rules that the NCAA enforces. The manual clearly states that student athletes are not to receive wages from member institutions, promoting fairness and amateurism in college sports.[1] To enforce these bylaws, the NCAA has prescribed sanctions for infractions, including, but not limited to, suspension or termination of the student athlete's eligibility. As a Division I ("D1") institution, StoneU adheres to the NCAA's comprehensive regulations, which govern most aspects of its intercollegiate athletics programs, including recruitment, scholarships, practice schedules, and player conduct.

StoneU boasts a robust athletic department with numerous sports teams, but its football program is one of its flagships. The football program is a significant part of StoneU's identity, drawing considerable attention from students, alumni, and the broader community. Coach Jennica Rodriguez is Head Coach of Stone University's D1 football team. She has held the Head Coach position for seven years, working her way up from starting as StoneU's Wide Receivers' Coach for two years, then moving to Offensive Coordinator for four years before taking the Head Coach position. Throughout her time at StoneU as Head Coach, Rodriguez has led the team to

[1] See NCAA Bylaw 12.01.1, 2024-25 NCAA Division I Manual (2024), https://web3.ncaa.org/lsdbi/search/bylawView?id=8740.

the Conference Championships twice. The team regularly competes against other high-profile universities and participates in nationally televised games, contributing significantly to StoneU's revenue through ticket sales, broadcasting rights, sponsorships, and merchandise. In 2022, StoneU's total revenue for NCAA sports was $41,998,211, a substantial amount of which came from the football program. In an interview published in the Stone Herald, the Dean of StoneU described the football program as "a key driver of enrollment," with successful seasons boosting the university's profile and attracting prospective students.

Andreasen, like the vast majority of StoneU's football players, was recruited to the team on an athletic scholarship. This scholarship covers tuition, fees, room, board, books, and is contingent on compliance with NCAA eligibility requirements. When students are recruited to StoneU to play any D1 sport at the school, they sign both a National Letter of Intent as well as a Scholarship Letter that describes the terms and conditions of the scholarship offer. Upon signing, students are then given a Student Athlete Handbook. The Handbook states that under the NCAA's rules, the student's scholarship can be reduced or canceled during the term of the award if the player: (1) engages in serious misconduct warranting substantial disciplinary action; (2) engages in conduct resulting in criminal charges; (3) violates NCAA's rules. The Handbook also clearly states that if a student becomes injured and unable to continue partaking in their sport, StoneU cannot revoke their athletic scholarship, but only for the remainder of that academic year. Further, the Handbook states that StoneU university cannot cancel the athletic scholarship of an athlete because of decreased athletic ability, such as in the case of poor athletic performance.

Andreasen was listed on StoneU's NCAA Football Squad List from June 2021 until January 2023, playing as the school's starting wide receiver. As a student athlete, Andreasen's

involvement in StoneU's football program required a year-long commitment. Throughout the fall football season, Andreasen's weekly schedule was heavily dominated by football-related activities, which could occupy as many as forty hours per week. His daily routine Monday through Friday began as early as 6:00 a.m., starting with mandatory team workouts and practice sessions, followed by academic classes from 8:00 a.m. to 11:30 a.m. The afternoons were dedicated to additional training, film review sessions, chalk talk, fundraising events, team building, recruiting activities, ending with mandatory study hall sessions three days a week from 7:30 to 9:00 p.m. This rigorous schedule was maintained throughout the playing season. Spring and summer trainings also took place on a regular schedule; although referred to by the coaching staff as "voluntary," these off-season trainings were strongly encouraged, with an expectation of attendance that mirrored mandatory sessions. Spring and summer commitment totaled around twenty hours a week, including practices, scrimmages, and team meetings. In addition to time commitments, Andreasen and his teammates were subject to a range of restrictions. Student-athletes are bound by the NCAA's and StoneU's athlete conduct policies, which regulate their personal behavior, including restrictions on social media usage, interactions with the public, and outside employment. StoneU monitored compliance with these rules, with violations resulting in penalties ranging from warnings to suspension or expulsion from the team.

The Student Athlete Handbook states that players' academics must take precedence over athletics. The NCAA and StoneU enforced stringent academic requirements for continued athletic participation. Student athletes are required to maintain a full course load and achieve a minimum GPA of 2.0. For this reason, StoneU attempts to assist the players with their academics by having: (1) study tables, (2) tutor programs, (3) class attendance policies, (4) travel policies that restrict players from being off campus forty-eight hours prior to finals, and (5) a policy

prohibiting players from missing more than five classes in a quarter due to games. As Andreasen testified in his deposition, however, “Everyone knows that we’re obligated to schedule classes around team events. The only time we’re excused from practice is if the class is required by the school or we’re on the verge of flunking out. Otherwise, miss practice and Coach will have us running laps for days.”

According to an article by the Stone Herald, Coach Rodriguez is “known for her intense dedication to winning and high expectations.” In an affidavit of StoneU’s assistant football coach, he stated that “Jennica’s tough demeanor and levelheaded decision-making skills have brought the team to victory many times over during her years at StoneU.” In fall 2022, Rodriguez was in the running for the Bobby Dodd Coach of the Year Award, the top honor for NCAA D1 football coaches. As with all athletic coaches at StoneU, per NCAA regulations, coaches partake in mandatory annual training on topics such as sports safety, ethics, and compliance with NCAA rules. Safety training covers concussion protocols, mental health awareness, and injury prevention. Regarding concussions, the safety training teaches the standardized assessment of concussion (“SAC”) test, which is to be used on field sidelines as an initial concussion assessment. SAC asks a series of questions and takes about five minutes to complete; it is used to check the athlete’s orientation, immediate memory, and concentration. Accidents are common on the football field, but in all of Rodriguez’s record of coaching, she has never had a player removed from the team due to permanent injury.

Rodriguez recruited Andreasen when he was in high school, and he joined the StoneU football team the summer before his freshman year in 2021. Rodriguez was quoted in the Stone Herald in an article about Andreasen’s incoming football class, stating, “I saw endless potential

in him, you know? Kid has a talent that you don't see very often, and I know that with the right coaching he'll have a chance at going pro."

During his sophomore year, the fall 2022 football season, Andreasen suffered multiple concussions, all of which were witnessed by Coach Rodriguez. Andreasen sustained his first concussion September 10, 2022, during a high-stakes game against Ritters University after being tackled during the first quarter. Andreasen was immediately pulled from the game and medical staff diagnosed him with a concussion after performing the SAC test, charting that Andreasen seemed "confused and complained of dizziness." Stone University's concussion protocol emphasizes that even if a SAC test is inconclusive, "when in doubt, sit them out!" Andreasen was sidelined by medics for several days before medics eventually cleared him to play.

A few weeks later, on September 30, 2022, Andreasen experienced another head injury during a practice session. Andreasen refused medical attention when asked by Coach Rodriguez, insisting he was fine. Rodriguez noticed that Andreasen was rubbing his head and looking pale, but chose not to push for a medical evaluation, as she "believed that Andreasen's resilience was critical to the team's success." After this incident, Coach Rodriguez called Andreasen in for a meeting in her office. According to Andreasen's deposition, Rodriguez said to him: "I just want to check in and make sure everything is okay. You're our star player, and this team would not survive without you." Andreasen insisted that he was fine, and admits he told Rodriguez "a few bumps on the head were no big deal." Rodriguez replied, "I'm glad you're okay, Cal. The next few games are critical for this university and your future. Take care of yourself— you and I both know that your scholarship and spot at this school are dependent on you playing." Rodriguez does not dispute this recounting of their conversation.

Deposition testimony from teammates describes that Andreasen was “a little off” after his second injury. Several teammates reported he seemed slower at practice and would get plays wrong that had been practiced for years. On October 29, 2022, Andreasen suffered a third head injury after he ran the wrong route during a game, smacking straight into another player. The medical staff rushed to his aid, but during the on-field check-up, Coach Rodriguez repeatedly asked medical staff when Andreasen could return. Medical staff reported her making comments like, “We need our star player,” and “It’s just a little tap, how bad could it be?” The medical team suggested Andreasen sit out of the rest of the game, but Andreasen denied that he was experiencing any symptoms and by all reports was eager to return to play. When Coach Rodriguez was asked to make the final decision, she said, “It’s Cal’s call.” Andreasen said he could play, and he finished the game.

On December 13, 2022, the week before a crucial rivalry game, tensions were high. During practice, Andreasen took another hard hit, causing him to stagger and appear visibly dazed. There were no medical staff present at practice, so Coach Rodriguez paused practice and took it upon herself to assess Andreasen. She did not do the SAC test, but rather asked him if he was lightheaded as well as ordered a teammate to grab him water. Another teammate noticed Andreasen’s pale complexion, sweating, and slight slurring of speech and asked how he was feeling. Andreasen did not respond, but according to the teammate he appeared visibly nervous and glanced frequently at Rodriguez. The teammate asked again, concerned for Andreasen’s well-being, but Coach Rodriguez interjected, “He’s fine! Let’s not waste any more time, get back in there!” Despite feeling unwell, Andreasen returned to practice. Within minutes, he was hit again and collapsed on the field and lost consciousness. He was rushed to the hospital, where it was determined he had two fractured ribs and a cervical spine fracture.

Coach Rodriguez stated in her deposition testimony when asked about the events of December 13, 2022: "Of course I know the signs of a concussion, but Andreasen wanted to keep playing. I didn't intend for my star player to end up in the hospital." Andreasen was unable to play for the remainer of the season, as he was confined to a wheelchair, and is currently participating in ongoing physical therapy to rehabilitate his ability to walk. Andreasen's athletic scholarship was upheld for the remainder of the 2022-2023 school year but was terminated in the fall of 2023. He remains enrolled at StoneU, but has had to take out significant loans to cover the cost of his enrollment, room, and board.

Standard of Review

In workers' compensation cases, this Court's standard of review depends upon whether the issue on appeal is a question of law or fact. In reviewing the WCA's decision on a question of law or interpretation and application of a law to the facts at hand, the standard of review is de novo. See Veema Equip. Co. v. McCloskey, 289 Stone 12, 13 (2018); see also Bowerman v. Black Equip. Co., 297 S.W.3d 858, 866 (Ky. Ct. App. 2009). A WCA decision is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. See Veema Equip., 289 Stone at 13; see also Bowerman, 297 S.W.3d at 866. For questions of fact, the WCA as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. See Veema Equip., 289 Stone at 13; see also Bowerman, 297 S.W.3d at 866. The facts pertaining to Andreasen's workers' compensation claim are not in dispute.

The standard of review of a court's ruling on a motion for summary judgment is also de novo. Harris v. ATC Inc., 419 Stone 267, 268 (2005); see also Rudisill v. Ford Motor Co., 709 F.3d 595, 600 (6th Cir. 2013). Summary judgment is appropriate when there is no genuine issue

as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Discussion

1. Workers' Compensation Claim

The Stone Workers' Compensation Act ("Act") entitles "an employee, who receives a personal injury arising out of and in the course of employment . . . to be paid compensation as provided in this act." St. G.L. § 3300.1(a). The Act defines "employee" as "every person in the service of another, under any contract of hire, express or implied." St. G.L. § 3300.1(b). The question before this Court is whether Andreasen, a student athlete, was an "employee" within the meaning of the Act.

The Fair Labor Standards Act ("FLSA"), National Labor Relations Act ("NLRA"), and the Act all use broad definitions of "employee" to delineate statutory coverage. See 29 U.S.C. 203 (e)(1), 29 U.S.C. §§ 152(2)–(3), St. G.L. § 3300.1(b). Although these acts have "distinct policy goals," the "shared history" of the NLRA and FLSA "often inspires courts to draw interchangeably from each statute's caselaw to answer fundamental questions related to the equitable regulation of the American workplace." Johnson v. NCAA, 108 F.4th 163, 178 (3d Cir. 2024). Workers' compensation cases are also often cited to and considered in opinions regarding employment status, and thus the caselaw of all three acts are a helpful tool in evaluating employer-employee relationships. See, e.g., Berger v. NCAA, 843 F.3d 285, 292 (7th Cir. 2016) (collectively looking at cases within FLSA, NLRA, and workers' compensation context to determine student-athlete employee status).

Workers' compensation statutes, like other legislation deemed to be in the public interest, "should be construed liberally in furtherance of the purpose for which they were enacted." Balt.

& Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932); see also Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 467 (Dist. Ct. App. 1963) (referencing the liberal interpretation of California's workers' compensation law Labor Code § 3351 definition of 'employee,' which is materially similar to the Stone Act's definition).[2] Although different in definition, "employee" under the FLSA is also "necessarily broad to effectuate the remedial purposes of the Act." Safarian v. Am. DG Energy Inc., 622 F. App'x 149, 151 (3d Cir. 2015). The Supreme Court has noted, however, that the definitions of employer and employee in the FLSA, although broad, "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). Whether an employee-employer relationship exists is highly fact dependent. See Burrell v. Staff, 60 F.4th 25, 43 (3d Cir. 2023).

Most courts use some formulation of the economic realities test to determine employment status. Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961). Although different jurisdictions have implemented their own variations of the test, this Court gives significant weight to seven main factors: (1) opportunity for profit or loss depending on managerial skill, (2) investments by the worker and the potential employer, (3) degree of permanence of the work relationship, (4) nature and degree of control, (5) extent to which the work performed is an integral part of the potential employer's business, (6) skill and initiative, and (7) whether compensation is expected. See Jackson v. Lee Towers, 22 Stone 1881, 1904 (1998); see also 29 CFR 795.110 (a)(1); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1536-38 (7th Cir. 1987). Some

[2] In response to the decision in Van Horn, the California legislature amended the state's workers' compensation statute to expressly exclude student athletes from the statutory definition of "employee," as described in Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829, 833 (Cal. Dist. Ct. App. 4th 2002).

jurisdictions, such as the Ninth Circuit, have used formulations pointing to different factors, while other courts have moved away from multifactor tests altogether. See Bonnette v. Cal. Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983); Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692, 698 (Tex. App. 2000); Berger, 843 F.3d at 291.

Despite these different formulations, courts generally examine the same types of facts in their analysis of whether someone is an employee. See, e.g., Waldrep 21 S.W.3d at 701; Coleman v. W. Mich. Univ., 336 N.W.2d 224, 225 (Mich. App. 1983). In almost all cases, no one factor or subset of factors is dispositive, and the weight given each factor depends on the facts and circumstances of the particular relationship. 29 CFR 795.110 (a)(1). Courts should account for "the circumstances of the whole activity" rather than considering "isolated factors" as determinative. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

This case is certainly not the first to require a court to consider student-athlete's employment status, as claims have arisen in various contexts across courts, from workers' compensation to NLRB decisions and beyond. Stone Mutual points out that courts have given weight to the NCAA's position that student-athletes are amateurs and asks this Court to do the same. NCAA bylaws indisputably foster a principle of "amateurism," stipulating that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport." NCAA Bylaw 12.01.1, 2024-25 NCAA Division I Manual (2024). Therefore, the NCAA interprets its own bylaws to mean that no employment relationship exists between student-athletes and the NCAA or its member institutions. See Johnson v. NCAA, 556 F. Supp. 3d 491, 500 (E.D. Pa. 2021), aff'd in part, vacated in part, 108 F.4th 163 (3d Cir. 2024).

Stone Mutual asserts that this long-held tradition of amateurism means that student-athletes themselves understand that they are not employees and are prohibited from receiving

compensation. When students sign a Letter of Intent or Financial Aid Agreement, they signal that they understand that their engagement in intercollegiate sports is subject to NCAA rules, including those on compensation. See Waldrep, 21 S.W.3d at 699-700. Although the definition of employee is broad, a lack of compensation is a key indicator of no employee-employer relationship. See Portland Terminal, 330 U.S. at 152. Although student athletes may receive scholarships, these are primarily received in return for their academic pursuits; they are not considered wages like the compensation referred to in Portland Terminal. Id.

Andreasen acknowledges that in early state court workers' compensation cases considering student athletes' employee status, courts almost always found no employer-employee relationship. See, e.g. State Comp. Ins. Fund v. Indus. Accident Comm'n, 314 P.2d 288 (Colo. 1957); Berger, 843 F.3d at 293. Andreasen points out that since those earlier decisions, however, college sports have changed, rapidly growing into a billion-dollar entertainment industry. The Supreme Court recently acknowledged this industry shift, holding that the NCAA's restrictions on education-related benefits violated the Sherman Act. NCAA v. Alston, 594 U.S. 69, 103-07 (2021). The decision in Alston pushed the NCAA to allow student athletes to profit from their "name, image, and likeness" ("NIL"). And in the most recent student-athlete challenge, the Third Circuit became the first federal court of appeals to hold that athletes at NCAA Division I schools may be considered employees under the Fair Labor Standards Act. Johnson, 108 F.4th at 167. The Third Circuit affirmed the trial court's denial of the NCAA's motion to dismiss for lack of standing due to employment status. See id. at 167. The court reasoned that the economic realities test was the correct test for determining employee status and that the NCAA's amateurism rationales no longer held the weight they once did. See id. at 167, 174. We agree that the NCAA's amateurism argument holds little weight, and decline

to "use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of athletes' relationships to their schools." Johnson, 108 F.4th at 182 (quoting Berger, 843 F.3d at 294 (Hamilton, J., concurring)).

Stone Mutual contends that even leaving aside the amateurism argument, the economic realities test demonstrates that student athletes are not employees. It argues that student athletes like Andreasen have no permanent relationship with their university, they may experience profit and loss based on managerial skill, and they join their team to use specialized skills in the same way that one might hire an independent contractor to perform a special task. See Lauritzen, 835 F.2d at 1536-38. Andreasen counters that StoneU, like all NCAA D1 schools, exerts a significant amount of control over its student athletes and that the athletes work is integral to the university's business. See Goldberg, 366 U.S. at 33; Johnson, 108 F.4th at 169. Ultimately, although no one factor of the economic realities test is determinative of employment status, we find Andreasen's the more persuasive argument. See Coleman, 336 N.W.2d at 37.

Finally, Stone Mutual contends that holding that student athletes are employees under workers' compensation statutes would quickly expand into FLSA, opening arguments for minimum wage, overtime pay, and other expensive benefits for all athletes. We do not see this as the problem Stone Mutual asserts it is. Moreover, for all of Stone Mutual's concern, this is already happening. In 2021, the NLRB recognized "that traditional notions that all Players at Academic Institutions are amateurs have changed," releasing a memorandum explicitly calling 'student athletes' employees and becoming the first government authority to do so. Jennifer A. Abruzzo, Memorandum GC 21-08, NLRB Gen. Couns. Memorandum (Sept. 29, 2021).

For these reasons, we AFFIRM the WCA Board's decision holding that Andreasen is an employee within the meaning of the Act and ordering Stone Mutual to pay Andreasen's claim.

2. Intentional Tort Claim

Workers' compensation is founded on a policy of quid pro quo, both protecting employers from costly lawsuits and ensuring that employees receive compensation promptly. 9 Larson's Workers' Compensation Law § 100.01 (2024); Kaminski v. Metal & Wire Prods. Co., 927 N.E.2d 1066, 1071 (Ohio 2010); Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148, 1153 (N.M. 2001). In most jurisdictions, workers' comp is the exclusive remedy for injured employees, limiting remedies to those provided in the state act. See Larson § 100.01. The requirements for workers' compensation coverage are established at the state level, and each state has its own requirements for qualification. Larson § 1.01 (summarizing the typical compensation act elements).

In some jurisdictions, workers' compensation is a substitute for any common-law remedies. See United States v. Demko, 385 U.S. 149, 151 (1966). However, most jurisdictions recognize that an "intentional" tort may permit an injured employee to recover against an employer if the employer acted with actual intent to injure. See Larson § 103.01. This narrow exception traditionally required the employee to show specific intent, but in recent years there has been a trend toward permitting injured employees to bring tort claims against an employer when the injury is the result of actions the employer knew were "substantially certain" to cause injury. See Larson § 103.04; Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 914 (W. Va. 1978).[3] About a dozen states now follow this or a similar rule, either decided by court decision or

[3] Although later modified by statute, this holding from West Virginia adopted the "substantially certain" definition from the Restatement Second of Torts, marking the first departure from the "pure intent" standard.

legislation.[4] The state of Stone very recently enacted St. G.L. § 3300.82, amending the Stone Workers' Compensation Act ("Act") to follow this trend.

Stone permits double recovery through both a common-law action and workers' compensation. See Amory v. Kent, 223 F.3d 83, 84 (Stone 2000); see also Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 611-14 (Ohio 1982). Section 3300.82 states "[i]n an action brought against an employer by an employee . . . for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." St. G.L. § 3300.82. The Act does not further define "substantially certain," and this Court has not considered the meaning of "substantially certain" since the enactment of § 3300.82.

In Stone, as in most jurisdictions, if an employee commits an allegedly tortious act and the employee was acting within the course of employment, then respondeat superior attaches, meaning the employer is responsible for the actions of the subsidiary. See Watkins v. Novar Inc., 122 Stone 3, 4 (1979); Helf v. Chevron U.S.A., Inc., 203 P.3d 962, 975 (Utah 2009). StoneU concedes that Coach Jennica Rodriguez was an employee acting within the course of employment at all times relevant to this matter. StoneU argues, however, that "substantially certain" requires specific intent to harm, and Coach Rodriguez did not have the requisite deliberate intent necessary for a successful intentional tort claim against StoneU. Therefore, the only issue before this Court is whether Coach Rodriguez's actions were "substantially certain" to have caused Andreasen harm. This is an issue of first impression in this Court.

[4] OH, LA, NC, CT, NJ, SD, and TX all employ a "substantially certain" standard, while WV, MI, WA, and FL use similar language or interpretations. See Larson § 103.04.

State courts have interpreted "substantially certain" across a wide spectrum, from a narrow employer-friendly definition to a more expansive interpretation. Compare Ohio Rev. Code Ann. § 2745.01(b) (West 2023), with Woodson v. Rowland, 407 S.E.2d 222, 229 (N.C. 1991). In all states that employ the "substantially certain" standard, the purpose of departing from the pure intent standard was not to overly expand the narrow exception and allow claims of gross negligence to succeed, but rather to create a carve out to allow employees to sue over employer actions that are so egregious that they amount to an intentional tort. See Larson § 103.04. Courts have struggled to interpret "substantially certain," however, causing some states to adopt alternative language[5] or completely do away with the standard.[6]

On one end of the spectrum is Ohio, which limits "substantially certain" to mean action taken with deliberate and specific intent to harm. Ohio Rev. Code Ann. § 2745.01(b) (West 2023). On the other more liberal side is North Carolina, which finds that deliberate intent to injure is unnecessary to succeed in a tort action under the intentional act exception, as long as the employer knew serious injury or death was almost certain to occur. See Woodson, 407 S.E.2d at 229.

In granting summary judgment for StoneU, the trial court held that an intentional tort claim against an employer requires the most egregious of circumstances, adopting the Ohio requirement of showing specific intent to meet the "substantial certainty" standard. Ohio Rev. Code Ann. § 2745.01(a) (West 2023) and St. G.L. § 3300.82 share identical language: "[i]n an action brought against an employer by an employee . . . the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another

[5] See Fla. Stat. § 440.11(1)(b).

[6] See Okla. Stat. tit. 85A, § 5 (LexisNexis)

or with the belief that the injury was substantially certain to occur." However, § 2745.01(b) states that "[a]s 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." Ohio Rev. Code Ann. § 2745.01(b) (West 2023). The Stone Act does not include any such language. In Ohio, the intentional act provision is extremely narrow; "absent a deliberate intent to injure another" an employer is not liable. Houdek v. ThyssenKrupp Materials N.A., Inc., 983 N.E.2d 1253, 1257 (Ohio 2012). Deliberate intent refers to specific intent to cause injury. See Kaminski, 927 N.E.2d at 1079.

Andreasen points out that prevailing under the Ohio definition is next to impossible for employees, as circumstantial evidence showing intent is not sufficient, and the evidence needed to succeed needs to be analogous to a sworn statement from the employer that they knew of the safety violations or unsafe conditions. See Houdek, 983 N.E.2d at 1260 (Pfeifer, J., dissenting). He does argue, however, that even under this strict standard, the question of whether Rodriguez's actions entailed specific intent to harm is one for a jury, and thus is not appropriate for summary judgment.

We need not consider Andreasen's argument under the Ohio approach, however, as we agree with him that North Carolina's approach is the better one as it best comports with the purpose of the intentional tort action and avoids creating an illusory action. Under the Supreme Court of North Carolina's holding in Woodson, any misconduct where serious injury or death was substantially certain to occur opens an employer to intentional tort liability. See 407 S.E.2d at 229. Knowledge that harm is substantially certain to occur is "more than the 'mere possibility' or 'substantial probability' of serious injury or death, . . . [but] less than 'actual certainty.'" Pastva v. Naegele Outdoor Advert., 468 S.E.2d 491, 493 (N.C. App. 1996). Unlike in Ohio,

North Carolina courts accept circumstantial evidence of knowledge that harm will occur. See Estate of Stephens v. ADP TotalSource DE IV, Inc., 886 S.E.2d 537, 549 (N.C. App. 2023).[7]

In all states that allow intentional act claims to be brought against an employer, courts use similar factors to determine whether the employer knew the conduct was substantially certain to cause injury or death. These factors include previous violations or accidents, whether the employer directly ordered the action that resulted in the injury, whether the employer was supervising (or failing to supervise), whether there were safer alternatives available for completing the work, and whether it was apparent to the supervisor that the situation was unsafe. See, e.g., Woodson, 407 S.E.2d at 231-32. No one factor is determinative, and all facts must be considered together. See, e.g., Arroyo v. Scottie's Prof. Window Cleaning, Inc., 461 S.E.2d 13, 16 (N.C. 1995). When the particular circumstances of the case warrant it, courts also consider whether the employee had adequate training, whether there was an explicit or implicit threat that failure to comply might mean loss of job, and whether the employee's own decisions brought about the injury. See Schiemann v. Foti Contracting, L.L.C., No. 98662, 2013 WL 408842, at *4 (Ohio App. 8 Dist. Jan. 31, 2013).

StoneU contends that even under a broader standard like North Carolina's, no reasonable trier of fact could find Coach Rodriguez knew her actions were substantially certain to cause

[7] We note briefly that other states have taken a position somewhere in between that of Ohio and North Carolina. New Jersey favors a stricter stance, requiring not just analyzing the employer's conduct, but also the context in which the conduct took place. See Millison v. E.I. du Pont de Nemours & Co., 501 A.2d 505, 514 (N.J. 1985). Florida abandoned the term "substantially certain" and adopted "virtually certain" in 2003, requiring clear and convincing evidence that the injury was likely to occur and that the employer knew of the risk. See Fla. Stat. § 440.11(1)(b) (2024). Louisiana has one of the most expansive standards, allowing for recovery for intentional torts if the employer intends the harm or, even absent intent, the injury was substantially certain to follow. See Bazley v. Tortorich, 397 So. 2d 475, 482 (La. 1981). Although we need not consider the merits of these other approaches here, this would not foreclose another court, or the Stone Supreme Court, from considering these.

Andreasen's injuries. StoneU emphasizes that intentional tort actions against an employer represent a "narrow holding in a fact-specific case" and are only for "the most egregious cases." Whitaker v. Town of Scotland Neck, 597 S.E.2d 665, 668 (N.C. 2003). StoneU contends that as Coach Rodriguez did not order Andreasen to play at any point, her actions cannot rise to this heightened level of egregiousness. In contrast, Andreasen argues that Coach Rodriguez knew her actions were substantially certain to cause him harm. He contends that as an experienced football coach, she was fully aware of the risks, having witnessed Andreasen's injuries firsthand, yet she continued to have him play. We agree. It was under her supervision that he continued to play. See Woodson, 407 S.E.2d at 232. A reasonable trier of fact could certainly find that it was evident to Coach Rodriguez that the situation was unsafe. See Arroyo, 461 S.E.2d at 16-17. Thus, summary judgment was inappropriate.

For these reasons, we REVERSE the trial court's order granting summary judgment for StoneU, and REMAND for further proceedings consistent with this opinion.

Decided and Dated: June 17, 2024.

SUPREME COURT OF STONE

STONE MUTUAL INSURANCE COMPANY, Appellant, and STONE UNIVERSITY Appellant, v. Calvin ANDREASEN, Appellee.	)	No. ST-24-03

NOTICE OF APPEAL

This Court hereby grants Appellant Stone Mutual Insurance Company's and Stone University's requests for review of the decision of the Stone Appeals Court in the above matters. This Court will consider all issues raised in the courts below.

Robert Volk, Clerk
September 26, 2024