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The Emerging Bad Faith Cause of Action Takes on the Exclusive Remedy Doctrine

by Robert R. Potter* 
and
Joan T.A. Gabel**

No perfect rule is possible, so the decisive question is what rule has the fewest flaws. From this it follows that the great secret for success of the workers' compensation system lay not in its vaunted, coercive original compulsion, but in the fact that it followed the very pattern of risk distribution that both historical experience and general theory of contract law indicated would best minimize the risks in question.¹

I. INTRODUCTION

The Georgia Workers' Compensation Act ("the Act")² and the related regulations establish a system of comprehensive medical coverage and income benefits for employees who suffer work-related injuries. Workers' compensation is a statutory scheme that grants the injured employee a sure remedy of scheduled income benefits and medical coverage without


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regard to fault; in exchange, the employer and insurer escape the high costs of litigation and the threat of compensatory and punitive damages.\(^3\) Under this quid pro quo, employees injured at work have as their exclusive remedy the workers' compensation system, thereby giving rise to the "exclusive remedy doctrine."\(^4\) The integrity of the exclusive remedy doctrine is the key to maintaining a fundamentally sound and equitable workers' compensation system.\(^5\) The exclusive remedy doctrine, however, is facing a formidable challenge in Georgia. In *Zurich American Insurance Co. v. Dicks*,\(^6\) the Georgia Court of Appeals held that a physical injury caused by willful and wanton cessation of workers' compensation benefits circumvents the exclusive remedy doctrine and gives rise to a tort action.\(^7\) The court found that a new or exacerbated physical injury that arises from the actions of the insurer is outside the scope of the Workers' Compensation Act.\(^8\) This ruling enables similarly situated plaintiffs to pursue recovery through the workers' compensation system and through traditional civil litigation. The holding in *Dicks* exposes employers and insurers to the very risk the quid pro quo originally prevented: compensatory and punitive damages.\(^9\)

The Georgia Supreme Court now has the opportunity to examine the *Dicks* ruling. The Eleventh Circuit Court of Appeals certified the following question in the case of *Doss v. Food Lion, Inc.*:\(^10\)

Does Georgia law recognize an independent cause of action apart from any remedy available under the Georgia Workers' Compensation Act where an employer and/or insurer has intentionally delayed authorizing medical treatment to which an employee is entitled under the Act and where such delay has exacerbated a work-related physical injury?\(^11\)

This Article explores the question presented in *Doss* by giving the historical context in which courts evaluate the exclusive remedy

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7. Id. at 728, 470 S.E.2d at 281.

8. Id.

9. Because the Georgia rules of civil procedure forbid it, no appeal stemmed from the *Zurich* decision because the court of appeals reached its decision on summary judgment. GA. SUP. CT. R. 30 (1996). See analysis section for more discussion.

10. 83 F.3d 378 (11th Cir. 1996).

11. Id. at 380.
doctrine. That perspective is then used to evaluate the ruling in Dicks. The Article examines the justification for re-establishing the integrity of the exclusive remedy doctrine in light of the historic rationale for the workers' compensation system. After building a foundation in precedent and policy, the Article argues that the exclusive remedy doctrine should remain intact as the very cornerstone of the workers' compensation system.

II. HISTORICAL BACKGROUND

A. The American Workers' Compensation System

Generally, workers in nineteenth century America did not bring lawsuits against their employers for injuries sustained on the job. A prevailing fear of unemployment kept most employees from ever testifying against their employers. Also, during this time, employers' most reliable legal defenses—assumption of risk, contributory negligence, and negligence of a fellow employee—became strong precedent for insulating employers. By the end of the nineteenth century, employees' decreasing remedies in work-related tort litigation gained the attention of many state legislators. As industrial growth brought corresponding increases in industrial accidents, legislators searched for answers. The German compensation system enacted in 1893 and the English Employers' Liability Act of 1880 provided new frameworks for the compensation of employees. Despite the popularity of these foreign solutions, the first American compensation act, which was passed by Maryland in 1902, was struck down as unconstitutional.

13. Id.
16. Id. An estimated 70% to 94% of all industrial accidents went uncompensated before workers' compensation legislation reached the United States. King, supra note 5, at 415.
17. An account of this system was published as a Special Report of the U.S. Commissioner of Labor in 1893. Larson, supra note 15, at § 5.20.
18. Epstein, supra note 1, at 818. The English Employer's Liability Act of 1880 became a model for many state legislatures in the United States. Id. at 787.
courts struck down other state compensation laws on the same grounds: the imposing liability on employers without fault amounted to a taking of property without due process of law under state and federal constitutions. The fear of a court finding of unconstitutionality caused state legislatures to pass less comprehensive and noncompulsory acts. But in a landmark decision in 1917, the United States Supreme Court upheld a New York compulsory workers' compensation statute.


Workers' compensation in the United States is a unique system that cannot be categorized under tort law or social insurance. The underlying premise of the quid pro quo is that the costs of industrial accidents and diseases "should, like other costs of doing business, be borne by the enterprise that engendered them," and ultimately by the consumer. Workers' compensation creates a contractual relationship between employers and employees in which benefits are shared "in ways that maximize their joint profits and use price adjustments to match the residual risks assigned to each party.

The amount of compensation injured workers receive under the system certainly may leave employees in a worse position than if they had never been injured, but the benefits afforded under workers' compensation go beyond the actual dollar payments. Employees enjoy guaranteed recovery of benefits for injuries that fall within the statute regardless of fault. Additionally, the relatively low cost of the system to employers renders them able to hire and retain more workers.

20. The Montana Workers' Compensation Statute, 1909 Mont. Laws 67, was struck down in 1909. A New York act, 1910 N.Y. Laws 674, was struck down in 1911.
22. Id.
25. LARSON, supra note 15, at § 1.20.
27. LARSON, supra note 15, at § 2.20.
28. Epstein, supra note 1, at 804.
29. Id.
30. LARSON, supra note 15, at § 2.50.
31. Epstein, supra note 1, at 800.
32. Id. at 800-01. Commentators maintain that employers benefit from the tempered compensation to injured employees because it gives employees little incentive to feign
profitable for the employee to work than to not work and collect benefits. Although employees and employers enjoy independent benefits, the goal of the system is to benefit both parties by replacing uncertain remedies with certain ones and to avoid the expenses and risks of tort litigation.

Accomplishing the goal of certainty of benefits depends squarely on the integrity of the exclusive remedy doctrine in workers' compensation statutes. The exclusive remedy doctrine limits the injured workers' recovery to that provided by the workers' compensation statute. The elimination of common law actions takes the guesswork out of remedies and "prevent[s] litigation from becoming a grotesque imitation of global war." If employees could bring their employer or their employer's insurance carrier into court claiming a separate tort action for every injury or subsequent delay in payments, the workers' compensation system would disintegrate.

B. Workers' Compensation in Georgia

In Georgia, the exclusive remedy doctrine of the Georgia Workers' Compensation Act limits the rights and remedies afforded an employee injured on the job. The Act states that "the rights and remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee ... at common law or otherwise, on account of such injury, loss of service, or death.

Employees can avoid the exclusive remedy doctrine by proving their injury is not within the scope of the Workers' Compensation Act.

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Note: The numbers correspond to footnotes in the text.
Indeed, the bulk of workers' compensation litigation concerns determinations of whether injuries "arose out of employment, and were suffered in the course of employment." The difficult question confronting the Georgia courts is whether an employee whose original injury is clearly within the statute can nonetheless elude the doctrine of exclusivity in order to pursue tort benefits as well as receive workers' compensation benefits.

The seminal case in Georgia addressing this question is *Bright v. Nimmo*. In *Bright*, the employee suffered an on-the-job injury and received benefits by order of the Workers' Compensation Board. His employer and his employer's insurer filed an untimely controversion of the claim in violation of the Act. In the interim, the employee did not receive payments and ultimately suffered financial injury and foreclosure on his house. Pursuant to the remedy for delay provided in the Act, the Board awarded the employee attorney fees and a fifteen percent penalty. The employee subsequently brought suit in tort against the employer and insurer for willful and intentional delay in payment that resulted in his financial injury.

The district court granted summary judgment to the employer and insurer on the grounds that the employee had his exclusive remedy under Georgia's Workers' Compensation Act. The plaintiff appealed to the Eleventh Circuit, which certified the question of whether Georgia law recognizes an independent cause of action for alleged intentional delay of workers' compensation payments. Noting that any delay in payment by a solvent payor is willful and intentional, the Georgia Supreme Court answered in the negative. The court held that "where compensable under the Act can still be within the purview of the Act for purposes of the exclusivity provision)."

43. The portion of the Act that provides remedies for delayed payments is now O.C.G.A. § 34-9-221(e).
44. 253 Ga. at 378, 320 S.E.2d at 366.
45. Id. at 379, 320 S.E.2d at 366.
46. Id. at 381, 320 S.E.2d at 368.
the Workers' Compensation Act provides penalties for delay, such penalties exclude the employee's use of common law remedies." 47

*Bright* controlled this issue until the Georgia Court of Appeals heard the unique case of *Jim Walter Homes, Inc. v. Roberts*. 48 In *Roberts* the employee received workers' compensation benefits until she terminated her employment and moved to Florida. The employee returned to Georgia to obtain authorized treatment because the employer/insurer refused to authorize additional medical treatment in Florida. She then filed suit, alleging that the employer/insurer failed to authorize necessary treatment, conspired against her, and hid the truth of her condition from her, resulting in her complete disability. The employer and insurer failed to answer the complaint and suffered a default judgment. 49

On appeal, the employer and insurer argued that the trial court lacked jurisdiction because the case involved a workers' compensation issue. 50 The appellate court found that the trial court had jurisdiction over the matter and affirmed the lower court's judgment. 51 The court reasoned that the exclusive remedy provision did not apply because the employee alleged intentional physical injury rather than intentional financial injury as in *Bright*. 52

The court of appeals re-addressed the distinction between physical and financial injuries in *Dutton v. Georgia Associated General Contractor Self-Insurers Trust Fund*. 53 In *Dutton* the employee began to receive workers' compensation benefits from the employer/insurer after an on-the-job injury. Seventeen months later, the employer/insurer began to question its obligation to pay for certain medical bills and a rental car, and discontinued payments. The employee brought a conspiratorial tort action seeking back payments, damages for further injuries suffered as a result of nonpayment, and punitive damages. The trial court dismissed the claim. On appeal, the employee argued that *Roberts* authorized a claim at common law while the employer/insurer pled the exclusive remedy doctrine. In affirming the lower court's dismissal, the court declared the case controlled not by *Roberts* but by *Bright*. 54 The court emphasized that the facts established in *Roberts* were that the

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47. 253 Ga. at 381, 320 S.E.2d at 368.
49. Id. at 619, 396 S.E.2d at 788.
50. Id. at 620, 396 S.E.2d at 789.
51. Id. at 622, 396 S.E.2d at 790.
52. Id. at 620-21, 396 S.E.2d at 789.
54. Id. at 608, 451 S.E.2d at 506.
employee suffered a physical injury which was caused by the intentional refusal to authorize necessary treatment. The court appeared to validate the distinction but deemed the instant facts to be more analogous to Bright.

After Dutton Georgia courts seemed to recognize two categories of bad faith workers' compensation claims: (1) claims that allege additional physical injury caused by tortious acts, and; (2) claims that allege financial injury, for which the exclusive remedy may be found within the workers' compensation system. It was not until 1995 in Zurich American Insurance Co. v. Dicks that the Georgia Court of Appeals made that distinction unmistakable.

III. Zurich American Insurance Co. v. Dicks and Doss v. Food Lion, Inc.

A. Zurich American Insurance Co. v. Dicks

June Dicks suffered an on-the-job injury which left her unable to work. The workers' compensation insurance carrier accepted the claim and authorized medical care. During the course of Ms. Dicks' treatment, the insurance carrier arranged an independent medical examination (“IME”) with another doctor. The IME physician concluded that the employee “should be either terminated from her job or put in a work hardening program where she can get back to work.” Based on this report, the insurer suspended Ms. Dicks' medical benefits, and her employer terminated her employment. Ms. Dicks was undergoing physical therapy treatment when the insurer suspended her medical benefits.

Following the suspension, Ms. Dicks requested a workers' compensation hearing seeking attorney fees and recommencement of her benefits. The administrative law judge ordered the insurer to reinstate benefits effective from the date of suspension. The administrative law judge also found that the employer/insurer's defense of the claim was unreasonable and assessed attorney fees.
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Ms. Dicks subsequently sued the employer/insurer in tort, alleging that the insurance carrier intentionally and wrongfully terminated her medical benefits, thereby aggravating her injuries. She introduced testimony from a physician indicating that the delay in her physical therapy “exacerbated [her] medical condition, greatly worsened her symptoms, adversely affected her ability to be rehabilitated, caused additional pain behavior and substantially affected her permanent impairment rating.” The employer/insurer moved for summary judgment on the grounds that the exclusive remedy doctrine barred the employee's tort complaint. After the superior court denied the motion, the employer/insurer appealed.

The Georgia Court of Appeals cited Bright v. Nimmo for the proposition that the intentional delay of workers' compensation payments does not give rise to an independent cause of action against the employer or its insurer for financial injury. The court in Dicks noted, however, that Bright expressly left open the question of whether the employee could recover in tort for an intentional physical injury by the employer. The Georgia Court of Appeals held that this distinction allowed a separate tort action only if the plaintiff could prove that the bad faith delay of workers' compensation payments caused a physical injury.

The court in Dicks found that the Workers' Compensation Act does not contemplate a separate physical injury flowing from a bad faith refusal to provide benefits. According to the majority opinion, a new or exacerbated physical injury could not be connected to the employment

64. Id.
65. Id.
66. Id.
68. 220 Ga. App. at 726, 470 S.E.2d 279 (citing Bright, 253 Ga. at 381, 470 S.E.2d at 368).
69. Id. at 728, 470 S.E.2d at 281.
71. Dicks, 220 Ga. App. at 728, 470 S.E.2d at 281. The Georgia General Assembly, however, has addressed the issue of separate physical injury flowing from medical malpractice. In the context of medical malpractice, the employee can sue the doctor, but the employer/insurer remains insulated from tort damages. The injury resulting from the malpractice is deemed part of the work-related injury, thereby obligating the employer and insurer solely for compensation provided by the Act. O.C.G.A. § 34-9-203.
relationship, thereby removing the injury from the Act's purview.\textsuperscript{72} Rather, the injury stemmed from the actions of the employer/insurer as a source outside of the employer/employee relationship.\textsuperscript{73} The majority denied the motion for summary judgment and held that to conclude otherwise would leave the employee without a legal remedy.\textsuperscript{74}

A three-judge minority fundamentally disagreed. In their dissent, the judges relied on \textit{Aetna Casualty & Surety Co. v. Davis}.\textsuperscript{75} The court in \textit{Davis} established that "[t]he intentional delay of Workers' Compensation payments does not give rise to an independent cause of action against the employer or its insurer where penalties for such delay are provided by the [Workers' Compensation Act]."\textsuperscript{76} The dissent then noted that the Act provides for the assessment of attorney fees and penalties for unreasonable delay in payment of benefits.\textsuperscript{77} According to the dissent, this is a remedy within the Act that, under \textit{Davis}, engages the exclusive remedy doctrine and bars a tort claim.\textsuperscript{78}

Because of new Georgia Supreme Court rules prohibiting review of a case where the appellate court has affirmed a trial court's denial of a motion for summary judgment, the court of appeals has had the last word.\textsuperscript{79} The \textit{Dicks} factual situation will now be presented to a jury to determine whether the employer/insurer intentionally and wrongfully

\begin{itemize}
\item \textsuperscript{72} \textit{Dicks}, 220 Ga. App. at 728, 470 S.E.2d at 281.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} \textit{Id.}, 470 S.E.2d at 281-82.
\item \textsuperscript{75} 253 Ga. 376, 320 S.E.2d 368 (1984).
\item \textsuperscript{76} \textit{Id.} at 377, 320 S.E.2d at 370 (citing \textit{Bright}, 238 Ga. at 381, 320 S.E.2d at 365).
\item \textsuperscript{77} \textit{Dicks}, 220 Ga. App. at 729, 470 S.E.2d at 282 (Ruffin, J., dissenting). Not only can the State Board assess attorney fees, O.C.G.A. § 34-9-108(b)(1), it can appoint physicians, O.C.G.A. § 34-9-101, order a change of physicians, O.C.G.A. § 34-9-201, assess a penalty of up to 20\% of the amount of any medical expense that is not paid within 60 days, O.C.G.A. § 34-9-203(c), or assess a civil penalty of up to $10,000 per violation for intentionally making any false or misleading representation for the purpose of "obtaining or denying of any benefit" under the Act, O.C.G.A. § 34-9-18(b). Any enhanced physical problems that result in increased disability would warrant a corresponding increase in total disability benefits, permanent partial disability benefits, or both. O.C.G.A. §§ 34-9-261-63. Finally, in the worst example of an intentional wrong, death benefits can be increased by 20\% for the employee's dependents when the employee's death "was the direct result of an injury proximately caused by the intentional act of the employer with specific intent to cause such injury." O.C.G.A. § 34-9-265(e).
\item The death benefits provision also specifically refers to O.C.G.A. § 34-9-11, Georgia's exclusive remedy provision. Because of this specific reference, it is conceivable that under \textit{Dicks}, an employee who dies at the hands of bad faith would have as his sole recourse the workers' compensation system, while one who lives can sue in tort.
\item \textsuperscript{78} 220 Ga. App. at 729, 470 S.E.2d at 282 (Ruffin, J., dissenting). The dissent left the sufficiency of that remedy to the legislature. \textit{Id.} at 730, 470 S.E.2d at 282-83.
\item \textsuperscript{79} GA. SUP. CT. R. 40 (1996).
\end{itemize}
terminated the employee's benefits and, moreover, whether this alleged misconduct caused Ms. Dicks any physical injury. The Georgia Supreme Court will nonetheless address the legal issue in Dicks in Doss v. Food Lion, Inc.\textsuperscript{80}

B. \textit{Doss v. Food Lion, Inc.}

Eric Doss suffered injuries when a 2.5 pound box of chocolates thrown by a co-worker struck his head. The self-insured employer paid all of Mr. Doss' medical bills but controverted payments for psychological treatment. The administrative law judge granted Mr. Doss' request for psychological treatment but did not assess attorney fees or penalties.\textsuperscript{81}

Mr. Doss then moved to Louisiana and started treatment with local doctors. Another dispute arose over payments for medical treatment. During this disagreement, Mr. Doss did not receive allegedly necessary in-patient rehabilitation. He maintains that the delay in authorizing the rehabilitation occurred in bad faith and that his condition worsened as a result, causing a new physical injury. He filed a diversity claim in the United States District Court for the Southern District of Georgia alleging bad faith and seeking compensatory and punitive damages.\textsuperscript{82}

The self-insured employer filed a motion for summary judgment arguing that the exclusive remedy doctrine barred the tort claim. The judge held that a cause of action could exist and allowed the claim to go to trial.\textsuperscript{83} The employer/self-insurer appealed to the Eleventh Circuit, which has certified the same question to the Georgia Supreme Court that the court of appeals decided in Dicks: Does an independent cause of action exist for bad faith delay in authorizing medical treatment resulting in physical injury?\textsuperscript{84}

III. OTHER JURISDICTIONS

While the Dicks and Doss decisions present cases of first impression in Georgia, the question of bad faith has already arisen in many other states.\textsuperscript{85} The erosion of the exclusive remedy doctrine in other states

\textsuperscript{80} 83 F.3d 378 (11th Cir. 1996).
\textsuperscript{81} Id. at 378.
\textsuperscript{82} Id.
\textsuperscript{84} Doss, 83 F.3d at 380. For in-depth discussions of bad faith claims in the workers' compensation setting nationwide, see Kiser, supra note 37, and Vivian Senungetuk, Workers' Compensation Exclusivity: Is it Here or is it Gone? 58 DEF. COUNS. J. 526 (1991).
\textsuperscript{85} See jurisdictions listed infra notes 89-92, 94.
is due in part to the weakening of employers' legal defenses and in part to the increasing attractiveness of tort remedies compared to compensation payments. States that allow independent causes of action for bad faith usually do so in the spirit of opening alternative forums to the injured claimant. A handful of states simply have ruled that bad faith claims are independent actions that are not subject to the exclusivity provisions of their respective workers' compensation acts. Other states have allowed independent bad faith claims only where the insurer's conduct has been malicious, outrageous, or deceitful. Still others have affirmatively declared that workers' compensation insurers have a duty of good faith in handling claims, the breach of which is not controlled by the exclusive remedy doctrine. At least two states have

86. Many states have adopted comparative negligence over contributory negligence. Assumption of risk is often destroyed as a defense if the risk was created by the employer, or if the risk was a known or extraordinary one. The fellow servant doctrine has been weakened as well. Larson, supra note 15, at § 4.50.

87. Kiser, supra note 37, at 159.

88. Senungetuk, supra note 84, at 526.

89. See, e.g., Leathers v. Aetna Casualty & Sur. Co., 500 So. 2d 451 (Miss. 1986); Birkenbuel v. Montana State Comp. Ins. Fund, 687 P.2d 700 (Mont. 1984); Russell v. Protective Ins. Co., 751 P.2d 693 (N.M. 1988) (recognizing bad faith as an independent cause of action only for refusal to pay); Kuney v. PMA Ins. Co., 550 A.2d 1009 (Pa. Super. Ct. 1988) (allowing a bad faith claim against the insurer because the insurer has a separate relationship with the claimant from the employer); Matter of Cert. a Question of Law, 399 N.W.2d 320, 321 (S.D. 1987) (allowing a bad faith claim because the injury was separate from the original industrial injury); Coleman v. American Univ. Ins. Co., 273 N.W.2d 220 (Wisc. 1979) (holding that a claim for bad faith in a settlement proceeding is not within the act).


indicated that they might recognize bad faith tort actions but have not yet seen facts that would compel them to do so.\(^9\)

States that exclude bad faith claims brought outside of the system expressly intend to preserve the integrity of their workers' compensation acts.\(^9\) A number of states have disallowed independent claims of bad faith against insurers and have placed them squarely within the jurisdiction of the workers' compensation system as the exclusive source of redress.\(^9\) A few states have provided specific statutory remedies for the willful and intentional delay of payment.\(^9\) Indeed, it is difficult to delineate specific trends because the states have taken such varied positions on this issue. Ultimately, the answers to the dilemma currently faced by the Georgia Supreme Court lie in Georgia's own case history.

IV. ANALYSIS

A. The Problem with Zurich American Insurance Co. v. Dicks

The court of appeals in *Dicks* offers no guidance on what constitutes the bad faith\(^9\) necessary to escape the exclusive remedy doctrine. The court also does not address how recognizing the bad faith cause of action will undermine the exclusive remedy doctrine and impact the workers' compensation system as a whole. Instead, the court in *Dicks* relied exclusively on Georgia's historical distinction between physical and financial injury.\(^9\) But regardless of what "bad faith" is or the injury

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\(^93\) Senungetuk, supra note 84, at 526.


resulting therefrom, the remedy should fall within the workers' compensation system.

The court in *Dicks* divided its analysis into two sections: (1) recognizing a distinction between physical and financial injuries due to bad faith, and; (2) finding no penalty within the Workers' Compensation Act for a physical injury.

1. **There Is No Logical Distinction Between Financial and Physical Injuries Resulting from Delayed Payments.** The Georgia Court of Appeals relied heavily on the supreme court's ruling in *Bright* to draw a distinction between recovery in tort for financial or physical injury at the hands of bad faith. The court in *Bright* noted that the facts indicated only a financial injury caused by the bad faith delay. The question as certified, however, addresses the bad faith delay in payment of benefits—not the nature of the injury resulting therefrom. Maintenance of the financial/physical injury distinction will inevitably lead to confusion when an employee who suffers both physical and financial injury due to bad faith must file two claims to recover—one through the workers' compensation system and one in the traditional courts.

The court in *Dicks* also looks to *Roberts* in support of the same distinction. The court in *Roberts* relied upon two sexual harassment cases that allowed a cause of action outside the workers' compensation system. The decisions recognizing that sexual harassment is not an injury as contemplated by the legislature merely confirmed the already

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99. For a discussion of the decision in *Bright*, see supra part II, B.
100. *Doss*, 83 F.3d at 380.
   The same course of conduct should give rise to but one claim actionable in but one court. If the conduct is the subject of proceedings before the Workers' Compensation Court, that court would have exclusive jurisdiction until and unless the statutory steps are taken for making such an order enforceable in some other Court. *Id.*

To rely on the distinction between physical and financial injury in *Doss* would improperly narrow the Eleventh Circuit's question.
104. The courts found that sexual harassment is not an "injury" as contemplated by the Act. "Injury' or 'personal injury' means only injury by accident arising out of and in the course of employment." O.C.G.A. § 34-9-1(4) (1992).
obvious distinction between discrimination and workers' compensation. Using sexual harassment as precedent is inappropriate in light of the clear line between Title VII injuries and injuries directly related to a compensable claim. Neither sexual harassment case involved a claim for physical injuries resulting from an intentional delay of payments for an already-accepted workers' compensation injury. Therefore, the court's reliance on Roberts to support the distinction between physical and financial injury is misplaced.

2. The Workers' Compensation Act Provides a Remedy for Intentional Delay of Medical Treatment. The key to the Roberts ruling was a finding that the Workers' Compensation Act does not provide a remedy for worsening of a physical condition attributable to a bad faith delay in medical payments. This presents a fundamental flaw in Roberts and the cases, including Dicks, which rely upon it.

Not only can the State Board assess attorney fees, it can appoint physicians, order a change of physicians, assess a penalty of up to twenty percent of the amount of any medical expense that is not paid within sixty days, or assess a civil penalty of up to ten thousand dollars per violation for intentionally making any false or misleading representation for the purpose of "the obtaining or denying of any benefit" under the Act. Any enhanced physical problems that result in increased disability would warrant a corresponding increase in total disability benefits, permanent partial disability benefits, or both. Finally, in the worst example of an intentional wrong, death benefits can be increased by twenty percent for the employee's dependents when the employee's death "was the direct result of an injury proximately caused

105. See Dicks, 220 Ga. App. at 727, 470 S.E.2d at 281.
107. The court in Dicks states that regardless of whether an injury is physical or financial, "where the [Workers' Compensation] Act provides a penalty for delayed benefit payments, a claim based on the delay is barred by the exclusive remedy provision." Dicks, 220 Ga. App. at 726, 470 S.E.2d at 279. The majority then finds that there is no remedy within the Workers' Compensation Act for physical injury, while financial injuries are redressed by penalties and attorney fee provisions. Id. at 728, 470 S.E.2d at 281. See O.C.G.A. §§ 34-9-108 and 221(e).
109. Id. § 34-9-101.
110. Id. § 34-9-201(c) (Supp. 1996).
111. Id. § 34-9-203(c).
112. Id. § 34-9-18(b).
by the intentional act of the employer with the specific intent to cause such injury.”

In Aetna Casualty & Surety Co. v. Davis, the Georgia Supreme Court stated:

the intentional delay of workers' compensation payments does not give rise to an independent cause of action against the employer or its insurer where penalties for such delay are provided by the [Workers' Compensation Act]. That is to say, where the Workers' Compensation Act provides penalties for delay, such penalties exclude the employee's use of common law remedies.

The dissent in Dicks relied on Davis in stating that regardless of the type of injury suffered, if the claim is based on an intentional and unreasonable delay in payment, the Workers' Compensation Act provides a penalty in the form of assessed fees and penalties. While the dissent sympathized with Ms. Dicks, it recognized that the role of the judiciary is not to enlarge existing statutory sanctions. Rather, any such enlargement is for the General Assembly.

114. Id. § 34-9-265(e) (1992).
116. 253 Ga. at 376, 320 S.E.2d at 370 (citing Bright, 283 Ga. at 381, 320 S.E.2d at 368). The court in Davis considered and declined to adopt decisions of jurisdictions that found an intentional delay gives rise to an independent cause of action. Id. at 377, 320 S.E.2d at 370 (citing 2A LARSON, WORKMEN'S COMPENSATION LAW, § 68.34(c), and Michael A. Rosenhouse, Annotation, Tort Liability of Worker's [sic] Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due, 8 A.L.R. 4th 902 (1981)).
118. 220 Ga. App. at 729-30, 470 S.E.2d at 282 (Ruffin, J., dissenting) (citing Bright, 253 Ga. at 381, 320 S.E.2d at 368). The General Assembly frequently examines the Act and amends it. The "definitions" provision, O.C.G.A. § 34-9-1, has been amended some thirty-eight times since it was first enacted in 1920, including nineteen times since 1980. The exclusivity provision, O.C.G.A. § 34-9-11, has been amended five times in the last twenty-five years. The temporary total disability section, O.C.G.A. § 34-9-281, has increased the maximum weekly benefit every other year for the past six years. Georgia courts have consistently held that the exclusive remedy doctrine is strictly within the legislature's purview. St. Paul Fire & Marine Ins. Co. v. Miniweather, 119 Ga. App. 617, 168 S.E.2d 341 (1969) (The Act is a "complete code" and the courts may "neither rewrite the law nor hedge it about with restrictions not included in it."); McCormick v. Mark Heard Fuel Co., 183 Ga. App. 468, 359 S.E.2d 171 (1987) ("[I]t is incumbent upon the legislature to modify the statutory exclusivity feature if it sees fit to do so.") Massey v. Thiokol Chem. Corp., 368 F. Supp. 668, 675 (S.D. Ga. 1973) (Any complaint about the workers' compensation system "addresses itself to the legislative and not the judicial branch.").
B. The General Problem with Undermining the Exclusive Remedy Doctrine

The Georgia Supreme Court must address the dilemma in the Dicks decision as it now decides the Doss case. In addition to exploring the issues specific to Dicks, the court must address the underlying policy question of whether the exclusive remedy doctrine should remain intact.\textsuperscript{119} Georgia courts and expert commentators maintain that the "exclusiveness of remedy is a rational mechanism for making the compensation system work in accord with the purpose of the Act."\textsuperscript{120}

To undermine the exclusive remedy doctrine is to undermine the workers' compensation system.

The workers' compensation system developed from a bargained-for exchange between industry and employees: Employees injured at work receive sure recovery without regard to fault while employers receive immunity from compensatory and punitive damages.\textsuperscript{121} If the extent of recovery by an employee is the issue, there are other means to accomplish that end without weakening the exclusivity doctrine.\textsuperscript{122}

Allowing direct tort action between employer and employee undermines the express premise of the original legislative bargain. So long as the injury is not wholly separate from the employer-employee relationship, the exclusive remedy doctrine must remain intact. Otherwise, one side of the legislative bargain is undone while the other remains in force.\textsuperscript{123}

The delicately balanced quid pro quo imposing no-fault liability in exchange for immunity from tort claims becomes illusory without a viable exclusive remedy doctrine.\textsuperscript{124}

Workers' compensation will lose its effectiveness as a cost-spreading mechanism if tort law invades the process. The transaction costs of a workers' compensation claim from initial reporting through the administrative courts are lower than those of a tort claim in litigation.\textsuperscript{125} Workers' compensation, unlike the tort system, is unfettered

\textsuperscript{119} For a discussion of previously recognized exceptions to Georgia's exclusive remedy doctrine, see supra note 41.

\textsuperscript{120} Massey v. Thiokol Chem. Corp., 368 F. Supp. at 676 (citations omitted). \textit{See} Epstein \textit{supra} note 1, at 818; King, \textit{supra} note 5, at 516.

\textsuperscript{121} For a complete discussion of the evolution of workers' compensation, see supra part II.

\textsuperscript{122} The legislature is in the best position to expand injured employees' recovery. \textit{See} supra text accompanying notes 67 and 110.

\textsuperscript{123} Epstein, \textit{supra} note 1, at 812. Epstein argues that allowing a tort action and a workers' compensation claim is beyond rational defense. \textit{Id.} at 813.

\textsuperscript{124} King, \textit{supra} note 5, at 411-12.

\textsuperscript{125} \textit{Id.} at 412.
by expensive determinations of “fault” or “pain and suffering.” torque is regarded as a notoriously inefficient cost-spreading vehicle. Most importantly, workers’ compensation has less actual adjudication, thus allowing more insurance premium funds to reach injured workers.

Much of the stability of the workers’ compensation system is grounded in predictability. Adding bad faith claims to the formula not only adds to the unpredictability inherent in tort but also makes the avenue of recovery unclear. Some commentators argue tortious conduct can be deterred only through tort exceptions to the exclusive remedy doctrine. The fundamental flaw in such reasoning is the assumption that the exclusive remedy doctrine is synonymous with immunity. The workers’ compensation system is a shield only to the extent that it confines recovery to that provided by the legislature under the Workers’ Compensation Act. So long as the workers’ compensation system requires the employer or insurer to pay some penalty to employees who suffer injuries due to bad faith, the injury is redressed, the entire case remains within the workers’ compensation system, and the system itself remains viable.

VI. CONCLUSION

Clear precedent and public policy in Georgia mandate support for the exclusive remedy doctrine in Doss. Penalties for “bad faith” are available within the Act. If it is the opinion of the court that those penalties do not deter bad faith, then this issue is within the province of the General Assembly.

The Georgia Supreme Court should take the opportunity presented by Doss to solidify the exclusive remedy provision of the Georgia Workers’ Compensation Act. If an independent cause of action for bad faith is allowed, the unfounded distinction between physical and financial injuries will continue. Rather than granting different remedies for the same culpable conduct, the Georgia Supreme Court should support the

128. King, supra note 5, at 412.
129. Id. at 413.
131. Epstein, supra note 1, at 814.
132. See Bright, 253 Ga. at 381, 320 S.E.2d at 368; Dicks, 220 Ga. App. at 729-30, 470 S.E.2d at 282-83.
historical purposes and integrity of the workers’ compensation system by keeping the penalties for all bad faith conduct within the system.  

POSTSCRIPT

The Georgia Supreme Court answered the question posed in Doss v. Food Lion after the end of this survey period. In a five-page unanimous opinion, the court held that no cause of action exists for intentional delay in authorizing medical treatment. After noting that the Workers’ Compensation Act already provides penalties for intentional delays in treatment, Justice Norman S. Fletcher held that the “exclusivity provision is the bedrock of the workers' compensation system.” Any expansion of benefits afforded injured workers must, according to the court, originate with the legislature. The court then overruled the court of appeals holding in Zurich American Insurance Co. v. Dicks.

The court’s decision mirrors the authors’ analysis by recognizing remedies within the Act and then speaking to the importance of the exclusive remedy doctrine. A complete discussion of the court’s ruling in Doss will appear in the Mercer Law Review’s 1996-1997 Annual Survey of Georgia Law.

133. “What is needed is a return to the original conception of the system with its robust exclusive-remedy provision.” Epstein, supra note 1, at 813.
135. Id. at 313, 477 S.E.2d at 578.