Memorandum

RE: *Jackson v. ATS*

Issue One: Whether the Workers' Compensation Act's exclusivity clause bars Plaintiff's tort action because the Act adequately compensates a plaintiff for fraud before the injury.

Short Answer: No. The case law supports the conclusion that intentional torts are not barred by the Act's exclusivity clause because they aren't accidents. Nowhere in the Workers' Compensation Act are employers given carte blanche to knowingly misrepresent their employees' working conditions.

Discussion: No case law supports ATS's argument that a Plaintiff who suffered an on-the-job injury because of employer fraud (e.g., fraud before the injury) is excluded from recovering under tort. See ATS' Motion to Dismiss at 11-12. ATS relies on *Zaytzeff v. Safety-Kleen Corp* and *Johnson v. Hames Contracting* to support their arguments, but as we previously argued in our response to the Motion to Dismiss, neither of those cases supports their conclusion. See Plaintiff's Response at 12-15. *Zayteff*, and the line of cases from which it descends, turns on two distinct issues that are absent from this case: (1) that *psychological* injuries, without some sort of physical manifestation, are not compensable under the Workers' Compensation Act, *but* (2) because the claim for psychological injuries is inextricably linked to a worker's compensation claim for physical injury, the exclusivity bar applies. The case stands for the premise that, simply because "an injury is not compensable under the Act does not necessarily mean it is not within the purview of the Act for purposes of the exclusivity provisions." *Zaytzeff v. Safety-Kleen Corp.*, 222 Ga. App. 48, 50 (1996). And again, the Plaintiff in *Zaytzeff* never alleges fraud before or after the fact. *See id.* at 50 ("Examination of the record also reveals that no genuine issue of material fact exists regarding any fraud committed by appellee upon appellant. *Griggs v. All-Steel Bldgs.*, 209 Ga. App. 253 (433 S.E.2d 89), involving the intentional tort of fraud*, is distinguishable from this case and is not controlling*.) *Griggs* involved an incident of fraud after the fact, and *Zaytzeff* is an unsafe workplace case. *See id.* at 51 (The *Zaytzeff* court upheld the established rule that even if an employer's wilful failure to furnish a safe workplace for his employees results in an injury to those employees, their only recourse is under the Workers' Compensation Act.) Wilfully failing to provide an unsafe workplace is legally and factually distinct from fraudulently misrepresenting that safety measures had been taken when they had not, which is what ATS did.

In *Johnson v. Hames Contracting, Inc.* (208 Ga. App. 664), the plaintiff *did* allege that the employer had fraudulently and intentionally failed to inform him that he would be exposed to asbestos while performing his job. However, the issue addressed in Johnson is identical to that addressed in *Zaytzeff,* i.e., whether "injuries of a type not compensable under Georgia's Workers' Compensation Act are nonetheless barred by application of that Act's exclusivity provision." *Johnson v. Hames Contracting, Inc.*, 208 Ga. App. 664, 667 (1993). Again, as we argued in our previous brief, "Fraud, however, is not an 'accident' […] […] **Exemplary damages for fraud are not within the power of the Workers' Compensation Board to award**.*" Griggs v. All-Steel Bldgs.*, 209 Ga. App. 253, 255 (1993). However, there are facts/language in *Griggs* that might be considered more helpful to ATS's argument. The first is that *Griggs* involved fraud **after the fact**: the plaintiff was induced to sign an unfavorable settlement agreement by an insurance claims agent after he was injured on the job. The second is that the rule propounded by the court is specific to "intentional misconduct of the

defendants *subsequent to the physical injuries* which gave rise to the original workers' compensation claim." *Griggs v. All-Steel Bldgs.*, 209 Ga. App. 253, 255, 433 S.E.2d 89, 90 (1993). There is also language that supports the Defendant's argument that the exclusivity provision applies where there is a reasonable remedy under the act. *See id* at 257 ("Georgia law provides a common law cause of action for fraud or other torts committed by an employer or workers' compensation insurer against a claimant, where such act is not an accident arising out of and in the course of employment and where a reasonable remedy for such conduct is not provided by the Workers' Compensation Act.")

However*,* in *Smith v. Rich's, Inc.* (104 Ga. App. 883), a case cited by and relied upon by *Griggs,* the Court of Appeals held that intentional torts were not compensable under the Workers Compensation Act. Specifically, the court conceded that the plaintiff and defendant, as employee and employer, were under the terms of the Workers' Compensation Act when the injury occurred (making this an intentional tort **before the fact**), however, because the injuries alleged by the plaintiff were not compensable under the Act, she was not barred from bringing a common-law action against her employer.

> 'Injury' and 'personal injury' shall mean only injury *by accident* arising out of and in the course of the employment and shall not, except as hereinafter provided, include a disease in any form except where it results naturally and unavoidably from the accident, nor shall 'injury' and 'personal injury' include injury caused by the wilful act of a third person directed against an employee for reasons personal to such employee. By the plain and unambiguous terms of the statute, the injuries which are compensable under the act are injuries by *accident* whereas the injuries for which this plaintiff seeks damages are alleged to have been done intentionally and maliciously.

Smith v. Rich's, Inc., 104 Ga. App. 883, 884-85 (1961) (internal citations and punctuation omitted) (emphasis in original). *Smith* didn't involve the tort of fraud, but fraud is an intentional tort, it is not an accident, so it should be covered by this rule. The court held that this rule would also apply to the employer (as opposed to a co-worker), "provided it is sufficiently alleged in each count of the petition that the alleged tortious acts were wilful and wrongful acts of the defendant Rich's, Inc., and not merely independent acts of servants, agents or hirelings of the employer." *Id.* at 885.

In conclusion, this is not yet an issue on which the Court of Appeals has issued a clear and controlling rule, but the current case law supports the conclusion that the exclusivity provision of the Act does not apply to this case because ATS committed the intentional tort of fraud. Further, a ruling for ATS on this issue would encourage employers to fraudulently misrepresent the working conditions of their employment and then shield themselves against tort under the exclusivity of the Worker's Compensation Act – an act intended to redress *accidents.* This is a fundamental misuse/abuse of the Act and its legislative intentions.

Issue 2: Is there a case for specific intent to harm.

Discussion: No. ATS might have been consciously indifferent to the fact that their actions would likely result in harm, but there is no evidence to show that ATS specifically intended for Jackson to be harmed while on his delivery route. *See generally Viau v. Dean*, 203 Ga. App. 801 (1992).