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IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,451

JOHN E. FISHER and LILLY MAY FISHER,
as Personal Representatives of the Estate
of SHAUN E. FISHER, deceased,

Petitioners

vs.

SHENANDOAH GENERAL CONSTRUCTION
COMPANY, et al.,

Respondent

AMICUS CURIAE BRIEF OF FLORIDA POWER & LIGHT COMPANY

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Statement of the Case and Facts

The Fourth District Court of Appeal has certified the following question to the Court as one of great public importance:

> Does the Florida Workers' Compensation Law preclude actions by employees against their corporate employers for intentional torts even though the injuries were incurred within the scope of their employment?

This case is presented in the narrow procedural context of a dismissal of plaintiffs' complaint for failure to state a cause of action. While there are minor disputes between the parties as to what the dismissed complaint asserts as being the facts at issue, Florida Power & Light Company ("FP&L") accepts the facts as presented in plaintiff Fisher's Second Amended Complaint and here addresses only the question as certified by the district court of appeal.

Interest of Amicus Curiae

Florida Power & Light Company is the largest private electric utility company in the State of Florida. Its areas of operation extend from the Florida Keys to Georgia on the east coast, and across the southern portion of Florida into Ft. Myers and Sarasota.

As a major employer in Florida generating and distributing energy, FP&L suffers industrial accidents as an unavoidable incident of its far-flung activities. FP&L presently has over 13,000 employees in Florida. To date, the workers' compensation act, and its predecessor workmen's compensation act, have precluded damage suits by FP&L's employees based on events in the course of employment. Because of FP&L's participation in the workers' compensation system of Florida since its inception, employees of FP&L have enjoyed prompt recompense for on-the-job injuries.

The policy advocated by plaintiff Fisher in this case presents a severe threat to the integrity of the workers' compensation system of Florida. FP&L believes that any exception to the bar of common law actions against corporate employers, for what Fisher has alleged to be "intentional" acts taken against employees in the course of their employment, would in short order expose major corporate employers in Florida to innumerable lawsuits and possible tort recoveries. FP&L suggests that this potential for unraveling the entire workers' compensation system is exacerbated for

industries having extensive operations in the state, numerous employees, or facilities which, by their nature, can expose employees to serious injuries.

FP&L is an enterprise which differs materially in respect to the exposure of its employees to risk of injury, from businesses such as insurance, advertising or retail sales. The services provided to its customers by FP&L are highly beneficial. Yet the nature of these services differs in risk exposure from the nature of activities performed in some trades and industries. FP&L's power lines are energized with electric current, many at high voltage levels, and those lines must be maintained and repaired, as needed, oftentimes while energized. Consequently, it is common for FP&L employees to work at night, during bad weather, and occasionally during the outset of tropical storms, simply to maintain essential electric service to its customers.

FP&L is genuinely concerned that, should this Court adopt Fisher's proposed exception to the workers' compensation law, attorneys in Florida will resort to the common law tort system of injury recompense against FP&L, and against those businesses and industries whose services, products, or methods of production and distribution, by their nature, expose employees to substantial but inevitable risks. The amicus brief of the Academy of Florida Trial Lawyers makes evident this goal of the plaintiffs' bar. A simple allegation of "intent," coupled with facts which show merely that a corporate

employer has directed an employee to perform the job for which that employee was hired, will suffice to bring the matter outside chapter 440. Higher risk industries like FP&L, of course, will be the prime targets for this newly-authorized exception to the workers' compensation system.[1]

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[1]FP&L, of course, is a regulated utility. To the extent that additional costs of defending litigation should become a normal part of its business, those additional costs will eventually be reflected in the utility bills of FP&L's customers.

Summary of the Argument

The Florida Workers' Compensation Act is not, as plaintiff Fisher suggests, a statute developed in an earlier era when the tort system was an antiquated forerunner of present law. The Act was adopted in 1979. In that year, the Florida Legislature rewrote the workmen's compensation law after a thorough review and analysis of the entire compensation scheme for workers. In doing so, the Florida Legislature knowingly left intact the basic policy underlying workers' compensation statutes, as previously enacted and as construed by Florida's courts, that workers should be compensated through benefits under the Act, rather than resort to the tort system, for all injuries arising in the course of their employment.

Fisher maintains that only accidental injuries are covered by the act, and that intentional acts, by definition, cannot be termed accidental. This interpretation is contrary to Florida cases which, adhering to the Act's most basic policy, have construed the term "accident" to provide compensation benefits under the Act not only for the tasks performed at the job site in the course of employment, but also for injuries resulting from exposure to workplace hazards.

One year before re-enactment of the Act in 1979, the Florida Legislature adopted for the first time in Florida a co-employee immunity rule designed to overrule common law decisions which had allowed fellow employees to be held liable

for injuries caused to their colleagues on the job. Immunity from suit for fellow workers was extended to all but those extreme forms of behavior which are tantamount to acts falling outside the scope of an employee's work responsibilities for the corporate employer. It is significant that the 1978 Legislature focused on the gross negligence, willful acts and reckless conduct of co-employees -- the very type which plaintiff Fisher would characterize as "intentional" -- yet limited tort recovery opportunities against fellow employees only for those behaviors which go beyond or outside work responsibilities. While doing so, the legislature retained intact the limited and absolute ban on tort suits against corporate employers for all job-related injuries. In re-examining the entire Act in 1979, the legislature again determined that injuries from the negligence of corporate employers, acting through their employees in the course of employment, and injuries resulting from workplace hazards, should remain compensable solely within the framework of the workers' compensation scheme.

Safety in the workplace has been a concern of the Florida Legislature in recent years, both within and outside the Act. The Legislature has not, however, chosen to use the employee compensation provisions of the Act as the mechanism for improving workplace safety. The Division of Workers' Compensation has been authorized to perform safety checks on industries performing dangerous tasks, and has promulgated

regulations to effect that goal. In the realm of exposure to hazardous and toxic substances, the legislature has directed administrative steps to improve workplace safety by separate legislation outside the Act. Thus, the legislature has affirmatively determined, as a matter of policy, that the goal of industrial reform is served best by means other than subjecting an occasional employer to tort recovery.

The trend of the law in other jurisdictions, both judicially and legislatively, is distinctly against the direction Fisher suggests.

Argument

I. THE ACT IS A CONTEMPORANEOUS ARTICULATION OF LEGISLATIVE POLICY THAT THE STATUTORY WORD "ACCIDENT" INCLUDES ALL WORKPLACE INJURIES AND EXPOSURES TO HAZARD.

The valued compromise underlying the workers' compensation act is simple:

> In exchange . . . for the certainty of compensation, the worker relinquishes the right to a jury trial and general damages. In exchange for limited liability, the employer agrees to pay without regard to fault.

Sadowski, The 1979 Florida Workers' Compensation Reform: Back to Basics, 7 Fla. St. U.L. Rev. 641, 642 (1979). This exchange exists to provide prompt benefits for work-related injuries which diminish or deprive the worker of earning capacity, to reduce litigation, and to transfer accident costs, in a socially responsive manner, from workers to employers.

In 1979, Florida adopted the Workers' Compensation Act in an attempt to bring the law "more in line with its underlying theory."[2] The entire Act was rewritten that year, and all phases of the predecessor Workmen's Compensation Act were examined in the process. The 1979 statute was new

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[2]Sadowski, 7 Fla. St. U.L. Rev. at 649. This article was prepared by the chairman and several key members of the House Insurance Committee of the Florida Legislature. That committee was primarily responsible for drafting the 1979 reforms.

legislation. In the course of its development, all old policies and procedures relating to industrial accidents were probed either to be modernized or discarded.

The major features of the 1979 reform were the modification of administrative claims procedure, and the establishment of a wage loss and impairment benefits system geared to the payment of awards grounded upon actual wage loss.

> Through this change, an attempt is being made to provide equity in compensation; reduce subjectivity in determining compensation; reduce the need for attorney involvement and litigation; reduce 'doctor shopping' to obtain higher impairment ratings; provide an incentive for injured workers to return to work; and provide an incentive for employers to provide rehabilitation.

Sadowski, 7 Fla. St. U.L. Rev. at 652-53. FP&L notes these revisions because, contrary to plaintiff Fisher's suggestion, the Act is fresh, new and contemporaneous, not an outmoded vestige of an earlier age. In every sense, the Act reflects the current thinking of Florida's legislative branch of government.

Central to the current Act, as was central to its predecessor, is the employer immunity provision which Fisher seeks to circumvent in this case. Fisher and Shenandoah General Construction Company have discussed the extent to which this section is intended to make the Act an exclusive remedy for employees injured on the job as provided in Section 440.11(1), Florida Statutes (1983). That discussion need not be repeated here. Fisher suggests, however, from an analysis merely of the word "accident" in the Act, that tort immunity

pertains only in the realm of non-volitional, occupational occurrences.

The courts of Florida have consistently construed the Act contrary to Fisher's constricted view. In fact, an "exposure theory" of compensability was created by the courts in response to decisions of claims commissioners who had given the same wooden meaning to the word "accident" which Fisher now suggests. See Festa v. Teleflex, Inc., 382 So.2d 122 (Fla. 1st DCA), rev. denied, 388 So. 2d 1119 (Fla. 1980); Dade County School Board v. Albert, 438 So.2d 990 (Fla. 1st DCA 1983); Brevard County Mental Health Center v. Kelly, 420 So.2d 911 (Fla. 1st DCA 1982). It should be noted that the latter cases adopted the Festa theory of exposure following enactment of this new workers' compensation law.

Festa and its progeny, however, did not really reflect new theory. They were based on cases awarding compensation under the predecessor act to workers injured by repeated exposure to deleterious substances or processes. In those cases, the injuries had resulted from dangers inherent in the tasks performed by employees, none of which arose from events which could be commonly termed accidents. See, Orr v. Florida Industrial Commission, 129 Fla. 369, 176 So. 172 (1937) (exposure to intense heat); Meehan v. Crowder, 158 Fla. 361, 28 So.2d 435 (1946) (exposure to mercury); Czepial v. Krohne Roofing Co., 93 So.2d 84 (Fla. 1957) (exposure to dust and fumes).

A second line of cases also disputes Fisher's literal reading of the term "accident." Recently, the First District Court of Appeal held that a Winn-Dixie employee could not sue her employer for an alleged intentional battery by her supervisor. Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985). Brown argued, as does Fisher here, that intentional torts are outside the purview of the statute because an intentional act can never be termed an accident. The court rejected this contention, citing several decisions in which assaults and intentional acts have been treated as accidents arising out of and in the course of employment. See Hill v. Gregg, Gibson & Gregg, Inc., 260 So.2d 193 (Fla. 1972) (superintendent severely assaulted claimant after firing him); Tampa Maid Seafood Products v. Porter, 415 So.2d 883 (Fla. 1st DCA 1982) (claimant stabbed by fellow employee); Prahl Bros., Inc. v. Phillips, 429 So.2d 387 (Fla. 1st DCA 1983) (claimant robbed by intruder).[3] See also, Sands v. Union Camp Corp., 559 F.2d 1345 (5th Cir. 1977), involving a supervisor's assault and battery claimed not to have been an accident but held to have arisen in a work-related dispute.

The exposure theory of accident, as well as the cases finding intentional conduct on the job to be compensable as a

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[3]Outside the realm of the Act, of course, are intentional torts, such as an assault, which are not employment-related at all, and are not causally connected to any risk or hazard of employment. See, for example, Schwartz v. Zippy Mart, Inc., 470 So.2d 720, 724 (Fla. 1st DCA 1985)

form of accidental injury under the Act, demonstrate that Florida's courts have uniformly applied the workers' compensation laws to cover work-related injuries. This construction of the term "accident" has obviously benefited workers by providing them prompt recompense for lost earnings, thereby promoting the legislature's goal of making the Act a self-executing system of remediation for employee injuries. Old Republic Insurance Co. v. Whitworth, 442 So.2d 1078 (Fla. 3d DCA 1983).

In reforming the law of workers' compensation in 1979, the legislature saw fit not to alter judicial decisions providing coverage under the Act for all forms of injury originating from risks connected with employment and occurring as a natural consequence of job activities. Plaintiff Fisher proposes a judicial change of direction from the courts' expansion of workers coverage -- an expansion which the legislature by its re-enactment of the policy, plainly chose not to restrict.

As a practical matter, Fisher seeks to label as intentional conduct the same negligent forms of workplace events and hazards which have historically been fully compensable under the Act. A prime example is Zurich Insurance Co. v. Scofi, 366 So.2d 1193 (Fla. 2d DCA), cert. denied, 378 So.2d 348 (Fla. 1979). In that case, a negligence suit was filed based on a trench cave-in allegedly resulting from violations of state and federal safety rules. At issue was the tort liability of the job-site supervisor, in his capacity as a

co-employee. The court found that the supervisor was carrying out (or failing to carry out) the employer's obligations when he failed to maintain the work area in compliance with safety rules. The court nonetheless characterized this omission as within the employer's non-delegable obligation to ensure workplace safety. That duty, the court held, required compensation within the bounds of the workmen's compensation laws, rather than resort to the tort system. Id. at 1195. See also, Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA), rev. denied., 399 So.2d 1141 (Fla. 1981).

As Zurich illustrates, Fisher is simply asking the Court to relabel, as intentional conduct, that which over the years has been negligence in varying degrees at the job place, and as such, compensable under Florida's statutory scheme. The legislature has not seen fit to change that result, in an area of the law which has always been uniquely assigned to the legislative branch of government. See, Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983); Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363 (Fla. 1972). Fisher's request for a policy change from the judicial branch of government should be rejected.

II. EMPLOYER AND EMPLOYEE LIABILITIES ARE COEXTENSIVE UNDER THE ACT FOR INJURIES IN THE COURSE OF EMPLOYMENT.

The 1978 Florida Legislature addressed the type of intentional and willful conduct which Fisher asserts is outside the range of employer immunity, in the context of fellow servant liability. As noted, it left the immunity of employers intact then, and on re-analysis one year later.

When the legislature re-enacts a statute which has been construed by the courts, it is presumed that the legislature is aware of that construction and intends to adopt it, absent a clear expression to the contrary. Gulfstream Park Racing Ass'n v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983). See also, Kerce v. Coca-Cola Company-Foods Division, 389 So.2d 1177 (Fla. 1980); Simmons v. City of Coral Gables, 186 So.2d 493 (Fla. 1966).

The fellow servant exception -- that co-employees can be subjected to tort liability for certain egregious conduct -- does no more than codify prior court decisions to the effect that acts of negligence outside the scope of employment may be actionable against the actor himself. The statute nonetheless gives fellow servants the same immunity which is accorded employers for those injuries that arise in the employment setting during the course of the employee's activities. See Seaboard Coast Line R.R. v. Smith, 359 So.2d 427, 429-30 (Fla. 1978); Sullivan v. Atlantic Federal Savings & Loan Association, 454 So.2d 52, 54 (Fla. 4th DCA 1984), rev. denied, 461 So.2d

116 (Fla. 1985); Zurich Insurance Co. v. Scofi, 366 So.2d at 1195.

Prior to 1978, an employee whose conduct injured a fellow employee could be forced to respond to a tort suit for ordinary negligence. West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976). The amendment in 1978 for the first time barred actions against a co-employee for ordinary negligence. The district court seems to have viewed the history of this provision from a different perspective, but it accurately reflected the purpose of the fellow servant rule as now stated in Florida's statute. Fisher v. Shenandoah General Constr. Co., 472 So.2d 871, 872 (Fla. 4th DCA 1985).

The effect of the 1978 amendment was a reaffirmation of the policies underlying the Act itself, that negligent acts ordinarily associated with job tasks or workplace hazards were to be compensable only under the Act, whether suit was brought against the employer or the employee. The conventional test of whether an employee is acting within the scope and course of his employment is whether that employee is doing what his employment contemplated. Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st DCA 1985); Morrison Motor Co. v. Manheim Services Corp., 346 So.2d 102 (Fla. 2d DCA 1977), cert. denied, 354 So.2d 983 (Fla. 1978).

For conduct to be within the scope of employment it must have been the kind the employee was employed to perform,

it must have occurred within the time and space limits of the employee's employment, and it must have been activated at least in part by a purpose to serve the employer. See, Schwartz v. Zippy Mart, Inc., 470 So.2d at 724. Fisher was within the scope of his employment under these standards.

Common sense dictates that a corporate employer can only act through its supervisory employees. The exception to the Act which Fisher proposes can be seen for what it is -- an attempt to emasculate the underlying principle of the Act -- by considering the prospect of tort recovery which Fisher would have against his supervisor. Taking the allegations of Fisher's amended complaint in their most favorable light, his supervisor surely would not have been subject to liability for the directives he gave to Fisher at the job site. The supervisor merely sent Fisher to clean certain pipes, a task which was in the ordinary course of the employee's job. Giving workplace instructions as to when and where to perform the employee's normal job responsibilities could not subject the supervisor to tort liability under the Act. Clearly, both Fisher and his supervisor were merely acting within the scope of their employment relationships with the employer when the accident occurred.

Shenandoah General Construction Company, as well as its supervisory employee, committed no intentional tort designed specially to injure Fisher. Simply because a workplace has certain hazards by reason of the products or processes being used, tort recoveries are not available. The

courts in Florida have said that the workers' compensation act is the sole source of redress for consequential injuries. See Clark v. Better Constr. Co., 420 So.2d 929 (Fla. 3d DCA 1982); Dessert v. Electric Mutual Liability Insurance Co., 392 So.2d 340 (Fla. 5th DCA), cert. denied, 399 So.2d 1141 (Fla. 1981).

In short, Fisher would condemn Shenandoah General Construction Company for the commission of an intentional tort as to which even Fisher's supervisor, who controlled Fisher's work routine, would not be held liable under the Act. Because Fisher's injuries arose out of and in the course of his employment, his financial recompense can be found only in workers' compensation coverage. See, Leonard v. Dennis, 465 So.2d 538 (Fla. 2d DCA 1985).

III. THE LEGISLATURE HAS ADDRESSED SAFETY CONCERNS OUTSIDE THE WORKERS' COMPENSATION SCHEME

The Division of Workers' Compensation is empowered to enforce safety rules through civil penalty assessments. Section 440.56(5), Fla. Stat. (1983). The division has promulgated regulations related to hazardous atmospheres, industrial safety and health. Fla. Admin. Code Ch. 38 F-40, 42-44. These standards are specifically supplemented by the Division's adoption as well of federal occupational health and safety standards for industry, construction and agriculture. Fla. Admin. Code Rules 38F-43.01-.03; 29 C.F.R. §§1910, 1926, 1928 (1985).

Florida has recently enacted a toxic substances law which specifically addresses the social impacts of injuries caused by toxic materials encountered in the course of employment. Section 442.101-.127, Fla. Stat. (Supp. 1984). The Division of Workers' Compensation has been delegated authority to enact regulations supporting this act's provisions, as well. This act provides for civil penalties and injunctive relief for conduct violating the law. Section 442.123, Fla. Stat. (1985). Regulations have been adopted which give the statute teeth. See Fla. Admin. Code Ch. 38F -41.10, permitting assessment of the maximum penalty on a daily basis until the violation is cured. Fisher's on-the-job injury in this case arose from exposure to a toxic substance.

The safety rule legislation, and, the toxic substances act, provide a current and direct approach by the legislative branch to industrial safety. It should be noted that the former was enacted within the context of the workers' compensation statute, evidencing a clear intent not to use the compensation scheme of the Act to promote safety concerns.

A juxtaposition of safety legislation and the workers' compensation scheme has been recognized in Florida's courts as relevant to the availability of compensation outside the Act. In Crosby v. Regional Utility Board, City of Gainesville, 400 So.2d 1024 (Fla. 1st DCA 1981), a city employee filed a negligence suit under the provisions of the Hazardous Occupations Act, Sections 769 et seq., Fla. Stat. (1979). Crosby, an electrical lineman, had been severely burned in the course of employment. Notwithstanding a provision of that act authorizing tort liability for negligent conduct, the court found the city immune from suit. The immunity shield of the workers' compensation law prevailed. The court reviewed the now-familiar purpose of the exclusive remedy provision, and it noted that the legislature had retained that immunity knowing the courts have consistently construed it to prevail over other expressions of legislative intent. Relying on the fact that the legislature had not meddled with the courts' construction of the immunity shield, Crosby held that the hazardous occupations act is an alternative remedy available only where the exclusive remedy provision of the Act does not attach. Id.

at 1026. See also, Richmond v. Liberty Mutual Ins. Co., 420 So.2d 360 (Fla. 5th DCA 1982), adopting the view espoused in Crosby.

FP&L suggests that the safety regulation scheme now found in the workers' compensation act, and in the toxic substances law, do not supplant the exclusive remedy provision of the Act. On the contrary, they bolster it. In the course of developing a regulatory apparatus geared directly at job safety, the legislature plainly chose to leave intact the tort immunity given employers with respect to injuries arising in the course and scope of employment.

IV. THE TREND IN OTHER STATES IS AGAINST AN "INTENTIONAL TORT" EXCEPTION TO EMPLOYER IMMUNITY FOR INJURIES IN THE COURSE OF EMPLOYMENT.

Contrary to plaintiff Fisher's assertion, the development of workers' compensation laws outside of Florida demonstrates, with few exceptions, a circumscribed approach to removing intentional conduct from the workers' compensation scheme. Some jurisdictions have created statutory exceptions to the exclusive remedy clause of compensation acts. Love, Punishment and Deterrence: A Comparative Study of Tort Liability Under No-Fault Compensation Legislation, 16 U.C.D.L. Rev. 232, 263 (1983). The legislative branch, of course, is the appropriate forum for that form of policy-making. See, Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983); Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363 (Fla. 1972).

The courts, however, have generally been unwilling to second-guess the legislature unless there has been a conscious and deliberate intention by the employer to harm the complaining employee. See, Hildebrandt v. Whirlpool Corp., 364 N.W. 2d 394 (Minn. 1985); Shearer v. Homestake Mining Co., 557 F.Supp. 549 (D.S.D. 1983), aff'd 727 F.2d 707 (8th Cir. 1984). These cases are instructive.

In Hildebrandt, employees asserted that Whirlpool had exposed them to toxic fumes without warning, fully aware of the hazardous nature of the toxins and of the defective nature of the equipment used in the manufacturing process. The employees

asserted a common-law right of action against Whirlpool resulting from its "deliberate and intentional course of conduct which it could have foreseen would cause physical injury to its workers, in order to secure financial advantage to itself." Hildebrandt v. Whirlpool Corp, 364 N.W.2d at 395. The employees admitted there was no malicious intent to injure them on the part of the employer. They simply contended it was sufficient for the employer to act with substantial certainty that its conduct would cause harm.

The Minnesota high court disapproved the employees' suggestion, citing with approval this extract from Larson's treatise on workers' compensation:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the 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 . . . of the employer short of genuine intentional injury.

In Shearer, a deceased employee's family alleged that the company had intentionally engaged in mining practices which created unreasonable risks of danger, including failure to properly train and equip mining employees and violating known MESA (Mining Enforcement and Safety Administration) regulations. It was also asserted that Shearer's supervisor had maliciously required him to blast holes in an area where the mine ceiling was improperly bolted.

The Shearers argued that the provision in South Dakota's workers' compensation law, which expressly authorized suit for an "intentional tort," should require only that the employer intended to do the act which causes injury or death, including willful, wanton, or reckless conduct undertaken with knowledge and appreciation of the high degree of risk. The court disagreed with Shearer's view of the statutory exception.

> (T)he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classified as an intentional wrong. In such cases, the distinction between intent and negligence obviously is a matter of degree. Apparently, the line has been drawn by the courts at the point where the known danger ceases only to be a foreseeable risk which a reasonable man would avoid, and becomes a substantial certainty.

Shearer v. Homestake Mining Co., 557 F.Supp. at 554-555.

The Shearer court suggested that permitting a common law tort remedy for an employer's willful, wanton or even reckless misconduct would return to the courts many claims which are now cognizable solely as administrative claims. The court refused to undermine the administrative scheme in this way, even in the face of the "intentional tort" exception in the statute. By doing so, the court properly kept the focus of inquiry in compensation cases on whether injury arises out of

and in the course of employment. The court refused to base injury redress on the degree of risk, or on the state of knowledge by the employer and employee regarding hazardous conduct or conditions.

As the Shearer and Hildebrandt courts have recognized, an approach such as Fisher suggests here would undermine the designed balance of workers' compensation laws to confer an expeditious recovery for employees, through a claims process freed from comparative fault analysis and uncertain damage awards, in exchange for tort immunity for employers with respect to injuries in the course of employment.[4]

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[4]Parenthetically, the Shearer panel expressly rejected the rationale of Mandolidis v. Elkins Industries, Inc., 246 S.E. 2d 907 (W.Va. 1978), relied upon in this proceeding by Fisher, as a "distinctly out of line holding." Shearer, 557 F.Supp. at 555. See also, Houston v. Bechtel Assoc. Professional Corp., 522 F.Supp. 1094 (D.D.C. 1981); Great Western Sugar Co. v. District Court, 610 P.2d 717 (Mont. 1980). The continuing vitality of Mandolidis, in light of its legislative overruling (see Shenandoah's answer brief at pages 10,15-16) is, of course, of no moment to Florida jurisprudence. The West Virginia story is instructive, however, for it illustrates the uniquely statutory arena in which the legislative branch adjusts rights and makes policy. The adoption by the West Virginia legislature of a specific statutory framework for intentional acts, moreover, shows again the questionable wisdom of judicial intercession on a piecemeal basis.

The modern trend of authority does not support an expansive intentional tort exception to the tort immunity provisions of workers' compensation statutes. See additionally, Mingachos v. CBS., Inc., 196 Conn. 91, 491 A.2d 368 (1985); Perille v. Raybestos-Manhattan-Europe, Inc., 196 Conn. 529, 494 A.2d 555 (1985); Noonan v. Spring Creek Forest Products, Inc., 700 P.2d 623 (Mont. 1985); Reed Tool Co. v. Copelin, 689 S.W. 2d 404 (Tex. 1985).; Ver Bouwens v. Hamm Wood Products, 334 N.W. 2d 874 (S.D. 1983); Gallant v. Transcontinental Drilling Co., 471 So.2d 858 (La.Ct.App. 1985); Brown v. P.S. & Sons Painting, Inc., 680 F.2d 1111 (5th Cir. 1982) (holding that it is not an intentional tort to fall below OSHA standards for the workplace).

Conclusion

An appreciation of the underlying goals of the workers' compensation system, as set by the legislative branch, has guided the courts of this state. A central goal of the act is to provide recompense to employees rapidly, without regard to relative fault. A necessary corollary to that objective is to reduce litigation and the risk of sporadic and delayed recoveries through the tort system of compensation for on-the-job injuries. The exclusive remedy provision has been crafted by the legislature and nurtured by the courts to implement that goal. On recent re-enactment of the entire compensation scheme, the exclusivity of remedy provision was retained intact. This court should decline Fisher's request to carve a judicial exception into a uniquely statutory area of the law.

Workplace hazards can cause injuries. The workers' compensation system nonetheless provides a means of recovery for injuries from those hazards. To label a job hazard as intentional is merely an exercise in linguistics but with grave implications for the current system of distributing benefits to injured workers.

The proposed statutory construction suggested by plaintiff Fisher totally neglects the legislature's will and judicial precedent. The policy of the act is only served by recognizing that workplace safety is a non-delegable duty of

the employer inseparable from other job responsibilities. Injuries arising from accidents in the course of employment, FP&L submits, should remain compensable solely under the Act.

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