IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67,451
DCA NO.: 84-2142

JOHN E. FISHER and LILY MAY FISHER, as Personal Representative of the Estate of SHAUN E. FISHER, Deceased,

Petitioners,

vs.

SHENANDOAH GENERAL CONSTRUCTION COMPANY, et al,

PETITIONERS' BRIEF

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

Appellants JOHN E. and LILY MAY FISHER, Personal Representatives of the Estate of Shaun E. Fisher, appeal the Final Order entered on July 17, 1985 by the Fourth District Court of Appeal of the State of Florida, affirming the trial Court's Dismissal with Prejudice of Fisher's Complaint against Shenandoah General Construction Co. and certifying the following question to this Court:

> "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."

Shaun E. Fisher was an employee of Shenandoah, a Florida corporation of Pompano Beach, Florida. (R-1). On December 7, 1981, while working for Shenandoah, he was required to clean out an underground pipe with a high-power hose. While inside the pipe, Shaun Fisher was overcome by methane gas, was injured and died. (R-2).

A Complaint was filed by the Esate of Shaun E Fisher on September 3, 1982. (R-1-6). Count I alleged that his death was due to Shenandoah's failure to provide oxygen masks, gas detection equipment, and proper rescue equipment for employees whom Shenandoah knew would be exposed to deadly gases in the underground pipes. It further alleged that Shenandoah failed to properly warn employees of the deadly underground gases and the steps to be taken during and after exposure. Fisher also alleged that Shenandoah deliberately and intentionally refused to comply

with Occupational Safety Health Administration safety regulations despite prior ciations. (R-3). Finally, Fisher charged that Shenandoah required its employees to actively avoid safety inspections.

Count II of the Complaint sought punitive damages against Shenandoah.

Shenandoah moved to dismiss the Complaint arguing that Fisher had plead a common law action in negligence which is barred by the exclusivity provisions of the Workmen's Compensation Act. The trial court agreed and dismissed the Complaint. The appeal of that dismissal was before the Fourth District in Fisher v. Shenandoah, Case No. 83-259.

At oral argument, on December 7, 1983, the Court dismissed the Appeal because the original Order was not final since it permitted Fisher to amend.

Fisher filed a Second Amended Complaint which differed from its predecessor in that Fisher (1) did not style Count I in Negligence, and (2) added allegations 9(i) and (j) which stated:

> "(i) The Defendant intentionally caused the Decedent's death by requiring him to go into pipes which they knew contained noxious fumes and which would in all probability cause injury or death to Decedent.
>
> (j) The Defendant intended that its employee, SHAUN FISHER, go into the pipe in question knowing that there were noxious fumes in the pipe and knowing that the Decedent, SHAUN FISHER, would be facing serious injury or death if he were to go into the pipe unprotected."

On September 5, 1984, the trial court dismissed the Second Amended Complaint. The Order was appealed to the Fourth District

which held that since the legislature did not specifically authorize a common law action for intentional torts against an employer, as it did against fellow employees acting with wilful or wanton disregard or gross negligence, the Court would not permit such an action.

However, the Court was sufficiently concerned by the issue to certify the above mentioned question to this Court.

Petitioner timely appealed pursuant to Florida Rule of Appellate Procedue 9.030(A)(2)(a)V.

SUMMARY of Argument.

I

By limiting the definition of injury to accidents, the Act by implication excludes intentional acts from its coverage therefore preserving the right of the intentionally injured employee to sue his employer at common law.

II

Cases from other jurisdictions have agreed there is a common law action available to employees who have been required to subject themselves to a dangerous condition in the workplace by an employer aware of the hazard. The Collins court even held that an intentional omission to inform the employee of a known danger is sufficient to state a cause of action avoiding the Act's exclusive remedy provisions.

An employee forced to operate an unguarded saw, was permitted to sue his employer in Mandolidis. The Blankenship court recognized the potential for employer misconduct arising from present industrial conditions in which more and more workers are subject to hazardous fumes and chemicals at the workplace.

III

Shenandoah's order to Fisher that he go in the lethal gas filled pipes or be fired constitutes an affirmative intentional act directed specifically at Fisher. Substantial certainty of the results of ones acts is the sine qua non of intentionality.

Such intentional act severs the employment relationship since such harm cannot be contemplated to be part of anyone's employment. To conclude otherwise interposes the Compensation Act as a shield protecting employers from the consequences of their wrongful actions, thus resulting in more injuries to employees.

IV

It is the public policy of Florida to deter intentionally wrongful acts by subjecting wrongdoers to financial responsibility for their conduct. To allow the Act to shield employer's intentional misconduct shifts those injury costs to innocent employers, employees and consumers.

V

The development of the rights of plaintiff in common law tort actions since the enactment of Workmen's Compensation statute has progressively disadvantaged employees regulated under the Act. The Act should be interpreted in light of the changes in tort law and workplace realities rather than on perceived views of drafters who could have never contemplated these changes. Recognition of exceptions rectify the worst inequities under the Act. Since Courts can develop workable doctrinal boundaries for the exceptions, they will not necessarily usurp the legislative function, however such decisions encourage legislative actions. Recognition of the intentional act exception has the salutary

effects of providing an adequate financial recovey to victimized employees as well as improving workplace safety.

I

A STRICT CONSTRUCTION OF THE FLORIDA WORKMEN'S COMPENSATION STATUTE DEMONSTRATES THAT IT DOES NOT BAR AN EMPLOYEE'S COMMON LAW ACTION FOR INTENTIONAL TORTS OF THE EMPLOYER.

In Grice vs. Suwanee Lumber Manufacturing Company, 113 So.2d 742 (1st DCA 1959), although concluding that Plaintiff's claim for testicular injury was within the confines of the Act, the Court accepted the premise in dicta that the Workmen's Compensation Act substitutes for common law rights and liabilities of employee and employer only on the subjects it covers and within its self contained limitations. The Court agreed that it does not affect rights which by implication are not within its purview. The employee may pursue common law remedies only for injuries not encompassed within the expressed provisions of the Act.

The Court stated the objective of the Act is to benefit employee and employer by simultaneously withdrawing from them certain common law rights.

> "This is the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for while the employer assumes a new liability without fault, he is relieved of the prospect of a large damage verdict."

Accord: Chorak v. Naughton, 409 So.2d 35, 38 (2nd DCA 1981).

Section 440.09 provides in pertinent part:

> "Compensation shall be payable under this Chapter in respect to disability or death of an employee if the disability or death results from an injury arising out of, and in the course of employment."

Injury is defined in Section 440.02:

> "Personal injury or death by accident, arising out of and in the course of employment." (emphasis added)

By limiting the definition of injury to accidents, the Statute, by necessary implication, excludes intentional torts of the employer from its coverage. See Grice supra 744.

The 1st DCA in Schwartz v. Zippy Mart, 10 FLW 1134, 1135 held that an employee who was fondled by a Zippy Mart Supervisor, had no cause of action for an intentional tort because the supervisor was not the alter ego of the employer. The Court did state that an employer cannot command or expressly authorize the intentional infliction of an injury on an employee and still claim the compensation shield. The Court concluded that if Zippy Mart had commanded the batteries performed by their supervisor they would have been liable at common law.

Judge Wentworth in his concurrence concluded that if Zippy Mart was alleged to have prior notice of the supervisor's conduct, this would support a finding of inferred wilfullness (emphasis added) (knowledge of dangerous cndition but no attempt to correct). He observed that to extend statutory immunity for wilfull conduct licenses the employer to permit harassment with impunity.

He concluded:

> "I perceive no legislative intent to shield employers, individually or corporate, from direct civil liability for intentional torts or actions based on employer conduct which might inferentially support a finding of wilfull intent".

II

OTHER JURISDICTIONS HAVE HELD THAT THE EMPLOYER WHO KNOWS OF A DANGEROUS CONDITION IN THE WORKPLACE BUT NEVERTHELESS ORDERS HIS EMPLOYEE TO SUBJECT HIMSELF TO SUCH CONDITION ON PENALTY OF TERMINATION COMMITS AN INTENTIONAL TORT WHICH PERMITS THE EMPLOYEE TO SUE AT COMMON LAW.

The earliest case reaching this conclusion was Collins v. Dravo Contracting Co., 171 S.E. 757 (West Virginia 1933) in which Dravo knew the river bank where Collins was working was substantially certain to cave in based on past incidents but required Collins to work there without warning and with deliberate intent to injure or kill him. The bank did cave in entombing Collins.

The Court challenged the notion that Defendant's bad acts must be affirmative i.e. set in motion by the employer for the purpose of inflicting injury or death. The Court reasoned since the Act is based on the affirmative duties of employer to employee, and vice versa, a breach of such duties by definition are acts of omission. The Court argued that such omissions could result from a deliberate intent to injure.

In Mandolis v. Elkins Industries, Inc, 246 S.E. 2nd 907, 914, 922 (W.V. 1978), the employee, machine operator lost two fingers and part of his hand operating a ten-inch table saw not equipped with a safety guard. The allegations were that the employee was told by the employer to operate the machine or be fired, despite employer's knowledge of previous injuries resulting from lack of safety guards. A deliberate intention to injure was alleged. The evidence established that employer had

fired other workers for refusing to run the saw without a guard. On these facts, a common law action was permitted. Even dissenting Judge Neely agreed that since the employer ordered employee to operate the dangerous saw or lose his job, a cause of action beyond the scope of the Workmen's Compensation Act was justified.

In Blankenship v. Cincinnati Milacron Chemicals, Inc., 433 N.E. 2nd 572, 577, 578, 579 (Ohio, 1982) the employees alleged that while working at Cincinnati Milicron Chemical Plant they were seriously injured by toxic substances. They alleged that their employer knew of the dangerous condition but deliberately did not warn them of the danger.

In reaching its conclusion that these allegations gave rise to a common law action for an intentional tort, the Court could find no legitmate reason why a non-employee injured by intentional misconduct could recover at common law when an employee in the same position would not be able to recover.

In a concurring opinion, Chief Justice Celebreeze noted that the increased cost to the employer of eliminating health risks occasioned by common law actions although reducing profits preserves life and health.

> "I submit that anyone who believes that injuries or death from gasses... should not be eliminated because a manufacturer would suffer a competitive disadvantage is an enemy of all workers. The dissenters' position is one that I would expect to be championed by 19th century "robber baron," not a justice of this court who is duty-bound to serve all the people of Ohio."
>
> "Even a superficial perusal of the current literature, cases and commentaies would demonstrate to the casual reader, unless he or she were living on Fantasy Island that toxic fumes and chemicals in the workplace are

genuine hazards to many workers." (cite ommitted).

> "The bottom line of this case is that prohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to "cost-out" an investment decision to kill workers. This abdication of employer responsibility... is an affront to the dignity of every single working man and working woman in Ohio."

Judge Clifford F. Brown, concurring, argued that employer immunity for intentional torts derives from the desire to save dollars at the expense of chemically poisoned and otherwise injured employees. The implied question: Is the dollar saved more important than the worker's life?

> "Our enlightened decision in this case will serve as a good example to courts in other jurisdictions to adopt rules similar to ours, recognizing that it represents a refusal to revert to the Dark Ages of jurisprudence. Progress in workers' safety, which will be promoted by our decision, is as important as jobs for progress. Such workers' safety should rank higher on our scale of human values than that rallying cry and maxim: "Profit is not a dirty word in Ohio." What is good for workers is good for Ohio."

Judge Clark also refuted the employer's prediction of excessive litigation accompanying every workmen's compensation claim as an historically predictable dire forecast of excessive litigation which accompanies any important decision.

The Second Circuit of the United States Court of Appeals in Wade v. Johnson Controls, Inc., 693 F.2d (1982), also recognized a common law action for knowing exposure of employees to toxic chemicals.

The Vermont Act which is similar to our own, provides compensation in Section 618 to any workman receiving a personal injury by accident arising out of, and the course of his employment by his employer.

In Wade, the allegations were that the employer's air exchange and purification systems were inoperable, resulting in toxic levels of lead particulate in the work place, that the employer intentionally failed to repair the exchange system or inform the employees of the danger or suggest medical care at the onset of symptoms. Even though the Vermont Supreme Court had held that nothing short of a specific intent to injure would support a common law action, the knowing exposure of its employees to hazardous lead levels for extended periods of time was held to constitute a specific intent to injure, thus skirting the exclusivity provisions of the Act.

At bar, Fisher has not only alleged a deliberate failure to warn, in the face of knowledge that death or serious injury would result if Fisher entered the pipes filled with lethal methane gas, but also that the employer deliberately ordered Mr. Fisher to go into that death trap on pain of termination. These allegations constitute a deliberate intent to injure, the strictest standard for allowing a common law action against an employer.

Therefore, this Court need not go so far as the Courts in Blankenship, and Wade, since the instant complaint alleges the affirmative act of the employer in ordering the employee to enter the pipes filled with lethal gasses or be fired.

III

AN EMPLOYER WHO ORDERS HIS EMPLOYEE TO ENTER PIPES WHICH THE EMPLOYER KNOWS ARE FILLED WITH LETHAL GASES, COMMITS AN INTENTIONAL TORT NOT ARISING OUT OF THE EMPLOYMENT

A. INTENTIONALITY:

The Second District has held in the context of determining whether a homeowner's policy excluded intentional acts, that such acts must be intentionally directed specifically towards the person injured. Grange Mutual Casualty Company v. Thomas, 301 So.2d 158 (2nd DCA 1974). Furthermore, the Fourth District Court in Sullivan v. Atlantic Federal Savings and Loan Association, 454 So.2d 52 (1984) held that employer's failure to provide adequate security did not state a cause of action for an intentional tort since only omission or failure to provide adequate security was alleged.

In Mandolidis, supra 14, the Court compared an intentional act requiring subjective realization of resulting injury connoting premeditation, knowledge or consciousness with a negligent act, connoting inadvertence and concluded that conduct beyond the immunity bar is that performed with knowledge and appreciation of the high degree of risk of physical harm to another created thereby.

The Mandolidis court concluded that the employer's order to the employee at the risk of his job to operate a machine the employer knew to be dangerous constituted an intentional act.

The Louisiana Supreme Court in Bazley v. Tortorich, 397 So.2d 475 (1981), discussed the question of intentionality necessary to avoid the exclusive provisions of the Workmen's

Compensation Statute in the context of a garbage worker who alleged that his co-employee truck driver acted intentionally in operating the truck without a horn, disregarding mechanical and electrical maintenance standards, failing to keep a lookout, failing to stop at a safe place and failing to warn Plaintiff of danger. Bazley did not allege that the co-employee desired the consequences of his acts or believed that they were substantially certain to result from his acts.

The Court concluded that his actions were not intentional under Louisiana Law. The Court reasoned that the legislature aimed to use the division between intentional torts and negligence at common law.

> "Even a dog distinguishes between being stumbled over and being kicked" Holmes, The Common Law, 3 (1881)...
> "The meaning of "intent" is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct, or (2) knows that that result is substantially certain to follow from his conduct, whatever his desire may be as to that result"... "Thus, intent has reference to the consequences of any act rather than to the act itself." Restatement 2nd, Torts American Law Institute 8 (1965...W Prosser, Law of Torts, Section 8 (4th ed 1971).

The Court concluded that no intentional tort was alleged since the pleadings did not express or imply that the co-employee garbage truck driver desired the consequences of his acts or omissions or that he believed injury or death were substantially certain to result from them.

In Gross v. Kenton Structural and Ornamental Ironworks, Inc., 581 F. Supp 390, 392 (So. Dist. of Ohio 1984), the Court held that an intentional act was alleged where the

employer was aware of a defective staircase yet directed his employee to work under the it. The Court relied on Mandolidis and Blankenship as not requiring specific intent to injure and held that failure to warn of a known danger may amount to intentional tortious conduct. The Court on a Motion for Summary Judgment found evidentiary questions as to the employer's knowledge of the danger posed by the stairway and his conduct in removing the scaffolding before ordering the employee to work under it. The Court remanded these questions to the trier of fact.

The Supreme Court of Ohio recently decided the question of intentionality in the case of Jones vs. VIP Development Company, 472 N.E. 2nd 1046 (Ohio 1984). Jones was a consolidation of three cases, two of which warrant a factual rendition.

Willie Gains worked for the City of Painesville as a coalman-ashman at its municipal light plant. Part of his job was to keep coal chutes free from accumulation. The shutes were guarded with a sheet metal safety cover on top. This cover was cut off by the employer with a blow torch. Subsequently, Gains placed his hand in the shute to loosen accumulated coal dust and was caught by a pulley and killed.

In the second case, Donna Hamlin & four co-workers, sued Snow Metal Products, alleging that Snow knew there were toxic chemicals in the workplace but took no action to rectify the situation, did not warn employees of the danger and told them the fumes were harmless.

The Court held both common law actions permissible, despite the fact that Snow's conduct lacked specific intent to injure.

The Court characterized an intentional tort as one in which the employer does not necessarily desire to harm the employee but rather to bring about a result invading the interest of another in a way the law forbids. Intent includes not only desired consequences but those the employer believes substantially certain to result from his actions.

The Court held it is the element of substantial certainty of injury that distinguishes an intentional from a negligent act. This knowledge may be inferred from conduct and surrounding circumstances.

Applying the definition to Mr. Gains, the Court held that the employers removal of the safety cover from the chute, despite his substantial certainty that injury would result, gave rise to a common law action. The evidence showed the employer knew the cover was to protect employees from the kind of injuries Mr. Gains suffered and that the risks to the employees posed by its removal was extremely high.

> "A Defendant who fails to warn of a known defect or hazard which poses a great threat of injury may reasonably be considered to have acted despite a belief that harm is substantially certain to occur. The evidence adduced below supports the findings that Defendant employer knew that the removal of the cover posed a substantial risk to its employees." Jones, Supra page 1052.

Applying the definition to Ms. Hamlin, the Court held that the employer's knowledge of the hazards posed by toxic chemicals along with his failure to correct the dangerous

condition and his assurances that the workplace was safe, constituted an intentional tort.

B. BY ITS VERY NATURE AN EMPLOYER'S INTENTIONAL TORT AGANIST HIS EMPLOYEE CANNOT ARISE OUT OF OR BE IN THE CO OF THE EMPLOYMENT.

Under the Act, an employee engaging in outrageous conduct in derelection of his employment obligation is not entitled to compensation since his outrageous acts do not arise out of the employment. However, if the employer intentionally injures his employee in derelection of the employment obligation, so long as the injury occurs on the job site, while the employee is peforming the duties of his employment, it arises out of the employment thereby precluding a common law action.

Is it not anomalous to deny the employee his Workmen's Compensation remedy based on his intentional acts and yet grant it to the employer who intentionally injures or kills his employee?

Logic and reason compel the conclusion that the employment relationship can never contemplate intentional harm done by the employer to the employee. To hold otherwise would interpose the Workmen's Compensation Statute as a shield protecting intentionally tortious and sometimes criminal conduct. This is obviously not the purpose of the Workmen's Compensation Statute.

If the employer acts with intent to injure his employee, especially if such acts are in furtherance of his business interests, they are not within the contemplation of the employment relation, since it is against public policy to allow

employers to intentionally kill or maim their employees. Keyfetz, 276 AFTL Journal, 32, 1985.

In Magliulo v. Superior Ct., 121 Cal.Rptr. 621 (Court of Appeal, First District Div. 1, 1975). the Court discussed whether an the assault on a waitress by her employer is a risk or condition incident to the employment. The Court reasoned that to so hold would sanction criminal conduct and permit the employer to use the Workmen's Compensation Act as a shield from larger civil liability, which would have been imposed regardless of the common law defenses available to employers prior to the enactment of the Workmen's Compensation Act. The employer's intentional act injuring his employee severs the employment relationship, thus foregoing the protection of the Act.

In Blankenship, supra 576, the Ohio Supreme Court concluded that no reasonable individual would equate intentional and non-intentional conduct in terms of the degree of risk which faces an employee or contemplate the risk of employer's intentional torts as a natural risk of employment.

It would be a travesty of justice to allow the employer to intentionally inflict injury on his employees and then characterize such actions as within the risk incident to the employment.

At bar it is alleged that Shenandoah knew Fisher would be facing lethal risks by entering the pipes without protection but despite that knowledge ordered him into the pipe on penalty of termination. These allegations constitute affirmative acts intentionally directed toward Fisher. A deliberate intent to

injure is alleged since the employer knew or was substantially certain that he was sending Fisher to his death.

Since Shenandoah's actions were intentional, the risk of this particular injury is not incidental to the employment. The intentional act severs the employment relation subjecting the employee to common law liability. To hold otherwise would violate public policies against intentionally tortious or criminal conduct as well as those against intentionally killing or injuring employees by interposing the Act as a barrier against corporate liability.

IV

PUBLIC POLICY WOULD BE VIOLATED IF THE WORKMEN'S COMPENSATION SYSTEM INSURED INTENTIONAL TORTS OF EMPLOYERS AGAINST EMPLOYEES.

This Court in U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, (Fla. 1983) held that liability insurance indemnifying punitive damages assessed against an individual for his own wrongful conduct frustrates the public policy of this State that punitive damages should deter others contemplating aggravated misconduct.

In Northwestern National Casualty Company v. McNulty, 307 F. 2d 432 (5th Cir. 1962) the Court held under Florida Law that public policy prohibited construction of an automobile liability policy to cover punitive damages.

The Court relied on the strong public policy reasons for not allowing irresponsible drivers to escape personal punishment by punitive damages when they slaughter or maim others on the highways. The public policy will not be achieved if the delinquent driver receives a windfall at the expense of other insureds, thus transferring his personal financial obligation to the very persons endangered by his actions. The driving conduct which the court sought to deter, included intentional or malicious wrongdoing, action or inaction evincing a conscious disregard of others from which a jury might infer acts of a criminal nature, whether or not an actual criminal violation.

Finally, in Handley v. Unarco Industries, Inc., 463 N.E. 2d 1011 (Ill App 1st Dist. 1984) the employee alleged that the employer intended to injure or kill him by representing that

asbestos dust was not harmful and by intending that it be trapped in the bodies of workers.

Recognizing a cause of action, the Court observed that the quid pro quo established by the Workmen's Compensation Act was not meant to permit an employer who commits an intentional tort to use the Act as a shield against common law liability thus shifting injury costs to the innocent employers.

At bar, there are strong policy reasons for punishing employers who intend to injure or kill their employees. Such employers should not receive the windfall of limited liability at the expense of innocent employers, employees and consumers.

V

RECOGNITION OF THE EMPLOYEE'S RIGHT TO SUE HIS EMPLOYER FOR INTENTIONAL TORTS IS CONSISTENT WITH THE HISTORY AND PURPOSES OF THE FLORIDA WORKMEN'S COMPENSATION ACT AS WELL AS THOSE OF THE OTHER STATES.

Judge Cardozo in The Paradoxes of Legal Sciences, page 11, 1928, stated:

> "There can be no constancy in the law.. Law defines a relation not always between fixed points but often, indeed oftenest, between points of varying position. The acts and situations to be regulated have a motion of their own. There is change whether we will it or not."

The genesis of the Workmen's Compensation Acts in the United States occurred in the context of tort law as it existed from 1911 to 1920. Exceptions to the Exclusive Remedy Requirement of Workers' Compensation Statutes, 96 Harvard Law Review, 1641 thru 1645 (May, 1983).

At the time these Acts effected the quid pro quo between the employer and employee referred to in Grice, the common law of torts afforded much greater protection for employers in that (1) negligence was more difficult to prove due to strictly limited duties of landowners and the non-existence of negligence per se and res ipsa loquitor. There was no defense of comparative negligence but rather contributory negligence in which any fault on the part of the plaintiff would bar his action completely. The defense of assumption of the risk was well recognized in all states whereas today it is limited to express assumption of the risk. Finally, the fellow servant rule which prohibited suits against co-workers for negligence has been abolished.

At the time the quid pro quo was effectuated, 85% of Plaintiff/Employees were uncompensated, despite the fact that employers were negligent in 70% of the cases. Compendium on Workmen's Compensation,11 National Comm'n on State Workmen's Compensation Laws, (ed. 1973)

Since the the common law rights of Plaintiffs have expanded dramatically, the quid pro quo which was the basis of Workmens' Compensation Acts must be reexamined. The original purposes of these Acts were to provide a reasonable and certain recovery for the employee, encourage a safe working environment and limit liability of employers. Due to the drastic relative increase in expected recoveries of an individual suing in tort as compared with an employee claiming Workmen's Compensation, it is questionable whether the purposes of the Act are being served today.

Judicial recognition of exceptions to the Act are an attempt to reconcile the aforementioned disparities in expected recoveries.

These disparities motivated Courts to apply products liability theories of recovery to the employee at work. G. Calabresi, A Common Law for the Age of Statutes, 198 (1982).

Thus the exceptions alleviate the worst inequities of he status quo.

This Court should interpret the exclusive remedy rule in light of the changes in tort law rather than relying on perceptions of past legislative preferences. Calabresi, Id at 164.

Since the changes in tort law have occured long after the institution of Workmen's Compensation Acts, they could not have been foreseen by the drafters of those Acts who could not have contemplated what effect such changes might have on the exclusive remedy rule.G. Calabresi, The Costs of Accidents, (1970) 164.

Commentators have argued that it is wrong to view the compensation system as a static bargain impervious to societal change. If Courts engage in "ancestor worship" by evaluating allegations of intentional torts contended to constitute an exception in light of what the Act's founding fathers had in mind, regardless of legal changes liberalizing common law recoveries, then workers are bound by these outdated concerns until legislatures revisit the issue. Lewis, A Workmen's Restoration System, in 3, Supplemental Studies for the National Commission on State Workmen's Compensation Laws 9, 23, 1973. The anomalous result of Courts' failures to deal with the tort system as a dynamic process is to increasingly disadvantage workers trapped within a system originally designed for their benefit. The obvious conclusion is that the quid pro quo must be recalibrated to reflect the changes in the tort law and work place which have made the terms of the original trade off unacceptable. The opposition of railroad and maritime workers to Workmen's Compensation coverage as opposed to coverage under Employer's Liability Acts demonstrates that the original bargain could not now be renegotiated on the same terms. Marcus,

Advocating the Rights of the Injured, in Occupational Disability and Public Policy, 77, 90 (E Cheit and M. Gordon eds 1963).

Legislatures have been reluctant to relegislate the bargain due to (1) lack of interest and understanding in the complexities of the law; (2) the stalemate between the preference of diverse interest groups and (3) unfounded fears that stringent compensation requirements in one State could drive employers elsewhere. Report of the National Commission on State Workmen's Compensation Laws, 34, 123-125 (1972). Courts have recognized doctrinal exceptions and been able to draw workable boundaries for them. As to the intentional tort exception, Courts require proof of deliberate employer intention to cause injury. Gross negligence, wilfullness or recklesness is not sufficient to avoid the statutory bar.

Favorable judicial actions on the exceptions could and have aroused legislative interest and prodded legislators into grappling with the complexities of Workmen's Compensation Law. See Calabresi, Supra 164-166. California Supreme Court cases establishing dual capacity and intentional tort exceptions evoked a direct reaction from the State Legislature. The resulting law expanded the Supreme Court's interpretation of the intentional tort exception and eliminated the dual capacity doctrine. Act of September 10, 1982, Chapter 922, Section 6 (b)(I)-2, 1982 Cal.Legis.Scrv 4944 (West) (Allowing tort action for intentional employer assaults and fraudulent concealment of injuries).

Broader judicial recognition of the exceptions would encourage legislators to reach decisions on them but also might encourage them to pursue the comprehensive examination of Workmen's Compensation policy required for an act of reform. Even though Courts have the authority to recognize exceptions, this need not lead to judicial action mandating reforms in the system or expanding the exceptions into a general rejection of the exclusive remedy rule, since the Courts are able to develop workable boundaries for them. Exceptions, Supra page 1660.

The Ohio Supreme Court in Blankenship v. Cincinnati Milacron Chemicals, 433 N.E 2nd 572, 577 (Ohio, 1982), discussed the purposes and objectives of the Ohio Workmen's Compensation Statute in connection with permitting a common law action by an employee for an intentional tort of the employer.

The Ohio Compensation Statute attached is similar to our Act by providing that an employer will not be liable at common law for any injury received by any employee in the course of or arising out of his employment or for any death resulting from such injury. Labor and Industry Code, Section 4123.74.

The Act goes on to define injury in Section 4123.01 as any

> "Injury whether caused by external accidental means or accidental in character and result received in the course of and arising out of the injured employee's employment.

The Court reasoned that since the purposes of the Act were to assure the injured worker an adequate recovery and to improve workplace safety, to bar common law actions for intentional torts would encourage conduct contravening those purposes.

Worker's Compensation Laws achieve optimal work place safety by allocating the burden of accident costs at a level requiring expenditures on safety measures which minimize total accident costs. G. Calabrisi, supra 26-28. Employers are the appropriate party to bear accident costs since they control work place safety and are better able than workers to take preventive measures. National Commissioner's Report supra 39. The worker's sense of self-preservation is his built in incentive to behave safely. Such concerns far outweigh the financial consequences of accidents. E. Downy, Workmen's Compensation, 162 at 36-37, 1924. By failing to impose the full cost of work related accidents on employers, the Workmen's Compensation System creates inadequate economic incentives for work place safety. Interagency Task Force on Work Place Safety and Health, First Recommendations Report I-4 (1978), III-14, III-17 (under the most generous worker's compensation laws, employers bear less than 9% of employee wage loss; current negligence law would transfer 13% of these costs).

Employer liability for work place accident reduces the burden of accident losses since employers are best able to disperse those costs within the industry, among consumers and among workers in general.

Transferring the injury costs of intentional torts to the responsible employers encourages increased expenditures on safety.

Recognizing the intentional tort exception in this case will further the purposes of the Act by providing an adequate

financial recovery to the victimized employee, improving workplace safety and eliminating use of the Act to avoid full payment for the injuries and deaths resulting from their misconduct.

CONCLUSION

The Florida Workmen's Compensation Act does not bar an employee from suing his employer at common law for an intentional tort. Other jurisdictons with Compensation Acts similar to Florida have allowed a common law action against employers who knowingly order their employees to expose themselves to a dangerous condition in the workplace. Shenandoah's command to Fisher to enter the pipes filled with lethal gas constitutes an intentional act not arising out of the employment since such malfeasance cannot be envisioned as part of the employees job. Failure to permit a common law action under these circumstances encourages employers to subject emplyees to certain injury or death. Recognition of the employees right to a common law action for intentional torts is consistent with the purposes of the Act to assure to injured employees an adequate recovery and to improve workplace safety.

Fisher respectfully requests that this Court reverse the affirmance of the dismissal of his complaint and remand this case for futher proceedings in the Trial Court.

CERTFICICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S.Mail to KEVIN A. MALONE, ESQ., Krupnick & Campbell, P.A., 700 S. E. Third Avenue, Fort Lauderdale, Florida 33316 and JONATHAN L. GAINES, ESQ., Fleming, O'Bryan & Fleming, 1415 East Sunrise Boulevard, Fort Lauderdale, Florida 33338 this 17th day of September, 1985.

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RAB/mb