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IN THE SUPREME COURT OF FLORIDA

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

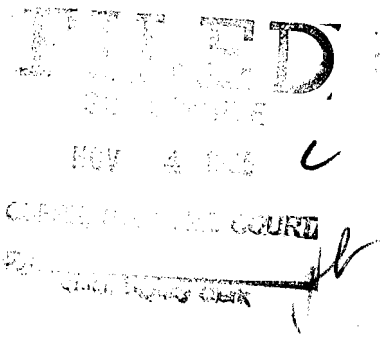
JOHN E. FISHER and LILY MAY FISHER, as Personal Representative of the Estate of SHAUN E. FISHER, Deceased.,

Petitioners,

vs.

SHENANDOAH GENERAL CONSTRUCTION COMPANY, ET AL.,

Respondent.




# BRIEF OF RESPONDENT

Jonathan L. Gaines, Esquire
E. Bruce Johnson, Esquire
FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, FL 33338

Telephones:

Broward : (305) 764-3000
Dade : (305) 945-2686
WPB : (305) 427-3105

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## STATEMENT OF THE CASE AND FACTS

On December 7, 1981, Shaun E. Fisher was accidentally exposed to methane gas while in the course and scope of his employment with Respondent, SHENANDOAH. Shaun E. Fisher died from his injuries, leaving neither a wife nor any minor children. Mr. Fisher's funeral expenses were paid by SHENANDOAH'S worker's compensation carrier.

On September 3, 1982, Petitioners, JOHN E. FISHER and LILY MAY FISHER, as Personal Representatives of the Estate of Shaun E. Fisher filed suit against Respondent, SHENANDOAH. (R. 1-6). Two counts of the Complaint sought damages against SHENANDOAH. Count I, entitled, "Negligence of Shenandoah General Construction Co.," admitted that the decedent was" in the course and scope of his "employment" at the time of his injury, and alleged that SHENANDOAH had been "grossly negligent" in providing for the safety of the decedent. Count II sought punitive damages for the allegedly "grossly negligent and reckless acts" of the Respondent.

On September 27, 1982, SHENANDOAH moved to dismiss the Complaint on the basis of the fact that under Fla.Stat. §440.11, Worker's Compensation is the exclusive remedy for employees, such as the decedent, injured in the course and scope of their employment. (R. 9-10). The trial court granted SHENANDOAH'S Motion and dismissed the Complaint on January 7, 1983. (R. 35). Petitioners filed their first Notice of Appeal on February 4, 1983. (R. 44).

The first appeal was sua sponte dismissed by the Court because following the entry of the Order dismissing Petitioners' Complaint, Petitioners submitted a second Order to the trial court which granted Petitioners' leave to amend their Complaint. This Order was signed without notice to either party. (R. 43). At oral argument, both sides agreed that no new facts could be alleged. However, the Fourth District informed the parties that jurisdiction could not be conferred by agreement.

Petitioners' Second Amended Complaint was filed on August 3, 1984. (R. 61-67). Again, it is admitted that SHAUN E. FISHER was injured, "while in the course and scope of his employment." (R. 62). The ultimate facts alleged in the Second Amended Complaint echo the original Complaint in its allegation of gross negligence against SHENANDOAH. It is alleged that the actions of SHENANDOAH "constituted such willful and wanton disregard of the rights of its employees and such gross negligence that the actions constituted an intentional and/or reckless intent to cause injury to its own workers." (R. 63-64).

The allegations of "negligence" are repeated throughout the counts of the Second Amended Complaint which Petitioners now seek to characterize as an intentional tort claim. (R. 62-64, Par. 9, 10, 12, 13, 14).

It should also be noted that throughout Petitioners' Brief it is stated that the employee was ordered to enter the pipe in question "on penalty of termination." (Petitioners' Brief at 12, 18). In fact, there is no such allegation in the

Second Amended Complaint.

SHENANDOAH filed its Motion to Dismiss the Second Amended Complaint on August 7, 1984. (R. 68-69). The Motion to Dismiss asserted that no matter what degree of employer's ngeligence is alleged, Workers' Compensation is the exclusive remedy for an employee, such as FISHER, injured in the course and scope of his employment. The Motion to Dismiss also asserted that the Second Amended Complaint did not assert any ultimate facts which would support a claim for punitive damages against the corporate employer.

The trial court granted the Motion to Dismiss and dismissed the Second Amended Complaint, with prejudice, on September 5, 1984. (R. 73). Petitioners did not seek further leave to amend and indicated that no facts beyond those contained in the Second Amended Complaint could be alleged.

Petitioners' Notice of Appeal was filed on October 4, 1984.

The Fourth District in Fisher v. Shenandoah General Construction Co., 472 So.2d 871 (Fla. 4th DCA 1985) held that the Petitoners' claim was barred by the exclusivity provision of the Worker's Compensation Law, Fla.Stat.§440.11. The Court stated that both the "actual statutory language" and the "entire underlying premise of the Worker's Compensation Law" precluded the Petitioners' action, even if it was assumed that the Second Amended Complaint sufficiently alleged an intentional tort. 472 So.2d at 872. The Court expressly withheld any ruling on whether the allegations did state an in-

tentional tort action, and certified the following question of great public importance 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.

## SUMMARY OF ARGUMENT

### I.

The allegations of the Second Amended Complaint are legally insufficient to state a cause of action sounding in intentional tort, and at most allege "gross negligence" or "willful and wanton negligence." As such, Petitioners' action is plainly barred by the provisions of Fla.Stat.§440.11, and there is no underlying basis for the certified question.

### II.

Even if we assume that the Second Amended Complaint does allege an intentional tort, the provisions of the Florida Workers' Compensation Act, as enacted by the Legislature, preclude an employee from bringing an intentional tort action against an employer with regard to injuries incurred in the course and scope of employment. This result is mandated by an application of well recognized rules of statutory construction to the plain language of the statute. Therefore, the certified question must be answered affirmatively.

### III.

The out-of-state authorities upon which Petitioners place heavy reliance are not germane to a construction of the Florida Workers' Compensation Act. Petitioners urge this Court to judicially legislate an amendment to the exclusivity provision of the Worker's Compensation Act in violation of the

well recognized doctrine of the separation of powers between the judicial and legislative branches of government. Additionally, Petitioners urge the Court not only to judicially create such an amendment, but to incorporate into it an unworkable and widely rejected definition of "intent" so that the Court's judicial creation will be tailored to the allegations of "gross negligence" in the Second Amended Complaint.

## ARGUMENT

### I.

### THE ALLEGATIONS OF THE SECOND AMENDED COMPLAINT DO NOT SUPPORT A CAUSE OF ACTION SOUNDING IN INTENTIONAL TORT AND THERE IS THEREFORE NO BASIS FOR THE CERTIFIED QUESTION.

In its opinion below, the Fourth District assumed, but did not hold, that the allegations pending before the Court sufficiently support a cause of action sounding in intentional tort. 472 So.2d at 872. In fact, the allegations at bar would, at most, support a claim for gross negligence. As such, Petitioners' action is plainly barred by Fla.Stat.§440.11 and there exists no underlying basis for the certified question.

The essence of the Petitioners' claim is that the injured employee was "willfully", "wantonly" and with "gross negligence" exposed to a dangerous situation which caused him injury. A strikingly similar attempt to erode the exclusivity provision of Fla.Stat.§440.11 was addressed by the Fourth District in the case of Sullivan v. Atlantic Federal Savings & Loan Association, 454 So.2d 52 (Fla. 4th DCA 1984). In Sullivan, the estate of a bank employee killed during a robbery by a robber who had threatened during a previous robbery to return and kill the employee, attempted to state an intentional tort claim against the bank. The allegations in Sullivan mirror the allegations of the Second Amended Complaint in the instant case:

> The decision by Atlantic. . . not to provide any reasonable adequate security measures at the Davie Branch was made with conscious knowledge that such a decision would expose Suzanne Sullivan to certain harm, which was likely to result in personal injury or death caused by an armed robber. . . in the alternative, the decision by Atlantic. . . not to provide any reasonable security measures at the Davie Branch was made with willful, wanton and reckless indifference to the fact that Suzanne Sullivan would thereby be exposed to certain harm, including but not limited to personal injury or death caused by an armed robber. Such conduct demonstrates a willful, wanton and reckless indifference by Atlantic. . . to the rights of Suzanne Sullivan, including but not limited to her right to life. Such conduct is so egregious as to consitute an intentional tort.
>
> 454 So.2d at 54. (emphasis added).

As in the instant case, the Complaint in Sullivan attempted to establish an intentional tort on the basis of the employer's omission to provide safer working conditions. Such allegations were held legally insufficient to state a claim for assault and battery in Sullivan. They are equally insufficient in the instant case. The Complaint at Bar explicitly alleges "gross negligence" and does not adequately allege an intentional tort. As Professor Prosser has stated:

> [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 is not classed as an intentional wrong.
>
> Prosser on Torts (1971), Section 8, Page 32.

This Court, in Seaboard Coastline Railroad v. Smith, 350 So.2d 427 (Fla. 1978), concisely explained the exclusivity provision of the Act, and the inappropriateness of weighing varying degrees of an employer's negligence:

> The Workers' Compensation Act, by its express terms, replaces tort liability of the employer with strict liability for payment of the statutory benefits without regard to fault. An employer under this Act is not liable in tort to employees by virtue of the express language of the Act. Such immunity is the heart and sole of this legislation which has, over the years been of highly significant social and economic benefit to the working man, the employer and the State. And, whether the injury to the employee is caused by "gross negligence," "wanton negligence," "simple negligence," passive or active, or no

> negligence at all of the employer, is of no consequence. There is no semblance of suggestion in these statutes that the Legislature intended to make any distinction in degrees of negligence so far as the employer's immunity is concerned and we see no reason or logic in any distinction.
>
> 350 So.2d at 429. (emphasis added).

Since the complaint at bar at most alleges "gross negligence", or "willful and wanton negligence" the Petitioners' action is barred. The Petition should therefore be dismissed and the decision of the Fourth District should remain intact.

## II.

## THE FLORIDA WORKERS' COMPENSATION LAW, AS ENACTED, PRECLUDES INTENTIONAL TORT ACTIONS BY EMPLOYEES AGAINST THEIR EMPLOYERS.

Even if we assume that an intentional tort has been sufficiently pled by the Petitioners, the certified question must be answered affirmatively because the statutory language of the Florida Workers' Compensation law plainly precludes actions by employees against their employers for injuries incurred in the scope of their employment, including those situations where the injuries are alleged to have been caused by the employer's intentional tort. It is a well accepted rule of statutory construction that when interpreting a statute, courts should avoid an interpretation which would render part of the statute meaningless or mere surplusage. Cilento v. State, 377 So.2d 622 (Fla. 1970); Finlayson v. Broward County, 471 So.2d 67 (Fla. 4th DCA 1985). An application of this rule to the plain language of the Workers' Compensation Law establishes that Petitioners' action against the corporate employer is barred by the statute.

Section 440.11 contains the exclusivity provision which has been called "the heart and soul of this legislation," Seaboard Coastline Railroad v. Smith, 359 So.2d 427, 429 (Fla. 1978):

> The liability of an employer . . . shall be exclusive and in place of all other liability. . .
>
> Fla.Stat.§440.11(1)(emphasis added).

The same section and paragraph of the statute provides that the identical immunity attaches to a fellow employee, acting within the scope of his employment, and then goes on to provide a very telling exception to the co-employee immunity. The statute provides that if a fellow employee acts "with willful and wanton disregard. . . or with gross negligence" suit may be brought against that fellow employee. The significance of this fellow employee exception in construing the Florida Workers' Compensation Statute cannot be over emphasized. As the Fourth District stated in its opinion in the instant case:

> The only reasonable inference from this statutory language is that willful and wanton conduct by a co-worker, will permit a common law action for intentional tort against that co-worker, but not against his employer. Were it otherwise we are of the opinion that this fellow employee exception for willful and wanton conduct, would have to be statutorily expanded to include the employer. As written it does not . . . If the Legislature did not intend to immunize employers from intentional torts, it would have been unnecessary to expressly except intentional torts from the immunization of fellow employees.
>
> 472 So.2d at 872. (emphasis added).

Significantly, Petitioners have cited no case in which a court has created an intentional tort exception to the rule of exclusivity when the statute in force already contained such an exception regarding co-employees. Indeed, such a judicial creation would render meaningless both the co-employee exception and the provision that an employer's liability under the statute is in place of "all other liability."

The Fourth District, in its decision below, goes on to note that "the entire underlying premise of Workers' Compensation law is to permanently remove servants and their masters when acting within the scope of employment, from the tort arena." 472 So.2d at 872. This Court succintly stated the scope of the exclusivity provision in Protectu Awning Shutter Company v. Cline, 16 So.2d 342, 343 (Fla. 1944):

> The Act removes all question of negligence, assumption of risk or wrong doing on the part of the employer.
>
> (emphasis added).

The Petitioners' solitary argument against the plain language of the Statute is that the Act covers only an "injury" arising out of and in the course of employment, and that injury is defined in the Act as, "Personal injury or death by accident, arising out of and in the course of employment." Fla.Stat.§440.02. The Petitioners' reasoning is that an intentional tort can never be an "accident" and therefore, cannot be covered by the provisions of the Act.

The Petitioners' reasoning is specious, because, while it does employ the statutory definition of "injury" it fails to include the statutory definitions of "accident."

> "Accident" means only an unexpected or unusual event or result, happening suddenly.
>
> Fla.Stat.§440.02 (emphasis added).

Contrary to Petitioners' argument, the statutory definition of "accident" is not inconsistent with an intentional tort in any way. In fact, in Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985), the First District had occasion to examine the question of whether an intentional tort could be considered an "accident" within the meaning of the Worker's Compensation Act. The Brown case involved the fondling of an employee by her supervisor. In attempting to state a common law cause of action against her corporate employer, one of the arguments advanced by the Plaintiff was that since she was alleging an intentional tort, such could not be considered an "accident" under the Worker's Compensation law. Noting that accident means only an unexpected or unusual event or result happening suddenly, the First District rejected the Plaintiff's contention:

> Such contention is without merit. In a number of prior decisions, assaults and intentional torts have been held to be compensable as accidents arising out of and in the course of employment.
>
> (Citing Hill v. Gregg, Gibson

> and Gregg, Inc., 260 So.2d 193 (Fla. 1972); Prahl Brothers, Inc. v. Phillips, 429 So.2d 386, 387 (Fla. 1st DCA 1983); Tampa Maid Seafood Products v. Porter, 415 So.2d 833 (Fla. 1st DCA 1982).
>
> (emphasis added).

In short, the Florida Workers' Compensation Act, as enacted, precludes an intentional tort action against an employer for injuries occurring in the course and scope of the employment.[1] To hold otherwise would render meaningless the exclusivity provision and the willful act exception to co-employee immunity. The certified question, therefore, must be answered affirmatively.

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[1] While Petitioners argue that this result is harsh, it is a manifestation of the trade-off of rights between employer and employee which allows the system to operate with unarguable benefits to society. Seaboard Coastline Railroad v. Smith, 350 So.2d 427 (Fla. 1978). Of course, since the Act does include an intentional tort exception to exclusivity for co-employees, the victim of such a tort is not left without an additional remedy in conjunction with Workers' Compensation benefits. While a common law action against the corporate employer is precluded, an intentional tort action against other corporate employees, including corporate officers and directors as individuals, is permissible under the statute. See, e.g. Choark v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1981); West v. Jessop, 339 So.2d 1136 (Fla. 2d DCA 1976). Moreover, in most situations such an action would be more appropriate than an action against the corporate employer. As stated by Professor Larson:

> When the person who intentionally injures the employee is not the employer in person nor a person who is realistically the alter ego of the corporation,but merely a foreman, supervisor, or manager, both the legal and moral reasons for permitting a common law suit against the employer collapse, and a substantial majority of modern cases bar a damage suit against the employer.
>
> 2A Larson's Workmen's Compensation Law, Section 68.21 (1982).

## III

## THE AUTHORITIES CITED BY PETITIONERS FROM OTHER JURISDICTIONS ARE NOT GERMANE TO A CONSTRUCTION OF FLORIDA'S WORKERS' COMPENSATION STATUTE.

The bulk of Petitioners' Brief discusses cases from other jurisdictions in an attempt to persuade the Court to judicially create, in spite of the statutory language, an intentional act exception to the exclusivity provision of the Workers' Compensation Act. Additionally, since the allegations of Petitioners' pending Complaint at most allege willful and wanton conduct or gross negligence (as opposed to a specific intention to cause the injury) Petitioners urge the Court to allow such allegations to suffice as "intent" in the proposed judicial creation. In support of this expansive concept of "intent" Petitioners place heavy reliance upon cases such as Mandolidis v. Elkins Industries, Inc., 249 S.E.2d 907 (W.Va. 1978). The expansive view of "intent" announced in Mandolidis, which Petitioners embrace, has been firmly rejected not only in the vast majority of jurisdictions which have enacted intentional act exceptions, but also in West Virginia itself where the decision was effectively reversed by a legislative amendment to the Workers' Compensation Act.

At the outset, it should be pointed out that in most states where there is an intentional act exception to the exclusivity provisions of Workers' Compensation, that exception exists because it has been statutorily enacted by the Legislatures of the states. For example, the States of Arizona, Louisiana, Oregon, Washington, and West Virginia have

enacted statutes which expressly provide that an intentional tort committed by an employer falls outside the scope of their exclusivity provisions. See, ARIZ.REV.STAT.ANN.§23-1022; LA.REV. STAT.ANN.§23:1032; OR.REV.STAT.§656.156(2); WASH.REV.CODE.ANN. §51.24.02; W.Va. CODE §23-4-2.

While courts in some states have interpreted their state's statutes to allow the bringing of an intentional tort action against an employer by an employee where such is not expressly provided in the statute, Petitioners have cited no case, nor has research revealed any case, where a statute containing provisions such as Florida's §440.11 has been interpreted to allow such an action against an employer. Specifically, it has not been held that an intentional tort action against an employer is permissible where the statute: 1) Provides that an employer's liability under the Act is in place of "all other liability,"; 2) Extends the same immunity from suit to co-employee's; and 3) Includes an exception to the co-employee's immunity, but not the employer's immunity, for intentional acts.

Petitioners urge the Court to judicially legislate an amendment to the Worker's Compensation Act as passed by the Legislature, stating that policy arguments and the enactments of other states would justify such an action. Such is not the case. As the Eleventh Circuit recognized in Libertarian Party of Florida v. State of Florida, 710 F.2d 790, 794 (11th Cir. 1983):

> A court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature.

Indeed, this Court has long recognized the impropriety, and the dangers, of such a judicial excursion into the legislative field. Justice Matthews eloquently addressed this issue in Pepper v. Pepper, 66 So.2d 281 (Fla. 1953):

> The courts have been diligent in striking down acts of the Legislature which encroached upon the Judicial or the Executive Departments of the Government. They have been firm in preventing the encroachment by the Executive Department upon the Legislative or Judicial Departments of the Government. The Courts should be just as diligent, indeed, more so, to safeguard the powers vested in the Legislature from encroachment by the Judicial branch of the Government.
>
> The separation of governmental power was considered essential in the very beginning of our Government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years. Experience

> has shown the wisdom of this separation. If the Judicial Department of the Government can take over the Legislative powers, there is no reason why it cannot also take over the Executive powers; and in the end, all powers of the Government would be vested in one body. Recorded history shows that such encroachment ultimately results in tyranny, in despotism, and in the destruction of constitutional process.
>
> 66 So.2d at 284.

It has also been suggested that Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), in which this Court recognized the "seat-belt defense," supports the Petitioners' proposed judidical amendment to the Workers' Compensation statute. (Amicus Brief of A.F.T.L. at 11). To the contrary, the Court observed in Pasakarnis that it was taking appropriate action precisely because it was not encroaching upon the province of the Legislature, stating:

> Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatuory, when we refuse to reconsider an old and unsatisfactory court-made rule.
>
> 451 So.2d at 451. (emphasis added).

The Worker's Compensation statute is obviously not a "non-statutory" field, and the exclusivity provision at issue is not a "court-made rule." In short, the only appropriate body to consider a change in the immunity provision is the Legislature.

Petitioners do not merely argue that the Court should create an intentional act exception where the Legislature has not. Beyond even that, it is suggested that the expansive and widely rejected concept of "intent" employed in Mandolidis v. Elkins Industries, Inc., 246 S.E.2d 907 (W.Va. 1978), and its progeny, should be a part of this new judicial creation.

Contrary to Mandolidis, in those jurisdictions where an intentional tort exception to the exclusivity of Workers' Compensation has been enacted, the overwhelming weight of authority holds that in order to trigger the exception there must have been an actual and specific intent by the employer to injure the employee. Professor Larson's explanation of this widely recognized rule echoes the allegations at bar and illustrates clearly that, even if Florida was among the states which had enacted an intentional act exception, the pending complaint would still be insufficient to state a cause of action:

> Even when the conduct of the employer goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing to provide a safe place to work, or even willfully and unlawfully violating a safety

> statute, this still falls short of the kind of actual intent to injure that robs the injury of accidental character.
>
> A. Larson, The Law of Worker's Compensation §68.13, p. 13-8. (emphasis added).

See also, Russell v. United Parcel Service, Inc., 666 F.2d 1188 (8th Cir. 1981).

Petitioners place primary emphasis upon Mandolidis in an attempt to characterize the "gross negligence" allegations of the Second Amended Complaint as an intentional tort. Interestingly, when the Supreme Court of West Virginia decided the Mandolidis case, it did not create an intentional tort exception to the exclusivity provision of the West Virginia Act. Rather, the Mandolidis decision entailed the application of a West Virginia statutory provision enacted in 1913 which explicitly created an exception to the exclusivity provision of the West Virginia Act for injuries resulting from "the deliberate intention of his employer to produce such injury or death." W. Va. Code§23-4-2. (Florida, of course, has not enacted such a provision with regard to employers, but has with regard to co-employees.).

Prior to Mandolidis, the rule in West Virginia was in line with the overwhelming weight of authority in other jurisdictions in which an intentional tort exception to worker's compensation exclusivity had been enacted. That is,

in order to fall within that exception there must have been a specific intent on the part of the employer to cause the injury. The Mandolidis court expanded the exception to include, "Willful, wanton, and reckless misconduct." The Court stated that its decision merely provided a definition of "deliberate intention" as used in the West Virginia statute. 246 S.E.2d at 914.

It is instructive to examine what occurred in West Virginia subsequent to the Mandolidis case. In his dissenting opinion Justice Neely stated that the Court was creating a new legal fiction to be known as "constructive intent to injure" which would have the effect of magnanimously supplementing compensation awards in every routine industrial accident. The fear expressed in the Mandolidis dissent was that the new, expansive definition of "deliberate intention" would create excessive litigation outside the Worker's Compensation Act and destroy the concept underlying the exclusivity provision, since claimants would allege in many cases that their injury was caused by "willful, wanton and reckless misconduct."

In fact, the experience in West Virginia following Mandolidis was exactly as the dissenting opinion feared. As was concluded in Mohler, In Wake of Mandolidis- A Case Study of the Recent Trials Brought Under the Mandolidis Theory Courts are Grappling With Procedural Uncertainties and Juries are Awarding Exorbitant Damages for Plaintiffs, 84 W.Va.L.Rev. 893, 928:

> Not only have the number of employee claims increased since Mandolidis but the cost of settlements are rising as well. As Justice Neely predicted, with the proliferation of suits that followed Mandolidis employers are facing many frivilous claims such as the slip and fall cases that have been filed recently. These claims must be met and the prospect of multi-million dollar verdicts has forced many employers to settle, whereas, before Mandolidis employers could rest assured that they were protected by §23-4-2 from most suits by their employees. Now, after Mandolidis, the employers must defend every suit brought since the West Virginia court, in Mandolidis, foreclosed virtually all prospect of obtaining a summary judgment by implying that all cases must go to the jury for a factual determination of whether the employer was guilty of willful, wanton and reckless misconduct.

The West Virginia Legislature reacted to the Mandolidis decision by amending its intentional act exception to provide a definition of "deliberate intention." The Amendment, enacted in February of 1983, amended Section 23-4-2, to provide that deliberate intention is defined as "consciously, subjectively, and deliberately formed intention to produce the specific results of injury or death to an employee." For further rejection of the unworkable Mandolidis standard see, Shearer v. Homestake Mining Co., 557 F.Supp. 549 (D. S.Dak. 1983); Houston v. Bechtel Associates Professional Corporation, 522 F.Supp. 1094 (D. D.C. 1981);

Kittell v. Vermont Weatherboard, Inc., 417 A.2d 926 (Vt. 1980).

In short, in those jurisdictions which have enacted intentional act exceptions the level of intent required is specific intent to cause injury to the employee. Florida has not enacted an intentional act exception regarding employers, but even if it had the allegations of "gross negligence" at bar would not be sufficient to fall within such an exception. Finally, none of the authorities cited by Petitioners have allowed an intentional tort action against an employer under a statutory scheme like Florida's which provides that an employer's liability under the Act is exclusive, extends the same immunity from suit to co-employees, and includes an exception to the co-employee's immunity, but not the employer's immunity, for intentional acts.

The Florida Workers' Compensation law does preclude actions by employees against their corporate employers for intentional torts, even though the injuries were incurred within the scope of their employment. The certified question must be answered affirmatively.

## CONCLUSION

The allegations at bar sound in "gross negligence", and thus Petitioners' Complaint is clearly barred by the provisions of Fla.Stat.§440.11, and there is no foundation for the certified question. Therefore, the Petition should be dismissed and the Fourth District's decision should remain intact.

Even assuming that an intentional tort has been alleged by Petitioners, the Florida Workers' Compensation Act, as enacted by the Legislature, precludes an employee from brining an intentional tort action against an employer for injuries incurred in the course and scope of employment. The out-of-state authorities relied upon by Petitioners do not justify the urged judicially enacted amendment to the Workers' Compensation Statute. For all of the foregoing reasons, the certified question must be answered affirmatively.

JONATHAN L. GAINES, ESQUIRE
E. BRUCE JOHNSON, ESQUIRE
FLEMING, O'BRYAN & FLEMING
Attorneys for Respondents
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, FL 33338
Telephones:

Broward : (305) 764-3000
Dade : (305) 945-2686
WPB : (305) 427-3105

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was furnished by U.S. Mail on this 31st day of October, 1985 to: RICHARD A. BARNETT, ESQUIRE, P.A., 4651 Sheridan Street, Suite 325, Hollywood, FL 33021; TYRIE A. BOYER, ESQUIRE, Boyer, Tanzler & Boyer, One Independent Drive, Independent Life Building, Suite 3030, Jacksonville, FL; KEVIN A. MALONE, ESQUIRE, Krupnick & Campbell, P.A., 700 S.E. Third Avenue, Fort Lauderdale, FL and ROBERT B. MILLER, ESQUIRE, FRIEDMAN & MILLER, 1799 N.E. 164th Street, North Miami Beach, FL 33162.

BY: _____

JONATHAN L. GAINES
E. BRUCE JOHNSON
FLEMING, O'BRYAN & FLEMING
Attorneys for Respondent,
SHENANDOAH GENERAL
CONSTRUCTION COMPANY
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, FL 33338

Telephones:

Broward : (305) 764-3000
Dade : (305) 945-2686
WPB : (305) 427-3105