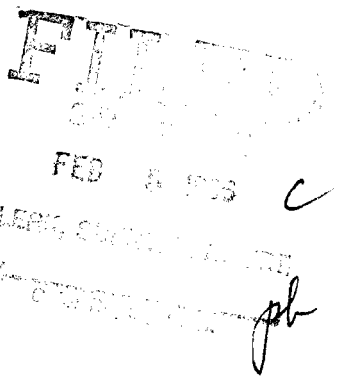
IN THE SUPREME COURT OF FLORIDA

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.,

Respondents.

PETITIONERS' REPLY BREIF

Respectfully submitted,

RICHARD A. BARNETT, P.A.
Emerald Hills Executive Plaza II
4651 Sheridan Street - Suite #325
Hollywood, Florida 33021
Phone: (305) 961/8550 - Broward
624/8541 - Dade

BY: Richard A Barnett
RICHARD A. BARNETT, ESQUIRE

Petitioner wishes to correct an inaccurate factual assertation. He was not, as represented in the Initial Brief, threatened with discharge if he failed to enter the pipe. He was; however, ordered to go into the pipe.

Since the Act specifically provides a common law action against grossly negligent co-employees, Respondents argue that a similar specific provision is necessary to provide a common law action for intentional torts by the employer. This argument fails because the Act always precluded common law actions for gross negligence, therefore necessitating an explicit exception to limit its coverage. Because the Act never covered intentional torts such an explicit exception is unnecessary.

Respondent suggests that only a specific statutory provision can provide an action for intentional tort beyond the scope of the Act. He cites other state compensation statutes as examples. However, courts in Ohio, Vermont and Illinois, among others, have construed their Acts so as not to preclude such an action. Far from being judicial legislation, Court rulings of this nature constitute statutory construction, uniquely the province of the judiciary.

Amicus argues that since the Legislature comprehensively reviewed the workman's compensation system before enacting the 1979 Act, that Act recognized the existing common

law precluding an employee's tort action against the employer for intentional torts. The Florida State Law Review article relied by Amicus for this argument does not establish that the Legislature considered whether the Act precludes intentional torts of employers. Even if Petitioners admit that when the Legislature reenacts a statute, it adopts pre-existing statutory construction, since this is a case of first impression, the argument is inapplicable.

When the Legislature has not explictly defined what behavior constitutes an intentional act beyond the scope of the Act, it is appropriate for Courts to construe the Statute. Nelson v. State, ex rel. Gross 262 So.2d 60 (Fl 1946), State v. Herndon, 27 So.2d 833 (Fl 1946), Ripley v. Ewell, 61 So.2d 420 (Fl 1922).

Amicus argues that the exposure cases, alleging failure to warn of a hazard which the employer knew presented an appreciable risk of injury, demonstrate that the acts at bar are not intentional. Sub judice, Petitioners allege employer's affirmative act, ordering the employee into the pipe, with knowledge (substantial certainty) that death or serious injury would result. The two situations are completely different.

Amicus argues that safety regulations promulgated pursuant to the Act constitute the legislative treatment of intentional torts of an employer. Petitioner would argue these

regulations are minimum standards of workplace safety. When such standards are violated and the employer orders his employee to subject himself to hazards despite employer's substantial certainty that injury or death will result, neither the Act nor its safety regulations should prevent a common law action.

Based on the statutory analysis posited in the Initial Brief, this Court should have no problem concluding that the Act does not preclude an employee's common law action for intentional torts of the employer. The difficut question is what employer behavior amounts to an intentional tort.

Petitioner has argued for the definition of intent enuciated in Bazley v. Tortorich, 397 So.2d 475 (LA 1981):

> "The meaning of intent is that the person who acts either (1) consciously desires the physical result of this 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 is to that result".

Ver Bouwens v. Hamm Wood Products, 343 NW 2d 874 (SD 1983), relied on by Amicus, adopted the definition of intent elucidated by this Court in Spivey v. Battaglia, 258 So.2d 815 (Fl 1972) as when an ordinary reasonably prudent person would believe an injury was substantially certain to result from his conduct. To establish intentional conduct more than the

knowledge and appreciation of risk is necessary. The known danger must stop being merely a foreseeable risk which an ordinary reasonable prudent person would avoid and become a substantial certainty.

Four categories can be postulated for employer acts injuring an employee.

First, the employer is the instrument of injury by shooting, hitting, assaulting or otherwise knowingly injuring or killing the employee. This definition of intentionality is adopted by most jurisdictions permitting an intentional act exception.

Second, the employer affirmatively orders or forces the employee to subject himself to a hazard which the employer knows is substantially certain to cause injury or death. This is the fact pattern at bar.

Third, the employer knowingly fails to warn the employee of a hazard which the employer knows is substantially certain to cause injury or death This is the factual pattern of Blankenship, Wade & Mandolidis.

Fourth, the employer knowingly fails to warn the employee of a hazard which the employer knows is reasonably certain to cause injury or death.

Petitioner argues that the second category of behavior constitutes an intentional tort. This Court need not address the third category of behavior exemplified by Blankenship to hold the instant behavior actionable at common law. Comparing the second and third categories, affirmative act versus omission, this Court's recent decision in Johnson v. Davis 10 FLW 583 (1985) suggests that, as to intentional torts, there is no longer any distinction between misfeasance and nonfeasance.

> "Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and in fact, both essentially have the same effect".

Amicus cites a number of cases to demonstrate that the trend is against Petitioner's position. In fact some of those cases support Petitioner.

In Reed Tool Co., v. Copelin 689 SW 2d 404 (1985)

> "We hold that the intentional failure to furnish a safe place to work does not rise level of intentional injury except when the employer believes his conduct is substantially certain to cause the injury."

In Noonan and Brown, the tort actions were denied because Plaintiffs did not allege that the employers were substantially certain that their employees would be injured by

the known defective machinery. Those cases alleged knowledge of defects not substantial certainty of injury.

Finally, Petitioner addresses the thorny question whether the injury occurred in the course and scope of employment. Any intentional wrong of the employer against his employee is beyond the employment relation. This fact forms the basis of the tort action. These wrongs usually occur when both employer and employee are at the place of employment during the work hours, perfoming their duties. In such a case, the worker has a compensation claim and tort action. If the employer is not performing the duties of the employment, even if the injury occurs at the workplace during work hours then the injury is not in the course and scope of the employment and the worker's remedy is limited to the tort action.

If the employee obtains compensation benefits and recovers under the tort action, such recovery would be subject to a compensation lien. This result allocates the risk to the offending employer rather than to all innocent employers.

In conclusion, since the Act does not cover intentional torts and since the employers behavior at bar is intentional, he should not be permitted to use the Workman's Compensation Act as a shield to avoid responsiblity for his own misconduct.

CERTIFICATE 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, TYRIE A. BOYER, ESQUIRE, Boyer, Tanzler & Boyer, One Independant Drive, Suite #3030, Jacksonville, Florida and ROBERT MILLER, ESQUIRE, Friedman and Miller, 1799 N.E. 164th Street, North Miami Beach, Florida 33162 on this 5th day of February, 1986.

RICHARD A. BARNETT, P.A.
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Hollywood, Florida 33021
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RAB/ntm