IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 67,963

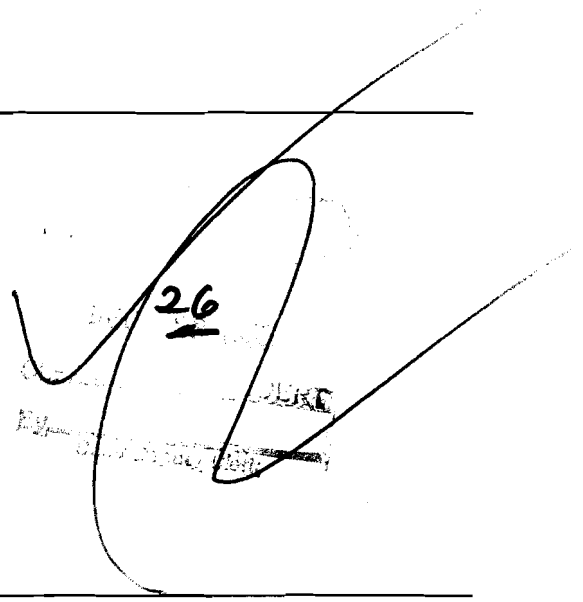
CARL LAWTON and MARY LAWTON

Petitioners

-vs-

ALPINE ENGINEERED PRODUCTS, INC.

Respondent



ON APPEAL FROM THE

FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

Karen E. Roselli, Esq.
KRUPNICK AND CAMPBELL, P.A.
700 Southeast Third Avenue
Suite 100
Fort Lauderdale, Florida 33316
Telephone: 305/763-8181

TABLE OF CONTENTS

TABLE OF CITATIONS

State Court Cases

STATUTES

MISCELLANEOUS

QUESTION PRESENTED

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 employement?

SUMMARY OF THE ARGUMENT

This case presents a question of great public importance. The issue of whether employees are precluded from suing their employers for intentional torts must be addressed by this Court in order for there to be a definitive interpretation of the Workers' Compensation Statute as it applies in this regard. Petitioner contends that the Workers' Compnesation law must not be construed in such a manner as to give employers a shield against liability for their intentional misconduct. Absent an exception to the exlucive liability provision contained in the Act, employees are free to inflict injury upon their employers and knowingly and recklessly disregard the safety concerns of their employees. Allowing employees to sue their employers for intentional wrongs is consistent with the public policy of deterring willful and wanton conduct and of requiring the tortfeasor to bear the financial burden of his own misconduct.

STATEMENT OF THE FACTS

Petitioners, CARL LAWTON and MARY LAWTON, appeal the final order rendered on August 28, 1985 by the Fourth District Court of Appeal, affirming a summary judgment entered by the trial court in favor of the Respondent, ALPINE ENGINEERED PRODUCTS, INC. The Fourth District Court of Appeal certified, as a matter of great public importance, 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?

This Court has discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(V).

The Petitioner, CARL LAWTON, was employed by the Respondent, ALPINE ENGINEERED PRODUCTS, INC., as a punch press operator. On January 5, 1981, while in the course and scope of his employment with ALPINE, MR. LAWTON was severely injured when his hand was crushed in a punch press. At the time of the accident, MR. LAWTON, was making adjustments to the punch press, pursuant to the instructions of his supervisors.

MR. LAWTON applied for and received workers compensation benefits from ALPINE'S carrier. Because of the severity and permanency of MR. LAWTON'S injuries (his hand was mangled and he lost all of his fingers on that hand), MR. LAWTON, filed suit against the manufacturer of the subject press, Federal Press Company in June, 1981. MARY LAWTON, his wife, joined him in the

suit, seeking money damages for loss of consortium.

During the course of discovery, the Plaintiffs learned that ALPINE had received numerous written communications from Federal Press Company informing ALPINE that point of operation guards should be provided on the press and that the operators should be instructed about the various dangers involved in operating the press. These communications were dated from February, 1972 through August, 1980 and were attached to and incorporated into Plaintiffs' Second Amended Complaint.

Based upon information received during discovery, Plaintiffs sought leave of court to name ALPINE as a party defendant. Leave to amend was granted on June 8, 1984. (R.-16). On October 30, 1984, Plaintiffs again sought leave to amend their Second Amended Complaint to include a Count for fraud against ALPINE. (R 34-65). The trial court granted Plaintiffs' motion and the Third Amended Complaint was served. (R.-66).

Following service of the Second Amended Complaint, ALPINE filed a motion for summary judgment. ALPINE based its Motion for Summary Judgment on the theory that Plaintiffs' exclusive remedy was under the workers' compensation law of the State of Florida, and because MR. LAWTON had applied for and received workers' compensation benefits, ALPINE was immune from tort liability.

ALPINE directed its Motion for Summary Judgment against the Third Amended Complaint as well, on the theory that regardless of whether Plaintiffs sought to hold ALPINE responsible for either gross negligence or an intentional tort ALPINE was still entitled

to immunity from suit.

On November 5, 1984, the Honorable George Richardson, Jr., Circuit Judge for the Seventeenth Judicial Circuit, heard ALPINE'S Motion for Summary Judgment, as directed against the Third Amended Complaint, and granted Summary Judgment in favor of ALPINE. (R.1-15, 97 and 98).

Petitioners appealed the rendition of the Final Summary Judgment to the Fourth District Court of Appeal. The Fourth District Court of Appeal affirmed the decision of the trial court upon the authority of Fisher v. Shenandoah General Construction Co., 472 So.2d 871 (Fla. 4th D.C.A. 1985). However, as was done in Fisher, supra, the court certified the above stated question to this court as a matter of great public importance. The respondents filed a motion for rehearing and/or clarification on September 4, 1985. The Fourth District denied the Motion on October 28, 1985.

Petitioners filed a timely notice of appeal seeking to invoke discretionary jurisdiction of this Court pursuant to Florida Rule of Appellate Procedures 9.030(a)(2)(A)(V) on November 25, 1985.

ARGUMENT

I. THE FLORIDA WORKERS' COMPENSATION STATUTE DOES NOT PRECLUDE AN ACTION BY AN EMPLOYEE AGAINST HIS EMPLOYER FOR AN INTENTIONAL TORT.

The Florida Worker's Compensation Act does not provide compensation for injuries or death which are caused by intentional acts. As a result, workers' compensation is not any remedy, much less an exclusive remedy, for employees who are intentionally injured by their employers. Florida Statutes 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. (emphasis added)

The act goes on to define "injury" as follows:

> "Personal injury or death by accident, arising out of and in the course of employment." (emphasis added)
> Id. at Section 440.02

Under the terms of the statute, the event causing the disability or death must be an accident in order for the employee to be eligible for compensation. Since an accident is an event or happening which is unexpected or unintended, there can be no

compensation if the death or disability is caused by an intentional act.[1] Because the act was apparently not intended to cover intentional torts, injured employees must be allowed to sue their employers for intentional wrongs. To construe the statute otherwise would mean that employees who are intentionally injured have no redress whatsoever against their employer and that employers have license to knowingly and intentionally subject their employees to harm.

The interpretation that Florida Workers' Compensation Act does not preclude suits by employees against their employers for intentional acts was recognized by the First District Court of Appeal in Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st D.C.A. 1985). In Zippy Mart, the Plaintiffs filed suit against their employer, Zippy Mart, and against another employee of Zippy Mart for various sexual assaults and batteries which had been committed by the employee in the course and scope of his employment. The Plaintiffs alleged that Zippy Mart was liable for the assaults and batteries under the respondeat superior doctrine and also alleged that Zippy Mart was liable based upon its negligent hiring, supervision and retention of its employee. The

---

1 The definition of "accident" as used within the context of Workers' Compensation Acts has been defined as "an event that takes place without one's forsight or expectation; an undesigned, sudden, and unexpected event;... Its synonyms are undesigned unintended, chance, unforsee, unexpected, unpremedicated..." (emphasis added) Blacks Law Dictionary at p.31 (rev. 4th ed.)

First District Court of Appeal affirmed a Summary Judgment entered in favor of Zippy Mart on the grounds that Workers' Compensation provided the exclusive remedy to the Plaintiffs. The Court noted however, that "an employer... cannot intentionally injure an employee and enjoy immunity from suit." Id. at 1135. Accord Brown v. Winn Dixie Montgomery, Inc., 427 So.2d 1065 (Fla. 1st D.C.A., 1983). In Zippy Mart, however, the employer had not commanded or expressly authorized the batteries performed by the employee and therefore, there was statutory immunity since the only allegation regarding the employer's liablity was based upon simple negligence. Id. at 1135.

Judge Wentworth noted in his concurrence that if the employer had had prior notice of the employee's wrongful acts, it would be possible to find an "inferred wilfulness" on the part of the employer. Id. at 1136. In such case, there would be no legal or moral reason to preclude civil suit against the employer. Judge Wentworth further stated:

> The extension of statutory immunity for civil actions for wilful conduct could effectively result in a license for employers to permit harassment with virtual impunity... I perceive no legislative intent to shield employers, individual or corporate, from direct civil liability for intentional torts or actions based upon employer conduct which might inferentially support a finding of wilful intent. Id. at 1136

In the Ohio Supreme Court case of Blankenship v. Cincinnati Milacron Chemicals, 433 N.E. 2d 572 (Ohio 1982), the Court was required to construe the Ohio Workers' Compensation Statute as it applied to intentional torts committed by employers. The Ohio Statute is substantially similiar to the Florida Statute.

Section 4123.74 of the Ohio Revised Code Annotated provides in pertinent part:

> No employee of any employer, as defined in division (B) of Section 4123.01 of the Revised Code, shall be liable to respond in damages at common law by statute for any injury or occupational disease received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment or for any death resulting from such injury or occupational disease on the condition that such compensation under Sections 4123.01 to 4123.94, inclusive of the Revised Code.

The Ohio Statute, like the Florida Law, goes on to define injury as follows:

> "Injury whether caused by external accidental means or accidental in character and result received in the course of and arising out of the injured employees' employment." Id. at 4123.01

The Ohio Supreme Court concluded that the act was not intended to cover intentional acts by employers. The court reasoned as follows:

> The Workers' Compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability. But the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct. Indeed, Worker's Compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encourage such conduct, and this clearly cannot be reconciled with the motivation, spirit and purpose of the Act. Id. at 577.

The interpretation that the Florida Worker's Compensation Statute excludes coverage for intentional torts is consistent with the statutory provision regarding the acts of fellow employees. Under the Florida Statute, an employee is granted immunity when he injures a fellow employee within the scope of his employment. Fla. Stat. Section 440.11. However, when the employee acts "with wilful and wanton disregard or unprovoked physical aggression or with gross negligence" he is not entitled to immunity from liability. Petitioner acknowledges the statement by the Fourth District Court of Appeal in Fisher v. Shenandoah General Construction Company, 10 F.L.W. 1751 (Fla. 4th DCA, July 17, 1985), that had the legislature intended to expand employer liability for intentional torts as was done for fellow servants, then a similiar provision would appear in the act. Id. at 1751. However, under a strict interpretation of the Workers' Compensation Law, no such similiar provision is necessary. Because compensation is only paid for accidental injuries and death the exclusive remedy provision is not implicated. The policy against permitting a wrongdoer to benefit from his wrongful conduct mandates that the Workers' Compensation Act be interpreted so as to permit an employee's action against the employer for intentional wrongdoing.

II AN EMPLOYEE WHO IS INJURED DUE TO HIS EMPLOYER'S WILLFUL OR WANTON CONDUCT SHOULD BE ENTITLED TO MAINTAIN A CAUSE OF ACTION AGAINST HIS EMPLOYER.

A growing number of state courts and legislatures

have made it possible for an employee to bring a cause of action against his employer for injuries sustained as a result of the employer's reckless disregard for the safety of the employee. For example, in the West Virginia Supreme Court case of Mandolidis v. Elkins Industries, Inc., 246 S.E. 2d 907 (W.Va., 1978), an employee was injured in the course and scopeof his employment while using a table saw that lacked a safety guard. The employer was fully aware of the dangers created by the lack of the safety device but nevertheless required the employees to use the saw whithout a guard. The court determined that the employer could be held liable in a separate civil suit for willful, wanton and reckless misconduct. Id. at 922.

The Northern District Court of Illinois in McDaniel v. Johns-Manville Sales Corp., 487 F.Supp. 714 (N.D. Ill. 1978), denied a motion to dismiss filed by Johns-Manville against a group of employees who had been injured through the inhalation of toxic chemicals while on the job. The court, in applying Illinois law, noted that at least one other court had held that intentional torts are not the type of risks of employment that are contemplated by the Workers' Compensation Statute. Id. at 716.

Several other jurisdictions have likewise held that employees should be able to recover from their employers for intentional acts and wilful and wanton misconduct. See e.g. Blankenship v. Cincinnati Milacron Chemicals, supra, at 572; Wade v. Johnson Controls, Inc., 693 F.2d 19 (2d. Cir. 1982); Ky. Rev. Stat. Section 342.012 (repealed) (1983); Ohio Rev.

Stat. Ann. Tit. 41 (1980); Or. Rev. Stat. Section 656.018 (1983); Vt. Stat. Ann. Tit. 22 Section 618.622; (1985 Supp.); Wash. Rev. Code Ann. Section 51.24-020 (1986 Supp.); W. Va. Code Ann. Section 23-4-2 (1983). Furthermore, a significant number of jurisdictions permit injured employees to receive percentage increases in the compensation award where the employee has been guilty if intentional misconduct. Johns-Manville Product Corp. v. Contra Costa Superior Court, 612 P.2d 948, (Cal. 1980); Annot., A.L.R. 4th 778(1981). See generally Larsons, Workermen's Compensation, 69.20 p. 13-57. Such rulings and legislative enactments evidence the significant concern for safety in the workplace and for the satisfactory redress for worker's injuires caused by intentional acts of the employer.

By abdicating the immunity allegedly granted employers for their intentional acts, employers could no longer knowingly and intentionally expose employees to hazardous working conditions without subjecting themselves to tort liability. Moreover, employers would be less likely to make economic decisions that favor the employer but compromise the safety of the employee. See Blankenship, supra at 572. Since a strong policy behind the Workers Compensation Action is to encourage employers to provide a safe work place it is only logical that employers be held legally responsible for damages which occur when they intentionally disregard the safety of their employees.

III. IT IS AGAINST THE PUBLIC POLICY OF THE STATE OF FLORIDA TO ALLOW A WRONGDOER TO BENEFIT FROM HIS ACTIONS OR TO INSURE AGAINST HIS INTENTIONAL TORTOUS ACTS.

Under Florida law, one cannot obtain liability insurance coverage for punitive damages which may be awarded due to a tortfeasor's wrongful conduct. U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061 (Fla. 1983). The rationale for this prohibition is that the public policy behind punitive damages - to punish and deter - would be frustrated if one could insure against such damages. Id at 1064. As Justice Ehrlich stated in his concurrence in U.S. Concrete Pipe Co., supra:

> The purpose of punitive damages is, as the name indicates, to punish one who's wrongdoing surpasses mere mistake, negligence or thoughtlessness and to deter others from similiar misconduct. When a tortfeasor has acted with wanton or wilful disregard of the safety of others, punitive damages are imposed as a measure of society's dissapproval of such conduct. If the burden of paying the penalty may shifted to an insurer, and ultimately to society at large, the wrongdoer has no impetus to learn his lesson and chage his behavior" Id at 1066.

Since the workers compensation system is a form of insurance, it follows that an employer should not be allowed to insure against injuries caused by his willful and wanton acts. See Blankenship, supra at 577. By immunizing the employer from tort liability, the act leaves the door open for a multitude of abuses and provides no deterent whatsoever to wrongful conduct

by the employer. Moreover, when the employee's injuries are substantial and the workers' compensation received inadequate to fully compensate the individual, the inherent unfairness of the exclusive liability provisions is exacerbated.

As previously noted, an injured employee may recover from a fellow worker who has intentionally injured him. When an injured employee sues a co-employee, the employer or his insurer may be required to defend the co-employee who is responsible, if the co-employee was grossly negligent but still acting within the scope of his employment. Furthermore, the employer and/or his insurer may still be ultimately liable. In such case, the policy reasons for precluding suits by an employee against his employer for intentional misconduct are no longer viable. Additionally, an employer may still be liable for indemnity despite the exclusive liability provision of Florida Statute 440.11(1). L.M.Duncan & Sons, Inc., v. City of Clearwater, 10 F.L.W. 596 (Fla. Nov. 14, 1985).

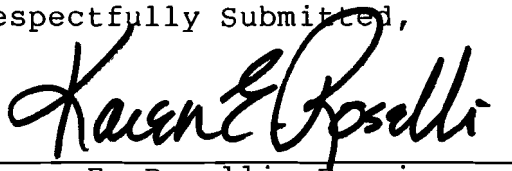
In conclusion, where an injured employee can show that through corporate decisions and policies, the corporate officers have embraced a course of conduct which involves fraudulent misrepresentation as to the safeness of the work place, there is no basis in public policy for protecting the employer from civil suit. The Workers' Compensation exclusivity provision should not be allowed to serve as a shield for intentional misconduct on the part of the employer.

CONCLUSION

For the reasons set forth above, the Florida Workers' Compensation Act should be construed so as to allow an employee to sue his employer for damages resulting from intentional misconduct. ALPINE'S failure to provide point of operation guards on their punch press machines when they had full knowledge of the dangerous propensities of the machine if operated without such a guard, constituted willful and wanton misconduct done in complete and total disregard and indifference to the safety of MR. LAWTON. Such conduct thwarts an important avowed purpose of the Workers' Compensation Act; that of providing workplace safety.

The Summary Judgment entered by the Trial Court in favor of ALPINE on the basis of the exclusivity provision in the Workers' Compensation Statute should be reversed and the Plaintiffs should be entitled to proceed with their claim through trial.

Respectfully Submitted,



Karen E. Roselli, Esquire
Counsel for Petitioners
KRUPNICK AND CAMPBELL, P.A.
700 Southeast Third Avenue
Suite 100
Fort Lauderdale, Florida 33316
Telephone: 305/763-8181