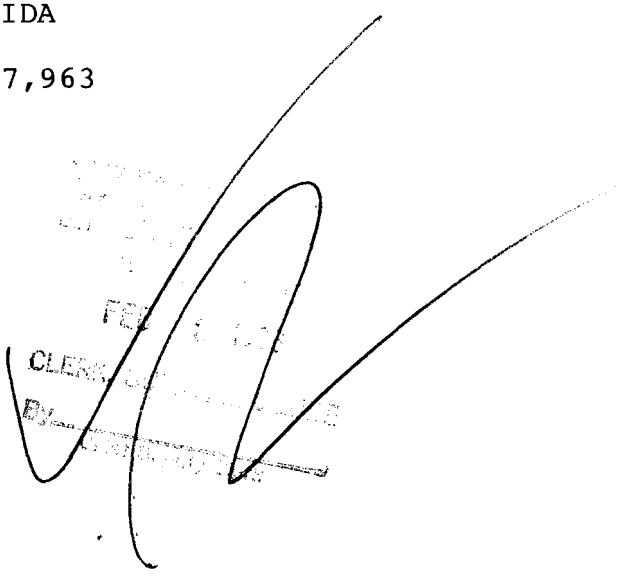
IN THE SUPREME COURT
STATE OF FLORIDA

CASE NUMBER: 67,963



CARL LAWTON and MARY LAWTON,

Petitioners

vs.

ALPINE ENGINEERED PRODUCTS, INC.,

Respondent

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS

KAREN E. ROSELLI, ESQUIRE
KRUPNICK, CAMPBELL, MALONE & ROSELLI, P.A.
SUITE #100 - COURTHOUSE LAW PLAZA
700 SOUTHEAST THIRD AVENUE
FORT LAUDERDALE, FLORIDA 33316
TELEPHONE: (305) 763-8181 DADE: 945-1146

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Pursuant to Fla. R. App. Proc. 9.210, the Petitioners hereby file their Reply Brief.

I.
PLAINTIFFS' THIRD AMENDED COMPLAINT STATES A CAUSE OF ACTION FOR AN INTENTIONAL TORT

Plaintiffs' Third Amended Complaint clearly states a cause of action for an intentional tort. It is well recognized that "intent" is not limited to a desire to bring about physical consequences. Intent is a much broader concept; intent "must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does." Prosser & Keeton, Law of Torts, at 36 (5th Ed. 1984) (emphasis added); see also Restatement of Torts 2d (1965), 15, §8 (a).

The meaning of intent has been addressed by a number of courts. See Mandolidis v. Elkins Industries, Inc., 246 S.E. 2d 907 (W.V. 1978); Gross v. Kenton Structural & Ornamental Iron Works, Inc., 581 F. Supp. 390 (S.D. Ohio 1984). Of particular significance is the interpretation of the term "intent" given by the Ohio Supreme Court in Jones v. V.I.P. Development Co., 472

N.E. 2d 1046 (Ohio 1984); a consolidation of three cases. The Ohio Supeme Court held that conduct which lacks a specific intent to injure can be intentional; a specific intent to injure is not an essential element of an intentional tort. Id. at 1051. In Gains v. City of Painesville, one of the three consolidated cases, the plaintiff, Willie Gains, was employed by the defendant City of Painesville to clean coal chutes. The chutes were equipped with a protective metal safety cover. As in the instant case, the defendant employer removed the safety guards, in spite of the substantial certainty that injuries could result if the guard was removed. While the plaintiff was attempting to remove the coal dust that had accumulated in the chute, his hand became caught between a pulley and the sidewall of the chute. His arm was drawn into the chute by the pulley, thereby causing serious injuries which ultimately resulted in his death. The court held that the defendant employer's act of removing the safety guard in the face of the substantial certainty that injury or death would result, stated a cause of action for an intentional tort. Id. at 1052-53. The Ohio Supreme Court stated:

> A defendant who fails to warn of a known defect or hazard which poses a grave 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 a finding that the defendant employer knew that the removal of the cover posed a substantial risk to its employees. Id. at 1052.

Likewise, the defendant employer in the instant case knowingly and intentionally removed all safety guards and devices when it knew, with substantial certainty, that injuries or death would result. These actions by the defendant, among others, are thoroughly and adequately set forth in Count IV, pararaph 24 (a) through (e) of the Plaintiffs' Third Amended Complaint, and as such, the complaint sufficiently states a cause of action for intentional tortious misconduct.

II.
AN EMPLOYEE WHO IS INTENTIONALLY INJURED BY HIS EMPLOYER IS NOT AUTOMATICALLY PRECLUDED FROM MAINTAINING A CAUSE OF ACTION FOR DAMAGES AGAINST HIS EMPLOYER WHEN THE EMPLOYEE HAS APPLIED FOR AND RECEIVED WORKERS COMPENSATION BENEFITS

The issue of whether a worker, who is injured through the intentional acts of his employer, is precluded from maintaining a cause of action against his employer was also addressed by the Ohio Supreme Court in Jones v. V.I.P. Development Co., supra at 1054. The court held that "an employee is not barred from recovering for an intentional tort by his acceptance of such benefits." Id. at 1054. To preclude an intentionally injured worker from seeking damages against his employer would effectively encourage intentional misconduct by the employer. Id. at 1054. The court reasoned in that "[a]n employer in such a

case can merely refrain from contesting the claim, thereby facilitating the receipt of limited compensation, and then reap the rewards of absolute immunity from further liability. This court will not foster such practices." Id. at 1054.

Additionally, the court refused to force the intentionally injured employee to make an election of his remedies. The court stated that as a practical matter, most workers are pressed to accept compensation under the Act, since workers compensation benefits mean immediate relief. Id. at 1054. Moreover, a severely injured employee often lacks the financial security necessary to sustain him through protracted litigation. Id. at 1054. The court went on to explain:

> To consider the receipt of benefits a forefeiture of an employee's right to pursue the employer in the courts would not only be harsh and unjust, it would also frustrate the laudable purposes of the Act . . . Further, it allow the employer to escape any meaningful responsibiity for its abuses.

Finally, the court noted that receipt of workers compensation, together with common law damages does not amount to a double recovery. The damages award constitutes a supplemental remedy for pain and suffering, loss of consortium, punitive damages; all of which are not compensable under the Workers Compensation Act. Id. at 1055.

The Respondent has also argued that the Fourth District Court of Appeal should have affirmed the summary judgment based upon the selection of remedies doctrine. The argument is without merit since an Appellate Court is not required to base its decision upon an alternative theory. In certifying the aforestated issue to this court, the Fourth District Court of Appeal has expressly recognized the need for the Florida Supreme Court to review this much litigated and heavily debated issue. See also Fisher v. Shenandoah General Construction Co., 472 So. 2d 871 (Fla. 4th DCA 1985). Petitioners once again urge this court to address the issue framed by the Fourth District Court of Appeal, so that the law in this regard may be settled for the present time.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners Reply Brief was mailed this 31st day of January, 1986 to: JOHN P. KELLY, ESQUIRE of the Law Firm of FLEMING, O'BRYAN & FLEMING, Post Office Drawer 7028, Fort Lauderdale, Florida.

KRUPNICK, CAMPBELL, MALONE & ROSELLI, P.A.
SUITE #100 - COURTHOUSE LAW PLAZA
700 SOUTHEAST THIRD AVENUE
FORT LAUDERDALE, FLORIDA 33316
TELEPHONE: (305) 763-8181 DADE: 945-1146

BY: Karen E. Roselli

KAREN E. ROSELLI

1/31/86: CB
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