IN THE SUPREME COURT OF THE
STATE OF FLORIDA

DEBRA ANN TURNER, JAMES CREIGHTON and LYNN CREIGHTON,

Plaintiffs/Appellants,

v.

PCR, INC., a Florida Corporation,

Defendant/Appellee.

Case No: 94,468

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT - NO. 97-2610

INITIAL BRIEF OF APPELLANTS

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CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF THE CASE AND FACTS

This case arises out of a chemical blast explosion that occurred at PCR, Inc.'s (APPELLEE) chemical plant on November 22, 1991. The explosion resulted in the death of Paul Turner (APPELLANT) and serious injuries to James Creighton (APPELLANT). As a result of the explosion, Appellants filed this suit against Appellee and stated several causes of action. (R.42-85). On June 3, 1997, the trial court granted Appellee's Motion for Summary Judgment stating that Counts I-IV were barred by Florida Statute 440.11(1), addressing workers' compensation immunity. (R. 778).

At the time of the explosion, Appellants were employed by the Appellee. Specifically, E.I. DuPont Nemours & Co. (DUPONT) hired Appellee to develop a replacement compound for Freon, which is referred to as F-Pentene-2. The chemical processes involved in the creation of F-Pentene-2 are very complicated. In order to produce the replacement compound F-Pentene-2, PCR and DuPont developed a process that used the chemical compounds Tetraflouroethylene ("TFE"), Hexafluoropropene ("HFP") and aluminum chloride. The process initially developed involved three steps: (1) mixing a solvent with TFE and HFP which results in a crude F-Pentene, an unpurified product containing TFE and HFP; (2) distillation - which is a separation process resulting in purification of the

F-Pentene so that TFE and HFP are removed and no longer present; and (3) hydrogenation - which combines hydrogen molecules with the purified F-Pentene. In an effort to circumvent the difficult and unstable three step process which had resulted in several prior explosions and meltdowns and to meet the deadlines imposed by DuPont, PCR modified the process by attempting to use crude F-Pentene (containing TFE and HFP) to slurry aluminum chloride in a 200-gallon propane cylinder which was not equipped with a safety release device.

The problems involved with PCR's modifications to the process are numerous and significant. First, TFE is one of the most dangerous chemicals in existence. TFE's explosive propensity is two-thirds that of TNT. In fact, TFE is known to explode when exposed to oxygen. ICI of America, Inc. ("ICI"), the company that manufactured and suppled TFE to PCR, advised PCR of the hazards of TFE and of a potential ban on the distribution of TFE. (R.638-639). Of equal importance, PCR also knew that the chemicals involved in this explosion were highly reactive because there were other incidents, some of which were reported involving the same chemicals or compounds containing similar reactive

components. (R.640-641[1], R.644-645[2], R.642-643[3], R. 646[4], R.647-648[5]).

Even after these incidents, PCR took few, if any steps to make the project safer. An ICI trip report dated March 13, 1990, indicates that conditions at PCR were substandard and TFE was not handled properly. (R. 650). Further, a DuPont interoffice memorandum dated November 17, 1990, states that conditions at PCR "are not under good control." (R. 655).

In addition to other documents produced by PCR, DuPont, OSHA, ICI, and other suppliers, the incident reports clearly indicate to experts aware of the dangerous nature of the chemicals and the processes that PCR's conduct was substantially certain to result in the devastating injuries to Creighton and the death of Turner. Turner himself experienced many problems with the project, including

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[1] On October 27, 1988, a reactive compound, similar in structure to those involved in this case, resulted in an explosion. (Correspondence from ICI to PCR).

[2] On June 2, 1989, TFE exploded when it was combined with aluminum chloride in an autoclave that blew a bursting disc. The propane cylinder involved in this case was not equipped with a bursting disc or other safety release device making it substantially certain that the explosion would and did occur.

[3] On March 21, 1989, HFP over-pressurized in propane cylinders

[4] On August 3, 1989, TFE reacted when it was combined with aluminum chloride.

[5] On July 20, 1990, the loading of HFP produced a highly exothermic reaction that was aborted.

several incidents that almost resulted in explosions. (R.718-719). Prior to the explosion, Turner voiced his concerns to PCR regarding the dangerous instability of the project. (R. 719). Moreover, after PCR failed to rectify the potentially disastrous situation, Turner requested vacation time immediately prior to November 22, 1991, so that Turner would not have to participate in a project Turner believed was substantially certain to result in the explosion that took his life. (R.719).

In fact, the deposition taken of Michael Brimeyer, supervisor of the catalog department at PCR, clearly indicates that prior explosions, problems and/or incidents involving TFE and HFP were never reported to him and hence, never discussed with employees of the catalog department, where Creighton was employed. (R. 2810-2812).

Mr. Brimeyer testified that he conducted two or three training sessions involving TFE, but yet was uninformed about exothermic reactions, deflagrations, problems or explosions involving TFE at PCR prior to the explosion at issue. (R. 2759).

However, notwithstanding prior explosions and ICI's, DuPont's and Turner's warnings, PCR continued on a course of conduct which was substantially certain to result in injury or death. As clearly set forth in the affidavits of

Appellants' experts Jack Brand ("Brand") and Dr. John Landrum ("Landrum"), PCR's use of TFE and HFP with the catalyst aluminum chloride in a 200-gallon propane cylinder, totally incapable of withstanding the reaction, coupled with PCR's mixing technique made the explosion on November 22, 1991, substantially certain to occur. (R.776; Brand Affidavit R.686-688).

PCR stood to make a fortune if it could produce this Freon replacement, F-Pentene-2 to meet the demands of DuPont. However PCR was forced to scale up an already problem riddled process to meet fast approaching contract deadlines. (R.768; Brand Affidavit R.686-688). In that regard, PCR intentionally pursued a course of conduct that sacrificed worker safety for company profits.

Appellants filed an appeal to the First District Court of Appeals on the trial court's granting of summary judgment for Appellee based on workers' compensation immunity pursuant to §440.11(1) Fla. Stat. (1991). The Court affirmed the trial court's Order, but certified the following question of "great public importance"to the Florida Supreme Court:

> IS AN EXPERT'S AFFIDAVIT, EXPRESSING THE OPINION THAT AN EMPLOYER EXHIBITED A DELIBERATE INTENT TO INJURE OR ENGAGED IN CONDUCT SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH TO AN EMPLOYEE, SUFFICIENT TO CONSTITUTE A FACTUAL DISPUTE, THUS PRECLUDING

SUMMARY JUDGMENT ON THE ISSUE OF WORKERS' COMPENSATION IMMUNITY

(Appendix 1)

Appellant's experts, both qualified chemists, reviewed voluminous documents and attended depositions in this case. They formulated opinions which specifically detailed their reasons to opine that Appellee engaged in conduct which was substantially certain to result in injury or death to an employee. These affidavits were not conclusory, but supported by fact contained in their review of the documents and depositions taken in this case. Counsel for Appellee never submitted an affidavit by an expert in opposition to Appellant's expert affidavits and simply surmised that they were conclusory. Definitely, this is not the standard of proof required by Appellee moving for summary judgment.

The affidavits submitted by Appellants in opposition to Appellee's motion for summary judgment clearly precluded the findings of the lower courts. The Appellants had no burden to meet, but to submit evidence in admissible form to preclude summary judgment. This was done pursuant to case law and statute. Summary Judgment should be reversed and sent back to the trial court for a jury to determine if Appellee engaged in any intentional act that was substantially certain to result in injury or death to employees.

ISSUE ON APPEAL

IS AN EXPERT'S AFFIDAVIT, EXPRESSING THE OPINION THAT AN EMPLOYER EXHIBITED A DELIBERATE INTENT TO INJURE OR ENGAGED IN CONDUCT SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH TO AN EMPLOYEE, SUFFICIENT TO CONSTITUTE A FACTUAL DISPUTE, THUS PRECLUDING SUMMARY JUDGMENT ON THE ISSUE OF WORKERS' COMPENSATION IMMUNITY?

SUMMARY OF ARGUMENT

This case presents a question of what evidence is necessary to adequately demonstrate a genuine issue of material fact sufficient to forego summary judgment. In the instant case, Appellants proffered uncontroverted affidavits of two qualified expert witnesses in opposition to Appellees motion for summary judgment. The trial court granted summary judgment and in support of such admitted he did not have "time" to review the record before the court and also stated that he felt the affidavits contained "mere conclusions" and as such did not rise to the level required to foreclose summary judgment. The case law of Florida and the clear wording of the Fla. R. Civ. P. clearly indicate that the trial judge was in error in granting summary judgment and as such this case should be permitted to go forward to a jury for determination of the factual issues presented.

The expert witness affidavits proffered by Appellant contain a thorough, fact based analysis of the highly complex issues involved in this case. Each affiant clearly sets forth in their affidavit the voluminous materials contained within the record which each reviewed in preparation for rendering their opinions. Each expert also set forth in detail precisely the information contained within the record upon which their opinions are based. These affidavits are not merely conclusory opinions designed to strategically get passed a motion for summary

judgment. They are well crafted, factually based opinions by disinterested experts prepared to render testimony on behalf of the Appellants in this case. Appellee has not indicated any objections to the qualifications of either of these experts, nor have they entered any expert witness affidavits in opposition to the opinions of Appellants experts.

This case involves very complicated chemical reactions, for which expert witness testimony must and should be utilized to assist the finder of fact in ascertaining whether the actions of the Appellee met the standard required to surpass workers' compensation immunity. Whether Appellees actions meet this threshold is clearly a question of fact appropriately decided by a jury. Appellants have demonstrated that they are prepared to present expert testimony in support of their position. There remains a genuine issue of material fact and as such summary judgment should not have been granted in this case.

Due to Appellee's disregard for the lives of their employees, Appellant, Turner, was killed, and Appellant, Creighton, was severely injured in a chemical explosion which could easily have been avoided if the proper precautions had been taken. Appellee was in a position to protect their employees, but took risks to fulfill a multi-million dollar contract resulting in this tragedy. Appellants have supplied sufficient evidence, expressly in the form of expert witness affidavits, to

demonstrate a factual issue which should ultimately be determined in a court of law by a jury. The order granting summary judgment should be reversed and this case remanded to the Circuit Court for a trial by jury as to all issues so triable as a matter of right.

ARGUMENT

I. THE EXPERT AFFIDAVITS PROFFERED BY THE APPELLANT MUST BE CONSIDERED BEFORE RENDERING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE.

The lower courts in this case have questioned the applicability of the expert affidavits proffered by Appellant, specifically referencing the conclusions reached by each expert and their appropriateness in a summary judgment determination. Florida law is well settled as to when expert witness testimony is appropriate. The Florida Supreme Court in the case Buchman v. Seaboard Coast Line Railroad Company, 381 So.2d 229 (Fla. 1980) set forth the elements required for expert testimony to be admissible. Specifically, the subject matter of the expert's testimony must be "beyond the common understanding of the average layman" and the expert witness must have knowledge which will aid the jury in finding the truth. *See id*. at 230. In determining whether to admit scientific expert testimony, the Florida courts have adopted the Frye standard which requires that the conclusions reached by the expert be generally accepted in the pertinent field of knowledge. In the instant case the Appellee did not file any expert affidavit in opposition to the findings reached by the Appellant's experts therefore the

question of the admissibility of the expert's conclusions should not be before this court. The question is whether the expert affidavits submitted by Appellants are admissible and what weight is afforded to the opinions expressed therein in opposition to the Motion for Summary Judgment filed by the Appellee. A discussion of this issue follows.

There are many instances wherein expert witness affidavits have been relied upon by the Courts in granting and/or denying motions for summary judgment, especially where the issues involved are highly technical in nature. For example, medical malpractice cases often contain factual issues which are outside the common knowledge of the jury. *See* Sims v. Helms, 345 So.2d 721 (Fla. 1977). In Sims, the plaintiff alleged that the defendant physician had been negligent in the procedure utilized to separate the plaintiff's bladder from her uterus during a vaginal hysterectomy. *Id*. at 722. The issue was whether the physician's choice of procedure was proper based upon the circumstances present at the time of the operation. *See id*. at 723. The Court held that without the assistance of the expert medical testimony the jury would be unable to determine whether the defendant physician was negligent. *See id*. *See also* Willage v. Law Offices of Wallace and Breslow, P.A., 415 So.2d 767 (Fla. 3d DCA 1982)(without expert testimony jury would not be able to determine if attorney was negligent in deciding not to call a

witness).

The use of expert witness affidavits at the summary judgment stage of a case has also been accepted in the courts of Florida. *See* Charlonne v. Rosenthal, M.D., 642 So.2d 632 (Fla. 3d DCA 1994)(permitting the use of expert affidavits both in support of and in opposition to Motion for Summary Judgment); Roster v. Moulton, 602 So.2d 975 (Fla. 4th DCA 1992)(finding expert witness affidavits created an issue of fact). In Navison v. Winn and Lovett Tampa, 92 So.2d 531 (Fla. 1957), a personal injury case, expert affidavits were proffered by the defendant in support of defendant's contention of contributory negligence on the part of the plaintiff negating any responsibility of the defendant. The Court considered the affidavits in conjunction with the other pleading which had been filed in reversing summary judgment in favor of the defendant. *See id*. The Court also took note that "neither the Court below nor this Court is permitted to pass upon the credibility of the witnesses or the comparative weight of the evidence where. . .a jury trial has been demanded." *Id*. at 533.

Testimony from expert witnesses in the form of Affidavits have been sufficient to raise genuine issues of material fact, thus surpassing the opposing party's motion for Summary Judgment. Lugo v. Florida East Coast Railway Company, 487 So.2d 321 (Fla. 3d DCA 1986). In fact, the absence of any expert

witnesses has been considered in determining whether summary judgment is granted. Russo v. Plant City Moose Lodge No. 1668, 656 So.2d 957 (Fla. 2d DCA 1995) *distinguishing* Roster, supra. In Russo the failure of the plaintiff to proffer expert testimony was in part the reason why plaintiff was unable to demonstrate a genuine issue of material fact. *Id*. at 958. In Hernandez v. Pino, 482 So.2d 450 (Fla. 3d DCA 1986) the District Court found error in the trial court's exclusion of an expert affidavit proffered in opposition to a motion for summary judgment.

In the instant case the Appellee has challenged the use of the expert affidavits filed by the Appellants. Clearly, the issues of this case are highly technical and well outside the common knowledge of the jury. Consequently, the use of experts would satisfy the requirements of Buchman, in that the testimony would be critical to aid the jury in understanding the complex issues and in rendering a determination as to whether the actions of the Appellee were substantially certain to result in injury or death. The instant case involves complex chemical reactions and questions the procedures utilized by the Appellee in mixing chemical compounds. The question is whether the Appellee required the Appellants to mix these highly volatile chemicals in such a way that was substantially certain to result in injury or death. The complexity of these issues requires expert testimony to aid the jury in determining whether the actions of the

Appellee were substantially certain to result in the injury or death of the Appellants.

Appellee also challenges the conclusory nature of the experts affidavits, however, they fail to proffer any expert affidavit in opposition of those conclusions reached or question the credibility of the experts. As discussed in Navison, the credibility of the experts and the weight of their testimony is to be considered within the province of the jury, not by the court in a Motion for Summary Judgment. Navison, 92 So.2d at 533 (citations omitted).

Moreover, the Florida Rules of Evidence permit an expert to render an opinion on the ultimate issue. "Section 90.703 codifies this principle by providing that opinion testimony is not objectionable solely because it 'includes an ultimate issue to be decided by the trier of fact.' The jury has the power to accept or reject the testimony of expert or lay witnesses and are not bound by their conclusions." Ehrhardt, *Florida Evidence* §703.1, 554 (citations omitted). Therefore, the expert witness affidavits proffered by the Appellants must and should be considered by the court in determining whether any genuine issue of material fact exists before granting a Motion for Summary Judgment.

II. THE AFFIDAVITS OF APPELLANT'S EXPERTS PRESENT GENUINE ISSUES OF MATERIAL FACT PRECLUDING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND THE ORDER OF THE DISTRICT COURT OF APPEALS SHOULD BE REVERSED.

The rule for granting summary judgment is set forth in Fla. R. Civ. P. 1.510 as follows:

> (c) . . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file **together with the affidavits**, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (emphasis added).

The Supreme Court of Florida has set forth when summary judgment should and should not be rendered. In Holl v. Talcott, 191 So.2d 40 (Fla. 1966), the Supreme Court attempted to lay the guidelines for granting of summary judgment. Holl involved a medical malpractice action wherein the plaintiff sued the surgeons, anesthesiologist and hospital for complications she endured as the result of an operation. *Id.* at 42. Each of the defendants moved for summary judgment. *See id.* The plaintiff filed an expert affidavit in opposition to the motion for summary judgment which the defendants moved to have stricken, and was ultimately stricken by the trial court. *See id*. The Court first addressed the burden in a summary judgment proceeding. *See id*. at 43. The party moving for summary judgment has the burden of proving conclusively that there is no genuine issue of

material fact before the court and that party is entitled to judgment as a matter of law. *See id*. The proof thereof "must be such as to overcome all *reasonable* inferences which may be drawn in favor of the opposing party". *Id.* It is not until that burden is met that the burden of proving that there are genuine issues of material fact shifts to the non-moving party. *See id* at 44.

In rendering its decision, the Court took account of the fact that this case involved complicated issues and there was a voluminous record before the Court. *See id*. at 44-45. The Court discussed the affidavits and the alleged deficiencies therein and found that where a case presents such complicated issues it is not required that the affidavits contain each and every detail reviewed in rendering an opinion. *See id*. The question was whether the affidavit, when read together with the record and "considered in the favorable light required to be accorded it", demonstrated that there were factual issues which "could and should be settled only by a trial." *Id* at 45. The Court further held,

> [W]e do not think it was ever intended that in a complicated case such as this one, the opponent of a motion for summary judgment be obligated to have his expert witness cover all the details and formalities that would be required in offering the same experts' testimony at a trial of the cause. . .The evidentiary matter must be both relevant and competent as to the issues in the cause.

Id. The Court also stressed the reluctance to render summary judgment against a

plaintiff foreclosing their day in court. *See id.* at 46. To protect the plaintiff's constitutional right to a jury trial, the Court stated, "the opposing party's papers [should] be liberally read and construed, as opposed to a strict reading of the movant's papers." *Id.* Moreover, the Court held, "Only after it has been conclusively shown that the party moved against cannot offer proof to support his position on the genuine and material issues in the cause should his right to trial be foreclosed." *Id* at 47. On rehearing the Court also indicated that the size of the record alone "mitigates against a finding that no genuine issues of fact exist to be tried." *Id.*

The instant case presents many of the same issues set forth in Holl. This case involves highly complicated issues to which Appellants have proffered expert testimony demonstrative of the genuine issues of material fact which should be resolved by the jury. Under Holl, the affidavits of the Appellants should be given heightened weight in determining whether summary judgment is granted to the Appellee. In addition, the record in this case is highly voluminous and contains many complex issues which cannot possibly be decided as a matter of law by summary judgment.

Appellants in opposition to the motion for summary judgment, submitted the affidavit of Dr. John Landrum. Dr. Landrum's affidavit is specific as to the

heinous conduct engaged in by Appellee in rendering his expert opinion that the conduct of Appellee was substantially certain to result in injury or death. *See* affidavit of John Landrum, (R. VI:999-1011). The trial court in this case incorrectly interpreted the governing law by requiring Appellants to prove that the Appellee knew its acts were substantially certain to result in death or serious injury. In Eller v. Shova, 630 So.2d 537(Fla. 1993) this Court noted that workers' compensation is intended to be the exclusive remedy available to an injured employee "so long as the employer has not engaged in any intentional act designed to result in or that is substantially certain to result in injury or death to the employee." *Id*. at 539 (emphasis added).

In the instant case, Appellants do not allege that Appellee's intentional acts were designed or intended to result in serious injury or death, but rather that Appellee's intentional acts were substantially certain to result in serious injury or death (emphasis added).

Thus, the question properly before the lower courts was whether evidence existed to support a factual issue of whether Appellee engaged in any intentional acts that were substantially certain to result in serious injury or death. It is respectfully submitted that the affidavits, when read together with the record and considered in the light most favorable to the non-moving party required to be

accorded it, demonstrated triable issues of fact, thus precluding summary judgment.

Additional cases have enunciated the standard that summary judgment should not be granted freely and all inferences must be resolved in favor of the non-moving party. In Williams v. City of Lake City, 62 So.2d 732 (Fla. 1953), The Supreme Court stated:

> The right to a jury trial is a very sacred part of our system of jurisprudence and, while we have held that the granting of summary judgment does not infringe upon such constitutional right, that very holding carries with it the idea that such judgments should be sparingly granted and only in those cases where there remains no *genuine* issue of any *material* fact. . .To sum it all up, if there are issues of fact and the *slightest* doubt remains, a summary judgment cannot be granted.. . .all doubts as to the existence of a genuine issue of a material fact must be resolved against the moving party.

When weighing whether a genuine issue of material fact is indeed present the Court must consider many factors such as the issues presented, whether the parties agree as to the facts, and whether the party moving for summary judgment has successfully disproved all contrary evidence. Escobar v. Bill Currie Ford, Inc., 247 So.2d 311 (Fla. 1971).

Arguably, the instant case presents the necessary requirements as enunciated by the Court and meets the threshold for abrogating workers' compensation immunity with regard to a Motion for Summary Judgment. The Third DCA

addressed the applicability of workers' compensation immunity at the summary judgment stage and the requirements of meeting the threshold of one of the exceptions to immunity. Connelly v. Arrow Air, Inc., 568 So.2d 448 (Fla. 3rd DCA 1990). The Court stated,

> the burden of an employee to prove that an employer's act of negligence rose to the level of an intentional infliction of harm, although heavy, is not impossible. The question presented is whether the evidence, viewed in a light most favorable to the appellant, demonstrated conclusively that the employer's actions were not 'substantially certain to cause injury or death to its employees. (emphasis added)

Id. at 449. The Court further addressed the role of the judge in considering the evidence presented in favor of and in opposition to the motion for summary judgment and held, "It is not the role of the trial judge, in ruling on a summary judgment motion, to weigh the evidence for the purpose of resolving the conflict." *Id.* at 451. The only issue is whether the evidence creates an issue of fact, and if it does, summary judgment should not be granted. *See id*.

In the instant case the District Court set forth the appropriate standard which must be met to overcome workers' compensation immunity by citing to Fisher v. Shenandoah, 498 So.2d 882. The District Court recognized that if the Appellants could demonstrate that "the employer engaged 'in conduct substantially certain to result in injury or death'" the appellants would be able to overcome workers'

compensation immunity and proceed with their claim against Appellee. The question then becomes whether the affidavits proffered by the expert witnesses on behalf of the Appellants are sufficient to create a jury issue as to whether this standard was breached by the employer. To do so, the Court must look closely at each of the affidavits and the supporting documents thereto. In granting Summary Judgment, the trial judge admitted that he did not have "time" to review the materials presented in this case and in the record, yet proceeded to grant summary judgment, clearly a gross injustice to the Appellants. *(See* Transcript of Hearing, April 24, 1997, p. 58).

In the instant case, based upon the record and Appellant's expert affidavits, genuine issues of material fact exist precluding summary judgment. If we are to apply the Court's standard as set forth in Eller and Fisher, Appellants have most certainly met any burden they would have in opposing a Motion for Summary Judgment.

In Connelly, the question presented was whether evidence, viewed in a light most favorable to the Appellant, demonstrated conclusively that the Appellee employer's actions were not substantially certain to cause injury or death to its employees. Based upon the record and affidavits submitted in opposition to the Motion for Summary Judgment, Appellee failed to meet their burden of proof.

In contrast, based upon case law cited on the standard of proof required to overcome a Motion for Summary Judgment and the Court's carved out exception to workers' compensation immunity, this Court must find that Appellants met their burden in opposition to Appellee's Motion for Summary Judgment.

It is not the role of the trial judge in ruling on a Motion for Summary Judgment, to weigh the evidence for the purpose of resolving the conflict. In the instant matter, Appellee failed to set forth any evidence in opposition to the affidavits submitted by Appellants' experts, thus precluding any finding that Appellant demonstrated conclusively that its action was not substantially certain to cause injury or death to its employees, thus precluding summary judgment.

This case presents an opportunity for this court to promulgate a test for ascertaining whether an affidavit, specifically that of an expert, is sufficient to get beyond summary judgment and demonstrate a genuine issue of material fact. Appellant would suggest a three-pronged test wherein the following criteria must be met:

1. The Affidavit must set forth the qualifications of the affiant;
2. The Affidavit must sufficiently address the legal standard at issue;
3. The Affidavit must detail the basis for the opinion, including appropriate citations to evidence and an accounting of what the affiant reviewed in

preparation of the affidavit.

Utilizing these criteria the courts of the State of Florida would be in a position to evaluate each affidavit and would limit the potential problem of affiants merely stating conclusions to get beyond summary judgment. In addition, the lower courts should be required to adequately review the record before it prior to rendering summary judgment and foreclosing a litigant from their day in court.

In the instant case, the Affidavit of Dr. John Landrum is proffered by the Appellants in opposition to the Motion for Summary Judgment asserted by the Appellee. In his twelve page affidavit, Dr. John Landrum sets forth with particularity his qualifications as an expert, including a Ph.D. in Chemistry, which are unchallenged by the Appellee. Dr. Landrum further discusses the materials he has reviewed in formulating his expert opinions, including but not limited to thousands of documents produced by both the Appellee and E.I. DuPont DeNemours and Company; reports, investigation notes, and other documentation collected by OSHA; and materials pertaining to safety in the care and handling of the chemicals involved in this explosion. In thirty explicit paragraphs, Dr. Landrum goes on to detail his findings from these documents including numerous previous incidents, explosions and/or deflagrations at the Appellee's place of business, details surrounding the multi-million dollar contract with DuPont, the

cause of the explosion involved in this case, the procedures utilized to create this complex chemical reaction, and so forth. Due to the complexities of this case, the testimony of Dr. Landrum would be of great benefit to the jury to aid in their understanding of the issues in the actions of the employer and the reactions of the chemicals are certainly outside the common knowledge of the lay juror.

Dr. Landrum lays the proper predicate for his opinion. Dr. Landrum concludes that it is his opinion with a reasonable degree of scientific certainty that the Appellee engaged in conduct which was substantially certain to result in death or severe bodily harm, the threshold required under Fisher. However, Dr. Landrum does not merely assert this as a conclusion, but provides a well analyzed basis for his opinion. Based on the complex nature of this case Dr. Landrum's affidavit is more than adequate to meet the required threshold and create a jury issue as to the liability of the employer. As such, Summary Judgment should not have been granted in this case.

Appellant further proffers the affidavit of Jack Brand. Mr. Brand fully sets forth his qualifications as an expert in chemical reactions, including more than 20 years of work in the chemical industry.. Mr. Brand also discusses the materials he reviewed in formulating his opinions including numerous documents provided by the Appellee and DuPont and other affidavits filed in the record. Mr. Brand also

attended the deposition of Adam Alty, the chemist in charge of the project. Both Dr. Landrum and Mr. Brand specifically set forth a description of the reaction involved in this case and the actions of the Appellee. Mr. Brand concludes, as did Dr. Landrum, that the "conduct of PCR was substantially certain to result in injury or death," the standard set forth which precludes summary judgment based upon case law and statute. Mr. Brand fully sets forth the basis for his opinion and does not merely make a conclusionary statement. Both of these affidavits are sufficient under the rules of evidence and the threshold set forth by Fisher to at a minimum create a jury question as to whether the Appellee engaged in activity substantially certain to result in death or bodily harm, and as such summary judgment is not appropriate in this case.

Each of the affidavits proffered by the Appellants in opposition to the Motion for Summary Judgment are well documented, thorough analyses of the complicated issues involved in this case. Each affiant sets forth in great detail the voluminous materials reviewed in preparation of their affidavits, and each specifically cites to specific acts on the part of the Appellee, in the past and in connection with the incident in question. Unequivocally, each affiant is highly qualified to testify as an expert and to render an opinion as to the culpability of the Appellee. These experts are unbiased professionals and their opinions in this case

should be considered by the Court in determining whether an genuine issue of material fact exists. Here the affidavits of Dr. Landrum and Mr. Brand clearly create such an issue foreclosing summary judgment in this case.

In the instant case the Appellants have proffered evidence in the form of expert witness affidavits to refute the Appellee's Motion for Summary Judgment. Based on the case law discussed, any and all inferences which may be deduced from those affidavits must be resolved in favor of the Appellants. To avoid future problems with this same issue, Appellant would suggest that this Court promulgate a test, such as the one suggested above, for the lower courts to evaluate affidavits filed in favor of or in opposition to Motions for Summary Judgment. Because the affidavits filed in this case demonstrate that there is a genuine issue of material fact as to whether the Appellee engaged in activity substantially certain to result in injury or death, in accordance with case law precluding summary judgment, the Appellee's motion for summary judgment should be denied and the Appellants should be entitled to proceed to trial for a final determination by a jury.

CONCLUSION

For the foregoing reasons the Opinion of the First District Court of Appeals and the Order of the trial court granting Appellee's Motion for Summary Judgment should be reversed and this cause remanded for a jury trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished via U.S. Mail to MICHAEL WHALEN, ESQ., Martin, Ade, Birchfield & Mickler, P.A., One Independent Drive, Suite 3000, Post Office Box 59, Jacksonville, Florida 32201 and JACK J. FINE, ESQUIRE, 622 NE First Street, Gainesville, Florida 32601 on this ____ day of ________________________, 1998.

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