THE SUPREME COURT OF FLORIDA

DEBRA ANNE TURNER, etc., et al., Petitioners,	)	CASE NO. 94,468
vs.	)	District Court of Appeal,
PCR, INC., etc., Respondent.	)	1st District - No. 97-2610

Discretionary Review of a Decision of
the District Court of Appeal, First District,
Passing on a Question Certified to be of
Great Public Importance

RESPONDENT'S ANSWER BRIEF ON MERITS

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Preliminary Statement and Certification of Type

The personal representative of Paul Turner's estate brought her action on behalf of the estate's beneficiaries. Lynn Creighton, as the wife of James Creighton, brought a separate, derivative claim for loss of consortium. For ease of reference, however, PCR will refer to the petitioners as "Turner," "Creighton," "petitioners" or "the employees."

For respondent's references to the record: (1st DCA Op. at *) refers to the opinion of the District Court of Appeal, First District dated November 4, 1998. (Petitioners' Br. at *) refers to the Initial Brief of the Petitioners. (R. *:**) refers to the record on appeal indicating the volume (in Roman Numerals) and pages of the record. (Tr. *) refers to the transcript of the hearing on respondent's motion for summary judgment. (App. *) refers to the Appendix to this brief. Respondent has omitted from the Appendix the exhibits attached to the affidavits in the Appendix. Those exhibits are in the record.

The undersigned attorney certifies that 14 point Times New Roman type was used in this brief.

STATEMENT OF THE CASE AND OF THE FACTS

Statement of the Case

The statement of the case of petitioners, Turner and Creighton, fails to include pertinent information about the nature of the case and the course of the proceedings. Petitioners, employees of the respondent, PCR, Inc. ("PCR"), filed a multi-count complaint against the respondent asserting claims for wrongful death and personal injuries arising out of alleged intentional torts, including: intentional exposure injury, battery, fraudulent misrepresentation and intentional infliction of emotional distress. (R. II:319-35; VI:1135-50).

PCR asserted workers' compensation immunity as an affirmative defense (R. II:350-53; VI:1155-57) and moved for summary judgment on that ground (R. III:374-615). Following a hearing (Tr. 1-65), the trial court granted summary judgment in favor of PCR (R. XI:2319-21)(App. 1). The employees appealed the decision to the District Court of Appeal, First District, raising several points. The First District affirmed the trial court's decision and certified to this Court the following question as one of great public importance:

> 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?

Thereafter, the employees filed a Notice to Invoke Discretionary Jurisdiction. Contrary to petitioners' characterization of the nature of review, this case is before this Court pursuant to its discretionary jurisdiction on a certified question -- not pursuant to its appeal jurisdiction. On December 9, 1998, this Court entered an Order postponing its decision on jurisdiction and setting a briefing schedule.

Statement of the Facts

PCR disagrees with much of the petitioners' statement of the facts. The petitioner employees fail to provide record references for most of their statements and many of these statements are inaccurate and are not supported by the record. PCR objects to the employees' inclusion of improper argument in their Statement of the Case and Facts but will respond to that argument in the Argument portion of this brief.

In support of its motion for summary judgment before the trial court, PCR filed affidavits from Dr. Adam Alty, the Ph.D. chemist directly in charge of the project that was the subject of this litigation (R. III:487-615)(App. 2), and Dr. Keith Baucom, vice president of PCR and also a Ph.D. chemist (R. III:394-486)(App. 3). Their affidavits show that PCR entered into a research and development ("R & D")

contract with Dupont to develop a safe, reliable process for producing the chemical compound F-pentene-2 as a substitute for Freon (R. III:487, ¶5)(App. 2). PCR produced F-pentene-2 by heating two chemicals, tetrafluoroethylene ("TFE") and hexafluoropropene ("HFP") in the presence of a promoter, aluminum chloride (R. III:488, ¶6)(App. 2). PCR started producing F-pentene-2 in small quantities and gradually worked up to larger amounts (R. III:488, ¶7)(App. 2). Before the accident, PCR made thirty-six runs of the product, including six runs in the 200-gallon reactor (Id.). Contrary to the employees' characterization of prior unrelated incidents at PCR's facilities, before the accident out of which the action arose, no employee of PCR in the F-pentene-2 project or other projects using TFE had suffered a single lost time injury (R. III:394, ¶4)(App. 3).

At the time of the accident, Turner and Creighton were both working as technicians at PCR (R. III:487, ¶3)(App. 2). Contrary to the employees' assertion that PCR did not report dangers associated with the TFE project from them, Turner received specific information on the dangers associated with the chemicals involved in the TFE project (R. III:488-89, ¶9)(App. 2). In addition to process sheets, PCR gave Turner, and told him to read, other documents containing the significant safety information known to PCR relating to the handling and use of the chemicals used in the project (R. III:489-90, ¶10)(App. 2). Copies of the documents available to

Turner were made part of the record (R. III:492-615). Creighton, like Turner, attended many training sessions at which he received special training and information about the dangers associated with the use and handling of TFE as well as training on his right to know of the dangers (R. III:394, ¶3)(App. 3).

Creighton is the only living eyewitness to the accident and he testified at his deposition that he remembered nothing about the accident or the events leading up to it (R. XII:2333-554 at pp.84-85). The parties have agreed that the explosion occurred while Turner was preparing to transfer a promoter-solvent mixture from a steel cylinder into a 200-gallon reactor (R. III:376). The employees imply that the explosion took place in the 200-gallon reactor while they were attempting to mix the reactants (Petitioners' Br. at 2). Instead, the record shows that the explosion occurred in a "100 lb liquid fuel cylinder" (R. II:1003-04, ¶¶15-16)(App. 4). In fact, there is no evidence that the 200-gallon reactor was implicated in the accident. Moreover, the employees' statement that the 200-gallon container lacked a safety release device is unsupported by the record (Petitioners' Br. at 2).

As to the employees' implication that the explosion occurred during a planned reaction, the evidence is undisputed that the accident occurred during the set-up for a run and not while the reactants were being mixed (R. III:487, ¶4)(App. 2). As the First District found, PCR had never experienced a reaction of these

chemicals until they were heated to at least 50° C (122°F) and no heat was to be applied during the planned transfer (R. III:490, ¶12a)(App. 2). Even during the actual runs, when heat was added, the biggest problem had been incomplete or no reactions; PCR had never experienced a runaway reaction when using these chemicals (R. III:491, ¶12d)(App. 2). Thus, as the First District concluded from its review of the record: "It is undisputed . . . that no explosion had ever occurred at PCR involving the same combination of chemicals, under the same conditions, as the fatal explosion at issue." (1st DCA Op. at 2-3.)

Following the accident, OSHA performed an investigation and determined that PCR had violated no OSHA regulations that caused or contributed to the incident (R. III:395, ¶6)(App. 3). In fact, OSHA never cited PCR for any safety violations involving the Dupont research or any of the materials used in the project (Id.).

SUMMARY OF THE ARGUMENT

To answer the question certified, this Court must determine whether the affidavits of petitioners' experts create a material factual issue. Affidavits opposing summary judgment must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. In order to defeat summary judgment an opposing affidavit must demonstrate the existence of a material issue of fact.

Here the ultimate factual issue is whether the employer committed an intentional tort against its employees. To prove an intentional tort, it is not enough to show that the employer engaged in intentional acts that were substantially certain to result in injury or death -- the employee must show that the employer **knew** that its acts were substantially certain to result in injury or death.

A scientific expert may be qualified to testify that conduct was substantially certain to cause injury or death. In order to defeat a motion for summary judgment, the affidavit of a scientific expert should be required to show affirmatively that the affiant was competent to testify that the employer knew that its conduct was substantially certain to result in injury or death and the affidavit should set forth the facts upon which the expert bases the opinion. A conclusory opinion should not be

sufficient to constitute a factual dispute that precludes summary judgment of the issue of workers' compensation.

Here the affidavits of petitioners' experts were insufficient to constitute a factual issue precluding summary judgment. At most the affidavits establish that the employer knowingly created an unsafe workplace. The affidavits fail to show that the persons are qualified to render an expert opinion as to the ultimate issue whether the employer knew its conduct was substantially certain to result in injury or death of its employees. The opinion of one expert that the employer knew is wholly conclusory and insufficient to create a factual issue.

ARGUMENT

The question certified to this Court is whether 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, is sufficient to constitute a factual dispute, thus precluding summary judgment on the issue of workers' compensation immunity. The answer to this question turns on the nature and sufficiency of the expert affidavits and how they relate to material issues of fact.

I. An Affidavit From A Scientific Expert Does Not Preclude Summary Judgment if the Affidavit Does Not Create a Factual Dispute as to a Material Issue of Fact.

PCR agrees with the employees that Florida still follows the stricter Frye test of reliability for scientific evidence. Brim v. State, 695 So.2d (Fla. 1997). In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedure used to apply that principle to the facts at hand. 695 So.2d at 272. A conclusory affidavit does not meet either requirement. Moreover, as the summary judgment rule states, summary judgment is proper only when the record show(s) that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law. Rule 1.510(c) Fla.R.Civ.P. Therefore, in order to defeat a motion for summary judgment, an affidavit must not only be

admissible but must also create a material factual issue. To determine whether the affidavits of petitioners' experts create a material factual issue, they must be judged against the standard for proving an intentional tort.

A. The Intentional Tort Exception Requires that the Employer Knew Its Conduct was Substantially Certain to Result in Injury or Death.

This Court has fashioned a so-called intentional tort exception to the immunity provision of the Florida Workers' Compensation Act that permits an employee to sue his employer only if the employer has committed an intentional tort against the employee. The standard for proving an intentional tort in the context of workers' compensation immunity was established by this Court in Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986), which held:

> In order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death.

498 So.2d at 883.

The standard is not unique to workers' compensation immunity cases, however, as it was borrowed from Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972), a negligence case which arose out of a work setting but did not involve workers' compensation immunity. In Spivey, the plaintiff sued the defendant alleging that the defendant's negligence had caused her injury. As his defense, the defendant

argued that his actions amounted to an intentional tort, for which the statute of limitations had run, rather than negligence, for which the limitation period had not run. In determining whether the defendant's actions amounted to an intentional tort, this Court adopted the Restatement (Second) of Torts definition of "intent":

> The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he ***believes*** that the consequences are substantially certain to result from it. (Emphasis added.)

Restatement (Second) of Torts § 8A (1964)(App. 7). Comment b to that section states that the law will treat a person as if he had in fact desired to produce a result:

> [i]f the actor ***knows*** that the consequences are certain, or substantially certain, to result from his act, and still goes ahead . . . . (Emphasis added.)

Restatement (Second) of Torts § 8A, cmt. b (1964)(App. 7). Illustration 1 of the definition also requires that the actor know that his actions are substantially certain to result in injury or death:

> A throws a bomb into B's office for the purpose of killing B. A ***knows*** that C, B's stenographer, is in the office. A has no desire to injure C, but ***knows*** that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort. (Emphasis added.)

Restatement (Second) of Torts § 8A, Illustration 1(1964)(App. 7). Thus, the intentional tort standard adopted by this Court in Fisher, requires that the employer

know that its actions are substantially certain to result in injury or death. See, also Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex.1985) (Also relied on in Fisher and also referencing the Restatement definition.)

The Restatement definition of intent also permits proof of intent by proof that the actor "desires to cause consequences of his act." Restatement (Second) of Torts § 8A (1964). In workers' compensation cases in Florida, Fisher includes the alternative standard of proving that the employer "exhibit a deliberate intent to injure." This part of the Fisher test, which appears to be more restrictive than the second alternative, has received little attention from the courts. In the instant case the petitioners admit that they do not contend that PCR's intentional acts were "designed or intended to result in serious injury or death." (Pet. Br. at 19). The brief will therefore concentrate on the second alternative for proving intent -- requiring that the employer "engage in conduct which is substantially certain to result in injury or death."

District court decisions have required that the employee plead and prove that the employer knew that his conduct was substantially certain to result in injury or death. In United Parcel Service v. Welsh, 659 So.2d 1234 (Fla. 5th DCA 1995), the Fifth District Court of Appeals discussed the standard for pleading an intentional tort stated by the Florida Supreme Court:

> [T]he court stressed that the complaint must allege that the employer ***knew*** that the injury or death was a virtual certainty, not that it was a strong probability. (Emphasis added.)

659 So.2d at 1236.

More recently, in Wilks v. Boston Whaler, Inc., 691 So.2d 629 (Fla. 5th DCA 1997), an employee sustained respiratory injuries as a result of exposure to a chemical, toluene diisocyante ("TDI"). Plaintiff, Wilks, alleged that his employer, Boston Whaler, failed to disclose dangers of exposure to TDI, that the employer never gave him information about TDI, and never mentioned TDI during safety meetings. Like PCR, the employer countered with evidence of its safety program. In affirming the trial court's summary judgment in favor of the employer, the Fifth District Court of Appeals reasoned:

> Boston Whaler may have done more to reduce the risk of injury from exposure to TDI, but doing more in terms of employing better methods to avoid worker injury, and ***intentionally*** creating a situation which is substantially certain to cause injury, is not the same. (Emphasis added)

691 So.2d at 632. Thus, the Fisher standard might be more accurately rephrased to state that the employer must either exhibit a deliberate intent to injure or **knowingly** engage in conduct which is substantially certain to result in injury or death.

The employee petitioners argue that the lower courts erred in requiring them to show that the employer knew that its acts were substantially certain to result in

injury or death. Pet. Br. at 19. They argue that it was enough to show that the employer engaged in intentional acts that were substantially certain to result in injury or death. As this Court noted in Fisher, however, a strict interpretation must be given to intentional torts "because nearly every accident, injury, and sickness occurring at the workplace results from someone intentionally engaging in some triggering action." 498 So.2d at 884. The drafters of the Restatement put it more directly at Comment a to § 8A, wherein they said:

> "Intent," as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result. "Intent" is limited, wherever it is used, to the consequences of the act.

Restatement (Second) of Torts § 8A, cmt. a (1964)(App. 7). Holding a person liable for intentionally engaging in a triggering act, without showing knowledge of the consequences, would result in a strict liability standard.

Evidence that the employer's actions merely created a dangerous work place, even where the risk of injury was great, does not create a material issue of fact. See Mekamy Oaks, Inc. v. Snyder, 659 So.2d 1290 (Fla. 5th DCA 1995); United Parcel Service v. Welsh, 659 So.2d 1234 (Fla. 5th DCA 1995); Thompson v. Coker Fuel, Inc., 659 So.2d 1128 (Fla. 2d DCA 1995), rev. denied, 668 So.2d 604 (Fla. 1996);

Kenann & Sons Demolition, Inc. v. Dipaolo, 653 So.2d 1130 (Fla. 4th DCA 1995); Kline v. Rubio, 652 So.2d 964 (Fla. 3d DCA), rev. denied, 660 So.2d 714 (Fla. 1995); Dynaplast, Inc. v. Siria, 637 So.2d 13 (Fla. 3d DCA 1994).

In order to defeat a motion for summary judgment, therefore, an affidavit from an expert must, at a minimum, create a factual issue whether the employer knew that its conduct was substantially certain to result in injury or death. Thus, the affidavit should show (1) that the conduct was substantially certain to result in injury or death; and (2) that the employer knew this.

II. A Conclusory Affidavit From a Scientific Expert is Insufficient to Create a Factual Issue as to an Intentional Tort .

The rule governing motions for summary judgment provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 1.510, Fla.R.Civ.P. Based on these requirements, Florida courts have held that conclusory affidavits are insufficient to support or oppose motions for summary judgment. See, e.g. Foster v. Weber, 578 So.2d 857 (Fla.5th DCA 1991); Spiwak v. General Real Estate Ltd., 546 So.2d 81 (Fla.3rd DCA 1989); Gimenez v. Barry, 572 So.2d 35 (Fla.3rd DCA 1991); Brooks v. Serrano, 209 So.2d 279 (Fla.4th DCA 1968);

Heitmeyer v. Sasser, 664 So.2d 358 (Fla.4th DCA 1995); TSI Southeast, Inc. v. Royals, 588 So.2d 309 (Fla. 1st DCA 1991). The rule is the same when the conclusory statement is made by an "expert." See, e.g. North Broward Hospital District v. Royster, 544 So.2d 1131 (Fla. 4th DCA 1989); Vidaurre v. Florida Power & Light Co., 556 So.2d 533 (Fla. 3d DCA 1990)(Schwartz, J., concurring opinion).

In Clark v. Gumby's Pizza Systems, Inc., 674 So.2d 902 (Fla. 1st DCA 1996), the plaintiff alleged that the defendant knew at the time of hiring the plaintiff that there was a substantial certainty that any of their employees delivering pizza to the FAMU campus at night would be robbed and/or beaten or assaulted. This Court held that:

> Conclusory allegations of "substantial certainty" do not raise otherwise insufficient allegations of fact to the level of intentional tort sufficient to avoid the exclusivity of the Act.

674 So.2d at 904.

Turner and Creighton do not contend that respondent failed to meet its burden at the hearing on the motion for summary judgment of proving the non-existence of a genuine triable issue. Holl v. Talcott, 191 So.2d 40, 44 (Fla.1966). Petitioners argue instead that, once the burden shifted to them, they produced affidavits that created a factual issue.

While petitioners argue that this Court has adopted a relaxed standard for expert affidavits opposing summary judgment in medical negligence cases, the rationale for that standard does not apply in workers compensation immunity cases. In Holl v. Talcott, 191 So.2d 40 (Fla.1966), this Court established the standard for determining the sufficiency of a medical expert affidavit to establish a factual issue as to negligence in a medical negligence case. The Court recognized that, in medical negligence cases, the subject matter of medical expert's testimony involved complicated medical issues relating to acceptable standards of medical care. 191 So.2d at 45. The Court noted that "the showing of negligence is generally dependent upon expert testimony as to the standard of care required and observed." 191 So.2d at 46. Given the peculiar nature of medical negligence cases, the Court did not think it necessary that a medical expert's affidavit in opposition to summary judgment "cover all the details and formalities that would be required in offering the same experts' testimony at a trial of the cause." 191 So.2d at 45.

As discussed above, the ultimate issue of fact in a workers' compensation immunity case bears no resemblance to a medical negligence case. Workers compensation immunity cases require a determination whether the employer acted intentionally rather than whether it acted negligently. Thus, the peculiar circumstances that exist in medical negligence cases do not exist in workers

compensation immunity cases. As this Court recognized in Holl v. Talcott, proof of medical negligence is peculiarly dependent upon expert testimony as to the standard of care required and observed. Since workers' compensation immunity does not depend upon the employer complying with industry standards there is no need for expert testimony as to industry standards; nor is there a need for testimony as to whether the employer complied with such a standard. The medical negligence and other negligence cases relied upon by petitioners, therefore, are not on point. Because the showing of intent is generally not dependent on expert testimony, the rational of Holl v. Talcott does not apply in an intentional tort case.

To be probative on summary judgment issue, therefore, the affidavit should show affirmatively that the affiant was competent to testify that the employer knew that its conduct was substantially certain to result in injury or death, and the affidavit should set forth the facts upon which the expert bases the opinion. A conclusory opinion, as the one in this case, should not be sufficient to constitute a factual dispute that precludes summary judgment of the issue of workers' compensation.

III. The Employees' Expert Affidavits Do Not Create a Factual Issue as to Whether the Employer Knew or Believed its Conduct Would Result in Injury or Death.

In this case, the trial court and First District both found that the only factual basis for opposing the employer's motion for summary judgment were conclusory statements contained in expert affidavits offered by the employees. Thus, in granting summary judgment, the trial court held that:

> Counts I through IV of the Complaints are barred by workers' compensation immunity because Plaintiffs have failed to establish a factual basis for the allegation that Defendant intentionally injured them or engaged in acts which were substantially certain to cause them injury or death.

(R. XI:2319)(App. 1). Contrary to the assertion by petitioners that the trial court simply did not read the record (Petitioners' Br. at 8), the trial court found that although petitioners affidavits stated "in conclusive terms" that PCR's actions were substantially certain to result in injury or death, "these conclusions are not supported by the record" (R. XI:2319-20)(App. 1). The court found that "there is no evidence that the Defendant [PCR] acted with such knowledge as to create any expectation of injury to the Plaintiffs" (R. XI:2320)(App. 1).

Affirming the judgment of the trial court, the First District agreed with the trial judge that "the undisputed material facts establish the applicability of workers' compensation immunity" (1st DCA Op. at 2)(App.6). As to the employees' expert affidavits, the First District stated: "We are of the view that the expert opinions are insufficient to create a material issue of fact when no issue of material fact

otherwise existed with respect to PCR's statutory immunity." (1st DCA Op. at 4)(App. 6) (also noting that "[t]o hold otherwise would allow the mere conclusory opinion of an expert witness in almost any case to create a question of fact for the jury on the issue of an employer's workers' compensation immunity--a result unintended by the plain reading of the statute" (1st DCA Op. at 5)).

As mentioned above, petitioners admit that the employer's acts were not "designed or intended to result in serious injury or death." (Pet. Br. at 19). In opposition to summary judgment, petitioners offered affidavits by two scientific experts. Contrary to petitioner's assertion, PCR did offer its own expert witness affidavits and did contest the affidavits of these experts at the hearing on the motion for summary judgment, arguing at that time that they were conclusory (Tr. 24-25).

The affidavits of petitioners' experts do not provide any factual basis for their conclusions that the conduct of PCR was substantially certain to result in injury to or death of its employees, Turner and Creighton. The conclusory affidavits fail to satisfy the Frye test burden and fail to satisfy the standard for affidavits opposing summary judgment. The affidavits fail to establish the general acceptance of either the underlying scientific principle or the testing procedure used to apply that principle to the facts at hand.

The record showed that before the accident, PCR had made thirty-six runs of the product, including six runs in the 200-gallon reactor, without a single lost time injury. PCR had never experienced a reaction of these chemicals until they were heated to at least 50° C (122°F) and no heat was to be applied during the planned transfer. Even during the actual runs, when heat was added, the biggest problem had been incomplete or no reactions. PCR had never experienced a runaway reaction when using these chemicals. Following the accident, OSHA performed an investigation and determined that PCR had violated no OSHA regulations that caused or contributed to the incident. In fact, OSHA never cited PCR for any safety violations involving the Dupont research or any of the materials used in the project. These facts led the First District to conclude that: "It is undisputed however that no explosion had ever occurred at PCR involving the same combination of chemicals, under the same conditions, as the fatal explosion at issue." (1st DCA Op. at 2-3.)

Moreover, the affidavit of petitioners' expert, Jack Brand, does not state, even in conclusory fashion, that PCR **knew** it was engaging in conduct substantially certain to result in injury or death (R. IV:687, ¶4)(App. 5). While the affidavit of their other expert, Dr. John Landrum, concludes that PCR knew that its actions were substantially certain to result in injury or death, the gist of his affidavit is that PCR knowingly required the employees to work with highly dangerous chemicals having

a history of instability, using inadequate equipment and unsafe work methods (R. VI:999-1011)(App. 4). These facts may create an issue as to whether PCR knew the risk of injury was great, i.e. was reckless. They do not create an issue whether PCR knew injury was substantially certain. The trial court concluded just that, stating:

> The record clearly creates a factual issue as to whether the Defendant was negligent, and perhaps grossly negligent, but there is no evidence that the Defendant acted with such knowledge as to create any expectation of injury to the Plaintiffs.

(R. XI:2320)(App. 1).

Finally, Landrum's affidavit fails to state how he is even qualified to render his conclusory opinion that PCR knew that its conduct was substantially certain to result in injury or death. His qualifications as a "research scientist" do not qualify him to render an expert opinion as to what a chemical manufacturer would "know" to be the substantially certain result of a unique manufacturing process. Landrum's affidavit does not indicate that he has ever worked in a chemical manufacturing plant, not to mention one similar to that of PCR. While Brand's affidavit states that he did have a chemical manufacturing background, it does not include even a conclusory statement that PCR knew that its conduct was substantially certain to result in injury or death of an employee.

Thus, the trial court was correct in disregarding the affidavits of petitioners' expert witnesses. At most the affidavits amount to an opinion by the experts that PCR was requiring its workers to work in unsafe conditions - which might create a factual issue in an action based in negligence or recklessness. The affidavits fail to show how these experts are qualified to give an opinion that the employer knew its actions were substantially certain to result in injury or death. Furthermore, the statement by Dr. Brand that PCR knew that its actions were substantially certain to result in injury or death are conclusory and not supported by the record.

CONCLUSION

For the foregoing reasons, this Court should answer the question certified in the negative and affirm the Final Summary Judgment entered below.

MARTIN, ADE, BIRCHFIELD & MICKLER,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Karen Cohen, Esq., 317 Seventy-First Street, Miami, Florida 33141 and Jack J. Fine, Esq., 622 NE First Street, Gainesville, Florida 32608, this ____ day of March, 1999.

_____

Attorney

APPENDIX INDEX