SUPREME COURT OF FLORIDA

ALLISON GAE REEVES, etc.

Petitioner(s),

Vs.

CASE NO. SC03-134
Lower Tribunal No. 2D01-5308

FLEETWOOD HOMES OF FLORIDA, INC., et al.

Respondents.

AMICUS BRIEF

OF
ACADEMY OF FLORIDA TRIAL LAWYERS

Jacqulyn Mack
MACK LAW FIRM CHARTERED
80 W. Dearborn Street
Englewood, FL 34223-3235
(941) 475-7966
FBN 0134902

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ***i***

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

The Academy of Florida Trial Lawyers (AFTL), *amicus curiae*, files this brief in support of Petitioner's position and adopts Petitioner's Statement of the

Case and Facts.

SUMMARY OF THE ARGUMENT

Second Certified Question

IF AN EMPLOYER ALLOWS ITS EMPLOYEES TO PERFORM A NEGLIGENT PROCEDURE REPEATEDLY AND FOR A LONG PERIOD, MAY THE FIRST INCIDENT IN WHICH THE PROCEDURE RESULTS IN INJURY OR DEATH BE TREATED AS AN INTENTIONAL TORT UNDER TURNER V. PCR, 754 So. 2d 683 (Fla. 1997)

The Second District Court of Appeal determined that the Defendant/Respondent was entitled to the Worker's Compensation Immunity Defense and reversed the trial courts denial of the Defendant/Respondents' Motion for Summary Judgment and certified two questions of great public importance to this Court. The AFTL is going to address only the second certified question.

The Second District Court of Appeal was wrong for two reasons. First it misconstrued the Turner, *supra*, decision as barring a finding that Fleetwood Homes' conduct, that gave rise to this case, was not "grossly negligent" because the "numerous successful performances of the challenged procedure show the risk of accident on April 1, 1991 was far from imminent" Fleetwood v. Reeves, 28 Fla. L. Weekly D61 *27 (2d DCA 2002). Second, this Court has repeatedly recognized the negligent mode of operation theory in the context of premises liability cases where the "human endeavor creates a generalized and foreseeable risk of harming others." McCain v. Florida Power Corp., 593 So. 2d 500, 503 (Fla. 1992); Owens v. Publix Supermarkets, Inc., 802 So.2d 315 (Fla. 2001); Markowitz v. Helen Homes of Kendall Corp., 826 So.2d 256 (Fla.

2002). It is the AFTL's position that the Turner decision was based upon facts involving a negligent mode of operation that was known to the employer, which created a foreseeable risk of harm to the employees. It was those facts that the Turner Court found sufficient to pierce the Worker's Compensation Immunity defense because the employer ignored warning signs that indicated that its "mode of operation" was substantially certain to cause injury or death and therefore was deemed "grossly negligent".

This Court should be compelled to interpret and apply the unique worker's compensation statutory framework in a manner that comports with the repeated decisions of Florida courts that have protected a citizen's constitutional right to access to the courts without inhibiting the stated legislative intent of the worker's compensation statutory scheme:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer…The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees…

Florida Statute § 440.015.
See also, § 440.10 and § 440.11.

This Court's decision in Turner v. PCR, *supra*, recognized that there are factual scenarios where an employee is placed in a position by virtue of their job description, where the employer knows, or should know, that there is a substantial certainty that the employee may be injured or killed because of the "zone of danger" created by the employer; the zone in which the employee's position is located. In these cases the common law remedies "mutually

renunciat[ed]" by the employee and employer pursuant to Florida Statute § 440.015 are available to the injured employee as a result of this Court's Turner, *supra*, decision.

ARGUMENT

A. The lower court erred when it determined that the Turner Court did not intend to allow a plaintiff to add together small risks of injury in order to reach a combined total where the likelihood of injury to some employee sometime was substantially certain.

Petitioners claimed that the conduct of two co- workers, Respondents, Miller and Oliver, constituted gross negligence and that the "'course of conduct' of the Fleetwood employees was such that a reasonably prudent person would know that it was 'substantially certain to result in injury or death'" Fleetwood Homes of Florida, Inc., et al. v. Allison Reeves, 28 Fla. L. Weekly D61 *7 (2d DCA 2002). The Second District Court begins its analysis of the Petitioners' claim against Respondents', Miller and Oliver for liability for gross negligence by stating that "[t]here is no question that Fleetwood could have devised a safer method to transport this roofing material." Id at*20. The lower court then states "[t]he procedure for transporting sheet metal that was devised by Fleetwood and implemented by Mr. Oliver and Mr. Miller may have been more dangerous than another method." Id. at *26. But, the lower court concluded that because the procedure

> had been successfully performed on many occasion over many years. By the time of the accident, **from the perspective** of Mr. Oliver and Mr. Miller, this procedure was a standard proven method for moving the sheet metal through the narrow section of the aisle.

Id. *27.

The Fleetwood Court engaged in precisely the type of analysis the Turner Court decried when it held that "we recognize and reaffirm the existence of an

intentional tort exception to an employer's immunity, and **hold that the conduct of the employer must be evaluated under an objective standard**." Turner, 754 So.2d at 684 (emphasis added). As the Turner Court stated

> This standard imputes intent upon employers in circumstances where injury or death is objectively "substantially certain" to occur. To hold otherwise would virtually encourage a practice of "willful blindness" on the part of employers who could ignore conditions that under an objective test would be found to be dangerous, and later claim lack of subjective knowledge or intent to harm an employee. This holding is also consistent with legislative policy recognizing the liability of managerial or policy-making co employees for conduct constituting reckless indifference to the safety of other employees.

Id at. 691.

Pursuant to Turner, the proper inquiry in this case was whether "the reasonable person" would have believed, viewing the evidence in the light most favorable to Petitioner[1], that Respondents' knew that there was a substantial certainty that a 12 foot roll of material weighing approximately 600 pounds, that was not secured to the forklift[2], could become detached and cause injury when it fell fourteen feet to the ground after striking a pipe it had struck in the past[3]. It is the AFTL's position that the lack of prior injuries cannot shield the Respondents in this case because they were on notice that the forklift operators "occasionally bumped this pipe when transporting wide loads"[4]. The Respondents should be also charged with the knowledge that should the forklift "bump" the "pipe" while transporting 12 foot, 600 pound material that

---

1 Turner, 826 So.2d at 684; Markowitz, 826 So.2d at 259.
2 Fleetwood v. Reeves, at *4-5
3 Fleetwood v. Reeves, at *4
4 Fleetwood v. Reeves, at *4.

then falls 14 feet and hits a person there was a "substantial certainty" that it would injure or kill that person, as it did in this case.

The Fleetwood Court viewed the "safety" of the "standard, proven method" of moving the sheet metal through the eyes of Respondents, Miller and Oliver, and completely ignored the Florida Supreme Court's Turner holdings' objectivity requirement[5]. The Fleetwood Court attempted to rehabilitate itself by referring to the "reasonable person standard" stating that

> In hindsight, there were safer ways to perform this task, but at the moment Mr. Miller was transporting the fatal load on April 1, 1991, it was not a procedure that an ordinarily prudent person, in light of the composite of circumstances, would regard as creating a clear and present danger.

Id. at *26-27.

It is the AFTL's position that the Fleetwood Court did not apply the proper objective standard in this type of case when the employee's conduct is evaluated because the employee is an agent of the employer and therefore should be held to the same objective standard.

Instead, the Fleetwood Court relied first on co-respondents, Miller and Oliver, subjective perspective. In so doing, the Fleetwood Court reduced the employer's duty of care and resulting burden of proof from an "objective standard" to a subjective standard. Pursuant to Turner, the employer is liable for the acts of the employee where the worker's compensation immunity shield is pierced. Therefore, the same objective standard should apply to both the employer and the employee in these cases where gross negligence and/ or

---

[5] Fleetwood v. Reeves, at *26.

intentionally tortious conduct has been alleged as it was in this case.

Finally, the facts in this case are similar to the Turner facts. The Turner case involved the continued use of a hazardous chemical by employees where the employer had prior knowledge of the chemical's hazardous nature and the danger it posed to its employees who were assigned to work with the chemical.[6] In this case, when viewing the evidence in the light most favorable to Petitioners[7], the appellate court should have concluded that there was a substantial certainty that the Respondent's procedure for transporting the aforementioned loads was sufficiently hazardous to constitute the type of conduct that was substantially certain to cause injury or death..

B. This Court has repeatedly held that the negligent mode of operation theory is permissible in the context of premises liability cases where the "human endeavor creates a generalized and foreseeable risk of harming others" and this Court should also hold that the negligent mode of operation theory is permissible where it creates a condition substantially certain to cause death or injury sufficient to pierce the worker's compensation immunity shield.

In the seminal case of the McCain, *supra*, Florida Supreme Court engaged in a thoughtful analysis of the difference between "forseeability" in the context of legal duty versus its application with regard to issues of proximate cause. Id. at 503-504. The question of legal duty is a question of law. The McCain Court resolved the question of legal duty by stating

> Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and

---

6 Turner, *supra*, at 684-684.

7 Turner, 826 So.2d at 684; Markowitz, 826 So.2d at 259.

> foreseeable risk of harming others. As we have stated:
> Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

Id. at 503. (citations and footnotes omitted).

The McCain Court determined proximate cause issues of foreseeability "generally must be left to the fact finder" :

> Unlike in the "duty" context, the question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve. Thus, where reasonable persons could differ as to whether the facts establish proximate causation--i.e., whether the specific injury was genuinely foreseeable or merely an improbable freak--then the resolution of the issue must be left to the fact-finder.

Id. at 504.

In this case, when the appellate court determined that the facts alleged by Petitioner were insufficient to pierce the worker's compensation immunity veil, it determined as a matter of law that the accident in this case was essentially an "improbable freak" and therefore the Respondent could not have been substantially certain that it conducted its business in a manner substantially certain to cause injury or death because of the "numerous successful performances of the challenged procedure" prior to the subject accident.

It is AFTL's position that analysis is incorrect for two reasons: first the challenged procedure was sufficiently hazardous if not "successfully performed" that it should have put Respondents on notice of the substantial certainty of injury or death if the challenged procedure was not "successfully performed" . As the McCain Court stated "it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent. In

such instances, the true extent of the liability would remain questions for the jury to decide" Id. at 503, *quoting*, RESTATEMENT SECOND OF TORTS § 435 (1965). Likewise in this case, it is immaterial that Respondent could not foresee the precise manner in which the injury occurred or its exact extent; is a jury question.

This Court in Owens v. Publix Supermarkets, Inc., 802 So.2d 315 (Fla. 2001), reaffirmed the McCain decision and restated

> Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. It is undisputed that under Florida law, all premises owners owe a duty to their invitees to exercise reasonable care to maintain their premises in a safe condition.

The Owens case involved the burden of proof in "slip and fall" cases brought against premises owners and/or lessors, where the fall was alleged to have been caused by the presence of a transitory object. Although this case was not pled on the basis of premises liability, it is the AFTL's position that the negligent mode of operation theory is applicable to this case. In fact, the Owens Court further stated:

> we recognize the continued viability of the mode of operation theory. If the evidence establishes a specific negligent mode of operation such that the premises owner could reasonably anticipate that dangerous conditions would arise as a result of its mode of operation, then whether the owner had actual or constructive knowledge of the specific transitory foreign substance is not an issue. The dispositive issue is whether the specific method of operation was negligent and whether the accident occurred as a result of that negligence.

Id. at 332.

Although the Owens Court was faced with a simple negligence standard, rather than the gross negligence standard in this case the analysis is identical. The

dispositive issue in this case is whether the Respondents' specific method of operation was negligent and whether there was a substantial certainty that Mr. Reeves death occurred as a result of that mode of operation. In fact, in the Turner case, *supra*, the negligent mode of operation, i.e. the continued testing of TFE coupled with the prior knowledge of its dangerous propensities, was the basis for the Turner Court's finding that there was gross negligence on the part of PCR. In this case, the Respondents were on notice of the fact that the forklift had "bumped this pipe when transporting wide loads."[8] It is the AFTL's position that a person of average intelligence would comprehend that if the subject forklift was carrying an unsecured "wide load" when it "bumped" into the pipe there would be a "substantial certainty of injury or death" to any other worker in the immediate area.

In a recent case, Markowitz v. Helen Homes of Kendall Corp., 826 So.2d 256 (Fla. 2002), the Florida Supreme Court again reaffirmed the continuing validity of the negligent mode of operation theory and stated "the basis for the negligent mode of operation theory is the claim that the specific mode of operation selected by the premises owner resulted in the creation of a dangerous or unsafe condition." Id. at 260. In the premises liability context the negligent mode of operation theory requires that the plaintiff present evidence that the specific negligent mode of operation put the premises owner in a position where it could "reasonably anticipate that dangerous conditions would arise as a result

---

[8] Fleetwood v. Reeves, *4.

of its mode of operation." Id. at 259. In the context of piercing the worker's compensation immunity veil, the negligent mode of operation theory of liability would require that the plaintiff prove that the specific negligent mode of operation is "substantially certain" to result in death or injury.

Conclusion

In conclusion, this Court's precedent should dictate that the case be remanded to the trial court for further proceedings. The extension of the negligent mode of operation theory to cases involving piercing the worker's compensation immunity is not an infringement on the legislature's policy as enunciated in the worker's compensation statutory scheme, *supra*. In fact, if this Court decides against extending the negligent mode of operation theory to these types of cases it would be encouraging the employer's in this State to engage in the practice of "willful blindness"; a practice specifically denounced by the Turner Court.[9]

_____
Jacqulyn Mack, Esquire
MACK LAW FIRM CHARTERED
80 West Dearborn Street
Englewood, Florida 34223-3235
(941) 475-7966

Florida Bar No: 0134902

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed to on this

---

[9] Turner, 754 So.2d at 691.

_____ day of March, 2003.

_____

Jacqulyn Mack, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Rule 9.100(l) and 9.210(a)(2), FLA.R.APP.P., effective date January 1, 2001.

_____

_____

Jacqulyn Mack, Esquire