SUPREME COURT OF THE STATE OF FLORIDA
Case No. SCO5-358
Lower Tribunal Nos. 3D03-1465, 3D03-1532

THE BOMBAY COMPANY, INC.,

Petitioner,

v.

MARTIN BAKERMAN,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTRODUCTION AND SUMMARY OF ARGUMENT

> It is a major over-simplification to assume that all harms are caused by one of two types of human conduct: accidental or deliberate. Tort and criminal law scholars delight in noting the many gradations of mental states falling uneasily in between. Thus, next to strict liability are rules imposing liability absent the highest levels of care; beside these are rules for ordinary negligence; next come rules for gross negligence; for recklessness; for willful and wanton conduct; and for different shades of intention that involve conscious indifference or substantial certainty that harm will ensue from the performance of certain actions.

Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. Rev. 1, 15 (1996). "[V]ery often, there is an extremely fine line between what is negligence and high degree recklessness and what is intent in a substantial certainty sense." Peter F. Lake, *Tort Litigation in Higher Education*, 27 J.C. & U.L. 255, 302 (2000).

In this case, the blurring of the line between high degree recklessness (negligence) and substantial certainty (intentional tort) threatens to undermine the workers' compensation law as well as cause unintended reverberations throughout Florida tort law. Had the jury found that The Bombay Company's refusal to purchase a new ladder was "substantially certain" to cause injury or death and left it at that, then the court could find, consistent with precedent, that Bombay's actions fit the "substantial certainty" definition of an intentional tort and thus

removed the incident from the "accident" category covered by workers' compensation.

However, the jury did not leave it at that. The jury found that Plaintiff Bakerman himself bore one-third the responsibility for falling off the ladder and breaking his ankle. Bakerman did not raise any issue concerning the applicability of comparative fault to this case. Petitioner's Initial Brief at 3 n.2. The finding of Bakerman's fault—which Bakerman does not contest—must remove Bombay's actions from the category of an intentional tort as a matter of law.

Florida's comparative fault statute prohibits the allocation of fault in circumstances involving intentional torts. Fla. Stat. Ann. § 768.81(4)(b); *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So. 2d 232, 234 (Fla. 1997). And while some jurisdictions, in some limited circumstances, do permit consideration of a plaintiff's fault in determining the amount of recovery for an intentional tort, this awkward combination of doctrines has never been part of Florida's workers' compensation jurisprudence.

If this Court holds that comparative fault can coexist with an intentional tort in the workers' compensation context, future litigation will be required to determine the answers to the following questions (at a minimum):

$ To what extent does Florida law consider plaintiff's own negligence in

determining whether a defendant is liable for an intentional tort?

- If an employee is found to be negligent by a jury, does this finding of fault undermine the essential "no-fault" character of workers' compensation?
- If an unsafe, yet open and obvious, condition in a workplace has not resulted in any injury over a significant period of time, how can such a condition be held "substantially certain" to cause injury?
- Does an ongoing modestly dangerous activity presenting a small risk of harm cumulate into a "substantial certainty" of harm—and thus an intentional tort —just by the fact of the passage of time and repetition of the activity?

While this case does not explicitly present these questions for decision, the Court's analysis of the question that *is* presented could well impact these other areas of tort law. Therefore, Amicus urges the Court to resolve the question presented with caution, and hold that where the plaintiff himself is found to be partially at fault for his injuries, the defendant cannot be found to have committed an intentional tort such that plaintiff is excepted from the exclusive remedy provision of the workers' compensation law. Fla. Stat. § 440.09(1). The decision below should be *affirmed*.

INTEREST OF AMICUS

PLF is a nonprofit, tax-exempt California corporation organized for the

purpose of engaging in public interest litigation. Formed in 1973, PLF believes in and supports the principles of limited government, free enterprise, private property rights, and the protection of individual rights. PLF seeks to protect the free enterprise system from abusive regulation, a civil justice system that grants excessive liability awards, and barriers to the freedom of contract. PLF and its attorneys have been granted leave and participated on behalf of PLF and others in Florida courts. *See, e.g., State v. Florida Consumer Action Network*, 830 So. 2d 148 (Fla. 1st DCA 2002). PLF also has specific expertise in the issues presented in this case, having participated in cases involving the exclusive remedy of workers' compensation law. *See, e.g., Cain v. General Electric* (Ky. Sup. Ct., pending); *Kinsman v. Unocal Corp*., No. S118561 (Cal. Sup. Ct., pending). Both parties consent to the filing of this brief.

ARGUMENT

I

AN EMPLOYER WHO PROVIDES AN
UNSAFE LADDER FOR USE BY EMPLOYEES
DOES NOT COMMIT AN INTENTIONAL TORT

Falling from a ladder during the course of one's employment makes for a quintessential workers' compensation claim. *See, e.g.,* Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So. 2d 433 (Fla. 3d DCA 2001); *Builder's Square,*

Inc. v. Shaw, 755 So. 2d 721 (Fla 4th DCA 1999); Barbosa v. Liberty Mut. Ins. Co., 617 So. 2d 1129 (Fla. 3d DCA 1993); *Williams v. Alfred S. Austin Const. Co.*, 224 So. 2d 280 (Fla. 1969); *Star Fruit Co. v. Canady*, 32 So. 2d 2 (Fla. 1947). Climbing even perfectly sound ladders presents a moderate risk of harm. *See* Hurst v. Astudillo, 631 So. 2d 380, 381 (Fla. 3d DCA 1994) (fall from a ladder, by itself, cannot support an inference of negligence); Miller v. Aldrich, 685 So. 2d 988, 990 (Fla. 5th DCA 1997) (plaintiff repairman cannot maintain negligence action against homeowner who provided ladder for home repairs when plaintiff has no idea why he fell off the ladder).

Unsound ladders present an even greater risk of harm, and Florida employers have been found negligent for failing to inspect or maintain ladders in good working order when such failure results in an injury to an employee. *See* Kenan v. Walker, 173 So. 836, 838 (Fla. 1937) (railroad was liable to employee who fell from a ladder inside a water tank, where the nails holding the rungs in place had deteriorated from time spent under water and employer failed to inspect the ladder to discover the deterioration); American Hospitality Management Co. of Minnesota v. Hettiger, 904 So. 2d 547, 550-51 (Fla. 4th DCA 2005) (air conditioning repairman who borrowed allegedly defective ladder from hotel to make repairs, fell and sustained injuries, sued the hotel operator for negligence,

which was presumed when the hotel destroyed the ladder the same day as the repairman fell); Hamilton v. Shell Oil Co., 215 So. 2d 21, 22-23 (Fla. 4th DCA 1968) (plaintiff sued owner of gas station for negligent maintenance of the ladder on a tank truck, from which plaintiff fell and was injured; court held that plaintiff's exclusive remedy was in workers' compensation because plaintiff was actually an employee of a contractor who provided workers to Shell for certain job duties). Amicus has found no case in Florida *or any other state* where a defendant who failed to maintain a ladder at a worksite was held to commit an intentional tort.

That this case involves a ladder means that the employee required no exceptional skills or intellect to use the tool or determine its soundness. *Cf.* Taylor v. Universal City Property Management, 779 So. 2d 621, 622 (Fla. 5th DCA 2001) ("[S]ome injury-causing conditions are simply so open and obvious that they can be held as a matter of law not to give rise to liability as dangerous conditions."). It thus can be distinguished from cases involving chemical reactions or complicated machinery that demand a higher level of knowledge and skill to discern unsafe conditions. *See, e.g., Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. 1st Dist. Ct. App. 1990) (involving intentional exposure to toxins); EAC USA, Inc. v. Kawa, 805 So. 2d 1 (Fla. 2d DCA 2001) (injury in running printing press that lacked safety guard). As noted below, Bakerman was fully aware of the enhanced

risk of improper use of the ladder. The Bombay Company, Inc. v. Bakerman, 891 So. 2d 555, 557 (Fla. 3d DCA 2004). To find the employer's actions to constitute an intentional tort in these circumstances substantially broadens the intentional tort exception.[1] For reasons of statutory interpretation and public policy, the Court should find that Bakerman's fall from the ladder was an accident covered by workers' compensation.

II

THE INCOMPATIBLE FINDINGS OF PETITIONER'S COMPARATIVE NEGLIGENCE AND A "SUBSTANTIAL CERTAINTY OF HARM" CANNOT EQUATE TO AN INTENTIONAL TORT

[1] Amicus does not suggest that the Bombay Company is blameless in this accident. The repeated refusals to replace the ladder certainly suggest some level of negligence. However, the fact that employees had been using the ladder for quite some time without any incident counterbalances the Petitioner's claim that the accident was a "substantial certainty."

The jury in this case made two, incompatible, findings. First, the jury found that Bombay "engaged in conduct substantially certain to result in injury or death." *Bakerman*, 891 So. 2d at 556 (the definition of an intentional tort). Second, the jury found that Bakerman was 33% comparatively negligent for his own injuries (with Bombay responsible for the remainder). *Id.* When the alleged intentional misconduct does not go beyond failure to assure a safe working environment, workers' compensation should be the exclusive remedy. What would be considered "failure to assure a safe working environment?" Such instances as when the employer conceals inherent dangers in the material employees are required to handle, or makes false representations in that regard, or allows an employee to use a machine without proper instruction. *See* Johns-Manville Products Corp. v. Superior Court, 27 Cal. 3d 465, 473-74, 165 Cal. Rptr. 858, 863, 612 P.2d 948, 954 (1980) (workers' compensation provides sole remedy even if employer deliberately fails to provide safe workplace); Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) (declining even to consider whether intentional failure to maintain safe work place constitutes intent to injure); *see generally* 2A A. Larson, Workmen's Compensation Law § 68.13, at 13-22 (1983) (stating employer not liable for simply allowing unsafe work place). Injuries that result from a simple failure to maintain a safe working environment are

compensable only by workers' compensation.

The intentional tort exception requires a showing that the employer engaged in conduct that is at least worse than "gross negligence." *Turner v. PCR, Inc.*, 754 So. 2d 683, 687 n.4 (Fla. 2000). Gross negligence is defined as "an act or omission that a reasonable, prudent person would know is likely to result in injury to another." Florida Dep't of Transp. v. Juliano, 864 So. 2d 11, 16 n.7 (Fla. 3d DCA 2003) (citing Eller v. Shova, 630 So. 2d 537, 541 n.3 (Fla. 1993)). The jury's mixed findings in this case suggest that Bombay's actions would be considered no more than "gross negligence."

In McClanahan v. State, 854 So.2d 793, 796 (Fla. 2d DCA 2003), the court of appeal considered another case of an unsafe work environment. The court noted that the employer-agencies

> were made aware of problems with the air quality in the building, that they did little to remedy the situation other than to clean and replace air conditioning filters, and that they were less than candid with the employees about the extent of the problems or the risks they posed.

Id.

The court concluded that "the evidence might support a conclusion that the agencies *negligently* exposed the employees to increased risk." *Id.* (emphasis added).

In Tinoco v. Resol, Inc., 783 So. 2d 309, 310-11 (Fla. 3d DCA 2001), the plaintiff's foot was crushed beneath a defective excavator which lurched forward 2-3 feet every time it was engaged in the forward position. The entire crew knew of this defect but plaintiff was in the excavator driver's blind spot when he engaged the excavator, which, as expected, lurched forward. The court noted that "the circumstances here demonstrate negligence, [b]ut under the case law, a showing of negligence, or even gross negligence, is not enough." *Id.* at 310-11 (citing *Comeau v. Lucas*, 90 A.D.2d 674, 455 N.Y.S.2d 871 (N.Y. App. Div. 1982)*Bonpua v. Fagan*, 253 N.J. Super. 475, 602 A.2d 287 (N.J. Super. Ct. App. Div. 1992)*Barth v. Coleman*, 118 N.M. 1, 878 P.2d 319 (N.M. 1994)*Wal-Mart Stores, Inc. v. Coker,* 714 So.2d 423 (Fla.1998)*Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997), *reh'g denied*.*Merrill Crossings*, 705 So.2d at 562; *Capps v. Buena Vista Const. Co.*, 786 So.2d 71 (Fla. 1st DCA 2001)*Samara Development Corp. v. Marlow*, 556 So.2d 1097 (Fla. 1990)*Johnson v. Comet Steel Erection, Inc.*, 435 So.2d 908 (Fla. 3d DCA 1983)

Other states have grappled with plaintiffs' attempts to expand the intentional tort exception to the exclusive remedy of workers' compensation. While some courts have permitted such expansion, the repercussions have been swift. The pitfalls endured by these states present a cautionary tale for the possible expansion

of the intentional tort exception in Florida.

A. Ohio

The breadth of the intentional tort exception to workers' compensation has expanded and contracted with dizzying frequency as Ohio's courts issue decisions expanding the exception and the Legislature reacts to shore up workers' compensation as an injured employee's exclusive remedy. In Blankenship v. Cincinnati Milacron Chems., Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982), the court allowed the plaintiffs to circumvent the exclusivity of workers' compensation, and emphasized that workers' compensation laws were not intended to immunize employers from the consequences of intentional acts. 69 Ohio St. 2d at 614-17, 433 N.E.2d at 577-79. The court implicitly adopted the "substantial certainty" definition of an intentional tort. *Id.* The Ohio Supreme Court adopted the test explicitly in Jones v. VIP Development Co., 15 Ohio St. 3d 90, 94, 472 N.E.2d 1046, 1051 (1984) (test superceded by statute in Hannah v. Dayton Power & Light Co., 82 Ohio St. 3d 482, 484, 696 N.E.2d 1044, 1046 n.2 (1998)). In Henke, Richard C., *Workers' Compensation in New Jersey: Toward a Removal of Workers from the Sacrificial Altar of Production Quotas,* 56 Rutgers L. Rev. 789 (2004)Tucker, Barbara J., *Tort Liability for Employers*

Who Create Workplace Conditions "Substantially Certain" to Cause Injury or Death,

50 Mont. L. Rev. 371(1989)*Brady v. Safety-Kleen Corp*., 1 Ohio St. 3d 624, 576 N.E.2d 722 (Ohio 1991)*Johnson v. BP Chems., Inc*., 85 Ohio St. 3d 298, 707 N.E.2d 1107 (Ohio 1999)*Johnson v. BP Chems., Inc*., 85 Ohio St. 3d 298, 304, 707 N.E.2d 1107, 1111 (1999):

> In *Brady* or that the General Assembly has simply elected to willfully disregard that decision.

The Ohio Court found that the legislation exceeded the authority of the Legislature relying on two provisions of the Ohio Constitution which have no counterparts in the Florida Constitution. One commentator ruefully noted that "while it would appear that the substantial certainty test was restored, the experience in Ohio is emblematic of the rancor generated by the struggle to circumvent the workers' compensation system."

In Mandolidis v. Elkins, 161 W. Va. 695, 246 S.E.2d 907 (1978), a machine

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[2] The Ohio Supreme Court's decision in *Blankenship* interpreted the general language of relevant constitutional and statutory provisions to hold that the "General Assembly has seemingly allowed the judiciary the freedom to determine what risks are incidental to employment in light of the humanitarian purposes which underlie the Act." *Blankenship*, 69 Ohio St. 2d at 613, 433 N.E.2d at 576. This is a separate question than that presented to Florida courts to determine whether a workplace injury occurred as an "accident."

operator sued his employer when his hand came in contact with a ten-inch table saw not equipped with a safety guard; he lost two fingers and part of his hand. 161 W. Va. at 707, 246 S.E.2d at 914. The plaintiff alleged that the employer previously had been cited for violations of the Occupational Health and Safety Act for not having a safety guard on the table saw, that the federal inspectors put tags on the table saw prohibiting its use until the safety violation was corrected, that the employer fired another employee for refusing to use the table saw without a safety guard, and that the employer instructed his employees to use the saw without a guard to speed up production and increase profits. The plaintiff alleged that this combination of factors demonstrated the defendant's utter disregard for the safety of the plaintiff and the deliberate intention to kill or injure him. 161 W. Va. at 707-08, 246 S.E.2d at 915. The court agreed, holding that willful, wanton, and reckless misconduct by the employer constituted deliberate intention to injure. 161 W. Va. at 705, 246 S.E.2d at 914, *overruling* Allen v. Raleigh-Wyoming Mining Co., 117 W. Va. 631, 186 S.E. 612 (1936) (specific intent to produce the injury must be shown to support a recovery).

Following *Note, In Wake of Mandolidis: A Case Study of Recent Trials Brought*

Under the Mandolidis Theory—Courts are Grappling with

Procedural Uncertainties and Juries are Awarding Exorbitant Damages for Plaintiffs, 84 W.Va.L.Rev. 893 (1982)*Mandolidis: A Case Study of Recent Trials Brought Under the Mandolidis*. *Id.*

Reacting to the business community's cries of outrage, the West Virginia Legislature attempted to "find a more equitable solution that would uphold the policy for having an alternative system for relief, yet not subject employers to infinite liability." S. Paige Burress, Comment, *The Intentional Tort Exception to the Exclusivity Provision of Workers' Compensation: A Comparison of West Virginia and Ohio Law*, 18 Ohio N.U. L. Rev. 273, 275-76 (1991) (citing W. Va. Code § 23-4-2 (2002)). In 1983, the Legislature amended the workers' compensation law in an effort to restrain the decision of the West Virginia Supreme Court of Appeals. *Id*. This amendment reversed the *Burress*, 18 Ohio N. U. L. Rev. at 275-76.

But the statute was not the end of the story. In *Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990), the West Virginia Supreme Court recognized that the legislative intent behind the 1983 amendment was to narrow the standard enunciated in *Mayles*, *Id*. at 96, 23. The court then proceeded to *broaden* the scope of the enactment. *Id*. The court noted the legislative effort but recognized that this effort had grossly failed by effecting exactly the opposite of its intent. *Id*.; *Blake v. John Skidmore Truck Stop, Inc.*, 201 W.Va. 126, 493 S.E.2d 887 (W.Va. 1997)*Mayles* harshly criticized this result, noting particularly that it bode ill for the state's economic development:

> The problem with allowing weak "deliberate intention" cases to get to the jury is that juries have sympathy for injured workers and no sympathy for big employers and insurance companies. If you allow 100 "deliberate intention" cases involving big employers like Shoney's, Inc., to get to juries, you will get some substantial number of groundless verdicts for the plaintiffs. More important, however, than the cases that are tried are the cases that are settled. *Mayles v. Shoney's, Inc.*, 185 W. Va. at 98, 405 S.E.2d at 25 (Neely, C.J., dissenting).

C. Michigan

The Michigan Supreme Court adopted the "substantial certainty" standard to expand the intentional tort exception in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 19-23, 398 N.W.2d 882, 891-93 (1986). The court embraced the alternative definition of "intent" found in the Restatement (Second) of Torts, § 8A and held that an employee may avoid the exclusive remedy of workers' compensation and sue the employer for common law damages in intentional tort, providing that the employer intended the act which caused the injury and knew that the injury was substantially certain to occur. Restatement (Second) of Torts § 8A (1965) states that "[t]he 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." *Id.*

The Michigan Legislature, sensitive to the fear of losing companies to the state's perceived inhospitable environment for business, moved quickly to amend the exclusive remedy provision of the statute, having the new language in place and in effect within 142 days of the McVickar, Michael B., *Comment, Michigan Worker's Compensation Act: The Intentional Tort Exception to the Exclusive Remedy Provision*, 23 Val.U.L.Rev. 371(1989)Michigan Senate, Senate Fiscal Agency Bill Analysis (May 26, 1987)*Beauchamp*:

> Further, redefining "disability" would send an important message to the business and manufacturing community that Michigan is serious about reforming its system and reducing employer costs. It would make a positive change in the perception others have of our law, its impact on employers, and our intentions to mitigate that impact. Having the same definition as other states would help us argue our competitive position and send a signal that Michigan is capable of responding constructively to changes in the economy.

Id. (quoting Higgins, Edward J., *So Much "Quo" for So Little "Quid": Time for Michigan to Reexamine the Intentional Tort Exception to Workers' Compensation Exclusivity*, 1992 Det. C.L. Rev. 27 (1992)Mich. Comp. Laws Ann. § 418.131(1). Mich. Comp. Laws Ann. § 418.131(1).

The Legislature has exercised its prerogative to determine the scope of workers' compensation, as is particularly appropriate because legislators are accountable both to the employers and the employees who participate in worker's compensation insurance plans. This Court should interpret the law to fulfill the general intent of the statute, without expansion that would alter the balance and undermine the exclusive remedy which is the fundamental underpinning of the law. *See Taylor v. School Board of Brevard County*, 888 So.2d 1 (Fla. 2004)

The Florida Workers' Compensation Law is intended to "systematically resolve nearly every workplace injury case on behalf of both the employee and the employer." *Miami-Dade County v. Aravena*, 886 So.2d 303 (Fla. 3d DCA 2004)

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via United States Mail to ROBERT E. BIASOTTI, ESQUIRE, and ANNETTE LANG, ESQUIRE, Carlton Fields, P.A., P.O. Box 2861, St. Petersburg, FL 33731; and ROBERT SCOTT NEWMAN, ESQUIRE, Marlow, Connell, Valerius, et al., 4000 Ponce de Leon Boulevard, Suite 570, Coral Gables, FL 33146; ROBERT N. PLIER, ESQUIRE, 1431 Ponce de Leon Boulevard, Coral Gables, FL 33134; BARBARA GREEN, ESQUIRE, Gables One Tower, Suite 450, 1320 South Dixie Highway, Coral Gables, FL 33146 this 28th day of September, 2005.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210 (a), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE is proportionately spaced, has a typeface of 14 points or more, and contains 20 pages.

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