IN THE SUPREME COURT OF FLORIDA

MARTIN BAKERMAN,

Petitioner/Plaintiff,

v.

THE BOMBAY COMPANY, INC.,

Respondent/Defendant.
_____/

Case No. SC05-358

District Court Case Nos.
3D03-1465, 3D03-1532

ANSWER BRIEF OF RESPONDENT THE BOMBAY COMPANY, INC.

On Review from the District Court of Appeal,
Third District, State of Florida

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PRELIMINARY STATEMENT

Petitioner, Martin Bakerman, is referred to as “Bakerman.” Respondent, The Bombay Company, is referred to as “Bombay.”

The record on appeal is contained in 10 volumes, and is referred to as “Rx y-z,” with “x” representing the volume number and “y-z” representing the page number(s). Volumes 7-10 contain the trial transcripts, and are referred to as “Tx y-z.”

All emphasis in quotations has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

For the purpose of this appeal, Bombay generally accepts the facts presented by Bakerman in his initial brief, subject to the following additions.

A. Bakerman Falls From A Step-Ladder In Bombay's Stockroom And Fractures His Heel

At the time of the accident in this case, Bakerman was employed as an assistant manager of a Bombay store in the Dadeland Mall in Miami-Dade County. T7 115, 173. Bakerman fractured his heel when he fell from a wooden step-ladder while he was retrieving an item from the top shelf in Bombay's stock room. T7 189.

Bakerman was hired by Valerie Gottschalk ("Gottschalk"), the store manager and a close friend of Bakerman and his wife. T7 105, 115, 130, 173. Gottschalk did not think the step-ladder in the stock room was safe, and claimed she told her district manager several times about the condition of that ladder. T7 119-21. Nonetheless, all of the Bombay employees who worked at this store--including both Gottschalk and Bakerman--routinely used this step-ladder every day, many times each day, to retrieve merchandise from the stock room. T8 206; T7 186-87.

Prior to Bakerman's injury, no Bombay employee had ever fallen from this ladder at this store. T7 133-34; T8 202. Bakerman testified that he used the ladder hundreds of times

before, and he had never once fallen off prior to this accident. Bakerman testified that he never formally complained to anyone that the ladder was dangerous. T8 206; T7 182; T8 209.

Bakerman testified that the ladder could not be opened fully in the stockroom because there was not enough room between the shelves. T7 179. Gottschalk, however, testified that she had used this same step-ladder in this stockroom in the open and locked position. T7 136. Whenever she used the ladder in the closed position, she always held on to the shelf to keep herself from falling. T7 136-37. Bakerman himself recognized that, when reaching for inventory on the top shelf, "of course you would be holding on with one hand and retrieving with the other." T7 180.

On the day of the accident, Bakerman positioned the ladder against the vertical rails of the shelving, without opening it or engaging the locking mechanism. T7 188, T8 219, 221-22. While reaching for a vase, Bakerman let go of the shelves. T7 188. He fell to the floor and fractured his heel. T7 189.

B. Bakerman Receives Workers' Compensation Medical And Lost Wages Benefits For This Workplace Accident

After Bakerman's fall from the ladder, Gottschalk filed a report of the injury. T7 111-14, 126. Bakerman immediately began receiving workers' compensation benefits, including biweekly wage reimbursements equal to two-thirds his normal

salary. T7 192. He continued to receive these reimbursements for the entire time he was out of work. T7 124-25, 192-93.

Bombay's workers' compensation carrier also paid for Bakerman's medical care and physical therapy necessitated by his workplace injury. T7 193. Bakerman returned to work about three months after he fell from the ladder. T7 192.

C. Bakerman Sues Bombay For An Intentional Tort

Thereafter, Bakerman sued Bombay alleging, among other things, that his claim fell within the intentional tort exception to the Workers' Compensation Act. R1 2-6. At trial, at the close of the Plaintiff's case and again at the close of all evidence, Bombay moved for a directed verdict, asserting that Bakerman's claims were barred by workers' compensation immunity. T9 418; T9 421; T9 425. The trial court denied those motions. T9 424-25.

The case was submitted to a jury. The jury found that Bombay engaged in conduct substantially certain to result in injury or death. R4 502. The jury also found that Bakerman was himself negligent and that he contributed to his own injuries. Id. The jury allocated the parties' negligence as follows:

> 3. State the percentage of any negligence which was a legal cause of damage to Plaintiff, MARTIN BAKERMAN, that you charge to:
>
> Defendant, THE BOMBAY COMPANY 67%
>
> Plaintiff, MARTIN BAKERMAN 33%

Post-trial, Bombay moved to set aside the verdict and enter judgment in accordance with its motion for directed verdict. R4 507-09, 532-34, 547-50. The court denied those motions. R6 31.

D. The Third District Reverses The Final Judgment And Orders The Judgment Be Entered For Bombay, Based On Workers' Compensation Immunity

On appeal, the Third District reversed the judgment entered in favor of Bakerman. The court held that Bakerman's allegations did not meet the substantial certainty test required to overcome workers' compensation immunity, as set forth by this Court in Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000).[1] See The Bombay Co. v. Bakerman, 891 So. 2d 555 (Fla. 3d DCA 2004), review granted, 903 So. 2d 189 Fla. 2005). The court noted that, under Turner, "[a] showing of 'substantial certainty' requires a showing greater than 'gross negligence[]'...." Bombay, 891 So. 2d at 557.

Consistent with Turner, the Third District reviewed the facts presented at trial, and determined that no reasonable jury could find, based on the evidence presented, that Bombay's conduct was worse than gross negligence. See id. at 557

[1] Bakerman refers extensively in his Initial Brief to the original 2-1 split decision that the Third District affirmatively abandoned in response to Bombay's rehearing motion. See IB at 3-4. Judge Cope (who authored both decisions for the court) concluded that the court overlooked or misapprehended material points of fact or law in reaching the original decision. The court then issued a new unanimous decision--which is the one and only decision of the court.

(concluding that the evidence "was legally insufficient to support liability under the intentional tort exception to workers' compensation immunity.").

Bakerman thereafter sought review in this Court, asserting conflict with Turner and Travelers Indemnity Co. v. PCR, Inc., 889 So. 2d 779 (Fla. 2004), which this Court granted.

SUMMARY OF THE ARGUMENT

In Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000), this Court recognized that an intentional tort was a valid exception to the broad immunity afforded to employers under Florida's Workers' Compensation Act. One method of proving this exception is by a showing that the employer engaged in conduct that was substantially certain to result in injury or death to the employee. This is an objective test.

Bakerman argues that the Third District inserted a new element of concealment into the substantial certainty test, thus transforming the objective test into a subjective test. The Third District did no such thing. To the contrary, the Third District expressly followed Turner in analyzing whether Bombay's actions rose to the level of culpability required to fall within the intentional tort exception. Not only was the Third District's analysis virtually identical to the analysis identified in Turner, but it is the same analysis that has been routinely applied by every one of Florida's district courts.

The Third District was likewise correct in narrowly construing the intentional tort exception. This Court recently stated in Taylor v. School Board of Brevard County, 888 So. 2d 1 (Fla. 2004), that exceptions to workers' compensation immunity should be narrowly construed. Moreover, when the Court first recognized the intentional tort exception, it expressly warned

that the exception must be applied strictly "because nearly every accident, injury, and sickness occurring at the workplace results from someone intentionally engaging in some triggering action." Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882, 884 (Fla. 1986).

Finally, the circumstances of this case simply do not rise to the level of culpable negligence sufficient to overcome workers' compensation immunity. Climbing any ladder necessarily presents a risk of injury, and such risk is readily apparent to any employee. Every Florida case construing the intentional tort exception makes one thing clear--the exception does not apply to employer conduct that constitutes nothing more than simple, or even gross, negligence. A mere probability of injury--even one known to the employer--is simply not enough. As the Third District necessarily concluded, simple negligence, or at most gross negligence, is all that was present here.

For these reasons, this Court should find that jurisdiction was improvidently granted in this case and deny review. Alternatively, should this Court decide to retain jurisdiction, the Court should approve the Third District's decision.

STANDARD OF REVIEW

The Third District concluded that the evidence in this case "was legally insufficient to support liability under the intentional tort exception to workers' compensation immunity." Bombay, 891 So. 2d at 557. That conclusion implicates a question of law. Additionally, this appeal addresses the construction of the judicially-created intentional tort exception to workers' compensation immunity. That issue also implicates a question of law.

This Court reviews questions of law de novo. Wade v. Hirschman, 903 So. 2d 928, 932 (Fla. 2005).

ARGUMENT

The pivitol question that the Third District was faced with in this appeal was simple and straight-forward: does Bakerman's claim that Bombay failed to replace a wobbly ladder in a storeroom state a claim for culpable negligence--worse than gross negligence--sufficient to overcome Florida's workers' compensation immunity? As explained more fully below, the answer is no. To find otherwise would completely eviscerate Florida's workers' compensation immunity laws and ignore the clear precedent that has been set forth in numerous cases from this Court and from Florida's district courts.

Bakerman's claim implicates nothing more that a common, everyday workplace accident, precisely the kind of accident that workers' compensation was designed to address and remedy for both employer and employee. To come within the intentional tort exception to workers' compensation immunity, an employee must show that the employer engaged in conduct that was at least worse than "gross negligence." Turner, 754 So. 2d at 687 n.4. There must be evidence in the record that the employer was "culpably or criminally negligent." Fla. Dep't of Transp. v. Juliano, 864 So. 2d 11 (Fla. 3d DCA 2003), review denied, 866 So. 2d 1212 (Fla. 2004). Without such evidence, judgment must be entered for the employer. Id.

THE THIRD DISTRICT, APPLYING THE STANDARDS SET FORTH IN TURNER V. PCR, INC., CORRECTLY CONCLUDED THAT THE EVIDENCE PRESENTED BY BAKERMAN WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF LIABILITY UNDER THE INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION IMMUNITY

Bombay respectfully asserts that no express and direct conflict exists between the underlying decision and Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000). The Third District in its decision below followed the exact same logic that this Court employed in Turner. More importantly, and contrary to Bakerman's argument, the Third District did not require a showing of concealment. It did, however--in complete accordance with Turner--require a showing that the employer's conduct was worse than gross negligence. The Third District correctly concluded that no such showing was made in this case, and ordered that judgment be entered for Bombay based on workers' compensation immunity.

In order to demonstrate that the Third District's analysis in the underlying decision is entirely consistent with this Court's analysis in Turner, it is necessary to review the parameters for the objective standard, as set forth in Turner, and to identify the steps that this Court took in Turner to evaluate the facts of that case in light of the "substantially certain to cause injury or death" standard.

A. In Turner, This Court Reaffirmed The Workers' Compensation Immunity Intentional Tort Exception, And Held That An Employer's Conduct Should Be Evaluated Under An Objective Standard

In Turner, this Court reaffirmed its earlier holding that an employer is not entitled to workers' compensation immunity for its intentional torts. The Court identified two alternative methods by which an employee could establish that an employer committed an intentional tort: (1) a showing that the employer exhibited a deliberate intent to injure (a subjective test); or (2) a showing that the employer engaged in conduct that was "substantially certain to result in injury or death" (an objective test). Turner, 754 So. 2d at 687. This case involves the second alternative.[2]

The Turner Court described the type of conduct that is necessary to support a finding of "substantial certainty of injury," and provided examples of cases where the "substantial certainty" objective test was satisfied. First, the Court confirmed that a finding of "substantial certainty" requires a showing greater than "gross negligence." Id. at 687 n.4. The

[2] As recognized by the Third District in the decision below, the intentional tort exception was initially recognized through case law. Bakerman, 891 So. 2d at 557 n.*. In 2003, however, the Legislature amended section 440.11(1), Florida Statutes, to provide a statutory intentional tort exception and to set forth the standard governing this exception. See § 440.11(1)(b), Fla. Stat.; ch. 2003-412, § 14, Laws of Fla. Because the incident in this case occurred in 1997, the 1997 version of the statute applies here, and the applicable intentional tort exception standard was that established by this Court in Turner.

Court further explained that the "substantial certainty" exception is very similar to the "culpable negligence" intentional tort exception that the Court had previously recognized in Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882, 882-83 (Fla. 1986); Lawton v. Alpine Engineered Prods., Inc., 498 So. 2d 879, 880 (Fla. 1986); and Eller v. Shova, 630 So. 2d 537, 539 (Fla. 1993). See Turner, 754 So. 2d at 687 n.4 (Fisher, Lawton); id. at 686-87 (Eller).

The Court described "culpable negligence" (i.e., that level of negligence which is sufficient to overcome the immunity) as "reckless indifference" or "grossly careless disregard" of human life. In contrast, the Court described "gross negligence" (i.e., that level of negligence which is insufficient to overcome the immunity) as "an act or omission that a reasonable, prudent person would know is likely to result in injury to another." Turner, 754 So. 2d at 687 n.3.

Finally, the Court provided specific examples of cases where the "substantial certainty" test was satisfied, and stepped through the facts of those example cases to identify how the facts in those cases highlighted conduct that was worse than gross negligence. The Court cited to Connelly v. Arrow Air, Inc., 568 So. 2d 448 (Fla. 3d DCA 1990), and Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. 1st DCA 1990), as

benchmarks for the objective standard for the intentional tort exception to workers' compensation immunity. See id. at 690.

In Connelly, the evidence before the court suggested that the employer of the deceased employee: (1) intentionally misstated the weight capacity of an aircraft; (2) intentionally and repeatedly kept its aircraft in a defective condition; (3) concealed actual flight loads which resulted in reduced thrust and erroneous fuel calculations; (4) ignored reports of imminent equipment failure; and (5) economically coerced employees to fly in violation of FAA regulations. 568 So. 2d at 449. Eventually, one of the employer's airplanes crashed as a result of this conduct, and the court found that the employer had engaged in conduct that was substantially certain to result in injury or death to its employees. Id. at 451.

The Connelly court based its finding of "substantially certain" conduct on the fact that the actions of the employer were rooted in deceit and misrepresentation." Id. In fact, the court specifically connected the withholding of information to the substantially certain standard:

> [W]here the employer, as in this case, withholds from an employee, knowledge of a defect or hazard which poses a grave threat of injury so that the employee is not permitted to exercise an informed judgment whether to perform the assigned task, the employer will be considered to have acted in a "belief that harm is substantially certain to occur."

Id. (citation omitted).

As the Court in Connelly expressly recognized, it was applying the objective substantial certainty test when it considered whether the actions of the employer were rooted in deceit. Connelly, 568 So. 2d at 451. Contrary to Bakerman's argument, see IB 12, it was not applying a subjective test. The point is that, although the test is an objective one, the employee must identify specific conduct of the employer which would objectively be considered to be worse than gross negligence or the equivalent of culpable negligence.

Like Connelly, Cunningham also involved an employer's misrepresentations relating to the risks present in its glass manufacturing plant:

> appellees removed manufacturers' warning labels on toxic substance containers, misrepresented the toxic nature of substances, and knowingly provided inadequate safety equipment, while misrepresenting the danger or extent of toxicity in the plant and the need for proper safety equipment.

Cunningham, 558 So. 2d at 96-97. The plaintiffs' claim in Cunningham fell within the exception to workers' compensation immunity because the plaintiffs demonstrated that the alleged hazard "was intentionally increased and worsened by appellee's deliberate and malicious conduct." Id. at 97. Far more than failing to remedy the risk, the employer increased the risk by

denying its employees information that would have allowed them to take appropriate safety precautions.

Bakerman argues in his initial brief that this Court expressly rejected a concealment requirement in Turner when it receded from its prior decisions in Fisher and Lawton. See IB 9, 14. Bakerman's argument is misplaced in two material ways.

First, Bombay never suggested--nor did the Third District ever find--that Turner requires an element of concealment. To satisfy the objective "substantially certain" standard, Turner requires that the employer's conduct must rise to the level of culpable negligence, conduct that is worse than gross negligence.

Second, a close reading of Fisher and Lawton discloses that, in each case, the facts alleged do rise to a level equal to or worse than culpable negligence. For example, in Fisher, the complaint alleged that the employer knew of the potentially fatal danger to its employee by requiring the employee to clean out an underground pipe with a high pressure hose, but intentionally exposed its employee to it anyway. The employer allegedly refused to furnish necessary safety equipment or comply with OSHA regulations, and "willfully and wantonly" forced its employee to deliberately evade OSHA and other required inspections. Fisher, 498 So. 2d at 883.

In Lawton, an employee caught his hand in a punch-press when a co-worker accidentally put the press into operation as Lawton attempted to adjust the machine. Lawton sued his employer for fraud (an intentional tort). For eight years, the employer had been receiving safety warnings regarding the punch-presses, but apparently not implementing or warning its employees about these safety issues. Lawton, 498 So. 2d at 880.

Contrary to Bakerman's contention, there is no way that Lawton or Fisher can read as rejecting the "worse than gross negligence" culpability requirement of Turner. Moreover, it is also beyond dispute that the facts in both Fisher and Lawton are far more egregious than the facts of this case.

As the last part of its analysis, the Turner Court reviewed the facts alleged in that case. In Turner, one employee died and one was seriously injured from an explosion caused by their employer's use of an ultrahazardous chemical called TFE. The manufacturer of TFE had notified the employer it was discontinuing the sale of TFE in United States because of the high risk of injury associated with the use of that chemical. Indeed, the employer in Turner knew first hand of the high risk of danger associated with TFE because the employer had experienced three similar explosions in less than two years. See 754 So. 2d at 684-85. The Court held that, if proven, the

conduct alleged in that case was at least as disturbing as the conduct in Connelly and Cunningham.

Once again, accepting the facts as alleged in Turner, the "worse than gross negligence/culpable negligence" requirement was met. PCR was aware of a dangerous condition, but had not disclosed the extent of the danger to its employees. The employees thus could not make a reasonable and informed decision as to their actions. See Turner, 754 So. 2d at 691. The alleged conduct thus gave rise to a level of culpable negligence sufficient to constitute an intentional tort. Id.

B. There Is No Express And Direct Conflict Between The Decision On Review And *Turner*

1. The Third District Did Not Hold That The Objective Test For Determining Whether An Employer Committed An Intentional Tort Requires Proof That The Employer Concealed The Danger

The central premise of Bakerman's argument is that the Third District injected a new element of concealment into the Turner objective substantial certainty test. But that is not what the Third District actually held.

The Third District did nothing more than correctly apply the objective test as set forth in Turner. It did not create a new element to this test, nor did it transform the objective test into a subjective test. The court simply conducted the same analysis that is consistently conducted by Florida courts

in determining whether the circumstances of a particlar case are sufficient to fall within the intentional tort exception to workers' compensation immunity--it compared the facts of this case with those of cases applying the Turner test.

To begin its analysis, the Third District quotes Turner's admonition that "[a] showing of "'substantial certainty' requires a showing greater than 'gross negligence []'...." Bombay, 891 So. 2d at 557. The court then notes:

> Of particular interest here, the Turner decision also points out that the cases finding liability under the intentional tort exception contain "a common thread of evidence that the employer tried to cover up the danger, affording the employees no means to make a reasonable decision as to their actions." (citations omitted).

Id. The court then ends its analysis by stating "[t]hat element is missing here." Id.

Bakerman's argument misapprehends one essential point--when the Third District states "that element is missing here," it is necessarily not referring to a concealment requirement. Turner does not have a concealment requirement (although Turner does at least imply that, when there is concealment, there will by definition be conduct that is worse than gross negligence). The missing element the Third District is referring to--the essential element that is expressly required by Turner--is the

failure to establish a showing that the employer's conduct rises to a level that is worse than gross negligence.

How do we know the Third District is not referring to concealment as the missing element? Because in the very next sentence, the court identifies the two separate and distinct reasons why the evidence presented was legally insufficient to support liability under the intentional tort exception to workers' compensation immunity. First, the court states, "the dangerous condition was evident to the employee;" and second the court states "there was no concealment of the danger." Bombay, 891 So. 2d at 557. If concealment alone was the missing element that the court was referring to when it said "that element is missing," then there would have been no need for the court to identify two separate reasons to support the legal insufficiency. Moreover, the additional element--which shows that the employee had the information to make an informed choice with regard to his own safety--was both separate and material in establishing the insufficiency of the employee's intentional tort claim.

In short, the Third District correctly and carefully applied Turner in every respect. The Third District duly considered and explicated every factor set forth by this Court in Turner, including the consideration and analysis of the level of culpability of Bombay--an essential factor in overcoming the

broad immunity granted by the Workers' Compensation Act through the objective substantial certainty test.

2. To Overcome Workers' Compensation Immunity, An Employee Must Show His Employer Engaged In Conduct That Was Worse That Gross Negligence And Rose To The Level Of Culpable Negligence

Under the substantial certainty test, a court must analyze the circumstances surrounding the case and determine whether a reasonable person would understand that the employer's conduct was "substantially certain" to result in injury or death to the employee. Turner, 754 So. 2d at 688. That is precisely what this Court did in Turner, and that is precisely what the Third District did here.

The Third District held that the evidence presented by Bakerman did not show that Bombay's actions were substantially certain to result in injury or death because there was no evidence that Bombay was more than grossly negligent. Bombay, 891 So. 2d at 557. Specifically applying the Turner test, the court held that the common thread of evidence set forth in Turner--that the employer tried to cover up the danger to its employees--was missing here. Id. The potential for injury when using the ladder was evident to the employee, and there was no concealment of the danger. Bakerman was able to make an informed and reasonable decision as to his actions. Thus, Bombay's actions did not rise to the level of culpability

sufficient to overcome workers' compensation immunity, and no claim for an intentional tort could be sustained. Id.

The Third District's application of Turner is not only consistent with that decision but it is consistent with the numerous Florida's courts that have conducted similar analyses. Florida's district courts that have applied the objective Turner test have routinely analyzed the employer's level of culpability by considering whether the employer informed its employees of a potentially dangerous situation that was known by the employer, whether there was concealment, or whether there was fraud, deceit, or some such similar condition. Indeed, many of the cases where courts have rejected the intentional tort exception involve factual circumstances that are far more egregious than the present and far greater employer culpability than the present.

For example, in Emergency One, Inc. v. Keffer, 652 So. 2d 1233 (Fla. 1st DCA 1995), the plaintiff was badly injured while cleaning a part of a firetruck near a live battery using a metal paint brush and flammable lacquer thinner. The defendant's employees were required to use the metal brushes to clean parts of the trucks that they could not reach. There was evidence that management was aware that electrical arcs had extended from the electrical sources on the trucks to the metal brushes, and

that management refused to obtain plastic brushes because of the additional expense. Emergency One, 652 So. 2d at 1234.

In considering whether the plaintiff's allegations fell within the intentional tort exception, the First District applied the objective Turner substantial certainty test. The First District compared the facts of this case to Connelly and Cunningham and concluded that this case was unlike the situation in Connelly and Cunningham because the facts did not reach the level of culpability alleged in Cunningham or set out in the evidence involved in Connelly. The court reasoned:

> It is particularly significant that both of those cases share the common thread of a strong indication to deceive or cover up the danger involved, so that the employees had no way to apprise themselves of the dangers involved and thereby make a reasoned judgment as to their course of action. In contrast, while in this case there is evidence of a dangerous work environment, there was no competent evidence to support a view of intentional misrepresentation of the dangers involved. Similarly, although there was an allegation that safety precautions were withheld, there was no evidence of a concerted intentional effort to do so.

652 So. 2d at 1235.

Similarly, in Allstates Fireproofing, Inc. v. Garcia, 876 So. 2d 1222 (Fla. 4th DCA 2004), the Fourth District held that the intentional tort exception did not apply where an employee was killed when a scaffold fell on top of him resulting in

severe head injuries. The court, applying the objective Turner test, recognized:

> A substantial certainty was found in the Turner test when the employer allegedly knew of previous explosions as a result of chemical mixtures and nevertheless instructed employees to continue to mix those specific chemicals while intentionally concealing such dangers and failing to provide adequate safety procedures.

Id. at 1224-25. The court then compared the circumstances of this case to several cases in which courts have applied the objective substantial certainty test and concluded that, at most, the employer's conduct in this case amounted to negligence.

> That is to say, [defendants] did not attempt to conceal, or fail to warn, the decedent of the danger involved with the scaffolds ....
>
> Moreover, it should have been obvious to the decedent that there was a danger of the scaffold tipping over and landing on him, and that this danger was more likely if someone was atop the scaffold or if the scaffold's path of movement was not clean and clear. As such, [defendant] did not prevent the decedent from making an informed decision on whether or not to expose himself to the risk.

Id. at 1226.

In Pacheco v. Florida Power & Light Co., 784 So. 2d 1159 (Fla. 3d DCA 2001), the Third District held that the defendants were entitled to workers' compensation immunity because, while the defendant's derelictions were very serious and had tragic

consequences, they did not rise to the level of an intentional tort required to invoke the Turner exception. In so holding, the court relied upon Holderbaum v. Itco Holding Co., 753 So. 2d 699 (Fla. 3d DCA 2000), in which that court had held that the failure to warn of a later realized threat to kill an employee did not give rise to an intentional tort. Pacheco, 784 So. 2d at 1163.

In Tinoco v. Resol, Inc., 783 So. 2d 309 (Fla. 3d DCA 2001), the plaintiff's intentional tort action was not sufficient to overcome immunity because all of the employees were warned about the potential danger with the machinery used in the plaintiff's position, and it was undisputed that the operating malfunction was obvious to all who were working in the vicinity of the machine, including the plaintiff. The court held that the circumstances of that case at most demonstrated negligence, but that a showing of negligence, or even gross negligence, was not enough to establish an intentional tort. Id. at 310-11.

The list of cases applying this analysis goes on and on. See, e.g., Florida Department of Transportation v. Juliano, 864 So. 2d 11 (Fla. 3d DCA 2003) (holding that intentional tort exception did not apply because, although defendant was aware of the problem, there was no evidence that defendant was culpably negligent); McClanahan v. State, 854 So. 2d 793 (Fla. 2d DCA

2003) (holding that employees injured by toxic mold in the workplace had not stated claim for intentional tort because, even though employer was aware of problems with air quality, did little to remedy the situation, and was less than candid with employees about situation, circumstances gave rise to gross negligence at most which did not meet substantial certainty test); Garrick v. Publix Super Markets, Inc., 798 So. 2d 875 (Fla. 4th DCA 2001) (holding that intentional tort exception did not apply because, although defendant had notice of potential injury, defendant's actions at most constituted negligence and not culpable negligence).

The "common thread" among all of these decisions is an allegation or proof of a high degree of culpability on the part of the defendant--a factor expressly recognized by this Court in Turner. See 754 So. 2d at 687 n.4. The level of culpability required by this standard is more than simple negligence, or even gross negligence. Indeed, it is commonly shown by an element of deceit or misrepresentation to the employee, preventing the employee from making an informed decision. There are no such facts present here.

Considering this factor in analyzing whether a plaintiff has adequately alleged an intentional tort (or whether the defendant is more than grossly negligent) has long been established in Florida's jurisprudence, and most certainly does

not inject a new element into the "substantial certainty" test set forth by this Court. The Third District's application of the Turner test was correct.

3. The Third District Correctly Concluded That The Intentional Tort Exception To Workers' Compensation Immunity Should Be Narrowly Construed

Bakerman argues that the Third District erred in construing the intentional tort exception "narrowly" because section 440.015, Florida Statutes, provides that the Workers' Compensation Act is not to be construed in favor of either the employer or employee. IB 19. In so doing, Bakerman argues, the Third District incorrectly applied this Court's decision in Taylor v. School Board of Brevard County, 888 So. 2d 1 (Fla. 2004). Bombay respectfully disagrees.

Not only was the Third District's decision consistent with Taylor, but Bakerman's argument defies the entire purpose of the Workers' Compensation Act. It simply makes no sense to conclude that exceptions to application of the exclusivity provisions of the Workers' Compensation Act are to be construed broadly, and Bakerman can cite no authority for this proposition.

Florida's Workers' Compensation Act is intended to provide the exclusive remedy for workers injured in the course of their employment. As Florida courts have long recognized,

> [t]he purpose of the exclusiveness of the Workers' Compensation Act is to limit the

> liability of the contributing employer to the compensation benefits secured. In return for accepting vicarious liability for all work-related injuries and for surrendering traditional defenses, the employer is allowed to treat compensation as a routine cost without exposure to tort litigation. Likewise, the employee relinquishes his tort remedies for a system of compensation sparing him the cost, delay, and uncertainty of litigation.

Chorak v. Naughton, 409 So. 2d 35, 38 (Fla. 2d DCA 1981) (citing Mullarkey v. Fla. Feed Mills, Inc., 268 So. 2d 363 (Fla. 1972)).

While limited exceptions to the broad exclusivity of the Act exist, these exceptions should only be applied in the most egregious of circumstances. As this Court has recognized, these exceptions must be construed narrowly. Taylor v. Sch. Bd. of Brevard County, 888 So. 2d 1, 5 (Fla. 2004); see also Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990) ("[I]t is a well-recognized rule of statutory construction that exceptions or provisos should be narrowly and strictly construed.").

Even the application of the substantial certainty test at issue here plainly shows that the exception is to be applied narrowly--it is only to be applied in cases of culpable negligence. Indeed, when the intentional tort exception was first recognized by this Court, it expressly warned that a "strict reading" of the exception was necessary "because nearly every accident, injury, and sickness occurring at the workplace

results from someone intentionally engaging in some triggering action." Fisher, 498 So. 2d at 884; see also Kline v. Rubio, 652 So. 2d 964, 965 (Fla. 3d DCA 1995) (recognizing that the definition of an intentional act must be strictly interpreted because nearly every accident or injury results from some sort of intentional conduct). Courts routinely recognize that the Act is to be applied liberally to preserve immunity in the face of sometimes egregious acts of employers, as long as those acts fall short of intentional torts or culpable negligence. Byers v. Ritz, 890 So. 2d 343 (Fla. 3d DCA 2004), review denied, SC05-120 (Fla. Jul. 27, 2005) (citations omitted).

Moreover, while in Taylor this Court construed a separate exception to workers' compensation immunity--the unrelated works exception--this Court's statements with respect to the construction of exceptions to immunity plainly apply across the board to all workers' compensation exceptions. This Court stated: "Because the unrelated works exception set out in section 440.11(1) represents an exception to the broad exclusive remedy provisions of Florida's Workers' Compensation Law, we conclude that under the ordinary rules of statutory construction we must interpret it narrowly." 888 So. 2d at 5 (citing Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990) ("[I]t is a well-recognized rule of statutory construction that

exceptions or provisos should be narrowly and strictly construed.")).

To give the intentional tort exception anything other than a narrow application would defeat the entire purpose of the Workers' Compensation Act and the years of case law holding that the exception applies only in the most egregious cases. Section 440.015, Florida Statutes, did not change that. See Kash-n-Karry v. Johnson, 617 So. 2d 791, 793 (Fla. 1st DCA 1993) ("[Section 440.015] represents nothing more than a statutory recognition of long-standing legal principles enunciated by Florida courts and applied in workers' compensation cases.").

C. The Facts Of This Case Do Not Show That Bombay's Conduct Rose To The Level Of Culpable Negligence And Therefore The Facts Were Insufficient, As A Matter Of Law, To Overcome Workers' Compensation Immunity

Almost every case construing the intentional tort exception to workers' compensation immunity makes one thing painstakingly clear--the exception does not apply to conduct that constitutes nothing more than simple, or even gross, negligence. A mere probability of injury, even one known to the employer is simply not enough. See e.g., Allstates Fireproofing, 876 So. 2d at 1224-25; McClanahan, 854 So. 2d 793; Pacheco, 784 So. 2d at 1163; Tinoco, 783 So. 2d at 310-11; Emergency One, 652 So. 2d at 1235.

Here, Bombay's failure to replace a wobbly step-ladder, even in the face of prior complaints, is simply not the sort of intentional or criminal conduct necessary to overcome the statutory workers' compensation immunity. As Bakerman himself candidly admitted, he misused the ladder when he fell. The jury found that to be the case as well, concluding that Bakerman misused the ladder, finding him comparatively negligent. And, although Bakerman was injured when he fell off this ladder, Bombay's employees had all used the very same wooden step-ladder thousands of times, without anyone ever being injured before.

In the end, the most that can be said is that Bakerman negligently misused his employer's step-ladder and Bombay negligently failed to replace a defective ladder. Bombay did not conceal any defect; in fact, Bakerman was fully aware of the problems with this step-ladder. The evidence in this case, when taken in the light most favorable to Bakerman, simply does not meet the high threshold required to establish an intentional tort under Turner.

D. Courts Are Often Called On To Determine Whether The Facts Of A Particular Case Rise To The Level Of Gross Or Culpable Negligence, And Are Routinely Asked To Decide As A Matter Of Law When Those High Standards Are Not Met

It remains only to note that the mere fact that the jury found that Bombay engaged in conduct substantially certain to cause injury does not end the inquiry. Bakerman misperceives

the role that the Third District played as a gate-keeper in evaluating the facts and the law in this appeal. Bombay argued to the court below that, as a matter of law, Bombay's knowledge of an allegedly defective ladder and the failure to replace it do not rise to the level of conduct required to find that Bombay committed the equivalent of an intentional tort.

The trial court stated that:

> it's also very clear that the company knew about the condition of the ladder and knowing that, intentionally told this person to use the ladder. So to me the jury question was, was there substantial certainty that someone would be injured . . . .

R6 604-05. But that was an incorrect statement of the law regarding the intentional tort exception to workers' compensation immunity. Knowledge of a risk of injury might demonstrate simple negligence, but is not the "grossly careless disregard" that the law holds equivalent to an intentional tort. Turner, 754 So. 2d at 687.

This Court explained the concept of substantial certainty as follows:

> [w]here a reasonable man would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he intended it. . . . However, the knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent.

D'Amario v. Ford Motor Co., 806 So. 2d 424, 438 (Fla. 2001)

(rejecting argument that driving while intoxicated is an intentional tort)(citations omitted)(emphasis in original).

Giving every favorable inference to Bakerman, Bombay's conduct in this case at most demonstrates knowledge and appreciation of a risk. As a matter of law, such conduct does not rise to the level of culpable negligence. See id.; see also Tinoco v. Resol, 783 So. 2d 309, (Fla. 3d DCA 2001) (to succeed in bringing a case under the intentional tort exception to workers' compensation immunity, "a showing of negligence, or even gross negligence, is not enough."); Timones v. Excel Indus. of Fla., 631 So. 2d 331, 332 (Fla. 1st DCA 1994)(stating that "[r]equiring employees to operate unsafe machinery is not sufficient" to overcome workers' compensation immunity).

The Third District recognized--correctly--that courts are and must be the gate-keepers for assuring that workman's compensation immunity is not discarded lightly. Turner makes clear that "substantial certainty of injury or death" requires a showing worse than gross negligence. The standard must be equivalent to culpable negligence. Trial and appellate courts have an obligation to review cases such as this one and reverse a jury's verdict when there simply is no evidence that would rise to the level of culpable negligence.

An analogous area where trial and appellate courts are called on to make virtually the same analysis on summary

judgment and directed verdict is in the area of punitive damages. The standard for punitive damages is similar to the standard for the intentional tort exception to workers' compensation immunity--conduct rising to the level of culpable negligence.

For example, in Weinstein Design Group v. Fielder, 884 So. 2d 990 (Fla. 4th DCA 2004), the Fourth District reversed a trial court decision denying a directed verdict on punitive damages, because the appellate court concluded that the defendant's conduct did not amount to more than gross negligence--there was no evidence of intentional, malicious misconduct, undertaken with knowledge that injury to the plaintiff would result.

Similarly, in Air Ambulance Professionals, Inc. v. Thin Air, 809 So. 2d 28 (Fla. 4th DCA 2002), the appellate court reversed a verdict for punitive damages because there was no evidence of an illicit scheme to put the plaintiff out of business and no evidence of fraud, malice, or any other type of behavior that would justify punitive damages.

There are numerous other cases from this and other Florida courts that stand for that same proposition. See, e.g., Genesis Publications, Inc. v. Goss, 437 So. 2d 169 (Fla. 3d DCA 1983) (punitive damages were inappropriate because the record evidence was sufficient to sustain a finding of intentional conduct by the defendant but not a wanton disregard of plaintiff's rights);

White Constr. Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984) (although evidence that brakes had not been working for some time, and that petitioners were aware of this fact was sufficient to show negligence, it is not sufficient as a matter of law to submit punitive damages to the jury; something more than gross negligence is needed to justify the imposition of punitive damages), receded from on other grounds, Murphy v. International Robotic Sys., Inc., 766 So. 2d 1010 (Fla. 2000); Como Oil Co., Inc. v. O'Loughlin, 466 So. 2d 1061 (Fla. 1985) (degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter; required misconduct goes beyond gross negligence).

The point here is this: courts are required to provide a check of jury verdicts based on sympathy or other factors where it is clear that the evidence simply does not amount to the kind of culpable negligence required for punitive damages or for overcoming workers' compensation immunity. That is what the Third District correctly did in this case.

CONCLUSION

Based on the foregoing, Bombay respectfully requests that this Court reconsider its decision on jurisdiction, recognize that there is no conflict with Turner, and discharge the petition for review as improvidently granted. Alternatively, Bombay requests that this Court approve the decision of the Third District below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Barbara Green, Esquire, Barbara Green, P.A., Gables One Tower, Suite 450, 1320 South Dixie Highway, Coral Gables, Florida 33146; and Robert N. Pelier, Esquire, Robert N. Pelier, P.A., 1431 Ponce de Leon Blvd., Coral Gables, Florida 33134, attorneys for Appellant/Plaintiff, Martin Bakerman, on this 23rd day of September, 2005.

By: _____
Attorney

CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 12-point Courier New double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
Attorney