SUPREME COURT OF FLORIDA
CASE NO. SC05-358
Lower Tribunal No. 3D03-1465, 3D03-1532

MARTIN BAKERMAN,

Petitioner,

v.

THE BOMBAY COMPANY, INC.,

Respondent.
_____/

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

PETITIONER=S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Martin Bakerman=s fall from a rickety wooden ladder owned by his employer, The Bombay Company, was inevitable. Bombay knew it was only a matter of time before someone was hurt, but, ignoring repeated entreaties from Mr. Bakerman and the store manager, refused to spend the money for a new ladder. Mr. Bakerman fell off the ladder and suffered a comminuted fracture of his foot.

The ladder was in a small store room at the back of the Bombay Company store. Whenever a customer decided to purchase an item from the store, a Bombay employee would have to retrieve it from the store room. The room was extremely small and crowded (T.117, 176). Every day, Mr. Bakerman had to go up and down the ladder to retrieve merchandise from the top shelf, just below the twenty-two foot ceiling (T.176, 179). The ladder was not tall enough for Mr. Bakerman to reach the top shelves in the store room (T. 179). Each time, he had to stand on the top step of the ladder (T.179). Although it was an A-frame ladder, it was difficult to use it in the open position, because, with the shelves and the merchandise, there was not room in the store room to open it completely. The employees had to use the ladder in the closed position, leaning it against the shelves (T.134-135, 180). The ladder was old. It was wobbly. It swayed from side to side. It shook. (T. 120,179, 181). It did not have rubber shoes on the bottom of the legs (T.180).

Again and again, Mr. Bakerman complained to his store manager, Valerie Gottschalk, about the ladder (T.181-182). Again and again, Ms. Gottschalk told the

District Manager, Michael Klein, that someone was going to get hurt, and asked for permission and money to buy a new ladder (T.122). Again and again, permission and money were denied (T. 122,182-184).

Mr. Klein visited the store at least two or three times a month (T.109, 139-40), and the jury could have found that he was well aware of the condition of the ladder and the layout of the storeroom. Ms. Gottschalk spoke to Mr. Klein about the ladder every time he came to the store (T.123). She was sure that he saw the ladder himself (T.123). At least three times, Mr. Bakerman heard Ms. Gottschalk tell Mr. Klein that they had to get rid of the ladder because someone was going to get hurt, and ask him for permission to buy a new one (T.182-183). Each time, Mr. Klein refused (T.194).

Finally, the inevitable happened. Mr. Bakerman, trying to reach an item on the top shelf, momentarily let go of the shelf that he had been holding onto to steady himself, fell from the ladder and suffered a comminuted fracture of his left heel, a painful and permanent injury (T.187-189, 518-526).

Mr. Bakerman sued Bombay. Bombay asserted worker=s compensation immunity as a defense. The trial court denied Bombay=s motion for directed verdict (T.420-424). The court instructed the jury that it could only find Bombay liable if Bombay had engaged in conduct Asubstantially certain@ to result in injury or death, and that the Amere probability@ of injury was not enough to hold Bombay liable (T.480).

A special interrogatory asked the jury to determine: ADid the Bombay Company engage in conduct substantially certain to result in injury or death?@ The jury answered

Ayes.@ (T.496-497)[1] The jury found Bombay 67 percent at fault, and Mr. Bakerman 33 percent at fault (Id.).[2] In the second half of the bifurcated trial, the jury assessed damages totaling $176,460, before reduction for comparative fault (R.501).

The trial court denied Bombay=s post trial motions, and entered final judgment for Mr. Bakerman in the amount of $118,228.20 (R.577). Bombay appealed.

On appeal, the Third District initially affirmed. The Bombay Co., Inc. v. Bakerman, 2004 WL 735628 (Fla. 3d DCA April 7, 2004).[3] The panel, relying on this Court=s decision in Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000), found:

> We conclude that the Asubstantial certainty@ standard was met here. The relevant points are: (1) The employer required the employees to stand on the top step of the ladder to reach merchandise on the upper shelves. This would be bad enough as an isolated occurrence but here it was routinely required. (2) This was a worn wooden ladder which swayed from side to side and could be maintained in an upright position only by having the employee manually hold on to the shelving. (3) the ladder was not an

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[1] Mr. Bakerman also asserted a spoliation claim against Bombay for destroying the ladder after his fall. The jury rejected that claim (T.497).

[2] The plaintiff did not raise any issue concerning the applicability of comparative fault to this case.

[3] When the opinion was withdrawn by the Third District on rehearing, it was withdrawn from Westlaw. Therefore, a copy is included in the Appendix to this Brief.

> appropriate design for the space and had to be propped against the tall shelving instead of being opened. (4) What moves this case into the category of "substantial certainty" was the employer's repeated failure to respond to the manager's specific requests for the money to replace this specific ladder.
>
> * * *
>
> The testimony indicated that the ladder would sway badly when an employee climbed near the top, and it was necessary to hold on to the shelving to prevent the ladder from swaying and falling. The jury could conclude that if an employee ever let go of the shelving, the ladder would fall — as it did with Bakerman. And the jurors' common sense would tell them that repeated use of this wooden ladder will only grow worse with repeated usage, [sic] thus increasing the danger.

2004 WL 735628 at *3-*4.[4]

The original opinion concluded that, "the fact that the store employees managed to use an unsafe ladder for a period of time . . . did not cure, or eliminate, the 'substantial certainty' of injury which existed." Id. at *4.

On rehearing, the Third District reversed itself. The court again reviewed this Court's decision in Turner v. PCR , but this time it held that the employer was entitled to worker's compensation immunity because it had not concealed the dangerous condition from Mr. Bakerman. Pointing to language in Turner that mentioned "a common thread

[4] In addition to the jurors' "common sense," plaintiff presented an engineer's expert testimony at trial that a rickety ladder would become worse each time it was used (T. 396-399).

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,@ the Third District held:

> the dangerous condition was evident to the employee and there was no concealment of the danger. For that reason we conclude that the evidence was legally insufficient to support liability under the intentional tort exception to worker's compensation immunity.

Bombay Co. v. Bakerman, 891 So. 2d 555, 557 (Fla. 3d DCA 2004).

Mr. Bakerman sought review in this Court based on conflict with Turner and with Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779 (Fla. 2004).

SUMMARY OF THE ARGUMENT

In Turner v. PCR, Inc., this Court held that there are two ways to prove that an employer=s actions amounted to an intentional tort sufficient to overcome worker=s compensation immunity. One is a subjective test, where the evidence shows a deliberate intent to injure. That is not present in this case. The second is an objective test, applicable where the evidence shows that the defendant knew or should have known that there was a substantial certainty that injury or death would result from its conduct. Contrary to the Third District=s decision on rehearing, the objective test does not require a showing that the defendant attempted to conceal its actions or to prevent the employee from learning of the danger. Such a requirement would turn the objective test into a subjective test. One can only conceal what one actually knows, not what one merely should know.

Under a proper application of the objective substantial certainty test, the trial court correctly left it to the jury to determine that Bombay knew or should have known that its conduct was substantially certain to cause injury or death and that Bombay was not entitled to immunity under the worker=s compensation law.

STANDARD OF REVIEW

The error in engrafting a concealment requirement onto the objective substantial certainty test is an issue of law, reviewed *de novo*. See, e.g., Maggio v. Fla. Dept. of Labor & Emp. Sec., 899 So. 2d 1074, 1076 (Fla. 2005)(Astatutory construction is a question of law subject to *de novo* review.@) Moreover, in reviewing the grant of a directed verdict for the Defendant, this Court must review the evidence and all inferences in the light most favorable to the Plaintiff, and cannot affirm unless no proper view of the evidence could sustain a verdict in favor of the Plaintiff. Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329 (Fla. 2001).

ARGUMENT

BOMBAY IS NOT ENTITLED TO WORKER=S COMPENSATION IMMUNITY BECAUSE THE TRIAL COURT PROPERLY ALLOWED THE JURY TO DETERMINE THAT BOMBAY KNEW OR SHOULD HAVE KNOWN THAT ITS ACTIONS WERE SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH.

The worker=s compensation system involves a mutual relinquishment of rights by employer and employee. The employee gives up the right to sue for negligence for Aaccidents@ at common law in exchange for payment of compensation regardless of fault; the employer gives up common law defenses and accepts strict liability in exchange for immunity from actions under the common law for negligence for Aaccidents.@ Aguilera v. Inservices, Inc., 2005WL 1403993, 30 Fla. L. Weekly S440 (Fla. 2005). The statute provides coverage for the employee, and corresponding immunity for the employer, only for work-related Aaccidents.@ An Aaccident@ is defined in '440.02(1) as including Aonly an unexpected or unusual event or result that happens suddenly.@

The worker=s compensation statute applicable at the time Mr. Bakerman was injured[5] did not provide coverage or immunity for intentional acts. The jury, the trial court and the original decision of the Third District all properly applied the objective, Asubstantial certainty@ test to determine that Bombay was not entitled to immunity under

[5] **In 2003, the Legislature amended '440.11, Florida Statutes. The amendment had two effects. First, it explicitly recognized an intentional tort exception to workers compensation immunity. Second, it set forth a number of statutory criteria to be satisfied before the intentional tort exception could apply, including a concealment requirement. The amendment is not retroactive, see FCCI Ins. Co. v. Horne, 890 So. 2d 1141, 1143 n.5 (Fla. 2004), and is not applicable here.**

the worker=s compensation statute because its actions in this case amounted to an intentional tort.

In Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000), this Court held that a plaintiff could prove the intentional tort exception to worker=s compensation immunity in either of two ways. The first is by showing a deliberate intent to injure. That is a subjective test. The second is an objective test:

> an objective standard to measure whether the employer engaged in conduct which was substantially certain to result in injury. This standard imputes intent upon employers in circumstances where injury or death is objectively "substantially certain" to occur.

754 So. 2d at 691.

By appending to this objective standard a requirement that the employer conceal the danger from the employee, the Third District=s decision on rehearing erroneously converted the Asubstantial certainty@ objective test of Turner into a subjective test, contrary to this Court=s holdings in Turner and Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779, 791 (Fla. 2004). Moreover, the Third District misapplied this Court=s decision in Taylor v. School Board of Brevard County, 888 So. 2d 1 (Fla.2004) concerning the proper construction of the worker=s compensation law. The evidence presented to the jury was legally sufficient to allow the jury to find that Bombay should have known that the ladder was substantially certain to cause injury to an employee.

A. The objective test does not require a showing of concealment or a coverup.

Contrary to the finding of the court below, this Court=s decision in Turner does not require a plaintiff, seeking to prove that an employer committed an intentional tort under the objective substantial certainty test, to prove that the employer tried to conceal the danger from the employee. To the contrary, the very nature of an objective test is that no showing of the employer=s subjective state of mind or actual intent is required.

This Court derived the two alternatives for demonstrating an intentional tort from Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882, 882-83 (Fla.1986). The Court explained in Turner:

> The second part of the alternative test in Fisher comes from Spivey v. Battaglia, 258 So. 2d 815 (Fla.1972), in which this Court cited the Second Restatement of Torts for the proposition that "[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 had intended it."

754 So. 2d at 688 (emphasis in original). The Court explained the difference between a subjective test and an objective test:

> Under an objective test for the substantial certainty standard, an analysis of the circumstances in a case would be required to determine whether a reasonable person would understand that an employer=s conduct was Asubstantially certain@ to result in injury or death to the employee. Under this approach, *the employer=s actual intent is not controlling.* On the other hand, a subjective approach essentially requires a determination as to whether an employer actually knew or intended the consequences of its conduct. Under this approach, there would actually be no alternative basis for recovery against an employer. Rather, an employee would be limited to

actions where the employer engaged in conduct that the employer *actually knew* would be harmful to the employee.

754 So. 2d at 688 (emphasis added).

The Court expressly rejected a subjective standard, pointing out that a subjective standard Aappears identical to the first part of the disjunctive test adopted in Fisher, i.e., a deliberate intent to injure,@ and that it Awould result in the virtual elimination of the alternative test for liability set out in Fisher . . . .@

Under an objective test, A[I]f a circumstance is substantially certain to produce injury or death,@ the Court explained, Ait cannot reasonably be said that the result is >unexpected= or >unusual.=@ Turner, 754 So. 2d at 689.

To eliminate the objective test, the Court held, would Aencourage 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.@ 754 So. 2d at 691 (emphasis added). This, the Court refused to do.

The Third District=s imposition, on rehearing, of a concealment requirement, results in the Avirtual elimination of the alternative@ objective test. It renders the test a subjective one, no different from the Adeliberate intent@ alternative. It requires a showing that the employer Aactually knew@ its conduct would be harmful to the employee.

The Third District made too much of this Court=s mention in Turner of Aa 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.@ 754 So. 2d at

691. Although the Court in Turner did note that Acommon thread@ in Connelly v. Arrow Air, Inc., 568 So. 2d 448 (Fla. 3d DCA 1990) and Cunningham v. Anchor Hocking, 558 So. 2d 93 (Fla. 1st DCA 1990), it did so only in noting the similarity of the facts in those cases to the facts in Turner. The Court did not hold that such concealment was an essential element to overcome worker=s compensation immunity. It was just one of the factors that the Court considered. While efforts at concealment may be relevant to show intent, the only purpose of *requiring* a showing of concealment would be to show that the employer subjectively *knew*, not that the employer should have known, the substantial certainty of injury to the employee.

In fact, Connelly can and should be read as satisfying both an objective and subjective test. The Connelly court noted that the employer withheld information from employees about the hazardous defects in the aircraft, depriving the employee of the ability Ato exercise an informed judgment whether to perform the assigned task,@ demonstrating that the employer A*acted in a >belief* that harm is substantially certain to occur.=@ 568 So. 2d at 451 (emphasis added). This demonstration of actual belief is an example of of the subjective test.

However, the Connelly court also noted that at least one of the employees who was killed in the crash did know about the danger. Four days before the crash, one of the stewardesses called her fiancé and told him about the problem with the engine, and that Arrow was not going to have it repaired until the aircraft returned to the United States. The stewardess rejected her fiance=s advice to get off the plane, and was killed in the

crash. 568 So. 2d at 450. The court did not distinguish that stewardess= claim from the claims of the other employees. It allowed all of the employees= claims to proceed on the theory that the employer engaged in conduct which was substantially certain to result in injury or death, including the stewardess who knew about the engine problem and about the employer=s refusal to fix it.

Thus, Connelly did not require that the employer hide information from the employees in order to satisfy the substantial certainty test. It merely noted that, as to some of the employees, that factor was present. It allowed employees to proceed against the employer even if, like Martin Bakerman, the employee knew of the dangerous condition and of the employer=s refusal to fix it.

In order for the employer=s actions to meet the test the Third District adopted in the present case, however, the employer must actually be aware of the substantial certainty of injury, and must deliberately take steps to hide it from the employee. In order to try to conceal something from someone, the person doing the concealing must have actual knowledge of the thing he is trying to conceal. This concealment requirement eviscerates the objective, substantial certainty test **B** whether a reasonable person would believe that the injury was substantially certain to follow **B** and renders it merely an echo of the first alternative test enunciated in Fisher and Turner, subjective, deliberate intent to injure.

That is not what this Court intended in Turner when it talked about the Acommon thread@ of concealment in the earlier cases. By the time it reached that point in its

discussion, the Court already had determined that the objective standard would apply. The concealment discussion appears in an entirely separate section of the opinion, in which the Court was comparing the facts in the Turner case to the facts in some of the earlier cases. The Court simply noted that one common fact in those cases was the attempt by the employer to Acover up the danger.@ 754 So. 2d at 691. The Court did not hold that such a cover-up was a requirement.

In fact, this Court in Turner specifically stated that the facts of two of its earlier cases, Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882 (Fla. 1986) and Lawton v. Alpine Engineered Products, Inc., 498 So. 2d 879 (Fla. 1986), in which there was no discussion of cover-up or concealment from the employee, would satisfy the objective test. See 754 So. 2d at 691 n. 8 (Awe nevertheless recede from Fisher and Lawton to the extent those cases can be read as rejecting the facts as stated therein as a sufficient basis to support an allegation of substantial certainty of injury.@) Neither of those cases involved concealment of the danger from the employee. Therefore, to hold, as the Third District did below, that concealment by the employer is required before the Turner test can be satisfied, conflicts with the rule announced in Turner.

In Fisher, the Court recited the allegations of the complaint, without mentioning any cover- up:

> The complaint alleges, *inter alia*, that Shenandoah required the deceased to enter pipes which it knew contained noxious fumes and which would Ain all probability@ cause injury or death. The complaint further alleges that Shenandoah failed to provide its workers with oxygen masks, gas detection

> equipment, rescue equipment, and other safety equipment, and otherwise failed to comply with OSHA regulations. Indeed, the complaint alleges that Shenandoah wilfully and wantonly required its employees to deliberately evade OSHA safety inspections so as to prevent the company from being cited for safety violations.

498 So. 2d at 883. This description of the complaint in Fisher does not include any allegation that the employer concealed the danger from the employees, or deprived the employees of an opportunity to make a reasonable decision about their actions, as the rehearing decision in the present case requires. In fact, the employer in Fisher appears to have used the employees to help conceal the violations from OSHA, so the employees must have been aware of the violations. Turner held that the facts described in Fisher were sufficient to overcome the worker=s compensation immunity defense, despite the employee=s knowledge.

Similarly, the facts alleged in the complaint in Lawton, as set out in the Supreme Court=s opinion, do not demonstrate that the employer covered up the danger to prevent the employee from making a reasonable decision:

> Alpine Engineered Products purchased a punch press from Federal Press Company in 1972. In 1981 Carl Lawton, a punch press operator employed by Alpine, caught his hand in the press when a co-worker accidentally put the press into operation as Lawton attempted to adjust the machine. The press crushed Lawton=s hand and caused the loss of all the fingers on that hand. . . . During the course of discovery, Lawton learned that between February 1972 and August 1980 Alpine had received numerous written communications from Federal Press informing Alpine

> that, for safety reasons, point of operation guards should be provided on the press and that operators should be instructed about the various dangers involved in operating the press.

498 So. 2d at 880. The Turner court held these allegations were sufficient to Asupport an allegation of substantial certainty of injury.@[6]

Furthermore, this Court in Turner, 754 So. 2d at 688, specifically overruled a case that had imposed a concealment requirement, Thompson v. Coker Fuel, Inc., 659 So. 2d 1128 (Fla. 2d DCA 1995). In Thompson, the Second District held that there was no exception to worker=s comp immunity because Athere is no evidence of the [employer=s] deception or intent to injure@ the employee. 659 So. 2d at 1130. This Court in Turner found that the Thompson court had erroneously applied a Asubjective evaluation [that] appears to be identical to the first part of the disjunctive test adopted in Fisher, i.e., a deliberate intent to injure.@ 754 So. 2d at 688. As in the now-overruled decision in

[6] Although the Court in Lawton also noted that the plaintiff later amended his complaint to allege an additional count for fraud, the facts constituting that fraud do not appear in the opinion. They were in a separate count, and do not appear to figure into the Court=s discussion of whether the intentional tort exception applied to the counts in the original complaint.

Thompson, the Third District below, by imposing a concealment requirement, made the Asubstantial certainty@ test a subjective one, not an objective one as required by Turner.

The Third District=s error below is the same as the error of the Second District in Thompson, which this court disapproved in Turner. Similarly, this Court in Turner disapproved United Parcel Service v. Welsh, 659 So. 2d 1234, 1235 (Fla. 1995), because the Welsh court had required a showing that Athe employer knew@ under a subjective test. 754 So. 2d at 688. Significantly, the facts in Welsh do not indicate any concealment by the employer; in fact, it was the employee who notified the employer that noxious fumes were emanating from a package on his delivery truck. By disapproving Welsh, this Court disapproved any imposition of a subjective standard on the objective, substantial certainty test.

Recently, in Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779(Fla. 2004), this Court stressed the difference between the subjective and objective tests:

> Importantly, under this standard the employer need not have *known* that its conduct was substantially certain to cause injury; the fact that it *should have known* of the substantial certainty would be sufficient to negate the Aunexpectedness@ or Aunusualness@ of any resulting injury, regardless of whether the injury truly was unexpected by the employer.

889 So. 2d at 788 (emphasis in original). The Court reiterated:

> To satisfy the objectively-substantially-certain standard of Turner . . . an injured employee need not prove that his or her employer *actually expected* that its conduct would result in injury. Rather, under Turner, an injured

employee only needs to demonstrate that his or her employer *should have expected* that injury would result.

889 So. 2d at 791 (emphasis in original).

The Court also pointed out that the legislature recently amended '440.11 to require either deliberate intent to injure, or virtual certainty of injury coupled with concealment of the danger from the employee. 889 So. 2d at 784 n.5. The Court noted that the standard applicable to Turner (and to this case) is Amuch more liberal@.

By injecting a concealment requirement into what is supposed to be an objective test, the Third District converted the objective test into a subjective test, contrary to Turner and Travelers.

In other areas of the law, courts have found intent under the objective substantial certainty test without any requirement of concealment. For example, in S.D. v. State, 882 So. 2d 447 (Fla. 4th DCA 2004), the court found sufficient evidence of intent to sustain an adjudication of guilt of battery where the defendant was angry and flailing her arms, saw the victim approaching her and continued to swing her arms. The court found sufficient evidence to show Asubstantial certainty of touching or striking [to satisfy] the intent element of battery.@

Bombay must have been aware of the dangerous condition of the ladder it provided to its employees and required them to use to reach merchandise on the top shelves. The store manager knew the ladder was going to hurt someone. She told the district manager so. The district manager repeatedly visited the store personally, and had frequent phone contact with the store manager. Again and again, the store manager told

him that the ladder was dangerous, which he no doubt saw for himself. Again and again, the store manager asked permission to replace the ladder. By repeatedly refusing to allow the expenditure of money for a new ladder, Bombay engaged in the kind of Awillful blindness@ that so concerned this Court in Turner.

Under the objective test, the jury properly was allowed to find that Bombay=s conduct was substantially certain to result in injury to the employees who were required to use that ladder every day, as the ladder got shakier, more rickety and more dangerous. Under the objective test, the jury properly was allowed to find that Bombay was not entitled to immunity under the worker=s compensation statute.

B. The Third District misapplied the rules of construction applicable to the worker=s compensation statute.

The Third District decided on rehearing to construe the intentional tort exception Anarrowly.@ That construction is contrary to '440.015, Florida Statutes, and to this Court=s holding in Turner that the statute Ais not to be construed in favor of either the employer or the employee.@ 754 So. 2d at 689.

Section 440.015 requires that Athe laws pertaining to workers= compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of eitehr employee or employer.@ In deciding to construe the statute Anarrowly,@ the district court incorrectly applied this Court=s recent decision in Taylor v. School Board of Brevard County, 888 So. 2d 1 (Fla.2004).

In Taylor, this Court interpreted the statutory Aunrelated works@ exception to worker=s comp immunity. The statute expressly provides an exception to immunity when

employees are engaged in Aunrelated works@, but does not define Aunrelated works.@ The Court pointed out that the term was susceptible to conflicting, even opposite, interpretations:

> We initially note that, in one sense, all employees of the same employer could always be considered engaged in related works since they are all charged to carry out the mission of the employer. At the same time, however, some distinction could always be drawn between the work of most employees so as to make their work unrelated.

888 So. 2d at 5.

Because of this ambiguity, this Court in Taylor was forced to resort to standard rules of statutory construction. The Court applied the rule that statutory exceptions should be narrowly construed. But that does not require narrow construction of the statute in all circumstances.

Here, there is no need to resort to rules of statutory construction, because, unlike Taylor, there is no statutory ambiguity here, and because this Court has already interpreted the portion of the statute applicable here, in Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000). See John Hancock - Gannon Joint Venture v. McNully, 800 So. 2d 294, 297 (Fla. 3d DCA 2001) (where language of statute is clear and unambiguous, no occasion to resort to rules of statutory construction).

In Turner, the Court Areaffirm[ed] our prior decisions recognizing . . . that workers compensation law does not protect an employer from liability for an intentional tort against an employee.@ 754 So. 2d at 687. The Court did not interpret an express

statutory exception. Rather, the Court construed the plain language of '440.09(1), which Aprovides compensation for injury by accident.@ 754 So. 2d at 689. The Court explained:

> Injury is defined in '440.02(17), Florida Statutes (1991) as Apersonal injury or death by accident arising out of and in the course of employment.@ Accident is further defined in '440.02(1), Florida Statutes (1991) as Aonly an unexpected or unusual event or result, happening suddenly.@ Conversely, therefore, *under the plain language of the statute*, it would appear logical to conclude that if a circumstance is substantially certain to produce injury or death, it cannot reasonably be said that the result is Aunexpected@ or Aunusual,@ and thus such an event should not be covered under workers= compensation immunity.

754 So. 2d at 689 (emphasis added; court=s emphasis omitted).

Thus, this case does not present a statutory exception that should be construed narrowly under Taylor. It presents instead the plain language of the statute as this Court has already construed it in Turner.

The Third District erroneously relied on Taylor to narrowly construe the intentional tort exception to statutory immunity, resulting in a subjective test. Properly viewed, the intentional tort exception is not an exception at all. It is merely an acknowledgment that intentional torts are not accidents covered by the worker=s compensation statutes.

C. The facts of this case are sufficient to allow a jury to find that Bombay is not entitled to immunity under the substantial certainty test.

Under a proper, objective substantial certainty test, the facts presented to the jury below were sufficient to allow the jury to find that Bombay committed an intentional tort. The jury heard evidence that:

- Bombay knew that the ladder was old and rickety, and too short for anyone who needed to reach merchandise on the top shelf (T.120, 138, 179).
- Bombay knew that the ladder wobbled, swayed and shook when anyone stood on it (T.120, 181).
- Bombay knew that there was no room in the store room to fully open the ladder, and that employees had to use it in the closed position, leaning it against the shelves (T.134, 179, 480, 219-222).
- The bottoms of the legs were cut at an angle so that when it was open in the AA@ position, the legs were flat on the floor (T.205).Bombay knew the ladder did not have rubber on the bottom of the legs (T.180, 119, 204).
- Bombay knew that employees using the ladder had to hold on to the shelves to keep from falling (T.135, 180).
- Bombay knew that the condition of the ladder was getting worse every day (T.396-399).
- Bombay knew that employees had to climb the ladder several times a day, every time a customer wanted to buy one of the items stored on the top shelves in the store room (T.133, 179, 206).

- Mr. Bakerman repeatedly complained to his store manager about the ladder (T.182).
- The store manager herself was Aafraid@ of the ladder (T.133).
- The store manager complained to the district manager that the ladder was dangerous every time he came into the store (T.123).
- The district manager was in the store two or three times a month (T.139-140).
- The district manager saw the ladder himself when he was in the store (T.123).
- The store manager warned the district manager that they had to get rid of the ladder because somebody was going to get hurt (T.182-183).
- The store manager repeatedly asked for permission and money to buy a new ladder (T.122, 182-184).
- The district manager obstinately refused to allocate funds to allow the purchase of a new ladder (T.122, 184).
- Bombay decided not to spend the money to replace the ladder (T.184).
- As the store manager repeatedly had predicted to the district manager, someone did, indeed, get hurt.

The jury could find, based on this evidence, that Bombay should have known that the ladder was substantially certain to cause injury or death. The trial court properly allowed the jury to answer that question.

Neither the lack of a prior injury, nor the absence of a coverup, precludes a jury from making that finding. Evidence of a prior injury could be relevant, because it is

evidence that the defendant is on notice of the dangerous condition. See, e.g., Lasar Mfg. v. Bachanov, 436 So. 2d 236, 238 (Fla. 3d DCA 1983). But it is not required. Here, the evidence is undisputed that Bombay did know of the dangerous condition of the ladder. Therefore, evidence of prior incidents was not necessary.

Additionally, this Court=s holding in Turner that the facts in Lawton were sufficient to satisfy the objective test should conclusively put to rest Bombay=s argument below that the lack of prior injuries caused by this ladder precludes a finding of substantial certainty. As the original Third District opinion recognized, there was no indication in Lawton that there were any prior injuries with the punch press.

In Lawton, the employer received numerous communications from the manufacturer warning it of Athe various dangers involved in operating the press.@ 498 So. 2d at 880. Here, Bombay received numerous communications from Mr. Bakerman and Ms. Gottschalk, the store manager, warning it of the danger involved in using the ladder. A jury could find Bombay=s state of mind in this case to be the equivalent of the employer=s state of mind in Lawton, which this Court held in Turner to be sufficient to satisfy the objective substantial certainty test.

Moreover, the absence of a cover-up does not relieve Bombay of liability. The Third District=s suggestion that a cover-up deprives the employee of the Ameans to make a reasonable decision as to their actions@ ignores the reality of the employer-employee relationship. As Mr. Bakerman explained:

> Well, you have a customer come to the store and they buy something, I don=t think I would have kept my job very long if I had said, well, I=m sorry I can=t give it to you, I have got a defective ladder. You make do with the tools the company gives you to do, period, and you do your job.

(T.184). In reality, an employee=s choice to face the danger imposed on him by his employer=s demands may be a choice of the lesser of two evils **B** getting injured or losing his job. For most workers, this is no choice at all. At most, the choice not to lose his job may constitute some negligence on the part of the employee **B** and indeed, the jury found some comparative negligence on Mr. Bakerman=s part. But it does not change the fact that the employer, under an objective test, should have known that the injury was substantially certain to occur, and decided to save a few dollars by refusing to replace the ladder.

The trial court properly allowed the jury to find that Bombay should have known that its obstinate refusal to spend a few dollars to replace the ladder was substantially certain to cause injury to Mr. Bakerman.

CONCLUSION

The objective test does not require proof that the employer concealed the danger from the employee. It requires only that the employer should have known that the injury or death was substantially certain to occur. The jury heard that evidence below. The decision of the district court should be reversed, and the jury=s verdict and trial court judgment should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. 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 this _____ day of July, 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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