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 JURISDICTION

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STATEMENT OF FACTS

Petitioner, Martin Bakerman, asks this Court to review a decision of the Third District Court of Appeal, issued on rehearing, which reversed a jury verdict and found, as a matter of law, that Mr. Bakerman=s employer was entitled to tort immunity under the worker=s compensation statute. The Third District made this ruling in spite of the jury=s finding on an interrogatory verdict form that the employer had committed an intentional tort by engaging in conduct that was substantially certain to result in injury or death. The facts are set out in the District Court=s opinion:

> Bakerman was the assistant manager of the Bombay store in the Dadeland Mall in Miami-Dade County. Merchandise was kept in a storeroom which had shelving approximately twenty-two feet high. Bombay supplied a wooden ladder which employees were to climb in order to retrieve merchandise stored on the shelves.
>
> Bakerman and the store manager had complained to the area supervisor that the ladder was too short and dangerous. To reach merchandise on the upper shelves, it was necessary to stand on the top step of the ladder. The ladder was in bad condition and swayed from side to side when someone climbed it. The only way to stop the swaying was to hold on to the shelves with one hand while retrieving merchandise with the other hand.
>
> Despite the store manager=s repeated complaints and requests to buy a new ladder, the area supervisor did not authorize the expenditure of funds to replace it. While at the top of the ladder retrieving merchandise, Bakerman used both hands to remove a piece of merchandise from a shelf. The ladder fell. Bakerman fractured his heel.
>
> Bakerman sued Bombay alleging that Bombay was liable for his injury under the intentional tort exception to the worker's compensation act. Bakerman contended that Bombay was guilty of an intentional tort in its repeated refusal to replace the defective ladder.
>
> At trial, the court denied Bombay=s motion for directed verdict on the issue of workers compensation immunity. On an interrogatory verdict

> form, the jury found that Bombay had engaged in conduct substantially certain to result in injury or death. The jury also found Bakerman thirty-three percent comparatively negligent.
>
> The trial court denied Bombay=s post-trial motion to set aside the verdict and enter judgment in accordance with its motion for directed verdict. ...

At first the Third District affirmed the trial court=s conclusion that this presented a jury question, but on rehearing, the court reversed, holding that the objective test could not be satisfied without a showing that the employer Atried to cover up the danger@:

> That element is missing here. Here, . . . 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. Accordingly we reverse the judgment and remand for entry of judgment in favor of Bombay.

SUMMARY OF THE ARGUMENT

The decision of the Third District expressly and directly conflicts with the decision of this Court in Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000) and Travelers Indem. Co. v. PCR, Inc., 889 So.2d 779 (Fla. 2004). In those two cases, this Court made clear that a plaintiff may prove the defendant=s actions amount to an intentional tort, for which there is no worker=s compensation immunity, by demonstrating, objectively, that a reasonable person in the employer=s position should have known that its conduct was substantially certain to result in injury or death. The court below gave lip service to that objective test, but tacked on a requirement of concealment by the employer. That added requirement renders the test subjective. Therefore, the decision expressly and directly

conflicts with the PCR cases, by announcing a rule of law which conflicts with a rule previously announced by this Court.

This Court should exercise its discretion to grant review to clarify the objective test for intentional torts. The difficulty of this issue is demonstrated by the Third District=s about-face on rehearing and by a Fourth District decision also requiring concealment. The Asubstantial certainty@ intent test arises in many areas of the law; the decision below may have a negative impact far beyond the issue of worker=s compensation immunity.

ARGUMENT

I. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH TURNER V. PCR, INC., 754 So.2d 683 (Fla. 2000) AND TRAVELERS INDEM. CO. v. PCR, INC., 889 So.2d 779 (Fla. 2004).

The decision below expressly and directly conflicts with Turner and Travelers because it announces a rule of law which conflicts with the rule announced in those cases. See, Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

In Turner, 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. 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.

This Court derived the two alternatives from Fisher v. Shenandoah Gen. Constr. Co., 498 So.2d 882, 882-83 (Fla.1986):

> 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). Spivey cited the Restatement (Second) of Torts '8A (1965) and W. Prosser, Law of Torts, p.32 (3d ed. 1964).

The Court expressly rejected a subjective standard, pointing out that a subjective standard Awould result in the virtual elimination of the alternative test for liability set out in Fisher . . . .@

The Third District=s imposition 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.

The Third District misstated the rule of Turner because it elevated the significance 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.@ 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.

In order for the employer=s actions to meet the Third District=s test, the employer must actually be aware of the substantial certainty of injury, and must deliberately take steps to hide it from the employee. This reasoning obliterates the objective, substantial certainty test **B** whether a reasonable person would believe that the injury was substantially certain to follow **B** and takes us back to the first alternative test enunciated in Fisher and Turner, deliberate intent to injure.

That is not what this Court intended in Turner when it talked about the Acommon thread@ of concealment. By the time it reached that point in its decision, 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 prior 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 cover-up or concealment, 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 met, 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 panel rehearing decision in the present case requires. In fact, the employer appears to have used the employees to help conceal the violations from OSHA, so the employees must have been aware of them. Turner held that the facts described in Fisher were sufficient to overcome the worker=s comp 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.@[1]

Recently, in Travelers Indem. Co. v. PCR, Inc., 889 So.2d 779, 791 (Fla. 2004), this Court emphasized the difference between the subjective and objective tests:

> To satisfy the objectively-substantially-certain standard of Turner, on the other hand, 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.

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

[1] 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.

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@.

Because the Third District converted the objective test into a subjective test by injecting a concealment requirement, the decision below conflicts with Turner and Travelers.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT REVIEW.

This Court should exercise its discretion to grant review because the issue is a difficult one, and the lower courts are in need of this Court=s guidance.

The difficulty of the issue is evidenced by the Third District=s about-face below. And that court is not the only one to misinterpret Turner in this way. In Allstates Fireproofing, Inc. v. Garcia, 876 So.2d 1222 (Fla. 4th DCA 2004), the Fourth District held that the Asubstantial certainty@ test was not met because the employer Adid not attempt to conceal, or fail to warn, the decedent of the danger ... @ The erroneous interpretation by both courts shows that there is a real risk that this heightened intent standard will infect the law as a whole.[2]

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[2] Although the Legislature, in 2003, amended '440.11, Florida Statutes, 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 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, as discussed earlier, a concealment requirement.

The Asubstantial certainty@ objective test arises in many other contexts besides worker=s compensation. See, e.g., S.D. v. State, 882 So.2d 447 (Fla. 4th DCA 2004) (affirming adjudication of delinquency of juvenile who continued flailing her arms when she saw victim coming near, because Asubstantial certainty of touching or striking . . . satisfies the intent element of battery@); State v. Harden, 873 So.2d 352 (Fla. 3d DCA 2004) (federal law preempts Florida anti-kickback statute which allows conviction under lower, Asubstantial certainty@ standard, which court described as allowing conviction for Amere negligence@); D=Amario v. Ford Motor Co., 806 So.2d 424, 438 (Fla. 2002) (under Asubstantial certainty@ test, drunk driving did not satisfy intentional tort exception to comparative fault); Forehand v. School Board of Gulf County, 600 So.2d 1187 (Fla. 1st DCA 1992) (applying Asubstantial certainty@ test to determine intent of public employee fired for insubordination); City of Winter Haven v. Allen, 541 So.2d 128, 138 (Fla. 2d DCA 1989) (discussing substantial certainty in context of sovereign immunity). Despite the wide variety of these areas of law, many of these cases cite Prosser=s discussion of the substantial certainty test, the original source of the test adopted in Spivey. Because of this crossover, the Third District=s decision may create confusion in those areas as well.

CONCLUSION

Petitioner respectfully asks this Court to grant review based on express and direct conflict with Turner and Travelers.

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 March, 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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