SUPREME COURT OF FLORIDA

CASE NO: SC06-1063
L.T. No.: 3D04-742

RODOLFO CASAS,

Petitioner,

vs.

SIEMENS ENERGY & AUTOMATION, INC.

Respondent.

PETITIONER=S JURISDICTIONAL BRIEF

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STATEMENT OF THE FACTS

On September 1, 2000, Rodolfo Casas= arm was crushed by the die of a 150 ton press, machine 409, at the Miami plant of his employer, Siemens Energy & Automation, Inc. At the time, Casas was attempting to dislodge a metal lid, which was being formed by the press, and which had become entrapped in the die area. (App.A.p.2). He was utilizing a screwdriver, as he had been instructed to do by his employer. (App.A.p.2) In light of the fact that it was known by his supervisor that material became stuck in the presses, Casas had been instructed on how to remove an obstruction by utilizing a metal rod or, alternatively, a foot-long screwdriver. (App.A.p.2).

In answers to interrogatories, Siemens admitted that Athere were no point of operation guards on the subject power press at the time of the accident.@ (App.A.p.16). John Samilian, the engineer who was hired by Siemens to up-grade its plant equipment to meet OSHA standards testified generally that Siemens presses did not have OSHA conforming guards on its presses. (App.A.p.15). Prior to Casas= injury, Siemens had received price quotes from three machine guarding vendors identifying ways that the plant presses needed safety-related upgrading including the press which injured Casas, and yet those presses remained in operation. (App.A.p.15). There was conflicting record evidence on whether there had been plexiglas guards on the press in question prior to the time of Casas= injury. The district court interpreted evidence *in favor of the non-moving party*, Siemens, by concluding that machine 409 had such point of operation guards but that they were not on the machine at the moment that Casas was injured. (App.A.p.16).

Moreover, the evidence in the light most favorable to plaintiff is that Casas was not mandated to turn off the press prior to removing the obstruction. When asked how he had been instructed to remove a metal lid that gets stuck in the machine, Casas testified as follows:

> *A:* Take the rod and find a way of removing it so that it can be thrown out, that's all, that is what I was taught.
>
> *Q.* Would you shut the machine down first?
>
> *A.* That, I was not taught because it was a matter of something that was simple take it out.
>
> ***
>
> *Q.* Don't you think it would be good, common sense, to turn that switch off and turn the machine off if something got stuck in the machine and you have to fix it?
>
> *A.* Yes.
>
> *Q.* Did you ever do that?
>
> *A.* No. ***Because the supervisor would say that it was not necessary to turn off the machine***.
>
> ***

(App.A.p.21) (Emphasis added)

Because Casas= arm would be and was still within the die space as he was removing the stuck metal lid while utilizing a foot-long screwdriver, his arm was crushed by the die when it closed. (App.A.p.2)

SUMMARY OF THE ARGUMENT

Petitioner Rodolfo Casas= arm was crushed in a 150 ton punch-press at the Miami plant of his employer Siemens Energy Automation. Casas sued Siemens under the Asubstantially certain to result in injury@ objective test adopted by this Court in *Turner v. PCR, Inc.*, 754 So.2d 652 (Fla. 2000). The district court affirmed a summary judgment in favor of the employer, relying upon *Bombay Company v. Bakerman,* 892 So.2d 555 (Fla. 3d DCA 2004), rev.granted 903 So.2d 189 (Fla. 2005), which is pending review before this Court. Accordingly, this Court has *prima facie* conflict jurisdiction. *Jollie v. State,* 405 So.2d 418 (Fla. 1981). Because *Bakerman* conflicts with *Turner,* so too does the district court=s opinion. Finally, the district court=s 2-1 opinion violates fundamental principles of appellate review on summary judgment by reading the record in favor of Siemens, a non-moving party. *Holl v. Talcott,* 191 So.2d 40 (Fla. 1966).

I. THIS COURT HAS PRIMA FACIE EXPRESS AND DIRECT CONFLICT JURISDICTION BECAUSE THE DISTRICT COURT=S DECISION EXPRESSLY RELIES UPON *BOMBAY COMPANY v. BAKERMAN,* 892 So.2d 555 (Fla.3d DCA 2004), REV.GRANTED 903 So.2d 189 (Fla. 2005).

Where, as here, a district court relies upon a case which is pending review in this court, this court has jurisdiction. See Art.V, '(3)(b)(3), Fla. Const.; *See also, Reuter v. McKenzie Check Advance, LLC.,* 2006 WL 1277922 (Fla. May 11, 2006); *Kesler v. Chatfield Dean & Company,* 794 So.2d 577 (Fla. 2001); *Jollie v. State*, 405 So.2d 418 (Fla. 1981).

Here, the district court cited to and relied upon its prior decision in *Bakerman,* which is pending review before this court. In particular, the Third District Court of Appeal held:

> As we noted in *Bakerman,* 891 So.2d at 557 (quoting *Turner* 754 So.2d at 691), cases finding liability under the substantial certainty test, Acontain >a common thread of evidence that the employer tried to cover up the danger [to its employees], affording the employees no means to make a reasonable decision as to their actions.=@

(App.A.p.5)

The court later stated that as in *Bakerman* and *Allstates,* the dangerous condition was open and obvious to Casas. (App.A.p.9)

Quite clearly, the Third District Court of Appeal=s decision in this case is premised upon *Bakerman.* Because that decision is pending before this court in case #05-358, this court has *prima facie* express and direct conflict jurisdiction. *Jollie v. State,* 405 So.2d 418 (Fla. 1981).

II. THE DISTRICT COURT=S OPINION CONFLICTS WITH THIS COURT=S OPINIONS IN *LAWTON V. ALPINE ENGINEERED PRODUCTS, INC.*, 498 So.2d 879 (Fla. 1986), AS MODIFIED BY *TURNER V. PCR, INC.*, 754 So.2d 683 (Fla. 2000), AND WITH *TURNER* AS WELL.

The facts in this case, properly viewed in favor of the non-moving party on summary judgment, are virtually identical to the facts in *Lawton.* Indeed, the majority opinion of the district court acknowledged the factual similarity, but distinguished *Lawton* by highlighting the fact that *Lawton* involved a motion to dismiss, rather than a summary judgment. (App.A.p.10).

In *Lawton,* an employee caught his hand in a punch-press machine when a co-worker accidently put the press into operation as Lawton attempted to adjust the machine. *Lawton,* 498 So.2d. at 880. The machine did not have any point-of-operation guards despite the fact that the employer had received numerous written communications from the machine=s manufacturer stressing the importance of point-of-operation guards. Id. *Lawton* and this case involve the same type of machine; the same defect, i.e. lack of point-of-operation guards, and prior notice to the employer concerning the importance of such guards. The facts as set forth in *Lawton* -- the knowing operation of an unguarded punch-press -- are sufficient to meet the Asubstantial certainty@ requirements of the

intentional tort exception to worker=s compensation immunity, according to *Turner*, 754 So.2d at 698 n.8.

The district court misapplied *Turner* by relying upon *Bombay Company v. Bakerman*, 891 So.2d 555 (Fla. 3d DCA 2004) which conflicts with *Turner* because it holds that the objective *Turner* test requires a showing of deliberate concealment or cover up by the employer. Thus, the decision in this case expressly and directly conflicts with *Turner* because it announces a rule of law which conflicts with the rule announced in that case. *See, Mancini v. State*, 312 So.2d 732, 733 (Fla. 1975).

By relying upon the currently-pending-review decision in *Bakerman v. Bombay Company*, the district court misapplied this court=s opinion in *Turner* in such a fashion as to rewrite that opinion. In *Turner*, this court held that a plaintiff may prove the intentional tort exception to worker=s compensation immunity either by demonstrating a deliberate intent to injure (not at issue here) or, by an objective test:

> This standard imputes intent upon employers in circumstances where injury or death is objectively Asubstantially certain@ to occur.

754 So.2d at 691.

This objective test was reaffirmed by this Court in *Travelers Indemnity Company v. PCR Corp., Inc.*, 889 So.2d 779 (Fla. 2004):

> In *Turner* ... we held that the latter method of satisfying the intentional tort exception, the substantial certainty method, calls for an objective

> inquiry. The relevant question is not whether the employer actually knew that its conduct was substantially certain to result in injury or death but, rather, whether the employer *should have known* that its conduct was substantially certain to result in injury or death.

Travelers, 889 So.2d at 782-83 (Emphasis in original).

This Court did not focus upon what the *employee* should have known in either *Turner* or *Travelers*. Rather, the test is what the *employer* should have known. At no point in *Turner* or *Travelers* did this court hold that it is appropriate for a court to consider whether the employee should have expected that an injury would result. Employees are instructed as to how and when to do their jobs. If they refuse to do their jobs as instructed by their employers, they will be dismissed for insubordination or suffer other adverse employment actions.

Casas= injury resulted from a combination of factors, each of which was known to Siemens far in advance of the accident. Objectively speaking, Siemens should have known that an injury was substantially likely to occur. Those factors included: forcing Casas to operate dangerous machinery with the knowledge that the point of operation was not guarded, in violation of mandatory OSHA machine guarding requirements. (b) Siemens= knowledge that workers are not infallible and could be expected to make mistakes while operating this dangerous equipment; (c) an increase, or Aramping up@ of production requirements at the factory notwithstanding the non-compliance; and (d) hiring

Casas for a job for which he was not qualified and then providing insufficient on the job training.

While this court noted in *Lawton* that the employer had failed to provide explicit warnings to the injured employee, surely the employee already knew that a punch-press machine could cause serious injury to his hand or any other body part that got caught in the machine while it was operating. The district court placed a great deal of emphasis upon the fact that Casas candidly testified that he understood what would happen if the die came down upon his hand. This proves nothing; ***anyone would appreciate that danger***.

III. THE DISTRICT COURT MAJORITY OPINION VIOLATES FUNDAMENTAL PRINCIPLES OF APPELLATE REVIEW ON SUMMARY JUDGMENT GRANTED BY READING THE RECORD IN FAVOR OF SIEMENS, THE NON-MOVING PARTY, IN VIOLATION OF *HOLL V. TALCOTT*, 191 So.2d 40 (Fla. 1966)

The majority opinion violates the fundamental principles of appellate review by passing upon the credibility of certain assertions, and by viewing the record in the light most favorable to Siemens, the non-moving party.

As Judge Cope noted in his dissent, the two judge majority failed to follow the dictates of *Holl v. Talcott*, and did not accept as true plaintiff=s testimony Athat he was set to work on this machine with relatively little training and with what turned out to be a

tragically inadequate understanding of how the machine works@. (App.A.p.30). Indeed, the district court=s opinion is guilty on several occasions of citing facts in Casas= favor, but then *interpreting* the facts against Casas, in contravention of *Holl v. Talcott.*

For instance, the court notes that Siemens admitted in an interrogatory answer that the machine did not have point-of-operation guards at the time of the accident. (App.A.p.16). The court interprets that admission literally, if not minutely, by stating that it proves only that *at the very moment* of Mr. Casas= injury there were no guards on the machine. (App.A.p.16). However, properly viewed (particularly with respect to other interrogatory answers ignored by the majority) it is clear that Siemens admitted that there were no guards on the machine at any time prior to Mr. Casas= injury.

Elsewhere, the district court refers to the tool which Casas was Aallegedly@ holding at the time of his accident. (App.A.p.2). The use of the word Aallegedly@ confirms that the court was reviewing the record in the light most favorable to Siemens the non-movant. Credibility determinations are the province of a jury. For purposes of summary judgment review, if Mr. Casas testified that he was using the screwdriver, then he was using the screwdriver.

CONCLUSION

We respectfully request that this court exercise jurisdiction in this case for the reasons stated above.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel certifies that the size and font style used in this brief is 14 pt, New Times Roman, in compliance with Fla.R.App.P. 9.210.

Respectfully submitted,

By:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished via U.S. mail to: John H. Pelzer, Esq., Ruden, McCloskey, 200 East Broward Blvd., 15 Floor, PO Box 1900, Ft. Lauderdale, FL 33302 on **June 28, 2006**.

Respectfully submitted,

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