

INTENTIONAL MISCONDUCT, AN EXCEPTION TO THE  
WORKER'S COMPENSATION DEFENSE  
by Ted Babbitt

Under the worker's compensation statute, an employer is ordinarily immune from suit even though the employer's negligence caused injury or death. Fla. Stat. 440.09(1) (1997) and Fla. Stat. 440.11(1) (1997). The Supreme Court has carved out an exception to this immunity where the employer's conduct amounted to an intentional tort. Fisher v Shenandoah Gen. Constr. Co., 498 So.2d 882 (Fla. 1986) and Lawton v Alpine Engineering Products, Inc., 498 So.2d 879 (Fla. 1986). In both of those cases, the employees failed to properly allege sufficient grounds to prove an intentional tort. In those cases the Supreme Court held that in order to prove an intentional tort which would obviate the workers' compensation immunity, the employer must be shown to have either "exhibited a deliberate attempt to injure or engaged in conduct which is substantially certain to result in injury or death." Fisher at 883.

In Eller v Shova, 630 So.2d 537 (Fla. 1993), the Supreme Court reaffirmed its holding in Fisher and Lawton, supra, that:

Employers are provided with immunity from suit by their employees so long as the employer has not engaged in any intentional act designed to result in or that is substantially certain to result in injury or death to the employee.

In these cases, the Supreme Court provided two alternative theories for proving intentional conduct on the part of the employer. The first of these requires a showing of deliberate intent while the second merely requires conduct which is “substantially certain” to result in injury or death. None of these cases, however, sets forth a standard by which the second alternative (substantial certainty) must be proven. No case law has explained whether the employer must have actually known of the potential hazard and intended the harm or whether the employer only should have known of the substantial certainty of injury or death.

The Supreme Court has now established the parameters for proving intentional conduct. Turner v PCR, Inc., 754 So.2d 683 (Fla. 2000) was a wrongful death action brought by the Estate of an employee. The Circuit Court granted a summary judgment despite the existence of affidavits by experts opining that the conduct of the employer amounted to a substantial certainty that harm, including death, would occur. The First District affirmed the summary judgment but certified the question to the Supreme Court. The Supreme Court held that the standard by which facts must be judged on this issue is the objective standard that the employer should have known that the conduct complained of was substantially certain to result in injury or death. Under this standard, it is not necessary to show that the employer actually intended harm.

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 the employer's conduct was 'substantially certain' to result in injury or death to the employee. Under this approach, the employer's actual intent is not controlling.

In support of its opinion, the Supreme Court cited the Second Restatement of Torts previously relied upon by the Court in Spivey v Battaglia, 258 So.2d 815 (Fla. 1972). The quoted provision from the Restatement provides:

Where 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 through he had intended it. *Spivey*, 258 So.2d at 817.

In analyzing the facts in Turner, supra, the Court pointed out that affidavits from two experts supported the existence of a serious risk of danger including evidence of prior similar incidents within the past two years. The Court pointed out that the experts' affidavits showed that they were competent to testify and that the facts in the affidavits were admissible in evidence. The analysis of the facts by the experts led to their conclusion that the employer had to know that Turner's death was substantially certain to occur. The Court then concluded:

In summary, we find that our prior case law recognizes, and we reaffirm, the existence of an intentional tort exception to an employer's immunity. That intentional tort exception includes 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.

This decision is an extremely important analysis of existing Florida law with regard to the worker's compensation exception. For the first time, the basis for proving intentional conduct of an employer has been explained. It is no longer necessary to show actual intent on the part of the employer. It is enough if the surrounding facts objectively show that the employer should have known that the injury or death was substantially certain to occur.