

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,451
DCA NO. 84-2142

JOHN E. FISHER and LILY MAY
FISHER, as Personal Representative
of the Estate of SHAUN E. FISHER,
Deceased,

Petitioners,

vs.

SHENANDOAH GENERAL CONSTRUCTION
COMPANY, et al.,

Respondent.

AMICUS CURIAE BRIEF OF
THE ACADEMY OF FLORIDA TRIAL LAWYERS (A.F.T.L.)

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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FILED
SID J. WILKES

SEP 26 1985

CLERK, SUPREME COURT

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STATEMENT OF THE CASE AND FACTS

Petitioners filed an action for wrongful death after the decedent was killed as a result of being ordered by his employer to expose himself to deadly methane gas. According to the allegations of the second amended complaint, the defendant employer intentionally exposed the decedent to the methane gas despite the fact that it knew of the inevitable consequences of such exposure. The Fourth District Court of Appeal assumed for purposes of its opinion that the allegations before it sufficiently supported a cause of action sounding in intentional tort.

In an opinion filed July 17, 1985, by the Fourth District Court of Appeal, the following question was certified to this Court as being of great public importance:

"DOES THE FLORIDA WORKERS' COMPENSATION LAW PRECLUDE ACTIONS BY EMPLOYEES AGAINST THEIR CORPORATE EMPLOYERS FOR INTENTIONAL TORTS EVEN THOUGH THE INJURIES WERE INCURRED WITHIN THE SCOPE OF THEIR EMPLOYMENT?"

In a footnote to the certified question, the Fourth District Court of Appeal added:

"Though not germane to the case before us, we hope the Supreme Court will also address the question of whether resourceful lawyers can circumvent the statute by simply alleging intentional torts against the employer's officers as individuals...."

The Fourth District Court of Appeal noted that there were no Florida cases directly on point, and therefore looked to the language of the Workers' Compensation Act.

On the one hand, the court below noted that §440.11(1), Fla.Stat. (1983), clearly provides that:

"The liability of an employer...shall be exclusive and in place of all other liability...." (Emphasis in original)

The district court reasoned that this language constituted a broad across-the-board exemption of liability for torts by employers. The court below felt that this conclusion was strengthened by an exception contained in §440.11(1), Fla.Stat. (1983), which exempts from immunities granted under the act employees who act "with willful and wanton disregard...or with gross negligence." The court opined that this language would have been an unnecessary redundancy if the legislature had not intended to immunize employers from intentional torts.

However, on the other hand, the district court noted that the statute only covers "injury arising out of and in the course of employment" (§440.09), and further defines "injury" as an "accident" (§440.02). The court admitted that a telling argument could be made that intentional torts are thus excluded because such are never accidental.

Faced with the ambiguous and inconsistent language contained in the Worker's Compensation Act on the issue of employers' liability for intentional torts, the district court answered the aforesaid certified question in the affirmative, but was sufficiently troubled by the problem to certify it to this Court as being of great public importance.

This Court's discretionary jurisdiction was timely invoked and briefs on the merits were requested.

The Academy of Florida Trial Lawyers (A.F.T.L.) is a large, state-wide association of trial lawyers specializing in litigation in many areas of the law, including personal injury litigation. A.F.T.L. is very

interested in this case because it involves, as a question of first impression before this Court, an elucidation of the extent to which an employer can escape responsibility for its intentional acts. The issue is one of great public importance with broad ramifications for millions of employees in the state of Florida. A.F.T.L. has obtained leave to file this amicus curiae brief in order to provide this Court with additional insight on this important issue from a standpoint other than that of the immediate parties.

SUMMARY OF ARGUMENT

Florida's Workmen's Compensation Act is in derogation of common law and must be strictly construed. The Act clearly states that it is only applicable to injuries or death caused by accident. An intentional tort is never accidental, and the allegations contained in Petitioner's amended complaint do not describe an injury caused by accident. Rather, the allegations describe an injury caused by gross and flagrant conduct on the part of a corporate employer, evincing a reckless disregard of human life. Such conduct is outside the purview of Florida's Workmen's Compensation Act.

There is absolutely no sound public policy basis for allowing a corporate employer to be shielded from liability under the ambiguous provisions of Florida's Workmen's Compensation Act as it relates to intentional torts of the type described in Petitioner's amended complaint. This Court should resolve that ambiguity by construing the Act to only apply to accidentally caused injuries, so as to hold employers responsible for those acts that would be sufficient to give rise to a claim for punitive damages: in other words, those acts sufficient to support a conviction for criminal manslaughter when they are the cause of death.

ARGUMENT

- I. FLORIDA'S WORKMEN'S COMPENSATION ACT APPLIES TO ACCIDENTAL INJURIES ONLY: IT DOES NOT APPLY TO INJURIES CAUSED BY INTENTIONAL ACTS.
 - A. The act is in derogation of common law and must be strictly construed.

Florida's Workmen's Compensation Act is in derogation of the common law remedies previously provided to employees and must be strictly construed. Allstate Mortgage Corporation of Fla. v. Strasser, 286 So.2d 201 (Fla.Sup.Ct. 1973). There is no question that under the common law, an employee could sue his employer for the conduct described in the complaint which was dismissed by the trial court. In the event of an ambiguity or inconsistency, the act must be construed so as not to intrude upon any common law rights not specifically abrogated by the act. Grice v. Suwanee Lumber Manufacturing Company, 113 So.2d 742 (Fla. 1st DCA 1959).

- B. The act is inconsistent and therefore ambiguous since it attempts to provide remedies in place of all other liability on the part of an employer and yet only applies to injuries caused by accident.

As the Court below noted, §440.11(1), Fla.Stat. (1983) provides that:

"The liability of an employer...shall be exclusive and in place of all other liability." (Emphasis in original.)

However, the court below also noted that §440.09 states that the statute only covers "injury arising out of and in the course of employment" and that §440.02 defines "injury" as an "accident."

The court was troubled by this language since it is obvious that an intentional tort is never accidental.

We are therefore faced with a statute clearly in derogation of common law, which on the one hand purports, under §440.11(1), to replace with its remedies the common law remedies of "all other liability" of employers, and yet on the other hand, limits its application pursuant to §440.09 and §440.02 to injuries caused by accident. The provisions are inconsistent and render the statute totally ambiguous as to what effect it has on eliminating the common law liability of employers for torts committed intentionally upon their employees.

The ambiguity must be resolved in favor of preserving those common law rights which were possessed by employees in Florida prior to the enactment of the Workmen's Compensation Act, and therefore, the certified question before this Court should be answered in the negative.

- C. Gross and flagrant conduct evincing a reckless disregard for human life is tantamount to an intentional act.

While acknowledging that the issue framed by the certified question has never been resolved by the appellate courts of this state, the court below was, nevertheless, swayed by the following language of this Court's opinion in Seaboard Coastline Railroad v. Smith, 359 So.2d 427, 429 (Fla. 1978):

"...and, whether the injury to the employee is caused by 'gross negligence,' 'wanton negligence,' 'simple negligence,' passive or active, or no negligence at all of the employer, is of no consequence. There is no semblance of suggestion in these statutes that the Legislature intended to make any distinction in degrees of negligence so far as the employer's immunity is concerned and we see no reason or logic in any distinction." (Emphasis supplied.)

As noted by the underlined language above, this Court, in Smith, was only concerned with differential degrees of negligence, ranging from gross to simple.

It is well settled that there is a type of conduct that surpasses gross negligence in its offensive character: negligence that is of a

"gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to the rights of others which is equivalent to an intentional violation of them." (Emphasis supplied.) White v. Dupont, 455 So.2d 1026 (Fla. 1984).

In White, this Court was concerned with setting forth a standard that must be met so as to justify the imposition of punitive damages upon a defendant. There is no question but that the type of conduct described in White that is sufficient to justify an award of punitive damages is that type of conduct for which the result cannot be said to be accidental. When one fires a gun in a crowded movie theater, one may have a subjective intent not to hurt anyone, but objectively, the consequences of such an act can never be considered an accident.

This Court should adopt the same standard set forth in White as the standard by which the conduct of a corporate employer is measured to determine whether or not the conduct falls outside the purview of the immunity granted under Florida's Workmen's Compensation Act to accidentally caused injuries.

II. AN AFFIRMATIVE ANSWER TO THE CERTIFIED QUESTION BEFORE THIS COURT WOULD IMPOSE A RULE OF CIVIL IMMUNITY FROM LIABILITY FOR ACTS BY EMPLOYERS THAT WOULD BE SUFFICIENT TO SUSTAIN A CRIMINAL CONVICTION FOR MANSLAUGHTER.

The policy basis behind adopting the punitive damage standard of White v. Dupont as the standard by which to determine whether a corporate employer's acts are the accidental cause of injury or death to an employee is clear: to hold otherwise would be to exclude from civil liability acts that would be sufficient to impose criminal liability upon the same defendant.

In Carraway v. Revell, 116 So.2d 16 (Fla. 1959), this Court stated that:

"the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages.'

"There is a real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter. Both have, as a basic purpose, the punishment of the offender. The offender in a manslaughter action may be deprived of his liberty or property by the state while the offender in an action for that kind of negligence justifying the imposition of punitive damages is deprived of his property -- not as compensation to the injured party but as punishment -- ergo, both are punishment and partake of public wrongs to a greater or lesser degree." Carraway, at 20.

The conduct described in Petitioner's complaint clearly partakes of a public wrong. The public policy of the state of Florida is to punish those wrongs criminally and civilly. It is very important to allow a person so wronged to be in a position to enforce them civilly as the state oftentimes does not have the resources to do so. The entire body of Florida law concerning punitive damages is based upon the concepts that public policy is

best served by allowing private citizens to be able to enforce public wrongs that personally involve them. This Court would truly create a wrong without a remedy if it deprives the employees of Florida of the right to sue their employers for acts that would be sufficient to justify the imposition of punitive damages: in other words, acts sufficient to support a judgment for manslaughter. This is the type of conduct described in the complaint before this Court, and there is no rational basis nor support in the history underlying the development of the Workmen's Compensation Act to support a construction that would deprive employees of this common law right.

III. THE MODERN TREND OF AUTHORITY IS TO IMPOSE LIABILITY ON EMPLOYERS FOR INTENTIONAL TORTS IN FURTHERANCE OF SOUND AND DECENT PUBLIC POLICY GOALS.

Petitioner's brief aptly points to the substantial body of law in other states which has developed to exclude from immunity under various workmen's compensation acts (similar to that of Florida) the types of conduct described in Petitioner's amended complaint. Collins v. Drave Contracting Co., 171 S.E. 757 (West Virginia 1933); Mandolis v. Elkins Industries, Inc., 246 S.E.2d 907 (W.V. 1978); Blankenship v. Cincinnati Milacron Chemicals, 433 N.E. 2d 572 (Ohio 1982); Wade v. Johnson Controls, Inc., 693 F.2d (1982); and Jones v. VIP Development Company, 472 N.E. 2d 1046 (Ohio 1984).

The above cases have been cogently discussed in Petitioner's brief, and only Jones v. VIP Development Company, supra, requires further elucidation.

The court in Jones, had before it an issue present in this case: whether an intentionally injured worker, by applying for and receiving worker's compensation benefits, is thereby precluded from seeking common law damages against his employer for the same injury.

In holding that the acceptance of such benefits is not a bar to recovery for an intentional tort, the Jones court stated:

"To limit a worker injured by the employer's intentional misconduct to worker's compensation benefits would actually encourage such conduct. Id. To bar an intentionally injured worker from the courtroom just because he has received such benefits would have the same effect. An employer in such a case could merely refrain from contesting the claim, thereby facilitating the receipt of limited compensation, and then reap the rewards of absolute immunity from further liability. This court will not foster such practices." Jones, at 99.

Neither should this Court create such an insidious shield for use by employers willing to strategically utilize economic hardship to force their employees to expose themselves to substantial likelihood of injury or death in the name of cost effectiveness and then further utilize this economic hardship so as to coerce the employee to accept worker's compensation benefits. Public policy dictates that this Court adopt the rule of Jones that an employee who has been intentionally injured by his employer is not barred from seeking common law damages against his employer despite his acceptance of worker's compensation benefits.

Since the development of Florida's Workmen's Compensation Act, the workplace has become more dangerous. To allow employers to intentionally subject their employees to intentional torts in the name of profit, flies in the face of all sound and decent public policy objectives. This Court

should recognize that its employees are intentionally being subjected to toxic wastes and noxious fumes and other life-threatening substances, by profit-hungry employers who would posit the argument that this is necessary in the name of economic expansion.

As discussed previously, the Workmen's Compensation Act does not apply to anything but injuries caused by accident. This Court has never before considered the policy arguments herein nor addressed this issue.

This Court does not need to wait for the legislature to clarify its intent if this Court finds that its intent is ambiguous.

In Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), this Court stated that it would not abdicate its continuing responsibility to the citizens of Florida to insure that the law would remain fair and realistic as society and technology change. Technological changes have rendered the market place an unsafe place for citizens employed by unscrupulous employers who would hide behind the shield of their corporate structure and the purported immunity created by the Workmen's Compensation Act. This Court should squarely face the issue and answer the certified question before it in the negative.

CONCLUSION

Amicus curaie, A.F.T.L., respectfully requests this Court answer the certified question before it in the negative and adopt the standard set forth in White v. Dupont, 455 So.2d 1026 (Fla. 1984), concerning the right to recover punitive damages as the standard by which to determine whether an employer's conduct falls within or outside the purview of Florida's Workmen's Compensation Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Amicus Curaie Brief and Appendix was mailed to RICHARD A. BARNETT, ESQ., 4651 Sheridan Street, Suite 325, Hollywood, Florida 33021; and JONATHAN L. GAINES, ESQ., Fleming, O'Bryan and Fleming, 1415 East Sunrise Boulevard, Fort Lauderdale, Florida 33338, this 24th day of September, 1985.

Robert B. Miller
ROBERT B. MILLER