6-1-2004

A Sea Change or Much Ado About Nothing? The Future of New Mexico Jurisprudence Concerning Tort Claims Arising from On-the-job Injuries of Employees in the Wake of Delgado v. Phelps Dodge Chino and the Substantial Certainty Test

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WRITING COMPETITION ENTRY

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"The greater the impact this opinion has on the workers' compensation system, the more profound will have been its need."
- Justice Franchini, *Delgado v. Phelps Dodge Chino, Inc.*

"[I]t is a tale ... full of sound and fury, signifying nothing."
- William Shakespeare, *Macbeth,* Act 5, Scene 5.

I. INTRODUCTION

The New Mexico Supreme Court's decision in *Delgado v. Phelps Dodge Chino, Inc.*[1] overruled the "actual intent test" and created an exception to the exclusivity provisions of the Workers Compensation Act which holds employers legally responsible for on-the-job injuries.[2] This exception allowed for employees, when seriously injured or killed on the job, to pursue remedies outside the constraints of the Act and sue in tort. *Delgado* replaced the "actual intent" test, which provided for legal relief in tort only when an employer could be shown to have actually intended to harm the employee who was injured or killed, with a three-pronged test based on whether the employer's conduct was willful, and whether the act in question was substantially certain to cause serious injury or death.[3]

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[1] 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.
[2] N.M. Stat. Ann. §§ 52-1-1 to -70 (1991 Repl. Pamp. & Supp. 2001); N.M. Stat. Ann. § 52-5-1 (1991 Repl. Pamp. & Supp. 2001).
[3] *Delgado*, 2001-NMSC-034 ¶ 26, 131 N.M. at 280, 34 P.3d at 1156.

The new standard created by the *Delgado* decision, holding employers responsible for conduct that is something less than intentional but more than negligence,[4] purported to set the stage for a deluge of tort claims from injured employees who previously would have been precluded as a matter of law from recovering damages outside of the Act.[5] Justice Franchini, in response to defense (and, by proxy, insurance company) concerns that his ruling would "wreak havoc" with the workers' compensation system, threw down the legal gauntlet by closing his opinion with the memorable caveat reproduced in the quotation *supra*.[6]

However, examination of *Delgado* and its New Mexico progeny, and comparison with case law in other jurisdictions with rules similar to those articulated by the New Mexico Supreme Court, indicate that while *Delgado* changed the law, its application is so narrow as to have minimal impact. Subsequent interpretations of the *Delgado* exception in New Mexico and other jurisdictions employing a similar standard have defined narrow boundaries and severely limited the scope of its coverage. As a result, Franchini's admonition, however dramatic in putting employers on notice that they will be held to stricter standards for protecting their employees, effectively seems to "signify nothing" beyond the unique facts presented by *Delgado*. The following discussion illustrates how *Delgado* is likely to come into play only in those rare instances where an employer's conduct is particularly egregious and the underlying facts are specifically analogous to those which led to the death of Reynaldo Delgado.

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[4] *See* W. Prosser, *Handbook of the Law of Torts* § 8 (4th ed. 1971) ("Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow[...]").
[5] See Exhibit A attached hereto for a fact-specific example of a suit brought for wrongful death in New Mexico under *Delgado* which survived defense summary judgment motions but was settled before trial.
[6] *Delgado*, 2001-NMSC-034, ¶ 31, 131 N.M. 272, 281, 34 P.3d 1148, 1157.

II. *DELGADO* REVISITED

Reynaldo Delgado died from extensive burns suffered during an explosion at a Deming, New Mexico copper smelting plant. The explosion occurred shortly after Delgado's supervisors, in response to an emergency condition known as a "runaway," ordered him to drive a specialized vehicle called a kress-haul into a tunnel and attempt to remove a 15-foot high cauldron, called a "ladle," that was rapidly filling with molten slag. The ladle could safely have been removed had Delgado's supervisors shut down the furnace, but the decision was made, for economic reasons, to keep the furnace burning and send Delgado in alone to attempt to remove the ladle, despite the fact that Delgado had never operated a kress-haul under runaway conditions. Entering the tunnel and seeing that the ladle already was overflowing, Delgado radioed one of his supervisors and informed him that he was neither qualified nor able to remove the ladle. His supervisor twice insisted, over Delgado's protestations, that he proceed with the removal. Shortly thereafter, the tunnel filled with smoke and Delgado emerged, engulfed in flames. "I told them I couldn't do it," Delgado said before collapsing on the ground. "They made me do it anyway. Charlie sent me in." Reynaldo Delgado died three weeks later in an Arizona hospital.[7]

Delgado's widow brought a number of tort claims in New Mexico district court against Delgado's supervisors and his employer, Phelps Dodge Chino, Inc., including wrongful death. The district court dismissed the action on defense's Rule 1-012(B)6 motion for failure to state a claim, on the grounds that the Workers Compensation Act

[7] *Delgado*, 2001-NMSC-034 ¶¶ 3-5, 131 N.M. at 275

provided the exclusive remedy for Delgado's death. The New Mexico Court of Appeals upheld the ruling. The New Mexico Supreme Court reversed, holding conduct that is willful and reasonably certain to cause serious injury or death is legally equivalent, for the purposes of superceding the exclusivity provisions of the Workers Compensation Act, to intentional injury of an employee. When an employer intentionally inflicts or willfully causes a worker to suffer an injury that would otherwise be exclusively compensable under the Act, that employer may not enjoy the benefits of exclusivity, and the injured worker may sue in tort.[8] The new rule was articulated as follows:

> For purposes of the Act, willfulness occurs when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the injury to occur, or has utterly disregarded the consequences of the intentional act or omission; and (3) the intentional act or omission proximately causes the injury.[9]

Thus was born the three-pronged *Delgado* test, though it was never actually applied to its own facts by a jury. The case, remanded to district court, was settled before trial.

[8] *Id.* at ¶ 1
[9] *Id.*

III. POST-*DELGADO* NEW MEXICO JURISPRUDENCE

Nearly three years after *Delgado*, neither the New Mexico Supreme Court nor the court of appeals has revisited the issue. Federal courts have under color of New Mexico law twice applied the *Delgado* test in diversity cases: The United States District Court, District of New Mexico, granted summary judgment in favor of defendants in *Cordova v. Peavey Co.*,[10] and the 10th Circuit upheld a Rule 12(b)(6) motion for defendants in *Wells v. U.S. Foodservice, Inc.*, holding that plaintiff failed to allege facts bringing the claim within the ambit of the *Delgado* rule.[11]

In *Cordova*, the plaintiff, a temporary custodial employee, lost his arm when he reached into a grain auger to remove a piece of twine from one of the auger's teeth at the same time that another employee, who could not see the plaintiff because of an extension previously installed on the auger by defendants, engaged the auger. There was no safety guard on the auger, defendants did not train either employee in the operation of the auger, and neither employee was supervised at the time of the accident. Further, the task being performed, per instruction from his supervisor, by the plaintiff when he was injured was prohibited by the terms of his employment agreement.[12] Plaintiff made a *Delgado* claim, asserting that the lack of safety precautions and training, coupled with the contravention of the terms of plaintiff's employment agreement, amounted to willful conduct on the part of defendants, resulting in the injury.[13] In ruling for defendants, the district court applied the three-pronged *Delgado* test. The court held that it was not foreseeable that the second employee would start the auger at the same time plaintiff reached into it (first

[10] 273 F.Supp.2d 1213 (D-N.M. 2003). The case is currently on appeal to the 10th Circuit.
[11] 2004 WL 848606 (10th Cir.(N.M.)(Slip Copy, April 21, 2004).
[12] *Cordova*, 273 F.Supp.2d at 1215-16.
[13] *Id.* at 1217.

prong), and that there was no evidence that defendants expected plaintiff to be injured or that they utterly disregarded the consequences of their decision to assign plaintiff a task outside the ambit of his employment agreement (second prong). Having ruled for defendants on the first and second prongs, the court declined to address the third prong (proximate cause). The court also distinguished the facts from those of *Delgado*, noting "one is easily repulsed by the insensitivity of Phelps Dodge Supervisors to what had to be most certainly a disastrous outcome for the employee."[14] The *Cordova* court's words emphasize its reluctance to extend *Delgado* beyond conduct that is clearly willfully culpable, if not actually intentional, and apply it to circumstances more closely resembling gross negligence.[15]

The 10th Circuit, in deciding *Wells*, was similarly reluctant to expand the holding in *Delgado*. Darrell Wells was a truck driver who was delivering products to defendants' customers when he was injured by a case of Tabasco sauce that tumbled out of the trailer and fell on him when he was unloading boxes from the trailer.[16] Wells claimed under *Delgado* that defendants' failure to provide a load lock on the trailer to prevent the cargo from shifting was an intentional omission under 49 C.F.R. § 393.100 of the Federal Motor Carrier Safety Administration, Department of Transportation Regulations. The court ruled that Wells' claim failed all three prongs of the *Delgado* test and refused to equate an intentional omission with intentional conduct that proximately causes an injury.

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[14] *Id.* at 1219-20.

[15] Plaintiff's brief submitted to the 10th Circuit in support of its pending appeal asserts that the circumstances of the case as described herein constitute factual issues relating to Peavey's breach of its employment contract with Cordova that preclude summary judgment, and that Peavey's instructions to Cordova to work on machinery in direct contradiction of his employment contract constitutes willful and intentional conduct.

[16] *Wells*, 2004 WL 848606 (page references not available).

The court even quoted counsel for the defense, which stated in oral argument, "This case is not so *Delgado.*"[17]

Cordova and *Wells* are an indication of New Mexico courts' reluctance to expand the bounds of *Delgado* beyond the scope of its particular facts, but the body of case law is still too sparse in and of itself to paint a complete picture of what will define *Delgado's* boundaries. For that, we turn to another jurisdiction, North Carolina, which has addressed the issues raised by *Delgado* in both greater number and detail.

IV. NORTH CAROLINA JURISPRUDENCE AS A SIGNPOST FOR *DELGADO*

Other jurisdictions that have considered how egregious employer conduct must be to override exclusivity provisions of workers compensation statutes have reached different results. The actual intent test is still in place in some states,[18] but that is the exception rather than the rule. A number of states addressing the issue have, like New Mexico, rejected the actual intent test and adopted some form of requirement of willful intentional conduct which the employer knows is substantially certain to cause injury or death to supercede exclusivity provisions of workers compensation statutes.[19] North Carolina, in particular, adopted a view toward employer misconduct as it relates to superceding exclusivity that is substantially similar to the test adopted in *Delgado*. As such, a closer examination of the body of relevant case law in North Carolina is instructive.

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[17] *Id.*
[18] *See e.g., Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979).
[19] *Howard v. Columbus Products Co.*, 82 Ohio App.3d 129, 611 N.E.2d 480 (1992); *Felden v. Ashland Chemical Co., Inc.* 91 Ohio App.3d 48, 631 N.E.2d 689 (1993); *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986); *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874 (S.D. 1983); *Suarez v. Dicknont Plastics Corp.*, 229 Conn. 99, 639 A.2d 507 (1994).

In *Woodson v. Rowland,* the seminal case in the state for employer misconduct resulting in employee injury superceding workers compensation exclusivity provisions, the Supreme Court of North Carolina held when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death, the employee, or the personal representative, may seek a remedy in tort against the employer.[20] The third *Delgado* prong, proximate cause, was not spelled out in the *Woodson* decision, but was later incorporated into the *Woodson* test.[21] The *Woodson* court used the term "constructive intent" to describe the kind of employer conduct which takes a plaintiff's claim outside of workers compensation. This interpretation is analogous to the reasoning behind *Delgado,* and the substantial certainty rule adopted in *Woodson* and the body of case law arising there from provides a signpost for how New Mexico law under *Delgado* might yet develop.

In *Woodson,* the facts were, as was the case in *Delgado,* indicative of particularly egregious behavior on the part of the defendant employer constituting "constructive intent." The decedent was killed when a ditch he was digging at the behest of his employer collapsed and buried him. Earlier that day, the defendant employer made the decision not to use a safety device called a trench box in the trench or to otherwise protect or reinforce the trench in any way, despite advice from his crew foreman that the trench was unsafe. Defendant's failure to take such safety precautions violated the Occupational Health and Safety Act of North Carolina, and there was testimony offered that failure to use a trench box and/or to reinforce the trench in that instance was virtually

[20] *329 N.C. 330, 340-1, 407 S.E.2d 222, 227-8 (1991).*
[21] *Seymour v. Lenoir County*, 567 S.E.2d 799, 801, 152 N.C.App. 464, 464 (N.C.App. Aug 20, 2002)

certain to result in the ditch collapsing.[22] The court ruled defendant's prior knowledge and utter disregard of the dangers associated with trenching, his presence at the site and concomitant opportunity to observe the hazards, his direction to decedent to proceed without the required safety precautions, his disregard for his foreman's advice, and scientific evidence supporting the testimony to that effect presented facts sufficient to survive defendant's motion for summary judgment.[23]

Subsequent North Carolina decisions following *Woodson* further clarified the substantial certainty test, stating substantial certainty "is more than mere possibility or substantial probability of serious injury or death, but is something less than actual certainty."[24] These decisions also illuminate the difficulty, analogous to the problem faced by New Mexico courts in applying the *Delgado* exception, in deciding how the legal test in *Woodson* should be applied to particular fact patterns. Judge Wynn astutely expressed this concern in his concurrence to *Pastva v. Naegele Outdoor Advertising, Inc.*:

> [S]ince creating the *Woodson* exception, the Court has consistently pointed out facts that *do not* establish a *Woodson* claim. However, it remains an uncertainty as to what facts *do* allege a *Woodson* claim sufficient to overcome pretrial dismissal. [...] [a]fter establishing the 'substantial certainty' standard, the *Woodson* court did not further define it, except as it found the *Woodson* facts met it."[25]

Prior to *Pastva,* the North Carolina Supreme Court dismissed four cases for having facts insufficient to withstand pretrial dismissal under *Woodson.*[26] *Pastva* was

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[22] *Woodson*, 329 N.C. at 336.
[23] *Id.* at 346.
[24] *Pastva v. Naegele Outdoor Advertising, Inc.*, 121 N.C.App. 656, 659, 468 S.E.2d 491, 493 (1996).
[25] *Pastva*, 121 N.C.App. at 660-1, 468 S.E.2d at 495 (Judge Wynn, concurring)
[26] *Id.* at 660 (referring to *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993); *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995); *Powell v. S&G Prestress Co.*, 342 N.C. 182, 463 S.E.2d 79 (1995); *Echols v. Zarn, Inc.*, 342 N.C. 184, 463 S.E.2d 228 (1995)).

dismissed by the trial court, but was reversed and remanded on appeal.[27] David Pastva was employed by Naegele Outdoor Advertising, and was instructed to work on a particular billboard, which subsequently collapsed and injured Pastva. Trial evidence showed the collapse was caused by structural failure. Evidence further showed that: 1) the failure was caused by defendant's use of improper components and by improperly moving the billboard; 2) the defendant did not perform any inspections on the billboard; 3) defendant provided plaintiff with no workplace safety training; 4) defendant had actual knowledge that the billboard was unsafe and dangerous immediately before it collapsed; 5) defendant had been cited and fined numerous times for workplace safety violations; and 6) defendant acknowledged that the collapse would not have occurred but for the defendant's "acts, conduct and omissions" with regard to the billboard. The court ruled that these acts and omissions constituted intentional conduct which the defendants knew or should have known was substantially certain to cause serious injury or death.[28]

Several more *Woodson* claims that succumbed to pre-trial defense motions in trial courts were upheld on appeal before the North Carolina Court of Appeals met a set of facts it felt met the narrowly defined *Woodson* requirements.[29] In *Whitaker v. Town of Scotland Neck,* Carlton Whitaker and two other maintenance workers were emptying a dumpster. Whitaker's job was to attach the dumpster to the garbage truck's lifting equipment. After Whitaker attached the dumpster and the lift was engaged, the latching mechanism gave way and the dumpster swung free of its restraints, striking and pinning

[27] *Id.* at 659.
[28] *Id.* at 657.
[29] *Kelly v. Parkdale Mills, Inc.*, 121 N.C.App. 858, 468 S.E.2d 458 (1996); *Caple v. Bullard Restaurants, Inc.*, 567 S.E.2d 828, 152 N.C.App. 421 (2002); *Yancey v. Lea*, 550 S.E.2d 155, 354 N.C. 48 (2001); *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, 543 S.E.2d 209, 142 N.C.App. 472 (2001); *Regan v. Amerimark Bldg. Products, Inc.*, 127 N.C.App. 225, 489 S.E.2d 421 (1997).

Whitaker against the truck. He died 28 days later.[30] An investigation by Scotland Neck's safety director revealed that the latching mechanism on the truck could not be latched by hand and that the dumpster was bent. Several of Whitaker's co-workers reported that the latching mechanism and the dumpster had been broken for at least two months and that the defects had been reported to their supervisor.[31] The supervisor denied any prior knowledge of the defects.[32] An OSHA investigation ruled that the defective equipment was the direct cause of the accident and that the accident was a result of employment conditions not in compliance with OSHA safety standards, constituting five "serious" violations of state labor law.[33] In its decision to reverse the trial court, the appeals court adopted a six-factor test to determine when conduct is substantially certain to result in serious injury.[34] The makeup of the test soon became irrelevant, however, as the North Carolina Supreme Court overruled *Whitaker* and held that the six-factor test for substantial certainty "misapprehends the narrowness of the substantial certainty standard set forth in [*Woodson*]."[35]

It should be noted that some jurisdictions have declined to adopt North Carolina's reasoning and have not followed *Woodson,* choosing to adopt even stricter standards for superceding workers compensation statute exclusivity provisions.[36] *Whitaker* nevertheless reinforced the *Woodson* exception as providing only the narrowest expansion of the exception to the exclusivity provisions of workers compensation

[30] *Whitaker,* 154 N.C.App. 660, 572 S.E.2d 812 (2002).
[31] *Id* at 661.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 663-64.
[35] *Whitaker v. Scotland Neck,* 2003 WL 22518654 ¶ 3 (N.C.)
[36] *Zimmerman v. Valdak Corp.*, 570 N.W.2d 204, 1997 ND 203 (N.D. 1997); *Birklid v. Boeing Co.*, 904 P.2d 278, 127 Wash.2d 853, 864 (Wash.1995); *Peay v. U.S. Silica Co.*, 437 S.E.2d 64, 313 S.C. 91 (S.C. 1993).

remedies for injured employees.[37] Similarly, this appears to be the direction *Delgado* jurisprudence in New Mexico is headed. Taking into consideration the language regarding the factual circumstances and employer conduct surrounding the deaths of plaintiffs in both *Woodson* and *Delgado,*[38] and comparing the results with the balance of cases brought under them that did not survive pre-trial motions and were affirmed on appeal, it is fair to make the correlation that, as with *Woodson* claims, egregiousness of employer conduct leading to a determination of "constructive intent" on the part of an employer, could at least be an implied prerequisite for a finding of material facts sufficient to send a *Delgado* claim to a jury.[39] Further support for this comparison can be drawn from both North Carolina's and New Mexico's similar rejections of Professor Larson's vigorous endorsement of the actual intent test[40] in *Delgado*[41] and *Woodson.*[42]

While North Carolina jurisprudence stemming from *Woodson* is in no way binding on New Mexico's treatment of *Delgado* claims, and nowhere in *Delgado* or its progeny are North Carolina *Woodson* decisions referenced; examination of the reasoning behind *Woodson* and its progeny indicates the direction of the path mapped out by *Delgado, Cordova* and *Wells*: the *Delgado* exception to exclusivity of remedies under the Workers Compensation Act will be applied narrowly, and probably not at all in instances which do not exhibit factual circumstances that might appear to meet the three-pronged

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[37] *Whitaker,* ¶ 3.
[38] Compare the language in *Whitaker,* 2003 WL 22518654 ¶ 4 ("The *Woodson* exception represents a narrow holding in a fact-specific case [...] This exception applies only in the most egregious cases of employer misconduct.") with that of *Cordova,* 273 F.Supp.2d at 1219 ("[O]ne is easily repulsed by the insensitivity of Phelps Dodge Supervisors to what had to be most certainly a disastrous outcome for the employee.").
[39] Compare with the facts detailed in Exhibit A, *infra.*
[40] 6 Larson & Larson § 103.03D
[41] *Delgado,* 2001-NMSC-034 ¶ 23, 131 N.M. at 278.
[42] *Woodson,* 407 S.E.2d at 230.

Delgado test but do not reflect employer behavior that is particularly egregious, i.e., conduct that **clearly** exhibits utter disregard for the safety of its employees.

V. CONCLUSION

The decision in *Delgado*, while legally significant, seems unlikely to have a measurable impact on the universe of employee injury claims that might fall outside the Workers' Compensation Act. As Justice Franchini stated in *Delgado*, "[W]e seriously doubt that employers are willfully injuring their employees with such frequency that the consequence of our decision to expose such employers to tort liability will be to 'wreak havoc' with the workers' compensation system."[43] This statement, when taken into consideration in conjunction with his closing admonition, reproduced *supra*, indicates that Justice Franchini may have recognized the MacBethian quality of his admonition: *Delgado* is a landmark case, filled with sound and fury as a warning to wanton and willfully callous employers. In its application, however, it thus far has signified nothing for instances other than those exceptionally rare cases where an employer does something so constructively malevolent as to offend the sensibilities of the court.[44]

[43] *Delgado*, 2001-NMSC-034 ¶ 31, 131 N.M. at 280.
[44] But see Exhibit A, attached hereto, for an illustration of how the *Delgado* exception may not always be as narrowly applied in trial courts as was envisioned by the New Mexico Supreme Court.

EXHIBIT A

Consider the following scenario, based upon a suit filed in New Mexico under the *Delgado* exception. Names have been omitted to protect settlement confidentiality, but the facts of the case are reflected accurately based on discovery and deposition testimony:

A company involved in wastewater treatment decides to change the chemicals it uses to treat water. The new chemical and the old chemical are quite reactive and should never be mixed. The manufacturer of the new chemical warns the company that the two should not be mixed, and suggests the company buy a new storage tank to hold the new chemical. The company is under pressure to complete the changeover, and company management has made representations to those with whom it has contracted that the new chemical will be ready to be used on schedule. These representations are, however, optimistic at best. The new tank has not been plumbed and is not ready to accept the new chemical and, in fact, the new chemical has not been delivered on the date expected. In the meantime, a manager of the company responsible for the project, and the same man who promised to the company's clients that the changeover would be completed on time, makes the decision not to use a new tank, but instead to wash out the old tank. He receives assurances from one of the on-site employees that the tank is being washed out and will be ready when the new chemical arrives. The washing out process involves using a high-pressure hose inside the tank to dilute and drain the old chemical.

The new chemical is delivered late on a Friday afternoon, but the new tank is still not ready. There is evidence that the employee misrepresented to the manager how far along his crew was in washing out the tank. If the company refuses delivery, the driver will take his payload back and the promised deadline will not be met. There are several

employees on site waiting to accept delivery. Not knowing what to do, they call their supervisor to the scene. The supervisor, who reports to the project manager, arrives on scene and sees that there is still some of the old chemical in the bottom of the tank, which can't easily be drained because there is a lip on the drain in the bottom of the tank. There is conflicting evidence as to whether the supervisor contacted the project manager. The project manager later testifies that he was not consulted by the supervisor as to the decisions then made on-site by the supervisor. The decisions turned out to have devastating consequences, and the critical events unfolded as follows:

The supervisor took a hacksaw and attempted to cut down the lip of the drain inside the tank. There were then more attempts to wash out the tank. The supervisor then OK'd the transfer of the new chemical. There was an initial trial run, whereby a small amount of the chemical was off-loaded into the tank, resulting in the release of a small amount of white smoke from the tank. The employee who originally called in his supervisor later (and was a plaintiff in the lawsuit) testified that at this point he voiced his concern about the safety of continuing with the offload. There is no corroborating evidence to support his claims. There were then more attempts to wash out the tank, followed by the supervisor's decision to go ahead with the full off-load. The off-load began and the new chemical reacted with the remaining residue of the old chemical and caused an explosion. Two employees were seriously injured, including the employee/plaintiff who called in the supervisor and allegedly voiced his safety concerns. The supervisor was even more seriously injured, most of his body covered in third-degree chemical burns. He died in the hospital the next day. Before dying, he said "I [screwed] up."

The survivors brought a wrongful death action under *Delgado* against the company, alleging that the actions of the company, by and through the now deceased manager, met the three-pronged test for willful conduct and substantial certainty set forth by the *Delgado* court and, therefore, entitled plaintiffs' to seek their remedies in tort rather than under the Workers Compensation Act.

Defense attorneys argued in a motion for summary judgment that as a matter of law the *Delgado* requirements had not been met, to wit that no jury could reasonably find that either the supervisor or company management was substantially certain that serious injury or death would occur and willfully proceeded to order the off-load in spite of this certainty, when the person whom the plaintiff alleges acted willfully and in utter disregard for the consequences was the supervisor who died as a result of the explosion. It was, the defense argued, at worst gross negligence. The Court ruled against the motion, finding the facts sufficient to bring before a jury and scheduled the case for trial. It never got there, however, as a settlement was reached the day before the trial was scheduled to begin.

Both sides acknowledged privately that had the case gone to trial and resulted in a verdict for plaintiffs, the trial judge's decision to allow the case to be heard under *Delgado* would have been a contentious issue on appeal. Of course, both sides expressed confidence that they would have emerged victorious...[45]

[45] The contents of Exhibit A may not be reproduced in any form, as they represent the facts underlying a confidential settlement. They are reproduced here for academic purposes only.