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## Proving Employer Intent: *Turner v. PCR, Inc.* and the Intentional Tort Exception to the Workers' Compensation Immunity Defense

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“If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.”<sup>1</sup>

Oliver Wendell Holmes, Jr.

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1. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1 (1894).

## I. INTRODUCTION

Workers' compensation is a form of strict liability.<sup>2</sup> It is a system where employers are responsible for their employees' injuries despite fault. In return, the *Florida Statutes* preclude employees from suing their employers for damages available under the common law tort system.<sup>3</sup> The exclusive remedy provision of the Florida Workers' Compensation Act provides this preclusive effect and gives rise to the workers' compensation immunity defense to tort actions.<sup>4</sup> Certain situations exist, however, where an employer may still be exposed to tort liability.<sup>5</sup> The intentional tort exception is such a situation.<sup>6</sup>

Recently, in *Turner v. PCR, Inc.*,<sup>7</sup> the Supreme Court of Florida recognized and reaffirmed the existence of an intentional tort exception.<sup>8</sup> Additionally, the court held that an objective standard may be used to judge an employer's conduct.<sup>9</sup> Now, employers may be accountable under this exception for conduct that a reasonable person, in the employer's position, would understand as "substantially certain" to result in injury or death to an employee.<sup>10</sup>

This comment discusses the Supreme Court of Florida's decision in *Turner*, as it addresses the intentional tort exception to workers' compensation as an exclusive remedy. In addition, it considers the impact the *Turner* decision may have on future litigation against employers. Part II gives a brief overview of workers' compensation in Florida as it describes benefits and disadvantages of the current system, and discusses case law concerning this exception prior to *Turner*. Part III outlines the facts of *Turner*, and Part IV summarizes the procedural posture of the case.

Next, Parts V and VI analyze the arguments presented by both sides of this dispute as they pertain to the intentional tort exception and employer conduct. Part VII describes in detail the Supreme Court of Florida's decision. Part VIII reflects on the decision and discusses its impact, particularly questioning what the court considers "substantial certainty," and providing a possible interpretation. This section additionally discusses the

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2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984).

3. FLA. STAT. § 440.11 (2000).

4. *Id.*

5. Robert L. Dietz & Robert E. Mansbach, Jr., *Workers' Compensation Law: Dual Challenges to Exclusive Employer Liability*, 66 FLA. BAR J. 53, 55 (1992).

6. *Id.*

7. 754 So. 2d 683 (Fla. 2000).

8. *Id.* at 691.

9. *Id.*

10. *Id.* at 688.

procedural aspect as it relates to surviving summary judgment in this type of case. Part IX concludes that holding employers responsible for intentional acts, as defined by this court's opinion, is appropriate. However, extending an objective standard to employees' conduct may also help in creating a system where both employers and employees are encouraged to behave responsibly and promote workplace safety.

## II. AN OVERVIEW OF WORKERS' COMPENSATION

### A. *Benefits and Disadvantages*

In Florida, the legislature enacted workers' compensation law to provide benefits including medical care and lost wages to employees for accidental injuries arising in the course and scope of employment.<sup>11</sup> The intent was to assure a "quick and efficient delivery of disability and medical benefits" and facilitate the employee's return to work at a reasonable cost to the employer.<sup>12</sup> The legislature designed the workers' compensation system to: replace uncertain remedies with certain ones; avoid the expenses of litigation; and resolve employment injury disputes through a more efficient and less costly system.<sup>13</sup>

Generally, to receive benefits, employees need only to inform their employer of an injury within thirty days.<sup>14</sup> Employers must pay benefits despite who is at fault.<sup>15</sup> Additionally, certain occupational illnesses are covered.<sup>16</sup> Therefore, employees benefit from prompt guaranteed medical care and disability benefits for lost wages. On the other hand, litigation within the workers' compensation system is increasingly a disadvantage. Originally intended to be the exception rather than the rule, litigation is becoming more frequent as employees try to prove eligibility, injury causation, and pursue washout settlements.<sup>17</sup> Additionally, although medical

11. FLA. STAT. § 440.015 (2000).

12. *Id.*

13. Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1089 (1999).

14. § 440.185(1); *see also* JOHN J. DUBREUIL, FLORIDA WORKERS' COMPENSATION HANDBOOK, § 2.02 (1999) (explaining employee reporting of injuries and occupational illnesses in general).

15. DUBREUIL, *supra* note 14, §§ 1.01[4], 1.02[1]; KEETON, *supra* note 2, § 80, at 573.

16. DUBREUIL, *supra* note 14, § 8.01[1]–[8]; KEETON, *supra* note 2, § 80, at 575.

17. DUBREUIL, *supra* note 14, § 1.01[5].

care is paid, if an employee loses time from work, he or she only receives a percentage of his or her lost wages.<sup>18</sup>

The benefits and disadvantages for employers are similar. Generally, employers benefit because they are immune from tort liability if they participate in the system.<sup>19</sup> Thus, employers for the most part escape the expense of litigating employee injury claims.<sup>20</sup> Unfortunately, the system, intended as an efficient and less expensive alternative, has still been costly for employers. Medical care is not cheap and lost-time costs can be considerable. For instance, nationally in 1984, employers spent an estimated thirty billion dollars in annual workers' compensation costs.<sup>21</sup> In 1993, that figure rose to seventy billion dollars.<sup>22</sup> However, due to reform measures over the last few years, costs have slightly declined.<sup>23</sup> Still, many criticize the effectiveness of the system as a solution for injured employees or a remedy for businesses faced with costly claims, demands for settlements, and increasing insurance premiums.<sup>24</sup>

### B. *Intentional Tort Exception*

Although workers' compensation is generally an exclusive remedy for employees, in 1986 the Supreme Court of Florida, in *Fisher v. Shenandoah General Construction Co.*,<sup>25</sup> remarked that employers were not immune from suit if they have engaged in intentional acts either designed to result in, or substantially certain to, harm an employee.<sup>26</sup> In *Fisher*, an employer ordered an employee to clean the inside of an underground pipe with a high pressure hose, resulting in the employee's death due to methane gas fumes.<sup>27</sup> The employee's personal representatives sued his employer, alleging Shenandoah's conduct constituted an intentional tort and therefore did not fall within the scope of Florida workers' compensation law.<sup>28</sup>

The original question certified to the Supreme Court of Florida in *Fisher* addressed whether Florida workers' compensation law precluded actions by employees against their employers for intentional torts, if the

18. FLA. STAT. § 440.15 (2000).

19. See generally KEETON, *supra* note 2, § 84, at 601.

20. *Id.*

21. See Gabel, *supra* note 13, at 1089.

22. *Id.*

23. *Id.*

24. See *Id.*

25. 498 So. 2d 882 (Fla. 1986).

26. See *id.* at 883.

27. *Id.*

28. *Id.*

injuries occurred within the scope of their employment.<sup>29</sup> However, the court refrained from answering the question directly, because it held that the facts in *Fisher* did not state an intentional tort cause of action.<sup>30</sup> The complaint alleged that the employer required the deceased employee to engage in an activity that would “‘in all probability’ cause injury or death.”<sup>31</sup> Instead, the court restated the certified question and addressed whether an employer commits an intentional tort when he orders his employee to engage in an activity that the employer knows to be dangerous, and that will “in all probability result in injury to the employee.”<sup>32</sup>

Expectedly, the court answered no; probable injury was insufficient to prove an intentional tort.<sup>33</sup> In doing so, however, it essentially addressed the original question stating, “[i]n order for an employer’s actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death.”<sup>34</sup> What was missing in *Fisher*’s complaint was the “substantial certainty” element.<sup>35</sup> Decided the same day, *Lawton v. Alpine Engineered Products, Inc.*,<sup>36</sup> met the same fate. In *Lawton*, the court held that a willful and wanton disregard for the safety of employees is different from committing an intentional tort.<sup>37</sup> Additionally, “[f]his [intentional tort] standard requires more than a strong probability of injury. It requires *virtual* certainty.”<sup>38</sup>

Now, in *Turner v. PCR, Inc.*, the Supreme Court of Florida recognizes and reaffirms that “workers’ compensation law does not protect an employer from liability for an intentional tort against an employee.”<sup>39</sup> This opinion specifically addresses and explains the alternative bases for recovery under this exception and how it takes a step back from the requirement of virtual certainty.<sup>40</sup>

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29. *Id.* at 882–83.

30. *Fisher*, 498 So. 2d at 883.

31. *Id.*

32. *Id.*

33. *Id.* at 883–84.

34. *Id.* at 883.

35. *Fisher*, 498 So. 2d at 884.

36. 498 So. 2d 879 (Fla. 1986).

37. *Id.* at 880.

38. *Id.* (emphasis added).

39. 754 So. 2d 683, 687 (Fla. 2000).

40. *Id.*

III. THE FACTUAL SITUATION OF *TURNER V. PCR, INC.*

On November 22, 1991, an explosion occurred at a chemical plant in Alachua County, Florida, killing Paul Turner and seriously injuring James Creighton.<sup>41</sup> At the time of the explosion, PCR, Inc. ("PCR"), employed both Turner and Creighton as technicians.<sup>42</sup>

E.I. DuPont Nemours & Co. hired PCR to develop a chemical replacement compound for Freon 113.<sup>43</sup> The creation of the replacement compound (F-pentene-2) involved complicated chemical processes.<sup>44</sup> Initially, requiring a difficult and unstable three-step procedure, the process resulted in several explosions and meltdowns.<sup>45</sup> Subsequently, PCR modified the process.<sup>46</sup> Before the November 22 explosion, PCR made thirty-six runs of the F-pentene-2 process.<sup>47</sup> Thirty of those runs involved quantities less than or equal to twenty gallons.<sup>48</sup> Six involved two-hundred gallon runs.<sup>49</sup> The explosion at issue occurred during the seventh, two-hundred gallon run.<sup>50</sup> Appellants produced evidence showing "at least three" other explosions involving the manufacture of F-pentene-2, although the processes involved differed.<sup>51</sup> However, the November 22 explosion resulted from mixing three chemicals required to produce F-pentene-2, in a one hundred pound liquid fuel cylinder lacking any pressure relief device.<sup>52</sup>

Turner and Creighton retained two chemical experts to investigate the circumstances surrounding the incident.<sup>53</sup> The experts provided affidavits stating it was substantially certain an explosion would result from mixing large quantities of the chemicals at issue, tetrafluoroethylene ("TFE"), hexafluoropropene ("HFP"), and aluminum chloride, in a propane tank, rather than in a reactor equipped with pressure release valves and other safety features.<sup>54</sup> The experts stated that TFE in particular, was "highly

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41. *Id.* at 684.

42. Respondent's Answer Brief on Merits at 4, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

43. *Turner*, 754 So. 2d at 684.

44. Initial Brief of Appellants at 1, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

45. *Id.* at 2.

46. *Id.*

47. *Turner*, 754 So. 2d at 685.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Turner*, 754 So. 2d at 685.

53. *Id.*

54. *Id.*

reactive,' 'prone to spontaneous and violent decomposition when heated or compressed,'" and required special equipment and precautions when handled.<sup>55</sup> Evidence was also presented that ICI, the manufacturer of TFE, had notified PCR that it was discontinuing supplying TFE due to its hazardous nature.<sup>56</sup>

Both experts concluded that due to intense pressure placed on PCR and the nearing phase-out date for the legal use and manufacture of Freon, PCR intentionally changed the protocol for producing F-pentene-2 to accommodate the existing reaction facility that was unsuited for that purpose.<sup>57</sup> Furthermore, evidence was presented that Turner voiced concerns regarding the safety of the project and PCR never informed Creighton regarding the hazards.<sup>58</sup> Finally, PCR, knowing TFE was dangerously unstable, allowed the practice of manually inverting the chemical containers thus, making it substantially certain employees would be harmed.<sup>59</sup>

#### IV. PROCEDURAL POSTURE OF *TURNER V. PCR, INC.*

Turner's estate, along with Creighton and his wife, sued PCR for wrongful death and personal injuries arising out of alleged intentional torts including: intentional exposure to injury, battery, fraudulent misrepresentation, and intentional infliction of emotional distress.<sup>60</sup> PCR claimed immunity as Turner and Creighton's employer and alleged they were only entitled to workers' compensation benefits.<sup>61</sup> The trial court granted summary judgment for PCR based on workers' compensation immunity pursuant to section 440.11(1) of the *Florida Statutes*.<sup>62</sup> Additionally, the trial court held the experts' affidavits amounted to conclusory statements rather than evidence of facts.<sup>63</sup> The First District Court of Appeal affirmed the trial court's order but certified the following question of "great public importance" to the Supreme Court of Florida:

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55. *Id.*

56. *Id.*

57. *Turner*, 754 So. 2d at 685.

58. Initial Brief of Appellants at 4, *Turner* (No. 94,468).

59. *Turner*, 754 So. 2d at 685.

60. Respondent's Answer Brief on Merits at 2, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

61. *Id.*

62. *Turner*, 754 So. 2d at 686.

63. Respondent's Answer Brief on Merits at 19-20, *Turner* (No. 94,468).



IS AN EXPERT'S AFFIDAVIT, EXPRESSING THE OPINION THAT AN EMPLOYER EXHIBITED A DELIBERATE INTENT TO INJURE OR ENGAGED IN CONDUCT SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH TO AN EMPLOYEE, SUFFICIENT TO CONSTITUTE A FACTUAL DISPUTE, THUS PRECLUDING SUMMARY JUDGMENT ON THE ISSUE OF WORKERS' COMPENSATION IMMUNITY?<sup>64</sup>

V. THE APPELLANTS URGE THE SUPREME COURT OF FLORIDA TO ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE

Turner and Creighton (Appellants) in their initial brief asked the Supreme Court of Florida to answer the certified question in the affirmative for two reasons.<sup>65</sup> First, Appellants argued the experts' affidavits proffered on their behalf must be considered before rendering summary judgment in favor of PCR (Appellee).<sup>66</sup> Second, Appellants argued the experts' affidavits "present genuine issues of material fact precluding Appellee's motion for summary judgment and the order of the district court should be reversed."<sup>67</sup>

Addressing their first argument, Appellants acknowledged that the lower courts in this case questioned the applicability of experts' affidavits and the weight they must be given in summary judgment proceedings.<sup>68</sup> Defending the applicability, Appellants cited *Buchman v. Seaboard Coast Line Railroad*,<sup>69</sup> where the Supreme Court of Florida set forth the elements for admissibility of expert testimony.<sup>70</sup> The two elements required for admitting expert testimony are: first, "the subject must be beyond the common understanding of the average layman"; and second, the witness must possess knowledge that will aid the trier of fact in determining the truth.<sup>71</sup> Likewise, Appellants argued the subject matter in this case was "highly technical and well outside the common knowledge of the jury," and additionally, the affidavits supporting a showing of material issues of fact.<sup>72</sup>

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64. *Turner*, 754 So. 2d at 684.

65. Initial Brief of Appellants at 11, 16, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

66. *Id.* at 11.

67. *Id.* at 16.

68. *Id.* at 11.

69. 381 So. 2d 229 (Fla. 1980).

70. *Id.* at 230.

71. *Id.*

72. Initial Brief of Appellants at 14, *Turner* (No. 94,468).

In particular, the experts' findings were necessary to create, at a minimum, a question of fact for the jury. Appellants claimed the issue was whether Appellee knew or should have known its specific actions or omissions, such as allowing highly volatile gases to be manually mixed in containers without pressure relief valves, were substantially certain to result in injury or death to an employee.<sup>73</sup> In further support of their argument, Appellants cited several other cases where courts relied upon expert witness affidavits in granting or denying motions for summary judgment.<sup>74</sup>

For example, Appellants cited *Roster v. Moulton*,<sup>75</sup> a Fourth District Court of Appeal case addressing the significance of experts' affidavits in summary judgment proceedings.<sup>76</sup> *Roster* involved a personal injury action filed against a bar after a customer struck the plaintiff, a bicyclist, with his vehicle while leaving.<sup>77</sup> The trial court considered the affidavits of two expert witnesses stating that the amount of alcohol the defendant consumed over a short period, with no outward evidence of physical impairment, would have put a reasonable server of alcoholic beverages on notice that the defendant was "habitually addicted."<sup>78</sup> These affidavits helped in creating an issue of fact, whether bar employees knew the defendant was addicted to alcohol.<sup>79</sup>

Additionally, Appellants cited *Lugo v. Florida East Coast Railway Co.*<sup>80</sup> In *Lugo*, a negligence and strict liability action brought under the Federal Employer's Liability Act, the trial court excluded the plaintiff's expert witness from testifying because he had not been listed as a witness, violating the court's pretrial order.<sup>81</sup> However, the Third District Court of Appeal refused to affirm for other reasons but stated, "we must assume that the trial court found the expert qualified to render an opinion, and his affidavit testimony reasonably credible, as it was the only evidence it could have relied upon in denying defendants' motions for summary judgment."<sup>82</sup> As these examples suggest, judges consider expert testimony in summary judgment proceedings and use the affidavits as evidence to deny motions for summary judgment.

Appellants not only claimed the court must consider their experts' affidavits, but that the affidavits set forth evidence creating disputable issues

73. *Id.* at 26.

74. *Id.* at 12-14.

75. 602 So. 2d 975 (Fla. 4th Dist. Ct. App. 1992).

76. Initial Brief of Appellants at 13-14, *Turner* (No. 94,468).

77. *Roster*, 602 So. 2d at 975.

78. *Id.* at 976 n.2.

79. *See id.* at 976.

80. 487 So. 2d 321 (Fla. 3d Dist. Ct. App. 1986).

81. *Id.* at 323.

82. *Id.* at 324.

for trial.<sup>83</sup> In favor of their second argument, Appellants cited the *Florida Rules of Civil Procedure* for granting summary judgment stating, summary judgment will be rendered if the “pleadings, depositions, answers to interrogatories, and admissions on file *together with the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”<sup>84</sup> Therefore, the moving party has the burden of proving there is no genuine issue of material fact for trial.<sup>85</sup>

Appellants used *Holl v. Talcott*<sup>86</sup> to illustrate this point.<sup>87</sup> *Holl* was a medical malpractice action where the petitioner claimed she suffered complications due to the negligence of her surgeons and others.<sup>88</sup> Here, the Supreme Court of Florida discussed experts’ affidavits and the alleged deficiencies of such when offered by respondents in support of summary judgment.<sup>89</sup> In fact, the court found the respondents’ affidavits did not demonstrate conclusively that the respondents were not negligent and therefore, they were not entitled to judgment as a matter of law.<sup>90</sup> Therefore, the respondents, as movants, did not meet their burden and this being so, the sufficiency of the petitioner’s affidavit should never have been reached.<sup>91</sup>

Using these arguments, Appellants clarified that they were not alleging that Appellee’s conduct was designed or *actually intended* to result in serious bodily injury or death.<sup>92</sup> Instead, they claimed that intentional acts by Appellee, perhaps motivated by business concerns, were *substantially certain* to cause harm, and the experts’ testimony explains the conditions that support this position.<sup>93</sup> Additionally, all inferences must be resolved in favor of the non-moving party.<sup>94</sup> Thus, the affidavits illuminated material issues of *objective intent* and *substantial certainty* that can only be resolved at trial.<sup>95</sup>

83. Initial Brief of Appellants at 16, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

84. *Id.* (citing FLA. R. CIV. P. 1.510).

85. *Id.* at 16–17.

86. 191 So. 2d 40 (Fla. 1966).

87. Initial Brief of Appellants at 16, *Turner* (No. 94,468).

88. *Holl*, 191 So. 2d at 42.

89. *Id.* at 44–45.

90. *Id.* at 45.

91. *Id.*

92. Initial Brief of Appellants at 19, *Turner* (No. 94,468).

93. *Id.*

94. *Id.* at 20.

95. *See id.* at 27.

## VI. THE APPELLEE URGES THE SUPREME COURT OF FLORIDA TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE

In response to the Appellants' arguments, PCR acknowledged disagreement with much of the Appellants' statement of the facts and claimed Appellants' version was not supported by the record.<sup>96</sup> Appellee's main arguments consisted of: first, an affidavit from a scientific expert does not preclude summary judgment if the affidavit does not create a dispute as to a material issue of fact; and second, a conclusory affidavit is insufficient to create a factual issue as to an intentional tort.<sup>97</sup>

Supporting the first argument, Appellee stated the affidavits opposing summary judgment must demonstrate the existence of a material issue of fact.<sup>98</sup> To determine this, it is necessary to judge the affidavits against the standard for proving an intentional tort.<sup>99</sup> This is not contrary to Appellants' arguments.<sup>100</sup> However, Appellee stated the issue was whether the employer committed an intentional tort against its employees.<sup>101</sup> Proving this required evidence suggesting that the employer had *actual subjective* knowledge that its conduct was substantially certain to cause injury or death.<sup>102</sup> Therefore, to create a material issue of fact, the experts' affidavits must provide evidence that the employer *subjectively knew* this result was substantially certain to occur and set forth facts supporting this claim.<sup>103</sup>

Appellee admitted that the affidavits in question could be used to establish that the employer knowingly created an unsafe workplace.<sup>104</sup> However, Appellee claimed that, in order to defeat a motion for summary judgment, the affidavit must show that the employer knew that his or her conduct was substantially certain to result in injury or death.<sup>105</sup> Therefore, because Appellants failed to show actual knowledge on the part of the employer as to the consequences of its acts, the affidavits were insufficient to defeat summary judgment.<sup>106</sup>

96. Respondent's Answer Brief on Merits at 3, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

97. *Id.* at 9, 15.

98. *Id.* at 9.

99. *Id.* at 10.

100. *See* Initial Brief of Appellants at 18–21, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

101. Respondent's Answer Brief on Merits at 7, *Turner* (No. 94,468).

102. *Id.*

103. *Id.*

104. *Id.* at 8.

105. *Id.* at 15.

106. Respondent's Answer Brief on Merits at 8, *Turner* (No. 94,468).

Supporting its second argument, Appellee stated Florida courts have held that conclusory affidavits are insufficient to create a genuine issue of material fact.<sup>107</sup> For example, Appellee cited *Clark v. Gumby's Pizza Systems, Inc.*,<sup>108</sup> where the plaintiff-employee alleged that the employer knew with substantial certainty one of its employees would be assaulted while delivering pizza to a particular college campus at night.<sup>109</sup> The First District Court of Appeal in *Clark* stated, "conclusory allegations of 'substantial certainty' do not raise otherwise insufficient allegations of fact to the level of [an] intentional tort."<sup>110</sup> Important in *Clark* is the court's definition of substantial certainty. There, the court cited *Fisher*, equating substantial certainty with virtual certainty.<sup>111</sup> Therefore, the affidavit in *Clark* was ineffective because it did not provide facts supporting a level of virtual certainty on the part of the employer.<sup>112</sup> Likewise, considering the court's prior holding regarding substantial certainty as virtually sure, Appellee argued the affidavits of Appellants' experts did not provide facts supporting this claim.<sup>113</sup>

Appellants replied, stating that Appellee misinterpreted the alternative bases for showing an employer had the requisite intent to prove the commission of an intentional tort and actual *subjective* knowledge was not required under the substantial certainty test.<sup>114</sup> As a result, the Supreme Court of Florida decided a clarification of this issue was necessary; whether actual *subjective* knowledge of the employer was required to find intent, and refrained from addressing the certified question.<sup>115</sup>

#### VII. THE SUPREME COURT OF FLORIDA DECLINES TO ADDRESS THE CERTIFIED QUESTION & ALTERNATIVELY DECIDES PROOF NEEDED FOR INTENTIONAL TORT EXCEPTION

The Supreme Court of Florida declined to address the certified question.<sup>116</sup> Instead, the court clarified what a claimant-employee must show when attempting to prove the commission of an intentional tort, thereby

107. *Id.* at 15.

108. 674 So. 2d 902 (Fla. 1st Dist. Ct. App. 1996).

109. Respondent's Answer Brief on Merits at 16, *Turner* (No. 94,468).

110. *Clark*, 674 So. 2d at 904.

111. *Id.*

112. *Id.*

113. See Respondent's Answer Brief on Merits at 23, *Turner* (No. 94,468).

114. Reply Brief of Appellants at 1, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

115. *Turner v. PCR, Inc.*, 754 So. 2d 683, 684 (Fla. 2000).

116. *Id.* at 684.

disallowing an employer from invoking an otherwise valid workers' compensation immunity defense.<sup>117</sup> Neither argument made by Appellants nor Appellee claimed expert testimony should be completely disregarded in summary judgment proceedings.<sup>118</sup> As previously noted, the Appellee essentially addressed the underlying issue implying that if actual knowledge requiring an inquiry into the subjective state of mind of the employer is necessary to prove an intentional tort, an expert's opinion that does not address the actual knowledge issue is of little use in creating a genuine issue of material fact.<sup>119</sup> Noting this line of thought, the court cited previous decisions setting forth two alternative bases for proving an intentional tort, including one allowing an *objective* finding of intent based on a reasonable person standard.<sup>120</sup>

#### A. *The Objective vs. Subjective Standard*

The Supreme Court of Florida in *Fisher* set forth the disjunctive two part test for proving an intentional tort.<sup>121</sup> The court takes note that Appellants do not claim that Appellee acted with deliberate malice toward them.<sup>122</sup> Therefore, the first part of the *Fisher* test is not at issue.<sup>123</sup> Instead, Appellants claimed the conduct of Appellee fell under the second part of the *Fisher* test; Appellee engaged in acts substantially certain to result in injury or death.<sup>124</sup> Thus, the court decided the issue was whether a subjective or objective standard is appropriate for judging the conduct of an employer under the second part of the *Fisher* test.<sup>125</sup>

An objective standard requires an analysis of the facts of a case to determine if the employer's conduct was substantially certain to result in injury or death.<sup>126</sup> The employer's actual intention to harm is not determinative.<sup>127</sup> The court pointed out that if subjective intent were required under the second part of the *Fisher* test, there would be no alternative basis for recovery against an employer.<sup>128</sup> A consequence of this

117. *Id.*

118. See Initial Brief of Appellants at 11, *Turner v. PCR, Inc.* 754 So. 2d 683 (Fla. 2000) (No. 94,468); Respondent's Answer Brief on Merits at 7, *Turner* (No. 94,468).

119. Respondent's Answer Brief on Merits at 7–8, *Turner* (No. 94,468).

120. *Turner*, 754 So. 2d at 688.

121. *Id.* at 687; see *supra* notes 25–35 and accompanying text.

122. *Turner*, 754 So. 2d at 688.

123. *Id.*

124. *Id.*

125. *Id.* at 688–89.

126. *Id.* at 688.

127. *Turner*, 754 So. 2d at 688.

128. *Id.*

holding would be that an employee could only recover in those situations where the employer actually intended to harm the employee.<sup>129</sup> In fact, in many previous cases, Florida courts held the employer must subjectively know that injury or death was virtually certain to rise to the level of an intentional tort.<sup>130</sup>

However, the Supreme Court of Florida in *Turner* attributed the second part of the *Fisher* test to *Spivey v. Battaglia*,<sup>131</sup> where it held if a reasonable person would believe a particular result was substantially certain to follow, the law finds he intended it.<sup>132</sup> Therefore, intention may be imputed where the facts indicate a reasonable person in the employer's position would realize or *should have realized* certain acts were substantially certain to cause injury.<sup>133</sup> In other words, proving intent under the second part of *Fisher* requires evidence showing conduct which a reasonable person in the employer's position should know is substantially certain to result in injury or death.<sup>134</sup>

#### B. *Virtual vs. Substantial Certainty*

The court recognized that in previous cases, particularly *Fisher* and *Lawton*, it declined to answer explicitly whether an intentional tort was a valid exception to workers' compensation immunity.<sup>135</sup> As stated earlier, this was due to the complainant's failure to allege a prima facie case of an intentional tort.<sup>136</sup> Specifically, both cases spoke of "probable injury" when in fact, substantial certainty is required.<sup>137</sup> Presenting evidence in support of an objective finding of intent requires an understanding of what "substantial certainty" means. The court recedes from equating substantial certainty with

129. *Id.*

130. *See Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986); *Lawton v. Alpine Eng'rd Prods., Inc.*, 498 So. 2d 879 (Fla. 1986); *Kenann & Sons Demolition, Inc. v. Dipaolo*, 653 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1995); *UPS v. Welsh*, 659 So. 2d 1234 (Fla. 5th Dist. Ct. App. 1995).

131. 258 So. 2d 815 (Fla. 1972).

132. *Turner v. PCR, Inc.*, 754 So. 2d 683, 688 (Fla. 2000) (citing *Spivey*, 258 So. 2d at 817). The court cited and relied upon the *Second Restatement of Torts* when forming the basis for its holding. *Id.*

133. *Spivey*, 258 So. 2d at 816-17.

134. *See id.*; *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 883 (Fla. 1986).

135. *Turner*, 754 So. 2d at 687; *Fisher*, 498 So. 2d at 883; *Lawton v. Alpine Eng'rd Prods., Inc.*, 498 So. 2d 879, 880 (Fla. 1986).

136. *Turner*, 754 So. 2d at 687.

137. *Id.*

virtual certainty, and explains the concept as something greater than gross negligence but less than being virtually sure.<sup>138</sup>

In *Turner*, the court hinted that substantial certainty may be something closer to “culpable negligence.”<sup>139</sup> Citing *Eller v. Shova*,<sup>140</sup> the Supreme Court of Florida defined culpable negligence as “reckless indifference” or “grossly careless disregard” of human life.<sup>141</sup> The court considers culpable negligence greater than gross negligence, but it is clear the distinction involves a matter of degree.<sup>142</sup> Some clues to the type of conduct or circumstances supporting a finding of substantial certainty are provided by two cases cited in this opinion.

In *Connelly v. Arrow Air, Inc.*,<sup>143</sup> the Third District Court of Appeal reversed summary judgment based on the workers’ compensation immunity defense for an employer airline.<sup>144</sup> The court stated:

It is quite reasonable to conclude, as a matter of law, that a passenger aircraft which is routinely overloaded and poorly maintained, with known mechanical deficiencies including a leaking hydraulic system, regular engine stalls, overheating, and faulty thrust reversers, will—to a substantial certainty—eventually succumb to the incessant forces of gravity causing serious injury to, or the death of, those aboard.<sup>145</sup>

Furthermore, the facts of *Connelly* suggested that the airline withheld knowledge of the defects and hazards from its employees so they were not permitted to exercise an informed judgment of whether to perform their assigned duties.<sup>146</sup>

Likewise, in *Cunningham v. Anchor Hocking Corp.*,<sup>147</sup> the First District Court of Appeal reversed summary judgment for the employer.<sup>148</sup> The allegations and supporting evidence in this case described a situation where a glass manufacturer, the employer, diverted the smokestack of the plant’s exhaust system allowing toxic fumes to flow into, rather than out of the working environment, and periodically turned off the ventilation system,

138. *Id.* at 687 n.4.

139. *Id.* at 687 n.3.

140. 630 So. 2d 537 (Fla. 1993).

141. *Turner*, 754 So. 2d at 687 n.3.

142. *See Eller*, 630 So. 2d at 541 n.3.

143. 568 So. 2d 448 (Fla. 3d Dist. Ct. App. 1990).

144. *Id.* at 451.

145. *Id.*; *see Turner*, 754 So. 2d at 690–91.

146. *Connelly*, 568 So. 2d at 451; *Turner*, 754 So. 2d at 691.

147. 558 So. 2d 93 (Fla. 1st Dist. Ct. App. 1990).

148. *Id.* at 100.



intensifying the employees' level of exposure.<sup>149</sup> Additionally, they removed warning labels from chemical containers, misrepresented the nature of toxic substances, and ignored the need for safety equipment.<sup>150</sup> Therefore, the repeated and continuous exposure, intentionally increased and worsened by the employer, supported the employees' contention that injury was substantially certain to occur.<sup>151</sup> Thus, these actions supported an intentional tort cause of action.<sup>152</sup> Of note, in both cases there was evidence that the deliberate actions or omissions of the employer were done to increase profits at the expense of employee safety.<sup>153</sup>

The facts of *Turner* are similar to *Connelly* and *Cunningham*. In *Turner*, the court specifically stated the alleged conduct of PCR, if proven, was at least as disturbing.<sup>154</sup> Appellants' experts claimed that serious danger existed due to the known hazardous activity involved, based on personal knowledge obtained through their investigation.<sup>155</sup> Additionally, the experts offered evidence of at least three other explosions that occurred at the plant in less than two years involving a chemical used in the fatal November 22 explosion.<sup>156</sup> Furthermore, the evidence suggested that PCR intentionally stepped up production, intentionally disregarded the safety of its employees, and failed to warn them of the highly explosive nature of TFE, in order to meet an approaching deadline and increase profits.<sup>157</sup> Significantly, like *Connelly* and *Cunningham*, this case "share[s] a 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."<sup>158</sup>

Once an act by an employer is considered actually or constructively intentional and results in harm to an employee, the court stated such an event should not be covered under workers' compensation immunity for the following reasons.<sup>159</sup> First, under the statute, compensation is payable for accidental disability or death arising out of and in the course of employment.<sup>160</sup> Furthermore, an accident is defined as an unexpected or

149. *Id.* at 95-97; *Turner*, 754 So. 2d at 690.

150. *Cunningham*, 558 So. 2d at 96; *Turner*, 754 So. 2d at 690.

151. *Cunningham*, 558 So. 2d at 97.

152. *Id.*

153. *Id.* at 96; *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 449 (Fla. 3d Dist. Ct. App. 1990).

154. *Turner*, 754 So. 2d at 690.

155. *See id.*

156. *Id.* at 691.

157. *See id.* at 690-91.

158. *Id.* at 691.

159. *Turner*, 754 So. 2d at 689.

160. *Id.*; FLA. STAT. § 440.09(1) (2000).

unusual happening or event, occurring suddenly.<sup>161</sup> Therefore, the court pointed out that if an event is substantially certain to occur as the result of an employer's act, then it is neither unexpected nor unusual and thus, does not meet the definition of an accident under the Workers' Compensation Act.<sup>162</sup>

Finally, the court stressed that workers' compensation is not intended to shield employers from liability for intentional torts and is not to be construed in favor of the employer or the employee.<sup>163</sup> The existence of "workers' compensation should not affect the pleading or proof of an intentional tort."<sup>164</sup> In sum, the workers' compensation immunity defense is not intended to block intentional tort suits at the summary judgment phase.<sup>165</sup>

## VIII. OPINION

### A. *Surviving Summary Judgment*

This decision by the Supreme Court of Florida is a logical and well-reasoned summary of the alternative bases available to prove the commission of an intentional tort resulting in injury to an employee. The court points out that it makes good public policy to hold employers responsible for intentional conduct resulting in injury.<sup>166</sup> The decision provides a road map for plaintiffs' attorneys filing claims under this exception.

To get a claim to trial successfully, it is necessary to allege either the employer committed intentional acts designed to harm the employee and/or alternatively, committed intentional acts the employer *should have known* were *substantially certain* to cause harm.<sup>167</sup> This case, unlike previous cases, survived summary judgment because substantial certainty of harm was alleged and supported with credible evidence thereby creating an issue of material fact.<sup>168</sup>

### B. *Defining Substantial Certainty*

An understanding of what is meant by "intent" and "substantial certainty" is important when pleading an intentional tort exception. An actor

161. § 440.02(1).

162. *Turner*, 754 So. 2d at 689.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

167. *See Turner*, 754 So. 2d at 688-89.

168. Compare *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986), with *Lawton v. Alpine Eng'rd Prods., Inc.*, 498 So. 2d 879 (Fla. 1986).

manifests intent when he or she desires to cause the consequences of the act.<sup>169</sup> However, if the actor knows, or should know, the consequences of his or her actions are substantially certain to occur and still proceeds, the law treats the actor as having intended to produce the result.<sup>170</sup>

Proving substantial certainty may be difficult. Acquiring an understanding of what substantial certainty means is important when setting forth the facts of the case. No bright line rule currently exists defining substantial certainty. However, the court provided a few excellent clues regarding what sort of evidence may support a finding of substantial certainty on the part of the employer.<sup>171</sup> First, the court states it has retreated from a requirement of *virtual* certainty.<sup>172</sup> What is virtual certainty? Perhaps the simplest interpretation is also the most common. In everyday terms, the meaning of virtual is “almost entirely,” “nearly,” or “for all practical purposes.”<sup>173</sup> Applying this plain or common meaning, one could say he or she is virtually sure of something if for all practical purposes it is inevitable. In essence, this probably means as close as one can come to being completely certain about something in an uncertain world. Now, it appears something less than this may do.<sup>174</sup>

In contrast, the court now states *substantial* certainty will suffice.<sup>175</sup> Again, looking to the common meaning of the word “substantial,” interpretations include: “considerable in quantity,” “significantly great,” or “largely but not wholly that which is specified.”<sup>176</sup> Yet, what is large or significant in terms of certainty? Most reasonably, this can only be determined on a case by case basis, allowing flexibility in weighing the various social policies involved.<sup>177</sup> It is the quantum of evidence, provided by the particular circumstances surrounding the event, that allows a finding of substantial certainty. For instance, looking to cases surviving this issue, it appears that evidence eliciting particular behavior is especially condemning.<sup>178</sup>

169. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

170. *Id.*

171. *Turner*, 754 So. 2d at 689–91.

172. *Id.* at 687–88 n.4.

173. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1320 (10th ed. 1993).

174. *Turner*, 754 So. 2d at 687–88 n.4.

175. *Id.*

176. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 173, at 1174.

177. Shannan Clare Sweeney, *The Intentional Act Exception to the Exclusivity of Workers' Compensation*, 44 LA. L. REV. 1507, 1516 (1984).

178. *See* *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 96–97 (Fla. 1st Dist. Ct. App. 1990); *see also* *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 451 (Fla. 3d Dist. Ct. App. 1990).

The following circumstances may support a finding of an employer's substantial certainty of inevitable harm. First, a hazardous work environment existed at the time the harm occurred.<sup>179</sup> Second, prior to the harmful incident, the employer engaged in intentional or deliberate acts or omissions which created or increased the danger of harm to employees.<sup>180</sup> Third, the employer willfully withheld facts from employees concerning the hazards.<sup>181</sup> Fourth, the employer provided no reasonable defense for its conduct.<sup>182</sup> Finally, the employer exhibited behavior placing profits before employee safety.<sup>183</sup> Therefore, the quantity and quality of the evidence eliciting the employer's acts and motivations must present a set of circumstances supporting a finding that a reasonable employer would know its acts were substantially certain to cause harm.

### C. Procedural Considerations

When an employee brings a tort action against his or her employer, the employer must plead the workers' compensation statute as a defense.<sup>184</sup> In other words, the employer must claim workers' compensation immunity. The employer has the burden to prove: first, the employee was subject to the workers' compensation act; and second, the act is the employee's exclusive remedy.<sup>185</sup> However, an employer is relieved of this burden in three situations. The employer does not need affirmative proof when: 1) the employment relationship is apparent; 2) a worker admits the injury occurred during employment; and 3) when the employee prosecutes a claim and accepts compensation.<sup>186</sup>

On the other hand, when the employee's complaint alleges facts admitting coverage under workers' compensation, the complaint must also allege facts showing an exception to the statute applies.<sup>187</sup> For instance, if the complaint fails to allege facts sufficient to apply the intentional tort exception, no civil action will lie and the complaint is subject to a general demurrer.<sup>188</sup> This pleading requirement is jurisdictionally based.<sup>189</sup> The trial court lacks jurisdiction if the complaint does not allege facts supporting a

179. *Cunningham*, 558 So. 2d at 95; *Connelly*, 568 So. 2d at 451.

180. *Cunningham*, 558 So. 2d at 96; *Connelly*, 568 So. 2d at 449-51.

181. *Cunningham*, 558 So. 2d at 96; *Connelly*, 568 So. 2d at 451.

182. *See Cunningham*, 558 So. 2d at 95-97; *see also Connelly*, 568 So. 2d at 449-51.

183. *Cunningham*, 558 So. 2d at 96; *Connelly*, 568 So. 2d at 449.

184. 82 AM. JUR. 2D *Workers' Compensation* § 90 (1992).

185. *Id.*

186. *Id.*; DUBREUIL, *supra* note 14, § 3.01[b][iii].

187. 82 AM. JUR. 2D *Workers' Compensation* § 90 (1992).

188. *Id.*

189. *Id.*

civil action.<sup>190</sup> Therefore, the action must be dismissed and workers' compensation law will apply.<sup>191</sup>

Notice, Appellants argued that Appellee did not meet its burden of proof.<sup>192</sup> Applying the above rule to sustain a motion to dismiss, Appellee had the burden to prove the employee was subject to workers' compensation law, *and* the intentional tort exception did not apply. Additionally, Appellants had to state sufficient facts in their complaint to assert an intentional tort exception. Appellants met their burden with the assistance of expert opinions.<sup>193</sup> On the other hand, Appellee failed to show conclusively that the intentional tort exception did not apply.<sup>194</sup> Appellee's only hope was that the *Fisher* test would be read narrowly, and the court would support an "actual knowledge" theory or hold with the "virtual certainty" standard. Unfortunately, for Appellee, the court did neither.<sup>195</sup>

Allowing an objective finding of intent based upon substantial certainty of harm, if pled correctly and supported by evidence, may allow more claims to get past the summary judgment phase. This may encourage more claims as employees attempt to evade the exclusivity provision of workers' compensation. Considering the costs of litigation, this is a significant concern to employers. The hope is that employers will consider the potential liability and reexamine their workplace practices. Ideally, the decision will prevent or discourage employers from turning a blind eye toward workplace safety.<sup>196</sup>

## IX. CONCLUSION

Common sense tells us successfully creating and maintaining a safe work environment requires both employers' and employees' participation. It is clear employers have a recognized moral duty to refrain from conduct placing employees in danger. Now employers are also legally accountable for objectively intentional conduct resulting in harm.<sup>197</sup> However, in many cases employees are sometimes in the best position to recognize potential hazards and determine what needs to be done to improve or prevent a dangerous situation. Therefore, to remain true to the original intent of the

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190. *Id.*

191. *See id.*

192. Initial Brief of Appellants at 22, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

193. *Turner v. PCR, Inc.*, 754 So. 2d 683, 691 (Fla. 2000).

194. *See id.* at 691.

195. *See id.*

196. *Id.*

197. *Id.*

Florida legislature, so as not to construe the law in favor of the employer or employee, perhaps we should apply a similar standard to employees' conduct that is substantially certain to cause harm to themselves and others.<sup>198</sup> If employees may sue their employer for imputed objective intentional harm, then allowing an employer to withhold benefits or defend on the basis of an employee's similar conduct may only be fair. Imposing responsibility into a system immune from blame may be beneficial.

*Theresa J. Fontana*

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198. FLA. STAT. § 440.015 (2000) (discussing the legislature's intent that the Workers' Compensation Act is not to be construed in favor of the employer or employee).