

Suing The Employer for Intentional Tort:
Overcoming Worker's Compensation Immunity

By: Marie L. De Marco Miller

Although generally an employee's exclusive recourse for injury sustained in the workplace is worker's compensation, there are cases that fall within the exception to that immunity.¹ If the injury arose prior to October 1, 2003, the standard is one of "substantial certainty". After October 1, 2003 – "virtual certainty" is required. It is well established that conclusory allegations are insufficient to overcome the immunity, and even gross negligence is insufficient to support the finding of an intentionally tortuous act.

History of Exception to the Immunity

In *Fisher v. Shenandoah*, 498 So.2d 882 (Fla. 1986), the Florida Supreme Court held that an employer's conduct constitutes an intentional tort where the employer either exhibits a deliberate intent to injure or engages in conduct virtually certain to result in injury or death. *Id.* at 883. In *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), the Florida Supreme Court reaffirmed its decision in *Fisher* but receded from any "virtual certainty" standard of proof.² Moreover, the *Turner* Court disapproved district court decisions that would require plaintiffs to prove the employer acted with a subjective intent to harm. The Court made clear that "the conduct of the employer must be evaluated under an *objective* standard." *Id.* at 684 (emphasis added).

In *Turner*, an explosion occurred at a chemical plant and caused injury and death to employees. Experts opined that the chemicals being utilized at the plant were highly reactive and needed to be handled with extra precaution. *Id.* at 685. The employer had notice of the chemicals' hazards, and the fact the chemicals were being removed from the market, but did not disclose that information to its employees. There was also evidence of at least three other

uncontrolled explosions at the plant prior to the one that killed and injured the plaintiffs. *Id.*

The Court affirmed that “substantial” certainty that injury will occur is the test, and that it is an objective one. Although the standard is higher than gross negligence,³ it does not require “virtual” certainty. *Id.* at 687. Rather, substantial certainty is similar to culpable negligence.⁴ Moreover, under an objective standard, the question is whether a reasonable person would understand the employer’s conduct was substantially certain to result in injury to the employee. *Id.* at 688. “Where a *reasonable man* would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it.” *Id.* (citations omitted, emphasis in original). Applying those standards, the Supreme Court in *Turner* concluded that an intentional tort was properly alleged.

The *Turner* Court cited with approval two earlier lower court decisions. In *Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93 (Fla. 1st DCA 1990), the appellate court reversed the trial court’s dismissal of plaintiffs’ cause of action based on workers’ compensation immunity. The plaintiffs alleged that the employer diverted a smokestack allowing toxic fumes to enter the workplace and periodically turned off the ventilation system, which intensified plaintiffs’ exposure to the toxic substances. *Id.* at 96. Plaintiffs in that case also alleged that the employer removed warning labels and misrepresented the toxic nature of the substances; knowingly provided inadequate safety equipment; and misrepresented the need for safety equipment. *Id.* at 97. Those allegations, if true, were sufficient to show that injury was substantially certain. *Id.*

Connelly v. Arrow Air, Inc., 568 So.2d 448 (Fla. 3d DCA 1990), is yet another case in which the trial court was reversed for dismissing plaintiff’s intentional tort case against its employer. In *Connelly*, the plaintiff alleged that the employer intentionally misstated the maximum weight that could be carried on its planes, and had, prior to the crash at issue, sold its

last plane capable of complying with the weight requirements. The plaintiff alleged that the defendant intentionally pursued a course of conduct that subordinated safety to profits. *Id.* at 449. The Third District Court held that where an employer withholds knowledge of a defect or hazard from an employee so that the employee cannot make an informed decision, and such defect or hazard poses a grave risk of injury, the employer will be considered as acting with a belief that harm is substantially certain to occur. *Id.* at 451.

Post *Turner* Cases that Clarify its Holding

In 2004 the Florida Supreme Court in *Taylor v. School Board of Brevard County*, 888 So.2d 1 (Fla. 2004), confirmed that exceptions to the worker's compensation immunity are to be narrowly construed. Then in *Travelers Indemnity Co. v. PCR Inc.*, 889 So.2d 779, the Florida Supreme Court was asked to determine whether there was insurance coverage for an intentional tort committed by the employer (PCR). *Id.*, at 781.

In deciding that there was coverage, the Florida Supreme Court reiterated its analysis in *Turner*:

Our decision in *Turner* rested squarely on tort law principles. In adopting an objective substantial-certainty test, we relied on *Spivey v. Battaglia*, 258 So.2d 815 (Fla.1972), which itself relied on the Restatement of Torts, for the proposition that '[w]here a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it.' *Id.* at 817 (first emphasis added [by the court]). **Importantly, under this standard the employer need not have known that its conduct was substantially certain to cause injury; the fact that it should have known of the substantial certainty of injury would be sufficient to negate the 'unexpectedness' or 'unusualness' of any resulting injury, regardless of whether the injury truly was unexpected by the employer** (emphasis added).

Id. at 789.

In *Bombay Co. v. Bakerman*, 891 So.2d 555 (Fla. 3d DCA 2004), a wooden ladder supplied to employees to reach shelves in the storeroom was in bad condition and swayed. There were numerous complaints and requests for a new ladder. Bakerman was injured when the ladder broke

as he was retrieving a package. The appellate court found that the “common thread of evidence that the employer tried to cover up the danger, affording employees no means to make a reasonable decision as to their actions” was missing. That common thread was present in cases wherein the exception to the immunity was upheld. *Id.* at 557. Since the dangerous condition was evident, there could be no exception. *Id.*⁵

In 2003, the Florida legislature amended its workers compensation statute, replacing the "substantial certainty" standard with a "virtually certain" standard, which is a higher standard. Fla. Stat. § 440.11(1)(b) (2003). However, the amendment is not retroactive. *Feraci v. Grundy Marine Constr. Co.*, 315 F.Supp.2d 1197, 1205 n.11 (N.D. Fla. 2004).

Stating a Cause of Action For Intentional Tort

For causes of action arising before October 1, 2003, proper application of the “substantial certainty” standard turns on the particular facts of a case, *Turner*, 754 So.2d at 686, and any evidence “that the employer tried to cover up the danger, affording employees no means to make a reasonable decision as to their actions” is critical to a finding that the employer committed an intentional tort. *Id.* at 691. It is an employer’s responsibility to identify actual or potential hazards in the workplace, to evaluate the extent of those hazards, and to minimize or eliminate those hazards. The employer is charged with the body of available scientific knowledge.⁶ An employer’s compliance with federal standards is not a defense to a cause of action based on this “intentional” tort.⁷

As with any personal injury case, the elements of duty, breach, causation and damages are necessary pleadings. But the plaintiff’s lawyer clearly needs additional allegations that raise the level of conduct on the employer’s part to that of an intentional tort as such term has been defined by law. The “common thread” in the cases where the exception to immunity is upheld include: the

employer's knowledge of the dangerous condition;⁸ evidence of concealment or misrepresentation to the employee; failure to take reasonable precautions to protect the employees; an absence of warnings, training, Material Safety Data Sheets, precautionary measures, safety equipment; physical evidence of dangerous conditions; prior accidents or incidents; and complaints by employees. An expert affidavit, from your warnings or causation expert, is critical at the summary judgment stage. For injuries occurring after October 1, 2003, it appears the legislature has brought us back to the pre-*Turner* "virtual certainty" analysis which will most likely require a showing of actual knowledge and evidence of a subjective intent to injure.

A Case Study

Constar Plastics, Inc., began as Sewell Plastics in Atlanta, Georgia, in 1964. Constar manufactured milk bottles from numerous plastics. In 1965, the company expanded to make bottles for the chemical industry. In 1977 the company expanded again manufacturing beverage bottles and mustard containers. The Orlando, Florida, manufacturing plant was added in 1966. By 1982 the Orlando plant had 150 employees.

Polyvinyl chloride (PVC) was used in other Constar plants starting in the early to mid-1970s. Hydrochloric acid (HCl), an off-gas of PVC processing, is an undisputed irritant to persons exposed to it, and such exposure can result in permanent injuries or death. OSHA, and other governmental agencies, set limits for allowable exposure to HCl. The facts clearly demonstrated repeated excessive exposures to dangerous gas. Employees who complained were told to go back to work. After being exposed for years to the off-gases of hot processing, numerous employees were diagnosed with adult-onset asthma and chronic obstructive pulmonary disease.

In representing these employees, we alleged that the employer knew or should have known, based on available scientific literature, employee complaints, testing from its chemical suppliers, and other facts, that the employees' exposure to heated and burning PVC would be substantially certain to cause injury or death. It was also alleged and shown that there was a concealment of critical facts regarding the safety of the employees so that they were deprived of any meaningful choice. Knowledge, concealment, misrepresentation, failure to warn, and other "common threads" were present. As a result, the motions to dismiss and for summary judgment were denied.⁹

Conclusion

Although it has become more difficult to allege a cause of action against an employer that will withstand a motion to dismiss or for summary judgment as a result of the legislatively imposed "virtual certainty" test, it is still possible to allege and prove a case against an employer for an intentional tort through the use of specific statements showing the intentional nature of the employer's conduct and the aforementioned "common threads".

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1. Florida Statutes section 440.11 (2003).
2. All prior cases utilizing the higher standard were reversed by *Turner*, including *Lawson v. Alpine Engineered Products, Inc.*, 498 So.2d 879 (Fla. 1986); *Gerth v. Wilson*, 774 So.2d 5 (Fla. 2d DCA 2000); *Clark v. Gumby's Pizza Sys., Inc.*, 674 So.2d 902 (Fla. 1st DCA 1996); *United Parcel Serv. v. Welsh*, 659 So.2d 1234 (Fla. 5th DCA 1995); *Kenann & Sons Demolition, Inc. v. Dipaolo*, 653 So.2d 1130 (Fla. 4th DCA 1995)

3. "Gross negligence" is defined as an "act or omission that a reasonable, prudent person would know is likely to result in injury to another." *Turner*, 754 So.2d 687 n.3.
4. "Culpable negligence is negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others. It is the entire want of care which raises a presumption of indifference to consequences." *Turner*. 754 So.2d at 687 n.3.
5. Other cases in which there was a finding of ***no*** exception include: *Fleetwood Homes of Florida, Inc. v. Reeves*, 833 So.2d 857, 859-861 (Fla. 2d DCA 2002) (no prior injury or incident); *Pacheco v. Power & Light Co.*, 784 So.2d 1159, 1163 (Fla. 3d DCA 2001) (no evidence of willful or deliberate indifference to safety); *Tinoco v. Resol, Inc.*, 783 So.2d 309 (Fla. 3d DCA 2001) (defect obvious to all); *Allstates Fireproofing, Inc. v. Garcia*, 876 So.2d 1222 (Fla. 4th DCA 2004) (no evidence to conceal and no failure to warn).
6. *Miles v. Vicksburg Chemical Co.*, 588 F.2d 512, 516 (5th Cir. 1979), *reh'g denied*, 591 F.2d 102; 602 F.2d 683 (5th Cir. 1979); 29 C.F.R. § 1910.1200; *AFL-CIO v. OSHA*, 965 F.2d 962, 972 (11th Cir. 1992); §388 Restatement of Torts (Second).
7. *Kidron, Inc. v. Carmona*, 665 So.2d 289 (Fla. 3d DCA 1995); *Freightliner's Corp. v. Myrick*, 514 U.S. 280 (1995).
8. Although *Turner*, discussed *infra*, indicates an objective standard applies, (i.e. knew or should have known), in practice, absent some evidence of actual knowledge it would be difficult to convince the court your case is excepted from worker's compensation immunity.
9. The complaint and relevant pleadings can be viewed on the firm website: www.productslaw.net.