

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

DEBRA ANN TURNER, JAMES
CREIGHTON and LYNN CREIGHTON,

Plaintiffs/Appellants,

v.

Case No: 94,468

PCR, INC., a Florida Corporation,

Defendant/Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT - NO. 97-2610

REPLY BRIEF OF APPELLANTS

Karen S. Cohen, Esquire
Florida Bar No.: 910333
GREEN, KAHN & PIOTRKOWSKI, PA
Attorney for Appellant, Turner
317 Seventy-First Street
Post Office Box 4197
Miami, Florida 33141
(305) 865-4311

Jack J. Fine, Esquire
Florida Bar No.: 223700
FINE, FARKASH & PARLAPIANO
Attorney for Appellant, Creighton
622 NE First Street
Gainesville, Florida 32601
(352) 376-6046

CERTIFICATE OF TYPE SIZE AND STYLE

This brief has been typed utilizing 14pt Times New Roman font.

TABLE OF CONTENTS

Certificate of Type Size and Style i

Table of Contents ii

Table of Citations iii

Argument 1

I THE AFFIDAVITS OF APPELLANT’S EXPERTS CREATE A
FACTUAL ISSUE AS TO WHETHER APPELLEE ENGAGED
IN INTENTIONAL ACTS WHICH WERE SUBSTANTIALLY
CERTAIN TO RESULT IN INJURY OR DEATH 1

II. THE AFFIDAVITS OF APPELLANT’S EXPERTS ARE NOT
CONCLUSORY AND ESTABLISH GENUINE ISSUES
OF MATERIAL FACT PRECLUDING APPELLEE’S MOTION
FOR SUMMARY JUDGMENT 5

Conclusion 12

Certificate of Service 13

TABLE OF CITATIONS

Case Law

Fisher v. Shenandoah, 498 So.2d 882 (Fla. 1986) passim

Other

Fla. R. Civ. P. 1.510 6, 11

ARGUMENT

I THE AFFIDAVITS OF APPELLANT’S EXPERTS CREATE A FACTUAL ISSUE AS TO WHETHER APPELLEE ENGAGED IN CONDUCT WHICH WAS SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH

Appellee has erroneously interpreted the exception to the workers’ compensation immunity statute as set forth by this Court in Fisher v. Shenandoah General Construction Co., 498 So.2d 882 (Fla. 1986). Fisher sets forth the exception as follows:

In order for an employer’s action 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.*

Id. at 883. (Emphasis added)

The Court has established a two pronged test requiring either an action on the part of the employer with the deliberate intent to injure the employee, or, in the alternative, actions taken by the employer which are substantially certain to result in injury or death. Appellant’s pleadings, in Count I of their Second Amended Complaint, allege that the defendant, PCR, Inc., knowingly engaged in conduct which would result in the catastrophic and violent reaction which occurred on November 22, 1991, and with deliberate intent, exposed its employees to a reaction

which was substantially certain to cause injury or death to its employees. (R. VI:1135-50; II: 319-35).

Appellee's Answer brief is misleading in that it focuses only on a definition of an intentional act and did not address the substantial certainty standard clearly enunciated in Fisher. Contrary to Appellee's argument, the trial court applied an incorrect legal standard by finding that an intent to injure must be shown. Both the trial court and the appellee disregard the second prong of the two part legal standard in Fisher. In place of the clear two pronged test, Appellee seeks to rephrase the standard set forth in Fisher to require that the employer must either exhibit a deliberate intent to injure or intentionally engage in conduct which is substantially certain to result in injury or death.

In the instant case, Appellee required the appellants to mix highly volatile chemicals, known to react with each other explosively, in such a manner that was substantially certain to result in injury or death. Each of Appellants' experts have reviewed the processes involved in this case, have reviewed documentation provided by Appellee, and have opined that in this case the Appellee deliberately engaged in the requisite conduct which was substantially certain to result in injury or death, thereby satisfying the test of Fisher. See Affidavit of Dr. John Landrum R.VI: 999-1011 and Affidavit of Jack Brand R.V: 686-88. As such, the affidavits of

Appellant's experts are sufficient to create a material fact, precluding summary judgment.

Appellee seeks to disregard the second prong of the test laid out in Fisher. In place of the clear two pronged test, appellee would substitute a combination of the two standards by replacing the disjunctive preposition "or" used by the court in Fisher to separate the two alternative standards with a conjunctive "and," making the standard extremely difficult, if not impossible, to prove. However, the issue of whether the standard has been proven is not before the Court on this appeal. The question certified to the Court is whether the affidavits filed by the appellant are sufficient to create an issue of material fact to survive a Motion for Summary Judgment.

Appellee attacks the qualifications of the experts in their brief, but did not do so on the record at the hearing through any testimony or countervailing affidavits. The affidavit of Appellant's expert, Dr. John Landrum, sets forth in detail his qualifications as an expert. (Paragraphs 2-5, Affidavit of Dr. John Landrum, R.VI:999-1011). Dr. Landrum continues to set forth with particularity the more than 3,000 documents reviewed in preparation of his opinion, including:

[Documents] produced by the defendant, PCR, Inc.
("PCR") numbered 1 through 1483; documents produced

by E.I. DuPont DeNemours and Company (“DuPont”) numbered 1 through 1773; the reports, investigation notes and other documentation collected by OSHA; and other documentation including Material Data Safety Sheets and manufacturer and/or distributors information. . .

(Paragraph 6, Affidavit of Dr. John Landrum, R. VI-999-1011)

Throughout his affidavit, Dr. Landrum continues to identify the evidence which document and indicate that the activities engaged in by Appellee were substantially certain to result in injury or death, and further states precisely which actions of Appellee met this standard. (Paragraphs 18-19, Affidavit of Dr. John Landrum, R. VI:999-1011). Specifically:

18. PCR and/or the Supervisor Chemist knew that this process was virtually certain to cause a reaction in the liquid fuel cylinder during the preparation and/or the transfer. This in and of itself evidences defendant PCR’s **deliberate intent to engage in conduct which was substantially certain to result in injury and death, which is exactly what occurred in this case.**
19. It is my opinion within a reasonable degree of scientific probability and/or certainty that PCR engaged in a course of conduct during its relationship with DuPont which **exhibited a deliberate intent to operate in a manner which was substantially certain to result in injury or death in that:**

(a) PCR, Inc. engaged in a continuous course of experiments with [TFE] which is a highly, unstable and flammable gas. The manufacturer of this gas, ICI, had PCR on notice as early as May 19, 1977, of the potential hazards inherent in the handling of TFE and had notified PCR in April of 1991 that they would soon discontinue supplying TFE throughout the United States

due to this hazard. Yet, PCR continued to use TFE in a reckless, wanton and uncontrolled manner and failed to instruct its employees of the hazardous and dangerous propensities of TFE which were document by ICI and provided to PCR prior to this incident.

(b) a review of PCR's documents indicate that there was a similar explosion on August 3, 1989 involving TFE. . .in another research and development project for DuPont. In fact, ICI which manufactures TFE and supplied PCR with this chemical had informed them of the explosive hazards of TFE warning that it can be as great as 2/3 that of TNT. Despite this warning, PCR continued upon the same course of conduct and failed to instruct its employees with the information supplied by ICI.

Emphasis added.

Dr. Landrum continues to cite to specific facts contained in the record upon which his opinions are based.

Thus the affidavits of record in this case clearly raise issues of material fact which reach or exceed the legal standards. No countervailing affidavits were filed or argued which contest the basis for the opinions of the experts, nor were any real challenges to the qualifications of these experts to speak to these issues raised in the trial court. Appellee's argument that the affidavits are conclusory will be addressed further below.

II. THE AFFIDAVITS OF APPELLANT'S EXPERTS ARE NOT CONCLUSORY AND ESTABLISH GENUINE ISSUES OF MATERIAL FACT PRECLUDING APPELLEE'S MOTION FOR SUMMARY JUDGMENT

Rule 1.510 of the Florida Rules of Civil Procedures sets forth the standard for granting of summary judgment as follows:

The judgment sought shall be rendered forthwith 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.

The instant case involves complex chemical reactions for which expert testimony will be required to document and prove the various factual issues which are present. Accordingly, Appellants have retained expert witnesses to review this matter and to render opinions as to the liability of Appellee. The affidavits proffered by the experts in response to Appellee's Motion for Summary judgment raise material issues of fact, specifically whether Appellee acted in a manner which was substantially certain to result in bodily harm or death. The affidavits set forth in detail the qualifications of the experts, the bases for their opinions, as well as their opinions. Their opinions are far from conclusory and as such must be considered when determining whether summary judgment should be granted. In this case the affidavits raise issues of material fact. Therefore the Circuit Court erred in granting summary judgment in favor of Appellee.

The affidavit of Dr. John Landrum contains his opinion as to whether Appellee's conduct was substantially certain to result in bodily harm or death. Dr. Landrum prepared a thirteen page affidavit which specifically sets forth facts to substantiate his opinion that PCR, Inc., exhibited a deliberate intent to operate in a manner which was substantially certain to result in the injury to Creighton and the death of Turner. (R. VI: 999-1011). Paragraph 19, subparts a-k set forth with great detail those actions taken by the Appellee which were substantially certain to result in bodily harm or death. Specific portions of Dr. Landrum's Affidavit detailing the factual bases for his opinions include:

Affidavit of Dr. John Landrum:

9. In its haste to meet the demands of DuPont for the production of F-pentene-2, PCR attempted to modify the process for the synthesis of F-pentene-2 to accommodate an existing reaction facility that was unsuited for the purpose. The methods used directly led to the explosion which occurred on November 22, 1991

15. The cause of the explosion on November 22, 1991, was the mixing of the chemical compounds tetrafluorethylene (TFE), hexafluoropropene (HFP) and aluminum chloride in a 100 lb liquid fuel cylinder designed for use to a maximum working pressure of 240 psi lacking any pressure relief device and having an approximate burst pressure of 1000-1200 psi.

16. The combination of these chemicals in this vessel resulted from the attempt to use crude F-pentene-2 as a solvent to slurry transfer the solid aluminum chloride into a 200 gallon reactor which was not equipped with a solid additions port as was present in the smaller

reactors (autoclaves), used at PCR in the earlier stages of this project. The absence of a solid additions port made the reactor unsuitable for use with a solid catalyst such as aluminum chloride as required for this synthesis. The improvised method of introducing the solid aluminum chloride required that it be loaded into the 100 lb liquid petroleum cylinder and that a solvent be added to the cylinder producing a suspension of aluminum chloride which could be transferred under pressure through a hose to the autoclave by inverting the cylinder. This procedure is fundamentally unsafe posing risk of rupture of the cylinder due to application of excessive nitrogen gas pressure.

17. PCR in its haste to produce for DuPont chose to slurry the aluminum chloride catalyst with the crude F-pentene-2 product which it knew contained tetrafluoroethylene (TFE) and hexafluoropropene (HFP). This placed the reagents together in a vessel unable to withstand the likely and substantially certain event of an uncontrolled reaction of the kind previously experienced at PCR on October 27, 1988; August 3, 1989 and July 20, 1990. The potential for disaster was clearly present and obvious to PCR and/or the Supervisory Chemist at PCR, who was not on site when the explosion occurred.

Affidavit of Dr. John Landrum. R. VI:999-1011

Dr. Landrum also sets forth what documents he reviewed in preparation of his opinion, as well as his qualifications for rendering same. Appellee states that the affidavit should “show affirmatively that the affiant was competent to testify that the employer knew that its conduct was substantially certain to result in injury or death, and the affidavit should set forth the facts upon which the expert bases the opinion.” (Respondent’s Answer Brief on Merits, p. 18). As indicated previously, this test as proffered by the Appellee dictates a higher standard than that required under the

two-pronged test of Fisher. Regardless, Dr. Landrum's affidavit meets each of these criteria as set forth by Fisher and arguably meets even the higher standard enunciated by the Appellee. In addition, there is more than sufficient evidence in the record which support Dr. Landrum's opinions, contrary to the findings of the trial court.

Furthermore, the affidavit of Jack Brand is clearly not conclusory. Mr. Brand details several incidents within a three month period prior to the explosion which resulted in near explosions which is evidence of Appellee's lack of control over the project. Portions of Mr. Brand's Affidavit indicative of the foundation for his opinions include:

Affidavit of Jack Brand

4. Based upon the documents that I have reviewed, including most of the exhibits in the Adam Alty deposition that I attended and my own knowledge based on over thirty one (31) years of working in chemical laboratories as an industrial chemist and supervisor, PCR, through its employees, primarily Adam Alty and his supervisor, engaged in conduct which was substantially certain to result in injury or death. The specific conduct of which I speak involved an experiment on or about November 22, 1991, in which extremely dangerous and volatile substances were combined in large quantities in a vessel which was totally incapable of containing the reaction and an explosion resulted.
7. Documentation including records I personally reviewed and the testimony of Adam Alty indicated that large quantities of these dangerous substances [TFE & HFP] were placed in a primitive propane tank, rather than in an autoclave which is designed with

pressure release valves, external cooling capability, temperature monitoring capability and other safety features to withstand a violent chemical reaction. The propane tank, which had none of these safety features, was then manually inverted, rather than remotely activated. Further, a static discharge was noted on Run #6 and there was no indication that the propane cylinder used in Run #7 was adequately grounded to prevent static charge accumulation. This experiment was so poorly designed and included such dangerous substances, equipment and procedures that it was substantially certain to result in explosion.

8. Specifically, the use of quantities of TFE and HFP used in "Run 7" with the catalyst aluminum chloride in a 100lb propane cylinder coupled with the mixing technique utilized by PCR in this reaction, made the explosion on November 22, 1991, substantially certain to occur. . .

Affidavit of Jack Brand, R. IV:686-688

Landrum and Brand each reviewed thousands of pages of relevant documents and deposition transcripts. They both have many years of expertise in the field of chemical engineering. While the trial court summarily dismissed their opinions, obviously, they were not unfounded and were formulated upon extensive review of relevant documents and the record. The trial court, however, substituted its own conclusions in rendering summary judgment and admitted at the hearing that it would not take the time to review the record: "Well, let me be frank about it. If you think its realistic that I can go back through this record and sort out that kind of detail, you're just sadly mistaken. I've got -- there isn't any time during my

working day when I can do this kind of work.” (Transcript of Hearing, April 24, 1997, p.58). Accordingly, Summary Judgment should not have been granted in this case as Fla. R. Civ. P. 1.510 quoted *supra* requires a review of the record to ascertain whether any genuine issue of material fact. The trial court, on its own admission, did not review the record and therefore summarily granted summary judgment.

It is true that Appellant’s experts have reached conclusions as every expert does when asked to review a case. Appellee argues that this case is somehow distinguishable from the precedent cases involving malpractice cited to in Appellant’s Initial Brief. The same standard should apply to all expert affidavits whether submitted to preclude summary judgment in malpractice cases or on the issue of workers’ compensation immunity.

This is a very technical and complex case. The complexity of the issues requires expert testimony on the issue of whether PCR, Inc. required Petitioners to mix highly volatile chemicals in a procedure already riddled with near catastrophic results in such a way that was substantially certain to result in injury or death. Appellant has retained expert witnesses qualified to assist the jury in understanding these complex procedures and they are prepared to fully testify to the issues of this case. Appellant’s experts have submitted affidavits setting forth their testimony in

opposition to Appellee's motion for summary judgment. A review of the available evidence, taken in a light most favorable to Appellant, precludes summary judgment in this case.

CONCLUSION

For the foregoing reasons the Opinion of the First District Court of Appeals and the Order of the trial court granting Appellee's Motion for Summary Judgment should be reversed and this cause remanded for a jury trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished via U.S. Mail to MICHAEL WHALEN, ESQ., Martin, Ade, Birchfield & Mickler, P.A., One Independent Drive, Suite 3000, Post Office Box 59, Jacksonville, Florida 32201 on this ____ day of _____, 1999.

GREEN, KAHN & PIOTRKOWSKI, PA
Attorney for Plaintiff/Appellant
317 Seventy-First Street
Miami Beach, Florida 33141
Telephone 305-865-4311

FINE, FARKASH & PARLAPIANO
Attorney for Plaintiff Creighton
622 NE First Street
Gainesville, Florida 32601
(352) 376-6046

By: _____
KAREN COHEN
Florida Bar No.: 910333

By: _____
JACK J. FINE, ESQUIRE
Florida Bar No.: 223700