ROSA ARGENTINA, WIFE OF/ AND LARRY ROBERT REINHARDT	*	**NO. 2000-C-1520**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
THE CELOTEX CORPORATION, ET AL.	*	**STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 97-764 C/W 97-765, DIVISION "F"
HONORABLE YADA MAGEE, JUDGE
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JAMES F. MC KAY, III
JUDGE
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(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge Philip C. Ciaccio, Pro Tempore)

(ON REMAND FROM THE SUPREME COURT OF LOUISIANA)

CIACCIO, J., <u>PRO TEMPORE</u>, DISSENTS WITH REASONS

THOMAS L. GAUDRY, JR.
JOHN A. LESLIE
WINDHORST, GAUDRY, RANSON, HIGGINS & GREMILLION, L.L.C.
Gretna, Louisiana 70054-1910
Attorneys for Respondents

KATRICK G. KEHOE, JR.
BIRDSALL, RODRIGUEZ, KEHOE & RILEY
New Orleans, Louisiana 70112

Attorney for Respondent/Mable Williams

FRANCIS P. ACCARDO
MONTGOMERY, BARNETT, BROWN, READ, HAMMOND & MINTZ, L.L.P.
New Orleans, Louisiana 70163-3200
Attorney of Defendants/Relators

WRIT DENIED

On January 22, 1996, an explosion occurred at the Flexcell manufacturing area of the Celotex plant in Marrero, Louisiana. At that time, plaintiffs, Larry Reinhardt and Mable Williams were employees of Celotex working in the Flexcell area. As a result of the explosion, Larry Reinhardt and Mable Williams suffered severe and debilitating burns over a percentage of their bodies.

On January 15, 1997, Rosa Argentina, wife of/and Larry Robert Reinhardt filed suit against Celotex Corporation, Philip Menk, Jr., and others asserting intentional acts on the part of their employer. On May 10, 1999, Celotex filed a motion for summary judgment suggesting there were no genuine issues of material fact and they were entitled to judgment as a matter of law. The trial court denied the defendant's motion for summary judgment on May 4, 2000. Celotex sought a supervisory writ from this Court which was denied with written reasons on September 21, 2000.

Thereupon, Celotex applied for supervisory writs to the Louisiana Supreme Court on October 23, 2000. The Supreme Court remanded the matter to our Court for briefing, argument and opinion.

Louisiana courts have held summary judgments are rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith. Roberts v. Orpheum, 630 So.2d 914 (La. App. 4 Cir. 1993). The meaning of "intent" in the context of the exception to the worker's compensation exclusive remedy is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from misconduct, whatever his desire may be as to that result. Bazley v. Tortorich, 397 So.2d 475 (La. 1981). Louisiana courts have further interpreted "substantially certain" to mean nearly inevitable, virtually sure, and incapable of failing. Ponthier v. Brown's Manufacturing, Inc., 95-1606 (La. App. 4 Cir. 4/3/96) 671 So.2d 1253, 1256.

In the instant case, the follwing allegations have been made. Celotex management knew the Flexcell unit had been shut down over the weekend in

anticipation of a freeze. Management knew that Reinhardt had arrived Monday morning and undertook the start-up procedure, as ordered by his supervisor. Management knew of a defective condition in that a five to six foot piece of copper pipe was removed from the vapor recovery system causing the vapor recovery system to remain non-operational. Management knew of the hazardous condition created by the release of vapor from the Flexcell process. Finally, it is alleged that management did not tell the plaintiff to turn off or reverse the steps he had already accomplished in the start-up procedure.

The plaintiffs must only point out to the court that Celotex knew an explosion was "substantially certain" to follow from its conduct, not that they intended to cause it. In Clark v. Division Seven, Inc., 2000 WL 1874120, 99-3079 (La. App. 4 Cir. 12/20/00), our Court affirmed a finding that when the employer's agent ordered the plaintiff to return to work on a slippery roof shortly after plaintiff had narrowly avoided injury, the circumstances indicated injury to the plaintiff was inevitable or substantially certain to occur. In the instant case, the allegations made concerning Celotex's knowledge of conditions in the plant may be enough to show that

the explosion was inevitable or substantially certain to occur.

A genuine issue of fact exists as to what happened on Sunday with the unit and why. The incident report provided by defense counsel was in direct conflict with the testimony of a witness concerning what took place on Sunday before the accident. Credibility questions are to be resolved by the trier of fact and not by summary judgment. 98-1818 (La. App. 3 Cir. 3/31/99) 733 So.2d 123. Therefore, we find no error in the trial court's refusal to grant the defendants' motion for summary judgment. Accordingly, this writ is denied.

WRIT DENIED