ROSA ARGENTINA, WIFE OF AND LARRY ROBERT REINHARDT	*	**NO. 2000-C-1520**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
THE CELOTEX CORPORATION	*	**STATE OF LOUISIANA**
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Ciaccio, J., dissents with reasons.

I respectfully dissent.

I would reverse the judgement of the trial court and grant the summary judgement dismissing plaintiffs' tort claim against Celotex, Philip Menk, Jr. and Karen Barrios.

The trial court gave no reasons for its denial of the summary judgement. Whether it was based on the subjective nature of knowledge, motive and intent is speculation and conjecture.

Plaintiff's employer and co-employees are immune from tort liability except for an intentional act. The Louisiana Supreme Court defined "intentional act" to mean "intentional tort" when it stated in Bazley v. Tortorich, 397 So.2d 475

(La.1981):

> The meaning of intent 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 that result is substantially certain to follow from his conduct, whatever his desire may be as to that result. Thus, intent has reference to the consequences of an act rather than to the act itself. Id .at p. 481.

The Supreme Court further amplified the meaning of "intent" in White v. Monsanto Co., 585 So.2d 1205 (La. 1991):

> Thus, intent has reference to the consequences of an act rather than to the act itself. Only where the actor entertained a desire to bring about the consequences that followed or **where the actor believed** that the result was substantially certain to follow has an act been characterized as intentional. Id. at p. 1208. (Emphasis added.)

This Court has held that knowledge and appreciation of a risk does not constitute intent. Gaspard v. OrleansParish Sch. Bd., 96-1754, p.4 (La. App. 4 Cir. 2/5/97), 688 So. 2d 1299, 1301; Cardwell v. New Orleans Pub. Serv., 96-0532, p.2 (La. App. 4 Cir. 11/6/96), 683 So.2d 888, 889; Jasmin v. HNV Cent. Riverfront Corp., 94-1497, p.2 (La. App. 4 Cir. 8/30/94), 642 So.2d 311, 313.

Reckless or wanton conduct, or even gross negligence by an employer, does not constitute intentional wrongdoing. Gaspard, 96-1754 at p.4, 688 So.2d at 1301; Jasmin, 94-1497 at p.2, 642 So.2d at 313; Gallon v. Vaughan Contractors, Inc., 619 So.2d 746, 748.

"Substantial certainty" has been held to mean "inevitable," "virtually sure," and " incapable of failing." Bridges v. Carl E. Woodward, Inc., 94-

2675, p.8 (La. App. 4 Cir. 10/12/95), 663 So.2d 458, 463; Jasmin, 94-1497 at p.2, 642 So.2d at 312; Gallon, 619 So.2d at 748; Faridnia v. Ecolab, Inc., 593 So.2d 936, 938.

Recently, our Court stated in Gaspard v. Orleans Parish School Board:

> The following acts do not fall within the intentional act exception of LSA-R.S. 23:1052(B): (1) allegations of failure to provide a safe place to work; (2) poorly designed machinery and failure to follow OSHA safety provisions; (3) failure to provide requested safety equipment; (4) failure to correct unsafe working conditions.

Our Court held:

> Thus, an employer's mere knowledge that a machine is dangerous and that its use creates a high probability that someone will eventually be injured is not sufficient to meet the "substantial certainty" requirement.

Plaintiffs have to prove that Celotex and its employees intended to cause an explosion in its plant. Of course, Menk and Barrios swear under oath that they never intended to do so. Given the stringent nature of the intent requirement, it is virtually impossible to establish that an employer intended to cause an explosion at one of its own plants. This very conclusion was reached in the case of Mitchell v. Exxon Corp., 907 F. Supp. 198 (M.D. La. 1995), where, applying the established Louisiana jurisprudence concerning the employer's "intent", the court analyzed allegations that an explosion at the employer's plant was an intentional act of the employer. In granting summary judgement in favor of the employer,

the court reasoned:

> This action was doomed from its inception…. Predicted upon the "intentional act" exception to employer immunity set forth in La. R.S. 23:1032(B), plaintiffs would have the court believe that the employer, Exxon, intentionally blew up its "east coker" unit at Exxon's Baton Rouge refinery, causing injuries to employees such as plaintiff… as well as to others, and causing millions of dollars in damage to Exxon's own property. The proposition is reduction ad absurdum. Id. at 198.

The court went on to state:

> It ought to be obvious to anyone that absent the most egregious of circumstances (sabotage in the face of an invading foreign army is the only example which comes to mind), no plant owner will intentionally destroy or badly damage its own plant facility. No degree of carelessness, negligence, or even gross negligence can, or ever will, amount to "an intentional act" so long as those words remain a part of the English language. Id. at 200.

Plaintiffs have made no showing of evidence that they will offer at trial to prove defendants' intent to cause an explosion and partial destruction of the Celotex plant in order to injure plaintiff, Reinhardt. Accordingly, there are no material issues of fact and, as a matter of law, summary judgement should be granted.