

6/15/01

**SUPREME COURT OF LOUISIANA**

**No. 2001-C-0886**

**ROBERT L. SMITH**

**VERSUS**

**TANNER HEAVY EQUIPMENT CO., INC.**

**CALOGERO, Chief Justice, dissents.**

The court of appeal, after reviewing the matter *de novo*, found that “[e]ach and every fact necessary to make a determination as to whether the employer knew [a cave-in] was substantially certain to follow is contested.” Smith v. Tanner Heavy Equipment Co., Inc., 00-1397, p. 2 (La.App. 3 Cir. 2/28/01) (unpublished). The court of appeal further found that the plaintiff employee could possibly establish an intentional tort as defined in Bagley v. Tortorich, 397 So. 2d 475 (La. 1981), depending on the fact-finder’s credibility determinations--determinations the court noted are inappropriate when deciding a motion for summary judgment. Id., p. 3. Believing the appellate court was correct in finding that there remain genuine issues of material fact, I agree with the court of appeal that summary judgment was not appropriate. See La. Code Civ. Proc. art. 966(B). In all events, under our Meador standards, set forth in La. Sup. Ct. Rule X, § 1, there is no reason for us to grant a writ in this case, particularly to reverse the court of appeal summarily. Accordingly, I respectfully dissent from the per curiam reversal of the opinion of the court of appeal.