SUPREME COURT OF LOUISIANA

NO. 2015-CC-0274

TRUMAN STANLEY, III

V.

AIRGAS-SOUTHWEST, INC., ET AL.

PER CURIAM

Plaintiff was injured in a work-related accident. The accident occurred when a cylinder exploded as one of plaintiff's co-workers attempted to fill it with compressed gas. It was later determined the cylinder was marked as defective, but plaintiff's co-worker did not see this marking at the time he attempted to fill the cylinder.

Subsequently, plaintiff filed the instant suit against several defendants, including his employer, Airgas-Southwest, Inc. ("Airgas"), alleging an intentional tort. Airgas filed a motion for summary judgment, arguing it was immune from liability under the workers' compensation law. The district court denied summary judgment on this ground, and the court of appeal, with one judge dissenting, denied Airgas's application for supervisory review. This application followed.

To recover in tort against his employer under La. R.S. 23:1032(B), plaintiff must prove the employer (1) consciously desired the physical result of its act, whatever the likelihood of that result happening from its conduct, or (2) knew that the result is substantially certain to follow from its conduct, whatever its desire may be as to that result. *Miller v. Sattler Supply Co., Inc*., 13-2558 (La. 1/27/14), 132 So. 3d 386; *Moreau v. Moreau's Material Yard*, 12-1096 (La. 9/21/12), 98 So. 2d 297.

In the instant case, Airgas produced undisputed testimony from plaintiff's co-worker establishing he did not intend to injure plaintiff or himself. Therefore, plaintiff must establish his injuries were substantially certain to follow as a result of his employer's actions.

In *Reeves v. Structural Preservation Systems*, 98-1795 at pp. 9-10 (La. 3/12/99), 731 So. 2d 208, 213, we discussed the "substantial certainty" requirement as follows:

> Believing that someone may, or even probably will, eventually get hurt if a workplace practice is continued does not rise to the level of an intentional act, but instead falls within the range of negligent acts that are covered by workers' compensation.
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> "'Substantially certain to follow' requires more than a reasonable probability that an injury will occur and 'certain' has been defined to mean `inevitable' or `incapable of failing.'" *Jasmin v. HNV Cent. Riverfront Corp.*, *supra* [642 So. 2d 311] at 312 [La. App. 4 Cir. 1994]. "[A]n 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." *Armstead v. Schwegmann Giant Super Markets, Inc.*, 618 So. 2d 1140, 1142 (La. App. 4 Cir. 1993), *writ denied*, 629 So. 2d 347 (La. 1993). "Further, mere knowledge and appreciation of a risk does not constitute intent, nor does reckless or wanton conduct by an employer constitute intentional wrongdoing." *Id.* (citing *Tapia v. Schwegmann Giant Supermarkets, Inc.*, 590 So. 2d 806, 807-808 (La. App. 4 Cir. 1991)).

In the instant case, plaintiff relies on evidence indicating that a cylinder with a wall leak is certain to catastrophically fail if an attempt is made to fill it with compressed gas. However, these facts do not establish plaintiff's injury was substantially certain to occur. Although Airgas may have been negligent or even grossly negligent in allowing the defective cylinder to be refilled, it was not inevitable that plaintiff would be injured as a result. To the contrary, the

testimony of plaintiff's co-worker establishes that if he had seen the marking on the cylinder, he would not have attempted to fill it.

Accordingly, the writ is granted. The judgment of the district court is reversed, and summary judgment is granted in favor of Airgas, dismissing plaintiff's intentional tort claim with prejudice.