SUPREME COURT OF LOUISIANA

No. 97-CC-2005

Earl J. Adams, Jr. et al.

versus

J.E. Merit Construction, Inc., et al.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FOURTH CIRCUIT
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CALOGERO, C.J. concurring in part, dissenting in part.

The ***Billiot*** case, which held that the exclusivity provision in LSA-RS 23:1032(A) did not include an employee's claim against his employer for punitive damages, was decided by this Court in a 5-2 decision in 1994. The following year, the Legislature, almost certainly in response to this Court's decision in ***Billiot***, amended the statute to provide that an employee's claim for punitive damages does fall within the exclusivity provision of the Worker's Compensation Act, thereby settling the issue for all future cases. Under these circumstances, it was my view that the issue should not be revisited, as the ***Billiot*** decision would affect only the finite number of cases that were pending prior to the 1995 amendment of LSA-RS 23:1032(A). This was also the view of the majority on three successive panels, wherein this Court denied writs on the same issue, until this writ was granted by a another panel. However, that being said, the case is now before this Court after briefs and oral arguments, and the merits must be decided.

The central premise behind the ***Billiot*** holding (that the exclusivity provision in LSA-RS 23:1032(A) did not include an employee's claim against his employer for punitive damages) was as follows: Prior to the 1914 enactment of the first

Worker's Compensation Act, the recovery of punitive damages was not "authorized" in Louisiana. Therefore, the Legislature could not have intended to bar an employee's recovery of punitive damages against an employer when it (the Legislature) declared "the rights and remedies [contained in the Worker's Compensation Act] granted to an employee on account of a personal injury for which he is entitled to compensation under this act [to be] exclusive of all other rights and remedies of such employee . . . ." Act 20 of 1914, § 34.

Although the ***Billiot*** court was probably correct in its conclusion that the recovery of punitive damages was not "authorized" in Louisiana prior to 1914, there did exist, prior to that time, a handful of cases that did discuss and, in some instances, purport to award "smart money," "vindictive damages," or "punitory damages" above and beyond the actual amount of damages sustained. However, as was recognized in ***Vincent v. Morgan's Louisiana & T.R. & S.S. Co.***, 140 La. 1027, 74 So. 541 (1917), which was cited and relied upon by the ***Billiot*** court, many of the discussions of punitive damages in these earlier cases

> arose in dicta or out of a mistaken belief among members of the bench and bar that moral damages, damages repairing injuries to the mind or feelings, and damages insusceptible of assessment by direct testimony [were] punitive damages, when in reality they are compensatory damages, arising from the mandate of full reparation under Article 2315 and the grant of broad discretion to the jury in assessing damages under Article 1934.

Billiot v. B.P. Oil, 93-1118 (La. 9/29/94), 645 So. 2d 604, 609 (summarizing the findings in ***Vincent v. Morgan's Louisiana & T.R. & S.S. Co.***, 140 La. 1027, 74 So. 541 (1917)). Thus, it is probably more accurate to state that prior to this Court's conclusive pronouncement in 1917 in the ***Vincent*** case that punitive damages were not recoverable under Louisiana law, there existed a state of confusion in the jurisprudence as to what punitive damages were, whether they

could be recovered, and, if so, under what circumstances.

It was against this jurisprudential backdrop that the Legislature in 1914 declared the Worker's Compensation Act to be the sole source of recovery by an employee against an employer, "exclusive of ***all other rights and remedies*** of such employee." Act 20 of 1914, § 34 (emphasis added). Given the confusion in the jurisprudence prior to 1917 as to the availability of punitive damages, this Court cannot now conclude--and should not have concluded in ***Billiot***--that the Legislature was oblivious to the existence and possibility of recovery of punitive damages when it enacted the first Worker's Compensation Act in 1914 and declared the Act to be "exclusive of all other rights and remedies." These reasons prompt me to conclude that the majority in ***Billiot*** erred in concluding that the exclusivity provision in LSA-RS 23:1032(A) did not include an employee's claim against his employer for punitive damages. I, therefore, concur in this facet of the case before us.

I also concur to point out more explicitly than does the majority that the plaintiffs, on remand, still have the opportunity to establish that the requested financial information remains relevant to their surviving claims. Plaintiffs have referred to claims sounding in intentional tort in brief and have cited, "chapter and verse," allegations of intentional tortious conduct on the part of defendants in their pleadings. In oral arguments, plaintiffs also raised the possibility of so-called "cross-claims" where some plaintiffs who are employees of one defendant could seek damages from the other two defendants. The plaintiffs in the instant suit are a group comprised of employees of one or more of the defendants, J.E. Merit, Basic Industries, Inc., and BP Exploration & Oil, Inc. Plaintiffs, who have sued all three defendants jointly, aver that, if the statutory employer defense is unavailable to one or two defendants of the three, the worker's compensation bar to a tort claim would

not apply to suits by plaintiffs who are employees of one employer-defendant against the other two defendants. Thus, upon remand, the district court should review the Motion for Protective Order in light of these remaining tort claims.

On the other hand, I dissent from the part of the majority opinion that grants defendants' motion for partial summary judgment, thereby precluding plaintiffs' punitive damages claims for all purposes under Civil Code article 2315.3. While I concede that plaintiffs are not entitled to recover such damages for claims based in negligence against their employer, I note that plaintiffs have, in brief and in their pleadings, made allegations of intentional tortious conduct on the part of the defendants. Because LSA-RS 23:1032(B) expressly states that the exclusivity provision found in LSA-RS 23:1032(A) does not apply to claims resulting from an intentional act, if plaintiffs can prove at trial that their employer has committed an intentional tort against them, then plaintiffs would be entitled to compensatory damages under Civil Code article 2315. Further, because plaintiffs' claims arose prior to the repeal of Civil Code article 2315.3, plaintiffs may well be entitled to recover punitive damages under 2315.3 for a claim based in intentional tort, provided that plaintiffs can prove the elements thereof.

Before its repeal, Civil Code article 2315.3 read as follows:

> In addition to general and special damages, exemplary damages may be awarded if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances shall not include electricity.

Certainly, an employer who has intentionally subjected his employees to the handling of hazardous or toxic substances without regard for their safety, as plaintiffs allege, has acted in a "wanton or reckless" manner. Thus, if plaintiffs can prove their allegations of intentional tort, in my view they would be entitled to

punitive damages.

Moreover, even if plaintiffs were not able to prove an intentional tort, plaintiffs have, as noted above, raised the possibility of "cross-claims" where plaintiffs who are employees of one defendant could seek damages from the other two defendants, assuming the unavailability of the statutory employer defense to the latter defendants. If these claims were proven and if plaintiffs could further prove that these defendants acted with "wanton or reckless disregard for public safety," then, again, plaintiffs would be entitled to recover punitive damages under article 2315.3. Thus, in my view, it is error for the majority to foreclose any possibility of plaintiffs' recovering punitive damages under article 2315.3 at this early stage of the proceedings by granting the motion for partial summary judgment on this issue.[1]

For the reasons given above, I respectfully concur in part and dissent in part.

[1]I am aware of footnote 5 in the majority opinion, the inclusion of which was prompted by my partial dissent. However, it may well be that the footnote alone is insufficient to preserve plaintiffs' claims for punitive damages where the worker's compensation bar would not apply, as defendants' motion for partial summary judgment sought a broad determination that plaintiffs were not entitled to damages under Civil Code article 2315.3.