

SUPREME COURT OF LOUISIANA

No. 98-C-0454

LINDA KELLY

Versus

SHIELD PACK, INC. AND CNA INSURANCE COMPANY

LEMMON, J., Concurring

The majority fails to decide the issue that we granted certiorari to decide -- whether an employee can ever, under any circumstances, state a cause of action in tort against his or her employer whose intentional and arbitrary denial of medical benefits causes the employee's disabling condition to undergo foreseeable disastrous worsening to a level something less than death. The majority opinion merely repeats the decision of the court of appeal that this plaintiff did not state a cause of action in her original petition. For largely unstated reasons, the majority then reverses the judgment of the court of appeal on the sole point of difference -- whether plaintiff should have been allowed the opportunity to amend her petition.

The history of this case in the lower courts is interesting. The trial court maintained defendants' exception of no cause of action and dismissed the action. The court of appeal agreed that plaintiff's petition did not state a cause of action under the facts alleged therein and affirmed the trial court's maintaining the exception. However, the court of appeal remanded the case to the trial court under La. Code Civ. Proc. art. 934, allowing plaintiff fifteen days to amend her petition, if possible, to state a cause of action in accordance with the criteria outlined in the opinion. In effect, the court of appeal ruled that an employee possibly may, under some circumstances, have a cause of action in tort against the employer based on the employer's arbitrary refusal to

provide medical benefits, but not under the circumstances alleged in plaintiff's original petition.

Defendants did not allow the orderly process contemplated by Article 934 of observing the delay for amendment and then renewing their exception to the amended petition or moving to dismiss for failure to comply timely with the order to amend. Rather, defendants applied for certiorari to this court, in effect complaining that they wanted an immediate ruling by this court on any amended petition that may be filed in the future.¹

The majority opinion clearly does not grant the relief sought by defendants in their application for certiorari, which is a declaration by this court that under no circumstances can an employee in a non-death case ever have a cause of action in tort based on the employer's failure to provide medical benefits for a work-related injury. In effect, the majority (and I) await another case in which the issue is squarely presented.²

Finally, I expressly decline to join in the speculative discussion of how the facts in Weber "would" have been different under the post-Weber amendments. I see no purpose for the discussion in the absence of a decision on the issue which prompted our grant of certiorari, and I emphatically disagree with the "conclusion" that if the new Office of Workers' Compensation procedures had been in effect, "the State would have been ordered to pay the cost of [Weber's] transplant."

¹Of course, defendants had every right to apply for certiorari, and this court has the power to exercise its supervisory jurisdiction and to grant certiorari on any ruling at any stage of the proceeding. La. Const. art. V, §5(A). However, I now question the wisdom of this court's exercising that power at this stage of the proceeding.

²The issue was squarely presented in Stevens v. Wal-Mart Stores, Inc., 29,124 (La. App. 2d Cir. 1/24/97); 688 So. 2d 668, cert. denied, 97-0671 (La. 5/9/97); 693 So. 2d 768, but that case was in a pre-trial posture. I would prefer to wait for a case which has been tried on the merits rather than on an exception of no cause of action.

