No. 1151244

IN THE SUPREME COURT OF ALABAMA

EX PARTE AUSTAL USA, LLC,

PETITIONER.

(IN RE: MICHAEL KESHOCK, ET AL.,

PLAINTIFFS,

V.

METABOWERKE GMBH, ET AL.,

DEFENDANTS.)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE ALABAMA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AUSTAL USA, LLC

From the Mobile County Circuit Court
(CV-15-901370)

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Amicus curiae Alabama Defense Lawyers Association respectfully moves for leave to file the attached brief in support of the Petitioner.

INTEREST OF AMICUS CURIAE

Amicus curiae Alabama Defense Lawyers Association ("ADLA") is an Alabama not-for-profit organization composed of over 1,100 lawyers involved in the defense of civil litigation. ADLA supports the work of improving the adversary system of jurisprudence in Alabama courts, reducing court congestion and unnecessary delays, and promoting improvements in the administration of justice. ADLA occasionally addresses governmental matters that directly affect the overall functioning of Alabama's legal system.

ADLA strongly believes that the decision by the Mobile County Circuit Court in this matter is contrary to Alabama and federal law, and that this erroneous decision would drastically undermine the structure and effectiveness of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Specifically, ADLA is concerned that the circuit court's rationale for denying the motion to dismiss renders illusory the important employer immunity at the heart of the LHWCA, as

it allows plaintiffs to avoid dismissal merely by reciting a conclusory allegation, regardless of the nature of the case or the facts alleged in the complaint. Adoption of such a rationale by this Court would unnecessarily inflict significant litigation costs upon employers covered by the LHWCA in cases intended to be covered by the LHWCA's immunity.

Accordingly, ADLA respectfully requests that this Court grant leave to appear as amicus curiae and file the attached brief. ADLA realizes that this brief is submitted out of time following this Court's decision to hear this matter by way of mandamus (wherein the petition serves as the opening brief) rather than by permissive appeal pursuant to Rule 5, Ala. R. App. P. (wherein the petitioner would have time to file a separate opening brief if the petition is granted). Given the importance and potentially wide-ranging impact of the issues before this Court, ADLA respectfully requests that this Court accept this brief and consider ADLA's perspective.

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BRIEF OF AMICUS CURIAE

Argument

I. The Circuit Court's Ruling is Inconsistent with Decisions Construing the LHWCA's Employer Immunity.

Amicus curiae ADLA urges this Court to reverse the circuit court's denial of Petitioner Austal, USA's motion to dismiss. Because it permits a complaint to survive a motion to dismiss due only to a conclusory allegation of "specific intent to injure" – when the nature of the case is for injuries due to a workplace accident under the Longshore and Harbor Workers' Compensation Act ("LHWCA") - the ruling threatens to directly undermine the broad employer immunity so central to the structure and balance of the LHWCA. See 33 U.S.C. § 905(a) (precluding tort actions against employers by employees injured in workplace accidents). Indeed, the circuit court's rationale is, not surprisingly, inconsistent with how courts have understood and applied this immunity.

Not long ago, this Court noted that "[s]ome courts have recognized an exception to the exclusivity provision of the LHWCA where the employer has committed an intentional tort." Rodriguez-Flores v. U.S. Coatings, Inc., 133 So. 3d 874, 881 (Ala. 2013). Even those cases referred to in Rodriguez-Florez, however, do not suggest that a mere conclusory

allegation of "specific intent to injure" entitles a plaintiff to survive a motion to dismiss and move into the discovery phase. In fact, those courts that issued holdings on the issue required that the complaint include substantiating factual allegations.

In Rustin v. D.C., 491 A.2d 496, 502 (D.C. 1985), the District of Columbia Court of Appeals affirmed dismissal of a complaint that offered only "conclusory allegations and innuendo" to prove that the employer "specifically intended to kill" the deceased employee. In Houston v. Bechtel Associates Prof'l Corp., D.C., 522 F. Supp. 1094, 1096-97 (D.D.C. 1981), the federal district court held that a complaint failed to allege intentional injury when the only factual allegations were that the employer willfully exposed the plaintiff to unsafe working conditions. Similarly, the federal district court in Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 316 (D. Me. 1981) dismissed a complaint for failing to sufficiently allege specific intent to injure when it asserted only that the employer failed to warn employees of dangers from asbestos exposure and to protect the employees from exposure. Finally, in Roy v. Bethlehem Steel Corp., 838 F. Supp. 312, 316 (E.D. Tex. 1993),

at the summary judgment stage, the federal district court held that testimony of intentional failure to follow safety regulations could not prove the intentional injury exception.[1]

These courts' approach to immunity under the LHWCA echoes jurisprudence on other federal immunities. Over thirty years ago, in a qualified immunity case, the Supreme Court stated that a defendant "is entitled to dismissal before the commencement of discovery" if the complaint failed to "adequately alleg[e] the commission of acts" that established an exception to immunity. Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985) (emphasis added). For a few federal immunities, courts have held that limited, "jurisdictional discovery" is necessary to determine whether there is a factual basis for an exception to immunity. However, even in these cases, the plaintiff must make factual allegations that, if true, would show an exception to immunity. For instance, in Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992), the plaintiff

[1] ADLA notes that these decisions pre-date the Supreme Court's rulings in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), and therefore are not based on the federal pleading standard requirements articulated in those cases.

sought discovery after alleging the "commercial activities" exception to a foreign agency's immunity under the Foreign Sovereign Immunities Act. The Fifth Circuit held that discovery could be warranted "only to verify allegations of specific facts crucial to an immunity determination" and held that the plaintiff was not entitled to discovery because it had failed to allege specific facts. Id. at 534, 537 (emphasis added). See also Nyambal v. Int'l Monetary Fund, 772 F.3d 277, 281 (D.C. Cir. 2014) (holding that "bare assertion . . . without offering any specific, non-conclusory factual allegations" did not support waiver exception to defendant's immunity under the International Organizations Immunity Act), cert. denied, 135 S. Ct. 2857 (2015).

Therefore, decisions concerning the LHWCA and other federal immunities do not support the circuit court's denial of a motion to dismiss based solely on a conclusory allegation of the "specific intent to injure" exception. Instead, they reflect a general recognition that a complaint allege facts substantiating that conclusion in order to survive a dismissal on immunity grounds – a recognition necessary to maintain the immunity in any real and meaningful sense.

II. Adoption of the Circuit Court's Rationale Would Render LHWCA Employer Immunity Illusory.

As the United States Supreme Court has recognized, true immunity protects defendants "not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). Indeed, "true immunity . . . not only insulates the party from liability, but also prevents the party from being exposed to discovery and/or trial" and that "immunity from suit entails a right to be free from the burdens of litigation." McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1339 (11th Cir. 2007) (emphasis added). More recently, the Eleventh Circuit went so far as to say that an order that "required appellants to answer the complaint and called for discovery . . . denied them immunity from suit." Butler v. Sukhoi Co., 579 F.3d 1307, 1311 (11th Cir. 2009) (deciding a claim of immunity under the Foreign Sovereign Immunities Act).

Underlying these decisions is the recognition that the practical significance of a purported immunity from suit substantially declines the further the litigation is allowed to proceed. As this Court is undoubtedly aware, the cost of litigation rises dramatically once a case enters the

discovery and summary judgment stages.[2] If a motion to dismiss premised on LHWCA immunity will fail merely because a complaint includes the phrase "specific intent to injure," employers will always be faced with the prospect of high discovery costs every time an injured employee files a tort suit. Employers could settle, of course, but that would not resolve the problem — under the circuit court's legal rule, the asking price of a settlement would be substantially higher due to the expense of the alternative (discovery and summary judgment briefing). And such "settlement" of workplace accident cases would upset the statutory trade-off underlying the immunity.

If the circuit court's rationale were to be adopted, any injured employee would be incentivized to file a complaint formulaically alleging "specific intent to injure" to overcome LHWCA immunity and extract a settlement, in addition to filing for compensation under the LHWCA. Plaintiffs would

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[2] According to a 2010 systematic review of litigation costs by researchers from the Federal Judicial Center, empirical studies have found that discovery accounts for between 20 to 50 percent of a typical federal civil case. Emery G. Lee III & Thomas E. Willging, Defining the Problem Of Cost in Federal Civil Litigation, 60 DUKE L.J. 765, 781 (2010).

have a magic phrase to guarantee a substantial settlement, regardless of the facts of the case, based solely on the threat of costly discovery for the employer. Applied this way, the "specific intent to injure" exception swallows the LHWCA's exclusive remedy provision and its purpose. In turn, this would lead to a drastic increase in litigation filings, as dockets would be further crowded by cases that the LHWCA's immunity was intended to keep off of those dockets.

III. This Court Should Require Allegations of Facts that Would Substantiate the "Specific Intent to Injure" Exception to Immunity.

If this Court does recognize an intentional tort exception to the LHWCA's bar on suit, it should also clarify that a complaint must include some factual allegations that support the exception. Such a rule would comport with this Court's general understanding that when a plaintiff asserts a specific exception to an applicable immunity, the complaint must allege facts supporting the exception; a conclusory allegation of the exception is not enough to withstand a motion to dismiss.

Most notably, this Court's holdings on Alabama's Worker's Compensation Act ("WCA")[3] have required complaints to be dismissed if the factual allegations fail to support an exception to the employer's immunity. See, e.g., Ex parte Lincare Inc., [Ms. 1141373, Aug. 19, 2016] __ So. 3d __, 2016 WL 4417275, at *4 (Ala.) (ordering trial court to dismiss tort claims by employee against employer because "[i]t is clear from Martin's complaint that the incident in which she was injured arose out of her employment . . ." and "the injuries Martin alleges she sustained were not expected or intended by [employer] . . .").

Particularly relevant to this case is a line of cases on the "willful conduct" exception to the WCA. This exception, spelled out in the WCA at Ala. Code 1975, § 25-5-11, allows a plaintiff to bring suit against a co-employee or agent of the employer if the defendant caused injury or death to the plaintiff via "willful conduct." However, this Court repeatedly has refused to allow a mere conclusory recitation

[3] This Court has noted the similarities between the LHWCA and WCA, stating, "employers enjoy immunity from tort claims under the LHWCA as they do under the [Alabama WCA]." Rodriguez-Flores v. U.S. Coatings, Inc., 133 So. 3d 874, 881 (Ala. 2003).

of "willful conduct" unaccompanied by allegations of substantiating facts to carry a complaint past the motion to dismiss stage. In Blackwood v. Davis, 613 So. 2d 886, 887 (Ala. 1993), this Court affirmed dismissal of a complaint because the mere allegation of "willful and/or intentional failure to have adequate lighting" did not state a claim "that any of the co-employees set out purposely, intentionally, or by design to injure [plaintiff]"). Similarly, in Sanford v. Brasher, 549 So. 2d 29, 30, 33 (Ala. 1989), this Court held that even though a complaint charged defendant co-employees with "willful conduct," it did not "mee[t] the burden that the statute places on the plaintiff" to show intent to injure. See also Thermal Components, Inc. v. Golden, 716 So. 2d 1166, 1169 (Ala. 1998) (upholding dismissal of the complaint because "even when the factual allegations of the complaint are read most favorably to [the plaintiff]," they did not illustrate an example of the "willful conduct" exception). The Court should apply the same approach in this line of WCA cases to allegations of "intent to injure" in LHWCA cases.

Furthermore, this Court has ruled similarly in motions to dismiss on the basis of state-agent immunity. Although these cases note that an assertion of qualified immunity

generally raises factual issues that cannot be decided on a motion to dismiss, the Court has held that complaints should be dismissed if they lack any specific factual allegations to establish an exception to the immunity. In Ex parte Alabama Dep't of Forensic Scis., 709 So. 2d 455, 458 (Ala. 1997), this Court ruled that the defendant's acts as alleged in the complaint were clearly discretionary, rather than ministerial, and so ordered that the complaint be dismissed on qualified immunity grounds. Likewise, this Court has ordered dismissal based on both state-agent and state immunity grounds where the complained-of conduct clearly fell outside of the exceptions to the state-agent immunity defense. Ex parte Troy Univ., 961 So. 2d 105, 111 (Ala. 2006) ("Because Martindale is alleged only to have ratified a memorandum agreement . . . she is immune from civil liability to the Institute. The amended complaint makes no specific allegation that Martindale acted . . . in any [ ] way that would remove her from immunity under Cranman.").

Thus, this Court would be acting consistently with its precedent on other immunities if it decides to hold that a complaint must allege facts that would, if true, establish "specific intent to injure."

IV. Requiring More Than Conclusory Factual Allegations to Avoid a Broad, Statutory Immunity Is Not Only Reasonable But Is Necessary in the Nature of the Case.

Finally, ADLA notes that requiring a plaintiff alleging "specific intent to injure" to include supporting factual allegations is hardly an onerous burden. It is certainly an extraordinary occurrence for an employer to intentionally set out to injure his or her own employee (presumably out of some personal animus).[4] If there are facts suggesting that this took place, including some recitation of those facts in the complaint should be exceedingly simple, and would serve only to strengthen the plaintiff's case. Therefore, requiring some threshold allegation of facts would not burden plaintiffs who

[4] Indeed, there is a categorical difference – and not just a difference in degree - between a workplace accident and a situation where an employer intentionally injures a specific employee. Accordingly, an "exception" for the latter situation is in a sense not actually an "exception" at all, but a simple recognition that an employer intentionally injuring someone who happens to be his employee is not truly a "workplace accident," as it does not genuinely stem from the employer-employee relationship (but is instead just a personal assault of some kind). But such a situation is so extraordinary and "other than" that a plaintiff who has a good faith belief that such facts exist should have no difficulty whatsoever including some basic facts concerning the alleged "specific intent to injure."

genuinely have a plausible, good faith basis to allege "specific intent to injure."

It is axiomatic that a plaintiff should have a good faith basis for the allegations the plaintiff makes in a complaint. Indeed, under Rule 11 of the Alabama Rules of Civil Procedure, an attorney's signature on a complaint necessarily certifies "that to the best of the attorney's knowledge, information, and belief there is good ground to support [the complaint]." If every complaint carries an implied promise that the allegations therein are well-grounded, it follows that no attorney or plaintiff should allege specific intent to injure without believing there are facts supporting that conclusion. Therefore, requiring at least some summary of those known or believed facts to be alleged in the complaint does nothing more than ask a plaintiff or attorney to allege what he already presumably believes.

The Supreme Court of Mississippi has helpfully explained that representation should not be taken "absent a contemporaneous commitment to conduct sufficient investigation to form a good faith belief that each plaintiff has a viable cause of action against a particular defendant. Where that is done, providing notice in the complaint of each

plaintiff's claim against a particular defendant should not prove difficult." Illinois Cent. R.R. Co. v. Adams, 922 So.2d 787, 791 (Miss. 2006) (emphasis added). Similarly, in Alabama the allegations in the complaint should be based on more than "speculation or conjecture." Parrott v. Home Quarters Warehouse, Inc., 699 So. 2d 228, 230 (Ala. Civ. App. 1997) (citing Smoyer v. Birmingham Area Chamber of Commerce, 517 So. 2d 585, 588 (Ala. 1987)). In light of what is already required for a plaintiff bringing a complaint – an honest belief in the allegations therein and good grounds for believing so – requiring the complaint to allege facts that support a claim of specific intent to injure adds little additional burden to a plaintiff. Therefore, this Court should not hesitate to clarify that an allegation of specific intent to injure be accompanied by supporting factual allegations.

Finally, it is no answer to assert that "plaintiffs are not generally required to include detail in all their factual allegations." The issue presented here does not require the adoption of some broad, sweeping doctrine applicable to all cases; rather, this case concerns the narrow situation of what is required when a plaintiff is seeking to avoid a broad

statutory immunity. In such a circumstance, more than a bare, conclusory allegation is required in the nature of the case, lest the immunity be rendered illusory.

CONCLUSION

Based on the above, amicus curiae ADLA requests that this Court grant the Petition for a Writ of Mandamus and direct the circuit court to enter an order dismissing the underlying action.

Respectfully submitted,

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CERTICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this 9th day of December, 2016, to the following by U.S. Mail or electronic mail to their regular mailing addresses, on the following:

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