SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-01454

FRANKLIN CORPORATION — APPELLANT

Versus

PAULINE TEDFORD, JUDY HAIRE,
LORA SMITH, and SAMANTHA MIXON — APPELLEES

On Appeal from the Circuit Court of Calhoun County, Mississippi

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BRIEF OF AMICUS CURIAE
MISSISSIPPI ASSOCIATION OF SELF-INSURERS

NO ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

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9. Roger C. Riddick, Esq.
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10. Honorable Andrew K. Howorth
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11. Liberty Mutual Insurance Company
Workers Compensation/Liability Insurance Carrier for Franklin Corporation

Respectfully submitted this the 13th day of March, 2008.

ROGER C. RIDDICK

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BRIEF OF AMICUS CURIAE
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I.
INTRODUCTION

The Mississippi Association of Self-Insurers ("MASI") seeks leave from this Court to appear in this matter as Amicus Curiae. After careful consideration of the trial proceedings and rulings of the Calhoun County Circuit Court, MASI respectfully requests that this Court reverse and render the final judgment against Franklin Corporation ("Franklin") in this matter. MASI asserts that the exclusive remedy provision of the Mississippi Workers' Compensation Act ("MWCA" or "the Act"), Miss. Code Ann. § 71-3-9, bars Pauline Tedford, Judy Haire, Lora Smith, and Samantha Mixon's ("the Franklin employees" or "the employees") common law intentional tort claims against Franklin in this case. The Honorable Judge Andrew K. Howorth erred in denying summary judgment and in holding that the intentional tort exception to the exclusivity provision applied to allow the Franklin employees' claims to proceed to trial. Further, the Circuit Court improperly instructed the jury as to the definition of an "intentional act" as it relates to the intentional tort exception to the exclusivity provision of the MWCA. It is the position of Amicus Curiae, MASI, that the Franklin employees' injuries are compensable injuries "arising out of and in the course of employment" and therefore, the employees' only

remedy for compensation is pursuant to the MWCA. The Mississippi courts do not allow the exclusive remedy provision of the MWCA to be circumvented except in the very narrow situation of an intentional tort. The Franklin employees' injuries in this case are not the type of injuries to which the intentional tort exception applies, and are not the result of any "actual intent to injure" on the part of Franklin. Therefore, the employees' claims do not fall within the narrow intentional tort exception to the exclusive remedy of workers' compensation. The Franklin employees should not have been allowed to pursue a common law tort action against Franklin. Accordingly, the judgment entered against Defendant, Franklin, should be reversed.

II.
FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On August 17, 2004, the Franklin employees filed their First Amended Complaint alleging that Franklin Corporation intentionally exposed them to a toxic chemical (propyl bromide) contained in glue which was used in the manufacturing process of Franklin's furniture products. [R. at 30b-11 to 30b-12.] The employees' Complaint asserts that they sustained injuries during the course and scope of employment arising from toxic chemical exposure on the product assembly line at Franklin, and that the injuries were solely the result of intentional torts committed by Franklin. [R. at 30b-5 - 30b-12.] The Franklin employees based their claims on Franklin's intentional torts including misrepresentation, battery, intentional infliction of emotional distress, fraud and intentional misrepresentation, and civil conspiracy. [R. at 30b-24 to 30b-33.]

During pretrial motion hearings, Judge Howorth rejected Franklin's position that the exclusive remedy provision of the Workers' Compensation Act barred the employees' claims in this matter, and held that the employees' claims fell within the intentional tort exception to the

exclusive remedy provision. [R. at 4131.] Judge Howorth in his ruling held that "plaintiffs have alleged sufficient facts and causes of action which satisfy the intentional tort exception to the application of the Mississippi Workers' Compensation Act". [R. at 236.] The Judge further ruled that there were genuine issues of material fact as to whether there was an actual intent to injure on the part of Franklin, which was for a jury to determine, thereby allowing the employees' claims to go to trial. [Trial Transcr. 83:8-83:10; 83:24-83:27.]

On May 25, 2007, this case was tried to a jury in the Circuit Court of Calhoun County, Mississippi. [Tr. Transcr.] At trial, Judge Howorth approved a jury instruction which improperly instructed the jury as to the definition of an "intentional act" as it relates to the intentional tort exception to the exclusivity provision. [Tr. Transcr. at 2109:9-21.] The jury returned a verdict in favor of the Franklin employees, and final judgment was entered against Franklin by the trial court on May 31, 2007.

On June 12, 2007, Defendant Franklin filed a Motion for J.N.O.V. or in the Alternative for New Trial or Remittitur, asserting points of error on the part of the trial court. [R. at 4311.] Among other causes, Franklin claimed the trial court erred in allowing the employees' claims to stand based on the fact that the claims were barred as a matter of law by the exclusive remedy provisions of the MWCA. Miss. Code Ann. § 71-3-9. [R. at 4313-4314.] Franklin additionally asserted that the trial court erred in submitting Plaintiffs' jury instruction as to the definition of an "intentional act" as it relates to the exclusive remedy provision. [R. at 4317.]

Franklin's Motion for JNOV was denied, and Franklin subsequently appealed the judgment which resulted in the present appeal before this Court.

III.
ARGUMENT AND AUTHORITIES

The ultimate issue disputed in the case sub judice is whether the Franklin employees' injuries were accidental injuries arising out of the course and scope of employment, and therefore compensable under the MWCA; or, whether the injuries resulted from an intentional tort on the part of the employer thus falling outside the exclusivity provisions of the Act. As Amicus Curiae in this appeal, MASI asserts that the judgment entered against Franklin in this case was the result of the trial court's erroneous holding that the intentional tort exception applied, and the improper jury instruction as to the definition of an "intentional act" as it relates to the intentional tort exception to the MWCA exclusivity provision. Therefore, the judgment entered against Franklin should be reversed and rendered.

I. The Franklin employees' claims are subject to the exclusive remedy provision of the Mississippi Workers' Compensation Act.

For employees subject to the Mississippi Workers' Compensation Act, workers' compensation is the exclusive remedy available for an injury which arises in the course and scope of employment. **"The liability of an employer to pay compensation shall be exclusive and in place of all other liability** of such employer to the employee . . ." Miss. Code Ann. § 71-3-9 (Westlaw, current through End of the 2007 Regular Session and 1st Ex. Session). The MWCA provides that **"[c]ompensation shall be payable for** disability or death of an employee from **injury** or occupational disease **arising out of and in the course of employment . . ."** and defines "injury" as it relates to the MWCA as follows: "**'Injury' means accidental injury** or accidental death **arising out of and in the course of employment . . .**" Miss. Code Ann. §§ 71-3-7, 71-3-3 (Westlaw, current through End of the 2007 Regular Session and 1st Ex. Session). Mississippi case law has further clarified that accidental injury includes an injury which occurs due to negligence, gross negligence, or a willful or reckless act. *See Bevis v. Linkous*

Construction Company, Inc., 856 So.2d 535, 543 (Miss. App. 2003); *Peaster v. David New Drilling Co.*, 642 So.2d 344 (Miss. 1994); *Blailock v. O'Bannon*, 795 So.2d 533, 535 (Miss. 2001).

Plaintiffs in this case admit that at all times relevant to the facts and claims alleged in the Complaint, they were employees of Franklin Corporation and that their injuries were sustained while they were acting in the course and scope of employment with Franklin. [R. at 30b-5 to 30b-16] Therefore, the Franklin employees are subject to the mandates of the MWCA, and the only available remedy for their injuries is pursuant to the MWCA. The employees are not allowed to circumvent the Act thus maintaining a common law tort action against Franklin.

Further, the Franklin employees have already received workers compensation benefits for the same injuries which they now claim were solely the result of Franklin's intentional acts (which would not have been a compensable injury under the Act). [R. at 968.] The employees, having pursued and accepted benefits for their injuries as compensable under the MWCA, can not now assert that those same injuries are not the kind of injuries which are compensable under the Act. *See In re Estate of Richardson*, 903 So.2d 51 (Miss. 2005) (judicial estoppel precludes a party from asserting a position in one litigation, benefitting from that position, and then taking a different position to benefit in a subsequent litigation). The Franklin employees' claims are clearly governed by the provisions of the MWCA, and they are limited to receiving compensation pursuant to the Act.

II. Mississippi courts have consistently declined to allow the exclusive remedy provision of the Act to be circumvented, except in the very narrow situation of an intentional tort.

The exclusivity of the workers' compensation remedy is central to the purpose of the Act. The clear intent of the Mississippi Legislature in enacting the MWCA was to ensure that

employees who are injured as a result of their employment will receive compensation for their injury, in exchange for statutory immunity for employers from common law claims by their employees. [Dunn, Mississippi Workers' Compensation § 2 (3rd Edition Supp. 1986); *Sawyer v. Head*, 510 So.2d 472, 476 (Miss. 1987)] The purpose of the MWCA as stated in Dunn on Mississippi Workers' Compensation is set forth as follows:

> This type of legislation [workers compensation] is generally viewed as a compromise. ***Because of the exclusive nature of the remedy labor surrenders the right to assert a common law tort action*** along with the attendant possibility of achieving punitive damages. In exchange it receives assurance that an award is forthcoming.

Dunn, Mississippi Workers' Compensation § 2 (3rd Edition Supp. 1986) (emphasis added). According to Dunn, "the exclusive nature of the remedy" under the Act is the quid pro quo for the certainty that an employee will receive compensation when he is injured. *Id.* Additionally, the Mississippi Supreme Court has stated that the exclusive liability of the employer under the MWCA is a matter of public policy as contemplated by the Legislature. *Sawyer v. Head*, 510 So.2d 472, 476 (Miss. 1987) ("the liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer. **This is more than a statement of law -- it is a statement of public policy by the Legislature . . .**").

As the exclusive remedy provision of the MWCA is central to the intent and purpose behind the Act, it follows that there are markedly narrow circumstances in which the Mississippi courts have allowed the exclusive remedy of the Act to be circumvented. The one very narrow exception to the exclusive remedy provision is where an injury is not a compensable "accidental injury" under the Act, but rather is an injury caused by an intentional tort, where the employer acted with the *actual intent to injure the employee.* Cases in which the courts have found an intentional act on the part of an employer sufficient to circumvent the Act are extremely limited.

In 2003, this Court affirmed the Mississippi Supreme Court's declaration of the proper test for whether a tort claim was barred by the exclusive remedy provision of the workers' compensation act:

> In 2002, the supreme court . . . stated that *Miller* contained "a misinterpretation of the exclusivity test . . ." **The correct "inquiry set forth in *Miller* asks whether the injury is compensable under the act." Compensability is resolved by determining whether the injury is an accidental one as defined in section 71-3-3(b)** . . . [t]he focus is now to be on whether there was an accidental injury under the Act.

Goodman v. Coast Materials Company, 858 So.2d 923, 925 (Miss. App. 2003) (citing *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 624 (Miss. 2002)).

According to *Goodman*, whether an injured employee's claim is subject to the exclusivity of the Act is determined by *whether the injury constitutes a compensable accidental injury* as defined by Section 71-3-3 of the Act. *Goodman v. Coast Materials Company*, 858 So.2d 923, 925 (Miss. App. 2003). Where the injury is one compensable under the Act, it is subject to the exclusive remedy of the Act. *Id.* However, it must be noted that ***even where an injury results from an employer's reckless or grossly negligent conduct, particularly offensive or reprehensible conduct, or purposeful, willful, or malicious conduct, these circumstances are still not enough to allow the injured employee to simply "opt out" of a workers compensation claim and pursue a claim for common law tort.*** *Bevis v. Linkous Construction Company, Inc.*, 856 So.2d 535, 543 (Miss. App. 2003); *Peaster v. David New Drilling Co.*, 642 So.2d 344 (Miss. 1994); *Blailock v. O'Bannon*, 795 So.2d 533, 535 (Miss. 2001).

In the context of workers' compensation, a willful tort is simply not enough to take an injury outside of the exclusivity of the Workers' Compensation Act in order to pursue a common law action. Mississippi case law in the workers' compensation context has made clear that ***an additional requirement is necessary to circumvent the exclusivity of the Act:***

> **"[I]n order for a willful tort to be outside the exclusivity of the Act, the employee's action must be done with an actual intent to injure the employee.** It is not enough to destroy the immunity that the employer's conduct leading to the injury consists of aggravated negligence or even that the conduct goes beyond this to include such elements as knowingly permitting hazardous conditions to exist or willfully failing to furnish a safe place to work or knowingly ordering the employee to perform a dangerous job."

Peaster v. David New Drilling Co., 642 So.2d 344, 347 (Miss. 1994).

> **"[M]ere willful and malicious act is insufficient to give rise to the intentional tort exception to the exclusive remedy provisions of the Act. There must be a finding of an 'actual intent to injure.'** Reckless or grossly negligent conduct is not enough to remove a claim from the exclusivity of the Act."

Blailock v. O'Bannon, 795 So.2d 533, 535 (Miss. 2001) (citing *Peaster v. David New Drilling Co.*, 642 So.2d 344 (Miss. 1994)).

In Mississippi, even an injury which results from the reckless, grossly negligent, purposeful, willful, or malicious act of an employer is still a claim which must be pursued under the MWCA, unless it can be shown that the employer's intent in committing the act was done with the actual intent to injure the employee. This is the only, extremely limited, circumstance in which Mississippi courts have allowed an employee subject to the MWCA to go outside of the Act and pursue a common law tort claim, and the courts have consistently and explicitly declined to allow other attempts to get around the exclusiveness of the Act.

III. The circumstances and injuries in this case are not sufficient to bring the Franklin employees' claims within the very narrow exception of an intentional tort.

The Calhoun County Circuit Court ruled that the intentional tort exception to the MWCA exclusivity provision applied in this case to allow the Franklin employees' claims to be heard in a court of law. [R. at 4131.] The court erred in denying Franklin's motion for summary judgment on this issue, and the court additionally erred in improperly instructing the jury as to the definition of an "intentional act" as it relates to the intentional tort exception. The crux of the

trial court's misguided rulings hinged on its failure to adhere to Mississippi's requirement that injuries must result from an "actual intent to injure" in order to apply the intentional tort exception. The court instead applied a "substantial certainty" standard. The Circuit Court's rulings go against the clear legislative intent of the MWCA, in addition to the precedential and binding case law authority in Mississippi. *See* Section 2, supra. The circumstances and injuries in this case are not sufficient to bring the employees' claims within the very narrow exception of an intentional tort, and the court erred in allowing the case to proceed to judgment.

A. The Franklin employees' injuries in this case are not the kind of injuries for which Mississippi courts allow the intentional tort exception to be applied.

The type of injury sustained is significant when considering whether the intentional tort exception should apply. Where the injury has been a physical injury or death, the courts have consistently held that that type of injury is clearly compensable under the MWCA and the intentional tort exception does not apply. In *Rodriguez v. Kivett's Inc.*, the court stated:

> In order to avail herself to this [intentional tort] exclusion, Plaintiff would first have to establish that Rodriguez **actually intended to cause the death** of Barahona . . . Plaintiff would have to establish that Barahona's death is **an injury that is not compensable under the MWCA.** As the MWCA expressly requires compensation for deaths arising out of the course and scope of employment . . . the Court finds that Plaintiff could not establish an intentional tort claim against Rodriguez that would allow her to avoid the exclusivity provision of the MWCA.

Rodriguez v. Kivett's Inc., 2006 WL 2645190 *5 (S.D. Miss.) (emphasis added). In *Peaster*, the court stated "[i]n each of the cases where this Court has allowed a claim for intentional tort, the injury has been something **other than physical injury or death**, which are compensable under the Act." *Peaster v. David New Drilling Co.*, 642 So.2d 344, 348 (Miss. 1994). The court held that the "appellants have not shown that the relief they are seeking [for employee's death] is not

of the kind for which compensation is normally granted under the Act." *Id.* This concept was reaffirmed in *Blailock v. O'Bannon* where the court stated that "[f]or a civil suit based on an intentional tort to proceed, the injury has been something other than physical injury or death, which are compensable under the Act." *Blailock v. O'Bannon*, 795 So.2d 533, 535 (Miss. 2001). The concept was again affirmed as recently as 2006 in *Rodriguez* as cited *supra*. *Rodriguez v. Kivett's Inc.*, 2006 WL 2645190 *5 (S.D. Miss.).

Other Mississippi cases have also held accordingly. In *Hurdle v. Holloway*, physical injury from a vehicle accident was compensable under the Act and barred common law tort claim against the employer. *Hurdle v. Holloway*, 848 So.2d 183 (Miss. 2003). Physical injury to a machine saw operator was compensable under the Act and subject to exclusive remedy provision in *Griffin v. Furtorian Corporation*. 533 So.2d 461 (Miss. 1988). Amicus Curiae herein is unaware of a Mississippi case in which a court has held the intentional tort exception to apply to the physical injury or death of an employee (with the exception of cases of occupational disease where intent is not considered according to the language of the statute).

The Mississippi Court of Appeals has clarified the types of injuries *which would* justify application of the intentional tort exception stating that "[s]ome injuries such as humiliation, deprivation of personal liberty, and embarrassment were not compensable kinds of injuries." *Goodman v. Coast Materials Company,* 858 So.2d 923, 924 (Miss. 2003). Additionally, the Mississippi Supreme Court applied the intentional tort exception in *Miller v. McRae's* to a claim for false imprisonment. 444 So.2d 461 (Miss. 1988). In *Miller*, the Court specifically noted that it is obvious that injury resulting from false imprisonment is not an accident but caused by a willful act. *Id.* Judicial holdings are clear: the types of injuries which justify application of the

intentional tort exception are those which are not physical, but emotional such as humiliation or injury to reputation or personal liberty.

In the present case, the Franklin employees have clearly asserted an intentional tort claim for purely physical injuries. The employees list such injuries as "central nervous system damage, neuropathy, brain shrinkage, skin burns, numbness, nausea, dizziness, overt anxiety, sleeplessness, and the inability to walk." [R. at 1023.] The Franklin employees' asserted injuries are unarguably physical injuries for which compensation is provided for under the MWCA, and therefore are not the types of injuries which justify application of the intentional tort exception.

B. Injury resulting from exposure to toxic chemicals has been characterized as gross negligence as opposed to an intentional tort.

The exact type of physical injury which is asserted by the Franklin employees in the present case - exposure to toxic chemicals - has specifically been classified by the courts as gross negligence and not an intentional tort. There have been a number of cases involving employees having been exposed to toxic fumes or chemicals in the workplace, and each time the courts have held that such act/injury constitutes gross negligence, but does not rise to the level of an intentional tort. In *Frye v. Airco, Inc.*, an employee brought a common law tort action against his employer for exposure to toxic chemicals in the workplace. 269 F.Supp.2d 743, 746 (S.D. Miss. 2003). In *Frye,* the complaint alleged intentional acts of the employer eerily similar to those asserted by the employees against Franklin, as follows:

> (a) intentionally concealing information from Larry Frye that was known to them regarding the dangerous nature of his exposure to vinyl chloride and polyvinyl chloride (PVC) dust at the plant; (b) misrepresenting information to Larry Frye that they knew to be false regarding the safety and danger of levels of exposure to vinyl chloride and PVC dust at the plant; (c) deliberately placing Larry Frye in a dangerous work environment; (d) battery; (e) fraud; (f) conspiracy with other defendants to conceal knowledge of the

> dangers of hazardous levels of vinyl chloride and PVC dust at the plant; and (g) conspiracy with other defendants to misrepresent the dangers to Larry Frye's health by providing false information to him regarding the effects of vinyl chloride and PVC exposure.

Frye v. Airco, Inc., 269 F.Supp.2d 743, 746 (S.D. Miss. 2003). The court in *Frye* clarified that the plaintiff's claims were characterized as claims of negligence rather than intentional acts, and in doing so the court stated:

> **[T]he allegations of the plaintiffs here do not remotely suggest the kind of "intent" that the Mississippi courts require to remove conduct from the coverage of the Act** . . . Here, although plaintiffs' complaint is replete with allegations of "intentional" misconduct by the resident defendants, **"the overwhelming language and facts point to negligence, including gross negligence," id.**, and hence, their claims against these defendants are barred by the exclusivity provision of the Workers' Compensation Act.

Frye v. Airco, Inc., 269 F.Supp.2d 743, 747 (S.D. Miss. 2003) (emphasis added).

In *Huddleston v. Kimberly-Clark Corporation*, the plaintiff sued the employer for intentional torts based on exposure to toxic chemicals in the workplace. 2002 WL 1611508 (N.D.Miss. 2002). The court held that plaintiffs were barred by the MWCA from pursuing a tort action against the employer, stating that "Plaintiffs do not cite any Mississippi cases that are factually similar where a court has held that the Act did not bar a suit against the employer . . . **Plaintiffs have not cited any Mississippi cases for the proposition that inhaling chemicals in the course of employment can amount to an intentional tort."** *Huddleston v. Kimberly-Clark Corporation*, 2002 WL 1611508 *3 (N.D.Miss. 2002). Likewise, in the case at bar, the employees have sued for exposure to toxic chemicals in the workplace as a result of Franklin's intentional tort. The law is clear that this kind of physical injury does not amount to an intentional tort and said action is barred by the exclusivity provision of the MWCA.

C. Franklin did not act with any actual intent to injure the employees and

therefore, the employees' injuries did not result from an intentional tort.

Although the Franklin employees asserted an intentional tort action, they have failed to show that Franklin acted with any actual intent to cause harm to them. *In Mississippi, in order to sustain a common law tort action in the workers' compensation context, the law requires injury resulting from an "actual intent to injure".* As recently as 2006, the "actual intent to injure" standard was reaffirmed and clarified. "[T]he reason Lockheed's actions and inaction which allegedly led to or caused Williams' rampage are not "intentional" is because Lockheed did not have an **actual intent to injure** . . ." *Blanks v. Lockheed Martin Corporation*, Not Reported in F.Supp.2d, 2006 WL 1766753 *2 (S.D. Miss.). The *Blanks* case also distinguished Mississippi's adoption of the "actual intent to injure" standard as opposed to the "substantial certainty" standard which was allowed by the Calhoun County Circuit Court. The *Blanks* court stated:

> [T]he Mississippi Court of Appeals in *Thornton v. W.E. Blain & Sons, Inc.* . . . clearly reaffirmed the 'intent to injure' standard stating:
> Thornton also urges this Court to adopt 'the substantial certainty standard, which allows an injured worker to circumvent the exclusivity provision of the Workers' Compensation Law in those instances where the employer engages in misconduct knowing that death or serious injury is 'substantially certain to occur . . . As Blain points out, **the Mississippi Supreme Court already has declined to create a 'substantial certainty' exception to the exclusivity provision** of the Act, stating:
> . . . We have stated consistently our position on this issue. The legislature has had every opportunity to include into the Act such a liberal exception [as "substantial certainty"] suggested by the appellants, yet failed to do so . . . If this court would include [it] . . . we would violate the purpose, spirit and philosophy of the Workmen's Compensation Act.

Id.

Where an injury would otherwise fall into the purview of the Mississippi Workers' Compensation Act, the only circumstance in which the intentional tort exception would be applied to circumvent the exclusivity provision of the Act, is where the injury resulted from an

employer's acts which were committed with the actual intent to injure the employee. ***This standard requires distinguishing between having an actual intent to commit the act, as opposed to having the actual intent that the resulting injury occur.*** In the present case, the Franklin employees have alleged that Franklin committed intentional torts sufficient to circumvent the Act by intentionally disregarding hazardous warnings of the toxic chemical in the glue and consciously deciding to use it anyway; making a conscious and intentional decision not to take safety precautions in using the glue containing toxic chemicals; and, acting to benefit itself financially in spite of the knowledge that employees could be harmed. [R. at 356-357.] ***However, even if Franklin acted with the actual intent to commit these acts, its actions are grossly negligent as they relate to the resulting injuries of the employees, because there is absolutely no evidence which indicates that Franklin committed those acts with the actual intent that the Franklin employees be harmed or injured.***

The Calhoun County Circuit Court erred in denying Franklin's motion for summary judgment and holding that the intentional tort exception applied to allow the employees' common law tort claim. The Franklin employees' injuries are not the type for which the intentional tort exception applies, and there is absolutely no evidence that the injuries resulted from any actual intent to cause harm to the employees. The employees should not have been allowed to pursue a common law tort action against Franklin.

Further, the Circuit Court erred in allowing the "substantial certainty" standard to be included in the jury instruction as to the definition of an "intentional act" as it relates to the intentional tort exception to the exclusivity provision. The Honorable Judge Howorth approved the following language in Jury Instruction P-2:

> In order to establish that an intentional tort was committed by Defendant, Franklin Corporation, Plaintiffs must prove that, more likely than not, Defendant, Franklin Corporation either desired to cause the consequences of its acts, or **believed that the consequences were substantially certain to result from it.** Said another way, if Franklin Corp. knew the consequences were certain, **or substantially certain,** to result from its acts, and still goes ahead, Franklin Corp. is treated by the law as if it had in fact desired to produce the result.

[R. at 5322 (emphasis added)]. The Mississippi courts have expressly declined to allow this "substantial certainty" standard set forth in Plaintiff's Jury Instruction Number 2, in the context of intentional tort in workers' compensation. *Blanks v. Lockheed Martin Corporation*, Not Reported in F.Supp.2d, 2006 WL 1766753 (S.D. Miss.). Therefore, the Circuit Court erred in allowing this standard to apply. MASI asserts that the judgment entered against Franklin in this case was the result of the trial court's erroneous holding that the intentional tort exception applied, and the improper jury instruction as to the definition of an "intentional act" as it relates to the intentional tort exception to the MWCA exclusivity provision. Therefore, the judgment entered against Franklin should be reversed.

IV.
CONCLUSION

For the foregoing reasons, the judgment entered against Franklin Corporation in this matter should be reversed. The narrow intentional tort exception to the exclusive remedy of workers' compensation does not apply to the Franklin employees' injuries in this case and their claims are subject to the sole and exclusive remedy of workers' compensation. Accordingly, Amicus Curiae, MASI, respectfully requests that this Court reverse the Calhoun County Circuit Court's ruling denying Franklin's motion for summary judgment and the subsequent entry of final judgment in this matter.

Respectfully submitted, this the 13th day of March, 2008.

MISSISSIPPI ASSOCIATION OF SELF-INSURERS

BY: _____
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CERTIFICATE OF SERVICE

I, Roger C. Riddick, do hereby certify that I have on this date mailed via United States mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Amicus Curiae, to the following:

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This the 13th day of March, 2008.

ROGER C. RIDDICK