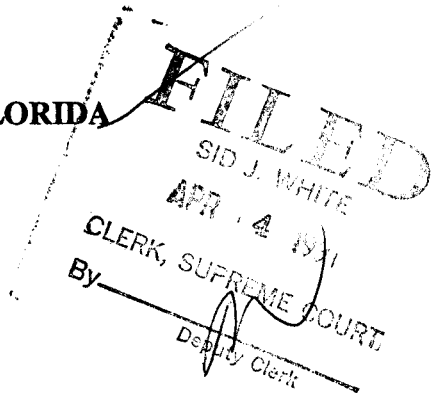

THE SUPREME COURT OF FLORIDA

BILLY G. SIBLEY,

Petitioner,

vs.

ADJUSTCO, INC.,

Respondent.

Case No. 77,357

Certified Question of Great Public Importance
from the Second District Court of Appeal

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CASES

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

Sibley's Statement of the Case and Facts omits essential information. Adjustco hereby submits its own Statement of the Case and Facts.

Sibley's Heart Attack

Sibley was a long distance owner-contractor truck driver. (R. 189). He and his wife have three children. (R. 134). In November of 1981, he was hired out to Sunco Carriers, Inc. (R. 189). The employer and the carrier were Florida corporations. (R. 136, 175, 206). On the trip in question, he picked up a load of chilled orange juice in Florida and was to deliver it to Lafayette, Louisiana. (R. 136). Sibley reached his destination, spent the night in his truck, (R. 136) and started unloading his cargo about 6:00 a.m. on the morning of November 24th. (R. 189). Soon after starting his work, he felt dizzy and weak. (R. 135). He walked into a nearby office and told the people there that he thought he was having a heart attack. (R. 136). He called and reported his illness to his employer in Florida, (R. 189) and went to the hospital. (R. 136, 189).

Sibley's Hospital Bed Statement

The workers' compensation statute imposed a duty upon the carrier to investigate and decide within 14 days whether a claim for work-related benefits would be paid or controverted. (R. 203). In Sibley's case, he was the only person who could shed light on the circumstances

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Symbols Used in this Brief:

Sibley = Petitioner Billy G. Sibley
Adjustco = Respondent Adjustco, Inc., substituted by stipulation for its predecessors in this litigation, Sunco Carriers, Inc. and Associated Industries of Florida, Claims Center
R. = Record on Appeal
A. = Appendix to Petitioner's Initial Brief

leading up to the heart attack. Sibley had driven from Florida alone, (R. 136) and had been unloading his truck by himself. (R. 137). A week after the heart attack, a representative from Adjustco visited Sibley in the hospital and tape recorded an interview with him about the occurrence. (R. 134). Sibley's wife was present. (R. 147). Sibley volunteered at the beginning that "I want to make statements towards my workmen's compensation at the present time." (R. 134). At the conclusion of the interview, Sibley was asked whether there was anything else he would like to add. (R. 142). He replied "Not a thing that I know of. I liked to have covered all of it I believe." (R. 142).

Five years later (R. 47) Sibley would claim that the statement had been taken from him while he was in the Cardiac Intensive Care Unit (R. 44) and that it had been distorted. (R. 46). To the contrary, the statement was taken in his hospital room (R. 146) on the Tuesday (R. 134) following the Sunday that he had been moved from intensive care. (R. 146). Also, a point-by-point comparison of the transcript of the testimony given by Sibley at the final hearing, (R. 157-162) and the transcript of the hospital interview, (R. 134-142) shows that the two contain the same essential facts.

Deputy Commissioner Rules for Sibley -- Statement Excluded

Sibley's claim for workers' compensation benefits was controverted and eventually came before the Deputy Commissioner for final hearing. No objection to the statement was voiced by Sibley's counsel, who stipulated it into evidence. (R. 176). During the course of the hearing, the Deputy Commissioner questioned Mrs. Sibley about the statement. (R. 143-154). He did not like the circumstances under which he perceived the statement was taken (R. 180) and stated in his order that he rejected its contents in arriving at his findings. (R. 180).

Testimony was taken as to whether Sibley had been engaged in "unusual exertion" as the test for determining whether the heart attack came from natural or accidental causes. (R. 158-159, 161-162). At one point, Sibley testified that there was nothing unusual about him having to unload his truck (R. 157) and there was nothing unusual or different about having to unload at this particular destination. (R. 161). Elsewhere he said that unloading by himself was unusual (R. 157) because his wife had been going with him and helping him (R. 157) by doing 50% or more of the work. (R. 161).

The Deputy Commissioner ruled for Sibley in three different orders, finding the claim to be compensable, (R. 8) that Sibley was permanently and totally disabled, (R. 29) and assessing a $38,000 fee for Sibley's attorney. (R. 18). In all, the Deputy Commissioner required: 1) compensation for medical bills as a result of the heart attack, 2) reimbursement for all medical expenses, 3) mileage paid out-of-pocket in seeking such medical care, 4) any other medical expenses filed by any health care insurer seeking reimbursement from claimant, 5) all future medical expenses from the heart attack, 6) permanent total disability benefits, 7) interest at the rate of 12% on all past compensation due plaintiffs, 8) attorney fees, 9) taxable costs, and 10) a reservation by the Deputy Commissioner to resolve future disputes as to specific amounts of benefits due under the compensation order. (R. 132, 205). [Through May of 1989, Adjustco had paid $134,170.70 to Sibley pursuant to the compensation orders with benefits to continue at the rate of $912 every two weeks thereafter. (R. 202, 210).]

Sibley's Recovery Affirmed on Appeal

Two of the three orders entered by the Deputy Commissioner were appealed by Adjustco to the First District Court of Appeal. (R. 2). In *Sunco Carriers, Inc. v. Sibley*, 478 So.2d 57

(Fla. 1985), the First District affirmed one of the orders, resulting in the voluntary dismissal of the other. (R. 2).

Sibley Seeks Civil Recovery

Following the appeal, Sibley filed a Petition for Rule Nisi seeking 1) an order directing the carrier to make payment, and 2) alleging that the carrier's failure to pay amounted to willful misconduct which "constitutes an independent intentional tort" (R. 3) warranting payment of punitive damages. (R. 4). The carrier responded stating that payment had been timely made. (R. 40). The Circuit Court thereafter dismissed Sibley's claim for punitive damages. (R. 42).

Sibley's Second Attempt at a Civil Recovery is Dismissed

Sibley then amended his Petition. This time he alleged that the statement taken in the hospital had been fraudulently and intentionally altered and that this "constitutes an independent intentional tort" (R. 46) warranting payment of punitive damages. (R. 47). Thereafter, Sibley clarified his position with an "Amendment to Amended Complaint by Interlineation", (R. 85) then revamped his assertions in a pleading entitled "Second Amended Complaint" filed in August of 1988 (Index to the Record) -- almost seven years after the statement complained of was taken. (R. 134). The matter was set for trial. (R. 197). At a hearing on the morning of trial, the court entered a Final Judgment of Dismissal for lack of subject matter jurisdiction. (R. 216).

Second District's Affirmance Followed by Certification

Sibley appealed to the Second District Court of Appeal, (R. 219) contending that the trial court erred in the dismissal of his action grounded upon alleged fraud and intentional infliction of emotional distress. (A. 7). Adjustco defended on the basis of the immunity provision of §

440.11 and the civil recovery provision of § 440.37. (A. 8). The Second District affirmed the trial court based on § 440.37. *Sibley v. Adjustco, Inc.*, 537 So.2d 353 (Fla. 1990). Thereafter, the Second District granted Sibley's motion and certified the question below to this Court as one of great public importance.

QUESTION PRESENTED

WHEN AN EMPLOYEE CLAIMS INJURY ARISING FROM THE ALLEGED FRAUDULENT ACT OF AN EMPLOYER/CARRIER COMMITTED IN THE COURSE OF A PROCEEDING INITIATED PURSUANT TO CHAPTER 440 IS A CRIMINAL ADJUDICATION OF GUILT PRESCRIBED IN SECTION 440.37 A CONDITION TO THE MAINTENANCE OF AN INDEPENDENT TORT ACTION? (Certified by Order of the Second District Court of Appeal, January 24, 1991.)

SUMMARY OF ARGUMENT

The Workers' Compensation Act consists of remedial social legislation which grants the claimant a recovery against the employer regardless of fault. In exchange, the claimant relinquishes the right to bring an ordinary civil suit under common law. The Act does grant an extraordinary exception to the civil immunity. § 440.37 permits a civil suit, but only after the offender has first been adjudicated guilty of a criminal act.

Whether a civil suit can be maintained depends on the nature of the alleged conduct. If the conduct complained of is within the scope of the Act, the only civil action is a § 440.37 action. A criminal adjudication is a prerequisite to such action. If the conduct is outside the scope of the Act, then the claimant is not bound by the Act. In such instance, the claimant is free to bring an ordinary civil suit without concern for the § 440.37 criminal predicate.

As posed, the certified question should be answered in the affirmative. This is because the question restricts itself to fraud "committed in the course of a proceeding initiated pursuant to Chapter 440." By its terms, the question is limited to those instances falling within the scope of Chapter 440. To answer the question in the negative would jeopardize the integrity of the statutory scheme that is at the heart of the Act's remedial social legislation.

The specific case giving rise to the certified question is an example of alleged conduct falling within the scope of the Act. Fraudulent statement-taking is addressed directly and dealt with severely by the Act. It therefore follows that a civil action would be permitted in the Sibley case, but only after a criminal adjudication of guilt.

ARGUMENT

PERMITTING A SECTION 440.37 TORT ACTION AGAINST AN EMPLOYER/CARRIER WITHOUT THE REQUIRED PRIOR CRIMINAL ADJUDICATION WOULD BE CONTRARY TO SECTION 440.37 AND TO THE CHAPTER 440 STATUTORY SCHEME

The certified question arises out the Sibley case captioned in this appeal. The question itself has a broader application and does not specifically refer to the Sibley case. The initial brief is written about the Sibley case and hardly addresses the larger question. This brief will address the larger question and use the facts of the Sibley case for illustrative purposes. In the process, this brief will respond to all of the specific points raised in the initial brief about the Sibley case.

A. The Policy of the Workers' Compensation Act Strikes a Balance Whereby Each Party Relinquishes Rights in Exchange for New Benefits.

Workers' compensation is a product of industrialism, which proceeds on the theory that

economic loss to the individual from injury in the line of duty should be borne in part by the industry in which he is employed, so that his dependents may not be left in want. *Duff Hotel Co. v. Ficara,* 150 Fla. 442, 7 So.2d 790 (1942). Sibley's case is a good example of how the workers' compensation social theory worked to the benefit of an employee, his wife and three children.

Assigning liability to another for disability from heart disease is virtually unknown in other forums. Even in the workers' compensation forum, the determination as to whether an incident of heart disease should be compensated is very difficult. Wigginton, *The Heart of the Working Man -- A Post Mortem,* 17 U. Fla. L. Rev. 543 (1965). This is because heart disease, in most instances, is the result of natural causes; it is not an occupational disease; causal relation between accident and attack is difficult to show; the term "unusual exertion," a requisite to recovery, is ambiguous and difficult to apply as a causal factor in heart cases; heart disease is a cumulative process, the proclivity building up over a period of years. *Id.* at 543. Nonetheless, the Workers' Compensation forum has allowed such recoveries -- to the extent that it has been suggested that the system could easily be converted into a general health insurance program. *Id.* at 559.

The statutory scheme is intended to be a two way street, requiring both the employer and the employee to surrender certain of their common law rights, in exchange for each receiving certain offsetting benefits. *University of Miami, Inc. v. Matthews*, 97 So.2d 111 (Fla. 1957), at 114. The employee gains the right to compensation regardless of the employer's fault, but loses the common law right to recover for some elements of damage that normally flow from the injury. 57 Fla. Jur.2d, *Workers' Compensation*, § 17. This is the quid pro quo in which

the sacrifices and gains of employees and employers are to some extent put in balance, for while the employer assumes a new liability without fault, he is relieved of the prospect of a large damage verdict. *Grice v. Suwannee Lumber Mfg. Co.*, 113 So.2d 742 (Fla. 1959) at 745-746, quoting Larson's Workmen's Compensation Law, § 65.10.

If Sibley had not enjoyed the advantages of the Act, and had instead been left to pursue his common law remedy, his prospects for recovery would have been different. First, Sibley would have been required to carry the burden of proving that his injury proximately resulted from a breach of duty owed by his employer. *Grice*, 113 So.2d at 746. He would have lost the liberal interpretation given the "unusual exertion" test under the Act and would have had to prove by a preponderance of the evidence that something his employer did in Florida caused his heart attack in Louisiana.

Second, Sibley would have had to be prepared to meet and overcome certain common law defenses. *Grice*, 113 So.2d at 746. In this regard, Sibley acknowledged that he was responsible for unloading his truck. He knew exactly what his cargo was when he set out and he knew that he was going to have to unload it at his destination. He did not hire any help. The common law defenses of contributory negligence and assumption of the risk would have made matters more difficult for Sibley in a civil proceeding. In all likelihood, he would not have recovered the $155,146.70 received to date plus the $912 to be received every two weeks in the future.

The Act establishes a statutory contract between employer and employee. *Winn-Lovett Tampa, Inc. v. Murphree*, 73 So.2d 287 (Fla. 1954). If Sibley's allegations, as a matter of law, are within the scope of the Act, he cannot be heard to claim that he should have the benefits of

both sides of the bargain.

B. Fraudulent Statement-Taking While Handling a Workers' Compensation Claim Falls Expressly Within the Scope of the Act.

Sibley's allegations call up the image of the sleazy insurance adjuster who tricks a vulnerable and disabled claimant at his hospital bedside by distorting his statement in order to later defeat the victim's meritorious claim in court. The scene ranks right up there with tying the damsel to the railroad tracks and stirs strong emotions in legal and judicial circles.

The image is also well known in legislative circles. The drafters made certain that such conduct was addressed in the Workers' Compensation Act and that it would be severely punished. The Division of Workers' Compensation must constantly examine claims files to find questionable claims-handling techniques. § 440.20(16)(a), Fla. Stat. (1990). The Division is also required to search for patterns of repeated unreasonably controverted claims by employers and carriers. *Id.* The Act requires that the Division certify such misconduct to the Department of Insurance, *Id.*, so that the offender's license can be suspended or revoked. § 440.38(3)(a). The Act deals severely and specifically with fraudulent statement-taking. § 440.37 makes the preparation of a false or misleading statement punishable as a felony of the third degree. Sibley's complaint contains allegations which he contends arose outside the scope of the Act. On the contrary, the very same misconduct is described in the Act and is punishable by the Division and through criminal prosecution of felonies established by the Act. As an aside, Sibley's brief is written as if his allegations were true. The record shows that the statement in question was not taken in intensive care as alleged. The facts contained in the statement were not distorted and are no different from those testified to under oath by Sibley at the final

hearing. The statement did not prejudice Sibley, as it was specifically rejected by the Deputy Commissioner and played no part in his ruling. Moreover, the Deputy Commissioner awarded full damages to Sibley in a close case that could have just as easily gone the other way. Although this is not the forum for deciding whether fraud was committed, it is the forum to establish that Sibley's claims are, after all, mere allegations.

C. The Authorities Relied Upon by Sibley Address Conduct Which Falls Outside the Scope of the Act.

Sibley contends that the alleged fraud, deceit and intentional infliction of emotional distress is outside the scope of the Act. (Initial Brief, p. 11). Simply characterizing the conduct as fraudulent does not take the claimant outside the scope of the Act. *Old Republic Insurance Co. v. Whitworth,* 442 So.2d 1078 (Fla. 3d DCA 1983) at 1079. It is the conduct itself that is determinative. *Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93 (Fla. 1st DCA 1990) and *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So.2d 1099 (Fla. 1989).

The *Cunningham* and *Byrd* cases are in fact the authorities cited by Sibley to support his position. The only thing these cases have in common with Sibley's case is the alleged fraud. The conduct alleged to be fraudulent is quite different. In *Cunningham*, the employer deliberately disabled toxic protection devices and intentionally removed toxic warnings from the toxic work environment of his unsuspecting employees. The court held that this conduct created "a cause of action in intentional tort outside the scope of the Workers' Compensation Act." *Cunningham*, 558 So.2d at 96. In *Byrd*, this court found that sexual harassment was conduct that fell outside the scope of a wage loss or workplace injury and was more appropriately dealt with by other laws. *Byrd*, 552 So.2d at 1104. In contrast, the instant case concerns the taking

of a statement while handling a workers' compensation claim, conduct expressly regulated by the Act. §§ 440.20(16)(a), 440.37, 440.38(3)(a).

D. The Rules of Statutory Construction Require that § 440.37 be Read and Construed in its Entirety and that the Section be Read in Context with the Chapter 440 Statutory Scheme.

Sibley urges a statutory construction of § 440.37(2)(e) which would permit an independent civil action against the employer/carrier for activities which are improper but not criminal. (Initial Brief, p. 17). § 440.37(2)(e) only consists of two sentences. For Sibley's construction of those two sentences to stand, they would have to be isolated from the rest of the Act and read alone. It is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the provision under construction and every part of the statute as a whole. *State v. Gale Distributors, Inc.*, 349 So.2d 150 (Fla. 1977). From a view of the whole law in pari materia, the reviewing court will determine legislative intent. *Id.* at 153.

It is instructive to just simply read the provision. § 440.37(2)(e) provides for a civil suit enabling the claimant "to recover the damages provided in this subsection." The reader is directed elsewhere in subsection (2) of § 440.37, *see,* 1 Fla. Stat. (1989) *Preface*, vi at vii (explaining matter included in a "subsection"), to find the damages to be recovered. The damages are found two paragraphs up in § 440.37(2)(c). The damages referred to are "compensatory damages, plus all reasonable investigation and litigation expenses, including attorney's fees at the trial and appellate courts." But § 440.37(2)(c) clearly states that these damages are obtainable only after "there has been a criminal adjudication of guilt." (Emphasis added). It is impossible to read (e) without (c). By its very terms, (e) is incapable of standing

alone.

Sibley states that his position is bolstered by Judge Ryder's dissent from the Second District's opinion. (Initial Brief, p. 17). The dissent states that a citizen should be given access to the courts for a civil tort committed outside the scope of the Workers' Compensation Act. We have no quarrel with that sentiment. In the instant case, the conduct complained of is specifically within the scope of the Act. If a wrong had been done by Adjustco to Sibley which was outside the contemplation of the Act, a civil action would be sustainable. There is nothing in the Act to prevent it.

The dissent also expressed concern about civil claimants being left to the whims of a state attorney and his willingness to prosecute the predicate crime. Ordinarily, the statutory scheme would not permit a civil action at all. The drafters did carve out an exception for proven criminal conduct. It was apparently felt that, with this extraordinary prerequisite, a civil suit could be authorized without disturbing the balance. The policy of the Act is to provide benefits regardless of fault in exchange for delivering employers from vexatious civil suits that would "partially nullify," *Sullivan v. Liberty Mutual Insurance Co.*, 367 So.2d 658 (Fla. 4th DCA 1979) at 661, quoting *Noe v. Travelers Insurance Co.*, 172 Cal.App.2d 731, 342 P.2d 976 (1959), or bring the "destruction," *Old Republic,* 442 So.2d at 1079, of the statutory scheme. If the dissent is flirting with doing away with the criminal adjudication, it could also be flirting with doing away with the balance.

Sibley also states that, since the alleged fraud took place in Louisiana, it is doubtful that Florida law would be able to achieve the necessary criminal adjudication. (Initial Brief, p. 17). Only the statement-taker was located in Louisiana. This suit was not filed against him. It was

filed against the employer and the carrier. (Adjustco has been substituted by stipulation and is liable for their acts.) Both the employer and the carrier are Florida corporations and subject to prosecution under the terms of § 440.37(2)(e).

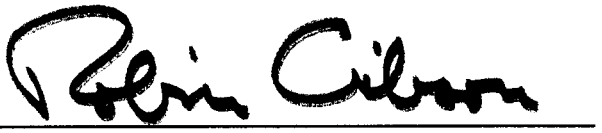
CONCLUSION

The answer to the certified question turns on whether the conduct complained of is within the scope or outside the scope of the Act. Since the certified question refers only to those instances involving proceedings initiated pursuant to Chapter 440, the question is limited to instances falling within the scope of the Act. Accordingly, the question must be answered in the affirmative.

With respect to the Sibley case giving rise to the certified question, the alleged conduct involves fraudulent statement-taking and expressly falls within the scope of the Act. The claimant has not obtained the required criminal adjudication. As to the Sibley case, the question must also be answered in the affirmative. And this litigation, now entering its tenth year, should be brought to a merciful end.

Respectfully submitted,

GIBSON & LILLY



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Certificate of Service

The original of this document and seven copies have been mailed to the Clerk of the Court, with copy to J. Michael McCarthy, Esquire, Post Office Box 3625, Lakeland, FL 33802-3625 and to C. Kenneth Stuart, Jr., Esquire, Post Office Box 2177, Lakeland, FL 33806 on this 2nd day of April, 1991.

Robin Gibson