SUPREME COURT OF FLORIDA

RODRIGO AGUILERA and
PATRICIA AGUILERA, his wife,

Petitioners, S. Ct. No.: SC03-368

vs.

INSERVICES, INC. f/k/a MANAGED
CARE USA SERVICES, INC., a North
Carolina corporation, MIPPY HEATH,
individually,

Respondents.
_____/

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS' AMENDED ANSWER BRIEF ON THE MERITS

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PREFACE

This answer brief on the merits is submitted on behalf of respondents Inservices, Inc. and Mippy Heath, a workers' compensation insurance carrier and its employee claims administrator. Inservices and Ms. Heath were defendants in the trial court and, unless otherwise noted, are referred to in this brief collectively as "Inservices" or "defendants." Petitioners, Mr. and Mrs. Aguilera, are referred to by name or as "plaintiffs."

In this brief, the letter "A" followed by a number designates references to the pages of the appendix to the initial brief of appellants/defendants Inservices, Inc. and Mippy Heath filed below in the Third District Court of Appeal. The letters "SA" followed by a number designate references to the pages of the Aguileras' supplemental appendix filed in this court.

STATEMENT OF THE CASE AND FACTS

Plaintiffs' amended complaint alleges Mr. Aguilera sustained an on-the-job injury on April 21, 1999 and, by May 12, 1999, received workers' compensation benefits including medical care. (A 5) On May 12, 1999, Aguilera was medically discharged to return to work with restrictions. (A 5) He later experienced kidney and/or bladder pain and requested that defendant Inservices authorize an examination by a urologist. (A 5-6) Inservices denied that request because it was not work related. (A 6) From that point forward, plaintiffs alleged, "the defendants did everything in their power to block medical treatment that it had actual notice Plaintiff needed . . .." (A 6)

On June 21, 1999, Inservices terminated Mr. Aguilera's compensation benefits effective July 9, 1999 even though it had medical reports stating he should not return to work. (A 6) Plaintiffs next allege Inservices "blocked" Mr. Aguilera's receipt of prescription medication on June 25, 1999.[1] (A 6) Five days later, Inservices denied Mr. Aguilera's emergency request for treatment by a urologist on the basis that it was not medically necessary. (A 6)

In July 1999 Mr. Aguilera's physician informed Inservices that his condition was deteriorating and that the need to consult with a urologist was urgent. (A 7) Two days later, Inservice's chosen physician prescribed and scheduled various urinary tests for Mr. Aguilera. (A 7) Inservices allegedly cancelled some of this testing but that which was done revealed a fistula. (A 7)

On August 19, 1999, three weeks after the fistula was discovered, Mr. Aguilera's *lawyer* informed Inservices Mr. Aguilera required emergency surgery; Inservices insisted upon a second opinion. (A 7) A week later, the Inservices claims

[1] It is conceivable that Inservices declined to pay for prescribed medication but, while keeping in mind the requirement that the well pleaded facts must be accepted as true, query how Inservices could have prevented Mr. Aguilera from *receiving* the medication.

handler assigned to Mr. Aguilera's claim appeared at the office of a urologist at the time of Mr. Aguilera's scheduled examination. (A 8) The claims handler, defendant Heath, allegedly told Mr. Aguilera not to tell his lawyer that she was present. (*Id.*)

Inservices insisted on medical tests that were painful to Mr. Aguilera, and which were contraindicated. (A 8) Inservices declined to authorize "critical" surgery until Mr. Aguilera permitted the testing. (*Id.*)

In November 1999 Inservices' case manager and nurse practitioner agreed Mr. Aguilera needed immediate surgery. (A 8) Defendant Heath allegedly stated she wanted a second opinion from a general surgeon but sent Mr. Aguilera to a gastroenterologist. (*Id.*) In March 2000, Inservices authorized the surgery, diagnosed as an emergency nine months earlier. (*Id.*) By that time, Mr. Aguilera had been urinating feces and blood for more than ten months. (*Id.*)

Among other theories of relief, plaintiffs sued Inservices and Ms. Heath for intentional infliction of emotional distress. (A 11-15) These claims allege Mr. Aguilera was entitled to receive workers' compensation benefits and that Inservices and Heath are liable for the "intentional infliction of emotional distress that was committed by Ms. Heath and perhaps others." (A 11) The alleged outrageous conduct is set forth in paragraphs 32 and 36 of the amended complaint. (A 11, 13) To paraphrase, plaintiffs allege defendants delayed and denied prescriptions for medication, referrals to medical specialists, essential medical care, payment of benefits, insisted upon painful testing, and lied to the plaintiff, his counsel and physicians about available benefits "and/or" plaintiff's medical condition. (*Id.*)

Plaintiffs do not allege that defendants' conduct caused the fistula or necessitated the surgery. Plaintiffs claim that from May 1999 "defendants did everything in their power to block medical treatment that it had actual notice Plaintiff needed, and by doing so recklessly endangered plaintiff's life, and engaged in a pattern of action substantially certain to bring about his death." (A 6) However, and significant to whether the amended complaint satisfies any possible exception under *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) *to carrier immunity* there is no allegation that defendants *knew or should have known* such conduct was substantially certain to result in injury or death. Nor is there any allegation that defendants were attempting to coerce Mr. Aguilera into dropping his claim or accepting a disadvantageous settlement. There is also no allegation in the claims for infliction of emotional distress that defendants were not entitled under the Workers' Compensation Act or the insurance policy to take the steps they took after receiving Mr. Aguilera's new complaints on May 24, 1999.

The trial court denied defendants' motion to dismiss made upon grounds of workers' compensation immunity. (A 64-66) The third district reversed and remanded with instructions to dismiss the action with prejudice. (SA 1-19) Applying "established precedent and the plain language of the Workers' Compensation Act" (SA 4), the court below held plaintiffs' exclusive remedies are under the Act and that the allegations are insufficient to satisfy any exception to the statutory workers' compensation immunity. (SA 9)

SUMMARY OF THE ARGUMENT

In holding the Workers' Compensation Act provides the exclusive remedy for alleged misconduct by a workers' compensation insurer arising from the handling of plaintiff's workers' compensation claim, the Third District Court of Appeal correctly construed the provisions of the Act and its decision is consistent with the prior decisions of this court and of other district courts of appeal. The Act places exclusive jurisdiction over workers' compensation claims with the Office of the Judges of Compensation Claims and immunizes workers' compensation insurers from suit for damages arising from such claims. The only exception to this exclusive jurisdiction and corresponding immunity is where the carrier commits an intentional tort that is independent of a breach of its contractual claims handling obligations and that satisfies the *Turner v. PCI, Inc.* standard.

In this case plaintiffs allege misconduct in the handling of Mr. Aguilera's compensation claim. Their claim for intentional infliction of emotional distress alleges no conduct separate from a breach of the workers' compensation insurance contract. It therefore does not allege an independent tort. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996). As courts in essentially identical cases from this state and others have said, plaintiffs should not be permitted to trump the statutory immunity by characterizing defendants' alleged claims handling misconduct as a tort when they allege no independent acts.

Even if the complaint did allege a separate tort, the allegations do not satisfy the standard established in *Turner v. PCI*, and thus do not qualify for the intentional tort

exception to the immunity rule. A carrier cannot be liable for intentional infliction of emotional distress for exercising its rights under an insurance policy.

ARGUMENT

I. A Workers' Compensation Carrier Is Immune From Suit For Claims Handling Misconduct Where Plaintiff Fails To Allege An Independent Tort and Where the Conduct Sued Upon Does Not Satisfy *Turner's* Objective Standard Because the Carrier Was Permitted In Adjusting Plaintiff's Claim To Take the Steps It Took.

A. The Workers' Compensation Act Immunizes Compensation Carriers From Civil Liability For Misconduct In Administering Benefits.

The Workers' Compensation Act is a legislatively ordained compromise between employers and employees pursuant to which workers relinquish their common law remedies for employment-related injuries in exchange for limited benefits that are paid promptly, efficiently and without proof of fault. § 440.015, Fla. Stat. (1997). To expedite delivery of benefits to the injured worker, the legislature determined "an efficient and self-executing system must be created which is not an economic or administrative burden." *Id*. Thus, the legislature created the Division of Workers' Compensation, § 440.44, Fla. Stat. (1997), the Workers' Compensation Oversight Board, § 440.4416, Fla. Stat. (1997), and the Office of the Judges of Compensation Claims, § 440.45, Fla. Stat. (1997). It has also created procedures for making and resolving claims for benefits, *e.g.*, §§ 440.185-440.20, Fla. Stat. (1997), for enforcement of compensation orders, for mediation and hearings, and appeals to the First District Court of Appeal. §§ 440.24-440.271, Fla. Stat. (1997). By enacting

Chapter 440, Florida Statutes, the legislature endeavored to create a comprehensive system for the administration (including adjustment) of workers' compensation benefits.

Insurance carriers are an integral part of this comprehensive, "efficient and self-executing system." § 440.015, Fla. Stat. (1997). Section 440.38 requires employers to secure payment of workers' compensation by purchasing insurance or by receiving authorization from the Division of Workers' Compensation to pay such compensation directly. Where the employer has purchased insurance, its insurer (1) must discharge the obligations and duties of the employer under the Act, (2) is subject to the jurisdiction of the Office of the Judges of Compensation Claims, and (3) is bound by the orders, findings and decisions of Judges of Compensation Claims to the same extent as the employer. § 440.41, Fla. Stat. (1997). The legislature has further mandated that every policy of workers' compensation insurance contain a provision to carry out the requirements of section 440.41. § 440.42, Fla. Stat. (1997).

The Act also provides for the regulation of compensation carriers in Florida. All carriers desiring to write workers' compensation insurance in Florida must register with the Division of Workers' Compensation; and the Division has the power to revoke the authority of a carrier to write workers' compensation insurance in the event it fails to comply with its obligations under the Act. § 440.52, Fla. Stat. (1997). The Division has the statutory authority to examine an insurance carrier "as often as is warranted to ensure that carriers are fulfilling their obligations under the law . . .." § 440.525, Fla. Stat. (1997).

Consistent with its intent to create an "efficient and self executing system," the legislature has unequivocally stated that the remedies to which a compensation claimant is entitled in the event of misconduct by a carrier shall *only* be as provided in the Act. Section 440.11(4), Florida Statutes (1997) expresses this intention in easily understandable language: "Notwithstanding the provisions of s. 624.155, the liability of a carrier to an employee or to anyone entitled to bring suit in the name of the employee shall be as provided in this chapter, which shall be exclusive and in place of all other liability."

The legislature has thus stated the only remedies available to a compensation claimant from compensation carriers are those provided in Chapter 440, Florida Statutes. And, further fulfilling its intention to create "an efficient and self-executing [i.e., comprehensive] system," the legislature has created remedies for carrier misconduct. These remedies address the type of misconduct plaintiffs allege in their amended complaint.

First, if a carrier "lies" regarding available benefits, sections 440.105(1)(a) and (b)(1-2) make such statement a criminal offense and subjects a carrier to penalties. Section 440.106(3) permits the Department of Insurance to revoke or suspend the authority of a workers' compensation carrier for violation of section 440.105.

If a workers' compensation carrier wrongfully attempts to or deprives or ignores a request for medical treatment, a claimant has a number of remedies. Section 440.20 sets a deadline for the timely payment of compensation claims and establishes penalties for late payments. Section 440.34(3) allows a claimant to recover attorneys'

fees from the carrier in a claim for medical benefits. Further, section 440.192 provides a procedure for resolving any benefit disputes between a carrier and a claimant and sets strict deadlines for dispute resolution.

Under the Act, a carrier may request an independent medical examination concerning compensibility or medical benefits. § 440.13, Fla. Stat. (1997). However, if a claimant believes the exam would be inconsistent with his medical condition, he can seek relief from a judge of compensation claims who has the power to deny a carrier's request. *Watkins Eng'rs & Constructors v. Wise*, 698 So. 2d 294 (Fla. 1st DCA 1997); Fla. R. Work. Comp. P. 4.065(b).

Whether it meets the liking of employees, employers or courts, the legislature has stated in section 440.11(4) that a carrier shall have no liability to a compensation claimant other than as provided in the Act. This must include liability for injuries occurring after the compensable on-the-job injury because there is no other injury for which a carrier might be liable. Carriers do not become involved in compensation claims until after the compensable on-the-job injury; there would be no reason for the legislature to extend immunity to a carrier unless that immunity encompassed conditions occurring after the injury giving rise to the claim. To hold, as plaintiffs urge, that the immunity created in section 440.11(4) applies only to compensable on-the-job accidents would eviscerate the statute.

It is also apparent that carrier immunity under the Act includes immunity for intentional conduct. Carriers act intentionally when they make decisions in the process of adjusting a claim. That the statute expressly extends immunity to a claim

for bad faith under section 624.155, Florida Statues reflects an intent that the remedies for claims handling misconduct, even if intentional or reckless, . . . "shall be as provided in this chapter, which shall be exclusive and in place of all other liability." § 440.11(4), Fla. Stat. (1997) The statute is clear, unambiguous and, as a derogation of the common law, must be strictly construed. It is not for the courts to second guess the legislature.

B. Every Court Considering the Issue Has Held, Like the Court Below, A Workers' Compensation Carrier is Immune Under Florida Law From Suit For Claims Handling Practices.

In the approximately 24 years before the lower court issued its decision in this case, four different courts in six separate cases considered whether a workers' compensation insurer is immune from suit for alleged misconduct in the administration of benefits to an injured employee. In every one of these cases, the court ruled, based upon Florida's comprehensive workers' compensation scheme, that a compensation insurer is immune from such an action. Each court reached this result notwithstanding the egregiousness of the alleged misconduct, the alleged intentional nature of the misconduct, or the tragic consequences resulting from it. The fact that not even one of these courts has allowed a cause of action like the instant one to proceed compels the conclusion that the decision below is correct and that plaintiffs' position is mistaken.

In 1979, the fourth district reviewed an order dismissing an action against a workers' compensation insurer for wrongful failure to authorize necessary medical treatment in connection with a claim for workers' compensation benefits. *Sullivan v.*

Liberty Mutual Ins. Co., 367 So. 2d 658 (4th DCA), *cert. den.*, 378 So. 2d 350 (Fla. 1979). There the court held the employee's sole remedy for the misconduct alleged was under the Workers' Compensation Act. *Id*. at 659. The court noted the first district had previously determined in *Warwick v. Hudson Pulp & Paper Co. Inc.*[2] that workers' compensation liability extends to injuries and aggravation of injuries resulting from medical treatment rendered incidental to a compensable injury. From there the court extrapolated: the employee's "injuries arising from medical treatment, or lack thereof, rendered incidental to his original injury, are likewise compensable by his employer and his employer's carrier . . .," and such relief is his sole remedy. 367 So. 2d at 660. Although the fourth district decided *Sullivan* before the enactment of section 440.11(4), based on its examination of the Workers' Compensation Act as a whole, it found "numerous expressions of intent by the legislature to apply the same liabilities and immunities to the carrier as are applied to the employer." 367 So. 2d at 660. The court also relied upon the following public policy considerations which also apply in this case:

> But, beyond the legalistic objection to appellant's position, we must point out that if delay in medical service attributable to a carrier could give rise to independent third party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. In the practical operation of the plan, minor delays in getting medical service, such as for a few days or a even a few hours, caused by a carrier, could become the bases of independent suits, and these could be many and manifold indeed. The uniform and exclusive application of the law would become honeycombed with independent and

[2] 303 So. 2d 701 (1st DCA 1974), *cert. denied*, 314 So. 2d 776 (Fla. 1975)

> conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified.
>
> It is true, however that, as appellant argues, insurance adjusters should obtain no sanction in overruling or 'directing competent physicians and surgeons.' Flagrant interference by a carrier with rendition of medical care, such as described in this complaint, should generate swift relief **in the commission**. The courts support **the commission** in affording it.

367 So. 2d at 660-661, quoting *Noe v. Travelers Ins. Co.*, 342 P.2d 976, 979-80 (Cal. 1959) (e.s.).

Finally, *Sullivan* affirmed the trial court's conclusion that the employee plaintiff made insufficient allegations to come within any intentional tort exception to the statutory immunity. Plaintiff alleged the insurer intentionally withdrew authorization for medical treatment but not that it intentionally injured the employee. This is like the instant case.

Several years later, the third district decided *Old Republic Ins. Co. v. Whitworth*, 442 So. 2d 1078 (Fla. 3d DCA 1983). In that case a workers' compensation claimant sued his employer's compensation carrier on causes of action including outrage. Plaintiff alleged the carrier willfully breached its obligations to make payments due under the Workers' Compensation Act. The third district granted a petition for writ of prohibition after concluding the circuit court lacked subject matter jurisdiction. The court noted a workers' compensation commissioner formally found that the carrier acted in bad faith by delaying disability payments. The compensation

commissioner awarded extensive benefits and imposed stringent penalties, costs and attorney's fees as a sanction. There was, therefore, no doubt that intentional misconduct in handling of the claim had occurred. Nonetheless, the court was constrained to deny the employee access to the circuit court:

> It is well established that because the Workers' Compensation Act provides a comprehensive, exclusive and adequate administrative remedy for employees' work-related claims, the Circuit Court is without jurisdiction over an employee's action for additional damages for injuries covered by the Act.

Id. at 1079 (citations omitted). Accordingly, in order to determine whether the compensation claimant could proceed in circuit court,[3] the third district considered whether his injury, allegedly resulting from the tort of outrage, was "covered by the Act." *Id.*

The court had no difficulty in concluding that it was. Judge Daniel Pearson wrote for the court:

> The injury for which [plaintiff employee] Byrd sought recovery in the Circuit Court was Old Republic's alleged bad faith refusal to timely compensate him for his disabilities, an injury which is compensable under the Act, and one for which the deputy commissioner in fact imposed punitive costs and attorneys' fees in the compensation proceedings. Plainly, then, the injury is covered by the Act, and a compensation claimant *cannot avoid the exclusivity of the Act and transform a delay in payments into an actionable tort cognizable in the Circuit Court simply by calling that delay outrageous, fraudulent, deceitful, or an*

[3] That this court held in *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992), that prohibition is not the proper appellate remedy for review of an order denying workers' compensation immunity is inconsequential to the substantive immunity questions presented in this case.

intentional infliction of emotional distress.

Id. (e.s.) The court found support for its analysis in provisions of the Act that give the Division of Workers' Compensation authority to punish recalcitrant insurers and in the first district's decision in *Florida Erection Services, Inc. v. McDonald,* 395 So. 2d 203 (Fla. 1st DCA 1981). In that case, the court held the Workers' Compensation Act was broad enough to provide the workers' compensation division with sufficient authority to punish a carrier for willful and intentional bad faith without going outside the parameters of workers' compensation law. The *Old Republic* court also noted that decisions from other jurisdictions agreed with its result. *Id.* at 1080.

The plaintiff in *Old Republic*, like the plaintiff in *Sullivan* and in the instant case, sought to evade the exclusivity of the workers' compensation law by alleging intentional harm. The court accurately concluded plaintiff alleged no more than "intentional non performance of a statutory duty imposed by the Act." *Id.* at 1081. To support its conclusion that such allegations were insufficient to come within the intentional tort exception to immunity, the court relied in part upon the California decision of *Everfield v. State Compensation Insurance Fund*, 115 Cal. App. 3d 15, 171 Cal. Rptr. 164 (Cal. App. 2d Dist. 1981) which was "virtually identical to the case before" it. *Id.*

In *Everfield*, the plaintiff alleged the carrier had intentionally, fraudulently, and in bad faith with intent to injure him, consistently delayed payment, arbitrarily

reduced amounts paid and disregarded a subpoena duces tecum, causing him physical and emotional damages. The California court concluded plaintiff had described claims handling misconduct but the addition of the words "fraudulent, deceitful and intentional" simply asserted the subjective characterization of the plaintiff rather than describing the actual conduct that had occurred.

> If every case in which there is a delay, a change of amount . . . could be brought into court by an unhappy worker by merely alleging that the acts were intentional, deceptive, outrageous and fraudulent without alleging the specific conduct and how it was carried out . . . it would make a shambles of the workers' compensation system . . .. The reasons for the delay, whether intentional or negligent, whether excusable or not, can be well inquired into by the board and where necessary, discipline imposed.

171 Cal. Rptr. at 165-66, quoted in *Old Republic*, 442 So. 2d at 1081. In *Old Republic*, the third district concluded Florida's workers' compensation law "contains mechanisms to ensure timely payment and provides an array of sanctions which may be imposed when a carrier wrongfully withholds payment. Because the availability of these sanctions gives . . . an adequate remedy under the Act, the remedy under the Act is exclusive." *Id.* at 1083.

Following *Old Republic*, the United States Court of Appeals for the Eleventh Circuit reviewed an action for, among other legal theories, intentional infliction of emotional distress against a workers' compensation carrier for mishandling a claim and intentionally mistreating the injured claimant and his wife. *Connolly v. Maryland Casualty Co.*, 849 F.2d 525 (11th Cir. 1988) *cert, denied*, 489 U.S. 1083, 109 S. Ct.

1539, 103 L. Ed. 2d 843 (1989). There the trial court dismissed the complaint for lack of subject matter jurisdiction because the exclusive remedy for a Florida employee covered by workers' compensation insurance is contained in the Florida Workers' Compensation Act. Dispassionately applying the law, as courts - particularly when deciding purely legal questions – must do, the Eleventh Circuit affirmed notwithstanding its acknowledgement that the alleged facts were "egregious." 849 F.2d at 525.

Plaintiff William Connolly was rendered a quadriplegic as a result of an on-the-job injury for which he claimed compensation. Unlike the allegations at bar, he was totally dependent upon the defendant carrier for financial support and medical care. The carrier allegedly pursued a plan to make life so miserable for Mr. Connolly and his wife that he would enter into a "wash-out" settlement agreement with the carrier just to rid himself of its misconduct. 849 F.2d at 526. The carrier entered into an agreement with Mr. Connolly regarding payment of monthly benefits in addition to medical care and providing a motorized wheelchair and a specially equipped van. The carrier never intended to fulfill its obligations under the agreement and for two years intentionally refused requests for delivery of the van. At the same time, the carrier intentionally terminated monthly benefits payments. In addition, conducting itself in a manner tantamount to lying to the claimant about available benefits, the carrier sent representatives to the Connolly home "to coerce Mrs. Connolly into convincing her husband that he should fully settle his claim or have his benefits cut off completely, and that going to court would do no good and should not even be attempted." *Id.*

In taking such coercive action, the court commented, the carrier "intentionally inflicted emotional distress on the plaintiffs." *Id.*

In an effort to avoid workers' compensation immunity and sustain their cause of action, plaintiffs in *Connolly* made the same argument that plaintiffs make in the present case. They submitted their injuries were not covered under the Act because they resulted from intentional conduct and did not arise out of or in the course of employment. The plaintiffs also argued the 1969 version of the Act, which governed their case, did not, as did the version at issue in *Old Republic*, expressly provide that a carrier's exclusive liability was under the Act or for penalties and attorneys' fees for the carrier's bad faith.

The court rejected these contentions as incorrect. It noted that under the 1969 Act, a recalcitrant carrier was subject to statutory penalties and fees. As to their contention that the carrier had acted intentionally, the court responded that, under Florida law, "even if labeled an intentional tort, the failure to make prompt payments is a compensable injury and cannot fall outside the exclusive provisions of the Act." *Id.* at 528. The version of the Act presently at issue contains even more explicit remedial provisions designed to both deter and remedy misconduct, including bad faith, in the process of administering compensation benefits. It is even more clear under the 1997 version than it was in *Connolly* that the misconduct alleged in plaintiffs' amended complaint is addressed in the Act and that the remedies for such are exclusively contained in it.

After *Connolly*, the Fourth District Court of Appeal considered whether

a workers' compensation claimant is entitled to proceed in court on an action for intentional infliction of emotional distress arising out of a failure to pay compensation benefits. *Southeast Administrators, Inc. v. Moriarty*, 571 So. 2d 589 (Fla. 4th DCA 1990) *rev. denied*, 581 So. 2d 1309 (Fla. 1991). The fourth district observed section 440.11(4) provided that "the liability of a carrier to an employee . . . shall be as provided in this chapter, which shall be exclusive and in place of all other liability." *Id.* at 590. The court acknowledged certain claims for intentional torts are outside of the exclusivity provision of the Act. But the court concluded the intentional infliction of emotional distress arose solely from a delay in payment of a claim and the act itself imposes sanctions for delayed payments. The fourth district summarized Florida law on this point: "[R]egardless of the intentional manner in which a decision by a carrier is made, the workers' compensation law provides the exclusive remedy for review of any administrative decision made by a carrier in which the basic of the claimant is that he has been wrongfully deprived of benefits due under the Act." *Id.* at 590.

Plaintiffs in *Southeast Administrators*, like plaintiffs in the instant case, sought to avoid the exclusivity of the Workers' Compensation Act based upon the intentional tort exception as articulated at that time in *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986) and *Lawton v. Alpine Engineered Prods., Inc.*, 498 So. 2d 879 (Fla. 1986). Plaintiffs make this same argument in the present case based upon *Turner v. PCR*. The fourth district, in *Southeast Administrators*, found these arguments "inapposite." 571 So. 2d at 590. It stated: "Here, even if it is assumed that petitioners did intentionally inflict emotional distress, a claim for such

conduct still arises out of petitioners' failure to pay the claim. [Plaintiff's] exclusive remedy is under the act . . .." *Id.*

In March 1994, the Fifth District Court of Appeal decided a similar case. In *Associated Industries of Florida Property & Casualty Trust v. Smith*, 633 So. 2d 543 (Fla. 5th DCA 1994), a workers' compensation claimant sued his employer's compensation carrier seeking damages for intentional infliction of severe emotional distress (outrage). Plaintiff alleged that in connection with his receipt of compensation benefits a psychologist had examined him to determine, among other things, whether he "was capable of returning to work from a psychological viewpoint." 633 So. 2d at 544. The Workers' Compensation Act requires that if a claimant is able to return to work he must conduct a job search in order to continue to receive benefits. The complaint further alleged that during a telephone call with the psychologist, the carrier's representative, instead of determining whether plaintiff could return to work, intentionally asked whether plaintiff was psychologically capable of doing the physical act of applying for a job. The psychologist responded plaintiff could physically do the act but he was not capable of employment until he received psychological treatment. Notwithstanding this, defendants denied plaintiff's psychological treatment and arbitrarily cut off his temporary total disability benefits and demanded that he conduct a job search in order to receive his monies.

The trial court denied the carrier's motion to dismiss on two grounds. First, the trial court held, based upon *Sibley v. Adjustco*, 596 So. 2d 1048 (Fla. 1992), the Workers' Compensation Act does not provide immunity for such a claim and,

second, the complaint stated a cause of action for the tort of intentional infliction of emotional distress. The fifth DCA reversed and remanded with instructions.

Explaining its decision, the fifth district first reviewed Florida law as reflected in *Sullivan*, *Old Republic*, *Connolly* and *Southeast Administrators, Inc.* The court was required "to determine the effect, if any, that *Sibley v. Adjustco*, has on this body of law." 633 So. 2d at 545. The court's analysis of *Sibley* began with the observation that "[t]he question before the Supreme Court in *Sibley* was a very narrow one -- whether the statutory cause of action authorized in section 440.37, Florida Statutes . . . limited the claimant to that statute and required him to satisfy the conditions precedent of that statute." 633 So. 2d at 545. The court accurately recognized that *Sibley* left Florida law unchanged holding only that "the statute provided a supplementary basis for a recovery of damages, not an exclusive basis." *Id.* (Footnote omitted.) The fifth district explained that the *Sibley* court did not pass on the merits of the alleged common law cause of action against the carrier nor did it recognize a previously unknown theory of relief:

> The *Sibley* court was careful to note that it was not deciding whether the plaintiff in that case had a common law cause of action against the workers' compensation carrier for an independent tort based on its employee's alleged conduct. Presumably, on remand, if the lower court determined no independent tort was alleged, dismissal would have been proper. **There is no suggestion that the supreme court was intending to authorize nonstatutory causes of action against workers' compensation carriers that were already limited by statute or case law.**
>
> The law of Florida, confirming the exclusivity of statutory remedies for failure of workers' compensation carriers to pay claims, remains as it was before *Sibley*. The workers'

> compensation carrier shares employer immunity, but, like the employer, loses that immunity when it commits an intentional tort. If a workers' compensation carrier has not merely breached the duty to timely pay benefits but has committed an independent tort against a claimant, the plaintiff may pursue his cause of action in circuit court.

Id. at 545 (citations omitted; e.s.).

The decision of the fifth district in *Associated Industries* teaches that the key to whether a claimant may bring a common law suit against a compensation carrier for misconduct in the claims handling process is whether the claimant has or can allege an independent tort separate from a breach of the workers' compensation insurance contract. In the case at bar, the third district determined plaintiffs did not allege an independent tort. In *Associated Industries*, the fifth district also concluded the complaint did not contain a well-pleaded cause of action for "any independent tort, much less the tort of intentional infliction of emotional distress." *Id.* The court explained that, without more, the carrier's claims handling misconduct does not establish a separate tort. Heeding the earlier cases' admonition that an injured employee cannot transform a breach of the workers' compensation insurance contract into an intentional tort by using words of malice and saying its so, the fifth district wrote:

> In this case, the 'intentional asking' of an allegedly irrelevant question to a third party is not 'intentional infliction of emotional distress;' nor can it be tortious to withdraw benefits based on the answer to an irrelevant question if it is not tortious to deny benefits without asking any question at all. If the complaint is supposed to establish 'outrage' based on the carrier's insistence that the employee conduct a job search, any allegations showing that the carrier's conduct was extortionate, unprivileged, unlawful or

> fraudulent are wholly missing. If the carrier had the right to require a job search as a condition of continuation of benefits, there is no wrongful act; if not, the wrongful termination of benefits for failure to do a job search can be remedied under the statute. With no more facts pleaded, there is no independent tort on which to base the lawsuit and the lower court should have dismissed it with leave to amend.

Id. at 545-546 (footnote omitted). The complaint did not contain well pleaded facts sufficient to allege "the deliberate or reckless infliction of mental suffering on another" and thus contained "no well-pleaded cause of action for any independent tort . . .." *Id.* at 545. For this reason, the court reversed the order denying dismissal.

The decision in *Associated Industries* is an indication the court below decided the case at bar correctly. Consistent with long standing statutory interpretation that carrier and employer are treated equally with respect to workers' compensation immunity, the courts in each decision, acknowledged an intentional tort exception to carrier immunity. Both courts recognized, however, mere claims handling decisions did not provide the necessary factual basis for a claim of intentional infliction of emotional distress because such decisions are not separate from a breach of contractual obligations and therefore cannot constitute an independent tort. And, each court recognized that labeling claims handling misconduct as a malicious or deceitful cannot convert that breach of contract into a tort. The decision in *Associated Industries* instructs that the test for the exception to the general rule of carrier immunity is whether the employee plaintiff states an intentional tort independent of a breach of the workers' compensation contract and that mere claims handling, even offensively insensitive and in bad faith claims handling, will not meet the standard. *Id.* at 1093.

The third district applied that test in the present case and reached the correct result.

The same analysis is also apparent in the most recent case before the decision under review. In *Sheraton Key Largo v. Roca*, 710 So. 2d 1016 (3d DCA), *pet. for rev. den.*, 728 So. 2d 204 (Fla. 1998), a compensation claimant sued her employer, its carrier, the claims administrator and the lawyer and law firm representing the employer/carrier. She alleged intentional infliction of emotional distress for delays in authorizing medical care *ordered* by the workers' compensation judge. The trial court granted the motion to dismiss filed by the defendants' lawyer and law firm but denied the motions on behalf of the employer, carrier and claims administrator.

The alleged facts closely resembled those at bar. After sustaining a compensable on-the-job injury, plaintiff's back condition deteriorated and physicians appointed by the employer/carrier reported she needed emergency surgery to avoid further problems including incontinence and suicidal depression. The carrier refused to authorize the surgery until the employee filed a claim with the workers' compensation court and obtained an emergency hearing. The workers' compensation court authorized depositions of the physicians who each confirmed the surgery was necessary and work-related. When the carrier *still* refused to authorize it, the plaintiff scheduled a second hearing and obtained an order requiring the surgery. When the carrier persisted for several days in failing to authorize the surgery, the employee filed in circuit court. The complaint alleged defendants, knowing the extent of her injury and the necessity for surgery, intended to harm her by refusing to authorize the

surgery.

Citing *de Oca v. Orkin Exterminating Co.*,[4] a decision authored by Judge Cope, the third district remarked that *Sheraton Key Largo* involved another attempt by a compensation claimant to "transmogrify a workers' compensation claim into an intentional tort . . .." *Id.* at 1017. The third district concluded that *de Oca* applied and governed the entire action, including the claim against the carrier.[5]

Each of the previous Florida cases involving similar claims to those at bar have interpreted the Workers' Compensation Act to extend immunity to carriers accused of claims handling misconduct, even egregious intentional misconduct. The courts in each of these cases declined to find an exception to carrier immunity in the absence of a tort truly independent of a breach of the workers' compensation insurance contract. Notwithstanding the egregious and offensive conduct alleged in each of the prior cases, the complaints in those cases, like the instant amended complaint, failed to allege an independent tort. The decision under review is consistent with the analysis and results in the prior cases. Indeed, the presence of administrative penalties for the conduct sued upon has been held by a majority of courts to evidence legislative intent that the remedy for delay, even vexatious delay, remains within the workers' compensation system.

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[4] 692 So. 2d 257 (3d DCA), *rev. denied*, 699 So. 2d 1374 (Fla. 1997).

[5] The court was unable to reverse the failure to dismiss the claim against the employer, carrier and claims administrator as their non-final appeals were unauthorized.

[6] Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §104.05[3] (2003**)**. And, as shall be seen in the following section, the decision below and those in *Sullivan, Old Republic, Connolly, Southeast Administrators, Inc., Associated Industries of Florida Property & Casualty Trust* and *Sheraton Key Largo* are all consistent with this court's decision in *Sibley*.

C. The Decision Below Is Consistent With *Sibley* Because *Sibley* Involved a Tort Independent From a Breach of the Workers' Compensation Contract.

As the third district recognized below, (SA 6), a workers' compensation carrier is not immune from all intentional torts. *See Sibley v. Adjustco, Inc.*, 596 So. 2d 1048 (Fla. 1992). The test is whether the carrier's misconduct constitutes a tort independent from a breach of the workers' compensation insurance contract. Claims handling misconduct does not amount to an independent tort and is not actionable because there are remedies under the Act, however unsatisfactory plaintiffs believe them to be in their individual case.

Whether misconduct constitutes a tort independent of a breach of contract depends upon whether such misconduct involves acts that are separate, i.e., independent, from acts that breached the contract. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1996) ("an independent tort . . . requires proof of facts separate and distinct from the breach of contract"). Fraud is the type of conduct that

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[6] Plaintiffs' extensive reference to foreign law notwithstanding, a "minority of states allow this type of suit." Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §104.05[3] (2003**)**.

typically might satisfy the standard. *See Id.* The claim in *Sibley* involved fraud on the part of the claims adjuster. As plaintiffs Aguilera describe it in their brief, "Mr. Sibley claimed 'that his statement was fraudulently edited [by the adjuster] to deprive him workers' compensation benefits.'" Petitioners' brief at 23-24. *Sibley* also involved an allegation that the adjuster acted with the intention of depriving the compensation claimant of benefits. Neither allegations of fraud nor of an intention to coerce a settlement or otherwise deprive benefits are present at bar.

While fraud is a separate tort from a breach of the workers' compensation insurance contract because it involves proof of facts that are different from those required to establish a breach of contract, as the court below accurately noted, the instant claim for intentional infliction of emotional distress does not. The third district was therefore correct in concluding such claim does not constitute an independent tort. Contrary to plaintiffs' suggestion in their brief, there is a meaningful distinction between fraud and the conduct alleged in the amended complaint in the present case. Under *HTP, Ltd. v. Lineas Aeareus Costariccenses*, fraud is an independent tort; the instant claim is not.

A cursory comparison of the claims in plaintiffs' amended complaint for intentional infliction of emotional distress (Counts II and III) with the claim for breach of contract (Count IV) reveals that the factual allegations of misconduct in the three counts are word-for-word identical. All relate to the alleged failure to timely provide benefits Mr.

Aguilera claims he was due "under the policy of insurance with the [d]efendant." (A 11)

Although plaintiffs contend in their brief that they have alleged an independent tort, they fail entirely to point to a factual allegation in their claims for intentional infliction of emotional distress that differs from the facts alleged in their claim for breach of contract. They make no effort to support their contention with the analysis required under *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.* Plaintiffs' contentions in this regard, however, reflect their recognition that they must allege a tort separate and independent from a breach of the workers' compensation insurance contract. They simply have failed to plead such and for this reason, perhaps, they avoid even attempting to show the court they have met the *HTP, Ltd.* standard. In any event, as a matter of law they could not meet the standard because, stripped of the conclusory hyperbole, this is no more than a claim for delayed benefits.

Had the amended complaint in the instant case alleged a tort independent from a breach of the workers' compensation insurance contract, it could be said that the court below misapplied *Sibley*. Since the amended complaint does not allege an independent tort, there is no misapplication of *Sibley*; indeed, the decision below is consistent with *Sibley*.

[7]

As the Fifth District Court of Appeal has observed, Florida law regarding the exclusivity of statutory remedies for failure of workers' compensation carriers to pay claims remains as it was before *Sibley*. *Associated Industries of Florida Property & Casualty Trust v. Smith*. "If a workers' compensation carrier has not merely breached the duty to timely pay benefits but has committed an independent tort against a claimant, the plaintiff may pursue his cause of action in circuit court." 633 So. 2d at 545. Because that is not the case here, there is no misapplication of *Sibley*.

D. The Court Below Did Not Misapply *Turner* Because Defendants Were Permitted to Engage in the Conduct Sued Upon in Adjusting Aguilera's Claim and Because the Allegations Do Not Meet *Turner's* Objective Test.

Section 440.11, Florida Statutes states, "Notwithstanding the provisions of s. 624.155, the liability of a carrier to an employee or to anyone entitled to bring suit in the name of the employee shall be as provided in this chapter, which shall be exclusive and in place of all other liability." § 440.11, Fla. Stat. (1997) On its face, the statute provides that *all* liability of a workers' compensation carrier to an employee shall be under the provisions of the Act, and not pursuant to common law claims or section 624.155. However, this court has indicated the workers' compensation

[7] Because the decision below is consistent with *Sibley* and with, as is set forth in the following section, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), defendants respectfully submit this court has improvidently granted jurisdiction in this case. Defendants ask that the court reconsider that determination and dismiss the instant petition.

statutes were not intended to bar recovery for intentional tortious conduct. *See Sibley v. Adjustco, Inc*.

[8]

Thus, under the established standards of this court, a carrier would not be immune from suit where, *under an objective standard*, the carrier engages in independent conduct which is substantially certain to result in injury or death to the employee. *See Turner v. PCR, Inc.*, 754 So. 2d 683, 686-87 (Fla. 2000) (as to an employer, exception to workers' compensation immunity exists where employer knew or should have known conduct complained of was substantially certain to result in injury or death); *Sibley*.

Applying this standard to an action against a workers' compensation carrier, courts must give effect to the well settled law in this state and around the country[9] that a claimant cannot avoid the exclusivity of the Act and transform delay in medical service, payments or other benefits into a cognizable tort action by calling the delay outrageous, fraudulent, deceitful or an intentional infliction of emotional distress; "[t]he temptation to shatter the exclusiveness principle by reaching for the tort weapon is all to obvious" in delayed benefits cases. Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §104.05[3] (2003**)**.

Such courts must also give credence to the principle that "an actor is

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[8] The court in *Sibley* did not construe the immunity provisions of section 440.11. Rather, the court construed section 440.37, Florida Statues (1989).

[9] *See* cases collected at Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 104.05[3] n. 38 (2003).

never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." Restatement (Second) of Torts § 46, comment g (1965). Specifically, as this court has established as a matter of Florida law, an insurer is not liable for intentional infliction of emotional distress where it does no more than take steps it is entitled to take in adjusting a claim under an insurance policy even when there are egregious or even tragic results. In *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985), this court wrote:

> Nonetheless, looking at the facts in the light most favorable to [the plaintiff insured], the facts as a matter of law are not 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' Rather, the insurance company *according to the terms of the policy* had the right to demand proof of ineligibility for Medicare. Although this demand and the withholding of further benefits had tragic results, and although we must assume from the jury's verdict that it found Metropolitan was in reckless disregard of the potential for such tragedy, Metropolitan *did no more than assert legal rights in a legally permissible way*. As such, Metropolitan's actions are 'privileged under the circumstances.'
>
> We therefore quash the decision of the district court insofar as it holds that Lucille McCarson had a cause of action for intentional infliction of emotional distress . . ..

Id. at 279. (e.s.) Thus, consistent with the legislative intent that matters arising from compensable on-the-job injuries should be addressed exclusively under the provisions of the Workers' Compensation Act, the standard for the exception to the exclusivity rule is high. A plaintiff must allege that the carrier took actions beyond those that it was privileged to take under the policy in adjusting the claim. And, that conduct must

satisfy the objective test stated in *Turner*.

In the present case, the well pleaded allegations of the amended complaint plead only actions Inservices was entitled to take in the course of adjusting Mr. Aguilera's claim for compensation benefits. To the extent the amended complaint alleges acts that were not privileged under the insurance policy, such allegations do not meet the requirements of *Turner*.

Applying *Metropolitan Life Ins. Co. v. McCarson*, it is plainly apparent that, while the alleged facts of the instant case engender sympathy, such considerations, or even consideration of tragic results (which are not alleged here), are inappropriate. The facts of the prior Florida cases, where courts have considered whether workers' compensation immunity applies to allegations of claims handling misconduct were just as egregious, if not more so, as the facts alleged here. *E.g.*, *Sullivan* (allegedly wrongful withdrawal of authorization for medical treatment resulted in loss of a foot); *Connolly* (carrier intentionally made life miserable for quadriplegic claimant and spouse to force settlement of a claim, including lying to claimant's spouse regarding fact that benefits would be cut off completely if claimant did not settle); *Sheraton Key Largo* (alleged wrongful refusal to authorize emergency surgery although necessity of same was verified by carrier appointed doctors).

Putting aside, therefore, consideration of whether the alleged circumstances are sympathetic, it is apparent the conduct alleged on the part of Inservices consisted of permissible garden variety claims handling or is otherwise not actionable under *Turner*. Plaintiffs allege Inservices denied Mr. Aguilera authorization

to be treated by a urologist, terminated benefits, cancelled "some" (A 7) scheduled medical tests, declined authorization for emergency surgery to seek a second opinion, and insisted on medical tests that were painful. Although these decisions might have been ill advised or ultimately deemed a breach of contract sanctionable under the Act, they are all traditional, permitted claims handling activities. As such, under *Metropolitan Life Ins. Co. v. McCarson*, they are not actionable even if they were not protected by workers' compensation immunity.

Nor do the remaining factual allegations satisfy the *Turner* objective test. It cannot be said, nor is it alleged, that the carrier knew or should have known that appearing at Mr. Aguilera's appointment with a urologist was substantially certain to result in injury or death to Mr. Aguilera. Nor could that be said (and it is not alleged) about lying about available benefits or about the adjuster's request that Mr. Aguilera not tell his lawyer she came to the appointment.

[10] Viewing the alleged facts dispassionately, and consistent with the analysis and result of every previous Florida case considering the same issue, the amended complaint does not fit within the *Turner* exception to workers' compensation immunity. Because it alleges only conduct in which defendants were permitted to engage in adjusting Mr. Aguilera's claim.

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[10] In any event, the allegation that respondents "[l]ied to the Plaintiff, the Plaintiff's worker's compensation counsel, and other physicians about available benefits and/or the Plaintiff's medical condition" is a conclusory allegation and not a well pleaded allegation of ultimate fact. Accordingly, this court should not accept it as true. *See Sickon v. The School Board of Alachua County, Florida*, 719 So. 2d 360 (Fla. 1st DCA 1998) ("We take as true only the well-pleaded factual allegations of the petition.").

E. Specific Responses To Certain Of Plaintiffs' Contentions

Below, Inservices specifically responds to certain points plaintiffs advance in their brief.

Contention

"The real issue, in this context, is whether the allegations and proof meet the burden of §46 of the Restatement (2nd) governing 'extreme and outrageous' conduct . . .." Petitioners' Brief at 35.

Response

> The issue is whether the complaint pleads a cause of action meeting any exception to the general rule of workers' compensation carrier immunity. This is a high standard that, as to a carrier, has not yet been met in any reported Florida case including this one.

Contention

"The trial court ably rose to the challenge here and determined that this case 'far exceeds standards of humanity.' " Petitioners' Brief at 35.

Response

> The trial court's comment shows that its ruling was not based on any consideration of the immunity rule or its statutory, public policy and case law underpinnings. Rather, it reveals it was influenced in ruling on a purely legal issue by considerations of sympathy.

Contention

". . . the Defendants engaged in a pattern of behavior . . . for no other purpose but the intentional one of inflicting injury." Petitioners' Brief at 35.

Response

> There is no factual basis for this purely conclusory statement. Nor is there a factual basis alleged in the amended complaint supporting a possible inference of such.

Contention

"Plaintiff did not sustain emotional injury from his original work related injuries – but from the carrier's subsequent actions." Petitioners' Brief at 35.

Response

> Absent a case meeting the exception to the exclusivity of the act, the Workers Compensation Act covers all matters arising from the original compensable injury, including claims handling issues. If the carrier were not immune from suits for claims handling misconduct, the statutory immunity set forth in section 440.11(4) would be meaningless.

Contention

"The combination of unjustified power and economic strength by Inservices, the impotence of Aguilera on the other (sic), and the abuse of that relationship by Inservices at a time when Aguilera was in weakened physical condition should be viewed by a civilized society as outrageous." Petitioners' Brief at 36-37.

Response

> Workers' compensation carriers are entitled to investigate and adjust issues of causation and medical necessity; the amended complaint alleges garden variety claims handling toward that end.

Contention

"Any alternative holding [to that urged in the dissenting opinion below] leaves the carrier "free to proceed and behave in any manner it desires." Petitioners' Brief at 37.

Response

> Respectfully, the holding of the court below does not leave

> carriers free to torture compensation claimants. It simply reflects the amended complaint failed to state an independent intentional tort meeting the requirements to avoid the exclusivity of the Workers Compensation Act. Carriers in general are subject to the penalties and sanctions set forth in the Act should they breach their duties to claimants. This is an inadequate remedy from plaintiffs' understandable but not legally sound self interested point of view. But, as Professor Larson has written regarding this very issue, "[s]ince when . . . has it been necessary for compensation acts to compensate claimants fully?" Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §104.05[3] (2003**)**. There are many, many employees for whom the statutory workers compensation scheme must be available.

F. Conclusion As to Point I

Section 440.11(4), Florida Statutes immunizes compensation carriers from liability except as provided in the Workers' Compensation Act for negligent or intentional claims handling misconduct. The intent of the legislature is to avoid costly delays, expenditures and skirmishing that would unquestionably occur if employees were permitted to try their luck at a greater recovery in tort whenever something disagreeable occurs in the benefits administration process. The temptation of employees to make an end run around the Act's comprehensive scheme for benefits administration would undermine the object of an efficient and inexpensive delivery of benefits. The number of lawsuits like the instant one will greatly increase with the inevitable inconsistent results that will come from a case by case determination as to whether each particular incident of alleged claims handling misconduct warrants setting aside the statutory remedies and concomitant carrier immunity. Such a result would subvert the intent of the legislature that the system of workers' compensation operate

separate and apart from the judicial system and the law of torts.

Such a result hardly means workers' compensation carriers are free to behave in any manner they desire. There are sanctions and penalties under the Act that serve to punish and deter claims handling misconduct. The Division of Workers' Compensation has the right to examine carriers' compliance with their obligations under the Act; and it has the right to revoke a carrier's authority to write workers' compensation insurance in Florida in the event of misconduct.

Even if the court is prepared to recognize that claims handling misconduct may give rise to an actionable independent tort, such a tort is not alleged in this case. The allegations in this case describe a delay in medical benefits while the carrier, justifiably or not, satisfied itself that the request for further care and surgery was employment related and medically necessary. A carrier is permitted to take such steps in adjusting a claim even though doing so may cause disagreement, discomfort, resentment or worse on the part of the claimant. There are no allegations defendants engaged in the conduct sued upon for the purpose of coercing Mr. Aguilera into giving up rights he otherwise had, or for any other unlawful purpose. The third district correctly determined Mr. Aguilera's remedies for an unjustified delay in the receipt of medical benefits did not give rise to an independent tort under *Turner*. The decision below should be left intact.

II. This Court Should Decline To Consider Plaintiffs' Constitutional Argument Because It Did Not Accept Jurisdiction For That Purpose, Plaintiffs Have Demonstrated A Lack of Interest In The Issue And The Court Has Previously Held the Act Constitutional.

This court did not accept jurisdiction of this case to consider a constitutional

issue. As plaintiffs write in their brief, this case is before the court "based on express, direct conflict with *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) and *Sibley v. Adjustco, Inc.*, 596 So. 2d 1048 (Fla. 1992)." Petitioners' brief at 1. This is because plaintiffs did not seek review in this court based upon a constitutional challenge. In fact, plaintiffs' lack of genuine interest in challenging the constitutionality of workers' compensation immunity (as applied) is reflected on the record.

In their answer brief in the court below, plaintiffs did not even cite the Florida Constitution or make argument based upon the count in the amended complaint seeking a declaration that workers' compensation immunity is unconstitutional in this case. The first opinion of the court below (before rehearing) reversed the denial of defendants' motion to dismiss as to plaintiffs' count seeking a declaratory judgment workers' compensation immunity is unconstitutional as applied. Plaintiffs did not seek rehearing of that determination. When Inservices sought rehearing or, in the alternative, a certified question to this court, plaintiffs agreed this court should review the case but not because of the constitutional claim. When the court below issued its decision on rehearing, plaintiffs filed a motion to certify a question to this court but made no mention whatsoever of the importance of doing so for constitutional reasons.

In this court, it is apparent from the cursory treatment plaintiffs give to the constitutional issue that they raised the point because they arguably can, *Trushin v. State*, 425 So. 2d 1126 (Fla. 1982),

[11] and, perhaps, to give *amicus curiae* the chance to raise for the first time in this case

[11] In *Trushin*, the court reviewed a constitutional challenge not otherwise properly before it "because the argument surrounding the statute's validity raised a fundamental error." 425 So. 2d at 1130. Fundamental

a challenge to workers' compensation immunity based upon Article I, Section 21 of the Florida Constitution.[12]

In any event, "[t]his court has repeatedly held the Act constitutional. *See e.g. Mullarkey v. Florida Feed Mills, Inc.*, 268 So. 2d 363 (Fla. 1972), *appeal dism.*, 411 U.S. 944, 93 S.Ct. 1923, 36 L.Ed. 2d 406 (1973)." Petitioners' brief at 38. *See also Newton v. McCotter Motors, Inc.*, 475 So. 2d 230 (Fla. 1985), *cert. denied*, 475 U.S. 1021, 106 S. Ct. 1210, 89 L. Ed. 2d 323 (1986); *Sasso v. Ram Property Management*, 452 So. 2d 932 (Fla.), *appeal dismissed*, 469 U.S. 1030 (1984); *Acton v. Fort Lauderdale Hospital*, 440 So. 2d 1282 (Fla. 1983); *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981). Even the Indiana case that plaintiffs rely on in their amended complaint to support their request for a declaratory judgment, *Sims v. U.S. Fidelity & Guaranty Co.*, 730 N.E. 2d 232 (Ind. Ct. App. 2000), has been reversed. *Sims v. U.S. Fidelity & Guaranty Co.*, 782 N.E. 2d 345, 348 (Ind. 2003) (holding statute vesting exclusive jurisdiction in Workers Compensation Board to determine whether compensation carrier committed independent tort in adjusting claim does not unconstitutionally deprive plaintiff of trial by jury). Further attention to this issue in this case is not warranted.

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error is not a concern in this case, and plaintiffs make no such contention.

[12] In their amended complaint, plaintiffs sought a declaratory judgment that section 440.11(4), Florida Statues (1997) is unconstitutional because it violates Article I, Section **22**, Florida Constitution. Never, until the Academy of Florida Trial Lawyers submitted its *amicus* brief, has Article I, Section **21** even been mentioned in this litigation much less litigated or ruled upon. Respectfully, it is an abuse of the *amicus* privilege for strangers to the case to raise for the first time in the state's highest court an issue that does not exist between the parties.

CONCLUSION

This court should dismiss the petition for want of conflict jurisdiction. Alternatively, the court should approve the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this ____ day of September 2003 to Friedman & Friedman, P.A., 2600 Douglas Road, Suite 1011, Coral Gables, Florida 33134; Lauri Waldman Ross, Esq., Lauri Waldman Ross, P.A., Two Datran Center, Suite 1612, 9130 S. Blvd., Miami, FL 33156; Barbara B. Wagner, Esq., Wagenheim & Wagner, P.A., 2101 N. Andrews Avenue, #400, Fort Lauderdale, FL 33311; Barbara Green, Esq., Barbara Green, P.A., 1320 South Dixie Highway, Suite 450, Coral Gables, FL 33146; and Diran V. Seropian, Esq., Caruso & Burlington, P.A., 1615 Forum Place, Suite 3-A, West Palm Beach, FL 33401.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Joshua D. Lerner

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