THE FLORIDA SUPREME COURT

S. Ct. Case No.:
CASE NO.: 3D01-867

RODRIGO AGUILERA and PATRICIA AGUILERA, his wife,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS[1]

Rodrigo Aguilera ("Aguilera") was involved in a work-related accident when he was struck by an electric forklift in April, 1999. (App. 2). Inservices, Inc. f/k/a Managed Care USA Services, Inc. ("Inservices") provided workers compensation benefits to Aguilera's employer, and referred Aguilera to a clinic where he was treated and discharged to return to work with restrictions. (App. 2). A few weeks later, Aguilera began to complain of kidney and bladder pain. After examination by two doctors, both of whom recommended that Aguilera not return to work, Aguilera's workers' compensation attorney requested examination and treatment by a board certified urologist. Inservices denied the request, deeming the injury **not** work related. (App. 2).

In June 1999, Aguilera notified Inservices that he was passing feces through his urine and was in need of immediate urological care. Aguilera was advised, instead, three days later that his workers compensation benefits were being terminated. Inservices then denied the emergency request for medical care claiming it was not medically necessary. (App. 2). Aguilera's treating physician advised Inservices several weeks later that his condition had deteriorated. A retrograde

[1] There are two appellate decisions. The first issued October 31, 2001, and the second on December 26, 2002, after a member of the panel majority switched his vote. Both opinions are attached as appendices here. Except where specifically noted, all references are the December 26, 2002 decision.

urethrogram revealed that Aguilera had a hole in his bladder, and Aguilera's need for medical care was now urgent. (App. 3). In response, Mippy Heath, a new case manager assigned to Aguilera's case, rejected Aguilera's request that a general surgeon perform emergency surgery on his fistula. Heath instead insisted on a second opinion and the administration of painful tests, contraindicated by Aguilera's medical condition.

After urinating feces and blood for over ten months, and seeing six doctors in addition to his treating physician, Aguilera's surgery was finally authorized on March 22, 2000. Aguilera filed suit against Inservices, Inc. and Heath asserting *inter alia* a claim for intentional infliction of emotional distress. Aguilera alleged that the Defendants lied to him concerning available benefits, refused to schedule appointments with physicians, wrongfully attempted to deprive or ignored his request for medical treatment, and insisted upon tests to evaluate him which were contraindicated by his medical condition. (App. 7). The Defendants moved to dismiss on various grounds, including the defense of workers compensation immunity. (App. 3). The trial court denied the motion, finding that the Defendants' conduct was intentional and outrageous. (App. 3). Defendants appealed the denial of their motion to dismiss, claiming they were entitled to worker's compensation immunity. (App. 2).

The Third District issued its first opinion on October 31,

2001. (App. 20-36). Judge Shevin, writing for the majority, quoted *verbatim* from the Plaintiff's amended complaint (App. 20-23), and concluded that this case went "beyond mere claims mishandling allegations and asserts independent acts that rise to the level of independent torts." (App. 25). Among other things, Aguilera's amended complaint "asserts intentional tortious behavior by Inservices and by the case manager – who went so far as to show up at Aguilera's urologist appointment and suggest that he lie to his attorney and say she was never there." (App. 25). The majority cited Turner v. PCR, Inc., 754 So. 2d 683, 684 (Fla. 2000) as recognizing "an intentional tort exception to the worker's compensation statutory scheme," and found that this case met the standard with its allegations that Defendants "intentionally engaged in conduct that was substantially certain to result in injury or death." (App. 26). The majority likewise concluded that it was "of no moment that the action in this case is against the carrier and case manager, and not against the employer," reasoning:

> It follows logically that if a carrier is shielded by the same immunity as an employer ... the carrier is also amendable to suits for intentional torts, under the exception as the employer would be.... There is no logic to making a distinction between the carrier and the employer for purposes of an intentional tort claim, when no such decision is made for any other purpose. Indeed, as recognized in Sullivan [v. Liberty Mut. Ins. Co., 367 So. 2d 658, 661 (Fla. 4th DCA), cert. denied, 378 So. 2d 350 (Fla. 1979)] "it appears the immunity granted under the statute was not intended to cover instances where a carrier intentionally harms the employee." It is beyond pre-

> adventure to assert that a carrier can commit intentional torts with impunity when the employer cannot do to the same. (App. 26-27).

Judge Gersten filed an extensive dissent, outlining "remedies" in the workers compensation act that Aguilera could pursue. (App. 29-36). The Defendants moved for rehearing and, on December 26, 2002, the panel withdrew its prior opinion, and adopted Judge Gersten's dissent as the majority opinion.[2] It concluded that Aguilera had no common law intentional tort claim because the workers compensation act "contain[ed] provisions addressing his allegations...". (App. 7). Among other things, the panel pointed to §440.105, Fla. Stats. (2000) which criminalizes "lies" regarding available benefits and subjects the carrier to penalties. (App. 7, n.2). While it "empathize[d] with Aguilera's plight in resolving his medical problems," (App. 4), the new majority characterized Aguilera's allegations as involving improper "claims handling" decisions which could not constitute "independent torts." (App. 9).

The panel asserted that Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000), had no application to this case because the workers compensation carrier "had no part in causing Aguilera's injuries." It recognized that Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992) stands for the proposition that "an adjuster who fraudulently edited the statement of a claimant ... result[ing] in the denial of benefits **constitutes an intentional**

[2] Senior Judge Nesbitt was the swing vote on both decisions.

act independent of the handling of a workers compensation claim" (App. 6, emphasis added), adding that "The workers compensation scheme does not immunize a compensation carrier from wrongdoing which occurs independently of its claims handling." (App. 6). However, lying to a claimant about available benefits constituted mere claims handling. (App. 9).

In a vigorous dissent, Judge Shevin disagreed, noting that "the majority opinion ignores the impact of Turner and apparently agrees with Defendants' argument that once an employee files a claim, the employee has already been injured, and the carrier is free to behave in any manner it desires." (App. 19). The "remedies" outlined by the majority did not compensate Aguilera at all for the injuries he had sustained as a result of the **carrier's** wrongful act because:

> The carrier's actions including alleged lies as to available benefits, refusal to schedule physician appointments, attempts to deprive him of medical care, and insistence upon tests contraindicated by his medical condition amount to intentional wrongful action **distinct** from its breach of contract. As to the case manager, as in Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992), Heath's acts of showing up at Aguilera's urologist appointment, and demanding that he lie to his attorney about her presence to cover up her actions, amount to intentional torts, independent of handing the workers' compensation claim. Here, as in Sibley, the independent tort should not be blocked by the improper application of the immunity. (App. 19).

STATEMENT OF JURISDICTION

Aguilera seeks further review, based on the District Court's misapplication of Turner v. PCR, Inc., 754 So. 2d 683 (Fla.

2000) and Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992). The misapplication of two controlling decisions of this Court creates express, direct conflict.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review a District Court decision which expressly and directly conflicts with a decision of this Court on the same issue of law. Fla. Const. art. V., §3(b)(3). Decisional conflict may be created by a conflict in legal principles appearing on the face of the decision OR the misapplication of a specific holding previously announced by this Court. See Rosen v. Florida Ins. Guar. Ass'n, 802 So. 2d 291, 292 (Fla. 2001); Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1272 (Fla. 2000); Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1040 (Fla. 1982).

Section 440.105(4)(b), Fla. Stat. (2000) makes it unlawful for any person to knowingly make false statements for the purpose of denying workers compensation benefits. However, that remedy is **not** exclusive and does not preclude a common law intentional tort action. See Sibley v. Adjustco, Inc., 596 So. 2d at 1051 (interpreting predecessor statute §440.37, Fla. Stat. (1989)). There can be no meaningful distinction between editing a claimant's statement to leave out material facts, and lying to the claimant directly about the benefits he has available. Both constitute independent, intentional torts.

This Court has recognized an intentional tort exception to

workers compensation immunity. Turner v. PCR, Inc., 754 So. 2d 683, 686-87 (Fla. 2000). Based on the facts as alleged, the intentional tort exception applies. The impact of the District Court's decision cannot be minimized – it authorizes torture in the state of Florida, because it leaves the carrier "free to behave in any manner it desires." (App. 19). This cannot be the legislature's intent in creating the workers compensation scheme.

The Third District's misapplication of Turner and Sibley creates express, direct conflict and warrants the further exercise of this court's jurisdiction here.

ARGUMENT

A WORKERS COMPENSATION CARRIER AND ITS ADJUSTER ARE NOT IMMUNE FROM SUIT UNDER TURNER AND SIBLEY FOR THEIR OWN INTENTIONAL TORTS, INCLUDING LYING TO CLAIMANTS.

Florida's workers compensation scheme was designed "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful re-employment at a reasonable cost to the employer." §440.015, Fla. Stat. (1999). In exchange for affording employees those benefits, an employer is shielded by statutory immunity from suit. §440.11, Fla. Stat. (1999). However, this Court "has recognized an intentional tort exception to the workers compensation statutory scheme .... [W]orkers compensation law does not protect an employer from liability for an intentional tort against an employee." Turner

v. PCR, Inc., 754 So. 2d 683, 686-87 (Fla. 2000).[3]

In Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992), Sibley was hospitalized due to a heart attack while unloading his truck. An adjustor for a workers compensation carrier took a statement from Sibley while he was hospitalized, but edited it. When the carrier denied benefits based on the edited statement, Sibley sued. Sibley's action was not against the adjustor at all, as the District Court's decision implies. Id. at n.2. Instead, Sibley sued the workers compensation carrier for the acts of its adjuster, claiming that its adjuster committed intentional, fraudulent and bad faith acts in taking a statement concerning the claim. The trial court dismissed Sibley's action on the carrier's motion, based on workers compensation immunity. The district court affirmed, but on a different basis.

The district court noted that "the workers compensation statute presents a comprehensive legislative effort to provide protective and compensatory mechanisms to working people who experience physical injury or loss in carrying out the employer's objectives." Id. at 1050. To accomplish these

[3] For purposes of workers compensation immunity, our courts have treated "employer and insurer" and "employer and carrier" interchangeably. Carroll v. Zurich Ins. Co., 286 So. 2d 21, 22 (Fla. 1st DCA 1973), appeal dismissed, 297 So. 2d 568 (Fla. 1974). The immunity granted under the workers compensation statute "was **not** intended to cover instances where a carrier intentionally harms the employee." Sullivan v. Liberty Mutual Ins. Co., 367 So. 2d 658, 661 (Fla. 4th DCA), cert. den. 378 So. 2d 350 (Fla. 1979).

objectives, the district court explained that the legislature enacted section §440.37, which criminalized the preparation of false statements for the purpose of denying payment. Id. The district court found that the interlocking provisions of §440.37 controlled, and concluded that the legislature intended this to be the **sole** means for a claimant to obtain relief for the behavior to have been committed by the carrier and its adjustor. However, the district court certified the question to **this** Court, which quashed the district court's decision. Id. This Court held that: "[S]ection 440.37 provides only an alternative cause of action rather than the exclusive cause of action under these circumstances." Id. Moreover, "those statutory provisions were not intended to bar recovery for intentional tortious conduct...." Id. "[T]he legislature was providing an alternative cause of action and not eliminating a common law right of action for an intentional tort." Id. at 1051.

The majority decision follows the analysis this Court discredited in Sibley. Once again, the district court looked to the workers compensation act as providing a claimant's "exclusive remedy for misconduct in the rendition of medical care...". Id. at 5. Once again, the district court looked to a criminal statute as the sole basis of recourse where the carrier lied to a claimant regarding available benefits, i.e., §440.105, Fla. Stats. (2000). Id. at 7, n.2. In fact, section 440.105, Fla. Stat. (2002), enacted in 1994, replaced section

440.37, repealed effective January 1, 1994. Ch. 93-4, §109, Laws of Florida. **Neither** version of the statute is exclusive. Instead, the statute merely provided alternatives to available common law intentional tort remedies. Sibley v. Adjustco, Inc., 596 So. 2d at 1051.[4]

There can be no meaningful distinction between editing a claimant's statements, to leave out material facts, so that he can be deprived of benefits, Id. at 1049-51, and lying to the claimant directly about the benefits he has available. (App. 7). Both are "independent torts," not mere claims management decisions. Both use false and fraudulent means to deprive the claimant of necessary medical care, and concomitant medical benefits.

Consider what happened here. Aguilera asserted a workers compensation claim, because he was passing feces through his urine. In response, the carrier cut off his benefits entirely. It lied to Aguilera about his existing benefits, and its claims representative instructed Aguilera to lie to his own lawyer. When Aguilera's treating physician advised the carrier that he had a hole in his bladder, and the situation became urgent, Aguilera was forced to see six other doctors, and undergo a

[4] The difference between the statutes is that §440.37 authorized a private statutory cause of action, eliminated in §440.105, Fla. Stat. (2000). Sibley did not turn on the private right of action in §440.37, however, but on the litigant's retention of his right to sue at common law for intentional torts. (i.e., fraud).

barrage of tests contraindicated by his medical condition. During this entire period – over ten months – Aguilera sustained serious injury, and was subject to infection and certain death, while feces passed through his bladder.

"Torture" is defined *inter alia* as "the infliction of intense pain to punish, coerce, or afford sadistic pleasure." Webster's New Collegiate Dictionary (1973 ed.). The majority's decision authorizes torture, because it leaves the carrier "free to behave in any manner it desires." This cannot be the intent of the legislature in creating the workers compensation scheme. (App. 19). It likewise cannot be the law of this state.

This Court has jurisdiction based on the district court's misapplication of Turner and Sibley. Further review is warranted.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully invokes this Court's jurisdiction under Fla. Const. art V, §3(b)(3) and requests the Court to (1) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) quash the decision of the District Court of Appeal, Third District.

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

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