SUPREME COURT OF FLORIDA

RODRIGO AGUILERA and
PATRICIA AGUILERA, his wife,

Petitioners,

Case No.: SC03-368

vs.

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

Respondents.
_____/

ANSWER BRIEF ON JURISDICTION

On Notice to Invoke the Discretionary Jurisdiction
of the Supreme Court to Review a Decision
of the Third District Court of Appeal

Joshua D. Lerner
Florida Bar No. 0455067
Rebecca A. Brownell
Florida Bar No. 0507059
RUMBERGER, KIRK & CALDWELL
Brickell Bayview Centre, Suite 3000
80 S.W. 8th Street (33130-3047)
Post Office Box 01-9041
Miami, Florida 33101
Telephone: (305) 358-5577
Telecopier: (305) 371-7580

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent Inservices, Inc. provided workers' compensation benefits to the employer of petitioner Rodrigo Aguilera. (App. 2) Aguilera was injured in a work related accident when a fork lift struck him in April 1999. (App. 2) Inservices assigned respondent Mippy Heath, a nurse case manager, to Aguilera's case. (App. 3) This litigation does not arise from Aguilera's April 19, 1999 on the job fork lift accident.

Rather, petitioners filed suit in circuit court alleging misconduct in the handling of Aguilera's claim for worker's compensation benefits arising from that accident. (App. 3) Specifically, petitioners, Mr. Aguilera and his wife, sought damages for common law bad faith and breach of contract against Inservices, intentional infliction of emotional distress against Inservices and Heath, as well as a declaration that the workers' compensation exclusivity rule was unconstitutional on the grounds that it eliminated claims for subsequent malfeasance by the carrier. (App. 3)

Respondents Inservices and Heath moved to dismiss based on worker's compensation immunity. (App. 3) The trial court denied the motion and respondents appealed. (App. 3-4)

The Third District Court of Appeal (on motion for rehearing) reversed and remanded with instructions to the trial court to dismiss the complaint. (App. 10)

The court explained, "established precedent and the plain language of the Workers' Compensation Act requires that we reverse." (App. 4)

The district court noted that under *Old Republic Insurance Co. v. Whitworth*, 442 So. 2d 1078 (Fla. 1983) petitioners were permitted to bring a tort action against a worker's compensation carrier only if the injury for which they sought recovery was not covered under the Act. (App. 4) The court found "all of the allegations relate to the defendants['] alleged breach of contractual obligations under the worker's compensation policy . . ." and Mr. "Aguilera's injuries arising from any delays in medical treatment were incidental to his original injury and compensable [under the Act] by his employer's compensation carrier." (App. 9) This finding -- that none of petitioners' allegations described conduct independent of respondents' administration of Mr. Aguilera's claim for worker's compensation benefits -- was key to the court's conclusion that worker's compensation immunity bars this action. (App. 8-9) Because the court found petitioners had alleged no conduct separate from a breach of the insurance contract providing worker's compensations benefits, and because "a carrier is immune from tort liability for acts taken to discharge its obligations under the Workers' Compensation Act," the Third District held the trial court erred in denying respondent's motion to dismiss.

Petitioners now seek further review in this court.

SUMMARY OF THE ARGUMENT

This court is without jurisdiction because the court below decided a different question of law than did the cases with which petitioners say there is conflict. The court below decided a claimant for workers' compensation benefits (i.e., an employee injured in an employment related accident) may not bring a tort action against the workers compensation carrier for misconduct in handling the claim where there is a remedy under the Act and the employee does not allege a tort independent of a breach of the insurance contract. Neither *Turner* nor *Sibley* decided this question. And, there is no misapplication conflict with Turner for the additional reason that the facts of this case are not substantially similar to *Turner's*.

Conflict resulting from misapplication may exist only where a district court of appeal applies a rule of law to produce a different result in a case involving substantially the same facts as the prior case. *City of Jacksonville v. First Florida National Bank of Jacksonville*, 339 So. 2d 632 (Fla. 1976)*; Mancini v. State*, 312 So. 2d 732 (Fla. 1975). *Turner* arose from an on the job accident (giving rise to worker's compensation benefits in the first place), in contrast to the instant case which arises from claims administration. The court decided only that a genuine issue of material fact existed as to whether the employer engaged in conduct that was substantially certain to result in injury or death and it therefore reversed a summary judgment for the employer based upon immunity. There were

substantially different facts in *Turner* and the court decided a different issue of workers compensation immunity law than decided below. Therefore there is no conflict with *Turner.*

The court in *Sibley* also decided a different question of law than did the court below. *Sibley* held section 440.37, Florida Statutes provides only an alternative remedy, rather than the exclusive one, for fraud in connection with a claim for worker's compensations benefits. The court simply held a common law action is available in addition to the statutory remedy. Worker's compensation immunity was not an issue in *Sibley.* The court in *Sibley* did not decide, as the court below did whether the employee's common law claim would be barred by worker's compensation immunity. The question decided in *Sibley,* i.e., whether section 440.37, Florida Statutes is the exclusive remedy for fraud committed in the claims administration process, is a different question of law from whether a carrier and its case manager are immune from suit under section 440.11, Florida Statutes. Review should be dismissed.

ARGUMENT

A. There Is No Conflict Jurisdiction In This Case Because The Decision Below Does Not Conflict With *Turner* or *Sibley* Where Each Of The Three Cases Decided Different Questions Of Law And The Facts Of *Turner* Were Materially Different Than The Instant Facts.

Article V, Section 3(b)(3) allows this court to review a district court of appeal decision "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." (e.s.) Petitioners are mistaken when they submit this court has jurisdiction because the court below misapplied *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) and *Sibley v. Adjustco, Inc.*, 596 So. 2d 1048 (Fla. 1992). There can be no conflict with, or misapplication of, the decision in *Sibley* because the court in *Sibley* decided a question of law that is different from the one the district court decided in this case. Nor did the court below misapply *Turner*. Although both *Turner* and the present case involved the defendants' claim to workers' compensation immunity under section 440.11, Florida Statutes, the factual and legal bases underlying the two decisions are substantially different.

Consideration of what the three cases actually decided demonstrates there is no conflict. The court below decided that because there are remedies under the Workers' Compensation Act for the claims administration misconduct alleged, and because such misconduct does not amount to an independent tort, the carrier is immune from suit under section 440.11, Florida Statutes.

In contrast, *Turner* was a wrongful death/personal injury action arising from an on the job accident that occurred before any workers' compensation benefits were claimed or administered. The court in *Turner*, decided

only that a genuine issue of material fact existed as to whether the employer engaged in conduct that was substantially certain to result in injury or death and, therefore, summary judgment for the employer based upon immunity should be reversed. Because the claim in this case is of misconduct in administration of benefits under the Act, the court below decided the immunity issue here on a different basis.

In *Sibley*, the court decided section 440.37, Florida Statutes does not provide the exclusive remedy for fraud committed by an insurance carrier in the course of a chapter 440 administrative proceeding for workers' compensation benefits. While the court acknowledged a common law intentional tort remedy is available in addition to the statutory remedy, it did not decide, as the district court did in the present case, whether the carrier was entitled to workers' compensation immunity. Because the three cases decided different questions of law, there can be no conflict.

Petitioners' contention that the decision below conflicts with *Turner* fails also because the facts of the two cases are materially different. The most salient difference is between the timing and nature of the injuries involved in the two cases. *Turner* involved an action against the employer for gross negligence in causing an on the job accident that triggered the employees' rights to workers' compensation benefits. The injury alleged at bar, emotional distress, occurred at

the hands of the workers compensation carrier during the process of administering benefits, i.e., after the on the job injury which triggered benefits in the first place. The court below, explaining why *Turner* is not applicable elaborated on the differences between the two cases:

> *Turner* involved the continued use of a chemical, TFE by an employer, PCR, who had advanced knowledge of TFE's ultra-hazardous nature. In fact, the manufacturer of TFE, notified PCR of its intention to discontinue supplying TFE throughout the United States because of the inherent danger and the high risk of injury of using TFE. In addition, PCR had first hand knowledge of the high risk associated with handling TFE because there had been at least three other similar uncontrolled explosions in less than two years at PCR's chemical plant.
>
> PCR ignored the warnings and danger signs and continued to allow its employees to use TFE in unsafe procedures because PCR needed to meet a fast approaching contractual deadline. As a result, one employee died and another received serious injuries in an explosion caused by TFE.
>
> The injuries in *Turner*, can be traced directly to the grossly negligent actions of PCR. If not for PCR's decision to continue to use TFE, the employees would not have been injured.
>
> In contrast, [instant respondent] Inservices had no part in causing Aguilera's injuries. Aguilera would have needed medical care with or without Inservices's alleged misconduct. Thus, there is no separate act, independent from Inservices's handling of the claim, which injured or 'to a substantial certainty' would have caused Aguilera's injuries. Furthermore, as noted prior, other remedies for Aguilera's claims are provided for by the Act.

(App. 8)

Conflict arising from the misapplication of a prior decision can be present only where the second case "involves substantially the same facts as a prior case." *City of Jacksonville v. Florida First National Bank of Jacksonville; Mancini v. State*, 312 So. 2d 732 (Fla. 1975). In no way whatsoever are substantially the same facts involved in the instant case as were before the court in *Turner*. For this reason, as well as because the court below resolved the immunity question on a different legal basis than did the court in *Turner*, there is no conflict with the decision in *Turner*.

Petitioners in their brief on jurisdiction offer no analysis to show conflict with *Turner*. They focus on *Sibley*. But there is no conflict with *Sibley* because the court in *Sibley* decided a different question of law than the court decided below. In *Sibley* the issue was narrow: whether section 440.37, Florida Statutes is the exclusive remedy for fraud committed by an insurance carrier in the course of a proceeding under chapter 440. The court held it was not, that a common law remedy also exists.

There was no discussion, much less a decision, in *Sibley* regarding workers' compensation immunity. Workers' compensation immunity was the question decided in the instant case. Nor, as the court in *Sibley* very clearly stated in footnote 2, did the court decide whether the defendant's alleged conduct constituted a tort independent of a breach of the insurance contract. The district

court's decision below on that issue was the basis for the outcome. But it is a question with which the court was not presented and did not decide in *Sibley*.

The court below relied upon its decisions in *Old Republic Ins. Co. v. Whitworth*, 442 So. 2d 1078 (Fla. 3d DCA 1983), *Sheraton Key Largo v. Roca*, 710 So. 2d 1016 (Fla. 3d DCA 1998) and *Montes de Oca v. Orkin Exterminating Co.*, 692 So. 2d 257 (Fla. 3d DCA 1997) and upon the Fourth District's decision in *Sullivan v. Liberty Mut. Ins. Co.*, 367 So. 2d 658 (Fla. 4th DCA 1979), *cert. denied*, 378 So. 2d 350 (Fla. 1979) for the general rule that workers compensation bars a tort action against a carrier if the injury is covered by the Act. Furthermore, the court below concluded the exception to the general rule is not applicable because the alleged conduct of respondents is not a tort independent of a breach of the contract to provide workers' compensation benefits. This is the question *Sibley* did not decide. There is no direct conflict because the two cases decided different questions of law.

CONCLUSION

In considering whether it has conflict jurisdiction under Article V, Section 3(b)(3), the court must be mindful that the district courts of appeal are Florida's courts of last resort in almost all cases, and it must guard against becoming a court of selected errors. *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960). Whether this court would have decided as did the court below is not the

jurisdictional question. Rather, the focus is on maintaining the uniformity of this state's court made law.

The decision below does not threaten such uniformity. Because it decided a different question of worker's compensation immunity than did the court in *Turner*, and because the facts at bar are substantially different than the facts of *Turner*, there is no conflict with *Turner* to support jurisdiction in this court. Similarly, *Sibley* also decided a different question of law than did the court below. The decision below no more undermines the holding in *Sibley* that section 440.37 is not an exclusive remedy than it calls into question what is required under *Turner* before an employee can sue his employer in tort for an on the job injury. There is no conflict with either case and therefore this court does not have jurisdiction of this case. It is due to be dismissed.

Joshua D. Lerner
Florida Bar No. 455067
Rebecca A. Brownell
Florida Bar No. 0507059
RUMBERGER, KIRK & CALDWELL
Brickell Bayview Centre, Suite 3000
80 S.W. 8th Street (33130-3047)
Post Office Box 01-9041
Miami, Florida 33101
Telephone: (305) 358-5577
Telecopier: (305) 371-7580

Attorneys for Respondents

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this ____ day of April 2003 to Friedman & Friedman, P.A., Attorneys for Plaintiffs, 2600 Douglas Road, Suite 1011, Coral Gables, Florida 33134 and Lauri Waldman Ross, Esq., Lauri Waldman Ross, P.A., Two Datran Center, Suite 1612, 9130 S. Dadeland Blvd., Miami, FL 33156.

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).

Joshua D. Lerner

307297