NO. SC 03-630

IN THE SUPREME COURT OF FLORIDA

TRAVELERS INDEMNITY COMPANY,

Appellant

vs.

PCR INCORPORATED,

Appellee

On certification from the United States Court of Appeals
for the Eleventh Circuit
No. 02-12829

BRIEF AND APPENDIX OF APPELLANT

Andrew E. Grigsby
Florida Bar No. 328383
HINSHAW & CULBERTSON
9155 South Dadeland Blvd.
Suite 1600
Miami, FL 33156
Phone: (305) 358-7747
Facsimile: (305) 577-1063

Allan B. Taylor
Pro Hac Vice application pending
DAY, BERRY & HOWARD, LLP
City Place I
Hartford, CT 06103-3499
Phone: (860) 275-0100
Facsimile: (860) 275-0343

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES

6566 (11th Cir., Apr. 4, 2003)
3

Turner v. PCR, Inc., 732 So. 2d 342 (Fla. 1st DCA 1998)
5

Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000)
1, 4, 6,

7, 8, 9,

13, 14, 15, 17, 19,

20, 22, 23,28, 31,

32, 33, 35

U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983)
28, 29

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This is an insurance coverage case of first impression under Florida law certified to this Court by the United States Court of Appeals for the Eleventh Circuit. It arises as a natural sequel to the recent decision by this Court in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) ("*Turner*"). In *Turner*, this Court formalized and clarified the intentional tort exception to the workers' compensation statutory scheme. This exception applies when an employer is shown either to have exhibited a subjective intent to injure an employee or to have engaged in conduct that is "substantially certain to result in injury or death." *Turner* held that when an employer intentionally creates working conditions that are substantially certain to kill or injure its employees, the law imputes intent to injure to the employer. An employer that intentionally injures its employees, whether the intent is subjective or imputed, is not protected from a tort suit by the exclusive remedy

provision of the Workers' Compensation statute.

In *Turner*, this Court concluded that the alleged actions of defendant-appellee PCR Incorporated ("PCR") were so "disturbing" and "egregious" that intent to injure would be imputed to it and it would not be protected from suit by the exclusive remedy provision of the workers' compensation statute. The issue presented here is whether PCR can pass to its insurer, and through its insurer to other employers in Florida, the cost of defending against and paying for its liability for the intentional tort it inflicted on its employees.

Travelers Indemnity Company ("Travelers") brought this declaratory judgment action in the United States District Court for the Northern District of Florida to determine its obligations under the employers liability insurance policy it had issued to PCR. Travelers' Complaint, filed on May 18, 2001 (R-1) [1] and

---

[1] Record references are to the district court record, as submitted to the Eleventh Circuit and transmitted to this Court upon certification the references to the docket entry number and, where appropriate, internal page numbers of each

amended on June 11, 2001 (R-3) named PCR and the underlying plaintiffs, the personal representative of the estate of Thomas Paul Turner and James Creighton, as defendants. The action was later dismissed as to the underlying plaintiffs pursuant to a stipulation of dismissal. (R-45.)

On April 23, 2002, the United States District Court issued an order granting PCR's motion for judgment on the pleadings and denying Travelers' motion for summary judgment (R-46). The court entered its judgment on the same day. (R-47.)

On Travelers' appeal to the Eleventh Circuit, that court entered an order on April 4, 2003 certifying two questions of Florida law to this Court and also inviting this Court to consider the question of Florida public policy presented by Travelers in its briefs to the Eleventh Circuit. *Travelers Indem. Co. v. PCR, Inc.*, No.

---

entry.

02-12829, 2003 U.S. App. LEXIS 6566 (11th Cir., Apr. 4, 2003).[2]

STATEMENT OF THE FACTS

a. The Underlying Actions.

On November 22, 1991, Thomas Paul Turner, III ("Turner"), an employee of chemical manufacturer PCR, was killed as a result of an explosion at PCR's plant in Florida. (R-32-p.2-Ex.A¶¶3,5,6.) James Creighton ("Creighton"), another PCR employee, was seriously injured in the explosion. (R-32-p.2-Ex.B¶¶4,5,6.) Shortly thereafter, Debra Ann Turner, as the personal representative of the estate of Paul Turner, brought a wrongful death action against PCR on behalf of her husband Paul. (R-32-p.2-3-Ex.B¶¶7,10.) This action was joined with a personal injury action brought by James and Lynn Creighton. *See Turner,* 754 So. 2d at 684. PCR claimed immunity as the employer of Turner and Creighton and alleged they

---

[2] A copy of the Eleventh Circuit's decision is attached in the appendix to this brief.

were entitled to workers' compensation benefits only. *Id.*

The central allegation of the underlying complaints is that Turner's death and Creighton's injuries resulted from PCR's intense drive to meet manufacturing demands at the cost of worker safety. (R-32-Ex.A¶10;Ex.B¶9.) Specifically, Turner and Creighton alleged that PCR engaged in intentional conduct that was substantially certain to result in injury or death. (R-32-Ex.A¶9;Ex.B¶9a.) In furtherance of this premise, the underlying plaintiffs alleged that PCR's intentional conduct included, but was not limited to, its design of an extremely dangerous system of transferring contents of a 100-pound cylinder to a 200-gallon reaction vessel which it knew exceeded its capacity (R-32-Ex.A¶10a;Ex.B¶9a); intentionally concealing from its employees these known dangers (R-32;Ex.A¶¶10c,10e;Ex.B¶¶9c,9e); failing to make safety equipment available to its employees (R-32-Ex.A¶10c;Ex.B¶9c); in other instances, failing to provide adequate safety equipment (*Id.*); failing to instruct its employees on appropriate and proper safety procedures (*Id.*), and otherwise intentionally subjecting Turner and

Creighton to a known dangerous condition that was substantially certain to result in injury or death. (*Id.*).

Despite these allegations, the trial court granted PCR's motion for summary judgment, holding that Turner and Creighton were entitled only to workers' compensation benefits. *See Turner v. PCR, Inc.*, 732 So. 2d 342, 343 (Fla. 1st DCA 1998). The district court of appeals affirmed, noting that the record did not appear to show the necessary intent to overcome PCR's workers' compensation immunity. *Id.* at 344. However, the court certified to this Court the question whether an expert's opinion that an employer "exhibited 'a deliberate intent to injure' or . . . engaged 'in conduct . . . substantially certain to result in injury or death'" raised a factual dispute sufficient to preclude summary judgment on the issue of workers' compensation immunity. *Id.* at 343 (quoting *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 883 (Fla. 1986)).

In order to answer that question, this Court reasoned that it ". . . must first decide what a claimant-employee must show when attempting to prove the

commission of an intentional tort by an employer in order to avoid an otherwise valid workers' compensation defense." *Turner*, 754 So. 2d at 684. The court began this analysis by examining the facts alleged by the injured workers. That extensive discussion emphasized claims that PCR knew of and deliberately withheld information about the danger of the processes in which the workers were engaged, failed to provide the necessary equipment to make the processes safer, and proceeded with a process known to be unsafe in order to meet a commercial deadline to find a replacement for the coolant Freon before it was phased out for environmental reasons. *Id*. at 684-85.

The court next described Florida's workers' compensation law as a compact under which both workers and employers surrender some rights in order to facilitate the efficient delivery of needed benefits and medical care to injured workers. Employees surrender the right to sue, because "worker's compensation is the exclusive remedy for 'accidental injury or death arising out of work performed in the course and the scope of employment.'" *Id.* at 686 (quoting Fla.

Stat. § 440.09(1) (1997)). In exchange for this immunity from common law suits, employers agree to provide benefits without regard to fault. *Id*.

Turner reaffirmed, however, as previous cases had held, that under Florida law, the workers' compensation immunity "does not protect an employer from liability for an intentional tort against an employee." *Id.* at 687. This Court also reaffirmed its earlier holdings that an employer commits an intentional tort when it "exhibit[s] a deliberate intent to injure or engage[s] in conduct which is substantially certain to result in injury or death." *Id.* Finally, the Court considered whether the intentional tort exemption applies only if the employer actually knew that its conduct was substantially certain to produce injury or death (a subjective standard) or whether it is enough that the employer should have known (an objective standard). *Id.* at 687-88. The Court opted for an objective standard of substantial certainty, relying on the well-established Florida tort doctrine that "'where a reasonable man would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he had intended it.'" *Id*. at

688 (quoting *Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972)). As this Court summarized its holding, the objective standard "imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur." *Turner*, 754 So. 2d at 691. Failing to follow this rule, *Turner* said, "would virtually encourage a practice of 'willful blindness' on the part of employers who could ignore [dangerous conditions] and later claim lack of subjective knowledge or intent to harm an employee." *Id*.

Turner explained that use of an objective standard of substantial certainty for the purpose of determining whether an employer would be "held in the eyes of the law as though [it] had intended" an employee's injury was also consistent with the language of the workers' compensation statutes. *Id.* at 688 (internal quotation marks and citation omitted). The statutes apply to an injury arising out of and during the course of employment, and they define "injury" as "'personal injury or death **by accident** arising out of and in the course of employment.'" *Id.* at 689 (quoting Fla. Stat. § 440.02(17)) (emphasis added). "Accident", in turn, is defined

as "'an unexpected or unusual event or result, happening suddenly.'" *Id.* (quoting Fla. Stat. § 440.02(1)). As this Court explained, "if a circumstance is substantially certain to produce injury or death, it cannot reasonably be said that the result is 'unexpected' or 'unusual,' and thus such an event should not be covered under workers' compensation immunity." *Id*.

Applying the objective standard of substantial certainty to the underlying cases, the Court noted that Turner's complaint alleged that PCR's conduct "'was substantially certain to result in injury or death.'" *Id*. at 690 (citation omitted). Second, the Court found that the injured employees had provided sufficient evidentiary support for their allegations to preclude summary judgment against them. Terming PCR's alleged conduct "disturbing" and "egregious", it allowed the injured employees' suits to go forward under the intentional tort exemption to the exclusive remedy provision of the workers' compensation statutes. *Id.* at 690-91.

b. Travelers' Workers' Compensation and Employers' Liability Insurance Policy

On March 20, 1991, Travelers issued a "Workers' Compensation And

Employers' Liability Insurance Policy" (policy number 6K-UB-283J146-3-91) that provided workers' compensation and employers' liability insurance coverage to PCR. (R-3-Ex.C.)[3] The terms of the policy extended until March 20, 1992. (R-3-Ex.C;R-32-Ex.C.)

The policy parallels the coverage scheme set forth in the Florida Workers' Compensation Act. Part I of the policy provides Workers' Compensation Insurance. (R-3-Ex.C-pp.2-3.) Like the Florida Workers' Compensation Act, it only provides coverage for injuries to employees that result from accident or disease:[4]

> Part One - Workers' Compensation Insurance

---

[3] In its Order dated April 23, 2002, the district court reported that the policy was issued "on April 4, 2001 . . . ." (R-46-p.1.) This is incorrect. As noted above, the policy was issued on March 20, 1991. (R-32-Ex.C.)

[4] There is no question of disease in this case.

A. How This Insurance Applies

> This workers' compensation insurance applies to bodily injury **by accident** or bodily injury by disease. Bodily injury includes injury resulting in death.

(R-3-Ex.C-pp.2-3 (emphasis added).)

Part II of the Policy, Employers' Liability Insurance, also mirrors the Florida Workers' Compensation scheme. Under the terms of the policy, Travelers undertakes to pay all sums PCR "legally must pay as damages because of bodily injury to [its] employees, provided the bodily injury is covered by this Employers Liability Insurance." (R-3-Ex.C-pp.3-4.) However, coverage under the policy applies only to injuries that result from accident. (R-3-Ex.C-p.3.)[5] Specifically, the

---

[5] There are certain statutory exceptions to the exclusive remedy provision of the workers' compensation act that could result in an employer facing vicarious responsibility for a work-related injury by accident to an employee. Under Fla. Stat. § 440.11(1), supervisory or managerial employees are provided tort immunity unless it is proven that they, through culpable negligence, actively inflicted injury on the employee. *See Evans v. Jackson*, 634 So. 2d 232, 233 (Fla. 1st DCA 1994.) Similarly, co-employees of an injured worker are generally protected from tort lawsuits based on qualifying workplace injuries unless they act with "willful and wanton disregard or unprovoked physical aggression or with gross negligence

policy provides:

> Part Two - Employers Liability Insurance
>
> A. How This Insurance Applies
>
> This employers liability insurance applies to bodily injury **by accident** or bodily injury by disease. Bodily injury includes injury resulting in death.
>
> 1. The bodily injury must arise out of and in the course of the injured employee's employment by you.

(R-3-Ex.C-p.3 (emphasis added).) This coverage is subject to a number of exclusions, including an exclusion for intentional injury:

> C. Exclusions
> This insurance does not cover:
> * * * *
> 5. Bodily injury intentionally caused or aggravated by you.

(R-3-Ex.C-p.4.) Finally, the policy requires the insurer "to defend, at our expense, any claim, proceeding or suit against you **for damages payable by this**

---

when such acts result in injury or death." Fla. Stat. § 440.11(1).

insurance." (*Id.* (emphasis added).) This provision further specifies that the insurer has "no duty to defend a claim, proceeding or suit that is not covered by this insurance." (*Id.*)

c. The Holdings of the District Court

The district court set forth its analysis in its written order and judgment dated April 23, 2002 ("Order"). (R-46-pp.1-9.)[6] The court denied Travelers' Motion for Summary Judgment in which it asserted that the policy does not cover claims brought against the PCR because Turner's death and Creighton's injuries were not the result of an "accident," and that PCR's intentional conduct placed it outside the coverage provided under the liability insurance policy (R-46-pp.1,9.) It also granted PCR's motion for judgment on the pleadings on its coverage claim.

---

[6] A copy of the federal district court's Order is attached in the appendix to this brief.

(R-46-pp.1-9.)[7]

The district court did not address Travelers' contentions that Turner's death and Creighton's injuries did not result from an "accident" but rather from intentional conduct on the part of PCR.[8] Similarly, the district court failed even to acknowledge this Court's analysis and holding in *Turner* that under the plain language of the Florida Workers' Compensation Act, Turner's death and Creighton's injuries could not be deemed an "accident."

---

[7] The court's judgment dated April 23, 2002, states that the court granted PCR's "motion for summary judgment." (R-47.) This is incorrect. PCR's motion was styled and presented to the district court as a motion for judgment on the pleadings. (R-23.)

[8] Under Florida law, the insured bears the burden of establishing that a claim falls within the scope of coverage before the burden shifts to the insurer to establish the applicability of an exclusion. *See, e.g.*, *B&S Assocs. Inc. v. Indem. Cas. & Prop. Ltd.*, 641 So. 2d 436, 437 (Fla. 4th DCA 1994); *Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984).

Instead of addressing the question whether the death of Turner and the injuries to Creighton constituted "bodily injury by accident," the district court assumed that the claim fell within the policy's reach and turned immediately to the question whether the intentional injury exclusion defeated coverage. In analyzing this question, the court relied on a series of decisions that involve neither employer liability coverage nor a course of conduct that could be characterized as reckless, deceitful and demonstrating a patent indifference to the safety of employees. *See* (R-46-pp.6-7.) Most importantly, the court failed to acknowledge or consider the coverage implication of this Court's adoption of a standard that "imputes intent upon employers in circumstances where injury or death is . . . substantially certain" to occur. *Turner*, 754 So. 2d at 691. Similarly, the federal district court did not address whether Florida public policy would allow PCR to transfer its liability to Travelers when this Court had found that shielding PCR from tort liability "would virtually encourage a practice of 'willful blindness' on the part of employers." *Id.*

SUMMARY OF ARGUMENT

Under Florida law, the employees could not recover tort damages against PCR unless they could establish that PCR's conduct fell within the intentional tort exception to the exclusive remedy provision of the Workers' Compensation statute. Doing so required them to plead and prove that their injuries did not occur "by accident," because Workers' Compensation governs injuries to employees that do occur "by accident." The Travelers policy, however, applies only to injury "by accident." Thus, to prove their case for tort damages under Florida law, the underlying plaintiffs would have to prove that their claims fall outside the scope of Travelers' coverage. Under both the plain language of the policy and established Florida insurance case law, Travelers owes no duty to defend or indemnify when, as here, the underlying suits are not and cannot be suits for damages covered by its policy.

Moreover, if the underlying claims fell within the coverage grant, PCR's coverage claim would be defeated by the intentional injury exclusion. *Turner*

establishes that in order to prevail in their tort action, the underlying plaintiffs must allege and prove an intentional tort. An intentional tort, by definition, involves intended injury. *Turner* holds both that to establish an intentional tort, the injured employees must show either that PCR subjectively intended to injure them or that it acted in a manner that was "substantially certain" to injure them, and that the underlying actions satisfy the "substantially certain" prong of this requirement. *Turner* also holds that Florida law imputes intent to PCR, treating it as if it intended the substantially certain results of its intentional actions. The intentional injury exclusion bars coverage of intended injuries whether the wrongdoer discloses a subjective intent to harm or that intent is imputed as a matter of law.

Finally, if Travelers' insurance contract did provide coverage, the public policy of Florida would not allow that contract to be enforced by PCR. Well-established Florida precedent prohibits indemnification of wrongdoing that will be made significantly more likely if the resulting liability can be spread to others through insurance. For this reason, Florida has long prohibited insurance against

directly imposed punitive damages, and for the same reason, it prohibits insurance against damages resulting from intentional discrimination. *Turner's* holding that PCR's alleged conduct must not be protected by the exclusive remedy provision of the Workers' Compensation Act lest employers be encouraged to sacrifice safety for profits requires the conclusion that Florida public policy does not allow coverage of the underlying claims.

ARGUMENT

1 TRAVELERS' EMPLOYERS' LIABILITY POLICY DOES NOT COVER THE CLAIMS AGAINST PCR.[9]

1.1 The Death And Injuries At Issue Here Were Not Caused "By Accident."

1.1.1 Intentional Torts Are Not "Accidents" Within The Meaning Of An Employers' Liability Insurance Policy

In his dissent from this Court's refusal in 1986 to decide whether the exclusive remedy provision of the Florida Workers' Compensation Act applied to intentional torts, Justice Adkins and two other members of the court reasoned that the statute's express language did not encompass intentional torts. *See Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 885-86 (Fla. 1986) (Adkins, J., dissenting). Justice Adkins explained that the statute provided compensation for an employee's disability or death resulting from an "injury". The statute defined "injury" as "[p]ersonal injury or death by *accident* arising out of and in the course

---

[9] Since the Eleventh Circuit has asked this Court's advice on questions of law, this Court's review is plenary.

of employment." *Id.* at 885. Based on these definitions, Justice Adkins concluded that intentional torts fell outside the Act's scope:

> By limiting the definition of injury to accident, the statute, by necessary implication, excludes intentional torts of the employer from its coverage. Obviously, **an intentional tort is never accidental.**

Id. (emphasis added).

Turner unanimously endorsed Justice Adkins' analysis of the workers' compensation statutes, noting that they continue to define covered "injury" as "personal injury or death by accident arising out of and in the course of employment." *Turner*, 754 So. 2d at 689. *Turner* elaborated on Justice Adkins' explanation by reference to the statutory definition of "accident," which is "'only an unexpected or unusual event or result, happening suddenly.'" *Id.* (quoting Fla. Stat. § 440.02(1)). Examining that definition in the context of its holding that an intentional tort could be proved by showing that the employer's actions made death or injury "substantially certain," the Court echoed Justice Adkin's conclusion that intentional torts are not "accidents":

> [U]nder the plain language of the statute, it would appear logical to conclude that if a circumstance is substantially certain to produce injury or death, **it cannot reasonably be said that the result is 'unexpected' or 'unusual,' and thus such an event should not be covered under worker's compensation immunity.**

Id. (emphasis added).

As Travelers has shown above, the language of the Employers' Liability policy tracks the language of the Workers' Compensation Act. (*See supra* pp.9-11.) That policy applies only to "bodily injury by accident." (*Id*. at 11.) Moreover, this Court has consistently defined the term "accident" in insurance policies in words virtually identical to those used in the Workers' Compensation Act:

> The term accidental is generally understood to mean **unexpected** or **unintended**.

Dimmitt Chevrolet v. Southeastern Fid. Ins. Corp., 636 So. 2d 700, 704 (Fla. 1994) (emphasis added); *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) (a definition of term accident that "encompasses not

only ‘accidental events,’ but also injuries or damage neither expected nor intended” comports with the definition set forth in *Dimmitt*). *See also Aetna Ins. Co. v. Webb*, 251 So. 2d 321, 322 (Fla. 1st DCA 1971) (“accident” means that which is “unexpected, unusual, and unforeseen”).

Based on this identity in language and parallelism in structure, this Court should conclude that if an injured employee’s claim is beyond the scope of the Workers’ Compensation Act because it alleges a substantially certain injury, that claim is also outside the coverage of an Employers’ Liability insurance policy that covers only “bodily injury by accident.” No other holding would be logically consistent with *Turner’s* conclusion that an injury that is “substantially certain” cannot be “unexpected” and therefore is not an injury “by accident.”

Thus, in order to prevail in a tort suit against an employer for injury arising out of and during the course of employment, an injured worker must allege and prove that the employer committed an intentional tort. But if the worker succeeds

in proving that claim, there is no coverage under the Employers' Liability policy[10] because the employee's injury did not result from an "accident." Since the proof necessary to establish that the employer is liable necessarily establishes that there is no coverage, an employee's claim under the intentional tort exemption is not a suit "for damages payable by [the Employers' Liability] insurance." (*See supra* p.11.) Under both the plain language of the policy, which explicitly disclaims any obligation to defend a suit it does not cover, (*id*.) and the general insurance law of Florida, which holds that there is no duty to defend when there can be no duty to indemnify[11], the Employers' Liability insurer has no duty to defend or indemnify the

---

10 The standard form commercial general liability policy excludes injuries to employees arising out of and during the course of their employment. *See, e.g., Fla. Ins. Guar. Ass'n v. Revoredo*, 698 So. 2d 890, 891 & n.2 (Fla. 3d DCA 1997).

11 *See, e.g., Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So. 2d 1034 (Fla. 1st DCA 2000).

employer against such a claim.

1.1.2 Travelers Has No Duty To Defend Or Indemnify PCR

Turner's explanation of its reasons for allowing the injured employees to proceed with their tort claim against PCR illustrates the general principle set forth above. The Court allowed the injured employees to proceed because they pled and offered evidence to show that PCR sacrificed safety for profits and withheld vital information about the known dangers to which it deliberately exposed its employees. *Turner*, 754 So. 2d at 684-85, 689-90. This Court characterized PCR's alleged conduct as so "disturbing" and "egregious", *id*. at 690-91, that it fell within that fortunately small[12] class of cases in which the law imputes intent to

---

12 *Turner* identified two lower court cases in which employees had been allowed to press tort claims against their employers as comparable to the underlying claims here. *See Turner*, 754 So. 2d 683, 690-91 (Fla. 2000) (citing *Connelly v. Arrow Air, Inc*., 568 So. 2d 448, 449-51 (Fla. 3d DCA 1990) (employer airline that intentionally misstated the weight capacity of an aircraft; intentionally and repeatedly kept its aircraft in a defective condition; concealed actual flight loads which resulted in reduced thrust and erroneous fuel calculations; ignored reports of imminent equipment failure; and coerced employees to fly in violation of Federal Aviation Administration regulations found to have engaged in conduct that was substantially certain to result in injury or death to its employees); *Cunningham v. Anchor*

harm to employers because they have created circumstances in which injury or death is "substantially certain." *Id.*

Hocking Corp., 558 So. 2d 93, 96-97 (Fla. 1st DCA 1990) (employer which diverted a smokestack so that fumes would flow into, rather than outside of, the plant where the employees worked; periodically turned off the plant ventilation system; removed warning labels on toxic substance containers; misrepresented the toxic nature of substances; knowingly refused to provide safety equipment; and misrepresented the need for safety equipment and the dangers associated with working at a certain plant, found to have engaged in conduct that was substantially certain to result in injury or death to employees)). *Turner* also acknowledged that two earlier cases decided adversely to the injured employees appeared to set forth facts sufficient to satisfy the "substantial certainty" prong of the intentional tort definition. *Turner*, 754 So. 2d at 691 n.8. Since *Turner*, the courts have limited the use of the intentional tort exemption from exclusivity to a small number of cases of extraordinarily bad behavior by employers. "[C]ases which have actually applied the *Turner* doctrine, especially under *Turner* itself, have characteristically involved a degree of deliberate or willful indifference to the safety of the workers ._. ._." *Pacheco v. Fla. Power & Light Co.*, 784 So. 2d 1159, 1163 (Fla. 3d DCA 2001). In most instances, the courts have found that the employer's alleged behavior was not sufficiently egregious to invoke the intentional injury exception under *Turner*. *See, e.g., Fleetwood Homes of Fla., Inc. v.* Reeves, 833 So. 2d 857 (Fla. 2d DCA 2002), *review pending*, No. SC03-134 (Fla. 2003); *Garrick v. Publix Super Mkts., Inc.*, 798 So. 2d 875, 879 (Fla. 4th DCA 2001); *Holderbaum v. ITCO Holding Co.*, 753 So. 2d 699, 700 (Fla. 3d DCA 2000); *Tinoco v. Resol, Inc.*, 783 So. 2d 309, 310-11 (Fla. 3d DCA 2001).

This Court concluded that Turner's death and Creighton's injuries were not "unexpected" or "unusual" because they were "substantially certain" to follow from PCR's intentional acts. That conclusion compels the holding that as a matter of law, PCR's conduct was not an "accident" for the purposes of invoking coverage under the liability insurance policy. *See State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) (*citing Landis v. Allstate Ins. Co.*, 546 So.2d 1051, 1053 (Fla.1989)) (in cases in which "the insured's actions [are] so inherently dangerous or harmful that injury was sure to follow," the question whether an injury was accidental will be decided against the insured as a matter of law). Since Travelers' policy applies only to "bodily injury by accident," Travelers has no obligation to indemnify PCR against Turner's and Creighton's claims. And because Turner and Creighton could establish their claim only by proving facts that defeat coverage, Travelers owed PCR no duty to defend against the suits they brought.

1.2 Coverage is Barred By the Policy's Intentional Injury Exclusion.

Travelers' Employers' Liability policy expressly excludes from coverage

"[b]odily injury intentionally caused or aggravated by [the insured]." (R-3-Ex.C-p.4.) The United States District Court held that an injury is not "intentionally caused" within the meaning of this exclusionary language unless the insured employer had a "specific intent" to injure, and it equated "specific intent" with subjective intent. (R-46-pp.8,9.) That final step in the District Court's reasoning conflicts with the rationale of *Turner*, Florida tort law, and Florida insurance law.

This Court held in *Turner* that PCR's alleged conduct constituted an intentional tort because it was "substantially certain to result in injury." *Turner*, 754 So. 2d at 690, 691. Since the injuries to Turner and Creighton were "substantially certain" to occur, the law imputes to PCR the intent to inflict those injuries. *Id*. at 691. This imputed intent brings PCR's alleged misdeeds within the definition of an intentional tort,[13] thus avoiding the exclusive remedy provision. As *Turner*

---

13 *See, e.g.*, Restatement (Second) of Torts § 8A (1965) ("intent" used "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it"); *Id.* cmts. a, b; W.

explains, under Florida law, "where a reasonable man would believe that a particular result was substantially certain to follow, **he will be held in the eyes of the law as though he had intended it.'**" *Turner*, 754 So. 2d at 688 (quoting *Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972)) (emphasis added).

Treating PCR "as though [it] had intended" the death of Turner and injuries to Creighton would mean denying coverage, because Travelers' policy excludes intended injury. The federal district court refused to reach this obvious conclusion on the ground that Travelers' language – "intentionally caused by you" – is ambiguous because it does not specify whether intent must be "specific," as the court thought "thirty years of cases" required, or imputed based on the insured's "substantial certainty of injury." (R-46-p.8.) Applying the doctrine that an ambiguity in an insurance policy is to be construed in favor of coverage, the court

---

Page Keeton, et. al., *Prosser & Keeton on The Law of Torts* § 8 at 34-35 (5th ed. 1984) (intent describes "the purpose to bring about **stated physical consequences**").

held that the exclusion applies only in cases of "specific intent", which, it held, did not equate to intentional acts undertaken with a "substantial certainty of causing harm." (*Id.* at 9.)

There are three errors in the federal court's analysis. First, it violates the doctrine that courts should not rewrite insurance policies by straining to find ambiguity where none exists. Second, it misconstrues the cases on which the court's explication of Florida law rests, since neither of those cases turns on a purported distinction between subjective and imputed intent to injure. Finally, the Court simply ignored recent Florida cases holding that when intent to injure is imputed as a matter of law based on the nature of the insured's acts, an intentional injury exclusion bars coverage.

Nothing in the intentional injury exclusion suggests that it is in any way concerned with **how** it is established that that the insured intended the injury for which it seeks coverage; the exclusion unambiguously bars coverage if the insured intended the injury. By finding an ambiguity based on the exclusion's failure to

specify that intent to injure could be proven by showing that the insured created circumstances from which injury was "substantially certain" to follow, the federal district court violated the established rule that "the courts are not permitted to put strain and unnatural construction on the terms of the policy in order to create uncertainty or ambiguity." *Federated Mut. Ins. Co. v. Germany*, 712 So. 2d 1245, 1248 (Fla. 5th DCA 1998). *Cf. Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 28 Fla. L. Weekly S307, S309 (Fla. Apr. 10, 2003)(lack of definition in policy does not automatically create ambiguity.) Rather, courts must give unambiguous provisions effect as written, because "courts have no power to create insurance coverage where none otherwise exists." *Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d 863, 864 (Fla. 3d DCA 2000). Since Florida law, as confirmed in *Turner*, equates acting with "substantial certainty" that the actions will produce death or injury to intent to injure, the allegations and proof in the underlying lawsuits, as construed by *Turner*, trigger the unambiguous exclusion for intentional injury in Travelers' policy.

Nothing in the cases on which the federal district court relied even suggests the conclusion the court drew from them. In *Cloud v. Shelby Mutual Insurance Co.*, 248 So. 2d 217 (Fla. 3d DCA 1971), the insured driver used his car to push out of the way a car blocking a driveway. The bumper of the insured's car went over the bumper of the blocking car, and a passenger in the latter was injured. The trial court granted summary judgment for the insurer, based on an intentional injury exclusion, and the appellate court reversed. The appellate court held that the exclusion does not bar coverage "where there was an 'intentional act' but not an 'intentionally caused' injury." *Id*. at 218. In explaining this holding, it adopted a treatise's explanation that "injury or damage is 'caused intentionally' within the meaning of an 'intentional injury exclusion clause' if the insured has acted with the specific intent to cause harm" *Id*. (quoting 44 Am. Jur. 2d *Insurance* § 1411, at 259.) The court specifically rejected the argument that the "intent" required by the exclusion can be satisfied by the tort rule that "'a tortfeasor intends the natural and probable consequences of his act.'" *Id*. (citation omitted). The court neither faced

nor considered the implications of a claim that the injury to the passenger was "substantially certain" rather than merely a "natural and probable" result of the insured's action.

The second case on which the lower federal court relied, *Phoenix Insurance Co. v. Helton*, 298 So. 2d 177 (Fla. 1st DCA 1974), is similarly off point. In that case, the insured driver attempted to use his car to extract his wife from a melee. The trial court charged the jury in the coverage action that the intentional injury exclusion required a showing of "specific intent" to inflict injury, and it refused the insurer's request to charge that the exclusion would apply if the jury found that "as a normal consequence of the [driver's intentional] act it was probable that someone would be injured." *Id.* at 180 (citation omitted). The district court of appeals affirmed, holding that "[a]t best the evidence establishes negligence." *Id*. The court rejected, largely on the strength of *Cloud*, the insurer's argument that if the act is intentional, the injury is intentional. *Id*. at 181. As in *Cloud*, the *Helton* court had no occasion to consider the application of the exclusion when the insured's

actions were "substantially certain" to produce injury.

Thus, the two cases on which the United States District Court relied for its conclusion that Florida law rejects imputed intent when construing an intentional injury exclusion do not provide any support for that result. Rather, both of those cases deal solely with the application of an intentional injury exclusion to instances of ordinary negligence or recklessness, not to a situation in which intent is imputed as a matter of law. As this Court explained in *Spivey v. Battaglia,* 258 So. 2d 815 (Fla. 1972) on which *Turner* relied, Florida law treats actions that merely create a risk of injury differently from actions that are substantially certain to result in injury:

> Where a reasonable man would believe that a particular result was **substantially certain** to follow, he will be held in the eyes of the law as though he had intended it . . . . However, the knowledge and appreciation of a **risk**, short of substantial certainty, is not the equivalent of intent. Thus, the distinction between intent and negligence boils down to a matter of degree. Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid (negligence), and becomes a substantial certainty.

Spivey v. Battaglia, 258 So. 2d at 817 (footnotes and internal quotation marks

omitted).[14] The federal district court erred in holding that because the intentional injury exclusion does not bar coverage when the insured negligently or recklessly risks causing injury, it also does not bar coverage when the insured's actions are "substantially certain" to produce injury.

Rather than relying on cases that did not meet the standard for imputing intent to injure as a matter of law, the federal district court should have followed the much more recent case of *Landis v. Allstate Ins. Co.*, 546 So. 2d 1051 (Fla. 1989).

---

[14] *See also* Restatement (Second) of Torts § 8A cmt. b:

> If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence. . . .

In *Landis*, this Court explicitly held that when an act is inherently harmful, as is child molestation, an intentional injury exclusion applies regardless of the insured's asserted lack of specific intent to injure. *Id.* at 1052-53. As the Florida Supreme Court explained in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998), *Landis* stands for the proposition that whether an injury is unintended or unexpected is a question of law "in cases where the insured's actions were so inherently dangerous or harmful that injury was sure to follow."

Turner holds that PCR's alleged actions were so innately dangerous that the law will impute intent to injure to PCR. Under *Landis* and *CTC*, that imputed intent suffices to bar coverage under the intentional injury exclusion in Travelers' policy.

2 FLORIDA PUBLIC POLICY BARS INDEMNIFICATION OF EMPLOYERS FOR INTENTIONAL TORTS.

Florida's courts have long held that "public policy prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct." *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064

(Fla. 1983) (citing *Commercial Union Ins. Co. v. Reichard*, 404 F.2d 868 (5th Cir. 1968); *Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); Travelers Ins. Co. v. Wilson*, 261 So. 2d 545 (Fla. 4th DCA 1972); *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So. 2d 52 (Fla. 2d DCA 1965)). As this Court has explained, "[t]he Florida policy of allowing punitive damages to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance." *Id*.

In *Ranger Insurance Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005 (Fla. 1989) ("*Bal Harbour Club*"), the Court extended this public policy prohibition to insurance coverage for intentional discrimination on the basis of religion. The reasoning and holding in *Bal Harbour Club* require the conclusion that Florida public policy prohibits PCR from passing on to Travelers its liability for the injuries it intentionally inflicted upon its employees.

The underlying suit in *Bal Harbour Club* involved a claim of religious discrimination in the sale of land. The underlying plaintiffs had contracted to

purchase real property that was at one time subject to a deed restriction that prohibited occupation by anyone not a member of the Caucasian race or having more than one-fourth Hebrew or Syrian blood. *Id.* at 1005-06. The deed additionally provided that buyers had to be a member of the Bal Harbour Club, Ranger's insured. *Id.* at 1006. After being denied membership, the buyers sued. Ranger defended the action under a reservation of rights, but refused to indemnify the Club when it settled the case. Ranger then sought a declaratory judgment of no coverage, and the Club counterclaimed for the amount of the settlement. *Id.* The trial court ruled in favor of the Club, and the District Court of Appeal initially affirmed. While Ranger's motion for rehearing was pending, however, the court *sua sponte* asked for supplemental briefs addressing whether "the public policy of the state should prohibit the enforcement of an insurance contract covering damages arising from intentional religious discrimination." *Id.* The en banc District Court of Appeal held that public policy did not prohibit coverage, but it certified that question to this Court as an issue of great public importance. *Id.* & n.1.

In an opinion that sets forth and applies a generally applicable analysis for determining whether coverage is contrary to public policy, this Court reversed, holding that the Club could not be covered. That analysis "look[s] to two factors: the conduct of the insured (is it a type that will be encouraged by insurance?), and the purpose served by the imposition of liability for that conduct (is it to deter wrongdoers or compensate victims?)." *Id.* at 1007. *Bal Harbour Club's* explanation of both factors leaves no doubt that the proper ruling in this case is that public policy does not allow PCR's claim for coverage.

This Court began its explanation of the first factor by noting that "[i]t is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct." *Id.* (*citing* 12 J. Appleman & J. Appleman, *Insurance Law and Practice* § 7031 (1981); 9 G. Couch, *Couch Cyclopedia of Insurance Law* § 39.15 (1985)). This axiom rests on the belief "that the availability of insurance will directly stimulate the intentional wrongdoer to violate the law." *Id.*; *see also Mason v. Fla. Sheriffs' Self-Insurance Fund*, 699 So. 2d 268, 270

(Fla. 5th DCA 1997) (same). Although an intentionally wrongful act would not have been stimulated in fact by the availability of insurance if the wrongdoer did not factor insurance into the decision making process, the Court rejected any suggestion that the insurance coverage question turns on an inquiry into the decision maker's mental processes:

> Yet, because in most cases it is impossible to determine whether the perpetrator consciously considered insurability as a factor in making its decision to act wrongfully, **the proscription is necessarily applied to all intentional wrongful acts that are not impulsive or that do not produce unintended results.**

Bal Harbour Club, 549 So. 2d at 1007 n.4 (emphasis added).

In *Turner*, this Court held that PCR's actions were calculated, not impulsive, and that those actions produced results that were so "substantially certain" that they could not rationally be called "unexpected" or "unusual". Intentional actions taken for profit in the face of a "substantially certain" injury are paradigms of actions that will be stimulated by the presence of insurance, because insurance reduces the cost and risk to the wrongdoer and thereby increases the tortfeasor's expected return.

Turner's holding that allowing PCR the benefit of the exclusive remedy provision "would virtually encourage a practice of 'willful blindness' on the part of employers" *Turner*, 754 So. 2d at 691, applies *a fortiori* to the question of insurability. If an employer like PCR can shift its cost to its insurer, and through its insurer to all other purchasers of insurance, the employer is much more likely to sacrifice its employees' safety for its own profit than it would be if it had to pay the full cost of that decision. *See Bal Harbour Club*, 549 So. 2d at 1008 (supposition that making intentional discrimination insurable will not encourage discrimination "is lacking in empirical support and defies human experience . . . "Once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct.")

The second *Bal Harbour Club* factor, whether the purpose of imposing liability is primarily compensation or deterrence, also supports the conclusion that public policy prohibits coverage of the claims against PCR. In this case, even more clearly than in *Bal Harbour Club*, the liability PCR seeks to pass off to its

insurer has been imposed on PCR primarily for the purpose of deterrence.

This Court's focus on deterrence as the principal purpose of imposing liability in the injured employees' underlying claims cannot be disputed. The issue in *Turner* was not whether the employees would be compensated, but the means through which they would be compensated – workers' compensation or a tort suit. The rationale of workers' compensation in Florida, as explained in *Turner*, is that the employer is relieved of the potentially open-ended liability associated with tort litigation in return for providing the employee prompt and uncontested access to both medical treatment and compensatory benefits. *Turner*, 754 So. 2d at 686. Thus, the decision whether to allow a tort suit under an exception to the exclusive remedy provision does not turn on the need to compensate injured employees, because that objective is fulfilled by the workers' compensation system. Rather, as *Turner* illustrates, the decision to allow a tort suit to proceed focuses on the perceived deterrent effect of removing the employer's exclusive remedy immunity to suit. *Turner's* conclusion makes this purpose clear:

> [W]e reaffirm the existence of an intentional tort exception to an employer's immunity. That intentional tort exception includes an objective standard to measure whether the employer engaged in conduct which was substantially certain to result in injury. This standard imputes intent upon employers in circumstances where injury or death is objectively "substantially certain" to occur. **To hold otherwise would virtually encourage a practice of "willful blindness" on the part of employers who could ignore conditions that under an objective test would be found to be dangerous. . . .**

Id. at 691 (emphasis added).

To conclude that the principal purpose of allowing a tort suit to redress a workplace injury is deterrence does not suggest or require that the State is unconcerned with compensation. As this Court has recognized, the two objectives are not necessarily incompatible. *See Bal Harbour Club*, 549 So. 2d at 1008. In *Bal Harbour Club*, the Court acknowledged that the applicable anti-discrimination laws have a "secondary purpose" of compensating the victims of discrimination. *Id*. at 1009. It concluded, however, that the compensation goal would not be significantly affected by a ruling that public policy prohibits coverage of intentional discrimination:

> The bulk of discrimination cases are brought against commercial enterprises that have discriminated in the marketplace or workplace. These businesses generally have far greater resources than do individuals and to hold the acts of such parties uninsurable would result in relatively few instances where the injury would go uncompensated. Such was the case in the present claim.

Id.

The Court's reasoning in *Bal Harbour Club* applies directly to intentional torts by employers against employees in general, and to the actions against PCR in particular. By definition, almost all claims against employers are brought against commercial enterprises, and all claims brought under the intentional tort exemption to the workers' compensation exclusivity provision involve intentional wrongdoing in the workplace. As is true of Turner and Creighton in the underlying claims here, there is little reason to be concerned that preventing employers from spreading the costs of their intentional wrongdoing to other insured employers will result in failure to compensate injured employees.

Under Florida law as explained by this Court in *Turner* and *Bal Harbour Club*, public policy prohibits PCR from obtaining insurance coverage for its

intentional infliction of death and injury on its employees.

CONCLUSION

For the reasons stated above, this Court should answer "no" to the two questions certified to it by the Eleventh Circuit and should also inform that court that the public policy of Florida precludes insurance coverage for PCR in this case.

Respectfully submitted,

Allan B. Taylor

Andrew E. Grigsby
Florida Bar No.328383
HINSHAW & CULBERTSON
9155 South Dadeland Blvd.
Suite 1600
Miami, FL 33156
Phone: (305) 358-7747
Facsimile: (305) 577-1063

Allan B. Taylor
Pro Hac Vice application pending
DAY, BERRY & HOWARD, LLP
City Place I
Hartford, CT 06103-3499
Phone: (860) 275-0100
Facsimile: (860) 275-0343

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief and appendix was served by overnight courier service, postage prepaid, addressed to:

John A. DeVault, III,
Michael D. Whalen
Bedell, Dittmar, Devault, Pillans & Coxe, P.A.
101 E. Adams Street
Jacksonville, Florida 32202
Counsel for Appellee PCR Encorporates

Andrew E. Grigsby
HINSHAW & CULBERTSON
9155 South Dadeland Blvd.
Suite 1600
Miami, FL 33156
Counsel for Appellant

Allan B. Taylor

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, counsel hereby certifies that this brief complies with the font requirements of Rule 9.210(a)(2).

Allan B. Taylor

Andrew E. Grigsby
Florida Bar No.
HINSHAW & CULBERTSON
9155 South Dadeland Blvd.
Suite 1600
Miami, FL 33156
Phone: (305) 358-7747
Facsimile: (305) 577-1063

Allan B. Taylor
Pro Hac Vice application pending
DAY, BERRY & HOWARD, LLP
City Place I
Hartford, CT 06103-3499
Phone: (860) 275-0100
Facsimile: (860) 275-0343