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

REPLY BRIEF 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
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 CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

TABLE OF CONTENTS

Page

In its initial brief ("Travelers Br."), appellant Travelers Indemnity Company ("Travelers") demonstrated that its insurance policy does not cover the underlying intentional tort claims against appellee PCR Incorporated ("PCR") for three reasons:

- The intentional tort claims do not seek damages for "bodily injury by accident";
- The intentional tort claims allege injury that was intentionally caused by PCR; and
- Florida public policy precludes coverage of the underlying claims.

PCR's reply to Travelers' demonstration that its policy does not cover the underlying complaints is obfuscatory. PCR tries to hide in lengthy discussion of legal points that are either irrelevant or not disputed its lack of an answer to this Court's dispositive holdings in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), that:

1. the underlying complaints allege injuries that did not result from an accident, *id.* at 689-91; and
2. in the eyes of the law, PCR intended the injuries to its employees, *id.* at 688.

These holdings, and the well-established doctrines on which they are based, compel the conclusion that Travelers' employers liability policy does not cover the

underlying lawsuits.

Even if the Travelers policy did extend to the underlying claims, Florida public policy prohibits indemnification of PCR in the circumstances of this case. PCR's request that this Court forsake both its own analysis of public policy as set forth in *Ranger Insurance Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005 (Fla.1989), and its reasoning in *Turner* to follow an unpersuasive precedent of questionable authority from Ohio should be denied.

I. TRAVELERS' POLICY DOES NOT COVER THE UNDERLYING CLAIMS

In *Turner*, this Court reasoned "that if a circumstance is substantially certain to produce injury or death, it cannot reasonably be said that the result is 'unexpected' or 'unusual,'" *Turner*, 754 So. 2d at 689. Accordingly, the Court concluded that the substantially certain injury alleged by PCR's employees was not injury "by accident." In the only portions of its brief specifically addressed to Travelers' demonstration that the underlying complaints do not fall within the grant of coverage in its Employer's Liability Policy because they do not allege "bodily injury by accident," PCR argues that the reasoning of *Turner* has nothing to do with the outcome here because *Turner* involved the workers compensation statutes and this case involves an insurance policy. (PCR Br. at 17-19, 21-23.) As its only support for this argument, PCR includes a lengthy quotation from *Prudential Property & Casualty Insurance Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993). In that excerpt, the *Swindal* court restated the unexceptional principle that liability

insurance policies cover "injuries more broadly deemed under tort law principles to be consequences flowing from the insured's intentional acts."1

Swindal did not address the question presented here: Whether injuries that "cannot reasonably be said [to be] 'unexpected' or 'unusual'", *Turner*, 754 So. 2d at 689, are injuries "by accident" within the meaning of Travelers' policy. The answer to that question appears in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072 (Fla. 1998), where this Court defined the term "accident" in a liability policy:

> We hold that where the term "accident" in a liability policy is not defined, the term, being susceptible to varying interpretations, encompasses not only "accidental events." but also injuries or damage **neither expected nor intended** from the standpoint of the insured.

Id. at 1076 (emphasis added)1. Since the injuries to PCR's employees resulting from PCR's deliberate actions sacrificing employee safety for speed and profits2 "cannot reasonably be said [to be] 'unexpected'. *Turner*, 754 So. 2d at 689, those injuries were not accidental within the definition established in *CTC Development Corp*. PCR's suggestion that "caused by accident" should have a different meaning in this case from the meaning given to it in *Turner* has no merit.3

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1 PCR's assertion that it should prevail because the term "accident" in Travelers' policy is ambiguous (PCR Br. at 21-23) ignores the fact that this Court provided a default definition of that term in *CTC Development Corp.*

2 *Turner*, 754 So. 2d at 691.

3 This Court's reliance on *Turner* as establishing the definition of an "intentional tort" in the context of a product liability claim makes clear that the analysis followed in *Turner* is not limited to the workers compensation context. *See D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 438 (Fla. 2001).

PCR attempts to bolster its argument by raising, for the first time in this litigation, the specter that if coverage is not found here, injured employees "could be left without compensation of any kind." (PCR Br. at 17; *see id.* at 7, 9.) This completely unsupported assertion rests on PCR's apparent belief that the law will require an employee who has a *Turner* intentional tort claim to forego seeking workers compensation benefits. The primitive version of the doctrine of election of remedies invoked by PCR, however, need not be and has not been applied in this context. Rather, the courts allow an employee who believes that she has suffered an intentional tort at the hands of her employer to claim the immediate benefit of workers compensation and to seek additional recovery in tort. If the employee succeeds in tort, the employer is entitled to a credit for the amount paid in workers compensation benefits. *See, e.g.*, *Millison v. E.I. Du Pont de Nemours & Co.*, 101 N.J. 161, 186-88, 501 A.2d 505, 518-19 (1985); *cf. Fla. Workers' Comp. Ins. Guar. Ass'n Inc. v. Elite Pro. Servs., Inc.*, No. 00-4391, slip op. at 1-2 (Fla. 15th Cir. Ct. Jul. 29, 2002) (employees prosecuting *Turner* claim received full workers compensation benefits and Guaranty Association assumed responsibility for workers compensation obligations upon insolvency of employer's insurance company) (opinion attached hereto as App. A).

The remainder of PCR's coverage analysis attempts to neutralize this Court's holding in *Turner* that the underlying complaints allege an intentional tort because "'where a reasonable man would believe that a particular result was substantially certain to follow it, 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)). An intentional tort is a wrongful act where the actor has "the purpose to bring about stated physical consequences". W. Paige Keeton et al., *Prosser & Keeton on the Law of Torts* § 8 at 34-35 (5th ed. 1984). *Turner's* holding compels the conclusion that the claims by the injured employees are excluded from coverage under Travelers' policy because the employees allege that their injuries were intentionally caused by PCR. (*See* Travelers Br. at 22-28.)

PCR attempts to overcome this logic by appealing to what it identifies as thirty years of precedent holding "that intentional injuries are not excluded from insurance policies containing an exclusion for injuries intended or expected by the insured unless the insured acted with the specific intent to injure the third party." (PCR Br. at 7.) PCR's argument fails for two reasons. First, *Turner* held that "in the eyes of the law," PCR did act "with the specific intent to injure" its employees. Second, the precedent to which PCR points does not control this case because those decisions did not address the application of the intentional injury exclusion to intentional acts that were substantially certain to result in injury.

Nothing in *Turner* suggests that the intent to injure imputed to PCR because it deliberately put its employees in the way of substantially certain harm should have lesser consequences than a finding of intent to injure based on any other type of evidence. This Court's characterization of PCR's alleged conduct as "disturbing", *Turner*, 754 So. 2d at 690, and "egregious", *id*. at 691, refutes any claim that no opprobrium attaches to PCR's actions. In the eyes of the law and of

society, PCR is an intentional inflictor of injury.

Turner's conclusion that allowing employers who act as did PCR to escape the consequences of committing an intentional tort in the absence of evidence of "subjective knowledge or intent to harm an employee" would "virtually encourage a practice of 'willful blindness' on the part of employers," *id.*, teaches the same lesson. Allowing an employer that acted like PCR to recover under an insurance policy because the intent imputed to it does not have the same consequences as "subjective knowledge or intent to harm an employee" would reward PCR's "willful blindness" and encourage other employers to act with similar irresponsibility. The intent to injure imputed to PCR must carry with it the full legal consequences associated with the conclusion that PCR was alleged to have committed an intentional tort. Those consequences include the application of the intentional injury exclusion in Travelers' policy.

PCR's claim that following *Turner* to its logical conclusion in this case would conflict with extensive Florida precedent has no merit. As Travelers has shown, the two cases on which both the federal district court and PCR principally rely, *Cloud v. Shelby Mutual Insurance Co.*, 248 So. 2d 217(Fla. 3d DCA 1971) and *Phoenix Insurance Co. v. Helton*, 298 So. 2d 177 (Fla. 1st DCA 1974), involved claims of ordinary negligence, or perhaps recklessness, not claims of intentional tort. (*See* Travelers Br. at 25-27.) Similarly, *Prudential Property & Casualty Insurance Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993), to which PCR devotes several pages of its brief (PCR Br. at 13-14, 18-19), considered a case of

ordinary or aggravated negligence, not an intentional tort. (*See supra* p.3 & n.1.) These cases finding coverage of non-intentional torts do not support PCR's claim that the intentional tort it allegedly committed against its employees is not excluded from coverage.

The controlling precedent is this Court's opinion in *Landis v. Allstate Insurance Co*., 546 So. 2d 1051 (Fla. 1989). There, as here, the underlying tort consisted of an intentional act from which intent to injure was imputed as a matter of law.4 And there, as it should here, the Court held that the consequence of intent to injure, whether imputed or subjective, is that there is no coverage when the policy excludes intentional injury.

II. PUBLIC POLICY BARS COVERAGE OF THE CLAIMS AGAINST PCR

PCR acknowledges that *Ranger Insurance Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005 (Fla. 1989), provides the analytic framework for determining whether public policy precludes coverage of its employees' intentional tort claims. (PCR Br. at 23.) PCR's application of that framework to the facts of this case is, however, less than faithful to this Court's opinions in both *Bal Harbour Club* and *Turner*.

PCR claims that its conduct, the first factor identified in *Bal Harbour Club*, does not warrant a holding of no coverage because it did not act with "specific

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4 *See State Farm Fire & Cas. Co. v. CTC Dev. Co.*, 720 So. 2. d 1072, 1076 (Fla. 1998) (citing *Landis* for the proposition that an injury is expected or intended as a matter of law "where the insured's actions were so inherently dangerous or harmful that injury was sure to follow.")

intent" to inflict injury (PCR Br. at 24, 25); the injured employees are not at fault (*id.*); and the law already provides sufficient deterrent through the threat of criminal penalties (*id.* at 25-26). None of these arguments has any merit.

Turner held that the allegations of the underlying complaints and the evidence that supported those allegations made out a case that PCR intentionally exposed its employees to conditions that were substantially certain to produce serious injury or death because PCR "put[] the concern for profits first." *Turner*, 754 So. 2d at 691. That deliberate decision to place profits over employee safety is a quintessential example of an intentional wrong that will be encouraged if the costs associated with it are reduced by being spread to others through insurance and discouraged if the costs are born entirely by the party seeking to profit. It does not matter whether PCR specifically intended to injure the employees; the very fact that it made a profit-maximizing choice to create a substantial certainty that they would be injured establishes that its conduct was "a type that will be encouraged by insurance." *Bal Harbour Club*, 549 So. 2d at 1007.

PCR's remaining arguments with regard to the first *Bal Harbour Club* factor are even less substantial. Its invocation of the innocent co-insured doctrine2 of *Everglades Marina, Inc. v. American Eastern Development Corp.*, 374 So. 2d 517 (Fla. 1979), founders on the indisputable fact that PCR, which seeks recovery here, is the wrongdoer, not a victim of wrongdoing.5 PCR's suggestion that the

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5 Moreover, since intentional wrongs usually have an innocent victim, PCR's reading of *Everglades Marina* would eviscerate the "axiomatic" rule that "one

threat of criminal prosecution of employers because they have created unsafe working conditions serves as a sufficient deterrent is difficult to take seriously. This Court can take notice of the rarity of such prosecutions and of the legal difficulties that make them rare.6

PCR's discussion of the second *Bal Harbour Club* factor, whether the purpose of the imposition of liability is primarily to compensate the victim or deter the wrongdoer (PCR br. at 26-27), completely misses the point. Travelers does not dispute that personal injury lawsuits are, in general, intended primarily to compensate the victim. But, as Travelers explained in its initial brief, the issue before the Court in *Turner* was not whether the victim would be compensated, because the availability of workers compensation benefits assured compensation,7 but whether the employer should be exposed to the additional risk of a tort suit. This Court held that the injured employees should be allowed to sue PCR because it did not want to "virtually encourage a practice of 'willful blindness' on the part of employers." *Turner*, 754 So. 2d at 691. This reasoning leaves no doubt that suits brought under the intentional tort exception to workers compensation exclusivity serve a substantial deterrent purpose. That purpose would be undone by allowing employers to shift their liability to insurers.8

Having failed to justify its claim for insurance under the law of this State, PCR asks this Court to follow the holding of the Ohio Supreme Court in *Harasyn v. Normandy Metals, Inc*., 49 Ohio St. 3d 173, 551 N.E.2d 962 (1990). This

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should not be able to insure against one's own intentional misconduct." *Bal Harbour Club*, 549 So. 2d at 1007.

6 PCR's constant emphasis on its lack of "specific intent" would surely have been even more vigorous had it been charged criminally.

7 *See supra* pp. 4-5.

8 As Travelers also noted, the analysis in *Bal Harbour Club* recognizes that most actions serve both deterrent and compensatory functions. (Travelers Br. at 33-34.) Since all actions brought against employers under the intentional tort exception necessarily involve wrongdoing in the workplace and almost all of them are brought against commercial enterprises, the *Bal Harbour Club* analysis recognizes that precluding insurance of such claims is unlikely to result in the denial of all additional compensation to victimized employees. (*Id.* at 34, following *Bal Harbour Club*, 549 So. 2d at 1009.) PCR does not respond to this point.

Court should decline that invitation for many reasons. First, *Harasyn* is an opinion that has never been cited in a reported case outside of Ohio. Second, as the Ohio Supreme Court has recently noted, "there is debate within [that] court concerning the current state of the law" as set forth in *Harasyn*. *Doe v. Shaffer*, 90 Ohio St. 3d 388, 738 N.E.2d 1243, 1245-46 n.5 (2000).9

Finally, and most importantly, *Harasyn* should not be followed because it is wrong. It rests on the *ipse dixit* that "where intent is inferred from 'substantial certainty' of injury, the presence of insurance has less effect on the tortfeasor's actions because it was not the tortfeasor's purpose to cause the harm for which liability is imposed." *Harasyn*, 551 N.E.2d at 965. It was, however, the employer-tortfeasor's purpose to create the conditions from which injury was substantially certain to follow; the presence of insurance makes that decision less costly to the employer and therefore more likely. Florida's public policy should preclude insurance coverage that will make Florida's workers more likely to be injured because their employers choose profits over safety.

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9 The debate referenced by the Ohio Supreme Court is found in the dissent in *Buckeye Union Insurance Co. v. New England Insurance Co.*, 87 Ohio St. 3d 280, 720 N.E.2d 495, 502 (1999). Travelers respectfully submits that the reasoning in the *Buckeye Union* dissent is far more convincing than the explanation for its holding given by the court in *Harasyn.*

CONCLUSION

For the reasons stated above and in Travelers' initial brief, 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
HINSHAW & CULBERTSON
9155 South Dadeland Blvd.
Suite 1600
Miami, FL 33156
Phone: (305) 358-7747
Facsimile: (305) 577-1063

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

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. 328383
HINSHAW & CULBERTSON
9155 South Dadeland Blvd.
Suite 1600
Miami, FL 33156
Phone: (305) 358-7747
Facsimile: (305) 577-1063

Allan B. Taylor
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 two copies of the foregoing brief were served by overnight mail, 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

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

on this 27th day of June, 2003.

Allan B. Taylor

INDEX TO APPENDIX

1 In *Swindal*, the District Court of Appeals certified a question asking whether an intentional act exclusion applied to '"injuries arising out of an incident involving an intentional tort if the injuries "inevitably flow" from the insured's intentional act.'" *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 468 (Fla. 1993) (quoting *Swindal v. Prudential Prop. & Cas. Ins. Co.*, 599 S. 2d 1314, 1319 (Fla. 2d DCA 1992)). This Court, however, reframed the question to ask whether the exclusion applies "where the insured committed an intentional act intending to cause fear, but bodily injuries may have been caused accidentally." *Id.* In response to the reframed question, the Court held that the exclusion did not apply. In doing so, it explained that the decision in *Landis v. Allstate Insurance. Co.*, 546 So. 2d 1051 (Fla. 1989), "did not suggest that courts apply tort law causation principles of 'reasonably foreseeable' or 'natural or probable consequences' in construing the intentional injury clause in insurance contracts." *Swindal*, 622 So. 2d at 472. *Swindal* neither stated nor implied that when injury is so certain that intent to injure is imputed to the wrongdoer, as in *Landis* and here, an intentional injury exclusion would not apply to the tortfeasor's claim for coverage. *Swindal* explicitly did not deal with a situation, such as is presented here, where the injuries alleged in the underlying complaint were "substantially certain" to result from the intentional acts of the alleged tortfeasor.

2 *See Mich. Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 924 (11th Cir. 1998).