IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CURTIS JONES, individually, and ANNIE JONES, his wife, and each as parent and natural guardian of CURTIS JONES and SHABRAELIAH JONES, minors,

Petitioners/Plaintiffs,

CASE NO.: SC04-1538

vs.

MARTIN ELECTRONICS, INC.,

Respondent/Defendant.
_____/

BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF POSITION OF RESPONDENT/DEFENDANT

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Defense Lawyers Association ("FDLA"), adopts the Statement of the Case and Facts provided by Respondent/Defendant, Martin Electronics.

SUMMARY OF THE ARGUMENT

The question certified to this Court by the First District Court of Appeal is not of great public importance. The 2003 changes to § 440.11, Fla. Stat., abrogated the Substantial Certainty test announced by this Court in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000). Accordingly, intentional tort suits against employers will likely diminish to the point of being the rarest of exceptions, if they exist at all. While the question certified is unquestionably of great significance to the litigants, it is not of great importance to the citizens of Florida.

Should this Court accept jurisdiction and answer the certified question, FDLA urges that permitting employees' to seek workers' compensation benefits *and* tort damages arising from the same industrial event would subject *all* Florida businesses to increased cost of defending and indemnifying against tort suits. This Court should consider also the inconvenience to, and time required of, employers in defending negligence actions. The great degree of uncertainty of the exposure attendant to tort suits undermines a fundamental basis of the Workers' Compensation Law of providing employers a predictable measure of their exposure arising from on-the-job injuries and to keep those costs reasonable.

Finally, FDLA urges this Court to affirm the First District's finding that an employee who acquiesces that an on-the-job injury resulted from an "accident," may not allege in a civil action that the "accident" was, in fact, an intentional tort.

The election of remedies doctrine precludes litigants from taking inconsistent positions. The First District correctly applied the concepts announced by this Court in *Turner* to determine that an event cannot be both an "accident" and an intentional tort. Moreover, Petitioners' argument that the specter of intentional tort suits is a deterrent to employers ignores the role of the Occupational Safety and Health Administration ("OSHA") in promulgating and enforcing safety regulations to protect employees from industrial injuries.

ARGUMENT

I. THE QUESTION CERTIFIED TO THIS COURT BY THE FIRST DISTRICT COURT OF APPEAL IS NOT OF GREAT PUBLIC IMPORTANCE BECAUSE THE FLORIDA LEGISLATURE ABROGATED THE OBJECTIVE STANDARD OF "INTENTIONAL" TORTS ANNOUNCED IN *TURNER V. PCR, INC.*, 754 SO. 2D 683 (FLA. 2000).

The First District Court of Appeal certified to this Court the following question:

> May an employee receiving workers' compensation benefits litigate entitlement to additional benefits then, having obtained an award of the additional workers' compensation benefits, bring suit in circuit court for the personal injuries sustained on the job that were the basis for the award?

Martin Elecs., Inc. v. Jones, 877 So. 2d 765, 769 (Fla. 1st DCA (2004). Petitioners urge that by answering the certified question in their favor, this Court will permit catastrophically injured employees to rightfully make a conscious election to receive workers' compensation benefits *and* sue their employers for so-called Turner Standard torts. The Florida Legislature's amendments to § 440.11, Fla. Stat. (2003) have made the prospect of such suits in the future extremely rare, if not non-existent.

Section 440.11 provides that the liability of employers set forth in § 440.10, Fla. Stat. (2004), is exclusive, with certain exceptions. One exception is where the employer commits an "intentional" tort. *See* § 440.11(1)(b). Section

440.11(1)(b)1 describes the traditional intentional tort, such as a battery upon the employee. Section 440.11(1)(b)2 describes conduct that is not the battery-type intentional tort, but that is so egregious that it is virtually certain to injure or kill. Specifically, § 440.11(1)(b)2 provides that an employer's liability under the Workers' Compensation Law is not exclusive:

> (b) When an employer commits an intentional tort that causes the injury or death of the employee. For purposes of this paragraph, an employer's actions shall be deemed to constitute an intentional tort **and not an accident** only when the employee proves, by clear and convincing evidence, that:
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> ***
>
> 2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work….

(emphasis added).

An employee who chooses to sue his or her employer under this "virtual certainty" tort faces a heavy burden. The employee must show: (1) knowledge by the employer of prior similar accidents or explicit warnings of a specific danger;

(2) the danger was virtually certain to cause injury or death; (3) that he or she was unaware of the risk because the danger was not apparent; and (4) that the employer concealed the danger.

The heightened burden upon employees created by § 440.11(1)(b)2 should make such "virtual certainty" tort suits against employers a rare exception. Likewise, by eliminating the Turner Standard, the Florida Legislature has actually made it easier for an injured employee to determine if he or she has a colorable cause of action under § 440.11(1)(b)2. Accordingly, the question certified by the First District Court of Appeal is not of great public importance. FDLA respectfully urges this Court to decline to answer the question as certified or as rephrased by Petitioners.

II. THE DETERRENT EFFECT, IF ANY, OF THE SPECTER OF INTENTIONAL TORT SUITS IS OUTWEIGHED BY THE HARM IT WILL DO TO THE FUNDAMENTAL PURPOSE OF THE WORKERS' COMPENSATION LAW AND ADDS AN UNNECESSARY LAYER OF REGULATION OF INDUSTRY BEYOND THAT FURNISHED BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION.

Petitioners argue that the possibility of being sued for intentional tort in addition to paying workers' compensation benefits will deter employers from engaging in conduct substantially certain to injure or kill their employees. Petitioners provide no proof that the specter of such suits has any actual deterrent effect. Even assuming Petitioners' theory is correct, subjecting employers to both

the payment of workers' compensation benefits and tort damages must be weighed against the impact this will have upon industry in Florida.

FDLA urges this Court to consider that the Workers' Compensation Law permits *all* Florida employers to easily and accurately estimate their potential exposure for work-related injuries. This fosters the important public policy goal of promoting the conduct and growth of business. By adopting Petitioners' position, virtually every employer will be required to obtain additional liability coverage in order to defend against Turner Standard suits. The fact that some employers may prevail on summary judgment after discovery shows the employer did not commit a Turner Standard tort ignores that a fundamental tenet of Workers' Compensation Law is to protect employers from having to face such suits in the first place.

Under the Turner Standard, the employer's conduct in almost every work-related accident can be characterized as substantially certain to result in injury or death. *See Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 868 (Fla. 2d DCA 2002) ("[A]ny modestly dangerous activity at a workplace that is repeated often enough or long enough will eventually result in an accident."). Because the Turner Standard turns upon an objective evaluation of the employer's conduct, trial courts are almost certain to deny employers' motions to dismiss until the factual record has been sufficiently developed. Even then, many courts may be reluctant to grant summary judgment, opting to let the jury decide the issue. Assuming

employers win many, if not most, of these cases on the merits, the damage to the business community will have been done.

Experience dictates that if the Turner Standard suit drags on for any significant time, the defense costs will be in the tens of thousands of dollars. Faced with a proliferation of these suits, liability insurers can be expected to substantially increase premiums on employer liability policies, and employers will have to purchase greater coverage limits to safeguard against the uncertainty of damage awards. All of this will increase considerably the cost of doing business in Florida and undermine the goal of providing employers a predictable measure of exposure for work-related injuries.

Additionally, unlike the no-fault workers' compensation scheme, tort-based litigation requires plaintiff-employees to prove liability and damages, with a corresponding right of defendant-employers to prove affirmative defenses and challenge the measure of damages. The realities of such litigation will require employers to make employees, supervisors, managers, and even corporate officers available for depositions and other discovery, including assisting with answering interrogatories, requests for admissions, and document production. These tasks will add substantially to the cost of doing business by cutting into employee productivity, requiring the formation and implementation of procedures for

handling litigation, and will generally foster an atmosphere of harassment and inconvenience.

This Court should recognize that Petitioners' proposals have potentially far-reaching effect on all businesses in Florida. By subjecting employers to exposure on two fronts, individual businesses, and possibly whole classes of industry, may find Florida too financially risky in which to begin or continue doing business.

Finally, Petitioners ignore that Florida employers are already subject to the requirements and penalties of the Occupational Safety and Health Administration ("OSHA"). By using the threat of tort-based damages, including punitive damages, as a de facto regulatory scheme, Florida employers would be subject to an extra layer of regulation and in which the exposures have the potential to drive individuals or whole classes of business out of this State or into bankruptcy. Or both.

III. THE "INCONSISTENT POSITIONS" COMPONENT OF THE ELECTION OF REMEDIES DOCTRINE PRECLUDES AN EMPLOYEE FROM ASSERTING THAT AN ON-THE-JOB INJURY RESULTED FROM BOTH AN "ACCIDENT" AND AN "INTENTIONAL" TORT.

Petitioners argue an employer's conduct that causes injury or death to an employee may be both accidental *and* intentional. This argument fails. First, in announcing the test for determining whether an employer's conduct defeated workers' compensation immunity, the *Turner* Court concluded that the "standard

imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur." *Turner*, 754 So. 2d at 691 (emphasis added). Even though *Turner* created an alternate basis for recovery under a standard that was slightly below specific intent, this Court nevertheless recognized that workers' compensation immunity could not be overcome absent some degree of intent to injure or kill. Accordingly, *Turner* stands for the proposition that if an employer engages in conduct substantially certain to lead to injury or death, the law will impute some level of intent to the employer.

Second, the 2003 revision to § 440.11(1)(b) expressly states that an employer's intentional tort is "not an accident" under the Workers' Compensation Law. While this codification is in some way a repudiation of *Turner*'s objective, "substantial certainty" test, it also reestablishes that aspect of *Turner* that conduct by an employer that is substantially certain to cause injury or death is not an accident. "[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 workers' compensation immunity." *Turner*, 754 So. 2d at 689.

Petitioners argue the election of remedies doctrine can *never* bar an employee from receiving both workers' compensation benefits and tort damages

for an on-the-job injury caused by the employer's "intentional" tort. Petitioners would apply the doctrine only where there is a dispute over the compensability of an injury. Under Petitioners' application, if a workers' compensation claimant and the employer/carrier disagree about whether an injury occurred during the course and scope of employment, or whether the claimant was an "employee" at the time of the injury, the claimant may agree to accept workers' compensation benefits. Petitioners argue this would trigger the election of remedies doctrine and claimant would be barred from pursuing a *common* negligence suit against the employer.

Limiting the election of remedies doctrine to situations in which the employee chooses between workers' compensation benefits and tort damages because of a dispute regarding compensability ignores that the intentional tort exceptions to workers' compensation immunity by their very nature fall outside the Workers' Compensation Law. Petitioners' construction would permit injured employees to take full advantage of the Workers' Compensation Law, which necessarily requires an acquiescence to be bound thereby, and to simultaneously repudiate the Workers' Compensation Law in order to obtain tort damages. This is precisely the sort of vacillation the election of remedies doctrine is intended to prevent.

Petitioners argue also that Florida law recognizes that conduct is only intentional if the tortfeasor intended the actual harm that results from his or her

conduct. Petitioners rely upon the definition of "intent" established in insurance coverage law and cite *Barry Univ., Inc. v. Fireman's Fund Ins. Co. of Wisc.*, 845 So. 2d 276 (Fla. 3d DCA 2003), for the proposition that intentional conduct may nevertheless be deemed accidental. Insurance coverage turns upon the rules of insurance policy construction that are unique to that area of law. Under Florida law, coverage exclusions in insurance policies are construed narrowly and against the insurer. *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998); *State Farm Fire and Cas. Co. v. Castillo*, 829 So. 2d 242 (Fla. 3d DCA 2002).

The concept of intent as codified in the Florida Workers' Compensation Law is not subject to the narrow interpretation applicable to insurance policies. Rather, this Court recently clarified that exceptions to workers' compensation immunity are themselves to be narrowly construed. *Taylor v. School Board of Brevard Co.*, 29 Fla. L. Weekly S 421 (Fla. Aug. 19, 2004). Because the intentional tort rule is an exception to workers' compensation immunity, it must be narrowly construed. The definition of "intent" proposed by Petitioners would effectively broaden the intentional tort exception to the Workers' Compensation Law by making the exception applicable to employers who engage in intentional conduct, but who do not intend the specific harm that results. Accordingly, this Court should reject the

invitation to overlay the rules of insurance policy interpretation upon Florida's Workers' Compensation Law.

CONCLUSION

The opinion of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing has been furnished by U.S. Mail to:

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on November 17, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2)

Respectfully submitted,

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