IN THE SUPREME COURT OF 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,

vs. CASE NO.: SC04-1538

MARTIN ELECTRONICS, INC.

Respondent/Defendant.
_____/

AMENDED
ANSWER BRIEF OF RESPONDENT MARTIN ELECTRONICS, INC.

_____

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PRELIMINARY STATEMENT

There are two parties in this case: Petitioners – Curtis and Annie Jones; and Respondent – Martin Electronics, Inc. To maintain consistency with the briefs below, Martin Electronics, Inc. will be referred to by name ("Martin") or as Defendant, and Curtis and Annie Jones will be referred to by name or as Plaintiffs.

To avoid confusion, the exhibits in Respondent's Appendix are labeled consecutively to the exhibits in Petitioners' Appendix.

STATEMENT OF THE CASE AND THE FACTS

Plaintiffs' Complaint against Defendant seeks personal injury damages resulting from an explosion that occurred at Martin's plant. [E. 7].

At the time of his injury, Curtis Jones was an employee of Martin, working in the course and scope of his employment. [E. 23 & 24]. The accident and the resulting injuries to Plaintiff were covered by workers' compensation as required by Chapter 440, Florida Statutes. [E. 27].

From the accident until now, Plaintiff has received workers' compensation benefits, which included medical expenses, lost wages, and attendant care benefits provided by Martin under Chapter 440, Florida Statutes. [E. 23 & 24]. Such benefits will continue for the rest of Plaintiff's life.

While attendant care benefits were being paid by Martin, a dispute arose concerning the hourly rate for the attendant care services that Mrs. Jones furnished. Mr. Jones filed a workers' compensation petition [E. 25 & 26], which sought to increase that hourly rate. The judge of compensation claims entered an order that granted Jones' petition, adopted as a finding of fact the parties' stipulation that Mr. Jones "sustained an injury by

accident," and increased the hourly rate for attendant care services. [E. 25 & 26].

Meanwhile, in Circuit Court, the Joneses filed the Complaint in the present case seeking damages in intentional tort. [E. 7]. As amended, the Complaint alleges:

> While MARTIN did not have an actual intent to injure CURTIS JONES, the injuries to CURTIS JONES were the result of intentional conduct on the part of MARTIN that was substantially certain to result in injury or death. [E. 8, ¶8]

Martin moved for summary judgment claiming that Mr. Jones elected the workers' compensation system as the exclusive remedy for his injuries by pursuing and receiving benefits there. [E. 9]. The trial court denied Martin's motion, finding that Plaintiffs can proceed against Martin on an intentional tort theory of liability and that Martin is not entitled to workers' compensation immunity. [E. 12].

On appeal, the decision of the trial court was reversed, and the District Court certified the following as a question of great public importance:

> 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? [E. 15].

This Court has postponed its decision on jurisdiction and requested briefs on the merits. [E. 19]. As a consequence, the following two issues are presented in the instant appeal:

1. Is the certified question one of great public importance?

2. After pursuing and receiving workers' compensation benefits, can Plaintiffs seek intentional tort damages in a civil suit?

SUMMARY OF THE ARGUMENT

Although the issue in this case has been certified as one of great public importance, Defendant disagrees because the 2003 Legislature amended §440.11, Fla.Stat., and, in so doing, legislatively abrogated the objective standard adopted in *Turner v. PCR, Inc.*, 765 So.2d 683 (Fla. 2000). After October 2003, cases like this one, which rely on the objective *Turner* standard, are not actionable as a matter of law. Under the new subjective standard, no reasonable plaintiff would argue that pursuing and obtaining workers' compensation benefits for an on-the-job accident was consistent with a subsequent intentional tort suit for the same injuries. *Turner* created a window which has now

closed. The instant issue will not arise again, so there is no public importance in its resolution.

Should this Court accept jurisdiction, the First District's certified question should be answered negatively because Florida's District Courts have consistently held that once an injured employee affirmatively seeks workers' compensation benefits, he has elected that as his remedy. The election of remedies doctrine is particularly applicable to the instant case because in seeking workers' compensation benefits, Mr. Jones stipulated, and a judge of compensation claims found, his injuries were the result of an on-the-job accident. After having so stipulated, Plaintiffs now contend that Mr. Jones' injuries are the result of intentional conduct on the part of Defendant. In other words, from Plaintiffs' perspective, the explosion was an accident for workers' compensation purposes but caused by an intentional act for purposes of this suit. As a matter of law, Plaintiffs are estopped from taking inconsistent positions in related litigation.

An accident for workers' compensation purposes is statutorily defined as "an unexpected or unusual event or result that happens suddenly." §440.02(1), Fla. Stat. (2000). Once an event is determined to be an accident, it, by definition, is either an unexpected event or an

unexpected result. As this Court stated only four years ago in *Turner*, "…if a circumstance is substantially certain to produce injury or death, it cannot reasonably be said that the result is unexpected or unusual…" *Turner*; 765 So.2d at 689.

Plaintiffs have made a conscious and successful election to pursue benefits through the workers' compensation system. As a consequence, they are now barred from bringing the immediate suit against Defendant.

ARGUMENT

I.

THE ISSUE BEFORE THIS COURT IS NOT ONE OF GREAT PUBLIC IMPORTANCE.

This case comes to this Court because of an election of remedies defense raised by Defendant. Plaintiffs argue that election of remedies does not apply because pursuing workers' compensation benefits is not inconsistent with pursuing an intentional tort suit under the objective standard adopted by *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000). Defendant disagrees and argues that once an employee pursues workers' compensation benefits, he has elected that as his exclusive remedy.

While the issue presented is important to the parties, it is not a question of great importance to the public. Similar cases will not arise in the future because the objective standard adopted in *Turner* has been abolished by the legislature.

The law regarding the intentional tort exception to workers' compensation immunity was established by this Court in the companion cases of *Lawton v. Alpine Engineered Products, Inc.*, 498 So.2d 879 (Fla. 1986), and *Fisher v. Shenandoah General Construction Co.*, 498 So.2d 882 (Fla. 1986). Thereafter, in *Eller v. Shova*, 630 So.2d 537 (Fla. 1993), this Court cited *Fisher* and *Lawton* and stated that:

> "employers are provided with immunity from suit by their employees so long as the employer has not engaged in any intentional act designed to result in or that is substantially certain to result in injury or death to the employee." *Eller*, 650 So.2d 539.

Until *Turner*, there was disagreement among the District Courts regarding the proper standard to be applied to the second part of this disjunctive test. *Turner* clarified that an employee need only establish that the employer should have known that the conduct complained of was substantially certain to result in death or injury (objective standard).

After *Turner*, every workers' compensation claim had the potential to also be an intentional tort action for

additional damages. The injured employee only had to allege in civil court that the employer's conduct was such that "the employer should have known that death or injury was substantially certain to occur."

The practical effect of *Turner* was noted in a concurring opinion written in *EAC USA, Inc. v. Kawa*, 805 So.2d 1 (Fla. 2d DCA 2001):

> Over a sufficient period of time, any dangerous job is substantially certain to injure or kill some employee. The builder of the Golden Gate bridge knew with a substantial certainty that building the bridge would cause an employee to sustain a serious injury or death. That did not make the act of building the bridge a battery.
>
> Allowing a dangerous machine to be operated without proper guarding by poorly trained employees for a sufficient period will eventually cause injury or death. In my mind, however, the conduct is a negligent omission that may rise to the level of gross or culpable negligence… I fear, however, that treating such conduct as a battery may prove to create more problems than it solves. *EAC USA*, 805 So.2d at 5. (emphasis supplied)

While *Turner* sets the stage for the instant question, it has been rendered moot by 2003 legislation which states:

> 440.11 Exclusiveness of Liability. –
>
> (1) The liability of an employer prescribed in §440.10 shall be exclusive and in place of all other liability…except as follows:

> (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:
>
> 1. The employer deliberately intended to injure the employee; or
>
> 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.

Without *Turner*, no reasonable plaintiff would argue that pursuing and obtaining workers' compensation benefits for injuries sustained in an on-the-job accident was consistent with a subsequent intentional tort suit for the same injuries. Workplace incidents now fall squarely within or without the workers' compensation system. Thus, the instant situation will not arise after October 1, 2003, no question of great public importance is posed here, and this Court should decline jurisdiction.

II.

THE WORKERS' COMPENSATION SYSTEM IS AN ALTERNATIVE TO CIVIL SUITS AND THE TWO ARE MUTUALLY EXCLUSIVE.

The distinction between a statutory workers' compensation claim and a common-law action for negligence could not be more stark. Under Florida Workers' Compensation law, the employee gives up a common law right to sue his employer in exchange for strict liability and the rapid recovery of specified benefits. *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000). For employees within the statute's reach, workers' compensation is the exclusive remedy for "accidental injury or death arising out of work performed in the course and scope of employment." §440.11(1), Fla. Stat. (2000).

If an on-the-job injury is the result of an accident, then workers' compensation is the employee's only remedy. If an on-the-job injury is not the result of an accident, then it is not within reach of the workers' compensation system. The statutory definition of accident is "an unexpected or unusual event or result that happens suddenly." §440.02(1), Fla. Stat. (2000). By definition, on-the-job injuries resulting from intentional acts are not the result of an accident and, consequently, fall outside

the workers' compensation system. The *Turner* court explained the concept as follows:

> "Conversely, therefore, under 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 (emphasis omitted). In other words, job-related injuries arising from an intentional act cannot, by definition, be the result of a job-related accident.

For example, if a sole proprietor punches an employee, he does not have workers' compensation immunity because the injury is not the result of an accident. In such an instance, the injured employee can bring a common law suit for battery against his employer because, even though the incident occurred on the job, it is outside the scope of the workers' compensation system. However, if the employee seeks workers' compensation benefits and, in so doing, stipulates that the touching was accidental and, based upon such a stipulation receives benefits, he cannot thereafter bring a civil suit for battery because the two remedies are mutually exclusive.

In the instant case, if Martin intentionally injured Mr. Jones, then he had a common law right to sue. However, if he elects to pursue workers' compensation benefits and in so doing stipulates that his injuries were the result of an accident, he is bound by that election.

In their initial brief (page 15), the Joneses cite *Turner* dicta to support their position that *Turner* extinguished their obligation to elect between workers' compensation or a civil action for intentional tort. According to Plaintiffs' diagram (Initial Brief, p. 18), Florida's workers' compensation law allows an employee injured by on-the-job negligence to elect between a tort suit or a workers' compensation claim for benefits. The diagram is wrong. There is no election of remedies between workers' compensation benefits and a negligence suit. Workers' compensation is the exclusive remedy for accidental injury or death arising out of work performed in the course and scope of employment. §440.11(1), Fla. Stat. (2000). If an accident caused the injury, the employee has no choice but to accept workers' compensation benefits, and the election of remedies doctrine is inapplicable. There is nothing to elect because Chapter 440 completely bars any legal action against an employer where the injury is caused by an accident. *Wishart v. Laidlaw Tree Service, Inc.*, 573

So.2d 183 (Fla. 2d DCA 1991) (where negligence causes on-the-job injuries, the employee's exclusive remedy is workers' compensation).

The *Turner* court did not hold or even state in dicta that an intentional tort suit could be brought as an additional remedy over and above workers' compensation benefits. The opinion does not mention whether the plaintiffs received workers' compensation benefits; that was irrelevant to the issue before it. Rather, the Court re-visited the standard for determining whether an intentional act had occurred and announced it was an objective one.[1] *Turner*, 754 So.2d 683.

Election of remedies is implicated only where an intentional act is involved – then the injured employee has a choice between workers' compensation benefits or an intentional tort suit. If Martin's conduct was substantially certain to result in injury to Mr. Jones, then Mr. Jones can elect between the workers' compensation system and a civil suit. However, he cannot have both. Upon choosing one, the other is lost. The law supporting this proposition is well

[1] As previously discussed, the Florida legislature reacted to *Turner v. PCR* and, as of October 1, 2003, the objective standard it established no longer applies.

established and discussed in the following Section III.

III.

> IN FLORIDA, AN EMPLOYEE WHO SEEKS AND RECEIVES WORKERS' COMPENSATION BENEFITS FOR AN ON-THE-JOB INJURY HAS ELECTED SUCH AS HIS EXCLUSIVE REMEDY.

The doctrine of election of remedies in Florida is an application of the doctrine of estoppel based on the theory that one electing should not later be permitted to avail himself of an inconsistent course. ***Williams v. Robineau***, 168 So. 644 (Fla. 1936). In ***Robineau***, this Court explained an election of remedies as:

> …a choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone. …The election is matured when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other. ***Robineau***, 168 So. at 646.

Section 440.11 provides that when an injured employee elects to receive compensation pursuant to the Workers' Compensation Act, the employer's liability is limited to that prescribed in Section 440.10. In pertinent part, Section 440.11(1) provides:

> [T]he liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee,

> the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the legal representative thereof, in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. (emphasis supplied)

In Florida, an employee who pursues and receives workers' compensation benefits for an on-the-job injury has elected such as his exclusive remedy; thus, a subsequent tort suit for damages is barred as a matter of law.[2]

In determining when an employee's tort suit will be barred by workers' compensation immunity, the courts have found the following employee actions to be dispositive:

> 1) If the employee has actively filed for a workers' compensation claim and received benefits for an injury or accident, or even received a settlement for these benefits, a tort suit is barred. See *Matthews v. G.S.P. Corp.*, 354 So.2d 1243 (Fla. 1st DCA 1978); *Michael v. Centex-Rooney Const. Co.*, 645 So.2d 133 (Fla. 4th DCA 1994); *Townsend v. Conshor, Inc.*, 832 So.2d 166 (Fla. 2d DCA 2002).

[2] This presumes active pursuit of workers' compensation benefits by the claimant, which the record on appeal shows did occur in this case and is discussed in Section V.

> 2) If the employee has admitted or stipulated to the fact that the injury or accident occurred during the course of his or her employment, or if some authority has made a factual determination on the merits of a claim for benefits, then a subsequent civil action is precluded. *Ferraro v. Marr*, 490 So.2d 188 (Fla. 2d DCA 1986), rev. den. 496 So.2d 143 (Fla. 1986).
>
> 3) If the employee has previously maintained and lost a civil action against his employer, the doctrine of election remedies bars workers' compensation claim. *Hume v. Thomason*, 440 So.2d 441 (Fla. 1st DCA 1983); and
>
> 4) If the employee claims and receives workers' compensation benefits, he has elected such compensation as an exclusive remedy where there is evidence of a conscious choice of remedies. *Mandico v. Taos Const., Inc.*, 605 So.2d 850 (Fla. 1992).

In this case, Mr. Jones' workers' compensation activities meet the election of remedy requirements and thereby established workers' compensation immunity for Martin in the civil suit. [E. 25 & 26].

In response to the election of remedy defense, Plaintiffs argue that the intentional tort suit remedy is a "supplementary and concurrent claim outside of workers' compensation system." (Initial Brief, p. 22). There are numerous cases which reject Plaintiff's position.

In *Matthews v. G.S.P. Corp.*, 354 So.2d 1243 (Fla. 1st DCA 1978), an employee injured during the course and scope of his employment sought and received workers' compensation benefits. He then sued his employer in civil court, claiming that its willful and wanton negligence permitted him to recover civil damages. In affirming the lower court's summary judgment, the First District held that:

> An employee may not elect to declare his injury to have been an accident occurring in the course of his employment and thereafter repudiate such position by alleging that the place and conditions of his employment were so dangerous that the injury was not in fact an accident. Such position is contrary to the conclusiveness of remedy doctrine embodied in the workers' compensation system. The provisions of the act may not be accepted and then repudiated by the employee. *Mullarkey v. Florida Feed Mills, Inc.*, 268 So.2d 363 (Fla. 1972).

Matthews, 354 So.2d at 1244. The inconsistent positions disallowed in *Matthews* are exactly what Jones is trying to do here. First, Matthews claimed he was in the course and scope of his employment to receive workers' compensation benefits. Then he claimed he was not an employee to receive tort damages. First, Jones claimed injury by accident to receive workers' compensation benefits and now claims otherwise to receive tort damages. Just as Matthews could not sue in tort, neither can Jones.

In *Ferraro v. Marr*,[3] 490 So.2d 188 (Fla. 2d DCA 1986), rev. den. 496 So. 2d 143 (Fla. 1986), the court held that an employer was immune from tort action because the plaintiff had received workers' compensation benefits. In *Ferraro*, the court relied on the plaintiff's stipulation that his accident arose out of the course and scope of his employment, that the claim for workers' compensation benefits had been filed by the plaintiff, that the plaintiff had admitted he knowingly signed the claim, and that the claimant made a conscious choice and ultimately did receive workers' compensation benefits. The same factors are present in the instant case. Plaintiff made a conscious and informed election of the workers' compensation remedy and thereby waived his other rights.

In *Pearson v. Harris*, 449 So.2d 339 (Fla. 1st DCA 1984), an employee first sought workers' compensation benefits asserting he was an "employee" entitled to the benefits of the workers' compensation law. The defendant disputed this, and the deputy commissioner found that he was an employee. Later, the employee brought a civil tort action, alleging that the ultra-hazardous nature of his

[3] *Ferraro v. Marr* was cited favorably by this Court in *Mandico v. Taos Construction, Inc.*, 605 So.2d 850 (Fla. 1992).

work imposed a duty on the employer to warn of any known hidden dangers. The employer asserted the election of remedies doctrine as a complete bar, and the lower court's summary judgment for the employer was affirmed by the First District with a specific finding that the employee made an election of remedy when he, through the workers' compensation proceeding, obtained an adjudication that he was an employee. He was thereafter specifically barred from alleging in the civil action that he was not an employee. In the case at bar, Plaintiff should face the same result. He has obtained workers' compensation benefits by stipulating that he was injured in an on-the-job "accident." [E. 25 & 26]. He should, therefore, be barred from now contending that his injuries were the result of an intentional act.

To easily understand why the District Court's opinion in this case should be affirmed, this Court need only consider ***Hume v. Thomason***, 440 So.2d 441 (Fla. 1st DCA 1983). In ***Hume***, in a reverse situation, the court held that the doctrine of election of remedies was properly applied to bar a workers' compensation claim where the claimant had previously maintained and lost a civil action in circuit court against his putative employer. The court held:

> that an election is matured "when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other," and "[i]t is generally conceded that to be conclusive it must be efficacious to some extent." ***Williams v. Robineau***, 124 Fla. 422, 168 So.2d 644 (1936); ***Williams v. Duggan***, 153 So.2d 726 (Fla. 1963). In the instant case, the summary judgment rendered in the circuit court was obviously efficacious from the Thomasons' point of view, as it worked to their advantage and to Hume's disadvantage. Thus, Hume's election matured when judgment was entered finally adjudicating the rights of the parties. He was precluded thereafter from pursuing his workers' compensation claim.

Hume, 440 So.2d at 442.

Here, Plaintiff's workers' compensation claim has worked to his advantage and to Defendant's disadvantage. It was, therefore "efficacious" within the meaning of ***Robineau***.

The workers' compensation system is based on the premise that the employee gives up a right to a common law action for negligence in exchange for strict liability and the rapid recovery of benefits. ***United Parcel Serv. v. Welsh***, 659 So.2d 1234, 1235 (Fla. 5th DCA 1995), cited favorably in ***Turner v. PCR, Inc.***, 754 So.2d 683, 685 (Fla. 2000). Under Plaintiffs' argument, Martin gets nothing for its compliance with the statutorily mandated workers'

compensation coverage because Martin's quid pro quo is supposed to be immunity from civil suit.

The most recent case on the subject again confirms that Plaintiffs' tort claim is barred. In *Integrated Health Services, Inc. v. Jones*, 28 Fla. L. Weekly D242 (January 2003) (not reported in So.2d), the Second District, relying on established concepts of estoppel, found that a plaintiff elected to pursue a tort claim in lieu of workers' compensation benefits. There, the injured employee filed a claim for workers' compensation benefits but withdrew it when her employer asserted that her injury did not arise out of the course and scope of her employment. She then pursued a tort claim, which was allowed with the following warning:

> …Thus, Jones' attorneys should be aware that they have elected to pursue a tort claim that may not be as beneficial to their client as the original workers' compensation claim that Integrated Health now admits was a covered claim. (emphasis supplied)

Integrated Health Services, 28 Fla. L. Weekly at D243.

Here, Plaintiff elected the workers' compensation system as his remedy. Estoppel attached and he cannot now choose an inconsistent path to the detriment of Martin.

Florida is not the only jurisdiction where the doctrine of election of remedies has been applied to require claimants to make a choice between the workers' compensation

system and civil suit. Other jurisdictions, while providing an exception to workers' compensation immunity for intentional torts, recognize that the immunity exception does not create a double remedy, but rather a choice of remedies, one of which must be pursued in derogation of the other. Examples of states which have so ruled are:

> 1) The Supreme Court of Kentucky recently denied a plaintiff the right to pursue a civil action for damages for an intentional act committed in the workplace, where the plaintiff had previously elected to pursue and collect her workers' compensation remedy. *American General Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688 (Ky. 2002).
>
> 2) The Supreme Court of Texas has held that an injured employee's intentional tort claim is barred by the employee's prior voluntary election of an inconsistent remedy under the workers' compensation statute. *Medina v. Herrera*, 927 S.W.2d 597 (Tex. 1996).
>
> 3) Illinois' Fifth District Court of Appeals found that the application for adjustment of claim in the workers' compensation proceeding, which alleged accidental injury, was inconsistent with the common law tort brought by plaintiff, which alleged an intentional injury. *James v. Caterpillar, Inc.*, 611 N.E.2d 95 (Ill. 5th DCA 1993). This analysis was also followed in the Illinois First District Court of Appeal in *Zurowska v. Berlin Industries, Inc.* 667 N.E.2d 588 (Ill. 1st DCA 1996), (employee's assertions of intentional tort were "legally inconsistent" with her filing for and accepting disability

payments under the workers' compensation statute).

4) In Iowa, see *Nelson v. Winnebago Industries, Inc.*, 619 N.W.2d 385 (Iowa 2000) (noting that although the plaintiff was not allowed to proceed with a civil suit for damages against his employer, plaintiff was not without compensation because he had received thousands of dollars through the workers' compensation system).

5) In Nevada, see *Advanced Countertop Design, Inc. v. Second Judicial District Court of the State of Nevada*, 984 P.2d 756 (Nev. 1999)(employee's prior workers' compensation claim and lump-sum settlement constituted a complete bar to a subsequent intentional tort suit).

6) In Arkansas, see *Gourley v. Crossett Public Schools*, 968 S.W.2d 56 (Ark. 1998). (As a matter of law, intentional tort suit was barred by election of remedy because plaintiff had previously pursued workers' compensation for same injuries.)

Plaintiffs also cite cases from other states which they argue support their position. Their reliance on those cases merits comment. In *James v. Caterpillar, Inc.*, 611 N.E.2d 95 (Ill. 1993), the concurrence of Justice Chapan, which is quoted extensively by Plaintiffs (Initial Brief p. 41), is in reality a dissenting comment. The majority opinion held:

"we must conclude that whether a plaintiff seeks to bring a common law action against his employer for an intentional tort based upon the actions of his co-employee or the employer, as in the instant case, plaintiff's claim

> will be barred by the exclusivity provisions of the act if plaintiff has filed for and received workers' compensation benefits under the act." (emphasis supplied). *James* 611 N.E.2d at 104.

While Plaintiffs correctly quote *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991), (Initial Brief, p. 44 & 45), Justice Mitchell's dissent in that case should not be overlooked. Regarding the majority's holding that the employee could pursue both statutory and common law remedies under an objective intent standard, Justice Mitchell wrote:

> Although I concede that the majority's holding represents reasonable and perhaps desirable social policy, I must agree with the Court of Appeals that to give an employee, in addition to the rights available under our Workers' Compensation Act, a right to bring a civil action against his employer, even for gross, willful and wanton negligence, would skew the balance of interests inherent in [the] … Act. Changes in the Act's delicate balance of interests are more properly a legislative prerogative than a judicial function." *Woodson*, 407 S.E.2d at 241.

As noted earlier, the Florida legislature has rejected the *Turner* objective intent standard; North Carolina has not. Similarly, *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994), quoted extensively by Plaintiffs (Initial Brief, p. 45 & 46), relies upon an objective intent standard

for the intentional act exception to workers' compensation immunity.

Plaintiffs argue that they only seek a jury determination of whether Defendant's failure to act constituted negligence or was an intentional act under *Turner*. (Initial Brief, pages 20, 21) Such a request might be reasonable if they had not already received the "quick and efficient delivery of disability and medical benefits" intended under workers' compensation law. (See §440.015, Fla. Statute (2000)). As this Court noted in *McLean v. Mundy*, 81 So.2d 501, 503 (Fla. 1955) and again in *Taylor v. School Board*, 29 Fla. L. Weekly S421 (Fla. 2004), the basic purpose behind workers' compensation law is twofold:

> (1) [T]o see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents. *Taylor*, 29 Fla. L. Weekly at S423.

Plaintiffs' position frustrates the second purpose of the system. Martin has provided Mr. Jones adequate and certain payment for his workplace injury. He has elected such as his remedy. Consequently, Martin should not be subject to the "unwieldy tort system."

IV.

EXCEPTIONS TO THE WORKERS' COMPENSATION SYSTEM ARE TO BE NARROWLY CONSTRUED.

The instant case is based upon the intentional tort exception to workers' compensation immunity. *Fisher v. Shenandoah Gen. Const. Co.*, 498 So.2d 882 (Fla. 1986); *Lawton v. Alpine Eng. Prods., Inc.*, 498 So.2d 879 (Fla. 1986); *Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93 (Fla. 1st DCA 1996) (an employee can bring a cause of action in tort if the employer's actions exhibit a deliberate intent to injure or if the employer engages in conduct which is substantially certain to result in injury or death).

Exceptions to workers' compensation immunity are to be narrowly construed. In *Taylor v. School Board*, 29 Fla. L. Weekly S421 (Fla. 2004), when considering the "unrelated work" exception to the workers' compensation scheme, this court accepted the Fifth District's holding with the following explanation:

> Further, we find that the *Taylor* holding comports with the overall legislative intent of the Florida Workers' Compensation Law, because the law was meant to systematically resolve nearly every workplace injury case on behalf of both the employee and the employer.
>
> A contrary holding giving wide breadth to the rare exceptions to workers'

> compensation immunity would merely erode the purpose and function of the Workers' Compensation Law as established by the Legislature. We agree with the observations of the Fourth District in its recent decision in ***Fitzgerald v. South Broward Hospital District***, 840 So.2d 460 463 (Fla. 4th DCA 2003), that the unrelated works exception should be narrowly construed because "[a]n expansive construction would obliterate the legislative intent that the system operate at 'a reasonable cost' to the employer" and that to decide otherwise would "erode the immunity provided under the workers' compensation law…leading to a profusion of suits and a proliferation of costs."

Taylor 29 Fla.L.Weekly at S425. Not holding the instant Plaintiffs to their election would erode this purpose and function of workers' compensation law. Rather than resolve nearly every workplace injury case, the workers' compensation system would become a first step. After securing no-fault benefits under workers' compensation, injured employees would see if a sympathetic jury might conclude, under the objective ***Turner*** standard, that the employer should have known the accident was substantially certain to occur. The purpose and function of the workers' compensation law would be eroded by a "profusion of suits and a proliferation of costs."

V.

THE INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION IMMUNITY IS NOT AVAILABLE TO PLAINTIFFS BECAUSE MR. JONES STIPULATED THAT THE EXPLOSION WAS AN ACCIDENT AND PURSUED HIS WORKERS' COMPENSATION CLAIM TO CONCLUSION.

In an effort to avail themselves of the intentional tort exception to workers' compensation immunity, Plaintiffs rely upon the *Turner* standard and allege that Defendant engaged in intentional conduct which was substantially certain to result in his injury. [E. 8]. Assuming for argument that Martin, under the *Turner* standard, intentionally injured Mr. Jones, Plaintiffs are precluded from asserting it as a matter of law, because Mr. Jones stipulated otherwise and pursued his workers' compensation claim to conclusion.

When Mr. Jones stipulated in his workers' compensation action that he was injured by an "accident," the "intentional act" exception to workers' compensation immunity vanished because the doctrine of estoppel precludes vacillating positions in related litigation. *Marks v. Fields*, 36 So.2d 612 (Fla. 1948). Simply stated, once an accident, always an accident.

Plaintiffs argue that Mr. Jones did not stipulate that his injuries were caused by an accident or pursue his

workers' compensation claim to a conclusion on the merits. (Initial Brief, p. 31 – 35). The record does not support their position.

It is true that the First Report of Injury or Illness was filed by Defendant while Mr. Jones was unconscious, but Plaintiffs never took the first step to disavow or withdraw that document. Rather, they subsequently signed consent forms that allowed the workers' compensation carrier to pay medical bills and other benefits, which now exceed 1.2 million dollars. Then, Plaintiffs retained a lawyer to obtain a higher hourly rate for attendant care benefits provided by Mrs. Jones. To effectuate this, their lawyer filed a petition seeking benefits they believed they were entitled to. Plaintiffs pressed their workers' compensation claim and stipulated (and the court found) that Plaintiff's injuries resulted from an on-the-job "accident." The fact that the stipulation is a form document which was prepared by the parties' counsel does not change this.[4] In other words, Plaintiffs consciously pursued workers' compensation benefits to fruition, gaining benefits (at the detriment of Martin) that will continue for the rest of Mr. Jones' life.

[4] Plaintiffs even claim that because Mr. Jones' lawyer, not Mr. Jones, signed the stipulation, he is not bound by it. (Initial Brief, p. 33). This is plainly false by pure operation of law.

Plaintiffs have not cited (and cannot cite) any Florida precedent where a worker took the steps undertaken by Plaintiffs but still was found not to have actively sought workers' compensation benefits. Plaintiffs consciously and successfully elected to pursue benefits through the workers' compensation system. As such, they are now barred from bringing the immediate suit against Defendant.

VI.

AN EXPECTED EVENT OR RESULT IS NOT AN ACCIDENT.

In his workers' compensation proceeding, Mr. Jones stipulated that his injuries were the result of an accident. The District Court, relying upon dicta in the *Turner* opinion, found that:

> the position Mr. Jones took in the workers' compensation proceeding – that he sustained an injury by accident – is incompatible with the current position he and Mrs. Jones take – that Mr. Jones' injuries were the result of intentional conduct that was substantially certain to result in injury or death.

The Joneses now argue that the statutory definition of accident allows an event to be both accidental and the result of objective intentional conduct. (Initial Brief, pgs. 23 – 31). This argument disregards all the cases which

remove intentional conduct from the workers' compensation system.

The statutory definition of an accident for workers' compensation purposes is:

> An unexpected or unusual event or result that happens suddenly.

§440.02(1), Fla. Stat. (2000).

Plaintiffs concede that the explosion was an unexpected and unusual event from both Martin's and Jones' viewpoint, thus, an accident for purposes of workers' compensation. (Initial Brief, p. 30). That conceded, Plaintiffs then assert they are not being inconsistent when they claim the explosion was the result of conduct by Martin which was substantially certain to cause injury. Plaintiffs justify their strained reasoning by employing the objective standard of ***Turner***, which, according to them, does not require Martin to "expect" the building to blow up. (Initial Brief, p. 30). This semantic argument misses the point.

As Plaintiffs' brief (pp. 26, 27 and 28) points out, an accident is the event that brings an employee into the workers' compensation system and provides tort immunity to the employer. Conversely, conduct that is substantially certain to cause injury or death takes an event *out of* the workers' compensation system and employer tort immunity is

lost. When Plaintiffs pursued and recovered workers' compensation benefits, it was because the subject explosion was an accident by stipulation. Once the event (explosion) became subject to the workers' compensation system, tort immunity attached. Based upon all the district cases on election of remedies cited herein, Plaintiffs are now estopped to contend otherwise.

CONCLUSION

The workers' compensation law was enacted to systematically resolve workplace injuries on behalf of both the employee and the employer. It is an alternative to civil suits, and the two are mutually exclusive. While there are exceptions to workers' compensation immunity, they must be narrowly construed so as not to erode the purpose and function of the system. Moreover, an exception to the workers' compensation system does not create an opportunity for a double remedy. Rather, such exceptions only provide an alternative which the employee may or may not elect. Plaintiffs consciously elected their remedy by actively pursuing and collecting benefits under the workers' compensation system. The instant tort suit is, therefore, prohibited as a matter of law.

Should this Court accept jurisdiction, the certified question should be answered negatively, and the District Court's opinion should be affirmed.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, this _____ day of _____, 2004.

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I HEREBY CERTIFY that this brief satisfied the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it is prepared in Courier New 12-point font.

_____
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