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,

CASE NO.: SC04-1538
Lower Tribunal Case No.: 1D03-4091

vs.

MARTIN ELECTRONICS, INC.

Respondent/Defendant.
_____/

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

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PRELIMINARY STATEMENT

There are two parties in this case – Petitioners, Curtis and Annie Jones and Respondent, Martin Electronics, Inc. For purposes of consistency with the Briefs filed before the First District Court of Appeal, Martin Electronics, Inc. will be referred to as Defendant and Curtis and Annie Jones will be referred to as Plaintiffs throughout this brief.

Citations to Petitioner's appendix shall be as follows: Exhibit [E.], tab, Page [p.], and Paragraph [¶] or lines.

STATEMENT OF THE CASE AND THE FACTS

On May 1, 2000, Building 78 on the Martin Electronics' plant unexpectedly exploded/deflagrated when an employee, Linda Lindsey, closed the door and turned off the light to lock-up the building for the night. [E. 2, p. 96, lines 1 – 13; E. 3, p. 129, lines 16 – 25 – p. 130, lines 1 – 7; E. 4, p. 39, line 25 – p. 40, lines 1 – 9; E. 5; E. 6]. Plaintiff Curtis Jones was the night supervisor on this production line and was sitting on a golf cart in front of the building when it exploded. [E. 3, p. 175, lines 15 – 25, p. 178, lines 14 – 24; E. 5; E. 6]. Building 78 was being used to dry a magnesium composition that was wet with hexane. [E. 2, p. 39, lines 8 – 15, p. 78, lines 19 – 25 – p. 79, lines 1 – 9; E. 5; E. 6]. Curtis Jones was catastrophically burned by the explosion. He was kept sedated for almost three months. [E. 10, Affidavit Curtis Jones]. He sustained third degree burns to sixty percent of his body. [E. 10, Affidavit Curtis Jones]. All of his fingers have been amputated and he has undergone twenty-four surgeries. [E. 10, Affidavit Curtis Jones].

Following this event, Defendant Martin Electronics filed a notice of injury with its workers' compensation carrier and began paying Curtis Jones' worker's compensation benefits. [E. 13, ¶ A]. Defendant Martin Electronics never disputed Curtis Jones' entitlement to workers' compensation benefits, and he has continued to automatically receive benefits. [E. 13 & 14]. However, approximately eight

months following the explosion, Martin Electronics workers' compensation carrier refused to pay for the appropriate amount of attendant care needed by Curtis Jones once he was released from the hospital or the appropriate rate per hour for this care that was being provided by Mr. Jones' wife, Annie Jones. [E. 13, ¶¶ C, D, E, & F). On December 21, 2000, Plaintiffs filed a Request for Assistance with the court of compensation claims concerning the extent of his attendant care benefits. [E. 1, tab 4]. On January 29, 2003, the Judge of Compensation Claims entered a Final Order in favor of Plaintiffs. [E. 1, tab 5]. On March 22, 2004, the First District Court of Appeal affirmed the Judge of Compensation Claims Final Order.

In November of 1999, Building 72 at the Martin Electronics plant exploded because of hexane vapor migrating into the non-explosion proof electrical system. [E. 4, exhibit 1 to deposition; E. 5; E.6]. In December of 2002, Plaintiffs discovered that the President, Vice-President, Safety Supervisor and a number of other top Supervisors of Martin Electronics had known since the explosion of Building 72 that Building 78 also did not have the required and necessary explosion-proof electrical system. [E. 4, p. 26 – 32; E. 5; E. 6]. As well as other electrical hazards, Building 78 was not equipped with explosion rated lights, wiring, switches and conduit, in violation of Martin Electronics' contract with the Department of Defense ["DOD"], the National Electric Code and OSHA regulations. [E. 4, p. 26 – 32; E.

5; E. 6]. Martin Electronics' own Safety Officer had generated a work order documenting these electrical hazards with a recommendation to fix the problems immediately. [E. 3, p. 62, lines 10 - 22; E. 4, exhibit 1 to deposition; E. 5; E. 6]. Between December 1999 and May 1, 2000, Defendant had not corrected any of these electrical hazards nor had it taken Building 78 out of operation pending such corrections. [E. 4, p. 26 – 32; E. 3, p. 62, lines 1 - 4, p. 173; E. 5; E. 6]. Plaintiffs filed this lawsuit on January 7, 2003 alleging that Defendant had engaged in intentional conduct that was substantially certain to result in death or injury. [E. 7].

Defendant moved for summary judgment in the trial court on the grounds that the election of remedies doctrine barred Plaintiffs' intentional tort lawsuit. [E. 9]. On August 26, 2003, the Honorable Judge James Roy Bean entered an Order denying Defendant's Motion for Summary Judgment. [E. 12]. The Order held: " CURTIS JONES had no right to elect a negligence lawsuit against his employer because his employer was entitled to worker's compensation immunity. The election of remedies doctrine is inapplicable to the instant cause for intentional tort, which is an exception to workers' compensation immunity." [E. 12]. The First District Court of Appeal reversed the decision of the trial court but certified the issue as one of great public importance. [E. 15] Plaintiffs filed a Motion for Clarification to reword the question certified to make explicit that this

issue was an election as between workers' compensation and an intentional tort claim under *Turner v. PCR*. [E. 16] The First District Court of Appeal denied the Motion for Clarification on July 28, 2004. [E. 17] Plaintiffs thereafter filed their notice pursuant to Florida Rule of Appellate Procedure 9.120. [E. 18] This Court then postponed its decision on jurisdiction. [E. 19]

SUMMARY OF ARGUMENT

The First District Court of Appeal has certified that this case poses a question of great public importance. Plaintiffs agree as the potential result of this case is no less than the effective elimination of the right of an employee to maintain an action for intentional tort against the employer as recognized in *Turner v. PCR, Inc.*, 754 So2d 683 (Fla. 2000).

It is well-established under Florida law that workers' compensation benefits are provided to employees for accidental on-the-job injuries as a substitute for, or in lieu of, the employees' right to a common-law action for negligence. Legal immunity from such action is therefore afforded the employer under workers' compensation law.

It is equally well-established, however, that the workers' compensation immunity of the employer does *not* extend to, nor protect an employer from, an employee's action for intentional tort, as more fully defined by this Court in *Turner v. PCR, Inc.*, 754 So2d 683 (Fla. 2000). The intentional tort exception serves to hold employers accountable (over and above workers' compensation benefits) for conduct that is beyond negligence and that constitutes intentional conduct substantially certain to result in death or injury.

Despite this purpose of the *Turner* opinion, the First District Court of Appeal relied on a small portion of dicta in *Turner* to reverse the trial court's order denying summary judgment for the employer Martin Electronics. *See Turner*, 754 So. 2d at 689. This dicta in *Turner* seems to imply that the requirement under the Workers' Compensation System that the on-the-job injury be "by accident" is inconsistent with a claim that the conduct of the employer was substantially certain to cause death or injury. Based upon this dicta, the First District Court of Appeal's opinion holds that the election of remedies doctrine bars an injured employee who litigates any issue of his or her workers' compensation benefits from also bringing a claim under *Turner*. The *Turner* Court, however, was not considering the issue of election of remedies in its discussion regarding the term "accident" or anywhere in the opinion. Thus, this issue of whether the election of remedies doctrine applies as between a workers' compensation claim and an intentional tort claim remains unanswered in Florida.

In these proceedings, Plaintiff is an employee who suffered a catastrophic on-the-job injury. Under these circumstances, Plaintiff, the injured employee, receives the contemplated workers' compensation benefits, and Defendant employer receives full statutory immunity from an action or additional liability based upon negligence, or even gross negligence. Liability of Defendant, and recovery by Plaintiff in

this proceeding will be authorized *only* upon the demonstration to the fact-finder that Defendant engaged in conduct that was "substantially certain" to result in injury or death. *Turner v. PCR, Inc*., 754 So2d 683, 688-689 (Fla. 2000).

The intentional tort claim is a separate and distinct claim outside of the Workers' Compensation System. Moreover, the assertion of an intentional tort claim is not inconsistent with the assertion of a workers' compensation claim, as the term "accident" as defined in the Workers' Compensation Statute and construed in the caselaw is not inconsistent with or mutually exclusive to a claim that an employer engaged in conduct substantially certain to result in death or injury. Thus no election of remedies is effectuated by pursuit or receipt of the workers' compensation benefits. This Court should accept jurisdiction of this issue in order to uphold the intended purpose of the Workers' Compensation System; as well as to avoid the unjust result of forcing the catastrophically injured employee to choose between a guaranteed workers' compensation claim and pursuit of an intentional tort action in which any recovery for ordinary negligent conduct by the employer will be precluded and for which there is no guarantee of any recovery whatsoever.

It is this Hobson's choice which, if approved, would effectively eliminate the

intentional tort right of action recognized by this Court. If pursuit or acceptance of workers' compensation benefits constituted an election of remedies, then no catastrophically injured employee would ever be well advised to forego such benefits on the mere possibility of success in an intentional tort action. Effectively, the right of an intentional tort action would exist on paper only, and its intended deterrent effect on the most outrageous and egregious employer conduct would be eliminated.

Further, to be a *binding* election the injured employee must have made a conscious decision to elect one claim and must have pursued that claim to a conclusion on the merits. Curtis Jones' filing of the petition concerning the extent of his attendant care benefits does not meet this requirement. Most importantly the "stipulation" relied upon by Defendant that the injury resulted from an on-the-job "accident" was merely a standard form filled out primarily by Defendant itself which stated that Plaintiff's injury was a compensable event. The form was not in anyway a stipulation by Curtis Jones as to the nature of the employer's injurious conduct. Second, the petition was merely a facet of a workers' compensation claim. No final resolution or conclusion on the merits of Plaintiffs' workers' compensation claim has been made. Defendant still continues to make workers' compensation payments to Plaintiffs and entitlement to these benefits has never been disputed.

Under Florida law, Plaintiffs should be permitted to pursue both an intentional tort claim and workers' compensation benefits, as these are not inconsistent, mutually exclusive claims. Moreover, this Court should recede from any language in the *Turner* opinion that could be read to stand for a contrary proposition. Thus, this Court should accept jurisdiction of the certified question and reverse the opinion of the First District Court of Appeal.

ARGUMENT

The First District Court of Appeal has certified to this Court the following 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?" Plaintiffs agree with the First District Court of Appeal that this case presents a question of great public importance to the citizens of Florida. This question until now has not been addressed in Florida. The First District Court of Appeal's opinion herein is the first court in Florida to consider the issue of election of remedies, as between workers' compensation benefits and the intentional tort exception under *Turner v. PCR, Inc*, 754 So. 2d 683 (Fla. 2000).

While the First District Court of Appeal's full opinion considers this precise issue, the certified question posed by the court states the question so broadly as to leave out the critical distinction that the injured employee is seeking a remedy for the employer's intentional conduct under *Turner v. PCR, Inc*, 754 So. 2d 683 (Fla. 2000). Plaintiffs would reword the questions as follows: Where an injured employee's entitlement to worker's compensation benefits is undisputed, may that employee successfully litigate for statutorily required additional benefits in the

worker's compensation proceeding and also maintain a separate action against the employer based on the employer's intentional conduct that is substantially certain to cause death or injury to the employee?

The critical distinction made in Plaintiffs' proposed question is that the issue involves an injured employee's right to litigate a portion of workers' compensation benefits without foreclosing that injured employee's right to bring a suit against his or her employer under the intentional tort exception to workers' compensation immunity pursuant to *Turner v. PCR, Inc*, 754 So. 2d 683 (Fla. 2000). The standard of review governing all issues in this matter is de novo. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) (holding standard of review for a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo).

I. An injured employee does not have an election to make as between a workers' compensation claim and an intentional tort claim. The Workers' Compensation System covers an employer's negligent conduct and an intentional tort claim covers an employer's intentional conduct, and such claims are not mutually exclusive.

The Florida Workers' Compensation System is the exclusive remedy for an employee injured in the course and scope of his or her employment. *See* § 440.11, Fla. Stat. (2003). The intent of workers' compensation is to provide "quick and efficient delivery of disability and medical benefits to an injured worker and to

facilitate the workers' return to gainful reemployment at a reasonable cost to the employer." § 440.015 Fla. Stat. (2002). In exchange for this quick and efficient payment of benefits, the employer is provided immunity for its negligence. The Florida Supreme Court has explained the system as follows:

> Essentially, under this no-fault system, the employee gives up a right to a common-law action *for negligence* in exchange for strict liability and the rapid recovery of benefits. . . . While providing employees with benefits on a no-fault basis, the flip side of this scheme is its provision for immunity from *common-law negligence* suits for employers covered by the statute.

Turner v. PCR, Inc., 754 So. 2d 683, 686 (Fla. 2000) (emphasis added). The system is set-up to automatically go into effect if the employee is injured in the course and scope of employment. *See* §440.185, Fla. Stat. (2003). Thus an employer may not be sued in negligence by an injured worker if that injured worker is an employee injured on-the-job.

The election of remedies doctrine, on the other hand, is simply "an application of the doctrine of estoppel." *Williams v. Robineau*, 168 So. 644, 646 (Fla. 1936). The election of remedies doctrine has been recognized by this Court as "an admittedly harsh and sometimes said to be obsolete doctrine." *Williams v. Robineau*, 168 So. 644, 647 (Fla. 1936). The purpose behind the doctrine is "that courts cannot permit a vacillating and capricious litigant to blow hot and cold or

play fast and loose by indecision and uncertainty." *Marks v. Fields*, 36 So. 2d 612 (Fla. 1948).

Applying these principles, the Florida election of remedies cases in the workers' compensation arena all involve a disputed claim of *entitlement* to workers' compensation benefits based upon (1) whether the injured worker was an employee or (2) whether the employee was injured in the course and scope of employment. As summarized by the Fourth District Court of Appeal:

> [T]he general rule that workers' compensation provides an exclusive remedy presupposes that the injured party is an employee and that the injury occurred in the course and scope of employment. The case law suggests that *where employee status is disputed or where it is uncontested that the injured worker is not an employee*, the injured party can make an election of remedies and bind himself to workers' compensation benefits.

Michael v. Centex-Rooney Construction Co., Inc, 645 So. 2d 133, 135 (Fla. 4th DCA 1994) (emphasis added). In this scenario, the courts have stated that where the plaintiff has pursued the disputed workers' compensation claim to a conclusion on the merits, the injured person may not subsequently pursue a civil action *for ordinary negligence* against the employer. *See, e.g., Lowry v. Logan*, 650 So. 2d 653, 656 (Fla. 1st DCA 1995).

The case sub judice, unlike the myriad of district level election of remedies cases in the worker's compensation arena, deals with a significantly different factual

issue. The issue for the Court herein is whether Curtis Jones had to elect between his workers' compensation benefits and an intentional tort claim against his employer pursuant to *Turner v. PCR*. In *Turner* this Court stated:

> Today, we reaffirm our prior decisions recognizing, as have our district courts and many jurisdictions around the country, that workers' compensation law does not protect an employer from liability for an intentional tort against an employee. *See, e.g., Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97 (Fla. 1st DCA 1990); *Clark v. Gumby's Pizza Systems, Inc.*, 674 So. 2d 902, 904 (Fla. 1st DCA 1996); *see also Larson & Larson, supra*, §§ 68.11-68.15.

754 So. 2d at 687. In *Turner*, the Florida Supreme Court adopted an objective standard for determining when an employer had engaged in intentional conduct substantially certain to result in death or injury. *See Turner*, 754 So. 2d at 691. In adopting this objective standard, the Florida Supreme Court emphasized that the importance of such a standard was to prevent "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, and later claim lack of subjective knowledge or intent to harm an employee." *Id*. The import of the intentional tort exception to workers' compensation immunity is to hold employers accountable for engaging in dangerous and egregious conduct that is substantially certain to injure their employees and to thereby deter employers from engaging in such conduct. If forced to elect between guaranteed workers' compensation benefits and a strictly

contingent intentional tort suit, no catastrophically injured employee could afford to gamble on the intentional tort suit and the deterrent effect of *Turner* would be effectively eviscerated. In order to facilitate this important purpose, the *Turner* decision plainly holds that the Workers' Compensation System is only intended to cover negligence and that the intentional tort exception is wholly separate and outside of workers' compensation.

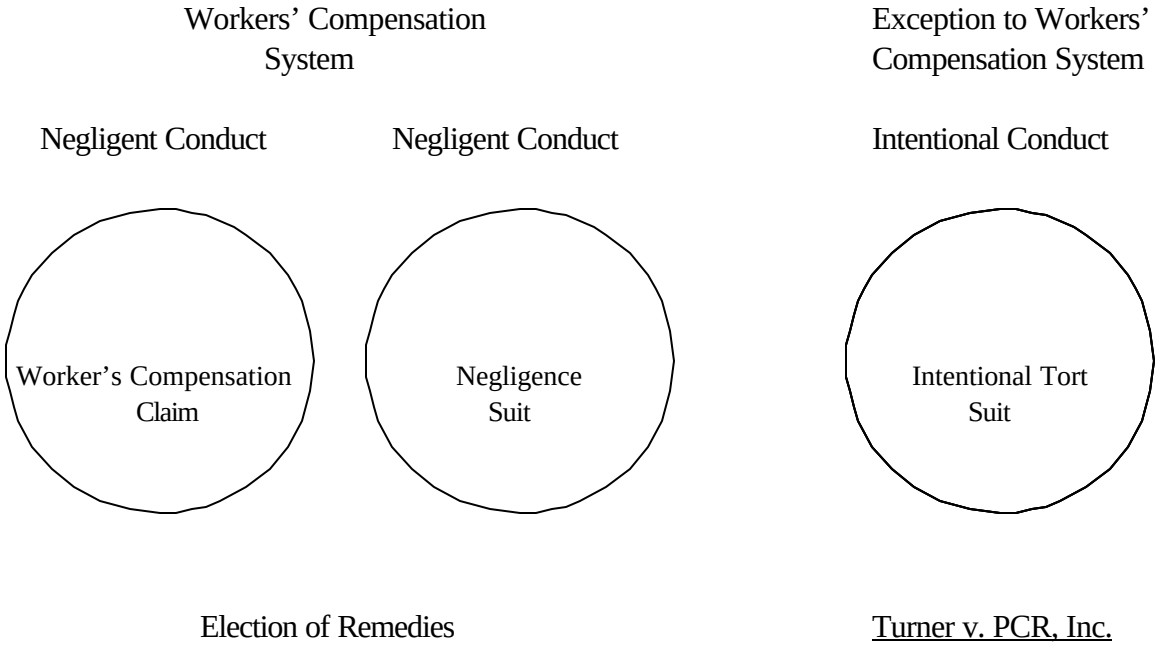
In *Turner v. PCR, Inc.* this Court, in dicta, quoted a portion of the dissent of Judge Adkins in *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986). This dicta reasoned, based upon the definition of accident within the workers' compensation statute as "only an unexpected or unusual event or result, happening suddenly," that "it would appear logical to conclude that if a circumstance is substantially certain to produce death or injury, it cannot reasonably be said that the result is 'unexpected' or 'unusual,' and thus such an event should not be covered under the workers' compensation statute. *Turner*, 754 So. 2d at 689; *see also* §440.02(1), Florida Statutes. In reversing the decision of the trial court, the First District Court of Appeal primarily relied on this portion of dicta in *Turner*. Before addressing this analysis in *Turner* head-on, it should be noted that in making this statement the *Turner* Court was (1) not considering the issue of

election of remedies and (2) only considering the second half of the definition, that is an unexpected or unusual **result** and not an unexpected or unusual **event**.

This discussion concerning the term "accident" makes sense within the context of *Turner* where this Court was explaining why the intentional tort remedy does not fall within the immunity provided by the Florida Workers' Compensation System. However, taken out of context and placed within the election of remedies scenario in the case at bar, that dicta can be persuasively misread to imply that a catastrophically injured employee must elect between workers' compensation and an intentional tort claim.

The election of remedies doctrine has never previously been extended to bar an intentional tort claim where an employee is injured in the course and scope of employment and receives workers' compensation benefits (with or without a dispute concerning the extent of a particular element of those benefits) and also sues his employer under the intentional tort theory of *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000). The *Turner* claim does not vanish because of some dispute as to the amount of a particular workers' compensation benefit. The reason this is so is deceptively simple - the intentional tort claim, as *Turner* makes clear, is outside of and an exception to workers' compensation, not a mutually exclusive or alternative path. This can be easily demonstrated by a chart used both before the trial court

and the First District Court of Appeal.



This illustration depicts how the election of remedies doctrine applies within the Workers' Compensation System, as between a workers' compensation claim and a negligence claim. The intentional tort claim is a separate and distinct claim that is outside of the Workers' Compensation System.

While the import of this illustration may not be immediately apparent, a careful analysis reveals the significant distinction it represents. To understand the heart of this distinction, one must place the issue within the scope of how the Workers' Compensation System is set up and administered. The Workers' Compensation System is a separate and specially created legal system which provides a quid-pro-quo benefit to both employers and employees. However, the unique qualities of this

system when applied within or mixed with common law principles can create results contrary to the purpose of workers' compensation.

This can be illustrated by examining how the election of remedies doctrine would actually play out, **if** this Court were to rule that the election of remedies doctrine is applicable as between workers' compensation and an intentional tort suit. The scenario would be as follows. An employee is injured on the job by his employer's conduct, similar to the conduct that occurred in Turner. The employee elects to pursue his *Turner* claim, thereby foreclosing his right to pursue a workers' compensation claim. The employer litigates the intentional tort claim and the jury finds that the employer's conduct was negligent rather than substantially certain to cause death or injury. The employee then has no remedy for his employer's negligence because he elected his intentional tort remedy and pursued it to a conclusion on the merits - the employee cannot then pursue a worker's compensation claim or a negligence claim.

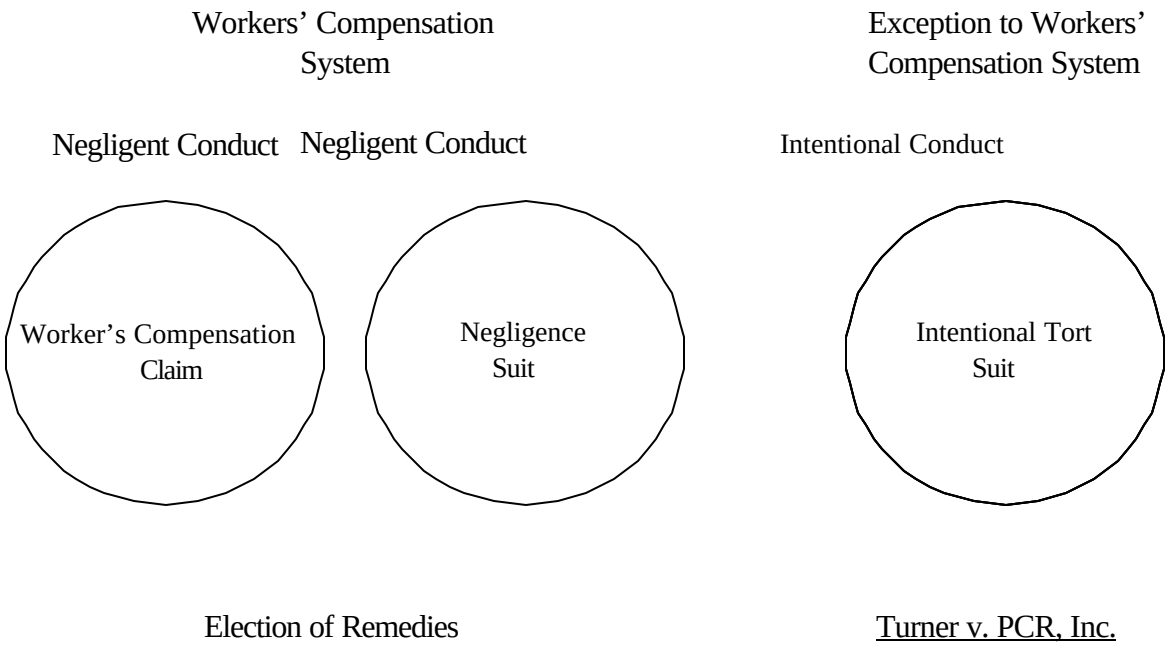
Without the overlay of the legislatively created workers' compensation system, an injured person would have the ability to bring a tort lawsuit with both a count for negligence and a count for intentional tort (presumably with a greater range of damages such as punitive). The jury would have to make the determination of whether there was negligence, an intentional tort, or no cause of action. Under basic

common law, it is simply pleading in the alternative. However, in the Workers' Compensation System such an alternative does not exist. The injured employee may not bring an intentional tort claim in the workers' compensation case or bring a negligence claim in the intentional tort case. Thus by mixing the common law doctrine of election of remedies with the Workers' Compensation System, the result creates an equitable imbalance, in that any remedy for negligence vanishes if the injured worker pursues an intentional tort claim. On the other hand, the application of the election of remedies doctrine as between a workers' compensation claim and negligence claim makes sense because the workers' compensation is a quid-pro-quo system that proves immunity for an employer's negligence.

As Judge Adkins succinctly put it in the same dissenting opinion in *Fisher v. Shenandoah Const. Co.*, 490 So. 2d 882, 888 (Fla. 1987): "I am afraid that this Court, by failing to answer the question presented and failing to recognize the existence of a prima facie case sounding in intentional tort, has given employers a license to maim and kill their employees. The majority seems to lose sight of the fact that all the plaintiffs were seeking to do is allow the jury to determine whether the defendant's actions were negligent or intentional." The same point is equally relevant herein - Curtis Jones is only seeking to have a jury determine whether Martin Electronics' conduct was negligent or an intentional tort. If the outcome of this case

is that Martin Electronics' conduct does not meet the *Turner* test, then Curtis Jones should be entitled to continue to receive his worker's compensation benefits. If the outcome is that Martin Electronics' conduct was substantially certain to cause death or injury then Curtis Jones should be entitled to whatever additional damages are awarded him based on the employer's intentional conduct.

On the other hand, Defendant employer's contention is depicted by the following illustration:



As is depicted by the illustration, under Defendant's theory any remedy for the employer's negligence simply vanishes. This result was not intended by the legislature when it enacted the Chapter 440, Workers' Compensation System, nor does this result support the reasoning in *Turner*. The election of remedies

preclusion as to a negligence claim essentially rests upon estoppel to assert **inconsistent status**. An injured party cannot assert that he was an employee injured on the job to pursue and secure full workers' compensation benefits, and then inconsistently assert he was not an employee or not on the job in order to maintain a negligence suit for the same injury. No such inconsistency is created as to an intentional tort action. Rather an intentional tort suit allows an injured employee to have a jury determine if the employer's conduct was negligent or intentional. This is not a mutually exclusive but rather a supplementary and concurrent claim outside of workers' compensation. In other words, if the employer's conduct is substantially certain to cause death or injury it necessarily fails to meet the standard of ordinary care, i.e., it is negligent. However, if the employer's conduct is negligent it is not necessarily also substantially certain to cause death or injury. These are not inconsistent positions, however the overlay of the legislatively created Workers' Compensation System confuses the picture, creating what appears to be an inconsistency but is not. As explained by this Court in *Turner:*

> Since the workers' compensation scheme is not intended to insulate employers from liability for intentional torts, and is not to be construed in favor of either the employer or the employee, workers compensation should not affect the pleading or proof of an intentional tort.

754 So. 2d at 689.

In sum, the election of remedies doctrine is not applicable to the intentional tort exception to workers' compensation, which is outside of the Workers' Compensation System and the injured employee has the right to have the issue decided by a jury.

II. "Accident" as defined in the workers' compensation statute is not inconsistent with an allegation that the employer engaged in intentional conduct substantially certain to result in death or injury.

As discussed in Section I., a portion of this Court's decision in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), can be misread to contradict the above statement, i.e., that "accident" as defined in the workers' compensation statute is not inconsistent with an allegation that the employer engaged in intentional conduct substantially certain to result in death or injury. However, as explained in Section I., the *Turner* Court was merely discussing the fact that the Workers' Compensation System was intended to cover negligence claims, not intentional tort claims. More importantly, however, the *Turner* Court in making the statement that "it would appear logical to conclude that if a circumstance is substantially certain to produce death or injury, it cannot reasonably be said that the result is 'unexpected' or 'unusual,'" had not undertaken a thorough analysis of the meaning of "accident" within the context of the Workers' Compensation System.

Before reaching this issue, based on the analysis used in *Turner*, it certainly

would be logical to conclude that a circumstance which is "substantially certain to cause death or injury" could be said to have been caused by an "unusual" "event" "happening suddenly," even though the "result" might not logically be said to be "unexpected" or "unusual." Take for example, the facts of the case at bar and *Turner*, the result of an explosion in either case was substantially certain to result in death or injury and such result could not be said to be "unexpected" or "unusual." However, the event of the explosion that resulted in injuring and killing employees could reasonably be said to be an "unusual" "event" that "happened suddenly." The definition of "accident" in the workers' compensation statute was written specifically in the disjunctive. Florida Statute, section 440.02(1) states: "'Accident' means only an unexpected **or** unusual event **or** result that happens suddenly." In other words, the "accident" need only be either unexpected or unusual and an event or result, and need not be both. Based upon the common sense analysis used by this Court in *Turner*, a circumstance, such as an explosion, could be substantially certain to cause, or result in, injury or death, while at the same time being an unusual event.

While the explosion in the case at bar, as in *Turner*, falls within this common sense reading of the definition of "accident," in order that the law reflect its clear intent it is important to undertake a careful analysis of the term "accident" within the

Workers' Compensation System. Once this analysis is considered, the basis for the First DCA's reversal vanishes. Of course, only the Florida Supreme Court has the authority to recede from or clarify the problematic language in *Turner*. Thus, the First DCA choice to certify this issue was more than correct; it was necessary in order to clarify Florida law in this regard so that citizens might know for certain what their rights are. Thus, with that in mind, such an analysis must be undertaken.

The word "accident" or "accidental" is present in the majority of states' laws establishing workers' compensation systems. *See generally* Larson Arthur, Larson's Workers' Compensation V. 2 § 42.01 (Desk ed. 1999). The general purpose behind this term has been to prevent workers' compensation claims that relate to an employee's health problem or systemic disease of an employee rather than an on-the-job injury.

As explained in Larson's Workers' Compensation treatise:

> Holmes' statement that the life of the law has been not logic but experience is probably truer in compensation than in any other field. For while most of the law built up around the "accident" requirement, for example, has been based upon false premises and embroidered with irrelevant distinctions, there has been a utilitarian purpose behind it all which cannot be disregarded when all the logical criticisms have been exhausted. That practical consideration is the fear that the heart cases and related types of injury and death will get out of control unless some kind of arbitrary boundaries are set, and will become compensable whenever they take place within the time and space limits of employment. Most states have chosen to press the "accident" concept into service as one kind of arbitrary boundary, but, with a few exceptions, one

> gets the impression that what is behind it all is not so much an insistence on accidental quality for its own sake as the provision of an added assurance that compensation will not be awarded for the deaths not really caused in any substantial degree by the employment.

Larson Arthur, Larson's Workers' Compensation V. 2 § 46.01 (Desk ed. 1999). Larson's point is plainly articulated through a look at the history and discussion of the term "accident" in Florida cases. *See, e.g., Alexander Orr v. Florida Industrial Comm.*, 176 So. 172 (Fla. 1937) (holding heat exhaustion, where it arises out of employment as well as in its course, may be considered an "accident" under the workers' compensation statute); *Parks v. Eppinger & Russell Co.*, 196 So. 704 (Fla. 1940) (holding that, under Florida's Compensation Act, the accidental acceleration of a venereal disease is not an accident); *Duff Hotel Co. v. Ficara*, 7 So. 2d 790 (Fla. 1942) (holding that an inguinal hernia sustained by employee in lifting a heavy pot in usual manner was an injury by accident even though he did not slip, fall, or stumble); *Travelers Ins. Co. v. Shepard*, 20 So. 2d 903 (Fla. 1945) (holding that dermatitis which came on gradually after packing fruit for several weeks was not an injury by "accident"); *City of Tallahassee v. Roberts*, 21 So. 2d 712 (Fla. 1945) (holding that a slipped vertebra that occurred when fireman merely got out of bed was not an accident under workers' compensation law).

The point made in every Florida case addressing the requirement that the

workers' compensation injury be "by accident" is that the claimed injury must have occurred as a result of something related to the job, rather than because of the employee's own non-job related health problems. The intent behind the term "accident" was to ensure that the injury was related to the job and to make distinct the separation between workers' compensation insurance coverage and general health insurance. *See Gray v. Employers Mut. Liability Ins. Co.*, 64 So. 2d 650, 651 (Fla. 1953)*; see also General Properties Co. v. Greening*, 18 So. 2d 908, 911 (Fla. 1944) ("This very valuable statute, [Chapter 440, Florida Statutes] while fulfilling a long standing public need, was not designed to take the place of general health and accident insurance.").

Nowhere in the history of the definition of "accident" in the Workers' Compensation System is the term connected to the intentional tort exception. The current definition of "accident" was the result of a Legislative amendment following the Florida Supreme Court case of *Gray v. Employers Mut. Liability Ins. Co.*, 64 So. 2d 650, 651 (Fla. 1953), in which this Court held "that an injury 'by accident' [need not] proceed from an unexpected cause. . . . It is enough, then, if there is an unexpected *result*, even though there was no unexpected *cause*, such as a slip, fall, or misstep." *Gray v. Employers Mut. Liability Ins. Co.*, 64 So. 2d 650, 651 (Fla. 1953). The Court further explained that: "It was not intended that such a statement

[that the injury itself cannot constitute an "accident"] should be construed as requiring a showing of an unexpected cause of the injury, such as a slip, fall or misstep; it was intended only to require the claimant to make a showing of some event or circumstances connected with his work to which his injury can be directly attributed, in accordance with the rule that the claimant is required to show that the accident or injury happened not only *in the course of* claimant's employment but arose *out of it.*" As *Gray* plainly states, the requirement of "accident" has been understood by the Florida courts to crystalize the separating line between when an injury is caused by the employment and when the injury is related only to an employee's own health and not to the job.

No case has held or even discussed that an injury was not "accidental" and therefore not compensable where the employer's conduct was intentional, thus arguably making the event or result expected or usual. Nevertheless, the concern of the First DCA opinion rests upon those defining terms "unexpected" and "unusual." This concern is misplaced when once again considered in light of the actual meaning and use of the term "accident" within workers' compensation law. In *Peterson v. City Commission of Jacksonville,* 44 So. 2d 423 (Fla. 1950), the Honorable Justice Chapman explained the majority rule concerning definition of accident: "The great weight of authorities from other States support this view. If the occurrence is

sudden, **unexpected and undesigned by the workman**, it comes within the provisions of the Act." *Peterson*, 44 So. 2d 423, 426 (Fla. 1950) (in dissent).[1] Thus an "accident" must be an unexpected or unusual event or result *from the point of view of the injured worker*, not from the point of view of the employer. The reason for this distinction is obvious. Along with the notion that the injury must truly be work related, i.e. not caused in whole by an employee's own non-job related health condition, the injury also should not follow from an event that the employee designed or expected to occur. This "unexpected" quality of an accident is wholly separate from the question of whether an employer's conduct viewed from an objective person's standpoint can be said to have created a circumstance where injury or death is substantially certain to result.

The Supreme Court of North Carolina reached this exact conclusion in considering the issue of whether the election of remedies doctrine barred a subsequent claim for an intentional tort. *See Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991). The Supreme Court of North Carolina held:

[1] The majority opinion in *Peterson* was modified by the Florida Supreme Court in *Gray v. Employers Mut. Liability Ins. Co.*, 64 So. 2d 650, 651 (Fla. 1953). The dissenting opinion in *Peterson* in holding that the injury should have been considered a compensable accident relied on much of the same analysis made by the Florida Supreme Court in *Gray* when the Court reversed *Peterson* and other earlier decisions.

> From the standpoint of the injured party, an injury intentionally inflicted by another can nonetheless at the same time be an "unlooked for and untoward event . . . not expected or designed by the injured employee." *Harding v. Thomas and Howard Co.*, 256 N.C. at 427, 428, 124 S.E.2d at 109, 110, 111 (1962). It is, therefore, not inherently inconsistent to assert that an injury caused by the same conduct was both the result of an accident, giving rise to the remedies provided by the Act, and an intentional tort, making the exclusivity provision of the Act unavailable to bar a civil action.

Id. at 233.

In the case at bar, the deflagration/explosion of Building 78 catastrophically burning Curtis Jones was both an unexpected and unusual event that happened suddenly from Curtis Jones' viewpoint. Even if the definition were to be more broadly interpreted to include an unexpected or unusual event from the view of Martin Electronics, no allegation in this lawsuit is inconsistent with even this definition. Plaintiffs allege that Defendant intentionally engaged in conduct (continued use of a building with known hazardous non-explosion proof electrical equipment and disregard of the safety supervisor's warning to shut the building down) that from an *objective* standpoint was substantially certain to result in death or injury. This suit makes no allegation that Martin Electronics expected Building 78 to deflagrate. Had Martin Electronics "expected" Building 78 to blow up, they obviously would have heeded their Safety Supervisor's warning to prevent destruction of a valuable asset. Martin Electronics gambled for its own profit,

hoping the building would not explode and Curtis Jones lost. Additionally, even if one could argue that Martin Electronics' intentional conduct equates with expecting the event, i.e. the explosion, Plaintiffs have not alleged nor does any legal element of an intentional tort require that Defendant intend the injury.[2] Moreover, as previously argued the explosion meets the disjunctive part of the definition as an "unusual" "event." While Martin Electronics had experienced prior explosions, it was by no means a *usual* occurrence at the workplace.

In sum, the meaning of "accident" within the Workers' Compensation System is not inconsistent with the allegation that the injured worker's employer engaged in conduct substantially certain to result in death or injury. Thus, the election of remedies doctrine is inapplicable.

III. Curtis Jones did not affirmatively stipulate to his injury being caused by accident and has not fully pursued a workers' compensation remedy to a conclusion on the merits.

While Plaintiffs maintain that Florida law does not require an election between the workers' compensation claim and an intentional tort claim, Curtis Jones in the

[2] *See Barry University, Inc. v. Fireman's Fund Ins. Co. of Wisc.*, 845 So. 2d 276 (Fla. 3d DCA 2003) (quoting *Castro v. Allstate Ins. Co.*, 724 So. 2d 133 (Fla. 3d DCA 1998) for the proposition that allegations involving intentional conduct may still be covered as an "accident" under a homeowner's insurance policy, e.g., while the party intended to touch the injured party by tickling his ear with an antenna of a handheld radio, the party did not intend the harm caused).

workers' compensation case has not affirmatively stipulated to his injury being caused by an accident nor has he pursued the claim to a conclusion on the merits. Defendant believes that the act of filing the request to receive appropriate attendant care benefits and the final order on that issue evince a conscious choice to pursue workers' compensation benefits and constitutes a final determination on the merits. Moreover, Defendant relies heavily upon what Defendant characterizes as a "stipulation" made by Curtis Jones that his injury was caused by an accident.

First, Plaintiffs' act of seeking the appropriate amount of attendant care benefits hardly evinces a conscious choice to pursue an entire workers' compensation case as opposed to an intentional tort case. This was merely a facet of the workers' compensation benefits, to which Defendant had not disputed Curtis Jones' entitlement. In fact, Defendant had been *automatically* paying Curtis Jones' medical bills, attendant care benefits, and disability payments. However, for whatever reason Defendant refused to pay Mrs. Jones the proper hourly rate for her care of Curtis Jones and refused to provide Curtis Jones the number of hours he required of attendant care. At that time, only seven months from the date of the explosion, this was a very small part of a much bigger picture. Second and more importantly, the "stipulation" relied upon by Defendant is contained in the Judge of Compensation Claims' Final Order on attendant care benefits [not in a stipulation

signed by Curtis Jones] and states that Curtis Jones "sustained an injury *by accident* arising out of and within the course and scope of said employment." [E. 1, tab 5]. It is enormously significant that Mr. Jones has **never** actually stipulated that his injury arose "by accident." Apparently the Judge of Compensation Claims surmised this "stipulation" from a standard workers' compensation form partially filled out by Mr. Jones' workers' compensation lawyer and completed by Martin Electronics filed for the pretrial hearing. [E. 1, tab 3]. The form provides no place for the parties to "stipulate" that injury was "by accident." Rather, the form provides a place for Martin Electronics to circle "YES" or "NO" for the statement: "Accident or occupational disease accepted as compensable", as well as, circle "YES" or "NO" for "Employer/Employee relationship on date of accident" and "Workers' compensation insurance coverage in effect on date of accident." [E. 1, tab 3]. This is a standard form used in workers' compensation cases. [E. 1, tab 3]. The form does not give any option for the employer or employee to state that the event causing the injury was or was not an accident. As is apparent from the face of the form, the purpose of the form is merely to allow the employer to circle "NO" regarding any affirmative defense that the employer is raising where the employer contends that the injured worker was not an employee or was not on-the-job when the injury occurred. Thus, the alleged "stipulation" relied upon so heavily

by Martin Electronics is not a stipulation affirmatively made by Curtis Jones at all. Moreover, the Order concerning attendant care benefits is not a final adjudication of the workers' compensation claim, as Curtis Jones is receiving ongoing workers' compensation payments. [E. 1, tab 6].

In *Williams v. Robineau,* this Court explained that an election is not made unless the remedy chosen is pursued to full satisfaction. 168 So. 644, 647 (Fla. 1936). That has yet to occur in the case at bar. To the same effect is *Wheeled Coach Industries, Inc. v. Annulis,* 852 So. 2d 430 (Fla. 5th DCA 2003), wherein the court held that, after the employer began voluntarily paying workers' compensation benefits, the filing of a petition to change the schedule of benefits, and order granting rescheduling, did not constitute an election of remedies or bar a subsequent intentional tort action for wrongful death.

Curtis Jones has never made a conscious choice to pursue a workers' compensation claim, nor has the workers' compensation claim proceeded to a conclusion on the merits. Curtis Jones merely accepted benefits that his employer was giving him and filed a petition, not when he was denied coverage or denied even the actual benefits, but only when his employer did not pay for the appropriate amount of attendant care benefits. Under Defendant's theory, Curtis Jones could have continued to receive workers' compensation benefits for the rest of his life

and pursued this intentional tort suit if only he had not requested that he be given his appropriate attendant care benefits. Defendant is attempting to turn its superior and advantageous position as employer into a trap for the unwary employee by denying a portion of (instead of entitlement to) workers' compensation benefits, thereby forcing the employee to petition for that portion of benefits, however small, and then claiming that the employee has elected workers' compensation as his or her remedy. This is not what Florida law holds.

IV. The primary purposes of both the Workers' Compensation System and the intentional tort exception to workers' compensation immunity are defeated if the election of remedies doctrine bars an employee injured by intentional employer conduct from pursuing an intentional tort claim while still pursuing a workers' compensation claim.

As specifically discussed in Section I., the immunity for common-law negligence suits afforded to employers under the Workers' Compensation System does not extend to an intentional tort claim under *Turner v. PCR*. In *Turner*, the Florida Supreme Court found that an objective standard was necessary for determining whether the employer engaged in conduct substantially certain to result in death or injury in order to prevent "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, and later claim lack of subjective knowledge or intent to harm an employee." *Turner v. PCR, Inc*, 754 So. 2d 683 (Fla. 2000). This intentional tort

exception exists for the sole purpose of holding employers accountable for engaging in dangerous and egregious conduct that is substantially certain to injure their employees and deterring employers from engaging in such conduct.

Significant to the matters herein, the election of remedies doctrine "presupposes a right to elect." *Williams v. Robineau*, 168 So. 644, 646 (Fla. 1936). However, in the case of an employee injured on-the-job by conduct of the employer substantially certain to cause that injury, that employee has **no** right whatsoever to elect between workers' compensation benefits and an ordinary negligence lawsuit. Moreover, the same employee has no meaningful "right to elect" between workers' compensation benefits and an intentional tort claim. No catastrophically injured employee can take the gamble of giving up immediate and necessary payment of his or her medical bills in exchange for a potential recovery in an intentional tort suit years later. The choice, if there were any, would be a Hobson's choice for the injured employee: "[A]n apparent freedom of choice with no real alternative." *Anderson v. Highlands Beach Dev. Corp.*, 447 So. 2d 1045, 1046 (Fla. 4th DCA 1984). Significantly, the most horribly and catastrophically injured employee will necessarily be the employee most harmed by such a rule, as the most seriously injured person can least afford to forego a needed medical

benefit to which he or she is undisputedly entitled under workers' compensation.[3] Notably, this gamble has recently been made even greater by the Florida Legislature's passage of the new workers' compensation statute (which is not applicable to the instant case). The new statute requires an employee to prove:

> 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.

Section 440.11, Fla. Stat. (2003); Ch. 2003-412, § 440.11, Laws of Florida. Thus, under the new standard, an employee's burden of proving that the employer's conduct falls within the intentional tort exception is now even higher and more difficult to meet. That a real and meaningful choice exists for the injured employee between receiving immediate payment of medical and disability benefits and bringing a claim for potential recovery under this incredibly high standard is a legal fiction at best.

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[3] Very significantly, Martin Electronics has not disputed that Curtis Jones was entitled to attendant care benefits. Plaintiffs' petition in the workers' compensation arena only concerned the amount of attendant care benefits that Curtis Jones should be provided and the rate of pay that Mrs. Jones was entitled to receive for providing these benefits. [E. 1, tab 5].

Additionally, considering that the employer's conduct in intentional tort claims often involves the employer concealing or misrepresenting the danger or hazard, the injured employee will likely not know without some discovery whether the employer's conduct amounts to an intentional tort. Yet the election of remedies doctrine "presupposes a right to elect." In the case at bar, Martin Electronics' president, vice president and other upper management employees knew more than six months prior to the May 1, 2000 explosion that Building 78 had highly hazardous, non-explosion proof electrical components in violation of the National Electrical Code, OSHA regulations and the DOD contract. [E. 3, p. 43, p. 62; E. 5; E. 6]. Further, these individuals had been told by Martin Electronics' Safety Supervisor to shut the building down and fix the problem. [E. 3, p. 173, lines 9 – 20; E. 5; E. 6]. However, this information had not been disclosed to Martin Electronics' employees, such as Curtis Jones. [E. 3, p. 103, lines 13 – 25 – p. 104, lines 1 – 23; E. 5; E. 6]. Considering the concealment element of an intentional tort claim, an employee will not know enough to, in good faith, file the claim until a significant period of time after his or her injury. The effect of requiring an election is to force an injured employee at the outset to choose whether to pursue workers' compensation benefits or an intentional tort claim.

No attorney could reasonably advise a client to elect the intentional tort suit. In a recent case, the Second District Court of Appeal warned that an attorney who advises a client to forego a workers' compensation claim in exchange for an *ordinary negligence* suit has potentially committed malpractice:

> Thus, [Plaintiff's] 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. If this tactic backfires, the attorneys should stand prepared to guarantee the workers' compensation claim that they chose to abandon.

Integrated Health Services, Inc. v. Jones, 28 Fla. L. Weekly D242 (2d DCA January 2003).[4]

In the case at bar, Curtis Jones needed his full attendant care benefits. He had third-degree burns to over sixty percent (60%) of his body that needed to be treated and bandaged on a daily basis. [E. 10, Affidavit Curtis Jones]. Because he had to have all his fingers amputated, he had no fingers to take care of these and other daily needs. [E. 10, Affidavit Curtis Jones]. Curtis Jones had no practical

[4] In *Integrated Health Services*, the employer originally denied workers' compensation coverage claiming that the employee was not in the course and scope of employment at the time of injury. The employee never made an allegation that the employer committed an intentional tort. The sole issue was whether the employee's exclusive remedy was workers' compensation or if the employee could pursue an ordinary negligence claim because the employer denied workers' compensation coverage on the basis that the employee was not on-the-job but then later admitted coverage. *See Integrated Health Services*, 28 Fla. L. Weekly D242.

ability to choose a potential recovery in an intentional tort suit sometime in the future over these attendant care benefits and payment for his twenty-four surgeries and months of hospitalization. Curtis Jones' workers' compensation benefits were his life line.

The election of remedies doctrine, which "presupposes a right to elect," has no application to the catastrophically injured employee, who (1) cannot gamble with his life by foregoing payment of necessary medical treatment and disability benefits in exchange for a potential recovery under an intentional tort claim in the future, (2) most likely does not have immediate knowledge of the facts necessary to file an intentional tort claim against his or her employer, and (3) would have difficulty finding any lawyer to bring the intentional tort claim in lieu of workers' compensation benefits.

If the election of remedies doctrine requires a choice between a workers' compensation claim and an intentional tort claim, the intentional tort exception to workers' compensation immunity would survive in name only. Affirming the First DCA's opinion would establish a rule in Florida that allows employers to escape any accountability for their egregious and intentional conduct by forcing an injured employee to choose between his or her workers' compensation benefits and an intentional tort suit. Such a rule would completely defeat the intent behind both the

Workers' Compensation System and the intentional tort exception.

This point is brought home in a concurring opinion by an Illinois Appellate court. *See James v. Caterpillar Inc.*, 611 N.E.2d 95 (Ill. 1993). In this well reasoned concurrence, Presiding Justice Chapman explains:

> Over the years, commentators have suggested that the worker's compensation statutes were the legislative issue of a bargaining mating between labor and management. Labor brought to the meeting its somewhat theoretical right to recover unlimited damages. Management brought its seemingly effective coterie of the fellow-servant rule, contributory negligence, and assumption of the risk. Each side gave and each received. In return for accepting limited awards, labor obtained an increased likelihood of recovery. In exchange for relinquishing defenses, management obtained limits on damages.
>
> [T]he concept of intentional injuries has never been considered as an element that went into the employer-employee bargain that resulted in the worker's compensation statutes. Why then should a claim for injuries that result from intentional acts receive the protection of the exclusivity provisions of the Workers' Compensation Act?
>
> My question goes beyond the inquiry about whether a workers' compensation claim was merely *filed* or whether an award was actually *made* and asks, if intentional torts were not part of the original bargain that the legislature considered and acted upon, why should courts grant them the protection of the exclusivity provisions of the compensation act?
>
> It may be that injuries from intentional torts were brought into consideration in the first place in order to assure an injured worker of at least some recovery, and it is true that, when considered from the worker's viewpoint, an injury at work is an injury at work whether caused by negligence or intentional misconduct. The same is not true, however, if the viewpoint is switched to that of the employer. An employer which engages in conduct that rises to the level of an intentional tort is no longer operating within the terms of the arrangement that gave rise to the Workers' Compensation Act.

> Such an employer should be subject to workers' compensation claims, both their filing and the acceptance of awards after their filing, and such an employer should also be subject to a common law action for damages.

Id. at 105.

Several other states, including Ohio, New Jersey, North Carolina, Louisiana, and Connecticut, have analyzed this issue and held the election of remedies doctrine inapplicable to a claim for workers' compensation and a claim for an intentional tort,. *See Jones v. VIP Development Co.*, 472 N.E.2d 1046 (Ohio 1984); *Millison v. E.I. du Pont*, 501 A.2d 505 (N.J. 1985); *Calapa v. Dae Ryung Co., Inc.*, 814 A.2d 1130 (N.J. 2003); *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991); *Gagnard v. Baldridge*, 612 So. 2d 732 (La. 1993); *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994). These courts have held that an injured employee may pursue both a workers' compensation remedy and an intentional tort suit. *See id.*

The Ohio Supreme Court in the case of *Blankenship v. Cincinnati Milacron Chemicals*, 433 N.E.2d 572 (Ohio 1982), held that the Ohio Workers' Compensation System did not preclude an employee from seeking damages at common law against his or her employer for an intentional tort. In the landmark case of *Jones v. VIP Development Co.*, 472 N.E.2d 1046 (Ohio 1984), the Ohio Supreme Court further delineated the standard necessary for proving the intentional

tort exception, adopting the substantial certainty test similar to that of Florida.[5] The *Jones* court also considered the issue of whether "an intentionally injured worker, *by applying for and receiving* benefits through the workers' compensation system, is thereby precluded from seeking common-law damages against his employer for the same injury." *Id.* at 1054 (emphasis added). In addressing this issue, the Ohio Supreme Court stated:

> In *Blankenship*, this court held that "the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct." To limit a worker injured by the employer's intentional misconduct to workers' compensation benefits would actually encourage such conduct. To bar an intentionally injured worker from the courtroom because he has received such benefits would have the same effect. An employer in such a case could merely refrain from contesting the claim, thereby facilitating the receipt of limited compensation, and then reap the rewards of absolute immunity from further liability. This court will not foster such practices.
>
> Nor will we force an intentionally injured employee to choose which remedy to pursue. In most cases, practical considerations will compel the worker to accept the easier, more immediate relief afforded by the Act, even though these benefits do not fully compensate the worker. Most seriously injured workers are not in a financial position to wait out a lengthy, expensive, and risky court proceeding to be compensated for the injury, due to the problem of pressing medical bills and often the inability to work. Many will thus be forced by harsh realities to opt for workers'

[5] Since the *Jones* decision the Ohio Legislature, like Florida's legislature, has twice disagreed with the court's definition of intentional tort and enacted a much higher standard. *See* Ohio Rev. Code § 4121.80 (struck as unconstitutional in *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722 (Ohio 1991)); Ohio Rev. Code § 2745.01 (struck as unconstitutional in *Johnson v. BP Chemical, Inc.*, 707 N.E.2d 1107 (Ohio 1999)).

> compensation. To consider the receipt of benefits a forfeiture of an employee's right to pursue the employer in the courts would not only be harsh and unjust, it would frustrate the laudable purposes of the Act and emasculate our holding in *Blankenship.* Further it would allow the employer to escape any meaningful responsibility for its abuses.

Id. (internal citations omitted).

The Supreme Court of North Carolina reversed an earlier opinion that could be read to stand for the proposition that simultaneous pursuit of an intentional tort claim and workers' compensation remedies "are inherently inconsistent and an election of remedies is required. . . ." *Woodson v. Rowland*, 407 S.E.2d 222, 223 (N.C. 1991). In so ruling, the court went on to favorably quote from the earlier case's dissenting opinion:

> The result thus obtained would be a more equitable one than forcing an employee who believes in good faith that he was injured by the intentional conduct of his employer to forego his compensation claim in order to maintain his common law claim. An injured employee having financial difficulties would be likely to accept workers' compensation benefits and forego a valid tort claim because he would have no real alternative. Such a policy would not serve to discourage intentional employer misconduct. Finally, the doctrine of election of remedies presupposes a "choice" between one or more inconsistent remedies. An employee in severe economic straits who makes a decision based solely on the exigencies of his immediate situation cannot be considered as having freely "chosen" one remedy over another. *Id.* at 233-234.

The Connecticut Supreme Court in *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994), also held that an injured worker is entitled to pursue both

his workers' compensation remedy and an intentional tort suit against his or her employer:

> The effect of the defendant's argument would be to force an injured employee to elect, at the outset, whether to pursue his or her remedies under the act, or to take his or her chances later at trial. . . . Indeed, judicially imposing the election of remedies doctrine in this case would, in all practical effect insulate employers from the consequences of their intentionally harmful conduct towards their employees. We have little doubt that most employees, who had been injured in the course of employment by conduct of their employers that would in a subsequent lawsuit be found to have been intentionally harmful to them would not undergo the financial privations of foregoing workers' compensation benefits in order to litigate their tort actions against their employer years later. The effect would, in all likelihood, be that the tort action would be a remedy in name only, and that the intentionally harmful conduct would go unpenalized.
>
> The act was designed to hold the employer liable for job related injuries, without regard to fault; so that employees may obtain relatively quick and certain compensation, while employers generally avoid the risk and expense of litigation stemming from common law tort actions. The principle of exclusivity is not eroded, however, when the plaintiff alleges an intentional tort, in which case an employee is permitted to pursue remedies beyond those contemplated by the act. Although an injured employee's remedies provided by the act are exclusive and cannot be supplemented with common law damages, there is no provision in the act that *requires* the injured employee to make an election between even mutually exclusive remedies.

Id. at 514. The court carefully considered what other state courts had ruled on the issue, and followed New Jersey's precedent setting case of *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505 (N.J. 1985). In further considering the

issue, the court relied on the long standing Workers' Compensation treatise by Arthur Larson, quoting:

> Workmen's compensation is above all a security system; a strict election doctrine transforms it into a grandiose sort of double-or-nothing gamble. Such gambles are appealing to those who still think of the judicial process as a glorious game in which formal moves and choices are made at peril, and in which the ultimate result is spectacular victory for one side and utter defeat for the other. The stricken workman is in no mood for this kind of play, and should not be maneuvered into the necessity for gambling with his rights, under the guise of enforcing a supposed penalty against the employer. *Id.* at 515.

In sum, the election of remedies doctrine first and foremost presupposes a "right to elect." As is made evident by the well reasoned opinions of the Ohio, North Carolina, and Connecticut Supreme Courts, an injured worker has no meaningful choice between his or her workers' compensation claim and potential intentional tort claim. Hence, from a basic policy standpoint the election of remedies doctrine should be held inapplicable.

Defendant's position maintains that an injured employee can *receive* workers' compensation benefits and pursue an intentional tort claim, so long as that injured employee doesn't consciously pursue any benefit to which he or she is entitled under the system. This argument, however, gives the keys to the courthouse to the intentional tortfeasor employer. Any employer who commits an

intentional tort catastrophically injuring an employee could escape the consequences of its actions by denying a workers' compensation benefit to which an employee is entitled, thereby *forcing* the employee to file a petition in the workers' compensation court to receive that benefit. Thus, employers who commit egregious, intentional acts that are substantially certain to result in death or injury to their employees could escape accountability for those acts by unjustifiably denying a portion of the workers' compensation benefits. Two wrongs should not make a right. The intentional tort exception should not rest upon the whims of the intentional tortfeasor employer's actions in the workers' compensation arena.

The intent and purpose behind the Workers' Compensation System, including the intentional tort exception, is built upon a mutual renunciation of rights but only within the context of an ordinary negligence scenario. To adopt Defendant's position and extend the election of remedies doctrine to cover an employer's intentional torts would completely eviscerate the goals and purposes behind this no-fault system.

CONCLUSION

This case is this Court's first opportunity to carefully consider whether in Florida the election of remedies doctrine applies as between a workers' compensation claim and a claim under the intentional tort exception to the Workers' Compensation System. The rights of Florida's citizens are at stake. If this Court were to adopt the First District Court of Appeal's decision, the intentional tort exception to workers' compensation immunity would survive only in name and the purpose of the Workers' Compensation System and the intentional tort exception would be eviscerated.

Additionally, the current state of Florida law does not require this Court to affirm the First DCA opinion because (1) the workers' compensation claim and the intentional tort claim are not inconsistent or mutually exclusive, and (2) an injured employee does not have any meaningful choice between a workers' compensation claim and an intentional tort claim, thus rendering the election of remedies doctrine inapplicable.

Accordingly, Petitioners request this Court to accept jurisdiction of the certified question, reverse the First DCA opinion herein and allow this case to proceed forward on the merits in the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Fred Johnson, Esquire, Fuller, Johnson & Farrell, P.A., P.O. Box 1739, Tallahassee, FL 32302, counsel for Appellants and Benjamin L. Crump, Esquire, Parks & Crump, LLC, 240 North Magnolia Dr., Tallahassee, FL 32301, co-counsel for Appellees via Hand Delivery this ____ day of October 2004

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THOMAS M. ERVIN, JR.

_____
DAVID H. BURNS

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Times New Roman 14 point, a font that complies with the requirements of Fla. R. App. P. 9.100(l).

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THOMAS M. ERVIN, JR.

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DAVID H. BURNS