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,

CASE NO.: SC04-1538

vs.

MARTIN ELECTRONICS, INC.

Respondent.
_____/

REPLY 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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I. The issue before this Court is one of Great Public Importance.

The First DCA's opinion in this matter gave careful attention to the fact that this Court has not addressed whether the election of remedies doctrine forces an election between a workers' compensation claim and an intentional tort suit. Finding this issue to be one of Great Public Importance, the Court certified the question. Significantly, no court in Florida has directly addressed this issue previously. This issue is of great importance so that employees, employers and carriers can know their respective rights and obligations under Florida law.

Particularly, injured employees need to know with certainty the consequences of their choices when catastrophically injured by employers' intentional conduct. Similarly, employers should know whether or not they are to be held accountable in any meaningful way for the consequences of their intentional conduct.

Specifically an injured employee, like Curtis Jones, must know what recourse he has when an employer wrongly denies a covered workers' compensation benefit. Does that injured employee have the right to seek that benefit within the workers' compensation arena or must he passively take whatever benefits the employer is willing to give him so as to not waive his right in the future to proceed against his employer under the intentional tort exception?

This is even more true since the amendment to section 440.11, Florida Statutes in 2003. Under the amended statute, a catastrophically injured employee will have an even higher burden in proving an intentional tort. Thus, catastrophically injured employees will be even less likely to be able to hold their employers accountable if forced to elect. Additionally, with a four year statute of limitations for an injured employee to bring an intentional tort suit, claims under the standard of *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), will continue to be filed for the next three years. It is also unknown how many cases currently pending involve this exact issue.

Moreover, the effect of the Section 440.11 amendment on *Turner* and the intentional tort exception is still unknown. Thus, it is even more important for this Court to enunciate what application, if any, the common law doctrine of election of remedies has within the context of workers' compensation and the intentional tort exception. This Court should take jurisdiction of this matter and answer this heretofore unaddressed issue in the law.

II. Even if the election of remedies doctrine generally appertains it has no application here because Curtis Jones could not forego immediate payment for the numerous surgeries and the attendant care required by his catastrophic injuries in order to preserve a future intentional tort suit.

Defendant's arguments II. through VI. are all based on the same faulty premise – that Curtis Jones' claim for workers' compensation benefits is mutually exclusive to and inconsistent with the instant intentional tort suit; and thus, application of the election of remedies doctrine bars him from bringing this intentional tort suit. Based upon this Court's discussion of the definition of "accident" in *Turner v. PCR*, this argument initially could appear logical, if one does not consider that in order to have an election in the first place the doctrine "presupposes a **right to elect**." *Williams v. Robineau*, 168 So. 644, 646 (Fla. 1936). To require a catastrophically injured employee to choose between guaranteed workers' compensation benefits and a future potential recovery for the

intentional tort (after lengthy litigation), creates a true Hobson's choice for that employee. Any meaningful "right to elect" between workers' compensation benefits and an intentional tort claim is eliminated. In the instant case, Curtis Jones was hospitalized following the explosion on an intensive care basis for four months. [E. 10, Affidavit Curtis Jones]. Following his release from the hospital Curtis Jones underwent additional, necessary life-sustaining surgeries (a total of 26 surgeries). [E. 10, Affidavit Curtis Jones]. Workers' Compensation was Curtis Jones' lifeline and the only way he could have received these required surgeries. Curtis Jones' had no real choice between obtaining workers' compensation to pay for these surgeries and attendant care and foregoing these surgeries and attendant care in order to preserve a potential future intentional tort claim. The Second DCA recently addressed the situation of an attorney who advises a client to forego workers' compensation in order to pursue a negligence suit based upon an employer's initial denial that the injured worker was in the course and scope of employment. The Court opined that such an attorney might be committing malpractice:

> This [Plaintiff's] attorney should be aware that the injured worker's pursue a tort claim, [Plaintiff's] attorney should be aware that she may also have a 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). If the election of remedies doctrine is applicable under the instant facts, no attorney could ever advise a catastrophically injured employee to forego workers' compensation benefits so as to preserve the right to possibly pursue an intentional tort claim. This is effectively no choice at all.

The stark effect that this application of the election of remedies doctrine would have on catastrophically injured employees, is only part of the picture. The catastrophically injured employee has no meaningful right to elect, and the unavoidable effect of applying the election of remedies doctrine is that the intentional tort exception is lost, along with its important policy basis. The intentional tort exception exists for the societally valuable purpose of holding employers accountable and thus deterring employers from engaging in intentional, dangerous conduct. *See Turner v. PCR, Inc.*, 754 So. 2d at 691 (Fla. 2000) (finding that the objective standard is necessary 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."). This important deterrent effect would be eviscerated if the election of remedies doctrine were to be used to extinguish the employee's right to bring the intentional tort claim.

Further, this application of the election of remedies doctrine would

effectively give the keys to the courthouse to the intentional tortfeasor employer. The employer could simply deny or reduce a benefit and force the injured employee to elect between required medical attention and a possible future intentional tort recovery. A rule where the employer and its carrier can effectively eliminate any potential liability for its intentional conduct would encourage the specific type of behavior of willful blindness that this Court was looking to abolish by its ruling in *Turner*.

Both parties have cited to this Court numerous out of state cases on this matter. The out-of-state cases discussed in length in Plaintiffs' initial brief carefully analyze this stark reality created for catastrophically injured employees by application of the election of remedies doctrine.[1] *See, e.g., Jones v. VIP*

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[1] Defendant's out-of-state cases, by contrast, are completely distinguishable as they are based upon a different statutory workers' compensation system or intentional tort exception and give this issue little consideration. *Nelson v. Winnebago Industries, Inc.*, 619 N.W.2d 385 (Iowa 2000), does not address the election of remedies doctrine and specifically states in footnote 1 that "the defendants do not argue that Nelson has elected his remedies by accepting workers' compensation nor that he has waived a common-law cause of action because of his acceptance of benefits. Accordingly, we do not discuss those issues." In *American General Life & Accident Ins. Co. v. Hall*, 74 S.W.3d 688 (Ky. 2002), the court held that the Kentucky Legislature in enacting statute 342.610(4) specifically foreclosed a plaintiff from pursuing the statutory intentional tort exception as well as a workers' compensation claim. The concurrence opinion in *James v. Caterpillar Inc*., 611 N.E.2d 95, 105 (Ill. 5th District 1995) points out that intentional torts should not be protected under the exclusivity provision of Illinois' workers' compensation act regardless of whether a workers' compensation claim was "filed" or "made." *Medina v. Herrera*, 927 S.W.2d 597 (Tex. 1996) is a

Development Co., 472 N.E.2d 1046 (Ohio 1984); *Calapa v. Dae Ryung Co., Inc.*, 814 A.2d 1130 (N.J. 2003); *Gagnard v. Baldridge*, 612 So. 2d 732 (La. 1993). As stated by the Supreme Court of North Carolina: "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." *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991). Additionally, these cases carefully weigh the real effect such a rule would have on employer's dangerous conduct: "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." *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507, 514 (Conn. 1994).

Moreover, this Court's very recent decision of *Travelers Indemnity Co. v.*

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split decision with an extensive dissenting opinion. *Advanced Countertop Design v. Second Judicial District Court of Nevada*, 984 P.2d 756, 758 (Nev. 1999) holds that one may elect between a workers' compensation remedy and an intentional tort; however, in order for there to be a valid election of workers' compensation, the injured employee must have accepted *a final SIIS award* that "acts as an accord and satisfaction of common law rights." Thus, if there are ongoing benefits to be paid and no final disposition has been made, then the injured employee may still bring the intentional tort lawsuit. *See id*. at 758-59. *Gourley v. Crossett Public Schools*, 968 S.W.2d 56 (Ark. 1998), holds that under Arkansas' intentional tort exception the injured employee must show "actual, specific, and deliberate intent by the employer to injure him."

PCR Inc., No. SC03-630 (Fla. December 9, 2003), in which this Court considered *Turner*'s definitions of "accident" and "intentional" within the liability insurance coverage context, discussed at length the opinion of *Millison v. E.I. du Pont*, 501 A.2d 505 (N.J. 1985) and the "virtual certainty" standard it adopted. New Jersey's workers' compensation system, like Florida's, is based upon the injury occurring "by accident." *See Millison* at 510-513. Despite the requirement of injury "by accident" within the New Jersey statute and the requirement that the employer's conduct be "virtually certain" to cause death or injury, the Court held that the election of remedies doctrine was not applicable:

> Plaintiffs have filed workers' compensation claim petitions, and ... defendants do not dispute that plaintiffs' injuries are compensable under the Compensation Act. The question arises, therefore, whether plaintiffs' pursuit of their compensation remedies acts as an election that bars their additional civil suit for intentional wrong.
>
> Precluding plaintiffs from a common-law cause of action for intentional wrongs because they have already chosen to seek the relief available under workers' compensation would be an unduly harsh and technical application of the election-of-remedies doctrine. The right to bring a common-law action for intentional wrongs beyond the intended scope of the Compensation Act would be a shallow right indeed if a claimant were forced to forfeit the recovery guaranteed by the Compensation Act in order to gamble on being able to prove that his injury was caused by the intentional wrong of his employer or co-employee. Plaintiffs who lose that gamble will be left totally uncompensated—even though it may be undisputed that those plaintiffs' injuries arose out of their employment—thus frustrating the Compensation Act's goal of providing security to workers who are disabled on the job.
>
> Our view is that in light of the Compensation Act's purpose of assisting

> disabled workers, the best approach is to allow a plaintiff to process his workers' compensation claim without forfeiting the opportunity to establish that he was injured as a result of conduct that amounted to an intentional wrong, entitling him to seek damages beyond those available in workers' compensation. If, however, a plaintiff should prevail in his suit based on intentional wrong, he would not be entitled to keep the entire amount of his compensation award as well as his civil suit remedy. . . . Thus if the trier-of-fact determines that du Pont and/or its doctors have been guilty of an intentional wrong as a result of their alleged fraudulent concealment of existing occupational diseases, du Pont or its insurance carrier will be able to offset compensation benefits previously paid to the extent that the civil damage award would serve as a double recovery.
>
> Plaintiffs' pursuit of compensation benefits will not serve to preclude the common-law suit that we have recognized in this opinion. The existence of the Compensation Act as social legislation to aid disabled workers should not prevent these plaintiffs from attempting to establish that the actual cause of their disabilities is an intentional wrong beyond the necessary risks of employment.

Millison at 519-520. Under the instant facts, Curtis Jones never had a meaningful right to elect. This Court, in accordance with the prudent and careful decisions of the highest courts of other States, should preserve the intentional tort exception and protect its laudable purposes by finding that the election of remedies doctrine is inapplicable in the case at bar.

III. The Jones' claim concerning the attendant care benefits in the workers' compensation court is not mutually exclusive to this intentional tort lawsuit. This suit falls under an exception to workers' compensation which can be simultaneously brought with a workers' compensation claim.

With no meaningful right to elect, this Court need not even consider

Defendant's argument that the workers' compensation claim and intentional tort suit are mutually exclusive and inconsistent. Yet as Defendant's Answer Brief clearly states, "the workers' compensation system is based upon 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." Amended Answer Brief at p.20. This quid pro quo discussed by Defendant's brief **is** still in place in the case at bar and has never changed. Curtis Jones has given up his right to a common law action for negligence in exchange for the rapid recovery of benefits under the Workers' Compensation System. Martin Electronics still receives the same benefit every employer who complies with the law and purchases workers' compensation coverage receives - immunity from negligence suits. However, neither the caselaw nor the statute require Curtis Jones to give up his action to hold his employer accountable for intentional conduct simply because he sought a workers' compensation benefit.

Despite Defendant's statement to the contrary, every Florida case cited by Defendant involves an injured worker making an election between a workers' compensation claim and a *negligence claim.*[2] This is the expected result, as this

[2] All the Florida cases discussed by Defendant involve a disputed claim of *entitlement* to workers' compensation benefits based upon employee status or whether the employer had obtained workers' compensation insurance coverage and whether litigating the issue later barred either a claim for ***negligence*** or workers'

Court explained:

> 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). Thus if the injured worker is not *entitled to workers' compensation benefits* then he or she may sue the employer in negligence because there has been no exchange of rights. Once the employer denies workers' compensation on the basis that the injured person was not an employee or was not in the course and scope of employment, then that injured person may elect to contest the entitlement to workers' compensation benefits claiming employee status or he or she may bring a negligence suit. In either scenario, the election of remedies doctrine would bar the

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compensation benefits depending on which was first filed. *See Matthews v. G.S.P. Corp.*, 354 So. 2d 1243 (Fla. 1st DCA 1978) (where Matthews first claimed he was injured in the course and scope of employment and then claimed he was not an employee, he was barred from bringing suit for culpable negligence); *Ferraro v. Marr*, 490 So. 2d 188 (Fla. 2d DCA 1986) (plaintiff who stipulated that he was in the course and scope of employment could not later bring negligence suit claiming he was not in course and scope of employment); *Pearson v. Harris*, 449 So. 2d 339 (Fla. 1st DCA 1984) (injured worker who sought workers' compensation benefits by asserting he was an employee, was later barred from bringing negligence suit claiming he was not an employee); *Hume v. Thomason*, 440 So. 2d 441 (Fla. 1st DCA 1983) (where the employer had failed to obtain workers' compensation coverage and thus by statute employee could elect to proceed in workers' compensation or file a negligence suit, employee was barred from later bring the workers' compensation suit when he first pursued an ordinary negligence suit).

injured person from later attempting to bring an action that would be based on a different status than that elected.

This case deals with a wholly separate issue, i.e., whether filing a claim in the workers' compensation system for a specific amount of a benefit (with no dispute as to the entitlement to that benefit) legally forces an injured employee to give up his or her right to proceed under the intentional tort exception. In this context, would the injured employee who disputes entitlement to workers' compensation benefits on the basis that the injury was not "by accident" have the right to file a negligence suit the same as the other injured workers in Defendant's cited cases who were not covered by workers' compensation? No, the injured employee here would still be required by law to give up his or her right to an ordinary negligence suit. The employer would continue to receive immunity, its quid pro quo, but the employee would receive nothing.

Despite the undisputed fact that the intentional tort exception is outside of workers' compensation, Defendant argues that Plaintiff by filing for workers' compensation has taken a position inconsistent with Plaintiff's later claim for intentional tort such that Plaintiff is estopped from pursuing the intentional tort claim. For the election of remedies to apply, the two claims must be both mutually

exclusive and require inconsistent positions.[3] *See Williams v. Robineau*, 168 So. 644, 646 (Fla. 1936) Nowhere in either the workers' compensation statute or caselaw is a workers' compensation claim and an intentional tort exception suit characterized as mutually exclusive. In fact, most, if not all, intentional tort suits have an outstanding workers' compensation lien or set-off from the verdict because the employer has been paying benefits to the injured employee.[4]

The only difference between those cases and the case at bar is that early in Curtis Jones' medical treatment, Defendant wrongfully refused to pay for both the correct number of hours and the correct hourly rate for attendant care benefits. These benefits were Mr. Jones' lifeline, and he understandably sought to have the deficiency corrected by filing a Request for Assistance in the workers' compensation system. It is only because Martin Electronics continued to wrongfully reduce the amount of this benefit that Plaintiffs ever had to pursue the issue any further. Thus Defendant's contention that Plaintiffs' position would radically change the manner in which these cases are handled or somehow lead to a

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[3] As discussed in length in Plaintiffs' Initial Brief, the definition of "Accident" within the workers' compensation statute is not inconsistent with a claim that the employer engaged in conduct substantially certain to result in injury or death because the instant facts meet the definition of an "unexpected or unusual" "event." §440.02(1), Fla. Stat. (2003).

[4] Even the injured employees in the *Turner* case had received workers' compensation benefits. [E.1, Tab 1 and 2].

proliferation of costs or a double recovery is simply false. All Plaintiffs' position would do is to force intentional tortfeasor employers to think long and hard before denying a workers' compensation benefit to which an injured employee is entitled.

Moreover, Plaintiffs' contention that exceptions to workers' compensation immunity are not mutually exclusive with workers' compensation claims is not a radical idea. *See Holmes County School Board v. Duffell*, 651 So. 2d 1176 (Fla. 1995) (holding that the injured employee has the right to pursue both a workers' compensation claim and a claim under the unrelated work exception to workers' compensation immunity). As Justice Anstead pointed out in his concurring opinion in *Holmes*:

> As a practical matter, when a fellow employee is sued under this exception, the employer's liability insurance will presumably apply since the employee is acting in the scope of his employment in the unrelated work. So, an employee may recover in tort, and probably against his employer's insurer, although his recovery may be reduced by any workers' compensation lien imposed.

651 So. 2d at 1179 (J. Anstead concurring). The case at bar presents in essence no different an issue than *Holmes*, except that herein Curtis Jones is pursuing a claim under the intentional tort exception rather than the unrelated works exception. And while the intentional tort exception proceeds directly against the employer rather than a co-employee, the practical and real effect is no different. In both circumstances it is the employer and the employer's insurance carrier that is "on the

hook" because the employer is vicariously liable for the acts of its employees. Simply put, the exceptions to workers' compensation immunity define those limited circumstances where an employer may be subject to a workers' compensation claim and a lawsuit related only to the exception. The aspects of the claim that are still covered by workers' compensation remain covered by workers' compensation. Any recovery of damages resulting from an exception to workers' compensation will be subject to a lien. The final result is that the exception claims, including the intentional tort claim, are not mutually exclusive with workers' compensation.

Martin Electronics seeks to escape liability for its intentional conduct that catastrophically burned its own employee, Curtis Jones. Martin Electronics' argument is based upon semantics and wordplay, not the justice or purpose underlying *Turner*'s exception. Having been proved wrong in denying Curtis Jones' attendant care, Martin now asks this Court to invoke the judicially created doctrine of election of remedies to shield them from accountability for the very acts which burned Curtis Jones and killed his co-worker. In these circumstances, the doctrine of election of remedies must give way to the essential public policies that protect employees from horrific injury at the hands of their employers who knowingly engage in conduct substantially certain to result in such injuries.

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 December2004

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THOMAS M. ERVIN, JR.

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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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