

IN THE SUPREME COURT OF FLORIDA

MARTIN BAKERMAN,

Petitioner/Plaintiff,

v.

THE BOMBAY COMPANY, INC.,

Respondent/Defendant.

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Case No. SC05-358

District Court Case Nos.  
3D03-1465, 3D03-1532

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**JURISDICTIONAL BRIEF OF RESPONDENT  
THE BOMBAY COMPANY, INC.**

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On Review from the District Court of Appeal,  
Third District, State of Florida

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Robert E. Biasotti, Esq.  
Florida Bar No. 0104272  
Annette M. Lang, Esq.  
Florida Bar No. 570915  
CARLTON FIELDS, P.A.  
Post Office Box 2861  
St. Petersburg, FL 33731  
Telephone: (727) 821-7000  
Facsimile: (727) 822-3768

Attorneys for Respondent/Defendant  
The Bombay Company, Inc.

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## STATEMENT OF THE CASE AND FACTS

Bombay generally accepts the facts presented by Bakerman in his petition, with one glaring exception. Bakerman claims the jury found that Bombay "committed an intentional tort by engaging in conduct that was substantially certain to result in injury or death." Pet. Juris. Brief at 1. The decision on review does not say that.

The Third District's decision states there was no evidence that Bombay deliberately intended to injure Bakerman. See The Bombay Company v. Bakerman, 891 So. 2d 555, 557 (Fla. 3rd DCA 2004). Hence, the jury necessarily did not find that Bombay committed an intentional tort.

The jury found two things: first, that Bombay "engaged in conduct substantially certain to result in injury or death." Id. at 556. Second, that both Bombay and Bakerman were negligent--Bakerman, thirty-three percent comparatively negligent for his own injuries; Bombay, comparatively negligent for the remaining sixty-seven percent of Bakerman's injuries. Id.

The Third District found that those facts--including the finding of comparative fault--were insufficient, as a matter of law, to allow for a jury finding that Bombay's conduct was substantially certain to cause Bakerman's injuries.

## SUMMARY OF THE ARGUMENT

There is no express and direct conflict between this case and Turner v. PCR, Inc. or Travelers Indemnity Co. v. PCR, Inc. The Third District carefully applied, followed, and quoted from, Turner, and correctly harmonized that decision with Taylor v. School Board of Brevard County, 888 So. 2d 1 (Fla. 2004), narrowly construing the common law exception to worker's compensation immunity at issue in this case. Because Travelers merely follows and elucidates Turner, it does not break any new ground and does not create any independent basis for conflict.

Simply put, Bakerman merely disagrees with the result reached by the Third District--a result that he admits is in complete accord with the Fourth District's resolution of this same issue. But, disagreement with an outcome--by itself--does not provide this Court jurisdiction to consider a conflict review petition.

In all events, given the recent amendments to Florida's workman's compensation scheme, this Court should decline Bakerman's invitation to accept review. The legislature codified the intentional tort exception to worker's compensation immunity over two years ago. That statutory change has rendered moot any distinction going forward between the current statute and the common law rule that applied in this 1997 case. For that additional reason, this Court should decline review.

ARGUMENT

**I. THE THIRD DISTRICT'S DECISION IN THIS CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH EITHER TURNER V. PCR, INC. OR TRAVELERS INDEMNITY CO. V. PCR, INC.**

The jurisdiction of this Court extends only to the specified class of cases enumerated in article V, section 3(b) of the Florida Constitution. Gandy v. State, 846 So. 2d 1141, 1143 (Fla. 2003). Conflict jurisdiction is limited to decisions "that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law." See Art. V, § 3(b)(3), Fla. Const. The conflict must "appear within the four corners" of the decision brought up for review. See Hill v. Hill, 778 So. 2d 967 (Fla. 2001). Absent a conflict, this Court lacks jurisdiction to review the district court's decision. See The Florida Star v. B.J.F., 530 So. 2d 286, 288-89 (Fla. 1988).

Here, there is no express and direct conflict between the instant case and Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000), or Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779 (Fla. 2004). The Third District took care to expressly address and harmonize this Court's Turner case on the face of its decision. The Third District expressly relied upon the Turner case as follows:

of particular interest here, the Turner decision also points out that the cases finding liability under the intentional tort

exception contain "a common thread of evidence that the employer tried to cover up the danger, affording the employees no means to make a reasonable decision as to their actions."

891 So. 2d at 557. The Third District then concluded:

That element is missing here. Here, . . . the dangerous condition was evident to the employee and there was no concealment of the danger. For that reason we conclude that the evidence was legally insufficient to support liability under the intentional tort exception to worker's compensation immunity.

Id. In reaching its conclusion, the district court carefully followed this Court's recent lead in Taylor v. School Board of Brevard County, 888 So. 2d 1 (Fla. 2004), and narrowly construed a similar exception to worker's compensation immunity. Bakerman completely ignores the Taylor case in his jurisdictional brief.

As Bakerman candidly acknowledges, the only other district court to directly confront this issue agrees with the Third District. See Pet. Juris. Br. at 3 (stating that "[t]he difficulty of this issue is demonstrated by the Third District's about-face on rehearing and by a Fourth District decision also requiring concealment."). Thus, Bakerman is not seeking to eliminate confusion among the district courts; rather, he appears to be seeking a second bite at the apple because he believes the Third District got it wrong. But that is not the role of this Court's discretionary review.

In the end, the Third District got it exactly right. Bombay's claimed failure to replace a wobbly step-ladder--even in the face of Bakerman's complaints to management about that ladder--is simply not the sort of intentional or criminal conduct that is required to overcome the statutory worker's compensation immunity. If an employer's alleged failure to remedy a workplace problem (such as a wobbly ladder), by itself, is sufficient to create a jury question on whether the employer's actions are objectively equivalent to an intentional tort, then worker's compensation immunity is rendered completely meaningless.

The fact is, in this case, Bakerman injured himself--at least in part--when he fell off this ladder. In the end, the most that can be said is that Bombay was also partly at fault when it failed to replace this defective ladder. Bombay certainly did not conceal any defect; in fact, it is undisputed that Bakerman himself was completely aware of the problems with this step-ladder and reported those problems to management. The evidence in this case, when taken in the light most favorable to Mr. Bakerman, simply does not meet the high threshold required to establish an intentional tort under Turner.



**II. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO  
REVIEW THIS CASE**

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Beyond the dispositive fact that there is no express and direct conflict (and the additional fact that the Third District did in fact get it right), Bakerman has failed to identify a compelling reason why this Court should review this case. The Florida Legislature recently codified the workman's compensation exception rule applied by the Third District in this case. The recent amendment in section 440.11, Florida Statutes, to require either a deliberate intent to injure or virtual certainty of injury, coupled with concealment of the danger from the employee, makes the legal issue addressed by the Third District moot in future cases.

In addition, Bakerman's own arguments highlight why accepting this case for review could lead to unintended confusion in unrelated cases. A review in this case would do nothing to assist the law of worker's compensation immunity, since the statute has now changed. However, as Bakerman suggests, a decision in this case could inadvertently lead to unintended consequences in juvenile delinquency proceedings, anti-kickback law, products/crashworthiness/comparative fault law, public employment law, and the law of sovereign immunity. See Pet. Jur. Br. at 9. For that reason alone, this Court should decline to accept review in this case.

**CONCLUSION**

For the reasons expressed above, the Third District's decision in The Bombay Company v. Bakerman, 891 So. 2d 555, 556 (Fla. 3rd DCA 2004), does not expressly and directly conflict with either Turner v. PCR, Inc. or Travelers Indem. Co. v. PCR, Inc. Hence, this Court should deny review.

Respectfully submitted,

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Robert E. Biasotti, Esq.  
Florida Bar No. 0104272  
Annette M. Lang, Esq.  
Florida Bar No. 570915  
CARLTON FIELDS, P.A.  
Post Office Box 2861  
St. Petersburg, FL 33731  
Telephone: (727) 821-7000  
Facsimile: (727) 822-3768

Attorneys for Respondent/Defendant  
The Bombay Company, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. mail to Robert N. Pelier, Esq., 1431 Ponce de Leon Boulevard, Coral Gables, Florida 33134; and to Barbara Green, Esq., Gables One Tower, Suite 450, 1320 South Dixie Highway, Coral Gables, Florida, 33146, attorneys for Petitioner/Plaintiff; and R. Scott Newman, Esq., Marlow, Connell, Valerius, et al., 4000 Ponce De Leon Boulevard, Suite 570, Coral Gables, Florida 33146, attorney for the Insurance Company of the State of Pennsylvania; on this 4th day of April, 2005.

By: \_\_\_\_\_  
Robert E. Biasotti

**CERTIFICATE OF COMPLIANCE**

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 12-point Courier New double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Robert E. Biasotti