THE FLORIDA SUPREME COURT

S. Ct. Case No.:
CASE No.: 2D04-1428

COLLEEN STEADMAN,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY
and NORMA JEAN PEELE,

Respondents.
_____/

PETITIONER=S AMENDED BRIEF ON JURISDICTION

Matthew D. Valdes, Esquire
MATTHEW D. VALDES, P.A.
1920 N. Orange Avenue
Orlando, Florida 32804
(407) 898-3288

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY & RULE & OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

This case concerns the right of an injured worker, whose injury is initially subject to Chapter 440, Florida Statutes, to file an action in circuit court for intentional torts, resulting in additional injuries, committed by an adjuster and insurance carrier. Colleen Steadman, petitioner, filed suit against Norma J. Peele and Liberty Mutual Insurance Company, respondents, for intentional infliction of emotional distress. The action for the intentional tort was due to the outrageous conduct of the respondents including intentionally refusing to honor a Compensation Order for medical benefits as entered by the Honorable Thomas G. Portuallo, Judge of Compensation Claims, all in the context of a life-threatening situation.

After the complaint was filed, the respondents filed a Motion to Dismiss on the grounds they were immunized from suit under ' 440.11, Fla. Stat. (1993), Florida Statutes. At a hearing on the matter, the Honorable Claudia R. Isom, Circuit Judge, held that as a matter of law, the appellants were not entitled to workers= compensation immunity under ' 440.11, Fla. Stat. (1993), Florida Statutes. Respondents then appealed to the Second District under Rule 9.130(a)(3)(C)(v), Fla. R. App. P. The Second District reversed holding the petitioners only remedy was within the Workers= Compensation Act because the conduct of the respondents was in the context of claims handling.

We are brought here by the Petitioner under Rule 9.030(a)(2)(A), Fla. R. App.

P. requesting the Florida Supreme Court to accept discretionary jurisdiction in this matter and quash the decision of the Second District Court of Appeal.

Contrary to Second District=s position, the petitioner asserts that the Workers= Compensation Act does not provide remedies for intentional torts, and appellants are not immunized by the Workers= Compensation Act for such intentional conduct, even if its is determined that the conduct is under the auspice of claims handling. However, it is certainly unclear how the fact that a carrier and adjuster ignoring a court order in a life threatening situation can be considered claims handling. Intentional and outrageous conduct by an employer or carrier must be actionable to preserve the obvious social value in protecting employees.

STATEMENT OF JURISDICTION

This Court has discretionary jurisdiction to review a District Court decision which expressly and directly conflicts with a decision of another District Court or the Supreme Court on the same issue of law. Florida Const., article V., '3(b)(3). Decisional conflict may be created by a conflict in legal principles appearing on the face of the decision or the misapplication of a specific holding previously announced by this Court. See *Rosen v. Florida Ins. Guar. Ass=n.*, 802 So. 2d 291 (Fla. 2001), *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1272 (Fla. 2001), *Arab Termite and Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1040 (Fla. 1982). In the instant case, the decision of the Second District is in conflict with prior decisions of the

Florida Supreme Court, as well as the Third and Fourth Districts.

SUMMARY OF THE ARGUMENT

The Second District issued its opinion on January 7, 2005. Appellee filed a Motion for Rehearing, which was denied by Order dated March 18, 2005. Judge Kelly, writing for the majority, held that Ms. Steadman=s claim is based entirely on Liberty Mutual=s delay in paying benefits awarded to her by the JCC. Therefore, Ms. Steadman is barred from filing suit against the Carrier under *Old Republic Ins. Co. V. Whitworth*, 442 So. 2d 1078 (Fla. 3d DCA 1983), *Southeast Adm=rs. Inc. v. Moriarty*, 571 So. 2d 589 (Fla. 4th DCA 1990) and *Inservices, Inc. v. Aguillera*, 837 So. 2d 464 (Fla. 3rd DCA 2002), *review granted*, 847 So. 2d 975 (Fla. 2003).

Steadman seeks further review, based on the District Court=s misapplication of *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), *Old Republic Ins. Co. V. Whitworth*, 442 So. 2d 1078 (Fla. 3d DCA 1983), *Southeast Adm=rs. Inc. v. Moriarty*, 571 So. 2d 589 (Fla. 4th DCA 1990) and *Inservices, Inc. v. Aguillera*, 837 So. 2d 464 (Fla. 3rd DCA 2002), *review granted*, 847 So. 2d 975 (Fla. 2003).

The misapplication of the controlling decision of this Court and the other District Courts creates express, direct conflict. This Court has recognized an intentional tort exception to workers= compensation immunity. *Turner v. PCR, Inc.*, 754 So. 2d 683, 686-87 (Fla. 2000). Based upon the facts as alleged, the intentional tort exception applies to this claim.

ARGUMENT

A WORKERS= COMPENSATION CARRIER AND ITS ADJUSTER ARE NOT IMMUNE FROM SUIT FOR THEIR OWN INTENTIONAL TORTS THAT CAUSE INJURY BEYOND THAT OF THE ORIGINAL INJURY

Immunity under section 440.11, Florida Statutes, does not apply to intentional acts and intent can be inferred from certain conduct substantially certain to cause injury. Beyond the plain reading of the statute, the Florida Supreme Court has recognized an intentional tort exception to the workers= compensation statutory scheme. *Eller v. Shova*, 630 So.2d 537, 539 (Fla. 1993). Seven years later, the Florida Supreme Court reaffirmed these prior decisions recognizing that the workers= compensation law does not protect an employer from liability for an intentional tort against an employee. *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000).

It makes no difference that the action in this case is against the carrier and case manager, and not against the employer. A carrier is afforded the same immunity from civil suit as the employer. *Sullivan v. Liberty Mutual Insurance Co.*, 367 So.2d 658 (Fla. 1979). It cannot be held that once an employee files a claim, he has already been injured, and therefore, the carrier is free to behave in any manner it desires.

The rationale by the Second District does not take into account precedent by this Court. In *Sibley v. Adjustco, Inc.*, 596 So. 2d 1048 (1992), an injured employee sued a workers= compensation carrier for actions by one of its adjusters. A statement

had been taken of the claimant while in the hospital, and then later edited. The claim was denied based upon the edited statement. That conduct was certainly in the context of claims handling, and would appear not to be as outrageous as the conduct of the respondents in the case before the Court, given the life threatening situation of the petitioner during the time of the intentional conduct.

This Court held in *Sibley* that subsequent legislation enacted to provide a criminal penalty for false statements used for the purpose of denying benefits, was simply an alternative action, and did not eliminate a common law right of action for an intentional tort. A criminal penalty to the wrongdoer cannot be equated with a remedy to the injured worker. There is no remedy in the Workers=

Compensation Act for an intentional tort. A remedy must exist to address the injured workers new injury, and not just provide a punishment to the wrongdoer. This is especially true when technically, no false statements have been made, but even worse, an Order of the JCC has been ignored and claimant is in need of medical care.

The Second District misinterpreted the holding in *Old Republic Ins. Co. V. Whitworth*, 442 So. 2d 1078 (Fla. 3d DCA 1983). That case held the test to determine if workers= compensation bars a tort action, is whether the injury for which a plaintiff seeks recovery is covered by the Workers= Compensation Act. *Old Republic Ins. Co., v. Whitworth*, 442 So.2d 1078 (Fla. 3d DCA 1983). The petitioner

would show that her injury would not be covered by the Act, as it was not an injury by accident as necessitated by the Act.

Section 440.02(1), Florida Statutes, (1993) defines accident as an unexpected or unusual event or result, happening suddenly. By definition, an intentional tort cannot be said to be unexpected. To the contrary, it was intended. The severe emotional distress the claimant was inflicted with, due to the conduct of the appellants, was not an injury by accident as defined by Chapter 440, and therefore, the immunity provisions of the Workers= Compensation Act do not apply.

The Second District misinterpreted the holding in *Southeast Adm=rs. Inc. v. Moriarty*, 571 So. 2d 589 (Fla. 4th DCA 1990). The Third District held that a circuit court has no jurisdiction over an action against a compensation carrier for injuries covered by the Act. As noted above, the petitioner's injury is not covered by the Act, and she has no remedy within the Act for the emotional distress intentionally inflicted upon her by the actions of the respondents.

The Second District misinterpreted the holding of this Court as explained in *Turner*. This Court held that liability is permitted despite the exclusiveness of the workers' compensation remedy because the likelihood of injury is so high that the event cannot be regarded as an accident. *Turner*, 754 So. 2d at 689. Where a reasonable man would believe that a particular result was substantially certain to

follow, he will be held in the eyes of the law as though he had intended it. *Spivey v. Battaglia*, 258 So.2d 815 (Fla. 1972). This Court did not say liability is permitted only against the employer, or only against the carrier if the allegations go beyond claims handling.

As recognized in *Sullivan v. Liberty Mutual Insurance Co.*, 367 So.2d 658 (Fla. 4th DCA 1979), ``it appears the immunity granted under the statute was not intended to cover instances where a carrier intentionally harms the employee." It is beyond peradventure to assert that a carrier can commit intentional torts with impunity when the employer cannot do the same.

The facts alleged in the amended complaint do not describe a carrier which makes the intentional decision to terminate benefits or takes some other intended action to adjust a claim. Rather, petitioner's complaint asserts intentional tortious behavior by the respondents not shielded by the workers' compensation immunity. A review of the facts pled in the complaint, which must be accepted as true, demonstrate that this case goes beyond mere claims-mishandling allegations and asserts independent acts that rise to the level of an actionable intentional tort. The complaint clearly alleges that respondents intentionally engaged in conduct that was substantially certain to result in injury or death. Evaluated under the *Turner* standard, the facts demonstrate that the petitioner has stated a cause of action for intentional infliction of emotional distress, that divests the adjuster and carrier of workers' compensation

immunity. This is sufficient to survive a workers' compensation immunity dismissal motion.

Cases that have actually applied the *Turner* doctrine, especially *Turner* itself, have characteristically involved a degree of deliberate or willful indifference to [the] employee. *Pacheco v. Florida Power & Light Co.*, 784 So. 2d 1159, 1163 (Fla. 3d DCA 2001). The respondents here exhibited the same deliberate and willful indifference to the Petitioner. The respondents knew of the severity of the petitioner=s condition, yet intentionally withheld authorization and payment for benefits ordered by a Judge of Compensation Claims. Beyond mere claims-mishandling allegations, these acts rise to the level of an actionable intentional tort. The actions are even more outrageous when in the context of the relationship between the parties. A fiduciary duty exists in such a relationship and it was thrown out the window. These actions were not decisions to terminate benefits or take some other intended action to adjust a claim. These actions arose after the claims were litigated extensively, the respondents were found liable, so they decided to ignore an Order of a Judge of Compensation Claims in order to inflict severe emotional distress on the petitioner. All remedies before the JCC had been exhausted. An Order had been entered, but the JCC lacked authority to enforce it, so the carrier ignored it.

This Court is already aware of the legal arguments on this issue due to a case currently pending before it. See *Inservices, Inc. v. Aguillera*, 837 So. 2d 464 (Fla. 3rd

DCA 2002), *review granted*, 847 So. 2d 975 (Fla. 2003) This Court has jurisdiction based on the district court=s misapplication of the law as interpreted by the Florida Supreme Court.

CONCLUSION

For the reasons expressed, petitioner respectfully invokes this Court=s jurisdiction under Fla. Const. Art V, '3(b)(3) and requests the Court to (1) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) quash the decision of the Second District Court of Appeal.

Respectfully submitted,

Matthew D. Valdes
1920 N. Orange Avenue
Orlando, Florida 32804
(407) 898-3288
Florida Bar No.: 0003018
Attorney for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail on this 23rd day of May, 2005, to Chris N. Kolos, Esquire P.O. Box 1526, Orlando, Florida 32802.

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Appellee certifies that this Answer Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

_____

Attorney