SUPREME COURT OF FLORIDA

Case No. SC06-1063

RODOLFO CASAS,

Petitioner,

vs.

SIEMENS ENERGY AND AUTOMATION, INC.,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

John H. Pelzer, Esq.
RUDEN, McCLOSKY, SMITH, SCHUSTER & RUSSELL, P.A.
200 East Broward Boulevard, 15th floor
P.O. Box 1900
Fort Lauderdale, Florida 33302
(954) 764-6660, 527-2469

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATEMENT OF THE FACTS

Casas' statement of the facts is not consistent with the facts recited within the four corners of the Third District's majority opinion. Although Casas correctly recites that his accident occurred while he was attempting to dislodge a metal lid, citing the slip opinion at page 2, the remainder of the pertinent facts on this point are omitted by Casas. The Third District noted,

> Should a metal lid become stuck in the machine, Casas was instructed to remove the obstruction with a long metal rod, or with a long screwdriver, which could be inserted into the machine through a hole in the machine's point of operation Plexiglas barrier guard. Under no circumstances was he to place his hands or arms within the punch area of the machine unless the machine had been turned off.

Slip Opinion, p.2.

In contrast to Casas' implication that the presses were not in compliance with the OSHA requirements, the Third District recited,

> the uncontradicted evidence was that machine 409 was equipped with two one-half inch thick Plexiglas guards at its front and left sides and metal guards on the machine's right side where the metal feeder was located. There were no guards on the backside of the press, which could be accessed only by crawling under it. These guards, again the uncontradicted evidence shows, are point of operation guards, which comply with the Occupational Safety and Health Administration (OSHA) requirements, and had been in place on this machine for over ten years. Other than for the purpose of changing the die, at which time the press was supposed to be completely turned off,

> operators were not permitted to operate this press without the Plexiglas guards in place.

Slip Opinion, p.13-15 (citations and footnotes omitted). While Casas correctly recites that Siemens was investigating upgrades, this was because "Siemens decided to voluntarily upgrade existing safety equipment to obtain a 'star award' from OSHA." Slip Opinion, p.15 fn.7.

Casas overstates the significance of Siemens' interrogatory response that the Plexiglas guards were not in place at the time of Casas' injury. If the barriers had been in place, Casas could not have inserted his hand into the machine. Admitting this fact does not support an inference that the guards did not exist .

Only a part of the district court's quotation from Casas' deposition is recited in Casas' brief, giving the misimpression that Casas was taught to put his hands in the machine without turning it off. The portion of Casas' deposition that the Third District emphasized is as follows:

> Q: Were you taught that if something got stuck in the machine and you had to take it out, that you should always use a rod or a screwdriver and never put your hands into it?
> A: Yes.
> Q: Why would you use a rod or a screwdriver and not your hands?
> A: To be able to take the part out because there's no way of taking out the part with your hand.
> Q: It could also be dangerous to put your hand in that situation, correct?
> A: Exactly.

Q: That's common sense?
A: Yes.

Slip Opinion, p.23.

ARGUMENT

I. THIS COURT DOES NOT HAVE *PRIMA FACIE* JURISDICTION MERELY BECAUSE THE OPINION CITES A CASE UNDER REVIEW IN THIS COURT.

The concept of *prima facie* jurisdiction was developed in *Jollie v. State,* 405 So. 2d 418 (Fla. 1981), to address situations in which a district court, considering several cases presenting the same issue, chooses one case as the "lead case" and resolves the others through a "citation PCA," or a per curiam decision without opinion citing the opinion in the lead case. 405 So. 2d at 419. If this Court accepted review of the lead case, then it had *prima facie* jurisdiction of the other cases that were decided by a citation PCA. 405 So. 2d at 421. *See also, Reuter v. McKenzie Check Advance of Florida, LLC,* __ So. 2d __ (2006 WL 1277922, Fla. 2006).

Because the Third District's opinion in this case was not a citation PCA, it is not presumptively within this Court's *prima facie* jurisdiction under the rational of *Jollie.* The decision of the Third District was not a citation PCA. Moreover, there is no indication that the Third District relied solely on *Bombay Company v. Bakerman,* 892 So. 2d 555 (Fla. 3d DCA 2004), rev. granted 903 So. 2d 189 (Fla. 2005), *("Bakerman")* as a lead case that was determinative of this case. The majority opinion in the slip opinion contained 24 pages of discussion, of which *Bakerman* was only a small part. The opinion cites numerous other decisions of

this Court and various district courts to support various aspects of its decision.

In *Kesler v. Chatfield Dean & Co.,* 794 So. 2d 577 (Fla. 2001), *Jollie* was expanded to cover a case in which the district court issued an opinion in which the district court cited and expressly relied upon a case that was in this "Court was at the time in the process of determining the identical issue . . . ." 794 So. 2d at 578. This case also does not fit within the limited extension of *Kesler.* In the district court opinion in *Kesler, Chatfield Dean & Co. v. Kesler,* 749 So. 2d 542 (Fla. 2d DCA 2000), *reversed,* 794 So. 2d 577 (Fla. 2001), the district court clearly relied exclusively upon its own decision in *Barron Case Securities, Inc. v. Moser,* 745 So. 2d 965 (Fla. 2d DCA 1999), as the sole and sufficient support for its legal conclusion that attorneys' fees are not awardable in connection with an arbitration award that did not specify the theory upon which it was based. The district court opinion in *Kesler* would have been a citation PCA but for the fact that the relief was a reversal. It was the functional equivalent of a citation PCA.

The Third District cited *Bakerman* for only one legal proposition, which is not contested by the parties in this case and actually favors Casas. The Third District noted that, since the incident occurred in 2000, the stricter standards of the 2003 amendment to the workers compensation law did not apply. Slip Opinion, p.4 fn.1. The only other proposition of law for which *Bakerman* was arguably cited was not actually a pronouncement of the *Bakerman* opinion at all. Rather,

the quote from *Bakerman* on page 5 of the Slip Opinion was actually a quote within a quote of this Court's opinion in *Turner v. PCR, Inc.*, 754 So. 2d 683, 691 (Fla. 2000). Of course, a direct quote from *Turner* would not provide *prima facie* jurisdiction, and a quote within a quote should be no different. Thus, unlike *Kesler*, the Third District in this case did not cite a case that was pending review for any issue which would provide a basis for conflict of jurisdiction. The remaining discussions of *Bakerman* in the Third District's opinion merely discuss the facts of the case, *e.g.* Slip Opinion, p.10, and do not support any conclusion that there is any express, direct conflict on any proposition of law.

II. THE DISTRICT COURT'S OPINION PROPERLY DISTINGUISHES *LAWTON V. ALPINE ENGINEERED PRODUCTS, INC.*, 498 So. 2d 879 (Fla. 1986), AS MODIFIED BY *TURNER V. PCR, INC.*, 754 So. 2d 683 (Fla. 2000), AND PROPERLY RECITED THE TEST OF *TURNER.*

This case was decided on summary judgment. *Lawton v. Alpine Engineered Products, Inc.,* 498 So. 2d 879 (Fla. 1986), *("Lawton")* addressed the sufficiency of allegations to survive a motion to dismiss. This is the distinction drawn by the Third District in this case. Slip Opinion, p.10. The question is not what was alleged, but what the record revealed. Casas' disagreement with the Third District's application of *Lawton* has nothing to do with the legal principles announced in the opinion. Rather, Casas merely disagrees with the District Court's view of the record. *See,* Petitioner's Jurisdictional Brief, p.5, 6, 8. This disagreement with the District Court's view of the facts is insufficient to provide a basis for this Court's jurisdiction.

Casas argues that the Third District misstated this Court's test from *Turner*. Petitioner's Jurisdictional Brief, p.6. This is curious, because the Third District actually quoted *Turner* for this very proposition, *via* a quote of *Turner* contained in *Bakerman.* This is the proposition that "cases finding liability under the substantial certainty test, 'contain "a common thread of evidence that the employer tried to cover up the danger [to its employees], affording the employees no means to make a reasonable decision as to their actions." ' " Slip Opinion, p.5, quoting *Bakerman,*

891 So. 2d at 557, in turn quoting *Turner*, 754 So. 2d at 691. It is difficult to see how a correct quotation of *Turner* can be a misstatement of the "objective *Turner* test." Petitioner's Jurisdictional Brief, p.6.

III. THE PETITIONER IMPROPERLY RELIES UPON DISSENT IN HIS ATTEMPT TO ESTABLISH CONFLICT ON THE QUESTION OF SUMMARY JUDGMENT STANDARDS.

In order to make the point that Casas attempts to make here, it is essential for him to cite to and rely upon the dissenting opinion. *See*, Petitioner's Jurisdictional Brief, p.9. This is improper. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Rather, any conflict "must appear within the four corners of the majority decision." *Id.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court does not have jurisdiction, and should not exercise jurisdiction in this case.

Respectfully submitted,

RUDEN, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
200 East Broward Boulevard, 15th floor (33301)
Post Office Box 1900
Fort Lauderdale, Florida 33302
(954)764-6660, 527-2469; Fax: (954)333-4069

By: _____
John H. Pelzer
john.pelzer@ruden.com
Florida Bar Number 376647

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel of record as noted below, by U. S. Mail, on July 14, 2006.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

RUDEN, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
200 East Broward Boulevard, 15th floor (33301)
Post Office Box 1900
Fort Lauderdale, Florida 33302
(954)764-6660, 527-2469; Fax: (954)333-4069

By: _____
John H. Pelzer
Florida Bar Number 376647

Counsel of Record

Donna B. Michelson, P.A.
1110 Brickell Avenue
9th Floor, Penthouse One
Miami, Florida 33131
Counsel for Casas

John H. Pelzer, Esq.
Ruden, McClosky
P.O. Box 1900
Fort Lauderdale, Florida 33302
Counsel for Siemens

Philip D. Parrish, PA
One Datran Center
9100 South Dadeland Boulevard
Penthouse One, Suite 1710
Miami, Florida 33156
Counsel for Casas

Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927
850/ 488-0125