IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-

AMANDA BOURASSA,

Petitioner,

vs.

BUSCH ENTERTAINMENT CORP.,
d/b/a BUSCH GARDENS,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER=S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF CASES

Page

TABLE OF CASES

Page

AUTHORITIES

I. STATEMENT OF THE CASE AND FACTS

There are few things in this world more dangerous to life and limb than a full-grown male lion.[1/] And we think that most reasonable persons would agree that hand-feeding raw meat to a full-grown male lion, simply to distract him while blood is being drawn from his tail, is an extremely dangerous (perhaps even an exceptionally stupid) thing to do. Yet Busch Gardens= zookeepers are instructed to do precisely that -- without the benefit of simple safety devices to distance fingers from mouths, like meat sticks or tongs -- on a regular basis.

In our judgment, it is a simple matter of common sense that such a procedure is substantially certain to result in injury to someone, sooner or later -- and the record contains the affidavit of an experienced, highly qualified zookeeper that it was Ainevitable@ that someone would eventually be injured because of the extreme risks associated with the procedure. AInevitable@ means unavoidable and certain, of course, and the Ainevitable@ occurred when Amanda Bourassa, fresh out of a two-year college program, was hand feeding Busch Gardens= lion, Max, while a simulated blood draw was being conducted on his tail. Max managed to snare Miss Bourassa=s fingers, pull her arm into his cage through too widely-spaced bars, and ripped her arm off at the elbow.

Miss Bourassa sued her employer pursuant to an exception to the immunity conferred by the Workers= Compensation Act, an exception which permits recovery under

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[1/] The statement of the case and facts is taken from the face of the majority opinion below (A. 1-16).

the common law for conduct that is Asubstantially certain to result in injury or death to the employee.@ *Turner v. PCR, Inc.*, 754 So.2d 683, 686 (Fla. 2000). Notwithstanding the expert=s sworn attestation that Miss Bourassa=s injury was Ainevitable@ as a matter of fact, the trial court concluded *as a matter of law* that hand feeding raw meat to a full-grown male lion was not Asubstantially certain@ to result in injury, and it granted Busch Gardens= motion for summary judgment on the ground that it was immune from suit.

In a split decision, a majority of the panel that heard Miss Bourassa=s appeal in the District Court of Appeal, Second District, affirmed the adverse judgment. It dismissed the expert=s affidavit as irrelevant and provided three reasons for its conclusion -- reasons which, as we will demonstrate, squarely conflict with this Court=s decision in *Turner v. PCR*. Judge Whatley filed a dissenting opinion (which is worth reading for what the majority=s opinion does not bother to disclose), which concludes with the following, perfectly sensible observation: A . . . if this case does not present a jury question as to whether the employer=s conduct was substantially certain to cause injury or death, than no case would seem to qualify.@ (A. 9).

II. SUMMARY OF THE ARGUMENT

The Court has jurisdiction to review the district court=s split decision for two reasons. First, the majority=s decision cites as controlling authority a decision that is pending review in this Court. Second, the majority=s decision misapplies this Court=s decision in *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000), and it is therefore in express and direct conflict with it. And because the majority=s decision conflicts with *Turner v. PCR*, it is wrong on the merits. We respectfully urge the Court to grant Miss Bourassa an

opportunity to demonstrate that the majority=s decision should be quashed.

III. ARGUMENT

THE DISTRICT COURT=S DECISION MISAPPLIES AND IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT=S DECISION IN *TURNER V. PCR, INC.*, 754 SO.2D 683 (FLA. 2000).

This Court=s jurisdiction to review the district court=s decision rests on two separate bases. First, the simplest. In the third of the three reasons it gave for concluding that the Asubstantial certainty@ exception to workers= compensation immunity did not apply, the majority wrote:

> Third, there is no evidence that Busch Gardens concealed the dangers inherent in the blood draw procedure from Bourassa or any other employee. Several Florida cases have held that when the employer has not concealed any of the risks involved in the activity and when the employee is fully aware of the risks, the intentional tort exception does not apply. *See, e. g.*, *Bombay Co. v. Bakerman*, 891 So.2d 555, 557 (Fla. 3d DCA 2004) (A[T]he 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.@), *review granted*, 903 So.2d 189 (Fla. 2005) . . . .

(A. 9-10).

It was precisely because *Turner v. PCR* contains no such requirement that this Court granted review of the Third District=s decision in *Bombay Co. v. Bakerman*, 891 So.2d 555 (Fla. 3d DCA 2004), *review granted*, 903 So.2d 189 (Fla. 2005). [1/] Oral

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[2/] *Bakerman* conflicts with *Turner* in another respect, because it states that the

argument in that case was held on April 3, 2006 (four days before the decision in Miss Bourassa=s case was filed), and that case is presently pending review in this Court. The Court therefore has jurisdiction to review the district court=s decision in this case, without more: AWe thus conclude that a district court of appeal . . . opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.@ *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981). *Accord Kelly v. Community Hospital of Palm Beaches, Inc.*, 818 So.2d 469, 470 (Fla. 2002); *State v. Lofton*, 534 So.2d 1148 (Fla. 1988).

In addition, we respectfully submit that the majority misapplied *Turner v. PCR* to

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Asubstantial certainty@ exception is to be Anarrowly construed@ (891 So.2d at 557) -- and it appears from Judge Whatley=s citation of the decision for that proposition that the district court was operating under the same misconception. In *Turner*, this Court (relying upon the plain language of '440.015, Fla. Stat., itself) explicitly held that the exception Ais *not* to be construed in favor of either the employer or the employee.@ 754 So.2d at 689 (emphasis supplied).

the facts in this case, and it is settled that misapplication of a decision of this Court creates an express and direct conflict supporting this Court=s discretionary review jurisdiction. *Engle v. Liggett Group, Inc.*, case no. SC03-1856 (Fla. July 6, 2006); *Knowles v. State*, 848 So.2d 1055 (Fla. 2003); *Robertson v. State*, 829 So.2d 901 (Fla. 2002).

We won=t belabor the Court=s unanimous decision in *Turner v. PCR*, because the Court is intimately familiar with both it and the difficult line-drawing it has spawned.[1/] Nevertheless, we remind the Court briefly that it rejected a Asubjective standard@ for analysis of the issue presented here in favor of an Aobjective standard,@ in order to avoid abolition of the statutory exception to workers= compensation immunity altogether. It held that, in order to invoke the Asubstantial certainty@ exception, an employee need not prove that the employer *actually knew* that its conduct was substantially certain to cause injury. Rather, the employee need only prove that the employer *should have known* that its conduct was substantially certain to cause injury. It also effectively put the issue in the hands of the finder-of-fact:

> Under an objective test for the substantial certainty standard, an analysis of the circumstances in a case would be required to determine whether a reasonable person would understand

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[3/] *Compare*, for example, the arguably conflicting recent decisions in *Patrick v. Palm Beach County School Board*, 927 So.2d 973 (Fla. 4th DCA 2006), and *Casas v. Siemens Energy & Automation, Inc.*, 927 So.2d 922 (Fla. 3d DCA 2006).

> that the employer=s conduct was Asubstantially certain@ to result in injury or death to the employee.

754 So.2d at 688.

And that is the single guidepost in *Turner* by which the statutory exception to workers= compensation immunity must be analyzed.[1/] There is no requirement in *Turner* that the employee must prove that the employer was subjectively aware of the dangers and deliberately ignored them at the expense of employee safety. There is no requirement in *Turner* that the employee must prove that he or she was not properly trained and was unaware of the risks. And there is no requirement in *Turner* that the employee must prove that the employer concealed the risks involved in the procedure that injured him. While these things may have appeared as requirements in various district court decisions pre-dating *Turner*, they were plainly rejected by this Court in *Turner* as elements that must be proven to invoke the Asubstantial certainty@ exception to workers=

[4/] That is also the guidepost that this Court used when it recently reaffirmed *Turner* in a related context in *Travelers Indemnity Co. v. PCR Inc.*, 889 So.2d 779 (Fla. 2004).

compensation immunity.[1/]

Yet the majority=s decision below rests on Miss Bourassa=s failure to prove to its satisfaction all three things. The majority held that Busch Gardens was entitled to immunity from suit because (1) Miss Bourassa failed to prove that her employer was

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[5/] In this connection, it is worth noting that, in *Turner*, this Court expressly disapproved the Second District=s decision in *Thompson v. Coker Fuel, Inc.*, 659 So.2d 1128 (Fla. 2nd DCA 1995). 754 So.2d at 688. Yet the majority relied upon *Thompson* below for the (somewhat confusing) proposition (which we believe to be indefensible after *Turner*) that Aan employer=s knowledge of the risks of dangerous activities and its failure to make the conditions >more safe= is not sufficient to establish an exception to workers= compensation immunity in the absence of some evidence of a deliberate indifference to employee safety@ (A. 12). In our judgment, knowledge of dangerous risks, coupled with a failure to reduce or eliminate the risks when practicable, *is* evidence of deliberate indifference to employee safety.

subjectively aware of the dangers involved and deliberately ignored them at the expense of employee safety; (2) she failed to prove that she was not properly trained and was unaware of the risks involved; and (3) she failed to prove that her employer did not conceal the risks from her (A. 8-10). Indeed, in one of the more confusing aspects of its decision, the majority observed that the risks of a substantial certainty of injury were Aobvious to all@ (A. 10), and that the Asubstantial certainty@ of injury exception therefore did not apply. And nowhere did the majority address the only pertinent question before it after *Turner* -- whether a reasonable person would understand that hand-feeding raw meat to a full-grown male lion was substantially certain to result in an injury to an employee required to perform the job in that manner.

Most respectfully, the majority=s decision undeniably resurrects the Asubjective standard@ rejected by this Court in *Turner*, and adds additional obstacles to recovery that are nowhere mentioned in *Turner*. The majority=s decision even goes so far as to dismiss the affidavit of Miss Bourassa=s expert as irrelevant -- on the ground that he only opined that Busch Gardens= extremely dangerous procedure could have been made considerably safer with a simple mechanical device to separate fingers from mouths, and did not prove the requisite Adeliberate indifference to employee safety@ (A. 12).

But before an employee can prove A*deliberate* indifference,@ proof that the employer *actually knew* of the hazard which it ignored is required -- which is precisely what the *Turner* decision says is *not* required when it *rejected* use of a Asubjective standard@ to govern analysis of the issue presented here. In short, the majority=s decision effectively renders the statutory exception to workers= compensation immunity impossible

to prove under any set of facts short of actual intent to injure, which is precisely what this Court was attempting to avoid when it adopted an Aobjective standard@ for determining applicability of the exception.

Worse still, we respectfully submit, the majority=s three-part test for invoking the exception simply makes no sense, because what it boils down to is this: the more obvious the danger and the greater the risk of injury the employee is required to face in his or her job, and therefore the greater the Asubstantial certainty@ that performing the job in the manner required by the employer will ultimately result in injury, the less likely the Asubstantial certainty@ exception to workers= compensation immunity will apply. Most respectfully, as Judge Whatley observed in dissent, if the majority=s reasoning is correct, Athen no case would seem to qualify@ for the statutory exception. In our judgment, that the majority misapplied *Turner* is undeniable, and that the Court has jurisdiction to correct its misapplication and clarify what has obviously become a difficult task for the district courts of this state is undeniable as well.

It will be no answer to this Court=s exercise of its discretionary jurisdiction that the legislature amended the Workers= Compensation Act after Miss Bourassa lost her arm to make it more difficult for persons like her to sue their employers for their intentional torts. Miss Bourassa deserves the benefit of the law that existed at the time she was tragically injured by her employer=s tortious conduct. There are also a number of cases in the pipeline that deserve the benefit of the law existing at the time of the incidents at issue in those cases. And, as petitioner=s counsel noted in her jurisdictional brief in the *Bakerman v. Bombay Co.* case presently pending in this Court, Asubstantial certainty@ is a legal

concept that affects a number of diverse areas across the spectrum of Florida=s jurisprudence, and a correction of the district court=s misapplication of *Turner* in this case will therefore be of benefit in areas that go well beyond the question of immunity under a now less liberal Workers= Compensation Act.

We respectfully urge the Court to grant review, as it did in the *Bakerman* case, for essentially the same reasons (and more) that supported a grant of review in that case.

IV. CONCLUSION

The Court has jurisdiction, and review should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of July, 2006, to: Daniel J. Fleming, Esq., Melkus, Fleming & Gutierrez, P.L., 800 W. De Leon Street, Tampa, FL 33606; Robert L. Blank, Esq., Rumberger, Kirk & Caldwell, P.A., 100 North Tampa Street, Suite 2000, Post Office Box 3390, Tampa, FL 33601; and to Elliot H. Scherker, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131.

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