

IN THE FLORIDA SUPREME COURT

PETITION TO REVIEW DECISION FROM THE DISTRICT COURT OF
APPEAL, FOURTH DISTRICT, STATE OF FLORIDA
4TH DCA Appeal No. 4D05-1598

DAMIEN PENDERGRASS, etc. et al
Petitioners,

vs.

R.D. MICHAELS, INC. Et. al.,
Respondents.

JURISDICTIONAL BRIEF OF RESPONDANT, R.D. MICHAELS, INC.
SC No. SC06-2021

ON APPEAL FROM DISTRICT COURT OF APPEAL OF THE STATE OF
FLORIDA, FOURTH DISTRICT
Fourth District Appeal No. 4D05-1598

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PRELIMINARY STATEMENT

Petitioners, DAMIEN PENDERGRASS, as Personal Representative of the Estate of Arthur Pendergrass, Jr., a deceased adult single man, for and on behalf of lawful claimants: The Estate of ARTHUR LEE PENDERGRASS, JR., DAMIEN PENDERGRASS, ARTIS PENDERGRASS, DEDRICK PENDERGRASS, and TARIS PENDERGRASS, individually, will be referred to as “Petitioners,” “Plaintiffs,” or “PENDERGRASS.” Arthur Lee Pendergrass, Jr. will be referred to as “Decedent.” Respondents, R.D. MICHAELS, INC., OCEANVIEW CONSTRUCTION CORP., and STAFF LEASING, INC. will be referred to by name or as “Respondents” or “Defendants”.

The record citations will refer to the Appendix filed by the Petitioners with their Jurisdictional Brief with the abbreviation “AA.”

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iv
STATEMENT OF FACTS.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. THE DECISION APPLIES THE APPROPRIATE STANDARD OF REVIEW FOR SUMMARY JUDGMENT PURSUANT TO RULE 1.510; THEREFORE, THERE IS NO DIRECT CONFLICT WITH <i>TURNER</i> OR <i>REEVES</i>	4
II. THE DECISION PROPERLY APPLIES THE OBJECTIVE STANDARD PURSUANT TO <i>TURNER</i> AND DOES NOT REQUIRE THAT PRIOR SIMILAR ACTS OR CONCEALMENT EXIST FOR SUBSTANTIAL CERTAINTY TO APPLY.....	6
III. TO THE EXTENT THAT THE PETITIONERS’ CONTENTION AS TO OSHA REGULATIONS IS PROPER IN THIS ACTION, THE DECISION DOES NOT COMMAND A CHANGE IN FEDERAL REGULATIONS. FURTHER, AS <i>TURNER</i> AND <i>REEVES</i> DO NOT ADDRESS OSHA VIOLATIONS, THERE IS NO CONFLICT.....	7
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10
CERTIFICATE OF COMPLIANCE	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>American Wrecking Corp. v. Secretary of Labor</i> , 351 F.3d 1254 (US App. DC Cir. 2003)	9
<i>Connelly v. Arrow Air, Inc.</i> , 568 So.2d 448 (Fla. 3 rd DCA 1990)	7
<i>Cunningham v. Anchor Hocking Corp.</i> , 558 So.2d 93 (Fla. 1 st DCA 1990)	7
<i>Fisher v. Shenandoah General Construction Company</i> , 498 So.2d 882, 883 (Fla. 1986)	8
<i>Reeves v. Fleetwood Homes of Florida, Inc.</i> , 889 So.2d 812 (Fla. 2004)	3,4,6,8,9
<i>Turner v. PCR, Inc.</i> , 754 So.2d 683 (Fla. 2000)	2-9
<u>Statutes and Rules</u>	<u>Page(s)</u>
Section 440.015, Florida Statutes	4, 5
Florida Rules of Civil Procedure 1.510	3,4,5,6

STATEMENT OF FACTS

While the Petitioners' Brief states that the facts were taken from the face of the Decision, there are several discrepancies which will be addressed in the order in which the Petitioners have set forth their facts. The Decision describes the weather as "windy" on that day; whereas Petitioners have characterized it as a "very windy" day. (AA p.2) OCEANVIEW CONSTRUCTION CORP. ("OCEANVIEW") hired the Decedent as a mason tender, rather than R.D. MICHAELS, INC. ("MICHAELS"), which was the general contractor. (Id.) The walls under construction had reached a height of eight feet about two days prior to the accident. (AA p.4) They had not been braced because the scaffolding around the walls was satisfactory bracing. (Id.) They were connected by rebar, but the tie beam had yet to be poured. (Id.) The four walls of the building had been completed on the Friday of the accident and were tied together at the corners by rebar, ready for the tie beam to be poured the following week. (AA p.2) MICHAELS' job superintendent discussed with OCEANVIEW'S owner the need to brace the walls due to the "possibility" of windy weather over the weekend, rather than windy weather that was "expected" over the weekend as stated by the Petitioners. (Id.)

The Decedent was a mason tender, who also totes the concrete block and cement, and generally provides the unskilled labor that the masons need to

construct a concrete block wall. (AA p.1-2) At around 3:00 p.m., the employees, including the Decedent, were cleaning up the site in preparation for the bracing when the north and south walls collapsed. (AA p.2) While the exact cause of the collapse is unknown, the evidence suggests that a strong gust of wind must have toppled the wall. OCEANVIEW'S contract with MICHAELS made OCEANVIEW responsible for the bracing of the walls. (AA p.3)

During the litigation, the Petitioners' expert filed an affidavit which simply recited the allegations of negligence in the complaint (AA p.4) and was unavailing in that it merely parroted the allegations and opined that the defendants were negligent. On deposition, Mr. Schaeffer, OCEANVIEW'S owner, testified that OCEANVIEW generally told its employees to use common sense and to be careful. (AA p.3-4) Mason tenders were also required to wear hard hats at all times. (AA p.4)

The Petitioners improperly assert arguments in the Statement of Facts concerning: the Decision's alleged requirements of knowledge of a prior wall collapse and intentional conduct in preventing Decedent from learning or appreciating risks; its ruling with respect to the criminal acts exception; and its finding of no evidence to satisfy the substantial certainty test in *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000). Further, the Petitioners argue the merits of this

action in the Statement of Facts in addressing the Decision's alleged converse ruling regarding what should have been obvious to the Decedent.

SUMMARY OF ARGUMENT

The Petitioners improperly argue the merits of the Decision in their Jurisdictional Brief. However, in addressing the allegations in the Brief, the Respondent asserts that the Decision does not expressly or directly conflict with this Court's decisions in *Turner* and *Reeves*. First, the lower court applied the appropriate standard of review pursuant to Rule 1.510 in affirming summary judgment. The Decision carefully reviews the facts of the instant case, as well as other Florida decisions that found the intentional tort exception applied, warranting the entry of summary judgment. Second, the Decision is consistent with *Turner's* "substantial certainty" test in that it considered evidence of "prior similar acts" and "concealment" as factors in affirming summary judgment, rather than mandating these factors as necessary elements of an intentional tort. Finally, to the extent that the Petitioners' allegations regarding OSHA are proper issues for jurisdictional determination, the Decision appropriately held that violations of OSHA regulations are insufficient to show acts involving intentional torts, which are consistent with this Court's holding in *Fisher*, and does not conflict with *Turner* or *Reeves*.

ARGUMENT

The Jurisdictional Brief improperly asserts arguments that address the merits of the action and issues irrelevant to jurisdictional determination, such as allegations that the facts of the instant case give rise to material issues of fact and that the Decision distinguishes a skilled job from an unskilled job. However, the Respondent has addressed the Brief's issues relating to alleged conflict with *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000) and *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So.2d 812 (Fla. 2004) as follows.

I. THE DECISION APPLIES THE APPROPRIATE STANDARD OF REVIEW FOR SUMMARY JUDGMENT PURSUANT TO RULE 1.510; THEREFORE, THERE IS NO DIRECT CONFLICT WITH *TURNER* OR *REEVES*.

The Decision applied the appropriate standard of review for summary judgment in cases involving workers' compensation, which is the same standard stated in Rule 1.510, Florida Rules of Civil Procedure, and as applied in *Turner*. The Petitioners contend that the Decision failed to distinguish between the standard for cases within the worker's compensation system and those "outside" of it, given the reference to §440.015, Florida Statutes. Thus, they state that the Decision applied a so-called "neutral light" test allegedly intended by that statute, rather than the "light most favorable to the non-moving party" test of Rule 1.510.

However, the Petitioners have clearly misconstrued the Decision's reference to §440.015, and have also failed to demonstrate how the Decision in fact applied

any standard of §440.015 to the instant case. In sum, §440.015 describes the legislative intent of the worker's compensation law. The *Turner* court referenced it as an introduction to its analysis of worker's compensation and the immunity that applies to employees. The Decision cites §440.015 in a similar manner and properly deduces that the legislature specifically rejected any liberal interpretation for workers' compensation laws, even though remedial legislation is generally interpreted liberally. (AA p.5)

From the Decision's logical deduction, the Petitioners have improperly inferred that the Decision applied this so-called "neutral light" test in determining the appropriateness of summary judgment in this case, rather than Rule 1.510. On the contrary, the Decision clearly meets the standard pursuant to *Turner* and Rule 1.510, which states that summary judgment shall be rendered if the evidence (pleadings, depositions, etc.) shows that "there is no genuine *issue* as to any *material fact* and that the moving party is entitled to a judgment as a matter of law." (*emphasis added*) R.1.510(c). In accordance with this rule, the Decision concluded that "*no material issues of fact* remain." (*emphasis added*) (AA p.8). This language demonstrates that it did in fact review the facts of this case pursuant to the standard enunciated in Rule 1.510. Further, in its analysis, it cites to numerous cases in which the courts considered whether the employees' conduct was sufficient to "raise an issue of fact for the jury" and defeat summary judgment.

Id. at 5. The Decision considered these cases involving summary judgment issues and applied the rationales utilized by Florida courts to affirm the lower court's decision to grant summary judgment to Respondents.

The Petitioners have not cited to any language in the Decision that indicates that the Decision failed to review the facts in “a light most favorable to the non-moving party,” as stated in *Turner*. Rather, they have used circular reasoning to deduce that the Decision applied the wrong standard because it did not rule in their favor.

There is no indication in the Decision that this Court utilized any other standard than that used in Rule 1.510, *Turner*, and *Reeves*. Thus, the Decision does not expressly or directly conflict with this Court's decision in *Turner* or *Reeves* with respect to the standard of review utilized by the lower court.

II. THE DECISION PROPERLY APPLIES THE OBJECTIVE STANDARD PURSUANT TO *TURNER* AND DOES NOT REQUIRE THAT PRIOR SIMILAR ACTS OR CONCEALMENT EXIST FOR SUBSTANTIAL CERTAINTY TO APPLY.

This Court has expressly and consistently held that to prove an intentional tort, the employer must be shown to have either exhibited a deliberate intent to injure or engage in conduct substantially certain to result in injury or death. *See Turner*, 754 So.2d at 687. The Decision restates this rule and clarifies that this second alternative requires the court to apply an objective test, also set forth in *Turner*. (AA p.7); *Turner*, 754 So.2d at 688-89. It further analyzes the facts of

Connelly v. Arrow Air, Inc., 568 So.2d 44 (Fla. 3d DCA 1990) and *Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93 (Fla. 1st DCA 1990); the Decision states that the facts in those cases were sufficient to support proof of the “objective test” of intentional conduct substantially certain to cause injury or death. (AA p.8) The Decision also examines several other cases in which Florida courts found objective evidence that the requisite intentional conduct did not exist, and found their facts far more similar to the present case. (AA p.8-10)

It further observes that Florida courts have highlighted two factors which show the type of intentional conduct which a reasonable person (an objective standard) would consider resulting in the substantial certainty of injury or death. (AA p.8) A review of the facts of the several cases cited by the Decision demonstrates that these factors were used in the courts’ holdings. While the Decision acknowledges that the courts have used such factors in their objective analyses, it does not impose the factors as *requirements* for a finding of substantial certainty, despite the Petitioners’ claims. The Decision considered these factors, as this Court and others had also considered, in utilizing the objective test for determining substantial certainty. Since the Decision’s rationale is consistent with *Turner*, there is no conflict and this Court should not exercise its discretionary conflict jurisdiction to review the Decision.

III. TO THE EXTENT THAT THE PETITIONERS’ CONTENTION AS TO OSHA REGULATIONS IS PROPER IN THIS ACTION, THE DECISION

DOES NOT COMMAND A CHANGE IN FEDERAL REGULATIONS. FURTHER, AS *TURNER* AND *REEVES* DO NOT ADDRESS OSHA VIOLATIONS, THERE IS NO CONFLICT.

The Petitioners have stated that the Decision expressly and directly conflicts with *Turner* and *Reeves* in three ways, the third of which is that it “deemed violations of OSHA standards insufficient to give rise to an inference as to whether the conduct that caused the violation is substantially certain to result in injury or death.” (Petitioners’ Brief, p.4) However, neither *Turner* nor *Reeves* address violations of OSHA regulations and their relation to substantial certainty.¹ In fact, the Petitioners simply conclude that the Decision has a far-reaching effect on federal regulation of construction standards without claiming that it actually conflicts with *Turner* or *Reeves*. Thus, the Petitioners have improperly addressed the merits of the action in their Jurisdictional Brief. However, if Petitioners’ argument is found appropriate, the Respondent responds as follows.

The Decision considers the OSHA regulations applicable to this case in the context of determining whether the employers’ conduct fell within the intentional tort exception to workers’ compensation immunity. In so doing, the Decision cites to this Court’s decision in *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So.2d 882 (Fla. 1986) for the proposition that the failure to provide a safe workplace or to

¹ While the underlying facts of *Reeves* included an investigation by OSHA, *Reeves* held that the appellate court did not have jurisdiction to review a non-final order and never addressed the merits of the case. 889 So.2d at 814.

follow OSHA guidelines does not constitute an intentional tort. The Decision uses *Fisher* as support for its conclusion that the employers' conduct did not rise to the level of an intentional tort to overcome immunity under Florida law. In no way does the Decision command a change in federal regulation concerning the bracing of walls or create a conflict with the standards of OSHA.

Further, Petitioners misapply the law stated in *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254 (US App. DC Cir. 2003) to infer that "willful" disregard of OSHA regulations rises to the level of an intentional tort to overcome worker's compensation immunity. In reality, *American Wrecking Corp.* involved a review of an order issued at an administrative hearing and discusses the meaning of "willful" in the context of the issuance of a willful OSHA citation. *See Id.* at 1257, 1262. In no way does the court apply the definition of "willful" as it relates to conduct substantially certain to result in injury or death. Given that the Decision's analysis of OSHA regulations remains squarely within the context of the facts of the instant case and that neither *Turner* nor *Reeves* discuss the effect of OSHA regulations, there is no conflict between the Decision and either case.

CONCLUSION

The Decision does not conflict with either *Turner* or *Reeves*; therefore, there is no basis in which this Court may exercise its discretionary conflict jurisdiction to review the Decision.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this _____ day of _____, 2006 to all parties on the attached service list.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla.R.App.P.9.210(a)(2). This document is being submitted in Times New Roman 14 point font.

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