

IN THE FLORIDA SUPREME COURT

PETITION TO REVIEW DECISION FROM THE DISTRICT COURT  
OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA  
4<sup>th</sup> DCA Appeal No. 4D05-1598

DAMIEN PENDERGRASS, Etc. et al  
Petitioners,

vs.

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

JURISDICTIONAL BRIEF OF PETITIONERS

SC No. \_\_\_\_\_ TBA

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

Jeanne C. Brady, Esq.  
Florida Bar No. 0997749

Frank R. Brady, Esq.  
Florida Bar No. 0588024

Brady & Brady, P.A.  
370 Camino Gardens Blvd., Suite 200C  
Boca Raton, FL 33432  
Phone: (561) 338-9256

Arvid J. Peterson, III, Esq.  
Florida Bar No. 373222  
Law Offices Of Arid Peterson, P.A.  
370 Camino Gardens Blvd., Suite 300  
Boca Raton, FL 33432



**IN THE FLORIDA SUPREME COURT  
500 DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927**

DAMIEN PENDERGRASS, etc. et al, )	Supreme Court case no. TBA
) )	4 <sup>th</sup> DCA No. 4D05-1598
Petitioners, )	
-v- )	L.T. Case No. 502001CA012024XXONAB
) )	
R.D. MICHAELS, INC., et al )	
) )	
Respondents. )	
_____ )	

**PRELIMINARY STATEMENT**

Petitioners, Damien Pendergrass, as personal representative of the Estate of Arthur Lee Pendergrass, Jr. (the “Estate”), the lawful claims of the Estate, and Damien Pendergrass, Dedrick Pendergrass, Artis Pendergrass and Taris Pendergrass individually, who were Appellants below, are referred to herein collectively “Petitioners”. Respondents, R.D. Michaels, Inc. (“Michaels”), Oceanview Construction Corp. (“Oceanview”) and Staff Leasing, Inc. (“Staff Leasing”), who were Appellees below, are referred to herein collectively as “Respondents”. The abbreviation “(e.s.)” means emphasis supplied. The abbreviation “AA” refers to the Appendix accompanying this jurisdictional brief.

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## CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

Appellants' appellate counsel, Jeanne C. Brady, Esq., hereby certifies that the following persons or entities may have an interest in the outcome of this appeal:

The Honorable Jonathan D. Gerber	Appellate Court
The Honorable Martha C. Warner	Appellate Court
The Honorable Larry A. Klein	Appellate Court
The Honorable Fred A. Hazouri	Appellants' appellate counsel
Jeanne C. Brady, Esq. Brady & Brady, P.A.	Appellants' trial counsel
Arvid J. Peterson III, Esq. Law Office of Arvid J. Peterson, III	Trial Counsel for Defendant R.D Michaels
Amy Millan, Esq. Wicker, Smith O'Hara, McCoy, Graham & Ford, P.A.	Appellate Counsel for Defendant R.D Michaels
Michel I. Nelson, Esq. Wicker, Smith O'Hara, McCoy, Graham & Ford, P.A.	Trial Counsel for Defendants Oceanview Construction Corp. and Staff Leasing, Inc.
J. Daniel Ennis, Esq. Lane, Reese, Aulick Summers & Field, P.A.	Appellant/Plaintiff Below Estate of Arthur Lee Pendergrass, Jr.
Damien Pendergrass, Personal Representative of the Estate of Arthur Lee Pendergrass, Jr. Trial Court	Appellant/Plaintiff Below Lawful Claimants of the Estate of Arthur Lee Pendergrass, Jr.Appellant/Plaintiff Below Damien Pendergrass Individually

Appellant/Plaintiff Below  
Dedrick Pendergrass Individually  
Appellant/Plaintiff Below

Artis Pendergrass Individually  
Appellant/Plaintiff Below

Taris Pendergrass Individually  
Appellant/Plaintiff Below

R.D. Michaels, Inc.  
Appellee/Defendant Below

Oceanview Construction Corp.  
Appellee/Defendant Below

Staff Leasing, Inc.  
Appellee/Defendant Below

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## STATEMENT OF THE FACTS

On a very windy day in January, 2000 two unbraced, 14 foot tall, concrete block walls were under construction, with no bracing and no permanent supporting structures. Employee, Arthur Lee Pendergrass, Jr. (“Decedent”) was instructed by his employer to clean the area around the walls, and was crushed to death when they collapsed upon him [AA p. 2].<sup>1</sup> Michaels was the general contractor, sub-contracted with Oceanview to build the concrete block walls, and used Staff Leasing to provide employees for the job [Id. p. 1]. Oceanview hired Decedent as a mason tender just days before the fatal collapse [Id.]. Decedent was employed by all three defendants [Id.]. A mason tender is an unskilled laborer who assists masons [Id.]. During that very windy Friday afternoon, the 14 ft. high walls were not braced, had no tied beams, no rebar (steel reinforcement) and no permanent support structures [AA p. 2]. Michaels' job superintendent discussed with Oceanview's owner the need to brace the walls due to more windy weather expected over the weekend [Id.]. Sometime later, Decedent was cleaning up the site for bracing when the walls collapsed and killed him [Id.]. The Occupational Safety and Health Administration (“OSHA”) investigated [Id.]. It cited Michaels with safety violations for failure to establish a limited access zone prior to the start

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<sup>1</sup> The facts are taken from the face of the Fourth District’s decision.

of construction of the masonry wall, and failure to adequately brace masonry walls over 8 ft. high to prevent collapse until permanent elements of the structure were in place [Id.]. Both were classified as "serious" violations [Id.].

OSHA cited Oceanview with safety violations for failure to: (1) initiate or maintain a safety program for employees; (2) instruct employees in recognition and avoidance of unsafe conditions; (3) establish a limited access zone prior to the start of construction; and (4) adequately brace masonry walls over 8 ft. high to prevent collapse [AA p. 2]. The first 3 violations were "serious" and the 4<sup>th</sup> was "willful" [Id.]. OSHA's report found Oceanview had knowledge of its regulation that masonry walls over 8 ft. require bracing, and deemed the nature and extent of its violation to be "plain indifference to the safety and health of its employees" [AA p. 3]. It further found Oceanview "*intentionally disregarded its health and safety responsibility because there was no safety program, and the employees were not trained for the task*" [Id.] (e.s). Oceanview promptly settled the willful citation with OSHA [Id.].

Decedent's Estate sued all three defendants for wrongful death [Id.]. Defendants had no expert. The Estate's expert opined on every allegation of the complaint, which in turn alleged that defendants failed to provide a limited access zone, failed to brace walls until permanent support were in place, deliberately

failed to comply with safety standards and failed to provide a safety program or instruct Decedent on safety precautions or recognition of dangers [AA pp. 3-4]. Against Staff Leasing, the Estate alleged deliberate disregard of a standard, failure to instruct Decedent about recognition and avoidance of unsafe conditions and failure to provide a safety program [Id.]. The complaint alleged, and the expert opined, that all defendants knew or should have known that their acts were substantially certain to cause injury or death [Id.]. Defendants testified that they had no wall collapse before [Id.]. One insisted that is not unusual for walls to progress without braces where there is a limited access area around them [Id.]. Mr. Schaeffer admitted that Oceanview had no specific safety program, but claimed that it generally told employees to use common sense and to be careful, and that mason tenders were required to wear hard hats at all times [AA pp. 3-4]. The Decision *draws the conclusion* that Decedent “would have” received these instructions, even though it conversely acknowledges that OSHA found there was plain indifference to human life and no safety program, training or instructions on hazard avoidance [AA p. 4]. According to Mr. Schaeffer, scaffolds are sufficient bracing, but OSHA issued a willful violation for failing to brace these walls, stating that the failure constituted plain indifference to human life [AA pp. 3,4].

Plaintiffs' expert opined on the knowing failure to give safety training or instructions on how to avoid any hazards, as that too is contained in the complaint [Id.].

The Decision found that knowledge of a prior wall collapse and intentional conduct preventing Decedent from learning or appreciating the risks are required, but absent here [AA pp. 10-11]. It ruled that the criminal acts exception in § 440.11 does not apply to corporations [Id. p. 6]. It also found no evidence to satisfy *Turner's* substantial certainty test [Id. p. 11]. It says that *Decedent* (an unskilled laborer) should have known the wall might fall, while the employers with over 30 years' experience did not know it [Id., pp. 3, 11] (e.s.). Even though the Decision acknowledges evidence of no safety program or training to recognize hazards, and that Decedent was *unskilled* and only worked for a few days, it conversely rules that the danger that the walls might fall should have been obvious to Decedent [Id.]. While the Decision acknowledges that the record is not crystallized just as to whether scaffolds were even in place at the time of the accident, it affirms summary judgment based on workers' compensation immunity under § 440.11 because defendants never had a wall collapse in their "many years of experience" [AA p. 11]. Rehearing was denied on September 22, 2006.

## SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review this case under Fla. Const. Article V § 3(b)(3) and Rule 9.030(a)(2)(iv), Fla.R.App.P. The Decision expressly and directly conflicts with *Turner v. PRC, Inc.*, 754 So. 2d 683(Fla. 2000) in at least three ways: (1) it reviews summary judgment under the neutral light of § 440.015, Fla. Stat., (2) it eviscerates *Turner's* objective substantial certainty test by imposing a *prior similar act* and *concealment* of that knowledge to prevent the employee from appreciating the risk involved; and (3) deems violations of OSHA safety 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. The neutral light of § 440.015 conflicts with *Turner* and changes fundamental principles of summary judgment. It also conflicts with *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So.2d 812, 821 (Fla. 2004) because it does not employ the “necessary steps” to assess summary judgment or every possible inference in favor of the non-movant.

## ARGUMENT

### I. **THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE FOURTH DISTRICT’S DECISION DUE TO CONFLICT WITH TURNER AND FLEETWOOD**

The Decision expressly and directly conflicts with the objective substantially certainty test and its application set out in *Turner*. It also conflicts with the necessary steps on summary judgment reinforced in *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So.2d 812, 821 (Fla. 2004). The Decision applies the neutral light of Fla.Stat. § 440.015, stating that facts are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer [AA pp. 4-5] (e.s.). It also rules that disputes concerning the facts are not to be given a broad liberal construction in favor of either the employee (*non-movant*), on the one hand, or the employer (*movant*) on the other hand [Id.] (e.s.). Yet *Turner* adopted the “every possible inference” test set out in *Emergency One, Inc. v. Keffer*, 652 So. 2d 1233,1235 (Fla. 1<sup>st</sup> DCA 1995), and requires the record and any supporting affidavits to be read in the light most favorable to the non-moving party. *Turner* at 684. This Decision says that Plaintiffs’ expert just parroted the complaint, while declining to articulate what he had to say [AA p. 12].

The neutral light of § 440.015 misapplies *Turner’s* standard, which is *no different* than any other non work related intentional tort case on summary judgment in circuit civil court. *Id.* at 684 (e.s.). The purpose of § 440.015 was merely to eliminate presumptions for the judge of compensation claims *within* the

workers' compensation system. *See Schafrath v. Marco Bay Resort, Ltd*, 608 So. 2d 97, 104 n. 3 (Fla. 1<sup>st</sup> DCA 1992) (e.s.); *Johnson v. Koffee Kettle Restaurant*, 125 So.2d 297, 299 (Fla. 1960). The former § 440.26 mandated presumptions when the employee's claim fell within the system and the injury indisputably occurred on the job, but no evidence of causation was available. Section 440.015 abolished those presumptions and liberal construction in cases within that system, and now requires the claimant to put on proofs, instead of allowing presumptions to control ultimate causation issues. *See § 440.26(1)* (West 1989) (setting out presumptions) (repealed eff. June 26, 1990 ch. 90-201, § 26, Florida Laws); *Fla.Stat. § 440.015* (Supp. 1990). Those principles do not apply to a civil suit where the jury is the ultimate fact finder and the every possible inference controls on summary judgment. *Turner* at 689 (e.s.). The Decision recites Respondents' testimony that "mason tenders were required to wear hard hats at all times" [AA pp. 3-4]. It then *concludes* that "Pendergrass *would have* received these instructions", even though the expert's opinion and OSHA materials cited in the Decision conflict with that conclusion in that they state there was no training or safety instructions [Id.]. Thus, the Decision passed on the weight of the evidence and resolved factual disputes, thereby misapplying *Turner*. Accordingly, there is conflict jurisdiction. *See Ford*

***Motor Co. v. Kikis***, 401 So. 2d 1341 (Fla. 1981).

The Decision changes the objective, substantial certainty test to a subjective one by requiring the employee to show: (1) a *prior similar act* and (2) intentional *concealment* of that knowledge preventing the employee from appreciating the risk involved. ***Turner*** requires neither concealment nor prior similar acts, even though such evidence would pass its tests. Although ***Turner*** receded from its language in ***Fisher v. Shenandoah Gen. Constr. Co.***, 498 So. 2d 882 (Fla. 1986) that suggested the substantial certainty test required a showing of “virtual certainty”, it also deemed ***Fisher’s*** facts sufficient to satisfy its objective substantial certainty test. 754 So. 2d at 687 n. 4. However, this Decision applies ***Fisher’s*** virtual certainty language to hold that OSHA violations do not meet any objective substantial certainty test or even raise an inference [AA p. 11]. It holds that a willful safety violation only indicates indifference to a rule, but nothing to infer willful disregard of safety itself [AA p. 12]. *See 29 USC § 666(e)* (incarceration for willful violation of safety standard when death occurs). The Decision also rules that the possibility of collapsing walls should have been obvious to Decedent, despite evidence of no safety instructions or even a program on how to recognize or avoid hazards, while implying that collapsing walls would not be obvious to employers. Nowhere in

*Turner* or *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779 (Fla.2004), did this Court deem it appropriate to consider whether *the employee* should have expected an injury to result. The Decision also distinguishes a skilled job from an unskilled job, and seems to indicate that training is not that important when the job is unskilled. This Court should exercise its jurisdiction to prevent these policies from becoming the law for pre-2003 amendment cases. Otherwise, employers with knowledge of OSHA safety standards and “many years of experience” in masonry construction are absolved from inferences that arise from failing to brace concrete walls with no permanent supporting structures, no limited access zone, known windy conditions and failure to train their unskilled employees as to how to recognize such hazards or appreciate the risks. The same unskilled and *untrained* laborer, on the other hand, is required by the Decision to know of the danger from his own common sense. *See, e.g., W.G. Fairfield Company v. OSHC*, 285 F.2d 499 (6<sup>th</sup> Cir. 2002) (hazard of crossing busy roadway not so obvious to eliminate safety training about it).

The Decision’s requirement of a prior wall collapse as an element of objective substantial certainty under *Turner* contradicts its reliance on *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448 (Fla. 3<sup>rd</sup> DCA 1990) and *Cunningham v. Anchor*

*Hocking Corp.*, 558 So. 2d 93 (Fla. 1<sup>st</sup> DCA 1990), each involving the *first* plane crash or death and both of which held that the facts were sufficient to support the virtually certain exception to immunity under *Lawton* and *Fisher*. Objectively speaking, the dangers and risks should have been ruled to be *obvious* to these employers, with their many years of experience and knowledge of OSHA standards, rather than holding the risks to be *obvious* to this unskilled, untrained laborer [AA p. 11]. Further, settlement of federal citations or no formal federal charges at all does nothing to erase the underlying conduct. *Turner* rules that workers' compensation should not affect the pleading or proof of an intentional tort where immunity is asserted, and that no employee should be held to a higher standard than any plaintiff in a non-work-related intentional tort case. 754 So. 2d at 689. Any party seeking summary judgment carries the heavy burden of conclusively establishing the absence of any genuine issue of fact as to all material allegations in the pleadings. *Foote v. Green Tree Acceptance, Inc.*, 597 So. 2d 803, 804 (Fla. 1<sup>st</sup> DCA1991). Under a light most favorable to Decedent where defendants carry the burden, there are genuine issues of material fact (and there are different reasonable inferences arising from certain uncontroverted facts) relating to the deliberate utter disregard of safety and defendants' objective intent. Defendants here did not even

show crystalized facts let alone conclusively extinguish them, and the inconsistent testimony relied on has credibility problems, which calls for jury resolution.

As *Turner* is misapplied, there is conflict jurisdiction. *See Kikis*. The Decision also relies on *Bourassa v. Bush Entm't Corp.*, 929 So. 2d 552 (Fla. 2<sup>nd</sup> DCA 2006) (SC06-1318) and *Casas v. Siemens Energy & Automation, Inc.*, 927 So. 2d 922 (Fla. 3<sup>rd</sup> DCA 2006) (SC06-1063), both pending decisions on jurisdiction. Should review be granted in either case, there will be prima facie jurisdiction on that basis too. *See Reuter v. McKenzie Check Advance, LLC.*, 930 So. 2d 610 (Fla. 2006) (so stating). This Court granted review of *The Bombay Co., Inc. v. Bakerman*, 891 So. 2d 555 (Fla. 3<sup>rd</sup> DCA 2004), which also tacked knowledge of a prior similar act and intentional concealment onto the objective substantial certainty test based on *Allstates Fireproofing v. Garcia*, 876 So. 2d 1222 (Fla. 4<sup>th</sup> DCA 2004). Confusion exists across the districts on this difficult issue, as evidenced by some very sharp dissents in pipeline cases involving accidents that predate the 2003 amendment of § 440.11. This Decision severs Federal regulations from their remedial purpose, which could negatively impact construction jurisprudence and safety. Evidence tending to show willful intent to violate known federal safety mandates infers a willful disregard of safety itself.

*American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254 (US App. DC Cir. 2003) (knowing disregard of regulations *or* plain indifference to employee safety). The United States Supreme Court holds that “The Occupational Safety and Health Act imposes on covered employers a duty to provide working conditions that 'are free from recognized hazards that *are causing* or are likely to cause death or serious bodily harm' to their employees, as well as an obligation to comply with safety standards promulgated by the Secretary of Labor." *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 240-241, 122 S.Ct. 738, 151 L.Ed.2d 659 (2002) (e.s). The purpose is to prevent death from hazardous conduct. OSHA and the regulations are to be liberally construed to effectuate the Act's remedial purpose of promoting safe working conditions. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13, 100 S.Ct. 883,891, 63 L.Ed.2d 154 (1980). The Decision strictly construes regulations, and effectively resets a national construction standard as to bracing, when OSHA said otherwise in this case. Unlike *Bombay, Bourassa* or *Casas*, this case involves a fatality in the face of evidence inferring well known but ignored safety regulations and no training at all. There is conduct that could have resulted in more than 60 days imprisonment. *29 USC § 666(e)*. Federal regulations are designed to work in tandem with the regulatory and deterrent effects on conduct that intentional tort law

provides. *People v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 128 Ill.Dec. 517, 534 N.E.2d 962 (1989), *cert. den., sub nom. Asta v. Illinois*, 493 U.S. 809, 110 S.Ct. 52, 107 L.Ed.2d 21 (1989)). Important safety issues call for this Court to exercise its jurisdiction. Finally, misapplication of fundamental summary judgment principles could carry over to more than pipeline cases.

### CONCLUSION

Petitioners respectfully request this Court to exercise its discretionary conflict jurisdiction to review this Decision. *See Kikis*.

Respectfully submitted,

Arvid J. Peterson, III, Esq.  
Trial counsel for Petitioners

and

Brady & Brady, P.A.  
Appellate counsel for Petitioners  
370 Camino Gardens Blvd., Suite 200C  
Boca Raton, FL 33432  
Phone: (561) 338-9256

By:

Jeanne C. Brady, Esq.  
Florida Bar No. 0997749

Frank R. Brady, Esq.  
Florida Bar no. 0588024

### CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and authentic copy of this jurisdictional brief has been furnished via U.S. Mail, postage prepaid, to John Cavo, Esq. and J. Daniel Ennis, Esq., Douglas Centre, Suite 304, 2600 Douglass Road, Coral Gables, FL 33134; Michele I. Nelson, Esq., Wicker Smith, et al., 1645 Palm Beach Lakes Blvd., Suite 700, West Palm Beach, Florida 33402; and Law Office of Arvid J.

Peterson, III, Appellants' trial counsel, 370 Camino Gardens Blvd., Boca Raton, FL 33432 this 10<sup>th</sup> day of October, 2006.

Brady & Brady, P.A.  
Counsel for Petitioners  
370 Camino Gardens Blvd., Suite 200C  
Boca Raton, FL 33432  
Phone: (561) 338-92565

By:  
Jeanne C. Brady, Esq.  
Florida Bar No. 0997749

**CERTIFICATE COMPLIANCE WITH**  
**FONT REQUIREMENTS OF RULE 9.210**

The undersigned certifies that this Brief complies with Rule 9.210(a)(2), Fla.R.App.P., as it is typed with times new roman 14 point font in Corel WordPerfect Suite 12 for windows format.

By:  
Jeanne C. Brady, Esq.  
Florida Bar No. 0997749