IN THE SUPREME COURT OF FLORIDA

DOMINO'S PIZZA and ALEXSIS, INC.,

Petitioners,

v.

Case No.: 85,803
District Court of Appeal,
1st District, No. 93-2526

RICHARD E. GIBSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

DOES FLORIDA STATUTE 440.09(3) PRECLUDE EXPERT TESTIMONY CONVERTING BLOOD ALCOHOL CONTENT FROM A PERCENTAGE OF BLOOD SERUM TO A PERCENTAGE OF WHOLE BLOOD?

The Employee seeks to sustain the rulings of the JCC and Court of Appeal by gaining this court's endorsement of the unduly restrictive interpretation of Section 440.09(3) contained in the **Florida Tile** opinion. This interpretation requires not only that the E/C prove the Employee's whole blood alcohol content but also mandates that the E/C's evidence in this regard be limited only to the results of a test of whole blood. **[Br. of Respondent at 6-7]; Florida Tile Industries v. Dozier, 561 So. 2d 654, 655 (Fla. 1st DCA 1990).** The E/C does not take issue with the requirement that it prove the alcohol content of the Employee's whole blood. The E/C contends, however, that it should have been allowed by the JCC to prove the alcohol content of the Employee's whole blood in any fashion allowed by the Florida Evidence Code. **Florida Tile's** requirement that only evidence of a whole blood test could be used to prove the Employee's whole blood alcohol content and the JCC's ruling that otherwise proper expert testimony could not be used for this purpose have no basis whatsoever in the language of Section 440.09(3) (1990). This fact was noted by the Court of Appeal herein. **[Initial Br. of Petitioner at Appendix. p.2.].**

The E/C agrees with the Employee that as a matter of statutory interpretation Section 440.09(3) (1990) should be construed so as to ascertain and give effect to the intention of

the legislature as expressed therein. **City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578 (Fla. 1984).** In making this determination, this court's first consideration is the plain meaning of the statutory language. **St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071 (Fla. 1982).** When the statutory language conveys a clear and definite meaning, there is no occasion for use of further rules of statutory construction and the plain and obvious meaning of the statute should be followed. **Ross v. Gore, 48 So. 2d 412 (Fla. 1950).**

The error of the Employee's statutory construction argument lies simply in the fact that, as noted by the Court of Appeal, Section 440.09(3) (1990) does not contain any language that purports to constrain the method by which the E/C may prove the Employee's whole blood alcohol content. Thus, the most reasonable construction of Section 440.09(3) (1990) is that although the E/C must prove the Employee's whole blood alcohol content it may utilize any method of doing so permitted under Florida law. Allowable options in this respect include expert opinion testimony as proffered by the E/C herein. **Florida Statute 90.704 (1990).** The **Florida Tile** construction of 440.09(3) that limits the E/C's evidentiary options only to a whole blood test report operates to add words to the statute and is improper as a result. **Chaffee v. Miami Transfer Co., Inc., 288 So. 2d 209 (Fla. 1974).**

That there is a difference of opinion among experts as to the validity of blood serum/whole blood alcohol conversions is not a valid basis for the JCC's preemptory exclusion of the E/C's expert testimony on this issue as apparently argued by the

Employee. See, **[Br. Respondent pp. 9-12]**. The JCC did not rule that there was an insufficient scientific basis for Dr. Barnhill's opinions but merely that the blood serum alcohol test result was inadmissible for any purpose based on **Florida Tile**, and that Dr. Barnhill's testimony was inadmissible because it "discussed" the blood serum result. **[R. at 465; 469]**. All other factors being equal, the JCC should have admitted both the testimony of Dr. Marcus[1] and of Dr. Barnhill and then should have evaluated the credibility of their opinions in his capacity as finder of fact. See, **Peacock v. Farmers & Merchant's Bank, 454 So. 2d 730, 735 (Fla. 1st DCA 1984)** (province of trial court as finder of fact to resolve conflicts between witnesses).

The Employee argues further that the 1994 amendment to Section 440.09(3) allowing blood serum to be used for testing purposes and implicitly authorizing expert testimony converting blood serum test results to the lower whole blood percentages show that the legislature did not consider the 1990 version of the statute to allow such testing or testimony. **[Br. of Respondent at p.13]**. The E/C submits that this argument ignores the fact that the 1990 version of Section 440.09(3) contains no restriction upon the manner of proof of whole blood alcohol content and that Employers under the 1990 version were free to use any method of proof permissible under the Florida Code and Rules of Evidence to establish the threshold level of blood alcohol.

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[1] The Employee only submitted a hearsay affidavit of Dr. Marcus. Upon remand, the Employee would of course either depose this witness or present him for live testimony before the JCC, thereby allowing cross-examination by the E/C.

The 1990 version of Section 440.09(3) certainly cannot be read as amendatory of the provision of Section 90.704 that allows expert opinion in these cases. With this in mind, the E/C submits that it is substantially more reasonable to assume that the legislature enacted the 1994 version of Section 440.09(3) to overturn the overly restrictive **Florida Tile** opinion rather than to restate an evidentiary option already available under the Code and Rules of Evidence.

Addressing Section 90.704, the Employee states that the blood serum alcohol test in question was inadmissible per se and that therefore Dr. Barnhill's testimony founded upon the serum test was nothing but an impermissible "conduit" for the serum result or alternatively that Dr. Barnhill's testimony was inadmissible because it was based upon "insufficient data." **[Br. of Respondent pp. 16-18].**

These points beg the question of this appeal because they assume the "inadmissibility" and "insufficiency" of the serum test result only on the basis of the rule of **Florida Tile**. **Id.** The Employee admits that the admissibility of the serum test was not challenged on any ground but the rule of **Florida Tile**. **Id.** at p.16. Because the **Florida Tile** evidentiary restriction is invalid, the serum test result constituted sufficient data to act as a foundation for Dr. Barnhill's testimony and Dr. Barnhill did not act as a mere conduit for inadmissible evidence. The Employee's arguments founder on this basis. Also, the holding of **Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430 (Fla. 2d DCA 1989)** provides no support for affirmance because as discussed in the

E/C's Initial Brief the **Riggins** holding is suspect in light of traditional rules of evidence and is factually distinguishable in any event. **[Br. of Petitioner pp. 10-13]**.

II.

THE 1994 AMENDMENTS TO SECTION 440.09 APPLY RETROACTIVELY TO REQUIRE REVERSAL OF THE DISTRICT COURT IN THE PRESENT CASE.

The Employee erroneously characterizes the 1994 amendment to Section 440.09(3) as "penal" in nature because retroactive application of the amendment

> . . . could deprive the employee of all benefits he otherwise would have recovered under the 1991 statute.

[Br. of Petitioner p. 22]. Thus, the Employee argues that the 1994 amendment is not retroactive. Id. at pp. 21-22.

Whether the section in question even imposes a "penalty" upon the Employee is highly questionable in the first instance. The 1994 version of Section 440.09(3) does not act to impose a burden on the Employee such as a criminal penalty, enhanced compensatory damages, or punitive damages as did the statutes considered in the cases cited by the Employee in support of his argument on this point. See, **State Farm Mutual Automobile Insurance Company v. Laforet, 20 Fla. L. Weekly S173, S176 (Fla. April 20, 1995)** (amendment added liability for new amount of compensatory damages and punitive damages); **Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1357-1358 (Fla. 1994)** (amendment imposing punitive damages); **City of Miami Beach v. Galbut, 626 So. 2d 192, 194 n.1 (Fla. 1993)** (amendment imposing sanctions including forfeiture of salary, impeachment, and monetary fines). Because the 1994 amendment addresses only the evidentiary manner by which

the E/C may prove intoxication, the amendment should be considered procedural and retroactive. The amendment would properly be considered retroactive had it gone even further and altered the entire burden of proof. **Stuart L. Stein, P.A. v. Miller Industries, Inc., 564 So. 2d 539, 540 (Fla. 4th DCA 1990)** (increase of the burden of proof to "clear and convincing" standard retroactive).

Even if Section 440.09(3) is considered "penal" in nature, the key to a retroactivity determination is not whether the statute contains some form of penalty but whether it contains a new penalty. **Laforet, supra, 20 Fla. L. Weekly at S176.** If this section contains a penalty in the form of a potential loss of benefits, the 1994 amendment did not add a new or additional penalty. Under either the 1990 or 1994 version of Section 440.09(3), the Employee could be deprived of Worker Compensation benefits if the JCC determined he was intoxicated at the time of the industrial accident and that this intoxication played a causal role in the accident. Under both statutes, the presumption of causation arose against the Employee if the Employee's blood alcohol content exceeded the stated bench mark at the time of the accident.

If the evidentiary restriction engrafted upon Section 440.09(3) by the **Florida Tile** opinion is unfounded then the 1994 version of Section 440.09(3) contains no option not already available to the E/C under earlier law and thus no new danger to the Employee's recovery of benefits is presented. Consequently, no new "penalty" is imposed upon an intoxicated Employee by the 1994

statute and the amendment should be applied retroactively. The Employee's arguments in this regard should be rejected.

III.

NON-PRESUMPTIVE USE OF WHOLE BLOOD/ SERUM CONVERSION EVIDENCE.

It is difficult to determine precisely what the Employee desires this court to make of the argument presented in the final portion of the Employee's brief. The issue involved in this appeal from its inception is whether the JCC erred by excluding Dr. Barnhill's testimony on the basis of the **Florida Tile** opinion. **Florida Tile** was the only basis for the JCC's order. **[R. 465].** Although the primary focus of the E/C's case both before the JCC and on appeal has been the propriety of the **Florida Tile** holding in the context of the presumption of causation contained within Section 440.09(3),[2] if this court finds that the rationale of **Florida Tile** is incorrect and consequently reverses the opinion of the Court of Appeal, the E/C should be able to admit testimony regarding the Employee's whole blood alcohol content for any appropriate purpose. It should be the JCC that makes any determination regarding admissibility of any particular piece of evidence in the event of a retrial, and this court should not be asked to make a preemptive advisory ruling on this issue.

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[2] The question of whether or not the testimony of Dr. Barnhill could be used by the E/C as non-presumptive proof of the Employee's intoxication was in fact raised at oral argument in the Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished to Louis K. Rosenbloum, Esq., at P. O. Box 12308, Pensacola, FL 32581; and to Thomas F. Condon, Esq., at 130 E. Government Street, Pensacola, FL 32501, both by regular U.S. Mail, this 25th day of August, 1995.

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