

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2176

UNITED CONTRACTORS CORP., a/k/a  
UNITED CONTRACTORS, INC.,

Petitioner,

vs.

MINERVA HERNANDEZ, as Personal  
Representative of the Estate of Ariel Hernandez, and  
Individually,

Respondent.

---

ON PETITION FOR REVIEW OF A DECISION  
ON THE DISTRICT COURT OF APPEAL, THIRD  
DISTRICT ON THE GROUNDS OF EXPRESS  
AND DIRECT CONFLICT OF DECISIONS

---

RESPONDENT'S BRIEF ON THE MERITS

---

JAY M. LEVY, ESQUIRE  
JAY M. LEVY, P.A.  
9130 SOUTH DADELAND BOULEVARD  
TWO DATRAN CENTER, SUITE 1701  
MIAMI, FLORIDA 33156  
PHONE: (305) 670-8100

TABLE OF CONTENTS

<u>ITEM</u>	<u>PAGE</u>
I. Preliminary Statement.....	1-2
II. Statement of the Case.....	2-6
III. Statement of the Facts.....	6-10
IV. Points Involved on Appeal.....	11
V. Summary of Argument.....	11-14
VI. Argument	
<u>Point I</u>	
THE PROSECUTION & SETTLEMENT OF A WORKER’S COMPENSATION CLAIM BARS THAT SAME CLAIMANT AND THOSE WHO CLAIM THROUGH SAID CLAIMANT FROM PURSUING A TORT CLAIM ARISING OUT OF THE SAME INCIDENT WHEN THE TORT CLAIM IS AGAINST THE STATUTORY EMPLOYER OF THE DECEASED WORKER.....	14-29
<u>Point II</u>	
A SETTLEMENT MADE PURSUANT TO CHAPTER 440 FLA.STAT. REQUIRES THE APPOINTMENT OF A GUARDIAN AND APPROVAL OF THE PROBATE COURT PURSUANT TO §744.387 FLA. STAT. WHEN MINOR CHILDREN.....	29-31
VII. Conclusion.....	31

VIII. Certificate of Service.....32

IX. Certificate of Type Size and Format.....32

TABLE OF CITATIONS

<u>ITEM</u>	<u>PAGE</u>
<i>Aerovias Colombianas, LTDA v. Paiz</i> , 695 So.2d 822 (Fla.3DCA)., <i>rev. den.</i> , 700 So.2d 687 (Fla.1997).....	16
<i>Chorak v. Naughton</i> , 409 So.2d 35 (Fla. 2DCA 1982).....	17
<i>Delta Airlines v. Cunningham</i> , 658 So.2d 556 (Fla. 3DCA 1995), <i>rev. den.</i> 668 So.2d 602 (Fla. 1996).....	15
<i>Ferraro v. Marr</i> , 467 So.2d 809 (Fla. 2DCA 1985).....	23
<i>Green v. Maharaja of India, Inc.</i> , 485 So.2d 1329 (Fla. 1DCA), <i>rev. den.</i> , 494 So.2d 1151 (Fla. 1986).....	23-25
<i>Hume v. Thomason</i> , 440 So.2d 441 (Fla. 1DCA 1983).....	17
<i>Lowry v. Logan</i> , 650 So.2d 653 (Fla. 1DCA), <i>rev. den.</i> , 659 So.2d 1087 (Fla. 1995).....	18, 19
<i>Mandico v. Taos Construction, Inc.</i> , 605 So.2d 850 (Fla. 1992).....	19
<i>Matthews v. G.S.P. Corporation</i> , 354 So.2d 1243 (Fla. 1DCA 1978).....	22-23
<i>Michael v. Centex-Rooney Construction Co., Inc.</i> , 645 So.2d 133 (Fla. 4DCA 1994).....	25-26
<i>McCormick v. Bodeker</i> , 119 Fla. 20, 166 So. 483(1935).....	16

<i>Pearson v. Harris</i> , 449 So.2d 339 (Fla. 1DCA 1984).....	17
<i>Velez v. Oxford Development, Co.</i> , 457 So.2d 1388 (Fla. 3DCA 1984), <i>rev. den.</i> 467 So.2d 1000 (Fla. 1985).....	18, 23
<i>Villeneuve v. Atlas Yacht Sales, Inc.</i> , 483 So.2d 67 (Fla. 4DCA 1986), <i>aff.</i> 505 So.2d 1331 (Fla. 1987).....	21
<i>Williams v. Duggan</i> , 153 So.2d 726 (Fla. 1963).....	17-18, 19, 26, 29
<i>Williams v. Robineau</i> , 124 Fla. 422, 168 So. 644 (1936).....	17, 22
<i>Wishart v. Laidlaw Tree Service, Inc.</i> , 573 So.2d 183 (Fla. 2DCA 1991).....	17, 18
<i>Wright v. Douglas N. Higgins, Inc.</i> , 617 So.2d 460 (Fla. 3DCA) <i>rev. den.</i> 626 So.2d 704 (Fla. 1993).....	18-19
<u>Statutes</u>	
§440.10(1)(b), Fla.Stat.....	15
§440.16, Fla. Stat.....	27-28
§440.17, Fla. Stat.....	30
§440.20(11)(a), Fla.Stat, 1994.....	22, 27
§744.387, Fla.Stat.....	13-14, 15, 30

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC00-2176

UNITED CONTRACTORS CORP,  
a/k/a UNITED CONTRACTORS, INC.,

Petitioner,

vs.

**Respondent's Answer Brief**

MARIA MINERVA HERNANDEZ, as  
Personal Representative of the Estate of  
Ricardo Ariel Hernandez and individually,

Respondent.

\_\_\_\_\_ /

I

**Preliminary Statement**

This is case is before this court for review of a decision of the District Court of Appeal which is alleged to be in conflict with the decision of another court on the same point of law. At issue is whether Respondent's acceptance of a nuisance settlement of a workers' compensation claim in which the employer and carrier maintained their defense that the accident did not occur within the course and scope of employment constitutes an election of remedies. Petitioner, United Contractors Corp, a/k/a United Contractors, Inc., shall be referred to as "United". Respondent Maria Minerva Hernandez, individually and as personal representative of the Estate of Ricardo Ariel Hernandez, shall be referred to as "Plaintiff". Decedent Ricardo

Ariel Hernandez, shall be referred to as “Decedent.” CA Associates, Inc., Decedent’s employer shall be referred to as “CA”.

## II Statement of the Case

Plaintiff filed suit against United, a contractor engaged in the business of excavation and construction of commercial property. United was engaged in an excavation project known as the Three Lakes development in Dade County. CA was hired by United to secure material and equipment at the Three Lakes site in preparation for Hurricane Erin’s landfall in South Florida. Plaintiff alleged Decedent was employed by CA to secure United’s material and equipment at the Three Lakes project. The job was scheduled to be completed by August 1, 1995.

In her lawsuit, Plaintiff contended that United was vicariously liable for the actions of its employees, *inter alia*, negligently operating a front end loader which crushed and killed Decedent, failing to warn Decedent and others similarly situated of the danger, and failing to properly hire trainers to supervise its employees.

On July 27, 1997, during the pendency of the instant wrongful death action, Plaintiff in her capacity as Decedent’s surviving spouse, filed a petition seeking worker’s compensation death benefits against CA on her behalf and on behalf of Aimee and Adrian (R. 377). CA filed a notice of denial contending that the accident did not arise out of Decedent’s employment (R. 359). Eventually Plaintiff and CA

entered into a lump sum settlement of the worker's compensation claim. A stipulation in support of joint petition for order approving the lump sum settlement indicated that CA contested the compensability of the claim and had filed a written notice of denial (R. 351). As a result of the settlement CA and its worker's compensation carrier agreed to pay Plaintiff, Decedent's surviving spouse, the sum of \$12,207.01 in full satisfaction of its obligations to pay death benefits under the Florida's Worker's Compensation Act (R. 352). From this sum there was deducted \$1,750.00 as reasonable attorney's fees for Plaintiff's worker's compensation attorney and taxable costs in the amount of \$457.01 leaving a net settlement to Plaintiff of \$10,000.00 (R. 353). The settlement agreement indicated that the parties agreed that no admissions of any kind were being made by either side and the employer specifically reserved any and all defenses as to compensability, employer/employee relationship, course and scope of employment, and other issues (R. 357).

There was no guardian ad litem appointed to represent the children before the Judge of Compensation Claims. The permission of the probate court was not sought with regard to the terms of the joint stipulation. By order dated June 22, 1998 the Judge of Compensation Claims approved the settlement and entered an order releasing the employer and carrier from liability for all worker's compensation benefits (R. 364). There was no mention of the minor children, Aimee and Adrian, in either the



stipulation or in the order approving the stipulation.

Following the settlement of the workers' compensation action, United moved for summary judgment in the circuit court proceeding (R. 342-350). In the motion, United maintained that it was Decedent's statutory employer within the meaning of §440.10(1)(b), Fla. Stat.. United maintained that since Plaintiff had accepted benefits pursuant to Chapter 440, Fla.Stat. from Decedent's employer, she could not maintain a tort action against United as general contractor/statutory employer (R. 345).

At the hearing on United's motion for summary judgment, Plaintiff argued that there was no stipulation in the settlement papers that the accident had arisen out of and in the course and scope of employment (R. 1001-1002). Plaintiff pointed out that Aimee and Adrian did not receive any of the compensation payment from the worker's compensation carrier. Plaintiff argued that there could be no acceptance of benefits without receipt of funds (R. 1006). After hearing argument on the motion, the trial court entered a summary final judgment in favor of United with regard to the claims of Plaintiff and her two (2) minor children (R. 1020-1021).

From this final judgment, Plaintiff appealed to the District Court of Appeal, Third District (R. 988-991). The District Court reversed the decision of the circuit court because it found there was no election of remedies (R. 1027). The District Court noted that in order for an election of remedies to occur, there had to be evidence of a

conscious intent to elect the compensation remedy and to waive the other rights (R. 1026). In its opinion, the District Court noted:

We do not believe that the record before us supports a finding that Hernandez had a conscious intent to elect the compensation remedy and to waive her other rights.... This stipulation stated that CA contested the compensability of the claim and, along with its workers' compensation insurer, took the position that there was no evidence that the accident arose out of and in the course and scope of Decedent's employment. There was no resolution on the merits of the claim. Even a brief review of the facts of this case suggests that CA may well have had a meritorious defense. Because the workers' compensation remedy was not pursued to a determination or conclusion on the merits, there could be no election of remedies. Rather, what happened here is that CA simply opted to "buy" its way out of the workers' compensation litigation by expediently (and cheaply) resolving what amounted to little more than a nuisance claim.

(R. 1027)

Regardless of the disposition of Plaintiff's individual claim, the court below determined the minor children did not elect the remedy of workers' compensation because there was no indication that the children were receiving any of the death benefits paid by the workers' compensation carrier (R. 1028-1029). The court below found that §744.387, Fla. Stat. applied to workers' compensation matters and required that a guardian be appointed and that the court determine whether the settlement is in the best interest of the ward (R. 1029-1030). As this was not done the settlement was

ineffective as to the minor children.

United filed a notice to invoke the discretionary jurisdiction of this court on the twin grounds of express and direct conflict of decision and because the decision affected a class of state or constitutional officers. This court has accepted jurisdiction over the case.

### III Statement of the Facts

#### A. The Course of Employment Issue

The testimony of the representatives of CA and United established that Decedent was not working for CA at the time of the accident. The undisputed evidence is that the project where Decedent was working, the Three Lakes project, had been shut down due to the approach of Hurricane Erin.

James Cavo is a contractor and a principal in United. United employed Jack Cook as its general superintendent (R. 516-517). Cook was responsible for hiring employees (R. 517). Cook set the work hours and scheduled the employees (R. 518). Cook had the authority to hire subcontractors on behalf of United (R. 528). Cook determined the hours that CA worked at the property and supervised the work CA did on the project (R. 531).

Cavo testified that the Three Lakes project, where Decedent was killed, was not

open for work on August 2, 1995 (R. 535):

Q: Do you know if the site was open for work on August 2, 1995?

A: To my knowledge, no.

Q: Do you know why?

A: We were shut down because of a hurricane.

Q: Do you know who communicated to the employees of United that the job site would be closed August 2?

A: Jack Cook.

Q: Do you know when he told them to return?

A: No I don't recall.

(R. 535-536).

Cook made the decision that August 2 would not be work day (R. 541). No one was supposed to be at the job site working on the date of the incident (R. 563).

Craig Davidson is vice-president and general manager of CA (R. 392). CA was hired to do clean up work at the Three Lakes project immediately before Hurricane Erin (R. 399-400, 475). Davidson advised Decedent and his other workers on August 1, 1995 to go home, secure their homes, and call after the hurricane (R. 416). He specifically told Decedent not to come back but to call (R. 453). With regard to Decedent's specific activities on the day of his death, Davidson testified:

Q: My only question to you sir, is, in your mind, was Mr. Hernandez in your employ on August 2, 1995?

A: I would probably say date in general, yes, if because if there was work after the hurricane, I intended to use him. So I would consider him still employed at the time.

Q: To help Mr. Jenks, at the time that he was killed on the job site, August 2, 1995, did you consider him in your employ?

A: I did not consider in the scope of work of anything that I instructed him to do.

Yes. He was still an employee, but, no, he was not working for me at that time.

(R. 438-439).  
(Emphasis Added).

Davidson advised the worker's compensation carrier that he did not know what Decedent was doing on the premises at the time of the incident (R. 440). Decedent's job with this company ended when daylight ended on August 1, 1995 (R. 451).

Davidson specifically told Decedent not to come back but to call (R. 453). Decedent was killed in a remote area away from where he would have been working if he had been working for CA (R. 454). CA had been retained to go and secure debris which could be dangerous in the high winds of a hurricane (R. 475).

Jack Cook is employed by United as a superintendent (R. 541). As superintendent, his job was to watch over the operation on a daily basis (R. 153). Decedent was laid off in July of 1995, due to lack of work (R. 159-160). On August

2, none of the employees of the sub-contractor was supposed to be on the premises (R. 186). Decedent was not supposed to be near the property on August 2 (R. 193). At some point on the day of his death, Decedent spoke with Cook and then left the property when he learned there was no work. As Cook testified:

Q: Am I correct that when you say that when you say that Ariel Hernandez left, you thought he actually drove off the Three Lakes property. Is that correct?

A: I saw him in his truck heading off the property.

Q: Heading towards the gate?

A: the exit.

Q: Where you would leave?

A: Yes.

(R. 524).

Decedent advised Cook that he was going to do cable television installations (R. 525-526). In Cook's opinion since there was no work and since Decedent had been advised there was no work, he was a trespasser (R. 540).

#### B. The Worker's Compensation Settlement

The action which precipitated United's filing of the motion for summary judgment is the settlement of Plaintiff's claim for death benefits under the Florida Worker's Compensation Act. Attorney Ben Levy represented CA in the worker's

compensation proceeding (R. 817). CA's defense in the worker's compensation proceeding was Decedent was not within the course of his employment with CA at the time of his death (R. 817-818). The compensation case was settled as a matter of convenience to the carrier and not because of any deficiency on the carrier's proof (R. 818). Attorney Levy and Attorney Jeffrey Breslow, who represented Plaintiff in the worker's compensation action, were of the opinion that if the case had gone to trial the evidence would have established that Decedent was not within the course of his employment (R. 818, 821). Attorney Breslow indicated that the amount of death benefits available far exceeded the amount settled for by Plaintiff (R. 821).

There was no guardian or guardian ad litem in the worker's compensation action (R. 821). There was no allocation of proceeds in the order approving settlement between Plaintiff and the minor children. There was no mention of Aimee or Adrian in the order approving settlement (R. 862). The settlement stipulation paid \$10,000.00 in a lump sum to the surviving spouse for death benefits (R. 352, 862). No approval was sought from the probate court or any other court with regard to the settlement of the minor children's claim (R. 221).

IV  
Points Involved on Appeal

Point I

WHETHER THE PROSECUTION & SETTLEMENT OF A WORKERS' COMPENSATION CLAIM BARS THAT SAME CLAIMANT AND THOSE WHO CLAIM THROUGH SAID CLAIMANT FROM PURSUING A TORT CLAIM ARISING OUT OF THE SAME INCIDENT WHEN THE TORT CLAIM IS AGAINST THE STATUTORY EMPLOYER OF THE DECEASED WORKER?

Point II

WHETHER A SETTLEMENT MADE PURSUANT TO CHAPTER 440 FLA. STAT. REQUIRES THE APPOINTMENT OF A GUARDIAN AND APPROVAL OF THE PROBATE COURT PURSUANT TO §744.387 FLA. STAT. WHEN MINOR CHILDREN ARE INVOLVED IN THE CLAIM?

V

Summary of Argument

I

In order for the settlement of the workers' compensation case to constitute an election of workers' compensation and a rejection of a civil tort remedy, Plaintiff must have a conscious intention to accept to accept the workers' compensation remedy. An election of remedies can only occur when there has been a disposition in some manner of the issue of whether the plaintiff/Claimant was injured in the course and scope of employment. This disposition can take many forms. It can be an adjudication by a circuit judge or a judge of compensation claims that the accident occurred in the



course and scope of employment. It can be in a settlement where the plaintiff/Claimant accepts workers' compensation benefits without any reservation so that it can be concluded that the parties implicitly agreed that the matter was within workers' compensation. It can be by explicit agreement. In the instant case there was no adjudication or agreement, either explicit or implicit, which resolved the issue of course and scope. Even though there was a nuisance/minimal settlement of the workers' compensation claim, the settlement papers indicated the issue of course and scope was not resolved and remained undecided. Under this circumstance, Plaintiff did not have the conscious intent to elect the workers' compensation remedy. The decision of the District Court of Appeal rendered below should be affirmed.

The settlement was for nuisance/minimal value. As opposed to other benefits available under workers' compensation which are dependent on percentage of disability, length of time out of work, and/or need for medical care, the total of death benefits to which a Claimant is entitled is immediately quantifiable. §440.17, Fla. Stat.. In the case at bar, due to the impossibility of proving that Decedent's death occurred in the course and scope of employment, the workers' compensation claim was settled for mere cents on the dollar. As a result, from the standpoint of workers' compensation Plaintiff was not made whole because she did not receive the entirety of the benefits to which she was entitled. There can be no election of remedies unless

the remedy selected makes the injured party whole. As this did not occur in the case at bar the decision of the District Court of Appeal rendered below should be affirmed.

The minor children received no money from the settlement. None of the settlement papers or the order approving the settlement and awarding the benefits make reference to the minor children. Assuming that the Plaintiff's petition for benefits included a claim for the minor children, merely filing a claim is not enough to constitute an election of remedies. There must also be receipt of benefits. Here there was none. The minor children have not elected the remedy of workers' compensation to the exclusion of tort. The decision of the District Court of Appeal rendered below should be affirmed.

## II

There is nothing in the language of §744.387, Fla. Stat. which limits its application to civil matters. By its plain language this statute applies to any claims. The salutary purpose of the statute, the protection of minors, is equally applicable to settlements in workers' compensation as it is to settlements in civil actions. There is no comparable workers' compensation statute that protects the minor and be considered as preempting the application of §744.387, Fla. Stat. to workers' compensation matters. As there was no compliance with §744.387, Fla. Stat., the settlement is ineffective as to the minor children. The decision of the District Court

of Appeal rendered below should be affirmed.

VI  
Argument

Point I

THE PROSECUTION & SETTLEMENT OF A  
WORKERS' COMPENSATION CLAIM BARS THAT  
SAME CLAIMANT AND THOSE WHO CLAIM  
THROUGH SAID CLAIMANT FROM PURSUING A  
TORT CLAIM ARISING OUT OF THE SAME  
INCIDENT WHEN THE TORT CLAIM IS AGAINST  
THE STATUTORY EMPLOYER OF THE DECEASED  
WORKER

At the outset, this court should note that the issue of whether Plaintiff's settlement of the workers' compensation claim at mediation for a relatively nominal sum constituted an election of remedies relates only to Plaintiff's individual claim. As noted by the court below, there were two additional reasons why the Plaintiff's settlement of the workers' compensation claim did not constitute an election of remedies as to the minor children. First, there was no evidence that the children had received any of the death benefits paid by the workers' compensation carrier pursuant to the settlement (R.1028-1029). Second, the settlement was ineffective as to the children because there was no compliance with §744.387, Fla. Stat. with regard to the settlement (R. 1029-1030). For this reason, in order to find that the settlement constituted an election of remedies as to the minor children, this court must hold the

District Court was wrong on all three prongs of its holding as to the minor children.

A

Initially, United was not Decedent's employer. Rather United maintained it was Decedent's statutory employer under §440.10(1)(b), Fla. Stat. and for this reason partook of CA's immunity from suit. In making this argument United overlooks that the record in this case does not establish United's standing as a statutory employer under §440.10(1)(b), Fla. Stat.. For this reason, United's entire argument is misplaced and this court has improvidently accepted jurisdiction over this case.

In *Delta Airlines v. Cunningham*, 658 So.2d 556 (Fla. 3DCA 1995), *rev. den.* 668 So.2d 602 (Fla. 1996), the District Court considered the meaning of §440.10(1)(b), Fla. Stat. which creates the statutory employer:

Section 440.10(1)(b), Florida Statutes (1993), stated that "[I]n case a contractor sublets any part or parts of his contract work to a subcontractor... All of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment." Here, as a common carrier, Delta has an express and implied contractual obligation to its customers to maintain its equipment properly, and it subcontracted part of that overall responsibility to Imex.... Pursuant to the explicit language of 440.10, Cunningham is considered to be Delta's employee.

*Id.* at 557.

*See also: Aerovias Colombianas, LTDA v. Paiz*, 695 So.2d 822 (Fla. 3DCA), *rev. den.*

700 So.2d 687 (Fla. 1997). In order for United to occupy the status of a statutory employer three elements must be satisfied. First United must have a contractual obligation. Second, part or all of the contractual obligation must be subcontracted to CA. Third, the Decedent must be injured while performing the subcontracted work. There is nothing in this record which establishes that Decedent was performing work which had been delegated by United to CA at the time of his death.<sup>1</sup> Consequently, United can not be considered a statutory employer of Decedent at the time of his death and is not entitled to workers' compensation immunity.<sup>2</sup>

## B

The issue before this court is whether the settlement of a workers' compensation claim for a minimal sum without a determination of whether the accident occurred within the course and scope of employment constitutes an election of remedies. In *McCormick v. Bodeker*, 119 Fla. 20, 166 So. 483, 484 (1935), this court stated the general rule as to the effect of an election of remedies:

---

<sup>1</sup> Craig Davidson, CA's vice president testified that Decedent was killed in a remote area away from where he would have working if he had been working for CA (R. 454). At the very least such testimony establishes there was an issue of fact on this issue which prevented the entry of summary judgment.

<sup>2</sup> As a result, Plaintiff believes this court has improvidently accepted his case and should decline to exercise jurisdiction since the underlying facts do not allow the issue of workers' compensation immunity to be raised.

Where the remedies afforded are inconsistent it is the election of one of such remedies which operates as a bar; but where the remedies afforded are consistent it is the satisfaction of the claim which operates as a bar.

This cause is governed by the former rule, since it is universally held that a civil tort action and a claim for workers' compensation are inconsistent remedies. *Wishart v. Laidlaw Lawn Service*, 573 So.2d 183 (Fla. 2DCA 1991). Thus, the discrete issue presented by this case is what actually constitutes an election of remedies and whether such an election took place in the case at bar. *Williams v. Robineau*, 124 Fla. 422, 168 So. 644 (1936), this court noted:

An election of remedies presupposes a right to elect. It is a choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone. It is generally conceded that to be conclusive it must be efficacious to some extent. A position taken which does not injure the opposite party is not an election which precludes a change or raises an estoppel.

*Id.* at 646.<sup>3</sup>

---

<sup>3</sup> An adjudication of a civil claim adverse to the plaintiff by summary judgment has been held to be efficacious and bar a subsequent workers' compensation claim brought by plaintiff against the Defendant because the election matured when the judgment was entered adjudicating the rights of the parties. *Hume v. Thomason*, 440 So.2d 441 (Fla. 1983). *See also: Pearson v. Harris*, 449 So.2d 339 (Fla. 1DCA 1984)(Adjudication by workers' compensation court that plaintiff was an employee is efficacious and binding in civil proceeding against employer); *Chorak v. Naughton*, 409 So.2d 35 (Fla. 2DCA 1982)(same).

In *Williams v. Duggan*, 153 So.2d 726 (Fla. 1963), this court held that the mere filing of a workers' compensation claim does not constitute an election of remedies. This court noted:

The filing of an action or the filing of a claim together with the procedural steps preliminary to the dismissal as in this case, without any disposition of the issues on the merits, does not in our judgment amount to an election between alternative remedies where they exist.

*Id.* at 727.

The compensation claim must be pursued to a determination or conclusion on the merits in order for an election of remedies to arise. *Lowry v. Logan*, 650 So.2d 653 (Fla. 1DCA), *rev. den.* 659 So.2d 1087 (Fla. 1995). Under the foregoing rule, in order for an election to occur, there must be a resolution of the issue of whether the accident is within the Workers' Compensation Act in some manner. This resolution can take the form of an adjudication or a settlement in which the resolution of the issue is acknowledged either explicitly or implicitly by the parties. For example, mere receipt of voluntary payments of workers' compensation indemnity and/or medical benefits without a claim being filed does not constitute an election of remedies. *Velez v. Oxford Development Co.*, 457 So.2d 1388 (Fla. 3DCA 1984), *rev. en.* 467 So.2d 1000 (Fla. 1995); *Wishart v. Laidlaw Lawn Service, supra.*; *Wright v. Douglas N. Higgins, Inc.*, 617 So.2d 460 (Fla. 3DCA), *rev. den.* 626 So.2d 704 (Fla. 1993). This is because

the receipt of such payments without a claim does not resolve the issue of whether the Claimant suffered an accident in the course and scope of his employment.

From the foregoing cases, Plaintiff gleans that in order for there to be an election of remedies two elements must be present: A claim or request for workers compensation benefits from the employee; and, Payment by the carrier in response to the request. Only when both elements are confluent can it be concluded that the accident occurred within the course and scope of employment because under these circumstances the issue of course and scope is concluded by the implicit if not explicit agreement of the parties to the compensation case. The case at bar falls outside of this rule because the settlement stipulation specifically indicated there was no agreement that the Decedent's death occurred within the course and scope of his employment, thus leaving the key issue undisposed and unresolved. Under these circumstances, under *Williams v. Duggan, supra.* and its progeny, there is no election and Plaintiff lacked the conscious intent to elect the remedy of workers' compensation over that of civil tort liability. *See: Mandico v. Taos Construction, Inc.,* 605 So.2d 850 (Fla. 1992)(One will be found to have elected workers' compensation as an exclusive remedy where there is evidence of a conscious choice of remedies); *Lowry v. Logan, supra.*(same).

In addition to the non-resolved issue of whether Decedent was injured in the



course and scope of his employment, the settlement of the workers' compensation claim was for nuisance value. Attorney Breslow in his affidavit stated that the available death benefit far exceeded the amount of the settlement (R. 821). The settlement was effectuated for cents on the dollar because Plaintiff was unable to prove that the Decedent's death occurred within the course and scope of his employment. The absence of such proof represented the death knell of the workers' compensation claim. As attorney Ben Levy, who represented CA and its worker's compensation insurer stated in his affidavit:

5. This matter was settled for a sum significantly less than the amount of death benefits Claimant would be entitled to under the Florida's Workers' Compensation Act. The case was settled as a matter of convenience to the Carrier's defense on the merits.
6. It is my professional opinion that had the case gone to trial, the Employer/Carrier would have prevailed on the issue of whether the Claimant was employed within the course and scope of his employment at the time of the accident.

(R.818).

Plaintiff's attorney in the workers' compensation matter, Jeff Breslow, echoed

Levy's opinion:

6. The death benefits in this case awardable under the Worker's Compensation Act were far in excess of the amount of settled for in the worker's compensation case. This is because the case was very difficult and the Claimant would not have been able to establish that the Decedent was

an employee of CA Associates and was within the course and scope of his employment at the time of his demise.

(R.821)

Thus, both attorneys in the workers' compensation case swore that Plaintiff could not prove Decedent was in the course and scope of his employment at the time of his demise.<sup>4</sup> The case was settled for nuisance/minimal value as a matter of convenience because both attorneys knew that if a trial were held, the probable finding was that the Decedent's death did not arise out of the course and scope of his employment. As a result the settlement was minimal and for substantially less death benefits than Plaintiff was entitled under §440.16, Fla. Stat.. Plaintiff did not receive the entirety of benefits to which she was entitled in workers' compensation and has not been made whole.<sup>5</sup> For this additional reason the settlement does not suffice as an election of

---

<sup>4</sup> As is established in the statement of the facts set forth in this brief, at the very least there is a genuine issue of material fact as to whether Decedent was in the course and scope of his employment at the time of the accident since both United's representatives and CA's representative testified that the project was closed at the time of Decedent's death. United's election of remedies argument represents an attempt to "end run" this testimony by arguing as a matter of law that Plaintiff is estopped to contend Decedent was not in the course and scope of his employment at the time of his death.

<sup>5</sup> The purpose of the election of remedies doctrine is to prevent double recovery. *Villeneuve v. Atlas Yacht Sales*, 483 So.2d 67 (Fla. 4DCA 1986), *aff.* 505 So.2d 1331 (Fla. 1987). Here there is no threat of double recovery because Plaintiff receive mere nuisance value for her workers' compensation claim which from a plain reading of the statute, was worth far in excess of her settlement which was effected

remedies.<sup>6</sup>

In reversing the summary judgment, the court below relied upon both of these deficiencies when it noted that CA chose to buy its way out of the workers' compensation claim for nuisance value (substantially less than full value) without any adjudication or agreement that the death occurred within the course and scope of Decedent's employment (R. 1027). The District Court believed the presence of these elements was critical to establishing a conscious intent on the part of Plaintiff to elect a workers' compensation remedy (R. 1027). The court below was correct in its reasoning and its opinion should be approved by this court.

A survey of the cases decided on whether acceptance of workers' compensation benefits constitutes an election of that remedy to the exclusion of a tort remedy clearly establishes the correctness of the District Court's determination. In *Matthews v. G.S.P. Corporation*, 354 So.2d 1243 (Fla. 1DCA 1978), the plaintiff filed a workers'

---

as a matter of convenience to the Carrier. As this court noted in *Williams v. Robineau, supra.* at 646-647, where an attempted exercise of an assumed remedy turns out to be abortive will not preclude one from resorting to another.

<sup>6</sup> The record in this case reveals that the compensation case was settled under the terms of §440.20(11)(a), Fla.Stat. which allows for settlement of *contested* claims. In order to utilize this statute, there can be no money paid on the claim and its compensability must be completely contested from the commencement of the claim. This is further evidence that it was always contested by CA that Decedent was injured within the course and scope of his employment at the time of his death.

compensation claim and accepted periodic indemnity benefits from the carrier, which were paid after the carrier accepted the claim as compensable. *Matthews* presents a situation where the course and scope was established by the request for benefits by the plaintiff coupled with the payment upon the request. In addition there appears no issue that the plaintiff there received all of the workers' compensation benefits to which he was entitled. Under these circumstances, the court held that there was an election of remedies. To be contrasted with *Matthews* is *Velez v. Oxford Development Co., supra.* There, the plaintiff's receipt of workers' compensation benefits paid voluntarily by the carrier without a claim being filed did not constitute an election of remedies. As no claim for workers' compensation was ever filed, the course and scope issue was not established and there was no election of remedies. *See also: Ferraro v. Marr*, 467 So.2d 809 (Fla. 2DCA 1985)(Claim for workers' compensation benefits and stipulation that between plaintiff and carrier that accident occurred in course and scope of employment constituted basis for contention that tort claim barred by election of remedies).

The decision of the First District in *Greene v. Maharaja of India, Inc.*, 485 So.2d 1329 (Fla. 1DCA), *rev. den.* 494 So.2d 1151 (Fla. 1986), is similar to the case at bar. There, plaintiff filed both a workers' compensation claim against her employer and a civil action against her employer arising from the same incident. Plaintiff

settled the civil action. The employer then moved to dismiss the workers' compensation claim on the grounds that the plaintiff has elected her remedy. *Id* at 1330-1331. The Judge of Compensation Claims agreed. The First District Court of Appeal reversed:

While recognizing that the doctrines of equitable estoppel and election of remedies have applied to bar claimants who have previously sought workers' compensation and obtained orders on the merits advantageous or potentially advantageous to them from later maintaining civil actions against the employers, (citations omitted) and while not doubting the proposition that compensation remedy is made exclusive by statute, See Section 440.11, Florida Statutes (1981), we prefer to resolve this issue presented herein as it was resolved by the Superior Court of New Jersey in *Tremonte v. Jersey Plastic Molders, Inc.*, 190 N.J.Super. 597, 464 a.2d 1193 (1983). Tremonte, a case presenting a factual scenario remarkably similar to the one presented herein, the New Jersey Superior Court was of the opinion that an employer's right to have a common law action dismissed on the basis that the claim would fall exclusively within the Workers' Compensation Act is not one that cannot be waived. Instead, the court held that by the employer's action in settling the common law suit by a voluntary payment. "it chose to buy its way out of that litigation and thereby waived its right to defend. In a word it volunteered a payment which it did not need to make.

*Id.* at 1195  
(Emphasis Added)

The logic of *Greene* is directly applicable to the case at bar. Here, as established by the affidavit of CA's attorney in the workers' compensation proceeding, Benjamin

Levy, the settlement was one of convenience, and that, if the matter had been tried, CA would have prevailed on the course of the employment issue. Under these circumstances, CA and its carrier merely sought to buy their way out of the workers' compensation claim by making a payment they did not have to make for a sum of money substantially less than what it would cost to defend the claim. Under the logic of *Greene*, the settlement of the workers' compensation claim does not bar the maintenance of the instant action.<sup>7</sup>

In its order requiring supplemental jurisdictional briefs, this court suggested the decision below was in conflict with *Michael v. Centex-Rooney Construction Co.*, 645 So.2d 133 (Fla. 4DCA 1994). In *Michael* the plaintiff filed a workers' compensation claim and received an adjudication that he was an independent contractor and not an employee and that he was not entitled to workers' compensation benefits. Plaintiff appealed the decision. While on appeal, the Plaintiff settled his workers' compensation claim for \$6,500. However, in *Michael* there is no indication that the

---

<sup>7</sup> Since there was no agreement in the workers' compensation settlement on the course and scope issue, it logically follows that Plaintiff could have sued CA civilly. CA could not raise an election of remedies defense because it did not agree that the Decedent's death occurred within the course and scope of employment and expressly reserved the defense in the settlement stipulation. Under such circumstances, the remedies may well be considered consistent in which case only the satisfaction of the claim operates as a bar. Since CA could be sued, how can United who owes its status as a statutory employer to CA, claim it is immune from suit under the election of remedies doctrine.

issue of course and scope of employment were reserved in the settlement papers. Secondly there is no indication in the opinion that the full value of the plaintiff's workers compensation case in *Michael* was something other than the \$6,500 settlement. As opposed to the case at bar, by filing a claim, settling the case without any reservation of the course and scope issue, and receiving the full value of his compensation claim, the *Michael* plaintiff clearly elected workers' compensation as his remedy. None of these facts are present in the case at bar. For this reason, *Martin* does not control the case at bar, Plaintiff did not elect workers' compensation as her remedy, and the decision of the Third District rendered below should be affirmed.

### C

As noted previously, with regard to the minor children, the court below found the even though their names appeared in the initial claim, the children did not receive any workers' compensation benefits and therefore could not have elected a compensation remedy. This holding is consistent with this court's holding in *Williams v. Duggan, supra.*, that the mere filing of a claim for workers compensation does not constitute an election of remedies.

The Petition for Benefits filed in the workers' compensation act, which is the Plaintiff's claim for benefits, included the names of the minor children, Aimee and Adrian (R. 377). No other document filed in workers' compensation mentions the two

minor children. The Stipulation in Support of Joint Petition for Order Approving a Lump Sum Settlement under F.S. 440.20(11)(a)(1994) was brought only in the name of Plaintiff as surviving spouse and did not include the minor children (R. 350-358). The caption of the Stipulation names on the Plaintiff as the Claimant in the workers' compensation proceeding. By the same token, the affidavit filed by the Plaintiff in support of the Joint Petition and Stipulation indicates that the settlement of this claim was being paid to Plaintiff as the surviving spouse and that Plaintiff is waiving her rights (R. 379). There is no mention in this affidavit of the two (2) minor children (R. 379). Lastly, the Order for Release from Liability entered by the Judge of Compensation Claims contains only the name of the Plaintiff as the surviving spouse and does not reference the two (2) minor children in any respect. Under these circumstances, at worst the minor children were mentioned in the claim for worker's compensation but received no benefits. This case is directly controlled by *Williams v. Duggan, supra*. and the minor children's participation in the tort action is not barred by the doctrine of election of remedies. The opinion of the District Court of Appeal should be affirmed.

In its answer brief, United argues that the minor children would receive some of the death benefit settlement pursuant to §440.16, Fla. Stat.. This statute indicates that where a Decedent is survived by both a wife and minor children, the Judge of



Compensation Claims:

[M]ay provide for payment of compensation in such manner as may appear to the judge of compensation claims just and proper and for the best interest of the respective parties....

(Emphasis Added)

In the case at bar, Decedent was survived by both a wife and minor children and this cause is governed by the foregoing portion of §440.16, Fla. Stat.. Contrary to the argument of United, the allocation set forth in the statute for minor children is not mandatory and the statutory percentages set forth therein do not necessarily apply to the workers' compensation settlement between Plaintiff and CA.

Reliance on §440.16, Fla. Stat. Is also misplaced for a second and more important reason. Regardless of the statutory working, it is the actual order entered by the Judge of Compensation Claims which defines the minor children's rights with regard to the proceeds of the workers' compensation settlement. As noted previously, nothing in the "Washout Order" or the Joint Petition and Stipulation indicates that the minor children are to receive any proceeds of the settlement. To the contrary, the Joint Petition and Stipulation indicates that all of the settlement proceeds are to be paid to Plaintiff (R. 810). The simple fact of this case is that the minor children did not receive any of the settlement proceeds. There is no election of remedies. *Williams v. Duggan, supra.*

Plaintiff's status as the natural guardian of the minor children does not compel a different result. Notwithstanding her status as the natural guardian of the minor children, Plaintiff was also proceeding individually in the workers' compensation case. Under these circumstances the minor children would still have to be identified in the settlement documents as recipients of funds before there is an obligation to pay them any of the proceeds as opposed to Plaintiff on her individual claim (as required by the "Wash Out" order). The children are not so designated. The children have not received any proceeds of the settlement and have not elected a workers' compensation remedy. The decision of the Third District should be affirmed.

#### Point II

#### A SETTLEMENT MADE PURSUANT TO CHAPTER 440 FLA. STAT. REQUIRES THE APPOINTMENT OF A GUARDIAN AND APPROVAL OF THE PROBATE COURT PURSUANT TO §744.387 FLA. STAT. WHEN MINOR CHILDREN

It is without genuine issue that no guardian ad litem was ever appointed to review the proposed settlement of the claim and advise the Judge of Compensation Claims as to whether the settlement was in the best interest of the minor children (R. 821). At no time was approval sought from any court with regard to settlement of the minor's claims (R. 821). The failure to protect the minor's rights is significant. Here the \$10,000 workers' compensation settlement has deprived the minor children of a

portion of a potential settlement of the civil action in which an offer in excess of six figures had been made.

As found by the District Court below (R. 1030), this case is controlled by §744.387, Fla. Stat.:

We are not aware of any case that limits the statutory language of section 744.387 to tort claims, as United contends. Further, if the children were included in the workers' compensation action, as United argues, then this would be a claim brought by the guardian, subject to the requirements of the guardianship statutes. Under section 744.387, the court needs to determine that the settlement is in the best interest of the child. This was not done here.... Without this determination, there could be no settlement of a workers' compensation claim brought by the minor children.

(R. 1030).

Simply put, the court below is absolutely correct in its interpretation of the statute. Absent the determination that the settlement was in the best interest of the minor children, there could be no settlement of any workers' compensation claim brought by the children. The decision of the District Court of Appeal should be affirmed.

United seeks solace in the provisions of §440.17, Fla. Stat.. United argues that this statute is the applicable statute for the appointment of a guardian in workers' compensation and not §744.387, Fla. Stat.. Unfortunately, United misinterprets §440.17, Fla. Stat. By the plain wording of this statute, it only provides for the

appointment of a guardian *to receive compensation* which is awarded to an incompetent or minor. Contrary to the contention of United, this statute does not provide for the appointment of a guardian to represent the interests of a minor child during proceedings before the judge of compensation claims. The decision rendered below should be affirmed.

VII  
Conclusion

Based upon the foregoing cases and arguments, Respondent MARIA MINERVA HERNANDEZ respectfully requests that this Court affirm the decision of the District Court of Appeal, Third District in all respects.

JAY M. LEVY, P.A.  
Attorneys for Petitioner  
Suite 1701 Two Datan Center  
9130 South Dadeland Boulevard  
Miami, Florida 33156  
Phone: (305) 670-8100  
Fax: (305) 670-0032

By: \_\_\_\_\_  
Jay M. Levy, Esq.  
Fla.Bar No. 219754

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to Sheridan K. Weissenborn, Esquire, PAPY, WEISSENBORN, POOLE & VRASPIR, P.A., 3001 Ponce De Leon Boulevard, Suite 214, Coral Gables, Florida, 33134, and to Guillermo F. Mascaro, Esquire, LAW OFFICES OF GUILLERMO F. MASCARO, 2701 LeJeune Road, Coral Gables, Florida, 33134, this 17th day of August, 2001.

\_\_\_\_\_  
Attorney for Respondent

IX  
Certificate of Type Size and Format

I HEREBY CERTIFY that the instant brief was typed in 14 point Times New Roman type in Word Perfect 6.1 format

\_\_\_\_\_  
Attorneys for Respondent