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IN THE SUPREME COURT OF FLORIDA

CASE NO: 00-2176

D.C.A. CASE NO: 3D99-00569

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.
_____/

PETITIONER'S BRIEF AND APPENDIX IN SUPPORT OF JURISDICTION

Respectfully submitted,

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INTRODUCTION

Petitioner, United Contractors Corp. a/k/a United Contractor's Inc., was the appellee in the Third District Court of Appeal and a defendant in the Trial Court. In this Petitioner's Brief on jurisdiction we will call the petitioner "Defendant," Respondent, Maria Minerva Hernandez, individually and as personal representative of the estate of Ariel Hernandez, her husband, was the appellant in the District Court of Appeal and a plaintiff in the trial court and a surviving spouse claimant before the Workers' Compensation Court and will be called herein "Plaintiff."

The symbol"A" will stand for the appendix filed herein, which containing the decision appealed. All emphasis is ours unless we show the contrary.

JURISDICTIONAL STATEMENT

Jurisdiction is pursuant to Article V § 3(b) of the Florida Constitution. The basis for jurisdiction is set forth in the argument below.

STATEMENT OF CASE AND FACTS

Plaintiffs' husband, Ariel Hernandez, was employed by C.A. Associates, hereinafter referred to as "CA," when he was killed on August 2, 1995, on a construction site owned by Lennar. At the time of his death his employer was doing work for the Defendant under a

contract that the Defendant had with the landowner(Lennar), which made the Defendant the statutory employer of the deceased pursuant to F. S. 440.10 (b).

The day following the accident C.A. filed a notice of injury pursuant to Florida's Workers' Compensation law stating that Ariel was acting in the course and scope of his employment at the time of his death.

Because of the accident, the Plaintiff, sued both landowner and the Defendant for wrongful death in the Circuit Court in and for Miami-Dade County, Florida and subsequently sought benefits pursuant to Chapter 440 Fla. Stat. before the Workers Compensation Court, for death benefits for herself and their children. Counsel represented her in both matters at all times.

CA's insurance carrier controverted the claims for Workers' Compensation benefits. During this time the tort claim continued with discovery. On May 6, 1998, at mediation on the Compensation case, the Plaintiff as claimant for herself and her children with Counsel agreed to settle the worker's compensation claim rather than try her case.

As part of this settlement the Plaintiff agreed to release and discharge the employer from any further liability and for any other future benefits in exchange for a lump sum payment.

In the settlement papers the Plaintiff affirmed that her husband was in the course and scope of his employment with CA when he died and that she understood that she was completely settling the workers' compensation claim. On June 28, 1998, the Judge of Compensation claims approved the settlement and the Compensation case was closed with the carrier being released from liability.

The Defendant learned of the settlement and moved for summary judgment because the Plaintiff had taken the compensation benefits and it was the statutory employer of the decedent and therefore immune from tort liability. On February 18, 1999, the motion was granted and the Plaintiff appealed the decision to the District Court.

The District Court reversed the decision on the basis that the Plaintiff could not settle the claim for her children without having complied with § 744.387 Fla. Stat., in that a guardian did not represent the children and as to her claim because she could not have made a conscious intent to elect workers' compensation benefits. This appeal follows.

Because of the decision, they allow the Plaintiff to pursue the tort claim and to collect the compensation benefits. In effect this voids F.S. 440.10(b) by making the statutory employer liable in tort beyond his liability in Workers Compensation. It also

declares a Judgement of the Workers Compensation Court invalid when such authority belongs only to the First District Court and requires all future death claims handled by Compensation Judges to require the appointment of guardians to represent minors rather than the procedures set forth by the Legislature to be used by the Compensation Courts, in this State, which is usually that the parent is the appropriate guardian for the children. Therefore, the decision below seriously affects the powers of the Judges of Compensation Claims and conflicts with other cases concerning workers' compensation claims elections and the preclusion of tort recovery for a covered compensation claim from a statutory employer.

SUMMARY OF ARGUMENT

The Florida Constitution grants this Court the power to review decisions of the District Courts where the decision would affect a class of State Officers. Here the officers that they have affected are Judges of Workers' Compensation Claims because it allows the Trial courts or the District Courts to oversee the decisions made by the compensation judges and if not agreed with it allows those Trial or Appellate Judges the power to disregard the Compensation Judges' rulings. Moreover the decision requires the Compensation Judges to require the claimants to go to probate court and begin

guardianships before they can act to settle and approve cases.

In addition the decision below conflicts with numerous other District Court opinions that hold that a party who elects to take the benefits of workers' compensation is thus barred from pursuing a tort claim against an employer and/or statutory employer.

ARGUMENT

THE DECISION HEREIN SOUGHT TO BE REVIEWED EXPRESSLY EFFECTS A CLASS OF STATE OFFICERS

The Florida Constitution, Article V § 3(b), grants jurisdiction to this Court to review District Court decisions that affect a class of state officers. Judges of the Workers' Compensation Claims are state officers. §440.45 Fla. Stat.(1997); Jones V. Chiles, 638 So.2d 48(1994) Thus, it is only necessary to review the decision below to decide whether it affects the Judges of Workers' Compensation Claims. If so, jurisdiction lies. We respectfully submit that an examination of the decision below reveals that the District Court has seriously affected Workers' Compensation Judges in the exercise of their jurisdiction and effectively allows trial and appellate judges to undo the exclusivity of the workers' compensation laws and by overseeing and reviewing the decisions made by the Workers Compensation tribunal without authority to do so.

Additionally, the decision mandates that a Workers'

Compensation Judge appoint a guardian pursuant to § 744.387 Fla. Stat. (1997) despite § 440.17 Fla. Stat. (1997), which allows the Compensation Judge the discretion whether to have a guardian appointed or he can designate the person who should receive the funds for a minor.

Chapter 440 benefits are the exclusive remedy for injured workers and we extend this remedy to statutory employers such as the Defendant. § 440.10(1)(b)(1997); Delta Airlines V. Cunningham, 658 So.2d 556 (Fla., 3rd D.C.A. 1987) As such the power to decide and award benefits and to release participants from liability is within the power of the Compensation Judge subject only to the review by the First District Court of Appeal. § 440.271 Fla. Stat. Yet the decision, below, overlooks this statute and the powers granted to the First District Court as the proper court to review and determine whether the Compensation Judge's approval of the Plaintiff's claim for death benefits was void as to the children because they had no guardian appointed to represent them pursuant to § 744.387.

Most respectfully, this determination materially affects Compensation Judges throughout the State. The effect of the decision is to require Workers' Compensation Judges to require the appointment of guardians before considering an award of death

benefits for minors. Totally contrary to the provisions of Chapter 440.

The decision herein has a considerable chilling affect on the ability of workers' Compensation Judges to manage their tribunal and to provide full relief to the employer as provided for by law. Therefore, we respectfully submit that this decision is one that clearly gives this court the requisite jurisdiction to hear this matter and clarify what the Compensation Judges must or must not do to complete cases before them and give the relief intended by the litigants before them.

II

THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN CONFLICT WITH THE OPINION OF THIS COURT AND OTHER DISTRICT COURTS.

Article V § 3(b) provides that the Court may review decisions of District Courts that conflict with opinions of this Court and other District Courts. In this regard we respectfully submit that the decision herein does in fact conflict with many cases and therefore jurisdiction will lie.

In Motchkavitz V. L.C. Boggs Industries, 407 So.2d 910 (Fla.1981), although the employer/employee relationship was in reverse to that herein this Court held that where the Claimant seeks to sue a workers' compensation benefits, that worker may not

sue in tort for the same accident. In the instant case, the Court below has ruled that the Plaintiff may do so and holds just the opposite and allows the widow of a deceased worker to pursue both a compensation claim and a tort claim and recover in both places because it refuses to recognize the applicable doctrine of election of remedies and the statute granting immunity to statutory employers.

The decision in the instant case is contrary to the decision in Hodkin v. Perry, 88 So.2d 139 (Fla. 1956)as Hodkin stands for the proposition that one may not take inconsistent positions in the course of litigation. In the instant case the Plaintiff took the position her husband was in the course and scope of his employment at the time of his death in order to pursue Workers' Compensation benefit and then, in order to overcome her having taken the benefits of workers' compensation she claimed in this proceeding that he wasn't in the course and scope of his employment with CA at the time of his death.

This decision likewise conflicts with the decisions of the First District Court of Appeal in Matthews v. G.S.P. Corporation, 354 So.2d 1243 (Fla.1st D.C.A. 1978) and Hume v. Thomason, 440 So.2d 441 (Fla. 1st D.C.A. 1983) wherein that Court held that a person could not partake of both compensation benefits offered by

the employer and likewise claim tort damages because to allow this type of double recovery would thwart the purpose of the workers' compensation laws.

In Hume supra the court further held that a person should not be able to in one place claim an injury in the course and scope of employment and thereafter repudiate that position by alleging different circumstances in a tort suit against the employer. That is, exactly what the Third District is allowing in the instant case.

The Plaintiff clearly stated in her affidavit to support the approval of her settlement that her husband was in the course and scope of his employment at the time of his death. In order to circumvent what she had done however she now must claim that he was not. This is a contrary position repudiating the other position she took in order to be awarded benefits.

By virtue of this opinion below there is a conflict between the Third District Court of Appeal and the First District Court of Appeal as well as with this Court. This is the situation envisioned by the Constitution to allow this Court to maintain jurisdiction and keep Florida law consistent. See Jenkins v. State, 385 So2d. 1356 (Fla. 1980) Therefore, this Court should accept jurisdiction of this case.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Plaintiff respectfully urges this Court to accept jurisdiction and to review the merits of this case.

Respectfully Submitted:

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of October, 2000 to Jay Levy, Esq. 2 Datran Center, Suite 1701, 9130 South Dadeland Blvd, Miami, Fla. 33156 and to Guillermo Mascara, Esq., 2701 Le Jeune Road, Suite 350 Coral Gables, Fla. 33134.

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2000

MARIA MINERVA HERNANDEZ, etc., et al.,

Appellants,

v.

UNITED CONTRACTORS CORP.,

Appellee.

** CASE NO. 3D99-00569

** LOWER TRIBUNAL NOS. 97-1270, 95-22369

Opinion filed September 27, 2000.

An Appeal from the Circuit Court for Miami-Dade County, Jon I. Gordon, Judge.

Freshman, Freshman & Traitz; Jay M. Levy, for appellant.

Papy, Weissenborn, Poole & Vraspir and Sheridan K. Weissenborn, for appellee.

ON MOTION FOR CLARIFICATION

Before COPE and SORONDO, JJ., and NESBITT, Senior Judge.

SORONDO, J.

We grant Appellant's Motion for Clarification on our original opinion. Accordingly, this court's opinion filed July 5, 2000, in this case is withdrawn, and we issue the following in its place.

Maria Minerva Hernandez appeals from the lower court's final summary judgment entered in favor of United Contractors Corp. We reverse.

On August 1, 1995, Ricardo Ariel Hernandez (decedent), worked

as a construction laborer for C.A. Associates, Inc. (CA), a subcontractor hired by United to secure material and equipment at a construction site in anticipation of Hurricane Erin's landfall. CA's job was scheduled to end that day. At the end of the day, Craig Davidson, CA's general manager, advised the decedent and his other employees to go home and call after the hurricane rather than come back to the site.

The next day, the decedent returned to the work site and spoke with United's general superintendent, Jack Cook, to see if there was any work. Cook advised him that there was none and thought that the decedent had left the site as he saw his truck heading off the property. The decedent apparently traveled to a remote area of the site away from where he had been working for CA. While there, he was accidently pinned against a dredge by a front-end loader and killed.

Davidson filed a Notice of Injury pursuant to the Workers' Compensation Act, asserting that the decedent was employed by CA from July 28, 1995 until his death on August 2, 1995. In response, CA's workers' compensation insurance carrier filed a denial.

Hernandez, the decedent's common-law wife, filed suit against multiple defendants including United, on behalf of herself, the estate, and her two minor children, Amy and Adrian. During the pendency of the wrongful death action, Hernandez, as personal representative of the decedent's estate, filed a petition seeking

workers' compensation death benefits against CA on her own behalf and also on behalf of the children. At mediation, Hernandez and CA's workers' compensation carrier reached a settlement. They entered into a stipulation to discharge any further liability and benefits in exchange for a lump sum payment of $10,000 of workers' compensation death benefits. The terms of the settlement agreement dictated that no admissions were being made by either side and the employer specifically reserved all defenses, including compensability, employer/employee relationship, and course and scope of employment. No guardian ad litem was appointed to represent the children, and the permission of the probate court was not sought with regard to the terms of the stipulation. Hernandez executed an affidavit averring that she was the surviving spouse of the decedent, who sustained a fatal injury while working for CA. The Judge of Compensation Claims (JCC) approved the settlement and ordered the release of the employer and carrier from liability for all workers' compensation benefits with no mention of the minor children.

Thereafter, United moved for summary judgment in the wrongful death action, asserting that it was immune from liability in tort as the decedent's statutory employer pursuant to section 440.10(1)(b), Florida Statutes (1995). At the hearing on the motion, Hernandez contended that she had not stipulated in the settlement that the accident had arisen out of the course and scope

of the decedent's employment and that the minor children did not receive any compensation and had not accepted any benefits from the workers' compensation carrier. The trial court entered final summary judgment in favor of United with regard to all claims. Hernandez appeals.

Hernandez raises four issues on appeal, the first two relating to the minor children and the other two relating to herself. As concerns the children, Hernandez argues the following: 1) The minor children did not elect the remedy of workers' compensation because there was no evidence that they received or were to receive any of the death benefits paid by the workers' compensation carrier. The order approving the settlement was completely silent as to the children and contained no allocation of the settlement between Hernandez and the children. 2) Any settlement of the workers' compensation claim did not bind the minor children when the settlement had not been approved by the probate court. The $10,000 workers' compensation settlement deprived the minor children of a portion of a potential settlement in the tort action in which an offer of six figures had been made. No guardian was appointed to represent the children in the workers' compensation proceeding. Absent a determination that the settlement was in the minor children's best interest, the settlement was invalid.

As concerns herself, Hernandez contends in her third point on appeal that the summary judgment should be reversed because there

is a genuine issue of material fact as to whether the decedent was engaged within the course and scope of his employment with CA at the time of his death. Finally, Hernandez's fourth argument on appeal claims that the settlement of the workers' compensation claim between herself and CA was a matter of convenience to both parties and did not constitute an election of remedies because she had no conscious intent to make an election of remedies and waive other rights.

Because we find it dispositive, we address Hernandez's fourth claim first. The doctrine of election of remedies ". . . is an application of the doctrine of estoppel and provides that the one electing should not later be permitted to avail himself of an inconsistent course." Williams v. Robineau, 124 Fla. 422, 425, 168 So. 644, 646 (1936). In Lowry v. Logan, 650 So. 2d 653, 657 (Fla. 1st DCA 1995), the First District discussed the doctrine and said:

> Consistent with the rule of law that to constitute an election of remedies the workers' compensation remedy must be pursued to a determination or conclusion on the merits, Florida courts also hold that mere acceptance by a claimant of some compensation benefits is not enough to constitute an election. ***There must be evidence of a conscious intent by the claimant to elect the compensation remedy and to waive his other rights.***

(Emphasis added). See also Wishart v. Laidlaw Tree Serv., Inc., 573 So. 2d 183 (Fla. 2d DCA 1991); Velez v. Oxford Dev. Co., 457 So. 2d 1388 (Fla. 3d DCA 1984). Along the same line, in Velez this Court

approvingly quotes from Professor Larson's treatise:

> Mere acceptance of some compensation benefits . . . is not enough to constitute an election. There must also be evidence of conscious intent to elect the compensation remedy and to waive . . . other rights.

Velez, 457 So. 2d at 1390 (quoting 2A A. Larson, Workmen's Compensation § 67.22 (1976)). 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. We note that the parties entered into a "Stipulation in Support Of Joint Petition For Order Approving a Lump-Sum Settlement Under F.S. 440.20(11)(a)(1994)." 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.

Although our resolution on Hernandez's fourth claim resolves

the entire appeal, we note that even if Hernandez's argument had failed as to herself, it is clear that the minor children did not elect the workers' compensation remedy as there is no evidence that the minor children received or were to receive any of the death benefits paid by the workers' compensation carrier.

Although the Petition for Benefits filed in the workers' compensation claim included the children's names, the record reflects that they are not mentioned in any other document filed therein. The stipulation mentioned above was brought only in Hernandez's name as the surviving spouse and did not include the minor children. Nothing in the Joint Petition and Stipulation indicates that the children were to receive any of the proceeds of the settlement, but rather it indicates that all of the settlement proceeds were to be paid to Hernandez. The caption of the Stipulation names only Hernandez as the claimant in the workers' compensation action.

Similarly, Hernandez's affidavit filed in support of the Joint Petition states that the Joint Petition and Stipulation indicates that the settlement of this claim was being paid to Hernandez as the surviving spouse. The children are not mentioned in this affidavit. Finally, the Order For Release From Liability entered by the Judge of Compensation Claims contains only Hernandez's name as the surviving spouse and does not mention the two minor children.

In light of this record, we find that the children's

participation in the tort action is not barred by the doctrine of election of remedies because although their names were included in the Petition, they were not included in any other document and they did not receive any workers' compensation benefits.

Even if the minor children had been included in the workers' compensation settlement, the workers' compensation claim would not have bound the children where, as here, the settlement was not approved by the probate court. The record indicates that no guardian ad litem was appointed to review the proposed settlement of the workers' compensation claim and to advise the Judge of Compensation Claims regarding whether the settlement was in the children's best interest.

According to section 744.387(1), Florida Statutes (1995):

> (1) When a settlement of any claim by or against the guardian, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, is proposed, but before an action to enforce it is begun, on petition by the guardian of the property stating the facts of the claim, question, or dispute and the proposed settlement, and on any evidence that is introduced, the court may enter an order authorizing the settlement if satisfied that the settlement will be for the best interest of the ward. . . .

In addition, section 744.387(2), Florida Statutes (1995) provides:

> In the same manner as provided in subsection (1) or as authorized by s. 744.301, the natural guardians or guardian of a minor may settle any claim by or on behalf of a minor that does not exceed $5,000 without bond. A legal guardianship shall be required when the

> amount of the net settlement to the ward exceeds $5,000.

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. There was no one in the workers' compensation proceeding to protect the interests of the minor children and to make sure that settling the workers' compensation case for ten thousand dollars was in their best interest, as opposed to electing to pursue a civil action with a potential remedy far in excess of that amount. Without this determination, there could be no settlement of a workers' compensation claim brought by the minor children.

Reversed and remanded for further proceedings.