

IN THE SUPREME COURT OF FLORIDA  
CASE NO: SC00-2176  
D.C.A. CASE NO: 3D99-00569

**FILED**  
THOMAS D. HALL  
APR 02 2001

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

CLERK, SUPREME COURT  
BY \_\_\_\_\_

Petitioner,

vs.

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

Respondent.

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**PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF  
JURISDICTION PURSUANT TO ORDER OF COURT ENTERED ON  
FEBRUARY 28, 2001**

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Respectfully submitted,

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## INTRODUCTION

Pursuant to this Honorable Court's Order of February 28, 2001, the Petitioner, United Contractor's Corp. a/k/a United Contractors Inc., is filing this Reply Brief to the Respondent's Supplemental Brief on Jurisdiction.

In this Reply Brief the Petitioner will be referred to as "United" and the Respondent, Minerva Hernandez et all will be referred to as Plaintiff.

All emphasis is ours unless otherwise indicated.

We certify that this supplemental brief has been written in Times New Roman 14 point font. ✓

## ISSUE PRESENTED

**WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE OF MICHAEL V. CENTREX-ROONEY CONSTRUCTION COMPANY, 645 So.2D 133 (Fla. 4<sup>th</sup> D.C.A.1994) DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE ON THE SAME QUESTION OF LAW?**

## SUMMARY OF ARGUMENT

The decision in the Michael case directly conflicts with the decision of the Third District Court of Appeal in the instant case on the same issue of law. When there is an inconsistency between district courts of appeal this Court has the

supervisory power to correct the inconsistency. Therefore, this Court should accept jurisdiction of the instant case and decide which of the two courts below was correct in determining whether tort recovery is barred when a claimant actively pursues a workers' compensation claim and then accepts workers' compensation benefits even where there is a dispute about compensability.

### ARGUMENT

**THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE OF MICHAEL V. CENTREX-ROONEY CONSTRUCTION COMPANY, 645 So.2D 133 (Fla. 4<sup>th</sup> D.C.A.1994) DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE ON THE SAME QUESTION OF LAW.**

In the opening paragraph of her Supplemental Brief on Jurisdiction the Plaintiff argues, although this Court has requested an amended brief addressing the issue of why the district court of appeal decision in the case of Michael v. Centrex-Rooney Const. Co., is not in conflict with the decision of the Third District Court of Appeal in the instant case, that this Court should simply disregard the Michael case because that case was not specifically cited by United in its Initial Brief on Jurisdiction. In this regard the Plaintiff contends that since United did not mention the Michael case in its Initial Brief on Jurisdiction this Court is duty bound to disregard Michael under the general rule that where issues

are not raised by a party appellant the issue is waived. Therefore, Plaintiff argues this Court should confine itself only to those cases raised by the Defendant in its Initial Jurisdiction Brief.

Most respectfully Plaintiff's position in this regard is absurd. Article 5, § 3(b) of the Florida Constitution embodies the idea that this Court is to have the power to preserve uniformity of principle and practice within Florida. Jenkins v. State, 385 So.2d 1356 (Fla. 1980) In addition every court, including this Court, has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. Out of necessity this would have to mean that where a litigant failed to mention a specific case but the Court is aware of said case that the Court has the power to make that case known to the litigants who are coming before it and ask questions about said case in relationship to the case that is then before the Court. Therefore, based upon this Court's obligation to preserve uniformity of principle and practice it is respectfully submitted that where the Court has before it a petition for discretionary jurisdiction, which is true in the instant case, this Court must not be confined to consider only those cases cited in the briefs where this Court has knowledge of an inconsistency that may be in addition to the inconsistencies already raised by the petitioner. It is simply inconceivable that this Court does not have the inherent

power to be aware of the law as it is addressed in the various districts of Florida and where necessary intervene to preserve the uniformity of the law regardless of whether a specific case was mentioned or not where the legal issues have been raised in a proper petition for jurisdiction. Therefore, the reliance of this Court on a case it is familiar with although not mentioned by one of the parties to the proceedings is not an ultra vires act of the Court and should not preclude this Court from considering the Michael case when deciding whether there is a basis for jurisdiction or not in the instant case.

Secondly, contrary to Plaintiff's position, the issue before the Fourth District Court of Appeal in the Michael, case was exactly the issue raised in the instant case before the Third District Court of Appeal and in the Initial Brief on Jurisdiction, to wit: were the Plaintiffs precluded from seeking recovery in tort against the general contractor where they sought and received workers' compensation benefits from the subcontractor of United. United has argued that the decision rendered by the Third District Court of Appeal, in the instant case, was inconsistent with other Florida decisions on the same point of law and, therefore, there was a need for the intervention of this Court to determine uniformity throughout Florida on the same point of law. Therefore, United has not waived any rights because the issues have been raised already and Michael is just

an additional case.

The issue of law in the Michael case and the instant case are identical. However, the final outcome in each case was totally opposite.

In Michael the Court held that where a party litigant actively pursues a workers' compensation claim against his or her employer and then accepts workers' compensation benefits, even though compensability and scope of employment were disputed, there is an election of remedies that precludes the worker from also pursuing a tort action against the general contractor. In the instant case, on the other hand, the Third District held that although a worker, in this instance the widow of the worker, actively pursues a workers' compensation claim and then accepts benefits, even though the claim was disputed, there is no election of remedies and therefore the worker is not precluded from seeking a tort recovery against the general contractor. Identical issues of law but decisions by two different district courts that were not identical. As a result there is clearly an inconsistency among the district courts of appeal. It is this type of an inconsistency that the revisionists considered when deciding what jurisdiction to give this Court in the 1980 constitutional revisions to the Florida Constitution. The supervisory power to correct inconsistency was one of the powers granted to this Court. Jenkins supra. It is, therefore, most respectfully submitted that the



Court should accept jurisdiction of the instant case to correct these inconsistencies.

In Michael the Fourth District found that it was the pursuit of a workers compensation claim coupled with the acceptance of the benefits that controlled the outcome of the case as versus whether there was a dispute concerning whether the claimant was in the course and scope of employment. The Fourth District Court of Appeal held that the employment status was irrelevant to the final out come with regard to preclusion. The test was whether the claimant chose to pursue a claim in workers' compensation and then take some benefits therefrom that caused the election to have been made and not the status of the claimant vis a vis the course and scope of work.

On the other hand, the Third District chose to disregard the pursuit and acceptance of the benefits as being the important matter to consider and determined that because there had been a dispute over the employment status there had not really been an election of remedies because the status of the employment had been at issue and therefore since there was settlement arising out of the disputed claim as to employment status that there was no election of remedies. Hence, the Third District has found that the status of the employment is relevant.

Interestingly two of the cases considered by the Fourth District Court of Appeal when arriving at its decision in the Michael case happen to be two cases relied upon by the Third District in arriving at its opposite conclusion in its decision in the instant case, to wit: Wishart v. Laidlaw Tree Service, 573 So.2d 183 (Fla. 2<sup>nd</sup> D.C.A. 1991) and Velez v. Oxford, 457 So.2d1388 (Fla. 3<sup>rd</sup> D.C.A. 1984) The different conclusions, however, stem from the fact that the Fourth District Court of Appeal recognized that the Wishart and Velez cases concerned situations where the insurance carrier for the employer began to provide the claimant with benefits without the claimant pursuing payment thereof while Michael, had specifically filed a petition seeking to force the carrier to pay benefits when the carrier had not paid benefits. In the instant case Plaintiffs likewise sought to force payment of benefits.

In both Michael and the instant case the litigants disputed the employment status and compensability by virtue thereof. Yet both Michael and the Plaintiffs accepted benefits at a lesser amount than might otherwise be afforded because of the fact there was a disputed claim. The only difference between the two cases was the outcome. In one, an election was found, in the other it was not. It is this difference that would give rise to this Court's jurisdiction.

Plaintiffs seek to avoid the jurisdiction of this Court by arguing that the

course and scope of employment is relevant and therefore the Third District was imminently correct in the outcome of the instant case because this issue goes to whether or not there was a conscious intent to elect remedies. This would appear to be a merits argument as versus a jurisdiction argument, however. <sup>1</sup>

Finally, the Plaintiffs argue that because the Michael decision failed to indicate whether the settlement agreement contained a statement of the carrier reserving all defenses concerning the compensability and the course and scope of employment issues the two cases were not directly in conflict with each other because the key fact relied upon by the Third District in concluding there had been no election of remedies was that there had been such a reservation. This is again a misplaced argument and something to be argued on the merits. The purpose of granting certiorari jurisdiction to this Court is to avoid an inconsistency between districts on the same issue of law. The issue of law in Michael and the instant case is whether a claimant can avail themselves of both tort recovery and workers' compensation benefits recovery in a construction accident against his or her employer or the statutory employer i.e, the general contractor. The Fourth District

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<sup>1</sup> In addition Plaintiffs raise at this juncture that it was necessary to have a finding by Judge of Compensation Claims that the claimant had been in the course and scope of employment. This is again a merits argument as versus a jurisdiction argument and is misplaced in attempting to avoid the jurisdictional question raised by this Court.

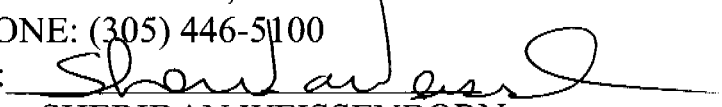
has said that one may not avail themselves of the workers' compensation benefits in a disputed claim and likewise avail themselves of a tort recovery and the Third District has said they may. Thence, we have an inconsistency on the same issue of law with different outcomes. Jurisdiction, therefore, pursuant to Article V, § 3(b) of the Florida Constitution lies in this Court so that Florida principle and practice may be preserved and be uniform throughout this State.

### CONCLUSION

It is respectfully submitted that the decision in the instant case and the decision in the Michael case are directly in conflict with each other and therefore this Court should accept jurisdiction in this case and proceed to determine which court is the correct court with regard to election of remedies once a litigant has accepted benefits in workers' compensation cases.

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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30<sup>th</sup> day of March 2001, 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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