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 SUPPLEMENTAL BRIEF ON JURISDICTION

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

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

TABLE OF CITATIONS

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC00-2176
3DCA CASE NO: 3D99-00569

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

Petitioner,

vs.

Respondent's Supplemental Jurisdictional Brief

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

Respondent.
_____/

I

Statement of the Case

Respondent has previously filed a jurisdictional brief responding to the arguments advanced by Petitioner in its jurisdiction brief. In her jurisdictional brief, Respondent explained why each case upon which Petitioner relied as creating conflict jurisdiction was not in conflict with the decision rendered by the Court below. This Court has ordered Respondent to file a supplemental jurisdictional brief addressing whether the opinion rendered below is in conflict with *Michael v. Centex-Rooney Construction Co., Inc.*, 645 So.2d 133 (Fla. 4DCA 1994), a case not relied upon

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

Petitioner for jurisdictional conflict. This brief is written in compliance with that requirement.

II
Jurisdictional Point Involved

WHETHER THE INSTANT CAUSE IS NOT IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT IN *MICHAEL v. CENTEX-ROONEY CONSTRUCTION CO.*?

III
Summary of the Argument

The decision of the court below is not in direct and express conflict with the decision of the Fourth District Court of Appeal in *Michael v. Centex-Rooney Construction Co.*, 645 So.2d 133 (Fla. 4DCA 1994)

IV
Argument

THE INSTANT CAUSE IS NOT IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT IN *MICHAEL v. CENTEX-ROONEY CONSTRUCTION CO.*

This Court has asked Respondent to address whether *Michael v. Centex-Rooney Construction Co., supra.,* is in conflict with the opinion rendered by the Third District below. As noted above, Petitioner has not claimed that the decision of the Third District is in conflict with *Michael.* Since Petitioner has not raised any claim of conflict with *Michael*, this court should follow the general rule that issues not raised

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

by a party appellant are waived and confine its determination of the jurisdictional issue to the decisions argued by Petitioner in its jurisdictional brief in determining whether conflict is present.

Notwithstanding Respondent's position that this court should not consider whether the decision below is in conflict with *Michael*, as requested by this Court, Respondent will address whether there is a conflict between *Michael* and the decision rendered below. As noted in Respondent's Brief on Jurisdiction, in order to vest this Court with conflict jurisdiction, the decision rendered below must expressly and directly conflict with the decision of another District Court of Appeal or this Court in the same point of law. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). This conflict must appear within the four corners of the decision. *Reeves v. State*, 385 So.2d 829 (Fla. 1986). When viewed in this light, the decision of the Fourth District in *Michael v. Centex Rooney, supra.* is not an express and direct conflict with the decision rendered below on the same point of law.

In reversing the summary judgment entered by the circuit court, the court below considered the doctrine of election of remedies. The court below first set out the applicable facts:

> 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'

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

> 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....*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.
>
> (A. 3).
> (Emphasis Added)

The Court then considered the law concerning election of remedies which was to be applied to the foregoing facts:

> In *Lowery v. Logan*, 650 So.2d 653, 657 (Fla. 1DCA 1995), the First District discussed the doctrine and said:
>
> > *Consistent with the rule of law that the constituted election of remedies a worker's compensation remedy must be pursued to a determination or a 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 2DCA 1991); *Velez v. Oxford Dev. Co.*, 457 So.2d 1388 (Fla. 3DCA 1984). Along the same line, in *Velez*, this Court approvingly quotes from Professor Larsen's treatise:
>
> > Mere acceptance of some compensation benefits...is not enough to constitute an election. There must also

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

> be evidence of conscious intent to elect the compensation remedy and to waive...other rights.
>
> *Velez*, 457 So.2d at 1390 (quoting 2A A. Larsen, 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 rule and 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 of the merits of the claim. Even a brief review of the facts suggests that CA may well have a meritorious defense. Because the worker's 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 the CA simply opted to "buy" its way out of the worker's compensation litigation by expediently (and cheaply) resolving what amounted to little more than a nuisance claim.
>
> (A. 6)
> (Emphasis Added)

Thus, the holding of the Third District is that in order for there to be an election of remedies, there must be a conscious intent to accept the worker's compensation remedy. This intent is evidenced by either a finding by the Judge of Compensation Claims or by agreement of the parties, that the accident occurred within the course and scope of employment. Since neither of these two events occurred in the case at bar, Respondent lacked a conscious intent to elect a workers' compensation remedy.

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

The opinion rendered by the court below is to be contrasted with the decision of the Fourth District in *Michael v. Centex-Rooney Construction, Co. Inc.*, 645 So.2d 133 (Fla. 4DCA 1994). There the Court quoted the trial court's holding with regard to the underlying facts

> On May 27, 1992, the Judge of Compensation Claims ruled that Michael was an independent contractor rather than an employee of Regal and further ruled that Michael was not entitled to workers' compensation benefits. Michael thereupon undertook an appeal regarding the decision of the Judge of Compensation Claims. Subsequently to Michael filing an appeal, Michael, Regal and Regal's workers' compensation carrier reached a lump sum settlement on Michael's workers' compensation claims and submitted a Joint Petition dated December 7, 1992, with an attached Affidavit from Michael dated December 3, 1992, to the Judge of Compensation Claims. Under the terms of Joint Petition, Michael agreed to a lump sum settlement of Michael's workers' compensation claim in the amount of $6,500.00 in accordance with Florida Statute §440.20(12)(b). Michael specifically acknowledged in the Joint Petition that the lump sum settlement constituted a "full and final Discharge" of Regal and its workers' compensation carrier's responsibility for workers' compensation benefits.

Id. at 134-135

The Fourth District then applied the following legal proposition to the foregoing facts:

> Where the injured party actively pursues and receives worker's compensation benefits, an election of remedies is found. See: *Mandico v. Taos Const., Inc.*, 605 So.2d 850, 853 (Fla. 1992); *Ferraro v. Marr*, 490 So.2d 188 (Fla. 2DCA), *rev. denied*, 496 So.2d 143 (Fla. 1986). On the

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

> other hand, where the injured party does not actively pursue such benefits, a factual determination is warranted regarding whether the injury was within the scope of employment. See: *Wishart v. Laidlaw Tree Ser., Inc.*, 573 So.2d 183 (Fla. 2DCA 1991); *Velez v. Oxford Dev. Co.*, 457 So.2d 1388 (Fla. 3DCA 1984), *rev. denied*, 467 So.2d 1000 (Fla. 1985).
>
> *Id.* at 135.

In contrast to the decision rendered below, the opinion in *Michael* fails to indicate there was a reservation of all defenses of the Employer and Carrier including compensability, employer/employee relation, and whether the accident occurred within the course and scope of employment, in effecting the workers' compensation settlement. This was the key fact relied upon the Third District in concluding there had been no election of remedies. As this factor is not discussed in *Michael* (nor does the opinion indicate it was even raised), *Michael* is not in **express** conflict with the case at bar on the same point of law.

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

V

Conclusion

This Court should deny the Petition for Review.

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

By: _____
JAY M. LEVY, Esq.

V

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 20th day of March, 2001.

_____
Attorney for Respondent

ORS

FILED
THOMAS D. HALL
MAR 30 2001
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC00-2176
3DCA CASE NO: 3D99-00569

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

Petitioner,

vs.

Certificate of Type Size

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

Respondent.
_____/

COMES NOW the Respondent MARIA MINERVA HERNANDEZ, by and through her undersigned attorneys, and hereby files this her Certificate of Type Size used in Respondent's Supplemental Brief on Jurisdiction as follows:

1. Respondent's Supplemental Brief on Jurisdiction was prepared in 14 Point Times New Roman in Word Perfect 6.1 format.

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.

JAY M. LEVY, P.A.
9130 SOUTH DADELAND BOULEVARD • TWO DATRAN CENTER • SUITE 1701 • MIAMI, FL 33156
TELEPHONE (305) 670-8100 • TELECOPIER (305) 670-0032

MASCARO, 2701 LeJeune Road, Coral Gables, Florida, 33134, this 29th day of March, 2001.

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

BY:_____
JAY M. LEVY, ESQUIRE
FLORIDA BAR #: 219754