

IN THE SUPREME COURT OF FLORIDA

**FILED**  
THOMAS D. HALL

DEC 04 2000

CASE NO. SC00-2176

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

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.

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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

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RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

CASE NO: SC00-2176

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

Petitioner,

vs.

**Respondent's Amended  
Brief on Jurisdiction**

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

Respondent.

\_\_\_\_\_ /

I

Certificate of Type Size

Hernandez certifies that 14pt Times New Roman was the type used in the preparation of this brief.

II

Statement of the Case

Hernandez filed suit against United, as surviving spouse of decedent Ricardo Ariel Hernandez, on behalf of herself and her two (2) minor children.<sup>1</sup> United moved

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<sup>1</sup> 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

for summary judgment and maintained that since Hernandez accepted benefits pursuant to Chapter 440, Fla.Stat. from CA, Hernandez could not maintain a tort action against United as a statutory employer. The trial court granted the motion.

The Third District Court of Appeal reversed. The District Court found that there had been no election of remedies because the record did not support “a finding that Hernandez had a conscious intent to elect the compensation remedy and waive her other rights.” (A. 6). The Third District concluded that CA:

[S]imply opted to buy its way out of worker’s compensation litigation by expediently (and cheaply), resolving what amounted to little more than a nuisance.

(A. 6)

The Third District also held that there was no evidence in the record that the minor children had elected worker’s compensation since they had neither received nor were to receive any of the death benefits paid by the worker’s compensation carrier (A. 7-8).

### III Jurisdictional Points

#### Point I

WHETHER THE DECISION HEREIN SOUGHT TO BE REVIEWED DOES NOT EXPRESSLY AFFECTS A CLASS OF STATE OFFICERS?

#### Point II

WHETHER THE DECISION HEREIN SOUGHT TO BE REVIEWED IS NOT IN DIRECT AND EXPRESS

CONFLICT WITH THE OPINION OF THIS COURT OR  
OTHER DISTRICT COURTS ON THE SAME POINT OF  
LAW?

IV

Summary of Argument

I

The decision rendered below does not directly affect the job responsibilities and/or duties of a judge of compensation claims. For this reason, the decision rendered below does not directly affect a class of state officers.

II

There is no express and direct conflict of decision between the decision rendered below and a decision of this court or of another district court of appeal on the same point of law.

V

Jurisdictional Argument

Point I

THE DECISION HEREIN SOUGHT TO BE REVIEWED  
DOES NOT EXPRESSLY AFFECT A CLASS OF STATE  
OFFICERS.

Under Article V, Section 3(b)(3), Fla. Const., this Court has discretionary jurisdiction to review a district court of appeal which expressly affects a class of constitutional or state officers. In *Spradley v. State*, 293 So.2d 697 (Fla. 1974), this

Court considered its discretionary jurisdiction to review a decision which expressly affects a class of constitutional or state officer:

A decision which 'affects a class of constitutional or state officers' must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction, a decision must Directly and, in some way, Exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers. This may be a decision in a case in which the class, or some of its members, is directly involved as a party. It may also be in a case in which no member of the class is a party if the decision generally affects the entire class in some way unrelated to the specific facts of that case.

(Emphasis Added)

In order to be reviewable under this section, the decision must directly affect the job duties of a state or constitutional officer. *See: Behr v. Bell*, 665 So.2d 1055 (Fla. 1996) (Decision requiring public defender to serve as standby counsel affects public defenders, a class of constitutional officers). This is to be distinguished from decision which merely construe or interpret a statute. Any such decision "affects" all judges because such a decision instructs a judge how to apply or enforce a statute. This type of affection is an insufficient jurisdictional basis upon which to predicate this Court's discretionary jurisdiction to review decisions which affect a class of state officers.

In *Spradley v. State, supra.*, this Court held that a decision of the District Court



of Appeal which affirmed the denial of a motion to dismiss an indictment did not affect a class of state officers, i.e. assistant state attorneys. The motion to dismiss contended that the indictment was not signed by a properly appointed assistant state attorney.

This Court held:

We make no decision as to the merits of this contention because, again, any decision on that issue made by the trial court or by the District Court in its per curiam affirmance does not affect a class of constitutional or state officers so as to invoke our jurisdiction. A decision on that issue affects only the substantive and procedural law regarding the sufficiency of indictments in general, the rights of petitioner, and the authority of one particular assistant state attorney in relation to the specific facts of this case.

*Id.* at 702.  
(Emphasis Added)

*Spradley* is instructive on why the case at bar does not present a decision which affects a class of state or constitutional officers. The decision rendered below, in *dicta* indicates that §744.387, Fla. Stat. applies to workers' compensation and requires the appointment of a guardian where children are involved in a workers' compensation settlement.<sup>2</sup> As occurred in *Spradley*, this ruling affects only substantive and

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<sup>2</sup> While United suggests that this "holding" of the court below will have a "chilling affect (sic) on the ability of workers' compensation Judges to manage their tribunal and to provide full relief to the employer as provided for by law," Jurisdictional Brief at 7, there is no substance to this statement. Certainly circuit judges have managed to perform their jobs without incident despite the presence of §744.387, Fla. Stat..

procedural law with regard to the need for a guardian ad litem. It is no different, for example, than a ruling by a District Court that a certain type of evidence does not constitute hearsay. Although such a decision would be binding on all circuit judges, it would not affect a class of state and constitutional officers in the sense intended by Article V, Section 3(b)(3). In short, the decision of the Third District does not directly and exclusively affect the Judges of Compensation Claims, as required by this Court's decisions in *Spradley* and *Bell*. The petition for review on the ground that the decision rendered below affects a class of constitutional or state officer should be denied.

#### Point II

THE DECISION HEREIN SOUGHT TO BE REVIEWED  
IS NOT IN DIRECT AND EXPRESS CONFLICT WITH  
THE OPINION OF THIS COURT OR OTHER DISTRICT  
COURTS ON THE SAME POINT OF LAW.

In order to vest this Court with jurisdiction, United must demonstrate that the decision rendered below expressly and directly conflicts with a decision of another district court of appeal or this court on the same point of law. *Jenkins v. State*, 385 So.2d 1356 (Fla 1980); *Dodi Publishing Company v. Editorials America, S.A.*, 385 So.2d 1369 (Fla. 1980). The conflict must appear within the four corners of the decision. *Reeves v. State*, 385 So.2d 829 (Fla. 1986); *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986). As will be presently demonstrated, the decision rendered by the District

Court below is not in express and direct conflict with any other decision. Consequently United's petition to review should be denied.

The point of law established by the court below is that there was no election by Hernandez of a workers compensation remedy to the exclusion of a civil remedy because there was no determination on the merits of whether the fatal accident occurred in the course and scope of employment. As the court below 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, ... 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. ...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...resolving what amounted to little more than a nuisance claim.

(A. 6)

This holding is not in direct and express conflict with any decision of this court or another district court of appeal on the same point of law.

United argues that the decision rendered below is in express and direct conflict with *Motchkavitz v. L.C. Boggs Industries*, 407 So.2d 910 (Fla. 1981). There is no conflict, express, direct, or otherwise. First, in *Motchkavitz* there was no dispute that the plaintiff was injured in the course and scope of his employment. Second,

*Motchkavitz* involves an entirely different legal issue: Whether workers' compensation immunity applies to a subcontractor where the injured employee worked for the contractor. Here, the issue is whether there had been an election of remedies by settling a workers' compensation claim for nuisance value when there is an unresolved dispute as to workers' compensation even applies. *Motchkavitz* is not in express and direct conflict with the case at bar.

Conflict is next claimed with *Hodgkin v. Perry*, 88 So.2d 139 (Fla. 1956). There this Court held that a party cannot take inconsistent positions in litigation. As this point was never discussed or reached in the opinion of the Third District below, there can be no express and direct conflict.

United's last argument is that the decision rendered below conflicts with *Matthews v. G.S.P. Corporation*, 354 So.2d 1243 (Fla. 1DCA 1978) and *Hume v. Thomason*, 440 So.2d 441 (Fla. 1DCA 1983). Both of these cases are concerned with a compensation claim and a civil action brought against the same employer and are not in express and direct conflict with the decision rendered below.

In *Matthews*, the employee had filed a claim for workers' compensation benefits. There was no dispute that the employee suffered an accident within the course and scope of his employment. Workers' compensation benefits were paid by the carrier. After receiving compensation benefits, the employee then filed a civil action

contending that the actions of the employer were so dangerous as to indicate that the injury was not an accident and not within workers' compensation. In affirming the dismissal of the civil action, the First District Court of Appeal held:

Plaintiff, having established that he was entitled to the benefits of chapter 440 because he received an injury arising out of and in the course of his employment, and that he did receive benefits as provided by such law, may not now be permitted to claim further damages upon his allegation that his injury, in fact, was not an accident within the contemplation of the law.

In the case at bar, as is expressly set forth in the Third District's opinion, it was never established that the Decedent's injury arose out of and in the course and scope of his employment. This is contrary to what occurred in *Matthews*. There is no express and direct conflict between the decision below and *Matthews*.

In *Hume*, the employee sued the owner/contractor civilly for failing to provide a safe work place. This action was resolved in favor of the owner/contractor. He then filed a compensation claim which was dismissed by the Judge of Compensation Claims on the basis of election of remedies. The First District Court of Appeal, held that *Hume* had elected his remedy by filing in civil court and obtaining an adjudication:

In the instant case, the summary judgment rendered in the circuit court case was obviously efficacious from the Tomasons' point of view, as it worked to their advantage and to Hume's disadvantage. Thus, Hume's election matured when judgment was entered finally adjudicating the rights of the parties. He was precluded thereafter from pursuing his workers' compensation claim.

*Id.* at 442.

In the case at bar, as opposed to the situation in *Hume*, there was never an adjudication in workers' compensation of whether the accident occurred in the course and scope of employment. The workers' compensation settlement is not efficacious. There is no express and direct conflict of decision.

VI  
Conclusion

Based upon the foregoing cases and arguments, Respondent MARIA MINERVA HERNANDEZ respectfully requests that this Court decline jurisdiction over the instant case.

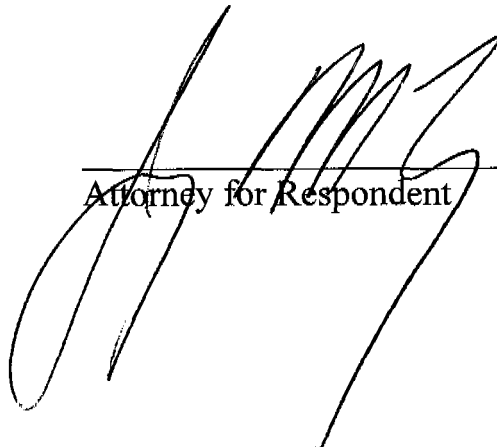
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By:   
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VII  
Certificate of Service

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 30th day of November, 2000.

  
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Attorney for Respondent