IN THE SUPREME COURT OF FLORIDA

Case No. SC00-2176
Lower Tribunal: 3D99-00569

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

Petitioner,

vs.

MARIA MINERVA HERNANDEZ, as
Personal Representative of the Estate
of ARIEL HERNANDEZ and individually,

Respondent.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit
in and for Miami-Dade County, Florida.

REPLY BRIEF OF PETITIONER ON THE MERITS

SHERIDAN WEISSENBORN
PAPY, WEISSENBORN, POOLE &
VRASPIR P.A.
3001 PONCE DE LEON BLVD
CORAL GABLES, FLA. 33134
PHONE: (305)-446-5100
FLA. BAR NO: 165960

TABLE OF CONTENTS

Page

TABLE OF CONTENTS... i

TABLE OF AUTHORITIES... ii

INTRODUCTION.. 1

ARGUMENT.. 1-11

I.

THE PROSECUTION OF A WORKERS' COMPENSATION CLAIM BARS THAT SAME CLAIMANT AND THOSE WHO CLAIM THROUGH SAID CLAIMANT FROM PURSUING A TORT CLAIM AGAINST THE STATUTORY EMPLOYER FOR INJURIES OR DEATH AS A RESULT OF THE SAME ACCIDENT... 1-9

II

A SETTLEMENT MADE PURSUANT TO CHAPTER 440 FLA. STAT. DOES NOT REQUIRE 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 9-11

CONCLUSION.. 11

CERTIFICATE OF COMPLIANCE.. 12

CERTIFICATE OF MAILING 12

TABLE OF CITATIONS

PAGE

STATE CASES

American Process Co. vs. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908) 4

Delta Airlines v. Cunningham 658 So.2d 556 (Fla. 3rd DCA, 1995) 4, 5

Green v. Maharaja of India Inc., 485 So.2d 1329 (Fla. 1st D.C.A. 1986) *7, 8*

Mandico vs. Taos Const. Co. 605 So.2d. 850 (Fla. 1993) 4, 5

Michael vs. Centex - Rooney 645 So.2d. 133 (Fla. 4th DCA 1994) 3, 4, 5, 7, 8

Motchkavitz v. L.C. Boggs Industries 407 So.2d. 910 (Fla. 1981) 3, 4, 5

Velez v. Oxford Development, 457 So.2d 1388 (Fla. 3rd D.C.A. 1984) 4

Wishart v. Laidlaw Tree Service, 573 So.2d 183 (Fla. 2nd D.C.A. 1991) 4

FLORIDA STATUTES

§440.16 8

§744.387 . . . . 9, 10

INTRODUCTION

In this Reply Brief we will refer to the parties as they had appeared in the Petitioner's Initial Brief on the merits, to wit: United for the Petitioner; and Plaintiff for the Respondent. In addition we will refer to the record citations as they appeared in the Initial Brief. All emphasis is ours unless the contrary is indicated.

ARGUMENT

I.

THE PROSECUTION OF A WORKERS' COMPENSATION CLAIM BARS THAT SAME CLAIMANT AND THOSE WHO CLAIM THROUGH SAID CLAIMANT FROM PURSUING A TORT CLAIM AGAINST THE STATUTORY EMPLOYER FOR INJURIES OR DEATH AS A RESULT OF THE SAME ACCIDENT

It must be remembered that the Workman's Compensation statute was designed to allow an injured or a deceased worker to recover for his damages regardless of fault. In order to further protect the injured or deceased worker the law provides that although the worker was working for a independent sub contractor on the job the general contractor is liable in workman's compensation in the event the injured's employer does not have coverage for workman's compensation. Therefore, the law which makes the general contractor liable to the injured worker prohibits the injured worker from suing not only his employer but

the general contractor on the job to compensate the general contractor for the extra burden the law places on him.

Plaintiff contends that she did not have a conscious intent to accept the workers' compensation benefits over the tort benefits and therefore should not be prevented from collecting from both the employer's compensation carrier and the general contractor whose employee was operating the loader that killed the Plaintiff's husband. It is her contention that the Statute should not apply to this case which prohibits the plaintiff from making a claim against the General Contractor. In support of her argument she contends that she should not be barred by the statute that prevents a suit against the General Contractor as it was a compromised settlement, that she entered into with the carrier for her husband's employer.[1]

Interestingly, Plaintiff does not dispute United's claim that the law in Florida is that a litigant can not accept both a tort remedy and a workers' compensation remedy without having been deemed to have made an election of one remedy over

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[1] In this regard her argument is that she accepted a nuisance or minimal settlement because there was a contest going on as to whether her husband was or was not in the course and scope of employment at the time of his death so she compromised the amount of benefits she might otherwise have accepted and this should then not count as an election but, rather is should only count as a voluntary payment to her.

the other thereby barring recovery in one of the cases. See *Motchkavitz v. L.C. Bogg Industries Inc.,*, 407 So.2d 910 (Fla.1981); *Delta Airlines v Cunningham*, 658 So.2d 556 (Fla. 3rd D.C.A. 1987); *Michael v. Centrex Rooney Const. Co.,* 645 So.2d 133 (Fla. 4th D.C.A. 1994) What Plaintiff argues, however, is that where a settlement during the process of the litigation is entered into and it is for less than the benefits one might receive coupled with a dispute over whether the employee was in the course and scope of his or her employment there is no election. Therefore, she argues, this Court should do as the Third District Court of Appeal had done, and determine that she could not have consciously intended to have elected her remedy. She wants this Court to relieve her from the consequences of her own acts and those of the statute. It is respectfully submitted her argument is misplaced. The most obvious reason for her error is that she was represented by counsel in both forums and she was given advice of counsel. She chose to accept the benefits. She was not forced to accept them nor was she required to pursue both claims. The settlement was at her choice and she could have gone on to the conclusion of the case and had she not received any benefits then she might have a right to proceed in the tort claim. However, that is not what she did.

The law does not allow you to proceed on a claim on a certain basis against one defendant and then after you settle change you pleading and go after another

defendant claiming an adverse position than what you claimed in the first suit. That is election of remedies.

The law does not provide that there is an exception to the doctrine of election of remedies based upon the amount of the benefits received. What the law provides is that where a party has inconsistent remedies and takes advantage of benefits under one of the inconsistent remedies the other remedy is no longer viable and an election has occurred. *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942 (Fla. 1908) In this regard the law is clear that where a party seeks affirmative relief in worker's compensation and in tort the acceptance of benefits in one will preclude the continuance of the other. *Motchkavitz*, supra.; *Michael* , supra.; *Delta*, supra.; *Mandico v. Taos Const. Co.*, 330 So,2d 757 (Fla. 1993) The only exception the Courts recognize to this election of remedies doctrine is when a voluntary payment has been made before any demand has been made. *Velez v. Oxford*, 457 So.2d 1388 (Fla. 2nd D.C.A. 1991); *Wishart v. Laidlaw Tree Serv. Inc.*, 573 So.2d 183 (Fla. 2nd D.C.A. 1991)[2]

In the instant case Plaintiff affirmatively sought the relief and in response

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[2] In addition, we would state that the other cases relied upon by Plaintiff fall within this exception when there is no finding of an election.

thereto the carrier finally agreed as did the Plaintiff to an amount of money to be paid as death benefits. There is no issue but that the funds she received were as a result of the having affirmatively sought such relief. She is the one who controlled her destiny. She chose to accept the benefits, which she had demanded. Thus, under the law she is not allowed to recover based upon a claim that her husband was an employee of a given sub contractor and now claim that he was not an employee of that contractor in order to try and prevail in both claims she has made. She is therefore deemed to have made the election of her remedies, as she cannot collect on a claim that he was an employee and then on a claim that he was not an employee of the same contractor. *Motchkavitz*, supra; *Mandico*, supra.; *Centrex*, supra.; *Delta*, supra.

In her argument Plaintiff does not deny she accepted the worker's compensation benefits. However, she asks this Court to overlook the law and bail her out of this decision; which she made while being represented by counsel, not in one, but in both cases, in order to allow her to continue on with her tort claim which is inconsistent with the compensation claim wherein she sets forth he was in the course and scope of employment.

Clearly, the law has always required a person to accept the consequences of

his or her own act. However, the Plaintiff does not wish to accept her own consequences. She would rather ask this Court to relieve her from her decision by buying into her argument that her settlement does not equate to a settlement and should be considered a voluntary payment to her. There is not one shred of evidence to support this alleged voluntary payment theory. To the contrary, the parties were in litigation and the issue of whether the husband had or had not been in the course and scope of his employment, as in any case, was contested. However, the settlement precluded such a determination. As in any litigated matter the workers' compensation judge could have determined otherwise and the First District Court of Appeal in an appeal may have affirmed such a decision. This is litigation. However, this settlement precluded that determination not at the behest of United but upon the decision of the Plaintiff who had counsel to direct her. [3]

There well may have been a different result than the lawyers set forth in their affidavits of their opinions. We will never know, however, because again the matter was settled and benefits accepted. The law can not overlook the precedent against Plaintiff however and she should not be allowed to thwart the law by

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[3] It should be noted that in the affidavit of counsel he only argues that he thought he might not win the issue of course and scope but he does not set forth that the decision to accept benefits was not well thought out and that the Plaintiff did not understand what she was doing.

arguing as she has in this case.

Remedies are elected when the decision to accept some benefit is brought to fruition. Moreover, Plaintiff did not have to accept anything she could have dismissed her compensation case if she truly believe compensation was not available and continued her law suit in the tort forum. She did not do that however, instead she accepted a compromised amount of benefits and now claims that this should not count as an election.

It should be noted as well that Plaintiff neglects to mention that in her affidavit which she filed in the Compensation case she claims that her husband had been in the course and scope of his employment at the time of his death. (R361-362) She chose to accept the benefits consciously. Therefore she should be estopped from seeking the funds in tort against the statutory employer, United.

Plaintiff further argues that the *Centex* case is unsupportive in this appeal because there was no indication what was set forth in the settlement papers nor whether the $6,500.00 was the amount of benefits that the claimant would have been entitled to receive. On the other hand she argues that the *Green v. Maharaja of India Inc.*, 485 So.2d 1329 (Fla. 1st D.C.A. 1986) is supportive.

In *Centex*, the issue had to do with the failure to pursue an appeal regarding the employment issue which could have been continued and which could have

been a favorable result to the claimant. This is the exact issue in this case. The settlement precluded or thwarted the determination and the person who accepted the benefits was deemed to have made an election thereof.

In *Green*, the issue turned around the failure of the tort claimant to set forth his affirmative defense of exclusive remedy of workers' compensation. That did not occur in the instant case. United raised this affirmative defense and this was raised before Plaintiff filed her worker's compensation claim. This case is simply unsupportive.

Finally, in regard to this issue Plaintiff argues that the settlement does not mention the two minor children, therefore they could not be included in the same. The problem with this argument is that the workers' compensation statute sets forth how benefits are paid. § 440.16 Fla. Stat. The law requires an apportionment of the amount received. A workers' compensation settlement is simply not like a tort settlement. The Plaintiff sought the benefits for herself and her children. To now claim that they were not included in the settlement is simply not a viable argument. Plaintiff is the natural guardian of the children and speaks for them and she may act for them without court approval in this regard in Workman's compensation cases. The claim was for all death benefits for a deceased employee. The only logical explanation is that the settlement included Plaintiff and her children.

Plaintiff was the natural guardian who can bind her wards. Moreover, if this were the case why is it that the two attorneys who had given affidavits had not set forth that the settlement did not include the children. What the affidavits stated was that a controverted case had been settled. The reason the affidavits did not state the children were not included in the settlement is obvious. It was not the case and the attorneys did not want to misstate the facts. Clearly, if that had been the case that would have been in the affidavits to support the contention there was no settlement by the children. Finally, Plaintiff argues the record does not establish United as a statutory employer. This was not raised below, except with regard to arguing course and scope. Therefore, this argument of Plaintiff should be disregarded. Moreover, the record clearly established United hired C.A. to perform certain of its functions. (R 698-699; 1022-1032)

II.

A SETTLEMENT MADE PURSUANT TO CHAPTER 440 FLA. STAT. DOES NOT REQUIRE 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.

Plaintiff seeks to overcome her judgment in accepting the settlement by arguing the children's claim was not approved by a court. Her only argument in

support thereof is that § 744.387 mandates court approval and because there was no approval of court the claim of the children should not be barred by the mother's actions.

It is Plaintiffs argument that this statute applies and that a probate judge did not have an opportunity to consider if the settlement was in the best interest of the children. The problem with this argument is that the statute refers to a court having jurisdiction of the claim making a finding of the best interest of the children. Workers' Compensation is not a court process. It is an administrative process that falls under the executive branch of government. Moreover, the benefits allowed are set forth by law. Workers' compensation is a statutory proceeding and it is not a proceeding that is being brought by or against the minors. It is a claim being brought against the employer for the recovery of benefits allowable to the worker or his family in accordance with Chapter 440. It is not the same as a claim being brought for the injury to the children which
§ 744.387 contemplates. Moreover, unlike the wrongful death statute there is no language in the Worker's compensation statute that mandates approval of a minors' settlement. Had the settlement in this case been in the tort claim court approval would have been mandated but not in the instant case.

The Workers Compensation Judge must give due consideration to all

claimants. It does not require him, however, to set forth in his order specific findings in this regard.

This argument was raised by the Plaintiff below in order to overcome the consequences of the Plaintiff 's act. Workman Compensation claims for death of employees has been in operation in Florida since 1935 at no time has the probate court been involved in the determination of the benefits in death cases for children of the deceased as those matters are handled by the Judges of the Industrial Commission.

CONCLUSION

Based upon the foregoing argument and citations of law, it is respectfully submitted that this Court should reverse the decision below and re-adopt the ruling of the trial court barring any claim against United.

Respectfully submitted,

PAPY, WEISSENBORN, POOLE
& VRASPIR, P.A.
3001 Ponce De Leon Boulevard / Suite 214
Coral Gables, Florida 33134
(305) 446-5100
By: ________________________________
Sheridan Weissenborn
Fla. Bar. No: 165960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was

furnished to the following by U.S. Mail on this 24th day of SEPTEMBER, 2001:

JAY M. LEVY, ESQ., 2 Datran Center, Suite 1701, 9130 South Dadeland Blvd.,

Miami, Fla. 33156; Guillermo Mascaro, Esquire, Guillermo Mascaro, P.A. ,

2701 LeJeune Road, Suite 350, Coral Gables, Florida, 33134.

PAPY, WEISSENBORN, POOLE &
VRASPIR, P.A
Attorneys For Appellees
3001 Ponce De Leon Boulevard
Suite 214
Coral Gables, Fla., 33134
Phone: (305) 446-5100

BY:______________________________
SHERIDAN K. WEISSENBORN
Fla. Bar No: 165960

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Brief has been printed in scalable Times New Roman 14 point type.