SUPREME COURT OF FLORIDA

CASE NO.: SC05-2065

SUMMIT CLAIMS MANAGEMENT, INC.
D/B/A CLAIMS CENTER, AS SERVICING
AGENT FOR FLORIDA RETAIL FEDERATED
SELF INSURED FUND,
PETITIONER,

Fourth District Court of
Appeals Case No. 4DO4-2458

V.

LAWYERS EXPRESS TRUCKING, INC.,
AND CANAL INSURANCE COMPANY; AND
JOHN DONNELLY AND ELIZABETH
DONNELLY,
HIS WIFE,
RESPONDENTS.
_______________________________________/

ANSWER BRIEF

LAWYERS EXPRESS TRUCKING, INC. AND CANAL INSURANCE COMPANY

JANUARY 27, 2006

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Note as to Names

Ft. Pierce Nissan, Inc.'s workers compensation insurance carrier Summit Claims Management, Inc., d/b/a Claims Center, as Servicing Agent for Florida Retail Federated Self Insured Fund, is the Petitioner herein and is sometimes referred to herein as "WC Carrier".

John Donnelly and Elizabeth Donnelly, his wife, were the plaintiffs in the tort lawsuit against Lawyers Express Trucking, Inc. which was settled at mediation, from which Canal's payment to the Donnellys arose. They are two of the Respondents in this case and will be referred to as "the Donnellys."

As the interests of the other two Respondents, Canal Insurance Company and Lawyers Express Trucking Inc., are virtually identical herein, both Canal and Lawyers Express are generally referred to collectively as "Lawyers Express"; however, Canal Insurance Company and Lawyers Express Trucking, Inc. are at times referred to separately for clarity or emphasis respectively as "Canal" and "Lawyers Express Trucking".

Statement of the Case

This appeal comes to the Court with a fundamentally simple procedural posture:

- On March 31, 1999, Employee Donnelly and his wife filed suit against Lawyers Express Trucking, Inc.: *John Donnelly and Elizabeth Donnelly, his wife v. Julius Grant and Lawyers Express Trucking, Inc.*, Case No. 99-CA-000443, in the Circuit Court of the Nineteenth Judicial Circuit in St. Lucie County, Florida (the "tort suit"), for injuries suffered in an accident on April 15, 1997.

- In that tort suit, Lawyers Express Trucking served WC Carrier with a subpoena on February 17, 2000, for its records related to Mr. Donnelly's work place injuries, which is the latest date on which WC Carrier could have been on actual notice of the pendency of the tort suit. (Record at p. 8 and Appellant's *Initial Brief* at p. 5)

- WC Carrier did not then file--and never has filed--a notice of payment in the Donnellys' tort suit as required by § 440.39(3)(a), Fla. Stat.

- In August, 2000, WC Carrier was invited to mediation of the tort suit, but did not appear or participate.

- The Donnellys' tort suit was then settled with Lawyers Express, with full payment having been made to the Donnellys, the tort suit having been dismissed and the Donnellys completing a full release of both Lawyers Express and Canal (including the Donnellys agreeing to indemnify Lawyers Express and Canal against any liens)(Record at p. 113).

- Approximately nine months later, on May 14, 2001, WC Carrier filed the instant case as a second suit, only against Canal and Lawyers Express Trucking: *Summit Claims Management, Inc. v. Lawyers Express Trucking, Inc. and Canal Insurance Company, Inc.*, Case No.: 01-CA-000796, in the Circuit Court of the Nineteenth Judicial Circuit in St. Lucie County, Florida (Record at p. 1-3). *WC Carrier did not, and never has, sued the Donnellys.*

- Canal and Lawyers Express Trucking timely filed a third-party claim against the Donnellys in the second suit (Record at p. 58-63).

- Judge Bryan granted summary judgment in favor of Lawyers Express Trucking and Canal Insurance Company and against WC Carrier (Record at p. 124-126).

- WC Carrier appealed to the Fourth District Court of Appeal (Record at p. 133-139).

- The Fourth District upheld Judge Bryan's grant of summary judgment, but certified conflict with a Fifth District Court of Appeal decision. *See Summit Claims Management v. Lawyer's Express Trucking, Inc., Canal Insurance Company, John Donnelly, and Elizabeth Donnelly, his wife*, 913 So. 2d 1182 (Fla. 4th DCA 2005) certifying conflict with *C&L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989).

Statement of Facts

Appellant WC Carrier, does not dispute that it, a workers' compensation insurer, was actually aware that a third-party suit had been filed to recover for injuries sustained in the work place by its insured, John Donnelly, and for which injury WC Carrier had paid benefits. *See* Appellant's *Initial Brief* at p. 5 and Record at pp. 8 and 124. Indeed, WC Carrier was served a subpoena for records by Lawyers Express in the tort suit. Appellant's *Initial Brief* at p. 5 and Record at p. 9.

Specifically, Mr. Donnelly, and his wife Elizabeth, filed suit against alleged third-party tortfeasor, Lawyers Express Trucking. Lawyers Express Trucking was insured by Canal which provided a defense to Lawyers Express Trucking in the Donnelly litigation. That third-party tort litigation was ultimately settled at mediation after WC Carrier had received actual notice of the tort suit both by receiving a subpoena and also by being invited to the mediation (but not appearing). After mediated settlement, the settlement proceeds were paid to the Donnellys.

WC Carrier never filed a statutory notice of payment in the tort action as required to create a lien upon any judgment or settlement. Record at p. 125 (Judge Bryan's Order on summary judgment: "However, that distinction makes no difference in the underlying principle that the lien must be filed where the carrier has notice even though the employee did not follow the statute.”). Instead, many months subsequent to the mediated settlement, WC Carrier sought to recover from Lawyers Express in a separate law suit for amounts it had paid in workers compensation benefits. The trial court entered summary judgment against WC Carrier and in favor of third parties, Lawyers Express Trucking and Canal, as well as the employee and his wife (Record at p. 125 [Judge Bryan’s Order on summary judgment]), because no statutory lien had arisen in favor of WC Carrier.

From the final judgment entered on that Order, WC Carrier brought its appeal to the Fourth District Court of Appeal. The Fourth District upheld Judge Bryan’s order granting summary judgment. The Fourth District also certified conflict with *C&L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989)(Judge Dauksch, authoring).

Summary of Argument

Despite the Fourth District Court of Appeal’s certification in its decision in this case of conflict with the Fifth District Court of Appeal’s decision in *C&L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989), in this case there simply is no conflict as it relates to Respondents Lawyers Express Trucking and Canal. This is so because the Fourth District decided that Petitioner WC Carrier would not even be entitled to an equitable lien as to any party, while the Fifth District decision did not recognize a lien as related to the tortfeasor, i.e. Lawyers Express

Trucking and Canal in this case. Thus, there is no conflict as it relates to Lawyers Express Trucking and Canal such that this Court should dismiss this matter as it relates to these two parties.

If the merits are reached, Florida's comprehensive workers compensation statute is in derogation of Florida's common law and, thus, is to be strictly construed. Such strict construction should properly result in this Court's rejection of WC Carrier's request that this Court append a remedy to Florida comprehensive statutory framework--a remedy that is not contemplated by Florida's legislature, nor implicit in the Florida's workers compensation statute. Specifically, the Court should not now by judicial fiat fabricate an equitable lien remedy when the statute does not provide for same *and* WC Carrier has failed to take advantage of the expressly provided for lien mechanisms otherwise extant in the statute. Simply, this Court should not reward lack of diligence.

Similarly, when the section from which WC Carrier attempts to extrude its illusory foundation for an equitable remedy is examined, it is apparent that the statute itself has nothing whatsoever to do with third-party tortfeasors. Specifically, the statute systematically defines the relationship between the employee on the one hand, and the employer (or its carrier, as is the case here) on the other. WC Carrier now attempts to drag Lawyers Express unwillingly into its fray with the employee when the statute under which it proceeds has nothing to do with either the employer's or the employee's relationship with a third-party tortfeasor.

In short, WC Carrier had the means, motive and opportunity in this circumstance to statutorily protect its own interest--but failed so to do. WC Carrier should not now be heard to argue that it should get a third and unwritten bite at the apple based on some vague intimation of equity. The remedy sought by WC Carrier should be denied to it as not permitted by the legislative enactment.

Standard of Review

Grants of summary judgment are subject to *de novo* review. *See Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). This Court's discretionary review is of decisions of district courts of appeal that expressly and directly conflict on the same question of law. Fla. R. App. P. 9.030(2)(A)(iv).

Argument

I. As to Lawyers Express and Canal Insurance Company, There is No Actual Conflict Between Districts

This case is before this Court as a result of the Fourth District's certification of conflict of a question of law in this case with the Fifth District Court of Appeal's decision in *C&L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989). *Summit Claims Management v. Lawyer's Express Trucking, Inc., Canal Insurance Company, John Donnelly, and Elizabeth Donnelly, his wife*, 913 So. 2d

1182 (Fla. 4th DCA 2005). The Fourth District expressed the conflict question as:

> Whether a workers' compensation insurance carrier that failed to seek its statutory lien until after the tort action concluded, despite having actual knowledge of the proceedings, is entitled to an "equitable lien"?

Id. at 1183. When *Summit Claims* and *Corbitt* are read side by side, however, it is clear that there is no conflict in the decisions as the questions of law are applied to Lawyers Express Trucking and Canal, because the facts in the two cases are not parallel on the issues relevant to those questions.

More specifically, as an overarching proposition, the Fourth District affirmed the trial court's denial to WC Carrier of an equitable lien as against Lawyers Express, which as the tortfeasor[1] had already paid the Donnellys the settlement sum due to the Donnellys. *Corbitt*, on the other hand, permitted an equitable lien *as against the proceeds of the settlement* which were in the hands of the employee/injured party to whom the third-party tortfeasor had made its payment. *Corbitt*, 546 So. 2d at 1186-87 ("The [workers compensation] *carrier is equitably entitled to a lien against the settlement*, which lien we hesitate to call a statutory lien because we cannot sanction either party's failure to strictly comply,

[1] Frequently in this brief Lawyer's Express Trucking, Inc. is referred to as the "tortfeasor" and not the "alleged tortfeasor". Such convention is in no way intended to be an admission of fault/liability on the part of Lawyer's Express Trucking, Inc., but rather is intended to simplify briefing and the language used herein.

but rule the judge should have enforced when the plaintiff [holder of the funds] filed its motion [for direction on payment of the funds]."(emphasis added)).

In *Corbitt*, the plaintiff employee which had not complied with its notice obligations under § 440.39, had apparently utilized the process provided for in the statute and then asked the Fifth District not to permit the carrier to receive the amount to which it was subrogated under that statute, because the carrier had not filed the notice that the statute required (and still requires) it to file to obtain the statutory lien. *Id*. at pp. 1185-86. In effect, the Fifth District permitted the carrier to enforce its subrogated rights directly against the employee to whom it had paid the workers compensation benefits, and used the rubric of an "equitable lien" to accomplish that result, where the employee instituted the request for equitable distribution while he still held the proceeds so that such a lien would be effective. *Id*. at 1186-87. *Cf. Maryland Casualty Co. v. Smith*, 272 So.2d 517 (Fla. 1973). *Corbitt* did not involve a suit against a third party or obligations of the tortfeasor in any respect, as the tortfeasor had already discharged its obligations by payment to the employee/insured. *Id.*

WC Carrier has not sought any relief against the Donnellys herein (WC Carrier has never sued the Donnellys), so the legal principle as applied in *Corbitt* is not directly involved in this case. As such, the same result could be reached with respect to Lawyers Express Trucking (and Canal) regardless of whether the holding in the Fourth District's or the Fifth District's decision is applied to the instant situation, i.e. no "equitable lien" would be available against Lawyers Express Trucking or Canal, neither of which company is holding any settlement proceeds. Accordingly, it is suggested that this appeal as it relates to Lawyers Express Trucking and Canal should be dismissed, with jurisdiction being declined for lack of an express conflict, with the effect that Judge Bryan's grant of summary judgment in favor of Lawyers Express and Canal will be affirmed.

II. Section 440.39 is to be Strictly Construed as it is In Derogation of the Common Law, and the Remedy Sought by Petitioners is Not in the Statute

Since its beginning, the workers compensation system has been consistently recognized by this Court as being in derogation of the common law relationship between employers and employees, such that the application of the statutory framework has been strictly construed, and the language followed with special diligence. *See, J.J. Murphy and Sons, Inc. v. Gibbs*, 137 So. 2d 553, 561 (Fla. 1962) ("Workman's compensation is entirely a creature of statute and must be governed by what the statutes provide, not by what deciding authorities feel the law should be.") If WC Carrier had followed the statutory instruction, this case would not be before this Court, because it would never have arisen. Only because WC Carrier did *not* follow either the statutory mechanisms for creating a lien or the one for otherwise enforcing its rights, is it asking this Court to go well outside the statutory framework, and to create for WC Carrier a remedy the legislature has not provided in the workers compensation system.

This Court should not vary from more than 50 years of its own jurisprudence, and should refuse WC Carrier's invitation. In adhering to its prior jurisprudence and limiting WC Carrier to the remedies and procedures the legislature provided to it, this Court will be reinforcing the stability of the law in this field, and avoiding the potential for subsequent cases to further "define" and "apply" the remedy WC Carrier so casually seeks. All this Court need do is apply the workers compensation statute, as written by the legislature, and not be swayed by WC Carrier's suggestion that the "purpose" of that statute, at least as WC Carrier would like it to be, requires more than the legislature has expressly provided.[2] This Court has many authorities to guide it in this case, including Mr. Justice Felix Frankfurter of the United States Supreme Court who humorously explained fifty years ago, in a similar context, "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374, 76 S.Ct. 410, 415, 100 L.Ed. 415, 419 (1956). The same might be said of reference to the "purpose" of a statute instead of the statute itself: go to the statute.

[2] The Fourth District in the instant case did not accept WC Carrier's offer to embellish the statute, and this Court should affirm.

In determining "what the statute says", it must be remembered that Florida's workers compensation system is undeniably in derogation of Florida's common law, as even the statute itself acknowledges. ("The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike.") § 440.015, Fla. Stat. (1997). As such, the statute is to be construed according to traditional strict statutory construction principles ("[T]he laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer."). *Id*. This Court has long recognized and applied these guiding principles.

For example, without the statutory grant, a workers compensation carrier, such as WC Carrier, simply has no subrogation or assignment rights to an employee's claim against a third-party tortfeasor. This Court explained in *Fidelity & Casualty Co. of New York v. Bedingfield*, 60 So. 2d 489, 495 (Fla. 1952)[3]: "We should not lose sight of the fact that the compensation insurer has no right of subrogation and no right of assignment in this case except that given it by the Statute [sic]."

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[3] *Bedingfield* also provides an excellent history of the development of Florida's statutory workers compensation program from its inception and supplanting of the common law, until the 1950's. Similarly, *Aetna Cas. and Surety Co. v. Bortz*, 271 So. 2d 108 (Fla. 1973) provides a recitation of the development of § 440.39.

As a further example, two years later, in *Brinson v. Southeastern Utilities Services Co.*, 72 So. 2d 37 (Fla. 1954), this Court was asked whether a workers compensation carrier was entitled to recover from its employee amounts the employee recovered from the third-party tortfeasor after the right to sue reverted to the employee from the employer. *Id.* at 37-38. Specifically, the statute in question (Florida's 1947 version of the workers compensation statute) provided that should the employee accept workers compensation benefits, the employer and/or carrier were entitled to sue the tortfeasor and keep the entire recovery, with any overage to be held by the employer as a trust fund toward future workers compensation payments. *Id.* The statute next provided that should the employer not file suit, the employee was permitted to sue on his own account and recover full damages regardless of the workers compensation paid. *Id*. In *Brinson*, After the employee had sued and recovered, the carrier then sued claiming that the employee had received a double recovery and that the carrier should be entitled to the amounts recovered. The Court explained:

> ***It is obvious that the carrier could have avoided what respondents now call "double recovery for the same injury" by the simple means of instituting a suit. It chose instead to ignore its right to proceed.*** Even now respondents claim no reimbursement, and if the allowance of compensation regardless of the judgment amounts to 'double recovery' certainly it would apply as well to sums paid as sums to be paid. Upon study we do not think that the sanction of recovery from a third party as well as compensation is as unfair as it first appears.

> ***Too much emphasis is placed by respondents on the amount of the judgment, too little on the provision of the statute.*** Let us suppose the petitioner had recovered a nominal amount, or any amount, for that matter, up to the amount of compensation allowable by law for his injury. What then? We are not conscious of any power in the court to supplement the legislation by establishing rules for such varying contingencies. ***The effect of accepting respondents' view would be the affording to them, at least in part, of the very protection they failed to invoke when they had the absolute choice.***

Id. at 38-39 (emphasis added). *See also Arex Imdemnity Co. v. Radin*, 77 So. 2d 839, 840-41 (Fla. 1955)("And insofar as petitioner's claim before the commission in this cause purported to be for subrogation benefits in addition to those adjudicated in the former proceeding, the claim is for a benefit or remedy which the Legislature has not provided, and one which, subrogation being a matter of grace, rests entirely within its discretion to grant or withhold." (citing *Brinson*)). As in *Arex Industry*, WC Carrier here seeks a remedy which the legislature has not provided it, and that remedy should be denied WC Carrier by this Court. In so deciding, this Court does not have to accept WC Carrier's definition of the "purpose" of the law, when the purpose is readily ascertainable from the statute, and is different from what WC Carrier proposes to the Court. The legislature's supposed purpose does not change the statute, in any event, as discussed below.

A. The Statutory Framework Provides Two Tools for An Insurer to Protect Its Subrogated Interest, and WC Carrier Availed Itself of Neither

Section 440.39 provided WC Carrier two alternative methods under the facts of this case, which it could have utilized to protect its subrogated interest. It could have brought a lawsuit against the tortfeasor, which it did not do, or it could have created a lien on settlement proceeds by filing a statutory notice in the suit later filed by the insured employee, which it did not do. WC Carrier's claim against Lawyers Express was, therefore, properly dismissed by Judge Bryan because WC Carrier did nothing to comply with the express statutory requisites to create its permissive, not mandatory, lien on settlement proceeds, despite its actual knowledge of the ongoing suit between the Donnellys and Lawyers Express. Furthermore, WC Carrier did not invoke the other statutory procedure available to it in the circumstances of this case. The remedy it seeks, an apparent claim against the tortfeasor which has paid its settlement, is simply not in the statute. It should not be appended onto the statutory framework by this Court: WC Carrier should have followed the statute.

Requiring WC Carrier to comply with the statute is neither unfair nor burdensome. Instead, to do what WC Carrier seeks would be inequitable, as well as unjustified. The statute, which provides that the employer/carrier "may file in the suit a notice of payment…", to create a lien, contemplates that there will be times when a workers compensation insurer will choose not to pursue such a lien to seek reimbursement. *See* § 440.39(3)(a), Fla. Stat. (1997). For instance, when there has been a settlement between the insurer and the employee waiving reimbursement, or when such recovery is overall *de minimis*, or internal workers compensation insurer's policies do not permit the insurer to seek recovery, or for other factual reasons. Necessarily then, a third-party cannot know the carrier's intention--or indeed sometimes even the existence of a workers compensation payments or their amount--without the presence of the statutorily required notice. The statute is clear: for a carrier's claim to "constitute a lien" on proceeds from a settlement or judgment payment in the employee's tort case, a formal notice must be filed with the court in the tort case, and served on the employee and all parties to the suit. Failure to file in the case is fatal to the WC Carrier's claim of lien *vis a vis* third-party Lawyers Express (and Canal). No other lien is permitted or required by the statute in question, and this Court should decline WC Carrier's entreaty to embellish the statutory framework in contravention of the plain legislative enactment.

Another procedure was available to WC Carrier in the circumstances of this case, and it was not utilized either. The accident between Mr. Donnelly and the Lawyers Express Trucking vehicle occurred on April 15, 1997. One year later, since the Donnellys had not filed suit, WC Carrier had the right to institute a lawsuit against Lawyers Express and to recover its subrogated interests and the other damages suffered by the employee, Mr. Donnelly, and his dependants. § 440.39(4)(a), Fla. Stat. (1997). That right existed under the statutory framework for one year, after which only the employee and his related claimants could file the action. § 440.39(4)(b), Fla. Stat. (1997). Since the Donnellys filed the instant action on March 31, 1999, WC Carrier had almost the entire year contemplated by the statute within which to accept and apply the statutory procedure available to it, but it did nothing. Having sat on the rights the legislature did provide to it, WC Carrier petitions this Court for a remedy that the legislature did not provide. The statute does not support that request, and it should be denied.

B. Section 440.015 Reinforces that Lawyers Express is Not Subject to an Equitable Lien and Reinforces that this Statute is to be Strictly Construed

In the absence of any statutory support for its desired remedy, WC Carrier repeatedly refers to its self-defined "purpose" of the workers compensation statute as justification for the judicial legislation it seeks from this Court. In claiming generalized support of its claim to an equitable lien by some statutory "purpose", WC Carrier cites to section 440.015, Fla. Stat. (1997). Because of its explicit recognition of the relationship to which the workers compensation system is directed, i.e. the employer-employee relationship, § 440.015 actually negates WC Carrier's claim that it is entitled to an equitable claim against Lawyers Express.

Specifically, section 440.015 provides:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers return to gainful reemployment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. ***The workers' compensation system in Florida is based on a mutual renunciation of common- law rights and defenses by employers and employees alike.*** In addition, it is the intent of the Legislature that the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured ***worker or*** the rights of the ***employer.*** Additionally, the Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be given a broad liberal construction in favor of ***the employee on the one hand or of the employer on the other hand***, and the ***laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction*** and not liberally in favor of either ***employee or employer. . . .***

[emphasis added/ending deleted]. From this section may be drawn two truths, the first is that Florida's workers compensation statute is designed to define the relationship between an *employee* and his/her *employer*--not the employee, employer and third-party tortfeasor. Secondly, Chapter 440, Florida Statutes is expressly in derogation of Florida's common law and, thus, to be strictly construed. *See, e.g., Fidelity & Casualty Co. of New York v. Bedingfield*, *supra*. No "purpose" can be found that requires or justifies interfering in the balance established by the statute. The statute fully implements its purposes, to the extent and in the manner that the legislature chose to implement them. Here, the alleged "purpose" of the statute simply cannot be used to create statutory language. Thus, the ultimate question is what does the statute say with respect to the instant controversy. The only remedies the statute affords were those not utilized by WC Carrier in this case. *See* Section A, *supra*.

C. Section 440.015, Fla. Stat. (1997) Further Reinforces that WC Carrier is Under No Circumstances Entitled to an Equitable Lien Against Lawyer's Express

Even if one assumed, in spite of the statutory language, that section 440.015 did not recognize inherent limits in the scope of Chapter 440's reach to employees and employers, section 440.015 teaches that Chapter 440 is to be construed: "[S]o as to assure the quick and efficient delivery of disability and medical benefits to an injured worker. . . .". As such, any interpretation that draws a third-party tortfeasor into the middle of which of the two claimants is entitled to the settlement payment ***after*** the third-party tortfeasor has paid to settle a case, and without any specific statutory notice being filed in the tort case docket despite the employer's and/or workers compensation carrier's actual knowledge of the tort case, would serve to slow the payment of tort settlements, could result in tortfeasors' engaging in necessary discovery as to the presence or absence of any workers compensation payments/liens, and would likely result in the slowing of alternative disposition of the otherwise innocuous personal injury cases that crowd the courts' dockets today.

Section 440.015 demands that the requested so-called equitable lien not be foisted *ex post facto* upon the "innocent" third party which has no obligations created by the statute, and WC Carrier's misguided arguments about the "purpose" of § 440.39 should not be accepted to justify variance from the carefully balanced statutory structure.

III. Further Review of the Workers Compensation Statute Demonstrates That Section 440.39 Does Not Relate to Lawyers Express Trucking, Inc. and/or to Canal Insurance Company

It must first be remembered that this matter involves *three* representative groups of parties: 1) the employer and its workers compensation carrier (WC Carrier), as Petitioner; 2) the injured employee (the Donnellys); and, 3) the third party tortfeasor and its insurance carrier (Lawyers Express), as Respondents. This matter does *not* involve, as WC Carrier repeatedly implies, only two parties.

In fact, the statute from which WC Carrier attempts to have this Court create a new equitable remedy against companies not involved in the employer-employee relationship, from which all workers compensation principles initially spring, in no way relates to Lawyers Express. That is, the statute under which WC Carrier lodges its demand for an "equitable lien" and upon which it grounds this appeal is essentially a portion of the comprehensive statutory framework affecting and defining the rights and responsibilities of only two parties, i.e. the injured employee (the Donnellys), and his employer (or its workers compensation carrier), when workers compensation coverage exists. Section 440.39 does *not, inter se*, control the conduct or define the relationship between either of those parties and third-party tortfeasors, such as Lawyers Express. Those relationships are defined by other laws, both statutory and case based.

Specifically, § 440.39, Fla. Stat. (1997), under which WC Carrier seeks to justify having this Court craft an equitable lien for WC Carrier, provides at subsection one:

> If an employee, subject to the provisions of the Workers' Compensation Law, is injured or killed in the wrongful act of his or her employment by the negligence or wrongful act of a third-party tortfeasor, ***such injured employee*** or, in the case of his or her death, the employee's dependents ***may accept compensation benefits under the provisions of this law, and at the same time such injured employee*** or his or her dependents or personal representatives ***may pursue his or her remedy by action at law or otherwise against such third-party tortfeasor.***

[emphasis added]. In other words, the statute directs that an injured employee may accept workers compensation benefits from his/her employer/workers compensation carrier, and simultaneously sue the stranger to the workers compensation relationship: the third-party tortfeasor. Section 440.39(1) does not, however, affect the liability of the third-party tortfeasor or the tortfeasor's carrier. That section does not "create" any remedy at law; it merely makes clear that the injured employee may pursue whatever remedies may exist, while still accepting workers compensation.[4]

As a corollary, § 440.39(2) defines the effect of a third party action on the employer-employee relationship by providing that a workers compensation carrier is subrogated to the rights of the injured worker, but only to the extent workers compensation benefits have been paid; or should the worker recover from the tortfeasor prior to payment of workers compensation benefits, the amount of such workers compensation benefits otherwise to be paid shall be offset by the recovery. Again, subsection two defines the relationship between the worker and his/her employer/workers compensation carrier--not the third-party tortfeasor (or the tortfeasor's carrier).

Section 440.39(3)(a) similarly provides a possible mechanism for enforcing the employer's subrogation rights where the statute explains, in pertinent part, that:

> Upon suit being filed, the ***employer or the insurance carrier***, as the case may be, ***may file*** in the suit a ***notice of payment of compensation*** and medical benefits to the employee or his or her dependents, ***which notice shall constitute a <u>lien upon any judgment or settlement</u> recovered*** to the extent that the court may determine to be their pro rata share for compensation and medical

[4] An earlier version of the workers compensation scheme did just the opposite: it required an injured employee to elect to accept workers compensation benefits, and effectively assign any right to recover from a third party tortfeasor to his employer; or to pursue the third party tortfeasor, without receiving workers compensation benefits. *Fidelity & Cas. Co. of New York v. Bedingfield,* 60 So. 2d 489, 492-3 (Fla. 1952).

> benefits paid or to be paid under the provisions of this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney.

[emphasis added]. It is this section that gives rise to a lien *against the judgment or settlement*--not a new claim against a third-party tortfeasor or its insurer. This section does not impose any new burdens on third-party tortfeasors nor does it require third-party tortfeasors to take any actions. Rather, should the statutorily filed notice be provided, then and only then, does a lien arise *against the settlement proceeds* or judgment. While good practice for the tortfeasor might be to protect that lien when the tortfeasor makes its payment, and case law suggests this is the legally necessary thing to do, the lien itself is only on the proceeds. When the statute is followed, the tortfeasor at least knows that a lien on the proceeds exists, and it can direct its conduct accordingly. Conversely, when no notice is filed, no statutory lien arises, and the tortfeasor should likewise be able to rely upon that state of affairs when directing its conduct.

Subsection 3(a) goes on to provide that, in the face of disagreement by the *claimants*, a judge may equitably distribute the proceeds of such a settlement or judgment, according to statutorily specified guidelines; and that subsection places the burden of proof of the correct allocation on the employee, in that instance. Then § 440.39(3)(a) further provides, in pertinent part:

> The determination of the amount of the employer's or carrier's recovery shall be made by the judge of the trial court upon application therefor [sic] ***and notice to the adverse party***. ***Notice of suit being filed shall be served upon*** the employer and compensation carrier ***and upon all parties to the suit or their attorneys of record <u>by the employee</u>***. ***Notice of payment*** of compensation benefits ***shall be served*** upon the employee and ***upon all parties to the suit or their attorneys of record by the employer*** and compensation carrier.

Thus, subsection 440.39(3)(a) provides that if notice is filed by the employer or its carrier <u>in the suit</u>, such notice gives rise to a lien against the settlement or the judgment. While that statute also contemplates notice of the lawsuit being delivered by the *employee* to his/her employer and its workers compensation carrier, it pointedly does not make the receipt of such notice a condition precedent to the employer’s ability to create a lien on the proceeds, if it chooses so to do.

In the instant case, WC Carrier had the right to create the statutory lien; it had actual knowledge of the lawsuit in which the lien could be created; and it did not act to create the statutory lien. Instead, almost a year after the settlement, this separate action was brought to relieve WC Carrier of the result of its own inaction, to the detriment of Lawyers Express, by a claim of a *post-facto* right to a lien--not recognized by the statute--on proceeds already paid. WC Carrier stretches to call this hoped-for result an “equitable” lien, under the facts of this case.

Petitioner rests much of its argument on inapposite language in § 440.39(3)(b), but subsection 440.39(3)(b) also does not impose a lien nor does it impose a burden on the third-party tortfeasor. Rather, that subsection merely provides a mechanism for the employee or the employer/carrier to have a court determine percentages of entitlement as between the two interests that are the constant subject of the workers compensation laws, the injured employee and his/her employer, before or after suit:[5]

> (b) If the employer or insurance carrier has given written notice of his rights of subrogation to the third-party tortfeasor, and, thereafter, ***settlement of any such claim or action at law is made***, either before or after suit is filed, ***and the parties fail to agree on the proportion to be paid to each, the circuit court of the county in which the cause of action arose shall determine*** the amount to be paid to each by such third-party tortfeasor in accordance with the provisions of paragraph (a).

Subsection b, as with every other subsection of § 440.39, does not inject the tortfeasor into the relationship between the employer and employee. Instead, this subsection requires the *employee* and *employer* to determine that there is a dispute in the amount to be paid to each, and then they, as the "parties" to whom money is to be paid, are to apply to a court to determine percentages of entitlement. This subsection again does nothing to impose burdens or restrictions on the third-party

[5] This was apparently the process followed by the employee in seeking to avoid payment to the employer/carrier in the case which may conflict with the Fourth DCA in the instant case. *See*, *C&L Trucking v. Corbitt*, 546 So.2d 1185 (Fla. 5th DCA 1989).

tortfeasor, who has no day-to-day knowledge of the status of the employee and employer relations.[6]

Construing the serial treatment of the employee-employer relationship in the context of a covered injury, § 440.39(4)(a) provides that should the employee not bring suit against a tortfeasor within one year, then the employer/workers compensation carrier *may* bring suit in the injured employee's name. As discussed above, WC Carrier had this opportunity in the present circumstance, but, again, chose not to avail itself of a statutory method to protect its subrogated interests in the employee's claim. Thereupon, section 440.39(4)(b) directs that should the employer/workers compensation carrier not bring suit after the first year, but before the end of the second year, then the right to sue reverts to the employee. Needless to say, this regulation of potential plaintiffs between themselves does not bear upon the tortfeasor's relationship to the only claim that exists, regardless of who actually exercises its right to bring it to suit.

Finally, subsections 440.39(5), (6) and (7) relate to the relationship between the <u>employee</u> and/or the <u>employer</u> (workers compensation carrier)--not the third party tortfeasor. Specifically, subsection five provides that if the carrier sues, then

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6 Moreover, in order to be consistent with the Florida law, this section must contemplate that a third-party tortfeasor and its insurer will tender its written mediated settlement payment within twenty days to the injured employee (*see* § 627.4265, Fla. Stat. (2005)) such that the employee and employer are then left to decide with the court their relative amounts of entitlement.

any settlement must be agreed to by the employee. *See* § 440.39(5), Fla. Stat. (1997). Subsection six specifically provides that any amount recovered by the employer or the employer's workers compensation carrier shall be credited against the employer's loss experience; a rate sensitive accommodation. *See* § 440.39(6), Fla. Stat. (1997). Subsection seven goes so far as to require the employer and employee to cooperate in bringing claims against third-parties. *See* § 440.39(7), Fla. Stat. (1997). All said, this statute defines elements of the employee and employer relationship, *not* those with third party tortfeasors or their insurers.

In the face of the foregoing, WC Carrier nevertheless has attempted to force Lawyers Express Trucking, a stranger to its relationship with the employee, into its dispute with the employee over the settlement funds--seeking the enforcement of a so-called "equitable lien," not against its employee who received the total of the Lawyer's Express Trucking paid settlement funds, including those to which WC Carrier is subrogated and to which this statute expressly applies, but against Lawyers Express Trucking, a stranger to the workers compensation relationship, which company no longer has the settlement funds and which was never provided the statutory notice required to create a workers compensation *lien* on the settlement proceeds before they were paid to the Donnellys. *See Appellants Initial Brief* at p. 34 ("Because the tortfeasor had actual notice of the payment and Petitioner's subrogation rights, their settlement with the employee without notice to Petitioner was at their own risk.”).

All of this is justified, WC Carrier asserts, because “contrary to this pronouncement by the Fourth District in the instant case [that § 440.39 does not provide for equitable remedies], § 440.39 is all about equitable remedies.” Appellants’ *Initial Brief* at p. 15. In this respect as to Lawyers Express Trucking, WC Carrier is simply wrong. Section 440.39 may have been written to balance the rights and obligations of the two parties controlled by its language, but it is not “all about equitable remedies” other than those expressly provided by its language. The statute does not contemplate such a remedy, and WC Carrier should not be provided same in the absence of statutory authority for such a lien or claim.

In point of fact, the statute contemplates that a court may be called upon equitably to apportion the <u>proceeds</u> of a settlement only within certain specified guidelines as between an employee and employer, and it does not otherwise provide other equitable leeway. *See Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So. 2d 1181 (Fla. 2005)(“We have generally recognized the principle of statutory construction, *expressio unius est exclusio alterius*-the mention of one thing implies the exclusion of another. We also have recognized as a general rule … that statutes in derogation of the common law are strictly construed.”)(internal citations and quotations deleted). The Court should decline WC Carrier’s invitation to graft onto the statute an equitable remedy not envisioned by the

legislature, i.e. that third-party tortfeasors could be swept, after the fact, into the inner workings of Florida's workers compensation statute for so-called equitable reasons, rather than explicit, expressed statutory reasons. If the Legislature had intended to grant the courts the flexibility to award generalized equitable relief in this § 440.39, it certainly knew how to do so. *See*, *e.g.*, § 44.406, Fla. Stat. (2005)("(1) Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application by any party to a court of competent jurisdiction, be subject to remedies, including:
(a) *Equitable relief*. …")(emphasis added).

Finally, WC Carrier fails to appreciate the old maxim of equity that in order to get equity, one must do equity. That is, WC Carrier claims that Lawyers Express's settlement with the Donnellys was "at its own risk" because Lawyers Express had actual knowledge of WC Carrier's earlier letter saying that it had paid benefits to Mr. Donnelly. WC Carrier then asserts that as such, it is now entitled to an "equitable" lien against Lawyers Express and Canal. At the same time it demands its so-called equitable lien, WC Carrier glosses over the fact that it too had *actual* notice that a lawsuit was progressing between Lawyers Express and the Donnellys. Record at p. 8. In the face of such knowledge, WC Carrier did not take the remarkably simple step of filing in the tort suit the required statutory notice which would have created the statutory lien to which it now aspires. Additionally, WC Carrier simply ignores the right it did not itself exercise to bring suit against Lawyers Express Trucking and control that litigation.

Under the circumstances, WC Carrier should not now be permitted to bang the equity pulpit as against Lawyers Express, and create from whole cloth a *new* remedy (equitable lien) as against Lawyer Express Trucking from a statute that does not govern the relationship between WC Carrier and the employee, and the third-party tortfeasor. Indeed, such a remedy has **never** been granted by **any** Florida Court as discussed in Section I, above. This Court should not be the first one to do so, without statutory authorization

Conclusion

Canal Insurance Company and Lawyers Express Trucking, Inc. suggest that this matter is not properly before this Court, as the perceived conflict between the Fifth District Court of Appeal in *Corbitt* and the Fourth District Court of Appeal in this case is not express and direct, in light of the significant factual distinctions.

In the event this Court reaches the merits of this case, the Court should reject Petitioner's effort to have this Court append the concept of an equitable lien or claim against a third-party tortfeasor which paid the mediated settlement amount as required by law, without any statutory lien being imposed on the settlement proceeds. The workers compensation system is purely a creature of statute, which gave Petitioner opportunities to protect its interests. Petitioner's ill-advised attempt to circumvent the statutory requirements when it declined to use the statutory process should be rejected.

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Certificate of Service

I hereby certify that on January 27, 2006, the undersigned furnished by U.S. Mail a copy of the foregoing to Steven P. Pyle, Esquire, 4063 N. Goldenrod Road, Suite 208, Winter Park, Florida, 32792; to Elizabeth C. Wheeler, Post Office Box 2266, Orlando, Florida 32802-2266; and to Ronald M. Rowars, Esquire, 2400 SE Midport Road, Suite 120, Port St. Lucie, FL 34952.

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Certificate of Compliance

The undersigned certifies that this Reply Brief/Initial Cross Appeal Brief complies the font requirements of Fla. R. App. P. 9.100(1).

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