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,

L.T. CASE NO. 4D04-2458

Petitioner,

vs.

LAWYERS EXPRESS TRUCKING, INC., CANAL INSURANCE COMPANY, JOHN DONNELLY and ELIZABETH DONNELLY,

Respondents.
_____/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA LOWER TRIBUNAL CASE NO. 4D04-2458

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties will be referenced by proper name or by their positions in this proceeding. References to the record will be made in parentheses by volume and page number, as (R.____). References to the Appendix will be made in parentheses by page number, as (A.___).

STATEMENT OF THE CASE

This action arose following settlement of a tort lawsuit by Respondents John Donnelly and Elizabeth Donnelly, his wife, against Respondents Lawyers Express Trucking, Inc. and Canal Insurance Company, Inc. (R.2) The tort action was filed as a result of a motor vehicle accident in which John Donnelly was injured. (R.2) At the time of the accident, Mr. Donnelly was in the course and scope of his employment with Ft. Pierce Nissan, Inc. (R.1) On behalf of Ft. Pierce Nissan, Inc., Petitioner paid workers' compensation and benefits for the injuries sustained by Mr. Donnelly. (R.1)

When the tort action was settled, Respondents failed to notify Petitioner and failed to provide for repayment to Petitioner of the compensation and medical benefits it had paid to or on behalf of Mr. Donnelly. (R.1-3) Therefore, Petitioner filed in the Circuit Court of St. Lucie County a petition for equitable distribution pursuant to § 440.39, Florida Statutes (1997). (R.1-3) Respondents Lawyers Express and Canal Insurance moved for summary judgment on the basis that Petitioner had not filed a "notice of lien" in the tort lawsuit. (R.99)

The trial court granted the motion for summary judgment. (R.124-25) The court determined that the "lien" must be filed when the carrier has actual notice of the action, even though the employee did not provide notice of suit as required by statute. (R.125) The trial court entered final summary judgment against Petitioner. (R.127) Petitioner appealed the judgment to the Fourth District Court of Appeal.

The Fourth District affirmed the judgment against Petitioner. (A.1-2) Noting that Petitioner relied on *C & L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989), wherein the Fifth District imposed an equitable lien in favor of the worker's compensation carrier on proceeds from settlement of a tort action, the Fourth District stated it disagreed with that decision. (A.2) The court certified the following question for express and direct conflict with Corbitt:

> 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"?

(A.1)

The Fourth District recognized that, pursuant to section 440.39(2), the entity that pays workers compensation benefits has statutory subrogation rights in any third-party suit. (A.2) The court also acknowledged that section 440.39(3)(a) requires the injured employee to serve a "notice of suit" upon the employer carrier.

(A.2) Upon suit being filed, the employer or carrier may file a "notice of payment" in the third-party suit, which "shall constitute a lien upon any judgment or settlement" resulting from the tort action. (A.2) The court noted that the purpose of the statute is to allow an employer or carrier to be made whole when workers compensation benefits have been paid to a beneficiary who later recovers from a third party for the same injury. (A.2)

The court noted that neither party complied with the statutory notice requirements. (A.2) However, the court determined that Petitioner had actual notice of the third-party suit. (A.2) Because Petitioner had actual knowledge of the suit and failed to file a "notice of payment" in accordance with section 440.39(3)(a), the court held that any claims or liens of Petitioner were waived. (A.3)

The Fourth District reasoned that workers' compensation is a branch of law which is entirely statutory in origin. (A.2) The court determined that the only subrogation rights available to employers and carriers are those delineated in the statute. (A.2) The court disagreed with *Corbitt* because "section 440.39 does not provide for equitable remedies." (A.3)

Petitioner timely filed its notice to invoke this Court's jurisdiction.

STATEMENT OF THE FACTS

On April 15, 1997, John Donnelly was injured as the result of a motor vehicle accident which occurred while he was in the course and scope of his employment with Ft. Pierce Nissan, Inc. (R.15) Julius Grant was the operator of the vehicle which collided with Donnelly's vehicle. Lawyers Express Trucking, Inc., owned the vehicle operated by Grant. Canal Insurance Company provided liability coverage to Grant and Lawyers Express.

Petitioner was the servicing agent for Florida Retail Federated Self Insured Fund, the worker's compensation carrier for Ft. Pierce Nissan, Inc.. (R.1) Petitioner paid worker's compensation benefits totaling $53,780.83 to Donnelly. (R.6) Robert Mott, a licensed adjuster working for Petitioner, handled the subrogation of Donnelly's claim. (R.114)

On September 15, 1997, Mr. Mott sent a letter to Lawyers Express notifying it of Petitioner's claim of lien for worker's compensation benefits paid as against any third party settlement proceeds or verdict monies paid. (R.114) The letter informed Lawyers Express that Petitioner as subrogee "shall look to you for reimbursement." (R.115) Mr. Mott suggested that Lawyers Express forward the letter to its liability carrier for their notice and disposition. (R.115) Copies of the letter were sent to Ft. Pierce Nissan, Inc.; John F. Donnelly, c/o his attorney, Ronald Rowars; and Julius Grant. (R.115)

In 1999 Mr. Donnelly sued Julius Grant and Lawyers Express Trucking, Inc., in the Circuit Court for St. Lucie County, Case No. 99-443. (R.8) No notice of the suit was provided to Petitioner. (R.118) As a result, no notice of payment of compensation benefits was served by Petitioner after the suit was filed.

In May 1999 Donnelly and Petitioner entered into a stipulation and joint petition to the Judge of Compensation Claims for approval of a lump sum settlement of the worker's compensation claim. (R.14-31) The settlement was approved by the Judge of Compensation Claims on May 25, 1999. (R.13) The settlement made no provision for waiver of the worker's compensation lien. (R.13-35; 110-14)

On February 17, 2000, counsel for Lawyers Express issued a subpoena to Petitioner seeking copies of "every piece of paper in your workers' compensation claim file of John Donnelly vs. Ft. Pierce Nissan." (R.8) Petitioner complied with the subpoena. (R.13-35) Copies of documents produced by Petitioner, including documents pertaining to the worker's compensation settlement, were filed by Respondents in the instant case. (R.13-35)

In August 2000 John Donnelly, Elizabeth Donnelly, Julius Grant, Lawyers Express and Canal Insurance entered into a settlement of the tort claims for the sum of $550,000.00. (R.9) The settlement included "any and all claims arising out

of an automobile accident on or about April 15, 1997, in St. Lucie County, Florida." (R.9) The settlement agreement provided that "the Plaintiffs are responsible for any and all liens." (R.12) The release required Mr. and Mrs. Donnelly "to hold harmless and indemnify second party from any and all claims of third parties to the proceeds of this settlement." (R.9)

Petitioner was not informed of the settlement. (R.114) Mr. Mott subsequently learned of the settlement when he reviewed the Jury Verdict Reporter. (R.114) Petitioner thereafter filed its petition for equitable distribution of the settlement proceeds pursuant to § 440.39, Florida Statutes. (R.1-3)

The petition named Lawyers Express Trucking, Inc. and Canal Insurance Company, Inc., as defendants. (R.1) Lawyers Express and Canal Insurance (hereinafter collectively "Canal") moved to dismiss the petition on grounds *inter alia* that the petition was "without merit." (R.4-5) The motion was denied by the trial court. (R.56-57)

In their answer to the petition, Canal Insurance did not deny a single allegation of the petition. (R.64-65) Rather, Canal reasserted that the Petition "fails to state a legal cause of action." (R.64) Canal also alleged that Petitioner failed to file any notice of lien and/or to record same in the lawsuit and that failure to file a notice and/or record it barred any claim for equitable

distribution/subrogation. (R.64-65) Canal did not assert that it was prejudiced in any way by the lack of formal notice after the suit was filed. (R.64-65)

Canal then moved for summary judgment based on the notice issue. (R.70, 99-100) In response to the motion, Petitioner filed the affidavit of Robert Mott setting forth the fact that on September 15, 1997, he notified Canal of Petitioner's payment of worker's compensation benefits and of Petitioner's right of subrogation. (R.102, 113-14) Petitioner noted that Canal's adjuster, Wesley Brown; Canal's defense counsel, Bradford Jefferson; and the employee's attorney, Ronald Rowars, all admitted they had knowledge of workers' compensation benefits having been paid. (R.102) All parties in both the workers' compensation proceeding and the third party tort action, as well as their attorneys, knew prior to settlement of the third party claim that workers' compensation benefits had been paid as a result of the accident. (R.102-03) Canal did not at any time refute or in any way dispute that it was on notice of Petitioner's claim.

In its order on Canal's motion for summary judgment, the trial court specifically noted that, at the time of the employee's claim against the third party tortfeasors, both the employee and the tortfeasors had knowledge and had received letters advising that the employee was injured in the course of his employment and that workers' compensation benefits had been paid. (R.124) The trial court

granted the motion for summary judgment based on *Zurich, U.S. v. Weeden*, 805 So. 2d 945 (Fla. 4th DCA 2001). (R.125) The trial court believed that *Weeden* dictated this result because of its holding that a worker's compensation carrier with actual notice of a lawsuit against the third party tortfeasor must file a notice of payment even though the employee did not follow the statute. (R.125) Citing *Maryland Casualty Company v. Simmons*, 193 So. 2d 446 (Fla. 2d DCA 1966), the court noted that its decision might have been different if this case was decided in the Second District. Final judgment was subsequently entered in favor of Lawyers Express and Canal. (R.127-28)

STATEMENT REGARDING JURISDICTION

The Fourth District certified the following question for express and direct conflict with *C & L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989):

> 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"?

This Court has jurisdiction pursuant to Article V, section 3(b)(4) of the Florida Constitution.

SUMMARY OF THE ARGUMENT

The Fourth District's decision in the instant case expressly and directly conflicts with the Fifth District's opinion in *C & L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989), and fails to give effect to the legislative intent underlying section 440.39. The Fifth District determined that the worker's compensation carrier was equitably entitled to a lien against the employee's settlement with the tortfeasor, where neither the employee nor the carrier had complied with the notice provisions of section 440.39(3)(a) but all parties were on notice of the carrier's payment of worker's compensation benefits. The Fourth District expressly disagreed with the Fifth District's opinion "because section 440.39 does not provide for equitable remedies."

To the contrary, section 440.39 is all about equitable remedies. The purpose of the statute is to allow an employer or carrier to be made whole when workers compensation benefits have been paid to a beneficiary who later recovers from a third party for the same injury. This purpose is reflected in the plain language of the statute.

The statute contains notice provisions designed to effectuate its purpose, but nothing in the statute suggests or implies that an employer/carrier's right of reimbursement is conditioned upon its compliance with technical notice requirements when all parties have actual notice. When all parties including the

tortfeasor and its insurance carrier have actual notice of the payment of compensation and benefits, the requirements for due process are satisfied and there should be no impediment to enforcement of the worker's compensation lienholder's right of reimbursement. The Fourth District's decision to deny equitable distribution based on a technical failure to comply with a notice requirement elevated form over substance.

The acceptance of the Workers' Compensation Law by the employee, employer and insurance carrier constituted a contract between the parties which embraced all of the provisions of the law as they existed at the time the employee sustained an injury. At the time of Donnelly's injury, the Workers' Compensation Law provided that, when he accepted compensation or other benefits, Petitioner became subrogated to his rights against the third party tortfeasors. When he filed suit against the tortfeasors, section 440.39 required him to sue not only for his own benefit but also for the use and benefit of Petitioner. Section 440.39 also required Donnelly to notify Petitioner of the filing of the lawsuit.

Donnelly failed in all of his obligations under section 440.39. He failed to notify Petitioner of the filing of the lawsuit. Although the suit included claims for the use and benefit of Petitioner, Donnelly and the tortfeasors excluded Petitioner from the settlement. Donnelly and the tortfeasors all knew that Petitioner had

made payments under the Workers Compensation Law and was claiming a right of reimbursement from the proceeds of the tort action, but no one notified Petitioner when the tort case was settled. Because Respondents failed in their own obligations under the statute, the Fourth District erred in holding that Petitioner was not entitled to equitable distribution of the settlement proceeds.

The Fourth District's conclusion that "section 440.39 does not provide for equitable remedies" is not supported by the case law. Many decisions have relied on equitable principles in construing section 440.39. Cases involving issues other than the Workers' Compensation Law have also recognized that equitable principles should be invoked when necessary to do justice between the parties.

This Court has held that the doctrine of equitable subrogation may be invoked when necessary to give full effect to the legislative intent underlying a statute. No court has ever held that an employer or carrier who has paid worker's compensation benefits as a result of a third party's negligence is not entitled to equitable subrogation under appropriate circumstances. The Fifth District's decision in *Corbitt* is consistent with the doctrine of equitable subrogation, which was implicitly rejected by the Fourth District in the instant case.

Where equity demands it, this Court has also permitted equitable liens to be imposed on homesteads beyond the literal language of the exemption in the Florida

Constitution. When the equitable circumstances fall within the spirit of the exceptions to the constitutional homestead exemption, this Court has imposed equitable liens to prevent unjust enrichment. So too should an equitable lien be recognized when the circumstances fall within the spirit of section 440.39 as in the instant case.

So long as the tortfeasor has received written notice of the employer or carrier's rights of subrogation, section 440.39(3)(b) provides for equitable distribution of any settlement of the tort action before or after suit is filed. Section 440.39(3)(b) is designed to protect the carrier in those situations not fully protected under section 440.39(3)(a). When its provisions are satisfied, section 440.39(3)(b) should and does preserve the carrier's right to obtain equitable distribution.

In the instant case the provisions of section 440.39(3)(b) were satisfied. Respondents had actual notice of the payment of compensation and benefits and Petitioner's claim for subrogation. The statute placed Respondents on notice of Petitioner's right of reimbursement. Because Respondents 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.

The Fourth District's decision should be quashed and the case remanded to the Circuit Court to make equitable distribution of the proceeds from the settlement of the tort action.

ARGUMENT

Statutory interpretation is a question of law subject to *de novo* review. *BellSouth Telecommunications, Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003). The Court's purpose in construing a statute is to give effect to the Legislature's intent. *Id*. In attempting to discern legislative intent, courts must first look at the actual language used in the statute. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). If the language of the statute is unclear, then rules of statutory construction control. *Id.*

One rule of construction provides, "In statutory construction a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity." *Id*. Once the intent is determined, the statute may then be read as a whole to properly construe its effect. *Id.* Section 440.015, Florida Statutes (1997), expresses the legislative intent with respect to interpretation of the Workers' Compensation Law:

> 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 worker's 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. . . .

In the instant case at least one court has observed that the steps the carrier must follow to secure a lien or to sue the third party tortfeasor are clearly defined by section 440.39 only in certain situations. *Maryland Cas. Co. v. Simmons*, 193 So. 2d 446, 448 (Fla. 2d DCA 1966). The results in other situations, declared by case law, have not at all times been obviously consistent. *Id.* By accepting jurisdiction in the instant case, this Court can resolve at least the conflict between the decisions in *Corbitt* and the instant case.

THE FOURTH DISTRICT'S DECISION TO DENY AN EQUITABLE LIEN WHEN ALL PARTIES HAD ACTUAL NOTICE OF THE PAYMENT OF COMPENSATION AND BENEFITS YET Respondents FAILED TO NOTIFY PETITIONER OF SETTLEMENT OF THE TORT ACTION IS CONTRARY TO THE LETTER AND THE SPIRIT OF SECTION 440.39, FLORIDA STATUTES (1997).

The Fourth District's decision in the instant case expressly and directly conflicts with *C & L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989), as well as with other appellate decisions. In *Corbitt* the Fifth District determined that the worker's compensation carrier was equitably entitled to a lien against the employee's settlement with the tortfeasor, where neither the employee nor the carrier had complied with the notice provisions of section 440.39(3)(a) but all parties were on notice of the carrier's payment of worker's compensation benefits. (A.5) In the instant case the Fourth District certified the following question for express and direct conflict with *Corbitt*:

> 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"?

(A.1) The Fourth District expressly disagreed with the Fifth District's *Corbitt* opinion "because section 440.39 does not provide for equitable remedies." (A.3)

Contrary to this pronouncement by the Fourth District in the instant case, section 440.39 is all about equitable remedies. The Fourth District actually noted in its decision that "the purpose of the statute is to allow an employer or carrier to be made whole when workers compensation benefits have been paid to a beneficiary who later recovers from a third-party for the same injury." (A.2) This purpose is reflected in the plain language of the statute.

Section 440.39(1) provides that an employee may accept worker's compensation benefits and at the same time pursue legal action against a third party tortfeasor. However, when the employee accepts worker's compensation benefits, the employer/carrier "shall be subrogated to the rights of the employee . . . against such third-party tortfeasor, to the extent of the amount of compensation benefits paid or to be paid as provided by subsection (3)." § 440.39(2), Fla. Stat. (1997). Subsection (3) provides in pertinent part:

> (3)(a) In all claims or actions at law against a third-party tortfeasor, the employee . . . *shall* sue for the employee individually *and* for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier, in the event compensation benefits are claimed or paid; . . . .
>
> (b) If the employer or insurance carrier has given written notice of his or her 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).

(Emphasis supplied.)

Section 440.39 contains additional provisions pertaining to the employer/carrier's right of recovery against a third-party tortfeasor. Subsection 4(a) provides:

> (4)(a) If the injured employee . . . fail[s] to bring suit against such third-party tortfeasor within 1 year after the cause of action thereof has accrued, the employer, if a self-insured, and if not, the insurance carrier, may, after giving 30 days' notice to the injured employee . . . and the injured employee's attorney, if represented by counsel, institute suit against such third-party tortfeasor, either in his or her own name or as provided by subsection (3), and, in the event suit is so instituted, shall be subrogated to and entitled to retain from any judgment recovered against, or settlement made with, such third party, the following: All amounts paid as compensation and medical benefits under the provisions of this law and the present value of all future compensation benefits payable, to be reduced to its present value, . . . together with all court costs, including attorney's fees expended in the prsecution of such suit, to be prorated as provided by subsection (3). The remainder of the moneys derived from such judgment or settlement shall be paid to the employee or his or her dependents, as the case may be.

Subsection (5) states:

> (5) In all cases under subsection (4) involving third-party tortfeasors in which compensation benefits under this law are paid or are to be paid, settlement may not be made either before or after suit is instituted except upon agreement of the injured employee . . . and the employer or his or her insurance carrier, as the case may be.

These provisions plainly evince a legislative intent that an employer/carrier who has paid worker's compensation benefits should be reimbursed by a third-party tortfeasor responsible for the employee's injury. The statute contains notice provisions designed to effectuate this purpose. Section 440.39(3)(a) provides:

> 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 . . . which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical 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. . . . 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 by the employee. 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. . . .

Read as a whole, section 440.39 does not suggest or imply that the employer/carrier's right of reimbursement is conditioned upon the filing in a lawsuit by the employee against the tortfeasor of a notice of payment of compensation and medical benefits. To the contrary, the statute provides for reimbursement of the employer/carrier whether or not suit is filed, so long as the tortfeasor has notice of the employer/carrier's right of subrogation.

Subsection (3)(a) provides that in all claims against a tort-feasor, the employee "*shall* sue for the employee individually *and* for the use and benefit of the employer . . . or . . . carrier." § 440.39(3)(a), Fla. Stat. (1997) (emphasis supplied). Section (3)(b) provides for equitable distribution between the employee and employer/carrier "either *before or after* suit is filed," so long as the third-party tortfeasor has been given notice of the employer/carrier's rights of subrogation. § 440.39(3)(b) (emphasis supplied). These provisions would be superfluous if the carrier's right of reimbursement was conditioned upon the filing in the tort action of a notice of payment.

In *C & L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989), the Fifth District determined that the word "shall" as used in the notice of suit requirement in section 440.39(3)(a) was mandatory and made operative the sentence which followed, which requires notice of payment of compensation benefits to be served

upon the employees and all parties to the suit or their attorneys of record. *Id* at 1186 (A.5). The Fifth District determined that, "without compliance with the first statutory requirement, the second is not required." *Id.* (A.5) *Corbitt* is the only decision in which this statutory language is construed.

The facts in *Corbitt* were virtually identical to those in the instant case. In *Corbitt* Aetna Life & Casualty Company insured C & L Trucking for workers compensation benefits. *Id.* at 1186. (A.5) Aetna notified the tortfeasors' insurance company of its subrogation claim before the filing of the plaintiff's lawsuit. *Id.* (A.5) As a defense to payment of any of the settlement proceeds to Aetna, the plaintiffs asserted that Aetna did not comply with section 440.39(3)(a), Florida Statutes (1985). 546 So. 2d at 1186. (A.5)

Noting that the plaintiffs relied on cases decided under a statute which had been amended after the cases were decided, and finding no precedent directly on point, the Fifth District extracted the "pertinent parts" of section 440.39 as it applied them to the facts of the case. *Id.* (A.5) The court noted that the plaintiffs filed their suit, knowing the carrier had paid benefits, against the tortfeasor who was given notice of the carrier's payments. *Id.* (A.5) The plaintiffs did not comply with the portion of the statute which required them to notify the carrier that suit against the tortfeasor had been filed. *Id.* (A.5) The court disagreed with the

plaintiffs' position that the carrier was obligated to strictly comply with the statute even though they themselves did not. *Id.* (A.5)

Given the two notice requirements at the end of section 440.39(3)(a), the Fifth District concluded that actual notice to the parties was sufficient to put the plaintiff and the tortfeasor on notice of the interests of the carrier. *Id.* (A.5) The court also determined that the plaintiffs' failure to give the requisite notice of suit to the carrier operated to bar the plaintiff from raising its claimed defense of the carrier's failure to comply with the statute. *Id.* (A.5) The court held the carrier was equitably entitled to a lien against the settlement. *Id.* (A.5)

Although the Fifth District did not identify the cases relied upon by the plaintiffs in *Corbitt*, no doubt at least two of those cases were cited by the Fourth District in support of its decision in the instant case. The Fourth District cited *Fidelity & Casualty Company of New York v. Bedingfield*, 60 So. 2d 489, 495 (Fla. 1952), for the proposition that the only subrogation rights available to employers and carriers are those delineated in the statute. (A.2) The court cited *Continental Insurance Co. v. Industrial Fire & Casualty Insurance Co.*, 427 So. 2d 792, 793 (Fla. 3d DCA 1983), for the proposition that the insurer must comply with the rules and conditions stated in the statute in order to avail itself of the benefits conferred by the statute. (A.2-3)

Continental does not support the Fourth District's decision in the instant case. That opinion makes no reference whatsoever to the facts in the case. There is no indication as to whether or not the plaintiff complied with the notice provisions and no indication as to whether or not the tortfeasor had actual knowledge of the payment of worker's compensation benefits. Additionally, the decision was partially based on language in section 440.39(3)(a) that has since been deleted. The statute no longer requires that a lien be recorded. *See Cotton Belt Ins. Co. v. Travelers Ins. Co.*, 402 So. 2d 69, 70 (Fla. 4th DCA 1981).

Bedingfield is inapposite to the instant case for several reasons. In that case, after the employee notified the worker's compensation carrier that she had filed suit against the tortfeasors, the carrier filed a motion to be added as a party plaintiff in the lawsuit. 60 So. 2d at 491. The circuit court denied the motion. *Id.* at 492. The carrier then filed a petition for certiorari, seeking a determination as to whether the carrier had a right to intervene as a party plaintiff. *Id.*

Before deciding the issue, the Supreme Court undertook an analysis of the worker's compensation law. *Id.* The court noted that prior to its enactment, an injured employee could not be compensated by an employer for damages unless the claim was based upon the negligence of the employer. *Id.* Lawsuits were expensive, and employers had all the traditional defenses to such a claim. *Id.* The

workers' compensation laws were enacted to provide for immediate and certain payment to be borne by the employer and without the necessity of proof of negligence or long drawn-out and expensive law suits and the uncertainty of the result of such law suits. *Id.*

The first workers' compensation law in Florida was enacted in 1935 as Chapter 17481. 60 So. 2d at 492. The original act required the employee to make an election to take compensation or to pursue his action at law in the civil courts against the third party tortfeasor. *Id.* at 493. The giving of notice to accept compensation operated as an assignment to the employer's insurance carrier of all right of the injured employee against the third party tortfeasor. *Id.* The carrier was entitled to retain from the amount recovered all expenses incurred in connection with the lawsuit, including a reasonable attorney's fee; all compensation benefits paid to the injured employee; and an amount equal to the present value of all future compensation to be paid the injured employee. *Id.* If anything was left, it was paid to the injured employee. *Id.*

The *Bedingfield* court noted that under the original statute, the employee had no right whatsoever to maintain or control a suit against a third party who caused his injury and was practically at the mercy of the employer or the insurance carrier. *Id.* As a result, many situations arose which caused injustice to the employee. *Id.*

For instance, sometimes the tortfeasor was insured by the same insurance company which provided worker's compensation benefits for the particular accident. *Id.* In those situations it was to the interest of the insurance company to settle or collect damages in tort only for the amount the insurance carrier would be required to pay under the terms of the workers' compensation law. *Id.* While it was to the interest of the employee to receive full compensation for injuries, it was to the interest of the insurance company for the tortfeasor to hold the damages down to no more than the insurer would be required to pay under the workers' compensation law. *Id.* In order to correct these injustices, the Legislature amended section 440.39 in 1951. 60 So. 2d at 493.

The 1951 amendment abolished the election requirement and provided that an injured employee might claim workers' compensation benefits and at the same time institute suit against a third party tortfeasor. *Id.* The amendment adopted many of the provisions which are included in the present version of the statute. *Id.* at 493-94. The *Bedingfield* court noted that the 1951 amendment simply gave the injured employee the right to control his own lawsuit against a third party tortfeasor and "provides for limited subrogation on an equitable basis." *Id.* at 494.

It was against this analytical backdrop that the *Bedingfield* court observed in dictum that "the compensation insurer has no right of subrogation and no right of assignment . . . except that given it by the Statute." *Id.* at 495.

> In the absence of a law or a contract specifically providing for it, insurance companies do not have the right of subrogation against the party causing such injury. In this case without the Statute, the compensation insurer would have no right of subrogation. Workmen's Compensation Laws are enacted because they deal with a matter of great public interest and are enacted under the police power of the State. When compensation insurers seek or accept the benefits of subrogation as provided for by the law, they must also accept the rules, regulations, burdens and conditions which go with the right of subrogation as provided by law.

Id. The Court noted that in *Haverty Furniture Co. v. McKesson & Robbins*, 154 Fla. 772, 19 So. 2d 59 (1944), it held that the employee was not a necessary party to a lawsuit under the original version of the workers' compensation law. 60 So. 2d at 495. In light of *Haverty*, the *Bedingfield* Court held the employer was not a necessary party under the amended law, which gave the injured employee control of the case. *Id.* For these reasons, the petition for certiorari was denied. *Id.*

In *Bedingfield* there was no issue as to the carrier's right to claim subrogation or a lien. The only issue was whether the carrier was entitled to intervene as a party plaintiff in the employee's lawsuit. The court's disposition of

that issue in no way implicates Petitioner's right to recovery in the instant case, where Petitioner did not seek to intervene but sought only to protect the subrogation rights expressly granted by the statute.

Language in *Bedingfield* does support the Fifth District's decision in *Corbitt*. The *Bedingfield* Court stated:

> There can be no question that the acceptance of the Workmen's Compensation Law by the employee, employer and insurance carrier constitutes a contract between the parties which embraces all of the provisions of the law as they exist at the time the employee sustains an injury.

60 So. 2d at 493. The *Corbitt* decision follows this precept as it gives effect to the provisions of section 440.39.

The Worker's Compensation Law as it existed at the time of Donnelly's injury provided that, if an employee accepts compensation or other benefits, the employer or carrier "*shall* be subrogated to the rights of the employee" against a third party tortfeasor whose negligence or wrongful act causes injury to the employee in the course of his or her employment. § 440.39(1), Fla. Stat. (1997) (emphasis supplied). Further, "in *all* claims or actions at law against a third party tortfeasor, the employee . . . *shall* sue for the employee individually *and* for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier,

in the event compensation benefits are claimed or paid . . . ." § 440.39(3)(a), Fla. Stat. (1997) (emphasis supplied). From its inception in 1935, the underlying theory of section 440.39 has been that a double recovery by the employee should be avoided without extending tort immunity to strangers outside of the employer-employee relationship. *See Aetna Cas. and Surety v. Bortz*, 271 So. 2d 108, 113 (Fla. 1972).

The Fifth District's decision in *Corbitt* is consistent with this principle. Citing its previous decision in *Employer Service Corp. v. Szlosek*, 566 So. 2d 897 (Fla. 4th DCA 1990), the Fourth District acknowledged in the instant case that the purpose of section 440.39 is to allow an employer or carrier to be made whole when worker's compensation benefits have been paid to a beneficiary who later recovers from a third party for the same injury. (A.2) The court nevertheless decided the issue contrary to the overriding purpose of the statute.

The court in *Szlosek* noted that the statute is not intended as a vehicle for a beneficiary to recover twice for the same injury. 566 So. 2d at 898. The *Szlosek* court rejected a claim by the employee's estate and the tortfeasors that a lien filed the same day they settled the third party lawsuit was untimely. *Id.* The court noted that the appellees did not comply with their own notice obligations under the statute and that the worker's compensation carrier only accidentally found out

about the lawsuit when the tortfeasor's attorney happened to contact the carrier's attorney requesting some records. *Id.* at 897-98. Under these circumstances, the court reversed the trial court's order striking the carrier's lien and remanded with instructions for the trial court to determine to what extent the carrier was entitled to recover from the settlement proceeds the benefits paid to the appellees. *Id.* at 898.

The record in the instant case is silent as to how and when Petitioner learned of the third party action. Mr. Mott's affidavit shows that he only learned of the settlement after it occurred. Material facts in *Zurich, U.S. v. Weeden*, 805 So. 2d 945 (Fla. 4th DCA 2001), also relied upon by the Fourth District in the instant case, were not present herein.

In *Weeden* the record was silent as to whether notice of the third party lawsuit was ever served upon the employer or carrier (Zurich). *Id.* at 946. However, Zurich's counsel was present on the first day of trial of the tort action. *Id.* Zurich never filed a notice of lien nor did its attorney file a notice of appearance. *Id.*

During the trial the court granted the tortfeasor's motion for a set-off of Weeden's worker's compensaton payments. *Id.* The order was not served on Zurich. *Id.* After several days of trial, the case was settled. *Id.*

After the settlement, Zurich filed a notice of lien. *Id.* at 947. Two months later, it filed a petition for equitable distribution of the settlement proceeds. *Id.* The trial court denied the petition on grounds that section 440.39 did not authorize a workers' compensation lien in the particular action[1] and that the petition was untimely. *Id.* The Fourth District found the second basis to be dispositive. *Id.*

The *Weeden* court determined that section 440.39(3)(a) "envisions" that the carrier's notice of lien be filed before there is a judgment or settlement, not after. 805 So. 2d at 948. The court reasoned:

> Any other construction of the statutory language would lead to the inequitable result which would occur here, if permitted, that parties reach a settlement that does not include the amount later sought to be asserted as a lien. *The extensive notice provisions of the statute, requiring notice of the suit on all parties, and the corollary notice of payment of compensation benefits, are designed to ensure a sharing of information before a party's position is adversely affected.*

Id.

The court found it significant that Zurich's notice of payment was not filed until after the amount at issue had been presumably set off, or excluded from the scope of the settlement. *Id.* As a result, the trial court did not have a timely

[1]The lawsuit involved a legal malpractice claim brought against attorneys who mishandled the employee's third party claim. 805 So. 2d at 946.

opportunity to consider Zurich's arguments as to the reach of its subrogation rights. *Id.* at 949. Additionally, the trial court ruled on the issue of the set-off without the benefit of the arguments and authorities that were first presented to it at the hearing on Zurich's petition. *Id.* For these reasons the Fourth District affirmed the denial of Zurich's petition for equitable distribution. *Id.*

The material facts supporting the court's decision in *Weeden* were not present in the instant case. In the instant case there was no setoff for the worker's compensation benefits paid by Petitioner. The settlement documents clearly reflect that Petitioner's lien was included in the settlement of the tort action. (R.9, 12)

Although the Fourth District's decisions in *Szlosek* and *Weeden* were founded on equitable principles just as in the Fifth District's decision in *Corbitt*, the Fourth District inexplicably rejected that reasoning in the instant case. The Fourth District in the instant case rejected the Fifth District's recognition of an equitable lien in *Corbitt*. (A.3) The court stated that "section 440.39 does not provide for equitable remedies." (A.3)

Although the very purpose of the statute is to do equity between the parties and avoid a double recovery by the employee/plaintiff, the Fourth District denied equitable distribution to Petitioner based on its technical failure to file in the tort lawsuit a notice of payment of compensation and benefits. The Fourth District's

decision placed form over substance as it was undisputed that Respondents had actual knowledge of the payment and that Respondents failed to notify Petitioner of either the filing of the tort lawsuit or the fact of the settlement. This decision conflicts not only with *Corbitt* but with other appellate opinions.

In *Maryland Casualty Co. v. Smith*, 272 So. 2d 517, 519 (Fla. 1973), this Court noted that section 440.39 is silent as to any requirement for notice of settlement of a tort claim. When subsection (3)(b)[2] was added, it did not require a notice of settlement nor did it require the employer's consent to a settlement. *Id.* Although an employee is free to settle a tort claim with or without notice to the employer or carrier, this Court concluded that equitable factors should be considered in determining the employer's share of recovery. *Id.* For instance, failure to inform the carrier of a settlement may be a factor where it appears that

[2]Section 440.39(3)(b) provides:

> If the employer or insurance carrier has given written notice of his or her 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).

the employee and the third party have joined in a bad faith effort to lessen the employer's potential recovery. *Id.* *Smith* is yet another decision recognizing the equitable principles inherent in section 440.39.

In *Aspen v. Bayless*, 564 So. 2d 1081, 1082 (Fla. 1990), this Court recognized that an insurance company that has paid a loss on behalf of its insured is entitled to subrogation either by express contract rights or by equitable subrogation by operation of law. The issue in *Aspen* was whether a nonparty could recover costs it had incurred on behalf of a named party under the rule and statutes regarding offers of judgment. *Id.* at 1082. This Court determined that denying a cost award to a prevailing defendant who was insured, and whose insurance carrier was liable for a prevailing party's costs, would give the plaintiff and/or the plaintiff's insurance carrier, an undeserved windfall. *Id.* at 1082-83. Additionally, denying costs would subvert the purpose and intent of Rule 1.442 and sections 45.061 and 768.79, Florida Statutes (1987), i.e., to encourage parties to settle claims without going to trial. *Id.* at 1083. Thus, although these statutes did not expressly provide for equitable subrogation, this Court recognized that equitable subrogation would serve their purpose and intent.

(Emphasis supplied.)

In *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999), this Court noted that the doctrine of equitable subrogation is not created by a contract but by the legal consequences of the acts and relationships of the parties. As a result of equitable subrogation, the party discharging the debt stands in the shoes of the person whose claims have been discharged and thus succeeds to the right and priorities of the original creditor. *Id.* The difference between conventional and equitable subrogation was described as follows:

> Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. Subrogation arises by operation of law, where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is, in equity, entitled to the security or obligation held by the creditor whom he has paid,. Ths is called "legal subrogation." Conventional subrogation depends upon a lawful contract, and occurs where one having no interest in or relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights of the creditor so paid.

Id.

No court has ever held that an employer or carrier who has paid worker's compensation benefits as a result of a third party's negligence is not entitled to equitable subrogation under appropriate circumstances. Just as this Court recognized in *Aspen* that equitable subrogation would promote the purpose and

intent of the offer of judgment statutes, *Corbitt* held that circumstances can give rise to an equitable lien in accordance with the purpose and intent of section 440.39. (A.5) In rejecting *Corbitt*, the Fourth District in the instant case implicitly rejected the principles of equitable subrogation recognized by this Court in *Aspen* and *WQBA*.

This Court has recognized that equity may be invoked to impose a lien on homestead property protected by the Florida Constitution. Article X, section 4 of the Constitution provides in pertinent part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereof, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead . . . .

Where equity demands it, this Court has permitted equitable liens to be imposed on homesteads beyond the literal language of the Constitution. *See Palm Beach Savings & Loan Assoc. v. Fishbein*, 619 So. 2d 267, 270 (Fla. 1993). When the equitable circumstances fall within the spirit of the exceptions to the constitutional

exemption of homestead property, this Court has imposed equitable liens to prevent unjust enrichment. *Id.*

That same reasoning was employed by the Fifth District in *Corbitt* and rejected by the Fourth District in the instant case. Section 440.39 clearly provides a right of subrogation to an employer or carrier who has paid worker's compensation benefits. The circumstances of this case fall within the spirit of section 440.39, and an equitable lien should have been imposed to prevent unjust enrichment. Although Petitioner did not file a notice of payment of worker's compensation benefits, the parties to the tort action were admittedly on notice of the payment. Because the tortfeasors 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. *Century Elevator Co. v. Spinos*, 652 So. 2d 451, 452 (Fla. 4th DCA 1995). *See also Dade County v. Pavon*, 266 So. 2d 94 (Fla. 3d DCA 1972) (noting that a patient's uninsured motorist carrier was put on notice by the hospital lien statute of the possible existence of a lien, and the statute placed upon the insurer a duty to make no settlement until the possible existence of the lien was determined).

Section 440.39(3)(b) permits the employer or carrier to obtain equitable distribution if the tort action is settled before suit is filed. So long as the tortfeasor

has received written notice of the employer or carrier's rights of subrogation, section 440.39(3)(b) provides for equitable distribution of any settlement of the tort action *before or after* suit is filed. Section 440.39(3)(b) is designed to protect the carrier in those situations not fully protected under section 440.39(3)(a). *Maryland Casualty Co. v. Simmons*, 193 So. 2d 446, 449 (Fla. 2d DCA 1966). When its provisions are satisfied, section 440.39(3)(b) "should and does preserve the carrier's right to obtain equitable distribution." 193 So. 2d at 449.

In the instant case, the provisions of section 440.39(3)(b) were satisfied. Petitioner gave written notice of its rights of subrogation to the third party tortfeasor. Thereafter settlement of the employee's claim against the tortfeasor was made, but there was no agreement on the proportion to be paid to the employee and to Petitioner. Under these circumstances, section 440.39(3)(b) required the circuit court to determine the amount of the settlement to be paid to the employee and to Petitioner. *See Simmons*, 193 So. 2d at 449.

This Court should accept jurisdiction of this case to resolve the conflict between the Fourth District's decision in the instant case and the Fifth District's decision in *Corbitt* . For all of the foregoing reasons, the Fourth District's decision in the instant case should be quashed.

CONCLUSION

The Fourth District's decision should be quashed and the case remanded to the Circuit Court to make equitable distribution of the proceeds from the settlement of the tort action.

Respectfully submitted,

s/ Elizabeth C. Wheeler

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CERTIFICATE OF SERVICE

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