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,

vs.

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

Respondents.
_____/

L.T. CASE NO. 4D04-2458

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

PETITIONER'S REPLY BRIEF ON THE MERITS

STEVEN P. PYLE and ELIZABETH C. WHEELER
Florida Bar No. 710180 Florida Bar No. 374210
STEVEN P. PYLE & ASSOCIATES, P.A. ELIZABETH C. WHEELER, P.A.
4063 North Goldenrod Road, Suite 208 Post Office Box 2266
Winter Park, Florida 32792 Orlando, Florida 32802-2266
Telephone: (407) 571-1848 Telephone: (407) 650-9008
Facsimile: (407) 571-1847 Facsimile: (407) 650-9070

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

TABLE OF CITATIONS (con't.)

Constitution and Statutes

PRELIMINARY STATEMENT

The parties will be referenced by proper name or by their positions in this proceeding. References to pages in the record will be made as (R.___) References to page numbers in the Answer Brief will be made as (Ans. Br.____).

INTRODUCTION

Respondents' "Statement of the Case" contains virtually no record citations. At least one of the averments has no record support. Nowhere in the record is there any documentation for Respondents' allegations that Petitioner was invited to mediation of the tort suit in August 2000 but did not appear or participate. (Ans. Br. 2, 4) The record shows only that there were issues of fact concerning the notification and attendance at the mediation conference in the tort action. (RI.108)

ARGUMENT

I. Jurisdiction under Article V, § 3(b)(4).

Respondents argue there is no conflict between the Fourth District's decision in the instant case and the case with which the Fourth District certified conflict, *C & L Trucking v. Corbitt*, 546 So. 2d 1185 (Fla. 5th DCA 1989). (Ans. Br. 8) Respondents assert there is no conflict because the facts in the two cases "are not parallel on the issues." (Ans. Br. 8) However, the issue in this case is one of statutory construction. As discussed in the Initial Brief at pages 2-3 and 19-21, the Fourth District's decision in this case clearly conflicts with *Corbitt* on this issue.

Moreover, the material facts in *Corbitt* and the instant case are virtually identical: In both cases the workers' compensation carriers notified the tortfeasors of their subrogation claims before the employees filed their lawsuits, the employees failed to notify the workers' compensation carriers of the filing of their lawsuits, neither of the compensation carriers filed a formal notice of payment of compensation, the employees and the tortfeasors agreed to settle all issues despite actual notice of the workers' compensation carriers' interests, and the employers were not timely advised of the settlements.

To the extent there are any factual distinctions between *Corbitt* and the instant case, those differences do not deprive this Court of jurisdiction under Article V, § 3(b)(4) of the Florida Constitution. This Court should exercise its jurisdiction because the heart of the conflict revolves around the differences in the district courts' interpretations of the statute. *See Borden v. East-European Ins. Co.*, No. SC04-1737, 2006 Fla. LEXIS 9, *2 (Fla. January 19, 2006); *Maddox v. State*, 31 Fla. L. Weekly S24, S28 n.1 (Fla. January 12, 2006), *motion for rehearing pending*. Furthermore, the issue is likely to arise again. *See Nettles v. State*, 850 So. 2d 487, 488 (Fla. 2003) (noting that, although the First District certified the existence of conflict, the conflict was more apparent than actual; but exercising discretion to resolve the issue rather than leave the trial courts with

conflicting guidance). As discussed below, the Fourth District's decision in the instant case conflicts not only with *Corbitt* but with other appellate decisions.

II. Statutory Construction.

Respondents argue that § 440.39 should be strictly construed because the workers compensation system is "in derogation of the common law relationship *between employers and employees*." (Ans. Br. 10, 12) (Emphasis supplied.) However, Respondents are neither employers nor employees. Section 440.39 affects only the rights and remedies of the employee and the employer; only the employee and employee are bound by it. *Trail Builders Supply Co. v. Reagan*, 235 So. 2d 482, 484-85 (Fla. 1970). A third party tortfeasor does not receive any benefit from the Worker's Compensation Act. *Sunspan Engineering and Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4, 6 (Fla. 1975).

None of the decisions cited by Respondents strictly construed the workers' compensation statutes at the behest of a third party tortfeasor. For instance, in *J.J. Murphy and Sons, Inc. v. Gibbs*, 137 So. 2d 553 (Fla. 1962), the issues were whether the deputy commissioner erred in calculating the employee's average weekly wage and in awarding certain disability benefits to the employee. That case did not even involve a claim against a third party tortfeasor.

The issue in *Fidelity & Casualty Co. of New York v. Bedingfield*, 60 So. 2d 489 (Fla. 1952), was also between the employee and carrier. The employee

contested the worker's compensation carrier's attempt to intervene as a party plaintiff in the employee's lawsuit against the tortfeasor. The Supreme Court determined that the applicable version of § 440.39 gave the injured employee the right to control his own lawsuit against a third party tortfeasor and provided for limited subrogation on an equitable basis. *Id.* at 493-94.

In *Brinson v. Southeastern Utilities Service Co.*, 72 So. 2d 37 (Fla. 1954), there was a dispute between the employee and carrier as to whether the employee was entitled to additional compensation after recovering full damages against the tortfeasor. The carrier contended its responsibility to pay compensation had ceased. The tortfeasor was not a party to the action.

The issue in *Arex Indemnity Co. v. Radin*, 77 So. 2d 839 (Fla. 1955), was whether the employee was entitled to receive additional compensation benefits after resolution of a third party tort action which included a distribution to the carrier as subrogee pursuant to § 440.39(2) and (3). The carrier contended the third party suit and settlement had terminated its liability under the Workers' Compensation Act, and the award of additional benefits was void. The Supreme Court determined that the carrier's right of subrogation as defined by the applicable version of § 440.39(3) was limited to "compensation benefits *paid*." 77 So. 2d at 841 (emphasis in original). The carrier's rights had been adjudicated in the earlier proceeding and could not be litigated anew in the context of a claim

before the Industrial Relations Commission for compensation accruing subsequently. *Id.*

In the instant case Donnelly settled his worker's compensation claim, *including* the right to future benefits, before settling his claim against Respondents. Whereas the carrier in *Arex* sought to avoid responsibility for future payments, Petitioner herein sought only to recover for compensation and benefits previously paid. The *Arex* decision did not in any way address the issues in the instant case.

Respondents contend that, "as in *Arex Industry*, [Petitioner] here seeks a remedy which the legislature has not provided it." (Ans. Br. 14) To the contrary, Petitioner clearly had a legislative remedy under the plain language of § 440.39. A basic tenet of statutory interpretation is that effect must be given to every clause in the statute so as to accord meaning and harmony to all of its parts. *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001). Thus, subsections 440.39(2) and (3) must be read *in pari materia*. *American Mut. Liab. Ins. Co. v. City of West Palm Beach*, 185 So. 2d 174, 176 (Fla. 4th DCA 1966). Subsection (2) provides that, if an employee accepts compensation or benefits under the Workers' Compensation Law, the employer or 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)." Subsection (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).

(Emphasis supplied.)

To interpret the statute as urged by Respondents would render the italicized language meaningless. If the Legislature intended that an employer/carrier would forfeit its subrogation rights simply by failing to file a notice of payment of compensation in the tort action even when written notice had been provided to the tortfeasor, there would be no reason to include the words "either before or after suit is filed." The plain language of subsection (3)(b) contemplates that the employer will be notified of a settlement so that it has an opportunity to agree or disagree "on the proportion to be paid to each," the employee and employer.

Despite the plain language of the statute and Respondents' undisputed notice of Petitioner's subrogation rights, Respondents acted to deprive Petitioner of those rights by concealing the fact of their settlement with the employee. Respondents not only had actual and written notice that Petitioner had paid compensation benefits but also had constructive notice of Petitioner's subrogation rights by virtue

of the publication of § 440.39 in the Florida Statutes. *See Dickerson v. Orange State Oil Co.*, 123 So. 562 (Fla. 2d DCA 1960). Nothing in § 440.39 suggests that it should be construed so as to benefit a third-party tortfeasor who has wrongfully deprived a worker's compensation carrier of its statutory subrogation rights.

Respondents argue that Petitioner "did nothing . . . to create its . . . lien on settlement proceeds. (Ans. Br. 15) This argument ignores that Petitioner provided written notice of its subrogation rights before Donnelly ever filed suit against Respondents. The argument also ignores that Petitioner was not notified of either the lawsuit or the settlement.

It is apparently Respondents' position that the notice provisions of § 440.39 should be construed strictly against Petitioner but ignored with respect to Donnelly and Respondents. Such a construction is not supported by the plain language of the statute or by the case law. The Fifth District correctly determined in *Corbitt* that the employee's failure to give the employer the notice required by § 440.39(3)(a) barred the employee from raising the employer's failure to comply with that subsection as a defense to the employer's claim for equitable distribution. 546 So. 2d at 1186. If the employee is precluded from raising the employer's lack of notice as a defense under such circumstances, there is no good reason not to also preclude the third party tortfeasor from raising such a defense under similar circumstances.

The Fifth District held in *Corbitt* that actual notice was sufficient to put the employee and the tortfeasor on notice of the employer's interest. 546 So. 2d at 1186. It is undisputed that Petitioner gave written notice of its rights of subrogation to Respondents. Their issuance of a records subpoena to Petitioner established that Respondents had actual notice that Petitioner had paid worker's compensation benefits. Despite having actual notice of Petitioner's subrogation rights, Respondents elected not to notify Petitioner of the settlement with Donnelly. Their conduct was not justified by this state's jurisprudence.

Respondents ignore multiple cases construing § 440.39(3)(b) inconsistently with the Fourth District's decision herein. One such case was *Maryland Casualty Co. v. Simmons*, 193 So. 2d 446 (Fla. 2d DCA 1966). Citing that case, the trial court below noted his decision might have been different if this case had arisen in the Second District. (R.125) In *Simmons* the Second District upheld the carrier's lien when the carrier had not filed a notice of payment in the employee's lawsuit against the tortfeasor due to the third party's failure to give the carrier notice of the suit. The court noted that § 440.39(3)(b) was designed to protect the carrier in those situations not fully protected under § 440.3(a).

In *Maryland Casualty Co. v. Smith*, 272 So. 2d 517 (Fla. 1973), this Court determined that a worker's compensation carrier was not necessarily precluded from asserting a subrogation claim against the tortfeasor after the employee and

tortfeasor settled without notice to the employer. The carrier sued the tortfeasors and their insurer for recovery of its compensation liability, and the tortfeasors filed a third party claim against the employee for indemnification. The trial court entered judgment in favor of the worker's compensation carrier *against the tortfeasors and their insurer* and by separate order held they were entitled to indemnification from the employee. *Maryland Cas. Co. v. Smith*, 247 So. 2d 526, 527 (Fla. 3d DCA 1971). The district court affirmed. *Id.*

On review this Court noted that the district courts had divergent views as to the effect of § 440.39(3)(b) in cases involving settlement without notice to the compensation carrier. This Court observed that the dissimilar interpretations could be directly assigned to the "inartful draftsmanship" exhibited in § 440.39. 272 So. 2d at 519. Despite the "inartful draftsmanship," this Court concluded that the Legislature was clearly attempting to balance the respective interests of the employee and employer:

> [A]s the statute is currently drafted, an employee is free to settle with or without notice since settlement need not be by consent of the employer. However, this freedom is not without limitation. Failure to inform the carrier may be a factor in determining equitable distribution where the employer has expended time and expenses preparing for a second-year suit without notice of settlement. *It may also be a factor where it appears that the employee and the third party have joined in a bad faith effort to lessen the employer's potential recovery*. Additionally, the trial court should consider whether the

> employer's participation in the settlement, had he received notice, might have improved the ultimate settlement decided upon even though the employer could not dictate the settlement terms.

272 So. 2d at 519 (emphasis supplied). Because there was nothing in *Smith* to indicate the trial court did not take these factors into consideration, this Court approved the result in that case.

In the instant case the trial court clearly did *not* take the *Smith* factors into consideration because the court determined that Petitioner was entitled to no recovery at all. Thus, the Fourth District's decision affirming the trial court conflicts not only with the Fifth District's decision in *Corbitt* but also with *Smith*. In *Smith* this Court approved the judgment in favor of the compensation carrier against the tortfeasors and their insurer. This Court did *not* hold that the compensation carrier was not entitled to recover from the tortfeasor.

Certiorari was granted in *Smith* to resolve a perceived conflict between the district court's decision and the cases of *Bituminous Casualty Corporation v. Florida Power & Light Co.*, 190 So. 2d 426 (Fla. 4th DCA 1966), *cert. denied*, 200 So. 2d 811 (Fla. 1967), and *Dickerson v. Orange State Oil Co.*, 123 So. 2d 562 (Fla. 2d DCA 1960). This Court in *Smith* neither disapproved nor overruled *Bituminous* or *Dickerson*. Although this Court noted that a divergent view was expressed in

Bituminous and *Dickerson*, the result approved by this Court in *Smith* was consistent with those cases.

In *Dickerson* the court deemed instructive the following passage from 2 Larson, Workmen's Compensation Law, sec. 73.22:

> The question of the effect of a release may also arise under statutes which do not put the employee to his election, since here, although it cannot be said that the employee is barred by the election doctrine, it can still be argued that he may have prejudiced the employer by impairing his subrogation rights. However, in such jurisdictions it has usually been held that the settlement impaired neither the employee's compensation rights nor the employer's subrogation rights, on the theory that *the third party has constructive statutory notice of the employer's subrogation interests, and must be held to know that he cannot evade his liability to the employer as subrogee by a settlement with the employee.*

123 So. 2d at 570 (emphasis supplied). The applicable version of § 440.39 had eliminated the necessity of an election by the claimant in *Dickerson*. 123 So. 2d at 571. The court noted that in a majority of the states with statutes allowing the employee to settle with the tortfeasor and still collect compensation, the employer was not thereafter precluded by the settlement from recovering from the third party the amount it must pay. In view of the provisions of § 440.39 and the intent of the Worker's Compensation Act as a whole, the court concluded that a release or settlement without notice to the employer or his carrier "does not affect the rights of

the employer or insurer to proceed against the third party the same as if such settlement had not been made." 123 So. 2d at 572.

Dickerson was decided prior to the 1959 statutory amendment which added § 440.39(3)(b). In *Bituminous* the court held that the 1959 amendment did nothing more than to set out in the statute a method for exercising the right of subrogation in the settlement amount. With respect to the issue in the instant case,

> A third party who has notice of the subrogation claim may settle with the injured employee but *only at his own risk*, for such a settlement affects only the employee's claim unless the carrier is notified so that it may participate therein.

Id. (Emphasis supplied.) Because the tortfeasor in *Bituminous* had notice of the employer's right to subrogation, the release by the injured workman without notice did not limit the right of the employer against the third party tortfeasor to a pro rata share of the settlement. *Id.* at 429.

Smith, decided in 1973, was the last case in which this Court considered the effect of § 440.39(3)(b). Subsequent to *Smith*, the district courts have reached differing interpretations of § 440.39. In addition to *Corbitt* and the Fourth District's decision in the instant case, see *Circle K Corp. v. Webster*, 747 So. 2d 1010, 1011 (Fla. 5th DCA 1999) (holding that § 440.39(3)(b) is designed to prevent settlement between an employee and tortfeasor without notice to the carrier; noting that due process is implicated where the parties to the tort action have attempted to foreclose

the lienholder by dismissing the action without notice); *Brown v. State Farm Mutual Automobile Insurance Co.*, 281 So. 2d 364, 366 (Fla. 2d DCA 1973) (holding that whether a release by the employee in favor of the tortfeasor is a bar to a subsequent action by a worker's compensation carrier must be decided by weighing the facts in light of equitable considerations, "not the least of which is whether the tortfeasor or his insurer had notice, actual or constructive, of rights vested or to become vested in a Workmen's Compensation carrier"). *Contra*, *Continental Ins. Co. v. Industrial Fire & Cas. Ins. Co.*, 427 So. 2d 792 (Fla. 3d DCA 1983) (holding there is no common law cause of action for failure to recognize the protected subrogation rights of a worker's compensation carrier).

Despite the foregoing cases holding to the contrary, Respondents claim it would be "inequitable, as well as unjustified" for Petitioner to proceed with its claim against them. Respondents claim that, although they had written notice of Petitioner's subrogation interest and sought to foreclose that interest by settling with Donnelly without notice to Petitioner, Petitioner should be precluded from any recovery simply because it did not file a formal notice of compensation in the tort lawsuit. Nothing in §440.39(3)(b) requires that notice be filed in the lawsuit so long as the tortfeasor has written notice of the compensation carrier's interest. Such notice was unequivocally given in the instant case. Petitioner did not "sit on its rights."

Respondents contend that §440.015 confirms that the Worker's Compensation Law is not designed to define the relationship between the employee, employer and third party tortfeasor. (Ans. Br. 17-18) Respondents nevertheless assert that the statute is to be strictly construed to their benefit. (Ans. Br. 18) These arguments are discussed above at 2-7. Both the express language of § 440.39(3)(b) and the cases construing it refute Respondents' position.

Asserting that it is an "innocent" third party, Respondents claim that interpreting §440.39(3)(b) to allow a compensation carrier to seek recovery of its subrogated interest after a settlement between the employee and tortfeasor would be contrary to language in § 440.015, which requires Chapter 440 to be construed "so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker. (Ans. Br. 19-20) This argument fails because tort damages are not "disability and medical benefits" under the Worker's Compensation Law. Moreover, Respondents are not "innocent" third parties.

Respondents had full knowledge of Petitioner's interest and sought to foreclose Petitioner's right of recovery by settling with Donnelly without notice to Petitioner. The purpose of § 440.39(3) is clearly to provide the tortfeasor with notice of the employer's interest. When that purpose is satisfied, as it was in the instant case, the employer is entitled to equitable distribution of its subrogation interest.

III. Application of § 440.39.

After arguing in Section II that the Worker's Compensation Law must be strictly construed to its benefit, Respondents acknowledged in Section III that the Law "in no way relates to Lawyers Express." (Ans. Br. 20) Respondents agreed that the relationships between it, the employee and the employer "are defined by other laws, both statutory and case based." (Ans. Br. 21) Some of those cases are discussed in the Initial Brief at pages 31-34. Respondents made no attempt to distinguish them.

Respondents freely conceded that "good practice for the tortfeasor might be to protect [the employer's] lien when the tortfeasor makes its payment, and case law suggests this is the legally necessary thing to do." (Ans. Br. 23) Respondents provided no satisfactory explanation for why they failed to follow this "good practice" in the instant case. Protecting the employer's lien is not only good practice but the equitable thing to do, as recognized by the Fifth District in *Corbitt*.

CONCLUSION

This Court should accept jurisdiction, quash the Fourth District's decision, and remand the case to the Circuit Court to make equitable distribution to Petitioner.

Respectfully submitted,

/s/ Elizabeth C. Wheeler

STEVEN P. PYLE and ELIZABETH C. WHEELER
Florida Bar No. 710180 Florida Bar No. 374210
STEVEN P. PYLE & ASSOCIATES, P.A. ELIZABETH C. WHEELER, P.A.
4063 North Goldenrod Road, Suite 208 Post Office Box 2266
Winter Park, Florida 32792 Orlando, Florida 32802-2266
Telephone: (407) 571-1848 Telephone: (407) 650-9008
Facsimile: (407) 571-1847 Facsimile: (407) 650-9070
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed this 21st day of February, 2006, to **Michael V. Elsberry, Esquire** of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., 215 North Eola Drive, Orlando, FL 32801, attorney for Respondents, Lawyers Express Trucking, Inc. and Canal Insurance Company, Inc.; **Ronald M. Rowars, Esquire** of Ronald M. Rowars, P.A., 2400 SE Midport Road, Suite 120, Port St. Lucie, FL 34952, attorney for Respondents, John Donnelly and Elizabeth Donnelly; and **Steven P. Pyle, Esquire** of Steven P. Pyle & Associates, P.A., 4063 N. Goldenrod Road, Suite 208, Winter Park, FL 327892, co-counsel for Petitioner.

STEVEN P. PYLE and ELIZABETH C. WHEELER
Florida Bar No. 710180 Florida Bar No. 374210
STEVEN P. PYLE & ASSOCIATES, P.A. ELIZABETH C. WHEELER, P.A.
4063 North Goldenrod Road, Suite 208 Post Office Box 2266
Winter Park, Florida 32792 Orlando, Florida 32802-2266
Telephone: (407) 571-1848 Telephone: (407) 650-9008
Facsimile: (407) 571-1847 Facsimile: (407) 650-9070

Attorneys for Petitioner

CERTIFICATE

OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief was typed in 14 point Times New Roman.

/s/ Elizabeth C. Wheeler
Florida Bar No. 374210
Attorney for Petitioner