

In the Supreme Court of Florida

CASE NO.: SC07-1888

JUSTO CARLOS PEREZ, individually, MARTA S. PEREZ, his wife,
AMY LYNN PEREZ and ANGIE PEREZ,

Petitioners,

v.

LA DOVE, INC.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

While working for La Dove, Inc., Petitioner Justo Carlos Perez was rendered a paraplegic while operating a forklift, which traveled off the end of a loading dock and crushed him. (A 2).¹ Petitioners Perez, his wife, and their two children filed and then settled a negligence action against R&R Industrial Trucks, Inc., the company responsible for maintenance of the forklift, claiming that a malfunction in the forklift's braking or transmission system caused the accident. (A 2). The Petitioners' recovery against R&R was substantially impaired by the fact that La Dove had failed to preserve the forklift in its condition at the time of the accident. (A 2).

The Petitioners thus brought the instant suit against La Dove for spoliation of evidence. (A 2). Their complaint specifically alleged that Michael Bass, the La Dove Vice President who was present the day of the accident, was “[admittedly] aware that a lawsuit could extend from the accident.” (A 2). The complaint alleged that, despite his actual knowledge of the evidentiary nature of the then-current condition of the forklift, Mr. Bass sent the forklift off for inspection, repair, and refurbishment immediately after police cleared the scene. (A 2).

¹ The Third District decision as to which review is sought is attached as an appendix to this brief, and all facts stated herein appear on the face of the decision. References to the Appendix appear as (A ___). All emphasis in this brief has been supplied by undersigned counsel unless indicated.

Petitioner Perez did not ask La Dove to preserve the forklift in the two-week period during which it was being repaired, but, as even the Third District's opinion put it, "given the severity of the accident, Mr. Perez probably had limited ability to make such a request." (A 2).

The Third District Court of Appeal issued a written decision affirming the trial court's dismissal of the Petitioners' suit against La Dove for spoliation of evidence. (A 1-8). As Petitioner Perez believes the Third District's decision creates direct and express conflict, Petitioner filed a timely notice to invoke this Court's jurisdiction, and these proceedings ensued.

SUMMARY OF ARGUMENT

The Third District's decision expressly and directly conflicts with a decision on the same question of law which was issued by the Fourth District Court of Appeal in *Builder's Square v. Shaw*, 755 So. 2d 721 (Fla. 4th DCA 1999). A basis for exercise of this Court's discretionary review powers is thus presented under the provisions of Art. V, § 3(b)(3) Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv).

In this case, the Third District, interpreting §440.39(7), Fla. Stat. (1997), addressed the notice requirement for a covered employee to file a negligent destruction of evidence claim against his employer, where the employee's recovery against a third-party tortfeasor is alleged to have been substantially impaired by the

employer's failure to preserve necessary evidence for use in that action. The Third District court held that a negligent destruction of evidence claim exists *only* if there has been actual notice given by the employee to the employer that the evidence should be preserved.

In contrast, in *Builder's Square v. Shaw, supra*, the Fourth District, also interpreting § 440.39(7), did *not* make notice from the employee a requisite element of a destruction of evidence claim against an employer, holding instead that an employer can be charged with constructive notice that evidence should be preserved when the circumstances are such that the employer "*should have known* that certain evidence could conceivably be critical to an employee's claim." *Builder's Square, supra*, 755 So. 2d at 724.

Under the legal standard set by Third District, the Petitioner's complaint was held to have properly been dismissed for failure to state a cause of action. Conversely, under the legal standard set by the Fourth District, the Petitioner's complaint would not have been held to have stated a cause of action, raising a fact question as to whether the employer had constructive notice that the forklift should have been preserved as evidence.

Because the Third District is now in conflict with the Fourth District, this Court has jurisdiction to resolve the conflict and restore uniformity to the law of Florida on this issue of law.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *BUILDER'S SQUARE V. SHAW*, 755 So. 2d 721 (FLA. 4TH DCA 1999).

The conflict presented in this case arises from irreconcilable interpretations of § 440.39(7), Fla. Stat., which provides:

(7) The employee, employer, and carrier have a duty to cooperate with each other in investigating and prosecuting claims and potential claims against third-party tortfeasors by producing nonprivileged documents and allowing inspection of premises, but only to the extent necessary for such purpose. Such documents and the results of such inspections are confidential and exempt from the provisions of s. 119.07(1), and shall not be used or disclosed for any other purpose.

The Third District Court of Appeal had previously interpreted this provision as creating an implied exception to employers' workers compensation immunity to allow an action by a covered employee against his employer for negligent destruction of evidence where his recovery against a third-party tortfeasor is alleged to have been substantially impaired by the employer's failure to preserve

necessary evidence. *General Cinema Beverages of Miami, Inc. v. Mortimer*, 689 So. 2d 276 (Fla. 3d DCA 1995). The *General Cinema* decision contained a remark that such an action would be permissible at least in instances “where ... there has been a timely request for preservation.” 689 So. 2d at 279.

Thereafter, the Fourth District issued its decision in *Builder’s Square v. Shaw*, 755 So. 2d 721 (Fla. 4th DCA 1999). In *Builder’s Square*, an employee fell off a ladder while he was employed by Builder’s Square. He initially sued the manufacturer of the ladder, but after he learned the ladder had been destroyed, he amended his complaint to add a cause of action against Builder’s Square for spoliation of evidence on the basis he was forced to accept an inadequate settlement from the ladder manufacturer without the ladder. At trial, the jury found that the employee-plaintiff had been substantially impaired in his ability to pursue his products liability claim against the ladder manufacturer as a result of Builder’s Square’s failure to preserve the ladder as evidence, and rendered a verdict in his favor.

On appeal, Builder’s Square argued - based on the *Cinema Beverages’* reference to ‘at least where ... there has been a timely request for preservation’ - that “an employee must make a definite request to the employer to preserve specific, identified evidence before an employer may be held liable on a spoliation of evidence claim.” *Builder’s Square, supra*, 755 So. 2d at 723-24. The Fourth

District rejected that argument and the ‘request’ requirement set out in *Cinema Beverages*, stating: “We think Builder’s Square reads the statute too narrowly.” 755 So. 2d at 724. The Fourth District held instead that an employer can be charged with notice to preserve evidence when the circumstances are such that the employer “*should have known* that certain evidence could conceivably be critical to an employee’s claim.” *Id.* The Fourth District explained:

Before [the employer] proceeded to dispose of any of [the evidence], the statutory duty of cooperation with its injured employee should certainly have suggested that it consult with the employee.... ***The failure of Builder’s Square to consult with plaintiff before disposing of the ladder could have been understood by the jury as a violation of the duty to preserve.*** Thus, we agree that plaintiff presented a jury question as to the sufficiency of the notice.

755 So. 2d at 724.

The Third District’s decision as to which Petitioners here seek review from this Court has now examined and disagreed with the Fourth District’s decision in *Builders Square*. The Third District decision in this case holds that a destruction of evidence suit against an employer will lie only where the employee has given actual notice to the employer via a *Cinema Beverages* ‘timely request’ for preservation of the evidence in question. *Perez v. La Dove, Inc.*, __ So. 2d __, 2007 WL 2609381 (Fla. 3d DCA 2007). (A 1-8). In so doing, the Third District expressly declined the opportunity to align itself with the contrary rule set out by Fourth District in *Builder’s Square*.

Accordingly, the Third District rule is now that only *actual* notice in the form of a timely employee request will activate an employer's §440.39(7) duty to preserve evidence, while the Fourth District's *Builder's Square* rule is that *constructive* notice can also activate an employer's duty to preserve evidence. Conflict has thus been created. *See, e.g., N & L Auto Parts Co. v. Doman*, 117 So. 2d 410 (Fla. 1960).

Under the Third District's rule, the Petitioners' complaint was held to have properly been dismissed for failure to state a cause of action because the Petitioners could only allege facts showing that the employer had constructive notice that the evidence should be preserved. Under the Fourth District's rule, the Petitioners' complaint would have been held to have stated a cause of action and to have raised a jury question as to whether the employer should have preserved the forklift. The Third District's decision here has created express and direct conflict with the Fourth District's *Builder's Square* decision.

Petitioners also respectfully submit that the conflict is one which should be resolved by this Court, and specifically, that it should be resolved by quashing the decision of the Third District and approving that of the Fourth District in *Builder's Square*. Where third-party tortfeasors are, or may be, at fault for injuries caused to employees while they are working, the law has an interest in having such third-party tortfeasors compensate the employees for their injuries, thus lessening the

burden on the workers' compensation system - precisely the reason for the inclusion of § 440.39(7) in the workers compensation statute. *See, e.g., Shaw v. Cambridge Integrated Services Group, Inc.*, 888 So. 2d 58, 64 (Fla. 4th DCA 2004)(“One of the most important rules and conditions stated in the Workers' Compensation statute is the duty to cooperate ... which includes the duty to preserve evidence”).

Further, the law has required both employers and employees to give up some rights to effectuate the aim of the workers compensation statute, but what the employees have given up is the right to full recovery of their tort damages.

Where an employee has sustained severe, life-altering injuries as a result of tortious conduct by a third-party, as in this case where Petitioner Justo Perez has been left paraplegic for the rest of his life, the difference between workers' compensation benefits and full recovery of tort damages can result in devastating variances in the quality of the employee's remaining life. If the employer *should* have known that evidence should be preserved to allow its employee to make a full recovery - and, as here, there was *no way* for the catastrophically-injured employee to make a 'timely request' for preservation - the better rule is that constructive as well as actual notice can serve to activate the employer's duty of preservation. After all, if it can be found, factually, that an employer should have known that it was destroying material evidence and thus standing in the way of its injured

employee's ability to make a full recovery, there is no reason that the employer should *not* be held responsible for breach of its duty to preserve the evidence.

In sum, Petitioners respectfully submit that a conflict has been shown that can, and should, be resolved by the Court. The Petitioners accordingly respectfully pray that this Court exercise its discretionary discretion and accept this case for review.

CONCLUSION

Based upon the foregoing facts and authorities, Petitioners respectfully submit that the conflict identified above present a basis for exercise of the Court's discretionary review jurisdiction, and the Court should exercise that jurisdiction to resolve the conflict by considering Petitioners' case on the merits.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Jurisdiction was sent by facsimile and by U.S. mail this 15th day of October, 2007 to: Michael J. Higer, Esquire, Higer, Lichter & Givner, LLP, 2999 N.E. 191st Street, Suite 700, Aventura, Florida 33180.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Jurisdictional Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.
