

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

FRANCIS DALE KENT,

Petitioner,

vs.

TRACTOR SUPPLY COMPANY,

Respondent.

CASE NO.: SC07-2203

Lwr Tribunal: 5D06-4372

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In its Answer Brief, Tractor Supply Company, will be referred to as “TSC” or as the Respondent, Defendant or employer. Petitioner, Francis Dale Kent, will be referred to as “Kent”, Petitioner, claimant, Plaintiff or employee. References to the Appendix to the Initial Brief of Respondent, TSC, will be made by the letter “A” and the appropriate page number from the Appendix. References to the Appendix attached to Petitioner’s Initial Brief on Jurisdiction will be referenced by the letters “AP” and the appropriate Appendix page number.

STATEMENT OF THE CASE

Petitioner, Francis Dale Kent, was a part time employee of Respondent, Tractor Supply Company, in May 2005 and according to the allegations contained within a Complaint filed on behalf of Kent, he alleges he was exposed to hydrated lime while on the job within the TSC warehouse from May 5, 2005 through May 10, 2005. (A-7) As the result of exposure to airborne hydrated lime, Petitioner filed a Petition for Benefits to obtain worker's compensation benefits, a Response to the Petition for Benefits was completed by an adjuster for the worker's compensation servicing agent in which the request for both indemnity and medical benefits was denied. Specifically, the adjuster responded as follows:

- “entire claim denied, as the condition complained of is the result of a pre-existing medical condition, that is not the result of employment with Tractor Supply Company;
- “the condition complained of is the result of a prior worker's compensation claim that has been settled for continuing treatment. Any outstanding medicals shall be covered by Mr. Kent from the settlement he received.” (A-20)

Following the response to the Petition for Benefits, the request for worker's compensation benefits was litigated, discovery obtained by the parties and a private mediation was scheduled to take place on Tuesday, November 8, 2005 (A-

24). However, despite the pending mediation on October 7, 2005, counsel for Kent filed a **Notice of Voluntary Dismissal without Prejudice** (*emphasis added*) (A-26) of the pending claim for worker's compensation benefits and on the same day, a Complaint for damages was filed by Kent in the Ninth Judicial Circuit (A-5).

In response to the Complaint, TSC raised as an affirmative defense, that "Defendant, Tractor Supply Company, is immune from tort liability for Plaintiff's cause of action pursuant to Florida Statute 440.11 and Florida Statute 440.10." (A-16) Standard discovery was exchanged between the parties and on January 26, 2006 the Plaintiff filed a Motion to Strike or in the alternative Motion for Partial Summary Judgment relative to Defendant's affirmative defense concerning the entitlement to assert worker's compensation immunity to the tort claim. (A-17) A hearing took place on November 16, 2006 at which time the Plaintiff's Motion for Partial Summary Judgment was granted in its entirety. (A-1) This was the Order appealed from by TSC, pursuant to Florida Rule of Appellate Procedure 9.130(a)(13)(c)(v)

The primary argument at the trial court level was that TSC took an inconsistent position between the written response to the initial Petition for Benefits and the subsequent defense of worker's compensation immunity, and that such an inconsistent position could not be sustained based on the holding of *Byerly vs. Citrus Publishing, Inc.*, 725 So2d 1230 (5th DCA, 1999).

Four points were raised by TSC in its appeal of the Summary Judgment entered in favor of the Plaintiff/Petitioner. The primary legal argument was that the trial court incorrectly applied the law of *estoppel* in granting Plaintiff's Motion for Partial Summary Judgment. The 5th District Court of Appeal held in Tractor Supply Company vs. Kent, 966 So2d 978 (5th DCA, 2007), that TSC was not *estopped* from asserting immunity from suit pursuant to the exclusivity provision of the worker's compensation law, and that the assertion of this defense was not an inconsistent position to the defense raised to the claim for compensation benefits. (AP-7). Based on this holding, the Summary Judgment entered by the trial court was reversed.

SUMMARY OF ARGUMENT

Petitioner is attempting to invoke the jurisdiction of this court by asserting the 5th DCA opinion in Tractor Supply Company vs. Kent, *supra*, expressly and directly conflicts with three decisions out of the 1st District Court of Appeal. However, a review of these decisions clearly show no express and direct conflict exists and as such, the Supreme Court of Florida should not accept jurisdiction of this matter.

ARGUMENT

The discretionary jurisdiction of this court should only be invoked in those instances in which an express and direct conflict exists between decisions of

differing Appellate Courts on the same question of law. It is the position of the Respondent that such conflict does not exist and there are no identical questions of law presented for consideration. As the Supreme Court observed in Aravena vs. Miami Dade County, 928 So2d 1163 (Fla. 2006), one test of express and direct conflict is whether the decisions are irreconcilable. To quickly confirm the absence of any alleged express and direct conflict, one need only look at the holding of the 5th DCA in Tractor Supply, supra. The 5th DCA confirmed it was error for the trial court to grant Partial Summary Judgment in which the defense of worker's compensation immunity was stricken as the employer engaged in no activity which would create an *estoppel* from asserting immunity from a civil suit pursuant to the exclusivity provision of the worker's compensation law. Id. at 966; (AP-9). This concept of *estoppel* and its application to the facts in the underlying litigation is woven throughout the arguments raised in the briefs filed in the 5th DCA. A review of the three 1st DCA cases cited by the Petitioner clearly show no concept of *estoppel* was argued in those three matters and the factual backgrounds of those cases are dissimilar to the facts in Tractor Supply Co. vs. Kent, supra.

A review of the three 1st DCA opinions clearly shows the lack of express or direct conflict necessary for this court to allow invocation of its discretionary jurisdiction. In Grice v. Suwannee Lumber Manufacturing, Co., 113 So 2nd 742 (1st DCA, 1979), an employee filed a civil claim to recover damages for injuries

sustained by accident arising out of and in the course of his employment with his employer. After filing an answer to the Plaintiff's/employee's Complaint, the Defendant/employer filed a Motion for Summary Judgment. That Motion was granted, the employee appealed claiming the injuries suffered were **not** within the purview of the Worker's Compensation Act and that he should be free to pursue his common law remedies for damages resulting from injuries not encompassed within the express provisions or intendments of the Worker's Compensation Act. The 1st District Court of Appeal confirmed that the Plaintiff's injuries were indeed within the scope and purview of the Worker's Compensation Act, and therefore the exclusive remedy provided by the Act found in Florida Statute 440.11 precluded maintenance of the common law action to recover for any elements of damage resulting from such injury. *Grice* at 747.

Of interest, the Petitioner makes an unsupported statement that the decision of the 5th DCA in *Tractor Supply Company vs. Kent, supra*, directly conflicts with *Grice vs. Suwannee Lumber Manufacturing, Co., supra*. However, the initial brief does not set out how, why, nor discuss the holding of the 5th DCA and compare it to the holding in the *Grice* opinion. The portion of the opinion cited by the Petitioner from *Grice* simply confirms there are indeed instances when an employee is permitted to sue an employer in tort and no aspect of the *Tractor Supply* opinion holds otherwise. In fact, the 5th DCA stated "the question

presented in this appeal is whether Byerly and Elliot established that an employer such as TSC, who, through its comp carrier, denied the worker's compensation claim on the basis that the injury or illness was pre-existing, is then estopped from asserting worker's compensation immunity and exclusivity in defending against a civil tort action." Tractor Supply at 980; (AP-5). Neither the issue presented nor the Courts ultimate holding create a conflict with the opinion of the 1st DCA in Grice, supra.

The second case in chronological order which the Petitioner claims is in conflict with the Tractor Supply, supra, decision is that of Williams vs. Hillsborough County School Board, 389 So2d 1218 (1st DCA, 1980). On page 9 of the Initial Brief, the Petitioner takes one sentence from the Tractor Supply opinion and claims it is in direct conflict with the Williams vs. Hillsborough County School Board opinion. According to the Petitioner, the 5th DCA in Tractor Supply concluded "there is no irreconcilable conflict in the employer here raising a pre-existing medical condition defense to a comp claim, but asserting it is, nevertheless, insulated from a civil suit." Tractor Supply at 981; (AP-7). Petitioner goes on to claim that this referenced "holding" is in direct conflict with Williams, supra.

The sentence referred to by the Petitioner does not represent the holding of the 5th DCA in Tractor Supply, supra. Accordingly, any alleged conflict would

exist between dicta in the Tractor Supply, *supra*, opinion and the holding of Williams, *supra*. The Williams matter involved a worker who was denied benefits on the grounds her injuries were not encompassed within the Florida Worker's Compensation Act. The Court confirmed in those instances whereby injuries fall outside the provisions of Chapter 440, Florida Statutes, employees are free to pursue common law remedies. Again, there is no aspect of the Williams decision which in any way directly and expressly conflicts with the 5th DCA opinion in Tractor Supply vs. Kent, *supra*. In fact, the 5th DCA noted the Petitioner's argument concerning the import of the Williams decision and stated "however, in Williams, an adjudication of non-compensability had been issued by a Judge of Compensation Claims. The Plaintiff obtained a decision that his claim was outside the Worker's Compensation Act and thus, he was free to pursue his common law remedies." Tractor Supply at 982; (AP-8). In the instant matter, Kent did not have an adjudication on the merits of his worker's compensation claim, took a voluntary dismissal when mediation was pending, filed his tort claim and claims he did so simply based upon the raising of a permissible argument by the insurance serving agent for TSC, that his injuries were attributed to a pre-existing medical condition. Accordingly, the facts in Williams, *supra*, are quite different from the factual background of Tractor Supply Company, *supra* and these differing facts were relied upon by the 1st and 5th DCA respectively in reaching their decisions.

The Petitioner appears to suggest that the raising of a pre-existing medical condition defense to a comp claim, in and of itself, immediately creates a conflict with cases which hold an injured worker whose injuries arise outside of the employment context or are otherwise considered non-compensable injuries, is free to pursue a remedy in tort. However, there is nothing within the Tractor Supply opinion which serves to act as a blanket denial of an employee's ability to pursue a common law remedy; rather, the opinion is limited to the facts of the case and the *estoppel* argument which was at the heart of the appeal. There is no such *estoppel* argument found in any of the three cases relied upon by the Petitioner in his attempt to show an irreconcilable conflict exists.

The third case relied on by the Petitioner to represent conflict is that of *Greathead vs. Asplundh Tree Expert Co.*, 473 So2d 1380 (1st DCA, 1985). That case involved a wrongful death action in which a Summary Judgment was entered in favor of the decedent's employer, co-employee and employer's insurer. In *Greathead*, the decedent was killed as a result of "horseplay". There, the Appellate Court reversed the entry of Summary Judgment in favor of the employer since there were disputed issues of fact as to whether the Plaintiff was within the course and scope of employment at the time of his accident and whether his horseplay constituted sufficient deviation so as to suspend the employer-employee relationship at the time of his injuries. *Greathead* at 1380. If it was determined an

employment relationship did not exist at the time of the Plaintiff's injuries the Court determined he was free to pursue a tort claim. *Greathead at 1383*. In the instant case, Tractor Supply never suggested Kent was outside the course and scope of employment at the time of his injuries. This argument was accepted by the 5th DCA which confirmed no inconsistent positions were maintained and therefore the holding in *Byerly, supra*, did not apply.

Of interest, on the top of page 10, the claimant in his Initial Brief tries to state that the 5th DCA's decision conflicts with its own decision in *Bylerly vs. Citrus Publishing, Co., supra*. This assertion reflects the claimant's misunderstanding concerning discretionary jurisdictional review by the Supreme Court. The rule under which the claimant is attempting to invoke discretionary jurisdiction allows for resolution of conflicts in cases in which the decision of the District Court of Appeal expressly and directly conflicts with the decision of the Supreme Court, or of **another** District Court of Appeal. Article V, Section 3(b)(3) of the Florida Constitution enables the Supreme Court to review a decision of a District Court of Appeal that expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law, but it cannot and does not allow the Supreme Court to resolve conflicts within a District Court of Appeal. *Allstate Insurance Co. vs. Langston*, 655 So2d 91 (Fla. 1995).

CONCLUSION

In order for this Court to invoke discretionary jurisdiction, an express and direct conflict must exist between the 5th District Court of Appeals holding in *Tractor Supply Company vs. Kent, supra*, and the three decisions from the 1st District Court of Appeal relied on by the Petitioner in his Jurisdictional Brief. The factual background of the three cases relied on by the Petitioner bear no similarity to the facts as they exist in *Tractor Supply, supra*. The 5th DCA's opinion in *Tractor Supply* is fact driven and the 5th DCA itself analyzed the three cases cited by the Petitioner in his Initial Brief, provided an explanation as to how those cases differed and declined an opportunity to clarify its decision or conduct a re-hearing *en banc*. (AP-10) Moreover, the heart of the issue on appeal in *Tractor Supply, supra*, was whether the employer should be *estopped* from asserting a worker's compensation exclusivity defense based on the fact it asserted a pre-existing injury defense in an earlier claim for worker's compensation benefits. No such *estoppel* arguments appear in the three cases cited by the Petitioner. The issues dealt with by the Tractor Supply court in its holding in no way conflict with opinions from the 1st DCA and the Petitioner's request for discretionary jurisdiction with this Court should be denied.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to **Chadwick J. Lawrence, Esq.**, 920 W. Emmett St., Kissimmee, FL 34741, **Bill McCabe, Esq.**, Co-Counsel for Kent, 1450 SR 434 West, Suite 200, Longwood, FL 32750, and **John Daly, Esq.**, Attorney for Amicus Curiae Florida Retail Federation, 201 E. Pine Street, Suite 1500, Orlando, FL 32801, by U.S. Mail delivery this _____ day of December 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Brief on Jurisdiction complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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