

SUPREME COURT  
STATE OF FLORIDA  
TALLAHASSEE, FLORIDA

FRANCIS DALE KENT,

Petitioner,

vs.

TRACTOR SUPPLY COMPANY,

Respondent.

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CASE NO.: SC07-2203

Lwr Tribunal: 5D06-4371

**PETITIONERS' INITIAL BRIEF ON JURISDICTION**

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This is an Initial Brief on Jurisdiction seeking to invoke discretionary jurisdiction to review a decision of the Fifth District Court of Appeal, Daytona Beach, Florida, opinion issued August 31, 2007, Motion for Rehearing denied October 25, 2007.

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**PRELIMINARY STATEMENT**

The Petitioner, FRANCIS DALE KENT, shall be referred to as "KENT".

The Respondent, TRACTOR SUPPLY COMPANY, shall be referred to as "TSC".

Reference to the record on appeal which was an appendix to the Initial Brief of the Appellant below, TRACTOR SUPPLY COMPANY, will be made by the letter "A" followed by the appropriate page number in the appendix.

The Trial Court below will be referred to by the letters "TC".

References to the appendix attached to Petitioner's Initial Brief on Jurisdiction will be referred to by the letters "AP" and followed by the applicable appendix page number. The appendix contains the opinion issued by the Fifth District Court of Appeal on August 31, 2007, and the order denying the Motion for Rehearing and/or Clarification dated October 25, 2007.

**STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

Petitioner, FRANCIS DALE KENT, was employed by the Respondent, TRACTOR SUPPLY COMPANY (TSC) (A-28). Between 5/2/05 and 5/10/05 KENT was exposed to hydrated lime dust while working in the warehouse of TSC which caused an aggravation of KENT's preexisting pulmonary condition and on 5/10/05 KENT was hospitalized (A-28).

Thereafter, KENT filed a Petition for Benefits for workers compensation benefits (A-29). On July 29, 2005 TSC filed a response to KENT's Petition for Benefits (A-20). In that response, TSC stated inter alia as follows:

1. Between May 5<sup>th</sup> and May 10<sup>th</sup> 2005 KENT was exposed to hydrated lime while on the job within TSC's warehouse (A-7).
2. Entire claim denied, as the condition complained of is the result of a preexisting medical condition, that is not the result of employment with TRACTOR SUPPLY CO. (A-20).

After TSC filed their response to KENT's PFB, KENT withdrew his workers compensation claim. On 10/17/05, KENT filed a Civil Suit against TSC in Circuit Court (A-4-12,29,36). In KENT's complaint against TSC, KENT alleged, inter alia, that TSC owed a duty to maintain a safe work environment and avoid creating a dangerous condition that it knew or should have known could

cause an aggravation of KENT's preexisting pulmonary condition. KENT alleged TSC chose to ignore the request made by KENT and his co-workers regarding the lime dust located in the warehouse and intentionally exposed its employees to the harmful effects of hydrated lime by refusing to cleaning it up in a timely fashion (A-7,8). KENT further alleged TSC breached the above duty owed to KENT and said breach directly and proximately caused KENT's injuries and need for medical treatment (A-7,8).

Thereafter, TSC filed their answer and twelve affirmative defenses (A-13-16). In its answer TSC, inter alia, admitted TSC owed a duty to KENT to maintain a safe work environment but denied the remaining allegations (A-13).

Additionally, TSC raised, inter alia, the following affirmative defenses:

**"ELEVENTH AFFIRMATIVE DEFENSE**

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.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff's claim for damages is barred as Plaintiff has previously elected his remedy by applying for and receiving workers compensation benefits. As such, Plaintiff is estopped to assert a claim for damages against Defendant, Tractor Supply Company." (A-16).

Thereafter, on 1/26/06 KENT filed:

**"MOTION TO STRIKE OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT RELATIVE TO DEFENDANT'S ELEVENTH AND TWELFTH AFFIRMATIVE DEFENSES."** (A-17-20).

Following an 11/16/06 hearing on the aforementioned motion, the Honorable Judge James R. Stroker entered:

**"ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF"** (A-1,2).

In that order the Trial Court ordered and adjudged as follows:

"The Motion to Strike or in the alternative for Partial Summary Judgment relative to Defendant's eleventh and twelfth affirmative defenses is hereby granted.

I find the Defendant's workers compensation insurance company denied an industrial accident occurred while in the course and scope of the Plaintiff's employment with Defendant and Defendant is now estopped from asserting immunity under Section 440.11 and 440.10, Florida Statutes.. ." (A-1,2).

On August 31, 2007 the Fifth DCA issued an opinion reversing the Trial Court's Partial Summary Judgment (AP-1-9). In that opinion the Fifth DCA stated the question presented in this appeal is whether the case of Byerley v. Citrus Publishing Inc., 725 So.2d 1230(11 5<sup>th</sup> DCA 1999) and Elliott v. Dugger, 542 So.2d 392(Fla.1st DCA 1989) establish that an employer such as TSC who, through its comp carrier, denies a workers' compensation claim on the basis that the injury or illness is preexisting, is then estopped from asserting workers' compensation immunity and exclusively in defending against a civil tort action (APP-5). The Fifth DCA concluded there is no irreconcilable conflict in TSC raising a preexisting medical

condition defense to a comp claim but asserting it is, nevertheless insulated from a civil suit (AP-7).

The Fifth DCA further stated the issue should be typically litigated in a workers' compensation setting and that employees should not be permitted to "jump the gun" and file suit in Circuit Court when a defense such as a preexisting condition is raised (AP-9).

KENT timely filed a Motion for Rehearing before the Fifth DCA which was denied on October 25, 2007 (APP-10).

#### POINT ON APPEAL

##### POINT I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FIRST DCA IN GREATHEAD V. ASPLUNDH TREE EXPERT COMPANY, 473 So.2d 1380(Fla.1<sup>st</sup> 1985), WILLIAMS V. HILLSBOROUGH COUNTY SCHOOL BOARD, 389 So.2d 1218(Fla.1st DCA 1980), GRICE V. SUWANNEE LUMBER MANUFACTURING COMPANY, 113 So.2d 742(Fla.1st DCA 1959).

#### SUMMARY OF ARGUMENT

##### I

The opinion rendered by the Fifth DCA in the case at bar expressly and directly conflicts with the decisions of the First DCA in Greathead v. Asplundh Tree Expert Company, 473 So.2d 1380(Fla.1st DCA (1985), Williams v. Hillsborough County School Board, 389 So.2d 1218(Fla.1st DCA 1980) and Grice v. Suwannee Lumber Manufacturing Company, 113 So.2d 742(Fla.1st DCA 1959).

In the above referenced cases, the First DCA held an employee is free to pursue his common law remedies for damages resulting from injuries not encompassed within the express provisions or intendments of the Workers' Compensation Act. Additionally, Greathead v. Asplundh Tree Expert Company, Supra, establishes that a Claimant may first file a tort claim and the employer may seek to defend that claim by raising workers' compensation immunity as an affirmative defense. There is no requirement that an employee must first litigate the injury in a workers' compensation setting.

#### ARGUMENT

##### POINT I

**WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FIRST DCA IN GREATHEAD V. ASPLUNDH TREE EXPERT COMPANY, 473 So.2d 1380(Fla.1<sup>st</sup> 1985), WILLIAMS V. HILLSBOROUGH COUNTY SCHOOL BOARD, 389 So.2d 1218(Fla.1st DCA 1980), GRICE V. SUWANNEE LUMBER MANUFACTURING COMPANY, 113 So.2d 742(Fla.1st DCA 1959).**

Article V, Section 3(b)(3), Fla. Const., provides that the jurisdiction of this Honorable Court may be invoked to review any decision of a District Court of Appeal that:

". . .Expressly or directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." See also, Fla.R.App.P.9.030(a)(2)(A)(iv).

Jurisdiction of this Honorable Court on a Notice to Invoke Discretionary Jurisdiction based upon a conflict depends on

whether the conflict between decisions below is express and direct and not whether the conflict is inherent or implied, Department of Health and Rehabilitative Services v. National Adoption Counseling Service Inc., 498 So.2d 888(Fla. 1986). For purposes of determining conflict jurisdiction, this Honorable Court is limited to the facts which appear on the face of the opinion, Hardee v. State, 534 So.2d 706(Fla.1988). Review based on conflict is unavailable where the opinion below establishes no point of law contrary to a decision of this Honorable Court or another District Court of Appeal, Curry v. State, 682 So.2d 1091(Fla.1996), First Union National Bank v. Turney, 832 So.2d 768(Fla.1<sup>st</sup> DCA 2002).

The Workers' Compensation Act, Chapter 440, provides coverage only if the employee suffers an accidental injury or death arising out of work performed in the course and scope of the employment, F.S.440.09(1)(2005), City of Port Orange v. Sedacca, 953 So.2d 727(Fla.1st DCA 2007), Greathead v. Asplundh Tree Expert Company, 473 So.2d 1383(Fla.1st DCA 1985). Locke v. Sun Trust Bank, 484 F.3<sup>rd</sup> 1343(11<sup>th</sup> Cir Fla. 2007). When an employee's injury arises out of and in the course of his employment, workers' compensation is the exclusive remedy for the injury and the employer is provided with immunity from other liability for the injury, F.S.440.11(1)(2005), Aguilera v.

Inservices, Inc., 905 So.2d 84 (Fla. 2005), Ruiz v. Aerorep Group Inc., 941 So.2d 505(Fla.3<sup>rd</sup> DCA 2006).

Conversely, when an employee's injury does not arise out of and in the course and scope of his employment, workers' compensation is not available, City of Port Orange v. Sedacca, Supra at 729 (Without an injury by accident, the Act provides no coverage and is inapplicable), Wishart v. Laidlaw Tree Service Inc., 573 So.2d 183(Fla.2<sup>nd</sup> DCA 1991). Similarly, there is no workers' compensation immunity for injuries which do not arise out of or in the course and scope of the employment, within the meaning of the Workers' Compensation Act, Aguilera v. Inservices, Inc., supra (immunity extends only to "an accidental injury or death arising out of work performed in the course and the scope of employment"), Byerley v. Citrus Publishing Inc., 725 So.2d 1230(Fla.5<sup>th</sup> DCA 1999), Williams v. Hillsborough County School Board, 389 So.2d 1218(Fla.1st DCA 1980).

In those instances where the employee is not eligible for benefits under the Workers' Compensation Act that employee is not without a remedy, Martinez v. Scanlan, 582 So.2d 1167(Fla.1991). There remains the viable alternative of tort litigation in those instances, Martinez v. Scanlan, Supra at 1172, Byerley v. Citrus Publishing Inc., supra, Elliott v. Dugger, 542 So. 2d 392 (Fla. 1<sup>st</sup> DCA 1989), Williams v. Hillsborough County School Board, supra.

Per F.S.440.02(36)(2005) an injury arises out of employment if the work performed in the course and scope of employment is the major contributing cause of the injury. Major contributing cause is currently defined, per F.S.440.09(1)(2005) to mean "the cause which is more than 50% responsible for the injury as compared to all other causes combined. . ."

If the Claimant has a preexisting condition, coverage is available under the Workers' Compensation Statute only if the workplace accident is and remains the major contributing cause of the disability or need for treatment, Closet Maid v. Sykes, 763 So.2d 377(Fla.1st DCA 2000). Conversely, if the injury is the result of a "preexisting medical condition" then it does not arise out of the employment, the Claimant is not entitled to workers' compensation benefits, and the employer is not entitled to workers' compensation immunity, Smothers v. Gresham Transfer Inc., 23 P. 3<sup>rd</sup> 333(Or. 2001).

The defense raised by TSC in the workers' compensation claim was an "arising out of" defense. TSC specifically alleged the "condition complained of is the result of a preexisting medical condition that is not the result of employment with TRACTOR SUPPLY COMPANY" (A-20).

The Fifth DCA, in its opinion in the case at bar, noted TSC's defense to the workers' compensation case did not assert that no employment relationship existed or that the incident

occurred outside the scope of employment (AP-6). The Fifth DCA found the denial asserts that under the terms of the Workers' Compensation Act the injury is one which is not deemed to be compensable (AP-6). The Fifth DCA concluded:

"There is no irreconcilable conflict in the employer here raising a preexisting medical condition defense to a comp claim, but asserting it is, nevertheless, insulated from a civil suit." (AP-7).

Claimant submits the above referenced holding is in direct conflict with Williams v. Hillsborough County School Board, supra. wherein the First DCA, in denying Claimant's workers' compensation claim for mental injuries stated:

"While the alleged injuries are not encompassed within the Florida Workers' Compensation Act, those injured under such circumstances or other situations not covered by the act are free to pursue common law remedies." Williams v. Hillsborough County School Board, Supra at 1219.

The decision of the Fifth DCA directly conflicts with Grice v. Suwannee Lumber Manufacturing Company, 113 So.2d 742(Fla.1st DCA 1959) wherein the First DCA stated:

"Appellant proceeds upon the basic premise that the Workman's Compensation Act is a substitute for the common law rights and liabilities of the employee and employer only on the subjects which it covers, and within its self contained limitations. **That it does not affect rights which are not within the purview of the Act or which by necessary implication or negation are excluded therefrom, we agree. As a necessary corollary it follows that an employee is free to pursue his common law remedies for damages resulting from injuries not encompassed within the express provisions or intendments of the Acts.**" (Emphasis mine), Grice v. Suwannee Lumber Manufacturing Company, Supra at 744.

The Fifth DCA's decision conflicts with its own decision in Byerley v. Citrus Publishing Inc., 725 So.2d 1230(Fla.5<sup>th</sup> DCA 1999) where in the Fifth DCA stated:

"We think it would be inequitable for an employer to deny workers compensation coverage on the grounds that the employee's injury did not arise out of the course and scope of employment, then later claim immunity from a tort suit on the ground that the injury did arise out of the course and scope of employment. This argument, if accepted, would eviscerate the Workers' Compensation Act and allow employers to avoid all liability for employee job related injuries." Byerley v. Citrus Publishing Inc., Supra at 1232.

The Fifth DCA also stated:

"Nothing is quick and efficient about allowing an employee to bypass the Act and sue in Circuit Court where the employer asserts that comp benefits are not recoverable because the injury/illness was the result of preexisting condition. That issue should typically be litigated in a workers' comp setting. Employee should not be permitted to 'jump the gun' and file suit in Circuit Court when a defense such as preexisting condition is raised." (AP-9).

Such a holding directly conflicts with the First DCA decision in Greathead v. Asplundh Tree Expert Company, Supra. An employee may file an action in tort, prior to filing a workers' compensation claim. F.S.440.19(6)(2005)

#### CONCLUSION

Since the Fifth DCA's 8/31/07 opinion expressly and directly conflicts with the above referenced cases of the First DCA, Petitioner respectfully requests that this Honorable Court grant Petitioner's Notice to Invoke Discretionary Jurisdiction and accept jurisdiction of this appeal.

Respectfully Submitted

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this \_\_\_\_ day of December, 2007 to: Chadwick J. Lawrence, 920 West Emmett Street, Kissimmee, Florida 34741, Deborah C. Drylie, 4719 NW 53<sup>rd</sup> Avenue, Suite A, Gainesville, Florida 32653, John P. Daly and Karissa L. Owens, 201 East Pine Street, Suite 1500, Orlando, Florida 32801.

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**CERTIFICATE OF TYPE FACE COMPLIANCE**

I hereby certify that this Initial Brief on Jurisdiction was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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