

**SUPREME COURT  
STATE OF FLORIDA**

Brenda Butler,

Petitioner,

vs.

Bay Center and Chubb Insurance Co.,

Respondents.

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Case No.: SC07-437

DCA Case No.: 1D06-1235

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**ON APPEAL FROM THE STATE OF FLORIDA  
FIRST DISTRICT COURT OF APPEAL  
OPINION DATED 29 DECEMBER 2006**

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**RESPONDENTS' BRIEF ON JURISDICTION**

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## **PRELIMINARY STATEMENT**

Petitioner, Brenda Butler, will be referred to as “Claimant” in this Brief. Respondents, Bay Center and Chubb Insurance Company, will be referred to as “Employer/Carrier” in this Brief.

References to the appendix attached to Petitioner’s Brief will be referred to by the letters “AP” and followed by the appropriate appendix page number. Legal citations contained in this Brief are intended to conform to Florida Rule of Appellate Procedure 9.800. All emphasis has been supplied by counsel unless otherwise noted.

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

Employer/Carrier will rely upon the Statement of the Case and Facts as contained in Petitioner's Brief on Jurisdiction, except as to argument contained therein. In particular, the focus on Judge Kahn's dissenting opinion. The countervailing arguments will be provided in this Brief in the Argument section.

## SUMMARY OF ARGUMENT

The December 29, 2006 opinion from the First District Court of Appeal does not expressly and directly conflict with an opinion from another district court of appeal or the Florida Supreme Court. The First DCA applied the applicable law in holding that the 2005 version of section 440.13 provided the procedure Petitioner had to satisfy to obtain pain management treatment. While Petitioner presents argument on the merits of her case in her jurisdictional brief, she has failed to show how the instant decision from the First DCA **expressly and directly** conflicts with either *Sullivan v. Mayo*, 121 So. 2d 424 9 (Fla. 1960) or *Hausler v. State Farm Mutual Automobile Insurance Company*, 374 So. 2d 1037 (Fla. 2d DCA 1979). Rather, Petitioner's complaint is truly on the outcome of the First DCA's applying of the applicable case law, not that the First DCA failed to follow the case law. Accordingly, this Honorable Court must deny Petitioner's request for supreme court jurisdiction.

## ARGUMENT

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

This Honorable Court should deny jurisdiction of this appeal as the First District Court of Appeal's 12/29/06 decision does not expressly and directly conflict with a decision of another DCA or of the Supreme Court. While Claimant adequately lays out the standards this Honorable Court must follow in determining whether to grant conflict jurisdiction under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, she then proceeds to argue the merits of her case. The fact of the matter is, simply, the First DCA **quotes** the well established principle that "substantive law prescribes applicable duties and rights, while procedural law prescribes the means and methods by which these duties and rights are applied and enforced." *Butler v. Bay Center*, 32 Fla. L. Weekly D123 (Fla. 1<sup>st</sup> DCA 12/29/06), citing *Russell Corp. v. Jacobs*, 782 So. 2d 404, 405 (Fla. 1<sup>st</sup> DCA 2001).

Judge Kahn in his dissent acknowledges that this is the correct standard, and admits that it is "difficult to clearly demarcate the distinction between a substantive right and a procedural or remedial enactment." Citing to *Paulk v. School Board of Palm Beach County*, 615 So. 2d 260,261 (Fla. 1<sup>st</sup> DCA 1993). (AP 9).

Claimant's primary complaint on this appeal is not that the First DCA failed to take heed of the applicable law, but rather Claimant is unhappy with the end result the First DCA reached after applying this Honorable Court's dictates and its own precedents. As Claimant argues in her Brief:

The Claimant's right to veto the E/C's initial selection of a physician and demand the appointment of another physician is a substantive right, not a procedural right.

(AP 10). But this argument goes to the heart of the matter, the merits of the case. This is not an argument for this Honorable Court to grant conflict jurisdiction. Claimant does not cite to any case which states that changes to the workers' compensation act's medical provisions in section 440.13 are by law substantive.

The first issue the First DCA reached was that the applicable statute was the 2005 version of section 440.13, relying on the test regarding substantive versus procedural law issued by this Honorable Court. Neither primary case relied on by Claimant, *Sullivan v. Mayo*, 121 So. 2d 424 9 (Fla. 1960) nor *Hausler v. State Farm Mutual Automobile Insurance Company*, 374 So. 2d 1037 (Fla. 2d DCA 1979), state a contrary point of law. *Sullivan* stands for the proposition that the substantive rights of an injured worker are governed by the workers' compensation law in effect at the time of the injury. Respondents agree that this is the law, and most importantly, so too did the First DCA.

*Hausler* provides that the terms of an insurance contract are set in accordance with the law in effect at the time the contract is entered into. Again, Respondents agree this is the applicable law. But it is not in conflict with the First DCA opinion below, which initially focused on whether the changes to section 440.13 were procedural. Relying on *St. Augustine Marine Canvas & Upholstery, Inc. v. Lunsford*, 917 So. 2d 280, 283 (Fla. 1<sup>st</sup> DCA 2005) (Section 440.13 “establishes an employer’s duty to see that an injured employee gets medical treatment, and prescribes the procedures for authorizing medical providers”), the First DCA held that the changes were procedural. Again, Claimant’s argument is not that the First DCA’s opinion conflicts with the applicable law, as the First DCA cited and applied the applicable law. Instead, Claimant disagrees with the end conclusion the First DCA reached. But the issue for this Honorable Court, at this stage of the appeal, is to determine whether the First DCA’s opinion **expressly and directly conflicts** with a decision of another district court of appeal or with the supreme court. Respondents argue that Petitioner has not shown any such express and direct conflict. Thus, as the instant decision from the First DCA is not in conflict with either *Sullivan* or *Hausler*, this Honorable Court must deny Claimant’s petition for jurisdiction.

## **CONCLUSION**

Based upon the foregoing arguments, analysis, and reasoning, Respondents argue this Honorable Court must deny Petitioner's request for Supreme Court jurisdiction.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that an original and five copies of the Respondents' Brief on Jurisdiction has been furnished by U.S. Mail delivery this 2<sup>nd</sup> day of April 2007, to: THOMAS D. HALL, CLERK, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927 and one copy each to JOEY D. OQUIST, ESQUIRE, 1135 Dr. MLK Street North, St. Petersburg, FL 33701 and BILL MCCABE, ESQUIRE, 1450 SR 434 West, Suite 200, Longwood, FL 32750, Attorneys for Petitioner.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), the undersigned counsel certifies that this brief is printed in Times New Roman 14-point font.

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