COPY

No. B226240

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LeFIELL MANUFACTURING COMPANY, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, SOUTHEAST DISTRICT, NORWALK COURTHOUSE, Respondent. O'NEIL WATROUS and NIDIA WATROUS, Real Parties-in-Interest.	Supreme Court No. S192759

OPENING BRIEF ON THE MERITS

Sandra L. Malek (State Bar No. 90447)
smalek@maleklaw.com
Jeffrey L. Malek (State Bar No. 94080)
jmalek@maleklaw.com
MALEK & MALEK
3625 Del Amo Boulevard, Suite 350
Torrance, CA 90503
Telephone: (310) 540-5100
Attorneys for Petitioner
LeFIELL MANUFACTURING COMPANY

No. B226240

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LeFIELL MANUFACTURING COMPANY, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, SOUTHEAST DISTRICT, NORWALK COURTHOUSE, Respondent. O'NEIL WATROUS and NIDIA WATROUS, Real Parties-in-Interest.	Supreme Court No. S192759

OPENING BRIEF ON THE MERITS

Sandra L. Malek (State Bar No. 90447)
smalek@maleklaw.com
Jeffrey L. Malek (State Bar No. 94080)
jmalek@maleklaw.com
MALEK & MALEK
3625 Del Amo Boulevard, Suite 350
Torrance, CA 90503
Telephone: (310) 540-5100
Attorneys for Petitioner
LeFIELL MANUFACTURING COMPANY

TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

ARGUMENT 5

I. UNTIL PUBLICATION OF THIS CASE, THERE HAS BEEN NO AUTHORITY TO PERMIT THE RECOVERY OF GENERAL DAMAGES AT LAW BY THE SPOUSE OF AN INJURED WORKER 5

II. A SPOUSE'S CAUSE OF ACTION FOR LOSS OF CONSORTIUM DERIVING FROM A WORK-CONNECTED INJURY TO AN EMPLOYEE SPOUSE IS BARRED BY THE EXCLUSIVE REMEDY DOCTRINE 8

III. THE COURT OF APPEAL HAS BROADENED THE STATUTORY EXCEPTION TO THE EXCLUSIVE REMEDY RULE AND HAS MADE THE EMPLOYER SUBJECT TO LIABILITY FOR DAMAGES TO THE THIRD PARTY SPOUSE 10

IV. CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

Page

Cases

Danek v. Hommer (1952) 9 N.J. 56 [87 A.2d 5] 7
Gillespie v. Northridge Hospital Foundation
(1971) 20 Cal. App. 3d 867, 98 Cal. Rptr. 134 7
Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1081 13
Williams v. Schwartz (1976) 61 Cal. App. 3d 628,
131 Cal. Rptr. 200 5

Statutes

Labor Code 3600 ..... 2, 3, 4, 8, 9
Labor Code 3601 ..... 7, 9
Labor Code 3602 9
Labor Code 4558 ..... 3, 4, 8, 10, 11, 12
Labor Code 4558(b) 3, 4, 5, 9
Gov. Code section 12900 12

No. B226240

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LeFIELL MANUFACTURING COMPANY, **Petitioner,** **v.** **SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, SOUTHEAST DISTRICT, NORWALK COURTHOUSE,** **Respondent.** **O'NEIL WATROUS and NIDIA WATROUS,** **Real Parties-in-Interest.**	**Supreme Court No. S192759** **OPENING BRIEF ON THE MERITS**

ISSUE PRESENTED FOR REVIEW

Whether the spouse of an injured worker may claim damages for loss of consortium in an action at law brought by the injured worker under *Labor Code* section 4558(b).

INTRODUCTION

LeFiell Manufacturing Company, defendant and petitioner, petitions this Court to reverse that portion of the published opinion and order of the Court of Appeal, Second Appellate District, Division Three, filed on

March 30, 2011, denying the petition for writ of mandate to order the trial court to sustain the demurrer to Real Party-in-Interest Nadia Watrous' claim for loss of consortium damages without leave to amend.

This is a matter of first impression. There is no case law on the issue of whether the spouse of an injured worker may assert a claim for damages in a court of law, where the injured worker's action is brought under *Labor Code* section 4558(b). The precedential value is great, as it is likely that a majority of such injured workers have spouses who would be able to assert claims for loss of consortium, as opposed to being limited to the remedies, if any, provided by the Workers' Compensation Act.

This published decision to permit a tort claim by the spouse of an injured worker to be brought in a court of law because it is stated to be "excluded" from Workers' Compensation has precedential value if allowed to stand, and presents an issue of law that will arise frequently. The ruling to permit the spouse of an injured worker to prosecute claims in a court of law is an expansion of the jurisdiction of *Labor Code* section 3600, without legislative authority for such an expansion.

STATEMENT OF THE CASE

Real Party-in-Interest O'Neil Watrous (the "worker") sustained a workplace injury. Real Party-in-Interest Nidia Watrous (the "spouse") is the spouse of the injured worker, who filed an action at law for loss of consortium.

The worker and his spouse together filed an action for damages. The worker alleged a claim under *Labor Code* section 4558(b), the exception to *Labor Code* section 3600 which permits a civil action in certain narrow circumstances, in this case, involving an injury on an alleged power press. The injured worker's spouse alleged a cause of action for loss of consortium.

Petitioner LeFiell Manufacturing Company ("LeFiell") is the special employer.

LeFiell brought a demurrer to the Complaint. As to the injured worker, the demurrer raised the issues that the Worker was not entitled to allege tort actions against the employer because the injury was subject to the exclusive remedy doctrine of the Workers' Compensation Act. The demurrer was denied by the trial court.

LeFiell petitioned the Court of Appeal for a writ of mandate, which, as to the worker, was granted.

As to the injured worker's spouse, LeFiell's demurrer asserted that the spouse was barred by the provisions of *Labor Code* sections 3600 *et*

seq. and 4558(b) from bringing an action at law for damages for loss of consortium. The trial court denied this demurrer.

The Court of Appeal denied the petition for writ of mandate as to the legal claims for loss of consortium brought by the spouse, and permitted the spouse to assert claims in a court of law for loss of consortium.

STATEMENT OF FACTS

This action arises from injuries allegedly suffered by Real Party-in-Interest O'Neil Watrous arising out of an industrial accident that occurred in the course of his employment with Petitioner LeFiell Manufacturing Company. The only claim by O'Neil Watrous is pursuant to the *Labor Code* section 4558(b) exception to the exclusive remedy doctrine in *Labor Code* section 3600 *et seq.* The remaining claim of Real Party-in-Interest Nidia Watrous is for damages for loss of consortium arising from the claim by her spouse under *Labor Code* section 4558.

ARGUMENT

I.

UNTIL PUBLICATION OF THIS CASE, THERE HAS BEEN NO AUTHORITY TO PERMIT THE RECOVERY OF GENERAL DAMAGES AT LAW BY THE SPOUSE OF AN INJURED WORKER

Certain *Labor Code*[1] provisions make Workers' Compensation the exclusive remedy for workplace injuries.

> "Labor Code section 3600 provides that liability thereunder is 'in lieu of any other liability whatsoever to any person' (...). Section 3601, subdivision (a), provides that 'Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is ... the exclusive remedy for injury ...of an employee against the employer ...' Section 5300, subdivision (a), declares that proceedings 'For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto' shall be instituted before the Workers' Compensation Appeals Board and not elsewhere."

Williams v. Schwartz (1976) 61 Cal. App. 3d 628, 131 Cal. Rptr. 200

There are several very limited exceptions to the exclusive remedy doctrine, one of which, at 4558(b), is at issue herein.

Labor Code section 4558(b) provides as follows:

---

[1] All section references are to the *Labor Code* unless otherwise noted.

> "An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." [Emphasis added.]

The legislature protected the right to damages that might be awarded to the marital community by permitting a widowed spouse to stand in the shoes of a deceased employee spouse. By precluding dependants of injured (but not deceased) employees from the right to bring actions at law, the legislature effectively acted to preclude increased awards rather than awards of compensation.

In the opinion of the Court of Appeal in this matter, the Court of Appeal expanded the exception set forth in section 4558(b) to permit a spouse of an injured worker to state a claim for loss of consortium in the trial court.

In a different matter not involving section 4558, the Court held as follows on the rights of the spouse of an injured worker:

> "The whole scheme of workmen's compensation contemplates that, in exchange for imposing on the employer a liability without fault and denying to him the common law defenses of contributory negligence and the fellow servant rule, he is assured of a single liability, limited by a statutory scheme, which provides for medical expenses and

> which allots a scheduled sum in lieu of both lost earnings and general damages. We can see no reason why the employer should also be held liable for collateral damages to third persons whose rights, at common law, were derivative from those of the employee.

Gillespie v. Northridge Hospital Foundation (1971) 20 Cal. App. 3d 867, 98 Cal. Rptr. 134

The *Gillespie* court agreed with the holding in the New Jersey case of *Danek v. Hommer* (1952) 9 N.J. 56 [87 A.2d 5] that where the employer becomes immune from liability in tort in consideration of the payment of compensation at a fixed rate irrespective of fault, then any action in tort that the spouse of the injured worker had by virtue of the marital status of the injured worker spouse in tort falls as well.

The legislature clearly had the opportunity to, and declined to, expand the exception to the exclusive remedy of Workers' Compensation to a dependent of the employee in the case of injury. Section 4558 provides a remedy to the spouse of an injured worker only in the case of death of the injured worker, not in the case of injury not resulting in death. There was no death of the injured worker in this case.

II.

A SPOUSE'S CAUSE OF ACTION FOR LOSS OF CONSORTIUM DERIVING FROM A WORK-CONNECTED INJURY TO AN EMPLOYEE SPOUSE IS BARRED BY THE EXCLUSIVE REMEDY DOCTRINE

Labor Code Sections 3600, 3601 and 3602 provide that where conditions warranting compensation exist, the sole remedy of the employee or his dependants is to recover such compensation, and the employer's liability to pay is in lieu of any other liability to any person.

The Court of Appeal in this matter correctly opined that the "plain language of section 4558 does not permit Watrous' spouse to seek loss of consortium damages." (Opinion, page 10)

The Court of Appeal then continued as follows:

> "Where the exclusivity rule of section 3600 applies, that rule encompasses not only any cause of action asserted by the injured employee but also loss of consortium causes of action that are deemed collateral or derivative of the employee's injuries. [Citations omitted.] This is so because claims for loss of consortium by a nonemployee spouse are dependent upon the employee injury, and the claim could not exist without an injury to the employee spouse. [Citations omitted]" (Opinion, page 11)

The Court of Appeal further stated that "Watrous's spouse's claim for loss of consortium is legally and causally dependent upon Watrous's power press injury." [Citation omitted] (Opinion, page 12)

Thereafter, the Court takes a wrongheaded leap into unsupported conclusions, and in so doing, is led to a misinformed and entirely incorrect holding:

The Court of Appeal stated that "Watrous's injury is excluded [sic] from the exclusive remedy rule in section 3600. Since Watrous's injury is outside the workers' compensation bargain, his spouse's dependent claim also falls outside the workers' compensation bargain of section 3600."

There is absolutely nothing in the record to support the conclusion that the injured employee's injury is any way "excluded" from the exclusive remedy rule. It appears that the Court may have inadvertently confused the word "exception," which is what section 4558(b) is, with the word "exclusion." That error has tainted the decision, and led the court to the wrong conclusion.

In fact, Watrous' injury was fully subject to Workers' Compensation. The "exception" provided by section 4558(b) does not preclude or exclude the remedy provided by sections 3600, 3601 and 3602. As an exception to the exclusive remedy rule, 4558(b) provides an additional remedy to the injured worker, namely, that the worker may also bring a claim in civil court, and accordingly, may also seek damages in addition to those within the jurisdiction of the Workers' Compensation Appeals Board. Indeed, here the injured worker filed both a Workers' Compensation action and an action at law. There is no requirement that all

such claims be brought in civil court. Nor, most importantly, is the injured worker excluded, by any statutory or case law, from Workers' Compensation. As provided in section 3602(a), where the "conditions of compensation" concur, as they do here, the

> "right to recover such compensation is, except as specifically provided in this section and Section[...] ...4558, the sole and exclusive remedy of the employee or his ... dependents against the employer..."

Thus, the injured worker is fully entitled to proceed in the Workers' Compensation Appeals Board and ALSO proceed in civil court under section 4558. The injured worker is in no way EXCLUDED from proceeding in both the Workers' Compensation Appeals Board and in civil court under the exception provided in section 4558.

III.

THE COURT OF APPEAL HAS BROADENED THE STATUTORY EXCEPTION TO THE EXCLUSIVE REMEDY RULE AND HAS MADE THE EMPLOYER SUBJECT TO LIABILITY FOR DAMAGES TO THE THIRD PARTY SPOUSE

The Court of Appeals states that:

> "Our holding in this case does not broaden the exception, but rather permits the recovery of full relief to those injured employees who plead and prove a power press injury. This result does not further expose the employer to tort liability. Nor does this result expose the employer to third-party

liability; the statute protects the employer from liability from indemnity." [Opinion, page 12]

The Court of Appeal also mischaracterized section 4558 at page 2 of its Opinion as an "exclusion" rather than as an "exception." Section 4558 is not an EXCLUSION from Workers' Compensation. It is a statutory exception to the exclusive remedy doctrine, which, if an injured employee can plead the statutory requirements, permits the employee to pursue a civil action which might include remedies which are not part of Workers' Compensation. It appears that the Court of Appeal mischaracterized the statute and its remedies because of a confusion of the terms "exclusion" and "exception." Unfortunately, this error in a published opinion, changes the well-established law regarding the 4558 exception to the exclusive remedy provided by the Workers' Compensation Act, Sections 3600, 3601 and 3602.

The Court of Appeal is wrong on all counts. The Court of Appeal has exceeded the statutory language by permitting the spouse of the injured worker to bring an action for loss of consortium in the civil court. Any statutory remedies for a spouse occur when death has occurred to the injured worker, and the spouse essentially stands in the shoes of the deceased spouse, so that the compensation due is not lost to the marital community.

The Court of Appeal here holds that section 4558 does not permit the spouse of the injured worker to bring a loss of consortium action except in the case of death of the injured worker, yet it concludes that the spouse can bring the action at law because the worker is "excluded" from Workers' Compensation. This is the plain confusion and wrong holding. There is no exclusion; indeed, in the instant matter the worker filed a Workers' Compensation action in addition to an action at law. Section 4558 allows an additional remedy. If there is no exclusion, then the spouse is limited to her remedies in the Workers' Compensation Appeals Board, just as is the worker. The only difference is that the worker has additional remedies by statute (section 4558(b)), which the Court of Appeal correctly holds does not extend to the spouse.

The legislature specifically omitted the spouse of an injured, but not deceased, worker from the coverage of section 4558. The instant Court of Appeal has taken it upon itself to supplant the legislature and increase the statutory benefits, as well as to increase the liabilities of the employer

This Court's ruling specifically exposes the employer to third party liability to the spouse for loss of consortium, contrary to the plain language of the statute, by holding that "Watrous's spouse has alleged a loss of consortium cause of action that does not fall within the exclusive remedy rule of the workers' compensation laws." (Opinion, page 12)

Additionally, and perhaps most importantly, the court of appeals mistakenly holds that this holding does not expand tort liability to the employer. Indeed, absent this ruling, employers would not be faced with third party tort claims by spouses of injured workers outside of the Workers' Compensation Appeals Board. This holding allows for such additional claims that have heretofore been limited to remedies in the WCAB. If the factors which give rise to a claim at law under section 4558 are nevertheless limited, as the Court of Appeals correctly held, the injured worker is not suddenly free from the entire exclusive remedy process. Rather, he or she may claim additional damages if certain facts are proved. The injured worker may not allege general negligence, as the Court of Appeal has correctly held. So, too, the spouse of the injured worker is not now suddenly free to bring claims at law that the spouse is otherwise barred from bringing, merely because the injured worker comes within a limited expansion of remedies as provided by section 4558. The injured worker and the spouse are still covered by the exclusive remedy provisions of the WCAB, and still enjoy remedies in that forum. Nothing in the statute negates those protections, nor are there enhanced remedies for anyone other than the injured worker, and then only upon the limited theory of liability prescribed by 4558.

The Court of Appeal cites *Schifando v. City of Los Angeles* (2003) 31 Cal. 4th 1074, 1081 as the sole legal authority in support of its holding

that Watrous's spouse's loss of consortium cause of action does not fall within the exclusive remedy rule of the workers' compensation laws. *Schifando* is a case involving employment discrimination involving physical disability and whether certain administrative remedies must be exhausted before filing a claim under the California Fair Employment and Housing Act (Gov. Code §12900 *et seq.*). There is absolutely nothing in *Schifando* that addresses Workers' Compensation, or the exclusive remedy doctrine, or any exception to the exclusive remedy doctrine, let alone section 4558. *Schifando* has no applicability to the case at issue, and is misleading at best. It is not authority for any holding in this matter.

IV.

CONCLUSION

The Court of Appeal in this matter has made a serious error in interpreting the exclusive remedy doctrine and the scope of the exception to it set forth in Section 4558(b). There is no other California case that can be found specifically addressing the right of the spouse of an injured worker to bring a cause of action in civil court for loss of consortium. Publication of this mistaken opinion will open the proverbial floodgates to such claims. If that is to happen, it must be by the legislative process, and not by judicial edict.

For the reasons stated herein, Petitioner requests that this Court reverse the ruling of the Court of Appeal as to the cause of action for loss of

consortium and deny the spouse of an injured worker the right to seek damages for loss of consortium in an action at law under *Labor Code* Section 4558(b).

Dated: July 18, 2011

Respectfully submitted,

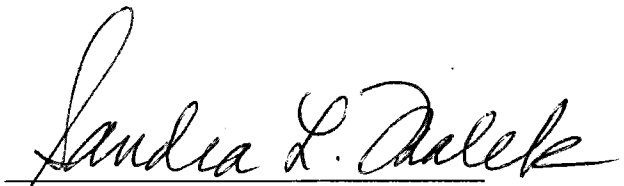
By Sandra L. Malek

Jeffrey L. Malek
Sandra L. Malek
Attorneys for Petitioner
LeFiell Manufacturing Company

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Petitioner is produced using 13-point Roman type including footnotes and contains approximately3,270 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 18, 2011



Sandra L. Malek

PROOF OF SERVICE

LeFiell Manufacturing Company, Petitioner v. The Superior Court of California, For the County of Los Angeles, Southeast District, Norwalk Courthouse, Respondent. O'Neil Watrous and Nidia Watrous, Real Parties-in-Interest.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 3625 Del Amo Boulevard, Suite 350, Torrance, California 90503.

On July 18, 2011, I served the following document OPENING BRIEF ON THE MERITS, on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope o r package, addressed as follows:

CALIFORNIA SUPREME COURT (Original + 13 copies)
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

COURT OF APPEAL (1 copy)
Second Appellate District
Division 3
300 South Spring Street
2nd Floor
Los Angeles, CA 90013

Hon. Yvonne T. Sanchez (1 copy)
Judge of the Superior Court
LOS COUNTY SUPERIOR COURT
Southeast District, Norwalk Courthouse
12720 Norwalk Blvd.
Norwalk, CA 90650

Hon. Raul A. Sahagun (1 copy)
Judge of the Superior Court
LOS COUNTY SUPERIOR COURT
Southeast District, Norwalk Courthouse
Department SE-F
12720 Norwalk Blvd.
Norwalk, CA 90650

Christopher E. Purcell, Esq.
Christina D. Bennett, Esq.
LAW OFFICES OF CHRISTOPHER E. PURCELL
77 Irvine Center Drive
Suite 200
Irvine, CA 92618
Telephone: (949) 861-2300
Facsimile: (949) 861-2301

Attorneys for Plaintiffs
O'NEIL WATROUS AND
NIDIA WATROUS

Nicholas C. Rowley, Esq.
Tiffany Chun, Esq.
CARPENTER, ZUCKERMAN & ROWLEY
8827 West Olympic Boulevard
Beverly Hills, CA 90211
Telephone: (310) 273-1230
Facsimile: (310) 858-1063

Attorneys for Plaintiffs
O'NEIL WATROUS AND
NIDIA WATROUS

Timothy J. Watson, Esq.
LEWIS, BRISBOIS, BISGAARD & SMITH, LLP
701 B Street
Suite 1900
San Diego, CA 92101
Telephone: (619) 233-1006
Facsimile: (619) 233-8627

Attorneys for Defendant
SPX CORPORATION

X BY OVERNIGHT DELIVERY: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 18, 2011, at Torrance, California.

Patricia Gardner