S192759

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LeFIELL MANUFACTURING COMPANY,

Petitioner and Defendant,

vs

O'NEIL WATROUS and NIDIA WATROUS

Real Parties-in-Interest and Plaintiffs.

After a Decision by the Court of Appeal
Second Appellate District, Division 3
Case No. B226240

REPLY TO ANSWER BRIEF ON THE MERITS

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Appellant respectfully submits its Reply to Real-Parties-in-Interest's Answer Brief.

I. ARGUMENTS RAISED BY REAL PARTIES-IN-INTEREST SEEK TO CONFUSE AND EXPAND THE LEGISLATIVE INTENT OF EXCLUSIVE REMEDY

Real Party-in-Interest, along with the Court of Appeal, has confused and misinterpreted the notion of the workers' compensation bargain.[1] While the Court of Appeal mistakenly held that the injured employee was "excluded" from workers' compensation, rather than coming within an exception, Real Party-in-Interest argues that this exception strikes down all barriers of the exclusive remedy doctrine. Rather than fully analyzing the case law, Real Party -in-Interest argues that "Judge-made law is the cornerstone of our legal system" citing (presumably Justice Mosk) *Rodriquez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, and arguing that this should be the basis of this Court's holding. Not finding any case to her liking, Real Party-in-Interest is arguing that this Court merely make it up!

While there is indeed a place for Judge-made law, as expressed in *Rodriquez* by Justice Mosk, it can be a logical extension of, and development of, the common law. When invoking the Court's views in expanding common law, it is humbly submitted that the words of James Madison should be considered: "In republican government, the legislative

[1] Real Parties-in-Interest mistakenly refers to Workers' Compensation as "Worker's (sic) Compensation" throughout the brief, which reveals much about her understanding or lack thereof of the legislative scheme.

power necessarily predominates" (See Federalist # 51), or the words of Justice Byron White:

> "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.... There should be, therefore, great resistance to ... redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."

Bowers v. Hardwick, 478 U.S. 186 (1986).

Justice Mosk wrote in his concurring opinion in *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Meier)* (1985) 40 Cal. App. 3d 5, in a case involving an unlicensed contractor's status as an employee of his hirer that, "Because the unfairness involved in the dissimilar treatment ... does not appear to be of constitutional dimension, the remedy must come, if at all, from the hands of the Legislature.... What form legislation should take is not this court's responsibility."

The Court is urged to rely upon the cases that do provide guidance, in that loss of consortium claims arising out of industrial injuries are barred by the exclusive remedy set out in the *Labor Code*, and that the exception in the instant matter does not confer additional rights or causes of action beyond the one for the injured employee alone.

II. THE EXCEPTION CREATED BY LABOR CODE §4558 DOES NOT PROVIDE AN EXCEPTION TO ANY PARTY, OTHER THAN THE EMPLOYEE THAT EXCEPTION IS NARROW AND DOES NOT PROVIDE FOR CLAIMS AT LAW OTHER THAN A VIOLATION OF THAT STATUTE ALONE

The loss of consortium claim, while related to the claim of the injured employee does not gain special status and is not part of the strict exception to workers' compensation benefits. Not only is the injured employee limited to claims arising out of *Labor Code* §4558, a claim for loss of consortium is not included in this statute. If it were otherwise, then the employee would be free to alleged other common law tort claims at law, and that is not true.

The instant matter before the Court is one of derivative versus dependant claims. This court held in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, that:

> "In barring certain third party civil actions, the derivative injury cases do not depart from the language of section 3600; they merely apply the statutory language to actions that are necessarily dependent on the existence of an employee injury (citing *Treat v. Los Angeles Gas*, the parents sought their own damages for the work-related death of their minor son) *ibid* 998. Citing *Cole v. Fair Oaks Fire Protection Dist.,* 43 Cal. 3d 148, 162 the Court reaffirmed, we acknowledged that consortium claims are not "merely derivative or collateral to the spouse's cause of action", but at the same time we held the exclusivity provisions applied because the

> consortium claim is "based on the physical injury or disability of the spouse".

Reaffirming *Rodriquez*, this Court held in *Snyder* at page 999 that:

> "while the losses for which damages sought in a consortium action may properly be characterized as 'separate and distinct' from the losses to the physically injured spouse (citations omitted) the former are unquestionably dependent, legally as well as casually, on the latter. One spouse cannot have a loss of consortium claim without a prior disability injury to the other spouse."

In further explaining its reasoning overturning the holding in *Bell v. Macy's California* (1989) 212 Cal. App. 3d 1442, the *Snyder* Court cited the holding in *Ransburg Industries v. Brown* (1995) 659 N.E.2d 1081, to wit: "Unlike a loss of consortium claim, the action does not seek compensation for damages suffered by the claimant which arose on account of the injury sustained by the employee. Rather, this action seeks to recover for the injury sustained by Brandon himself while *in utero*, which ultimately resulted, it is claimed, in Brandon's death".

The issues in *Bell*, *Ransburg*, and *Snyder* concern the rights and claims of third parties (*Bell,* appeal by a deceased infant; *Ransburg,* appeal of a deceased child; *Snyder,* a tort claim of a minor allegedly injured *in utero*). *Rodriquez* concerns a loss of consortium claim as a result of negligence of a third party. These cases are instructive on the instant issue in that their claims are not strictly part of the compensation bargain. In the instant matter, the claims are clearly part of the compensation bargain, and

the allegation of violation of *Labor Code* §4558 does nothing to disturb that notion.

Snyder held that "consortium claims are not merely derivative or collateral to the spouse's cause of action, but at the same time we held the exclusivity provisions applied because the consortium claim is based on the physical injury or disability of the spouse." *Snyder, supra at* 999. The Court further held that a claim for negligent or intentional infliction of emotional distress based on the plaintiffs having witnessed the physical injury of a close relative is logically depend on the prior physical injury. "Thus, the claim is due to the employee's injury and the action is barred as deriving from injuries sustained by an employee in the course of his employment." (Citations omitted.)

III. LOSS OF CONSORTIUM CLAIMS ARE PART OF THE COMPENSATION BARGAIN AND BARRED BY THE EXCLUSIVE REMEDY DOCTRINE

In reaffirming that Loss of Consortium claims are part of the compensation bargain, the Court in *Snyder* (citing *Williams v. State Compensation Ins. Fund,* 50 Cal. App. 3d 122) plainly stated that "the concerns raised by Michael's may be substantial, but are more properly addressed to the Legislature than to this court. The 'Compensation bargain' to which Michael's alludes is between businesses and their employees.... The workers' compensation law imposes reciprocal concessions upon

employer and employee alike.... The employee's concession of a common law tort action under sections 3600 and 3602 extends, as we have seen to family members' collateral losses deriving from the employee's injury." *Id.* 1004; 1005.

Real Party-in-Interest's argument from the outset of this litigation has been that the exception to the exclusive remedy codified by *Labor Code* §4558 strikes down all barriers to an action at law. As a result of this theory, in the instant matter, the injured employee alleged claims against his employer for general negligence and strict products liability as well as allegations of violation of *Labor Code* §4558. The Court of Appeal held that Real Party-in-Interest overreached, and that in fact he was still part of the compensation bargain, but was also able to maintain an action at law under the strict provisions of *Labor Code* §4558. No other claims other than *Labor Code* §*4558* being authorized by statute, his other claims were dismissed.

IV. LABOR CODE §4558 DID NOT ERASE THE EXCLUSIVE REMEDY/COMPENSATION BARGAIN

As the Court is well aware, the legal requirements to prevail under *Labor Code* §4558 are strict and not liberally interpreted. The *Labor Code* provides for a strict burden of proof, and specific facts must be proved in order to prevail, unlike a general negligence theory. The Court of Appeal held that the allegation of a claim under *Labor Code* §4558 did not obviate

the exclusive remedy provisions of the *Labor Code*, it merely allowed for this narrow pleading. Other tort claims were still barred by statute. At the same time the injured employee may proceed, and indeed in the instant matter has proceeded, before the Workers' Compensation Appeals Board, for normal workers' compensation benefits. The injured worker is not "excluded" from workers' compensation; indeed, he is still very much governed by it. The facts giving rise to the *Labor Code* violation allow a further remedy of damages at law, but it does not wipe clean the provisions of exclusive remedy. Just as the employee is still within the compensation bargain, so too is the spouse (see *Snyder, supra*). Real Party-in-Interest would have the Court treat the facts as though the employer were uninsured, removing employer's protections of exclusive remedy. This is not the case. Indeed, the facts that give rise to these types of claims at law are so narrowly construed that third parties may not initiate claims. If the employer were outside of the bargain this would not be the case.

Real Party-in-Interest's argument is set out in her ANSWER as follows: "Mr. Watrous has a claim under an exception, *Labor Code* Section 4558, to the exclusivity rule so he is not bound or restricted by it, thus worker's (sic) Compensation cannot be the 'sole remedy' here", misstates the law. This is the same argument that Real Party-in-Interest made to the Court of Appeal with regard to additional tort claims at law. These claims were rejected; the exclusive remedy did not melt away, but

there is an exception if the employee can prove certain specific facts. Other than the §4458 exception, the balance of the exclusive remedy remains intact.

The existence of *Labor Code* §4558 is an exception to the limits of workers' compensation, but exists within certain precise and limited parameters. Meet those parameters, and yes, the full panoply of remedies at law are available to the employee, but the employee may only allege claims under this section. Yet the employee is not excluded from workers' compensation, as the worker may, and does, receive the benefits of that system. There is no double recovery at law, the worker is not advantaged one way or the other for pursuing either claim. But, while the exclusive remedy gate is opened, it is not as though it does not exist, for if there were the case any claim in tort would be possible, and it is clear that the only claim that is permissible is one prescribed by *Labor Code* §4558. The rise of a claim under *Labor Code* §4558 does not strike down all protections or the existence of the exclusive remedy doctrine. Indeed, only the injured employee may file a case at law against the employer. No third party defendant may maintain an action, even for indemnity (*Labor Code* §4558 (d)). The *Labor Code* is merely an enhancement of remedies, not a "get of jail free card", for indeed there are still very strict restrictions in terms of pleading and proof to which the employee must adhere.

The Court of Appeal's and Real Party-in-Interest's assertion that allowing a loss of consortium claim at law does not further expose the employer to tort liability is misleading. The employer is operating under the compensation bargain of the exclusive remedy doctrine, so that the employer is not subject to suit by third parties, even in the case of a *Labor Code* §4558 claim. A loss of consortium claim is barred by the exclusive remedy doctrine. Indeed, the Court of Appeal held (in rejecting Real Party-in-Interest's claim) that the Loss of Consortium claim falls within the *Labor Code* §4558 claim. The Court of Appeal held:

> "The plain language of the section of 4558 does not permit Watrous's spouse to seek loss of consortium damages. Section 4558 only permits a dependant to pursue a civil suit for damages upon the death of the injured worker (citations omitted). There is no language in the statute that would expand the exception to permit a spouse to proceed with a loss of consortium claim."

Yet it is the very existence of the alleged *Labor Code* violation upon which Real Party-in-Interest is relying in asserting that she had a right to bring an action at law for a claim that, but for this *Labor Code* claim, she would be barred from bringing due to the exclusive remedy doctrine. The argument of Real Party-in-Interest, circles back to the notion of Judge-made law. Indeed the Court should be wary of any claim that expands legislative intent. The legislature clearly considered survival actions should the employee die as a result of an alleged violation of *Labor Code* §4558.

It could just as easily stated that loss of consortium claims could also be alleged at law. It did not. It has long been held that loss of consortium claims are barred at law by the exclusive remedy doctrine. Just as the Court has held that the *Labor Code* §4558 claim does not further expand claims in tort at law beyond the limits of the statute, so too should it affirm that the bar for a claim of loss of consortium has not somehow been transformed so that parties are no longer bound by the exclusive remedy doctrine. If it were otherwise, would not third parties, such as manufacturers of machines involved in these matters be allowed to sue the employer as well? The legislature expanded, in a limited manner, claims for the injured worker, only; no mention is made of other parties, spouses, or other third parties.

A claim for loss of consortium damages is a new exposure for the employer, and further expands *Labor Code* §4558 beyond what the legislature had written and intended. The argument by Real Party-in-Interest that such a claim does not further expand liability to the employer, when this is clearly a new claim by a third party, is disingenuous and incorrect. A holding allowing such claims erodes the exclusive remedy doctrine, and would do so without legislative intent.

V. THE COURT SHOULD DISREGARD, AND STRIKE FROM THE RECORD ALL REFERENCES TO FACTS NOT ALLEGED IN THE COMPLAINT, THE OPERATIVE PLEADING HEREIN

Real Party-in-Interest's inclusion into her argument of allegations of facts which have not been heretofore alleged is inappropriate, and a clear attempt to district and persuade the court on an emotional plane. The operative pleading here is Real Party-in-Interest's Complaint. The additional and new facts which are included in the ANSWER are not helpful to the issue and are improperly included as neither the trial court, nor the Court of Appeal had the benefit of review and consideration of these new facts. It is respectfully requested that all such references to facts not specifically plead in the complaint be stricken, and disregarded by the Court.

VI. CONCLUSION

The Answer filed by Real Party-in-Interest argues that the *Labor Code* §4558 allegation negates the compensation bargain and the exclusive remedy. The Court of Appeal rejected this argument holding that the injured worker was limited to the cause of action set out by the *Labor Code*. The legislature has not expanded this statue to allow third parties to bring tort actions at law against the employer, nor has it specifically allowed a claim for loss of consortium to be filed at law. While the legislature did consider survival actions, it can be concluded that at the

same time it also considered all claims that dependants could bring, and did not enact such rights.

It is urged that the Court not expand the compensation bargain, but keep it as intended. The Court should reverse the ruling of the Court of Appeal and deny this claim of loss of consortium at law.

Dated: August 24, 2011

Respectfully submitted,

MALEK & MALEK

By _____

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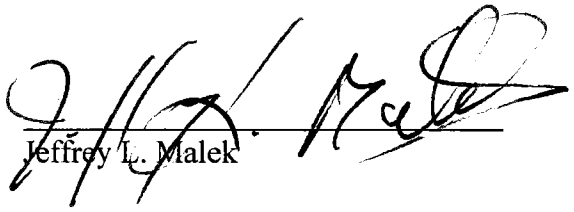
Attorneys for Petitioner and Defendant
LEFIELL MANUFACTURING COMPANY

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 approximately 3,098 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: August 24, 2011



Jeffrey 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 August 24, 2011, I served the following document REPLY TO ANSWER 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:

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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 August 24, 2011, at Torrance, California.

_____

Patricia Gardner