

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,268

DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

IVIA JEAN NEWSOME,

Respondent.

**FILED**

OCT 17 1988

**J. WHITE**  
CLERK SUPREME COURT

Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF  
APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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-and-

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INDEX

PAGE

I.	STATEMENT OF THE CASE AND FACTS	1
II.	ARGUMENT	1
III.	CONCLUSION	4
IV.	CERTIFICATE OF SERVICE	5

TABLE OF CASES

PAGE

MASTRANDREA v. J. MANN, INC.,  
128 So.2d 146 (Fla. 3rd DCA),  
cert. denied, 133 So.2d 320 (Fla. 1961)

1-4

I  
STATEMENT OF THE CASE AND FACTS

The decision sought to be reviewed contains its own succinct statement of the case and facts, and we therefore simply refer the Court to that decision for the necessary background here. One statement in the DOC's statement of the case and facts needs correction. The DOC states:

The trial court granted a motion by DOC for summary judgment on the grounds that Dixon was not in the physical custody of DOC at the time of his escape and therefore DOC was not liable for any negligence in the supervision of Dixon.

(Petitioner's brief, p. 1). This statement is inaccurate. According to the decision sought to be reviewed, [t]he trial court granted DOC's motion for summary judgment on the grounds [sic] of sovereign immunity".

II  
ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED IS NOT IN EXPRESS AND DIRECT CONFLICT WITH MASTRANDREA v. J. MANN, INC., 128 So.2d 146 (Fla. 3rd DCA), cert. denied, 133 So.2d 320 (Fla. 1961).

The DOC contends that the decision sought to be reviewed is in express and direct jurisdictional conflict with MASTRANDREA v. J. MANN, INC., 128 So.2d 146 (Fla. 3rd DCA), cert. denied, 133 So.2d 320 (Fla. 1961). We disagree. Even a cursory comparison of the two decisions will demonstrate that they are not even arguably in conflict.

In the first place, the decision sought to be reviewed holds simply that the DOC is not immune from the plaintiff's suit under the doctrine of sovereign immunity, because it had a statutorily imposed, ministerial (and therefore "operational level") duty to supervise inmates loaned to the DOT. The issue in MASTRANDREA was whether a general contractor could be found liable in a personal injury action for its independent masonry contractor's negligence, which was evidenced by violation of a local ordinance regulating the height of

materials stacked on a construction site. The two questions, and consequently the two decisions, are as different as an apple and an orange. Given the considerable difference between the two issues in the two cases, it is inconceivable to us that they could be viewed as being in express and direct jurisdictional conflict.

Despite the obvious difference between the two cases, the DOC nevertheless asserts that the decision sought to be reviewed conflicts with the following rule of law stated in MASTRANDREA:

. . . As a general rule, if a statute or municipal ordinance requires one to do a certain thing or to take certain precautions for the protection of persons on or near his property, he cannot delegate such duty to an independent contractor and be released from liability in case the contractor fails to perform it. In order that the employer may be charged with liability, however, the terms of the statute or ordinance in question must be of such a tenor as to subject him to a definite obligation. .

128 So.2d at 148. The DOC's protestations to the contrary notwithstanding, it is obvious that the decision sought to be reviewed does not conflict with this rule of law. It certainly does not announce a contrary rule. In fact, the "general rule" set forth in MASTRANDREA is not even discussed in the decision sought to be reviewed.<sup>1/</sup> If there is conflict, it must be found in the interstices of the two decisions by comparing the results reached in each of them.

This is the tack which the DOC has taken here. In effect, the DOC is arguing that had the MASTRANDREA "rule" been applied to the facts in this

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<sup>1/</sup> The reason there is no discussion of the MASTRANDREA "rule" in the decision sought to be reviewed is that neither MASTRANDREA, its "rule", nor the general proposition for which MASTRANDREA stands was argued to either the trial court or the District Court. Because the issue was not raised in any form below, it would be fruitless for this Court to accept jurisdiction of this case, even if MASTRANDREA were in express and direct conflict with the decision sought to be reviewed--since the issue giving rise to the conflict could not properly be reached by this Court.

case, the result in this case would have been different. Even if such a conclusion could be drawn, we are not at all certain that express and direct conflict would exist, but we need not debate that proposition because application of the MASTRANDREA rule to the instant case would clearly require precisely the same result as that reached by the District Court below.

MASTRANDREA holds that where a statute subjects a person to a "definite obligation", "he cannot delegate such duty to an independent contractor and be released from liability in case the contractor fails to perform it". The statute in issue in this case requires in plain and unambiguous language that inmates loaned to the DOT be "under supervision of the employees of the Department [of Corrections]", and it therefore imposes a "definite obligation" upon the DOC to supervise its inmates. When the MASTRANDREA rule is applied to those facts, the result is that the DOC "cannot delegate such duty [of supervision] to an independent contractor [the DOT] and be released from liability in case the contractor fails to perform it".

That is precisely what the District Court held below:

Section 945.11 is a clear legislative mandate that DOC is responsible for the supervision of inmates assigned to DOT work details such as this. To the extent that DOC relies upon DOT or other agencies to carry out its statutory responsibility of providing adequate supervision of its inmates while on §945.11 work details, it does so at its peril. . . . DOC is not entitled to the shield of sovereign immunity in carrying out its statutory operational duty of supervising such inmates whether through its own employees or those of any other agency to whom it purports to delegate such responsibility.

There is therefore clearly no express and direct conflict between the two decisions.

In the final analysis, the DOC's entire argument here rests upon a misreading of MASTRANDREA. If we understand the DOC's argument correctly, the DOC has read MASTRANDREA to mean that a statutory duty is "nondelegable" for purposes of liability only where it imposes a "direct obli-

gation" upon a person to comply with the statute itself. Having posited this as the holding of MASTRANDREA, it then argues that the decision sought to be reviewed conflicts with MASTRANDREA because the DOC does not have a duty "to directly supervise" its inmates while on loan to the DOT. The argument is spurious, because MASTRANDREA does not say that a statutory duty is "nondelegable" only where it imposes a "direct obligation"; it says that a statutory duty is "nondelegable" where it imposes a "definite obligation".<sup>2/</sup>

If that is not clear enough from the language of MASTRANDREA itself, it is certainly clear from the result in the case--because MASTRANDREA did not hold that the general contractor in that case had a duty "to directly stack" the subcontractor's materials itself. It held simply that if the general contractor delegated its statutory duty to another, it nevertheless remained liable for its delegee's negligence. In the instant case, the District Court held precisely the same thing--if the DOC delegated its statutory duty to another, it nevertheless remained liable for its delegee's negligence. In the final analysis then, the two decisions are perfectly consistent--and it is therefore impossible that this Court has "conflict" jurisdiction to review the decision sought to be reviewed.

### III CONCLUSION

It is respectfully submitted that MASTRANDREA is not in express and direct conflict with the decision sought to be reviewed; that this Court therefore has no jurisdiction to review the decision sought to be reviewed; and that the petitioner's request for review should be denied.

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<sup>2/</sup> The statute in this case, while it may not impose a "direct obligation" on the DOC, most certainly imposes a "definite obligation" upon the DOC to loan its inmates only "under supervision of employees of the Department [of Corrections]".

IV  
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this KVA day of October, 1983, to: PAMELA LUTTON-SHIELDS, Assistant Attorney General, Attorney General's Office, Suite 1502, The Capitol, Tallahassee, Fla. 32301, Attorneys for Appellees.

Respectfully submitted,

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