IN THE SUPREME COURT OF FLORIDA

L. M. DUNCAN & SONS, INC.,

Defendant/Petitioner,

vs.

CITY OF CLEARWATER, FLORIDA, a municipal corporation,

Plaintiff/Respondent.

CASE NO. 66,951

On Appeal From The Second District Court of Appeal

ANSWER BRIEF OF RESPONDENT, CITY OF CLEARWATER, FLORIDA

Alan S. Zimmet, Assistant City Attorney
P. O. Box 4748
Clearwater, Florida 33518
(813) 462-6760

Thomas A. Bustin, Esq.
P. O. Drawer CC
Gainesville, Florida 32602
(904) 374-5218

Attorneys for Respondent, City of Clearwater, Florida

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ISSUES PRESENTED ON APPEAL

I. WHETHER A MOTION TO DISMISS MAY SERVE AS A VEHICLE TO RESOLVE AN ISSUE OF FACT SUCH AS THE ISSUE OF WHETHER RESPONDENT, IF IT WAS NEGLIGENT AT ALL, WAS PASSIVELY OR ACTIVELY NEGLIGENT?

II. WHETHER THE IMMUNITY CLAUSE OF § 440.11(1), FLA. STAT., PROHIBITS AN EMPLOYER FROM FREELY CONTRACTING IN AN EXPRESS WRITTEN AGREEMENT TO INDEMNIFY AND HOLD HARMLESS AN ALLEGED PASSIVE TORTFEASOR?

STATEMENT OF THE CASE AND FACTS

Respondent, for clarity, substitutes the following Statement of the Case and Facts.[1/]

Respondent, City of Clearwater, Florida, contracted with Petitioner to lay pipe in a street (R, 11-90).[2/] As a result of that contract, Respondent was sued by one of Petitioner's employees on a theory of negligence (R, 1-5).

Since the construction contract between Petitioner and Respondent contained several provisions whereby Petitioner agreed to assume the defense of and indemnify Respondent for injuries arising out of the Petitioner's negligence, Respondent filed a third-party complaint against Petitioner seeking indemnity by reason of Petitioner's primary negligence. (R, 100-102).

In response to an amended third-party complaint (R, 100-102), wherein Respondent alleged that Petitioner had been negligent in doing the construction work and had breached the construction contract, Petitioner filed its motion to dismiss based primarily on immunity purportedly granted under Section 440.11(1), Fla. Stat. (1984), (R, 197). The trial court, on May 2, 1984, entered its order dismissing the amended third-party complaint with prejudice (R, 193).

Respondent appealed the dismissal of its amended third-party complaint and the Second District Court of Appeal, by its opinion filed February 20, 1985, reversed the dismissal.

1/ In the trial court, the City of Clearwater, Florida, was the Third-Party Plaintiff and will be referred to as "Respondent" or "City." L. M. Duncan & Sons, Inc. was the Third-Party Defendant and will be referred to as "Petitioner" or "Duncan." Eugene Burney, an employee of Duncan, and his wife Constance were the Plaintiffs in the trial court.

2/ References to the record on appeal will be noted in the text by (R, ____).

Following the filing of a motion for rehearing, the Second District Court of Appeal, on April 5, 1985, filed a substituted opinion adhering to its reversal of the order of dismissal, which opinion further expounded on the District Court's reasons why § 440.11(1), Fla. Stat. (1984) did not preclude the filing of Respondent's amended third-party complaint based on an express written agreement to indemnify entered into by Petitioner. (A copy of this opinion is included in the Appendix to this brief as Exhibit 1).

SUMMARY OF ARGUMENT

Neither a trial court nor an appellate court, on the basis of a motion to dismiss, may determine as a matter of law whether or not Respondent was actively or passively negligent where the Respondent claims it was, if negligent at all, passively negligent. Such an issue poses an issue of fact for the trier of facts. A right to contractual indemnity for the primary negligence of a contracting party (here, Duncan) cannot be precluded by that party's assertions that the allegations in the complaint fix the other party's (here, the City's) status as an active tortfeasor. Permitting this would be tantamount to allowing a motion to dismiss to be used as a vehicle to decide questions of fact. Furthermore, the District Court of Appeal correctly recognized that the Plaintiff's complaint alleges that the City was passively negligent in failing to discover and warn the Plaintiff of Duncan's active negligence. Therefore, the Petitioner's first argument must fail on the ground that the allegations of the Plaintiff's complaint portray the City as passively negligent. It must also be rejected on the ground that the Petitioner cannot assume facts helpful to it on a motion to dismiss.

The language contained in § 440.11, Fla. Stat. (1984), does not preclude an employer from entering into an express contract whereby the employer agrees to indemnify the other contracting party for damages arising from the employer's negligence. The statute does not contain language precluding the employer from entering into such a contract, and it is not contrary to public policy to recognize that an employer may contract outside the statute to provide such a loss distribution. A statute is not construed as destroying a right to contract unless the language clearly indicates that such right was intended to be destroyed. Further, recognition of such a contractual right does no harm to the functioning of the workers' compensation system set forth in Chapter 440, Fla. Stat. (1984), and the policies it implements.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL ACTED CORRECTLY IN REVERSING THE DISMISSAL OF THE AMENDED THIRD-PARTY COMPLAINT, SINCE A MOTION TO DISMISS MAY NOT SERVE AS A VEHICLE TO RESOLVE ISSUES OF FACT OR DECIDE AN ISSUE ON THE MERITS.

The pleadings filed in the instant case demonstrate that, at the time Petitioner filed its motion to dismiss, the question relating to whether or not there was any active negligence on the part of Respondent was, at best, a disputed issue of fact. (R, 1-5, 6-8, and 103).

By way of example, the complaint which was filed against Respondent alleged that Respondent had violated Chapters 50, 53 and 135 of its Code of Ordinances. No facts are present in the complaint to demonstrate that any one of the chapters has any application to the fact situation, or that any one of the chapters imposed a specific duty on Respondent. Rulings on motions to dismiss are governed by the well-established principle that all reasonable inferences are allowed in favor of the plaintiff which, in this case, is the City as the third-party plaintiff. The allegations made by the City in its third-party complaint are assumed to be true on a motion to dismiss. Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881, 883 (Fla. 1972).

In the present appeal, Petitioner seeks to have a motion to dismiss serve the same function as a trial or a motion for summary judgment. A motion to dismiss cannot serve as a vehicle to decide with finality issues of fact, or a case on the merits. Rice v. White, 147 So.2d 204, 207 (Fla. 1st DCA 1962); Dionise v. Keyes Company, 319 So.2d 614, 616 (Fla. 3d DCA 1975); Cherry v. Pirrello, 324 So.2d 158 (Fla. 3d DCA 1975). The kind and quality of negligence present in a case is a question for the jury. Consumer's Electric & St. R. Co. v. Pryor, 44 Fla. 354, 32 So. 797 (1902).

In arguing that the City was sued for its own negligence, Duncan has assumed facts helpful to its argument — facts which have not yet been established and which cannot be assumed in Duncan's favor on a motion to dismiss.[3/] Indeed, the Second District Court of Appeal characterized the lawsuit filed against the City as based on the City's passively negligent failure to properly inspect, discover, and warn the plaintiff of the dangerous condition created by Duncan's active negligence. (See Appendix, Exhibit 1, p. 2).[4/]

Examination of just one case cited by Petitioner demonstrates that Petitioner's approach is untenable, even from the standpoint of seeking summary judgment. In Florida Power Corp. v. Taylor, 332 So.2d 687 (Fla. 2nd DCA 1976), the District Court specifically acknowledged that the question of who was actively or passively negligent presented a fact question for the trier of fact and was not appropriate for summary judgment. 332 So.2d at 690-691. Petitioner argues on a motion to dismiss that Respondent is guilty of active negligence and makes this argument as though the fact was conclusively established. Such an argument seeks to have a motion to dismiss do more than it was ever designed to do and more than a

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3/ The City concedes that if a jury finds that the City was actively negligent, then the City will not be able to seek indemnification from Duncan under the contract. In its third-party complaint, the City seeks to hold Duncan to its contract and to hold it liable for its active or primary negligence. The City is not attempting to hold Duncan liable for the City's active negligence. Thus, the Petitioner has misconceived and mischaracterized the issue of this case — which is, can the City in light of the immunity provisions of § 440.11(1) hold Duncan to its contract to indemnify the City where Duncan is actively negligent and the City is passively negligent.

4/ The mere failure to discover an unsafe condition created by a joint tortfeasor constitutes passive negligence and does not bar indemnity against the tortfeasor whose active or primary negligence created the unsafe condition. Florida Power Corp. v. Taylor, 332 So.2d 687, 690 (Fla. 2nd DCA 1976). Here, the City has beed sued for its failure to discover an unsafe worksite created by Duncan, as the City alleged in its third-party complaint.

motion for summary judgment could do in a similar situation. Maybarduk v. Bustamante, 294 So.2d 374, 378, n. 4 (Fla. 4th DCA 1974).[5/]

The District Court of Appeal correctly characterized Respondent's alleged conduct as passive negligence. The issue the Petitioner seeks to raise — that the City was actively negligent — cannot be argued on a motion to dismiss. Therefore, the only issue properly before the District Court of Appeal and this Court is whether the Petitioner is immune from an action for contractual indemnity by reason of § 440.11(1), Fla. Stat. (1984).

II. SECTION 440.11(1), FLORIDA STATUTES, DOES NOT CONTAIN LANGUAGE PROHIBITING AN EXPRESS CONTRACT OF INDEMNITY AND THIS STATUTE SHOULD NOT BE CONSTRUED AS DESTROYING A RIGHT TO CONTRACT SINCE THE LEGISLATURE DID NOT CLEARLY INDICATE THAT CONTRACTS OUTSIDE THE STATUTE ARE PROHIBITED.

The only issue properly presented to the trial court and the Second District Court of Appeal was whether the provisions of § 440.11(1), Fla. Stat. (1984), prohibit an employer from entering into an express written agreement whereby the employer voluntarily agrees to indemnify a party, such as Respondent, for any damages that that party may be held liable by reason of the primary negligence of the employer.

There are several theories and reasons that require that the decision of the Second District Court of Appeal be upheld.

A. Existing Florida Case Law Requires Affirmance of the Decision of the Second District Court of Appeal.

The principle Florida case where the issue of indemnity and the exclusive remedy provisions of Section 440.11(1) have crossed paths is Sunspan Engineering and

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5/ Instructive is the discussion of the Supreme Court of Oklahoma concerning the passive/active negligence concept in the context of an express written agreement to indemnify in Rucker Co. v. M & P Drilling Co.. 653 P.2d 1239, 1241-1242 (Okla. 1982). A copy of this decision is included in the Appendix of this brief as Exhibit 2.

Construction Co. v. Spring-Lock Co., 310 So.2d 4 (Fla. 1975).[6/] In Sunspan, this Court held that § 440.11(1) was unconstitutional insofar as it precluded an alleged tortfeasor of an injured employee covered by workmen's compensation insurance from maintaining an action based on a common law contract of indemnification against the employer. This Court reasoned that the statute acted arbitrarily to deny the alleged tortfeasor access to the courts to sue the employer who may be primarily liable, while the employee and employer were permitted to sue the alleged torfeasor. Id. at 7. Thus, the Court did not permit the statute to place unreasonably its burdens on the third party, while the employer received a windfall. Ibid. "[A]bolishing the third party's right to sue while still allowing him to be sued does not further or expedite the objectives of the [Workers' Compensation] Act." Id. at 7-8.[7/]

The Second District Court of Appeal correctly recognized that the logic employed in Sunspan applies with equal force in the case of an express contract of indemnity. (See Appendix, Exhibit 1, p. 3-4).[8/] If the District Court's decision is reversed, the City will be denied access to the courts to sue the actively negligent

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6/ The language of § 440.11(1), Fla. Stat. (1984), that was considered by this Court in Sunspan has not been changed. A copy of Sunspan is included in the Appendix to this brief as Exhibit 3 for the convenience of the Court.

7/ The primary purpose of the Workers' Compensation Act is to secure wage compensation and medical payments to injured employees without the expense and delay in determining fault as between the employee and employer. Sunspan, supra, 310 So.2d at 7. The secondary purpose is to allow "the employer to spread his risks and pass employee accident losses to his customers as part of his cost of business." Ibid.

8/ Petitioner seeks to distinguish Sunspan by asserting that the City is an actively negligent tortfeasor. However, as discussed at p. 4-6 supra, it has not been established that the City is an actively negligent tortfeasor, the Petitioner cannot assume this fact to be true on a motion to dismiss, and as the District Court recognized, the Plaintiffs' allegations of negligence against the City constitute passive negligence.

employer.[9] Such a result would place on the City the burden of the Workers' Compensation Act and allow the primary negligent employer to receive a windfall. This result is even more offensive in the instant case than in Sunspan, since here the employer freely contracted to indemnify and hold harmless the City for the employer's primary negligence. Section 440.11(1), Fla. Stat., contains language limiting the liability of the employer, but the language does not supply a conclusion that the Legislature intended to abrogate a voluntary relationship such as exists in this case. Chapter 440 and specifically § 440.11(1) do not further any public policy that will be violated by recognizing the existence of this contractual relationship. There is no language in the statute that prevents the employer from expressly agreeing to assume an obligation beyond the statute, nor has Petitioner set forth any valid public policy reason why such departure should not be permitted. The purposes of Chapter 440 remain intact and recognition of the voluntary right of parties to establish a contractual relationship apart from the statute does no violence to the statute and the purposes it serves.[10] City of Artesia v. Carter, 610 P.2d 198, 200, 201 (N.M. 1950).[11] See also Sunspan, supra.

9/ The Petitioner's argument that the City will not be denied access to the courts is plainly wrong. The Petitioner failed to address the situation where the jury finds the City was passively negligent. If the City is found passively negligent, it will be held liable to the Plaintiffs. However, under the contract entered into by Duncan and the City, Duncan agreed to indemnify and defend the City against any claim for damages for the City's passive negligence. The Petitioner has a contractual duty to hold the City harmless against any such claim. If the Petitioner's motion to dismiss is granted, the City will be denied access to the courts to litigate Duncan's liability to the City under the contract.

10/ Protecting employers from themselves — from contracting to hold passively negligent tortfeasors harmless — is not a purpose of § 440.11(1). Yet, this is the only purpose that would be served by a holding that a freely entered-into contract to indemnify is unenforceable due to the immunity clause of the Workers' Compensation Act.

11/ A copy of the City of Artesia opinion is attached as Exhibit 4 of the Appendix for the convenience of the Court.

Petitioner mistakenly relies on Seaboard Coast Line R. Co. v. Smith, 359 So.2d 427 (Fla. 1978). As the Second District Court of Apeal pointed out below, Seaboard Coast is principally a case involving the issue of contribution and is clearly distinguishable from the instant case. That case involved a third-party action by an active tortfeasor for implied indemnity and contribution from an employer joint tortfeasor. With regard to the indemnity claim, Seaboard Coast merely held that an active tortfeasor does not have a right to implied indemnification even if the joint tortfeasor is guilty of willful or wanton misconduct. The Seaboard Coast decision does not contradict the reasoning of Sunspan, which was not even mentioned in the Seaboard Coast case.[12/]

The reasoning of Sunspan therefore should be applied to the instant case. The language of § 440.11(1) does not warrant treating an express, written contract to indemnify differently than the implied right to indemnity recognized in Sunspan.

B. Under The General Weight of Authority and as a Matter of Statutory Construction, the Decision of the Second District Court of Appeal Must be Affirmed.

The great weight of authority in other jurisdictions recognizes that statutory provisions similar to § 440.11(1) do not abrogate express contracts of indemnity that, by their nature, exist separate and apart from the workers' compensation statutory scheme. See 2A Larson, The Law Of Workmen's Compensation, §§ 76.41, 76.42 (1983);[13/] Annot., 100 ALR 3d 350, 380, § 8(b).

12/ This Court has recognized the continuing validity of Sunspan in a case decided after Seaboard Coast. See Houdaille Industries, Inc. v. Edwards, 374 So.2d 490, 494, n. 4 (Fla. 1979) (stating that Sunspan stands for the proposition that § 440.11(1) immunity does not protect against an indemnity action which is viable in the first place).

13/ A copy of these sections of Larson, including supplemental material, are attached as Exhibit 5 of the Appendix to this brief for the convenience of the Court.

See also, e.g., City of Artesia, supra; Giguere v.Detroit Edison Co., 319 N.W.2d 334 (Mich. Ct. App. 1982); Lorengen v. South Cen. Bell Tel. Co., 546 F.Supp. 694 (S.D. Miss. 1982); Rucker v. M & P Drilling Co., 653 P.2d 1239 (Okla. 1982); and Schuldies v. Service Mach. Co., Inc., 448 F.Supp. 1196, 1201 (Wisc. E. Dist. 1978). As Larson indicates, the vast majority of jurisdictions have adopted the better interpretation of immunity provisions such as § 440.11(1) so that a third party's action against the employer for indemnity is permitted. Larson, supra, § 76.41. The courts reason that a third party's action is not exactly for "damages" but for reimbursement. Such an action is not "on account of" the employee's injury, but is on account of a breach of an independent duty owed by the employer to the third party. Ibid.[14/] The clearest exception to the immunity clause is a third party's right to enforce an express contract in which the employer agreed to indemnify the third party for the very kind of loss the third party may be required to pay to the employer. Id. at § 76.42.[15/] This reasoning has frequently been applied to an indemnity agreement assumed by a contractor doing work for a city. Ibid. See also, e.g., Yearicks v. City of Wildwood, 92 A.2d 873 (N.J. 1952).

Thus, the great weight of authority is to the effect that exclusive remedy statutes such as § 440.11(1) do not abrogate express contracts to indemnify. If the employer wants to so contract, that is his right to do so. Recognition of such contracts does not violate any public policy found in Chapter 440.

14/ Section 440.11(1) states that "The liability of an employer prescribed in § 440.10 shall be exclusive and in place of all other liability of such employer to . . . anyone . . . entitled to recover damages from such employer at law . . . on account of such injury or death." (Emphasis added).

15/ In § 76.42, n. 37, Larson cites the numerous jurisdictions that have followed this reasoning and have held that immunity clauses similar to § 440.11(1) do not preclude third party actions against the employer based on an express contract to indemnify, such as the action filed by the City.

Principles of statutory construction also support the conclusion reached by the District Court of Appeal. Statutes that purport to restrain the freedom to contract are strictly construed. 3 C. Sands, Southerland Statutory Construction § 61.02 (1974). See also, e.g., Tinker v. Modern Brotherhood of America, 13 F.2d 130, 132 (N.D. Okla. 1926). Section 440.11(1), if read in accordance with the Petitioner's argument, would restrain the Petitioner's and the Respondent's right to contract. Since § 440.11(1) is not clearly intended to restrain this freedom to contract, it must be construed so as not to restrain an employer from freely contracting to indemnify a third party sued for injuries suffered by an employee.

C. A Theory of Waiver Requires Affirmance of the Decision of the Second District Court of Appeal.

Florida courts, as well as the courts of other jurisdictions, have recognized that the exclusive remedy provisions of Section 440.11(1), Fla. Stat. (1984), can be waived or an estoppel created. Williams v. Ashlord Chemical Co., 368 N.E.2d 304, 309 (Ohio Ct. App. 1976); State ex rel. Destin v. Flowers, 403 So.2d 488, 490 (Fla. 1st DCA 1981).

Where a party such as Petitioner has entered into a written contract whereby it expressly agrees to defend and indemnify the other contracting party, such as Respondent, from Petitioner's active or primary negligence, the conclusion follows that in the absence of the contract being contrary to public policy, the Petitioner by its voluntary act has waived or should be estopped from asserting the immunity granted by § 440.11(1). A contracting party should not be able to repudiate its contractual obligations unless the contract was contrary to law in the first instance. Such is not the case in this appeal.

The District Court, in its decision, was correct under several theories, all of which demonstrates that the exclusive remedy provision of § 440.11(1), Fla. Stat. (1984), does not prohibit express, written agreements to indemnify.

CONCLUSION

For the foregoing reasons, the decision of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

Alan S. Zimmet
Assistant City Attorney
P. O. Box 4748
Clearwater, Florida 33518
(813) 462-6760

Thomas A. Bustin, Esq.
P. O. Drawer CC
Gainesville, Florida 32602
(904) 374-5218

Attorneys for Respondent, City of Clearwater, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by United States mail to Donald V. Bulleit, Esq., and Nelly N. Khouzam, Esq., Attorneys for Petitioner, P. O. Box 210, St. Petersburg, Florida 33731, and to Enrique Escarraz, III, Esq., P. O. Box 360, St. Petersburg, Florida 33731, this 5th day of June, 1985.

Alan S. Zimmet
Assistant City Attorney
P. O. Box 4748
Clearwater, Florida 33518
(813) 462-6760

Thomas A. Bustin, Esq.
P. O. Drawer CC
Gainesville, Florida 32602
(904) 374-5218

Attorneys for Respondent, City of Clearwater, Florida