STATE OF FLORIDA

IN THE SUPREME COURT OF FLORIDA

L.M. DUNCAN & SONS, INC.,

Defendant, Petitioner

vs.

CASE NO. 66,951

CITY OF CLEARWATER, FLORIDA
a municipal corporation,

Plaintiff, Respondent,

_____/

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER L.M. DUNCAN & SONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND OTHER RELATED AUTHORITIES:

ISSUES PRESENTED ON APPEAL

I. WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN REVERSING TRIAL COURT'S DISMISSAL OF THE AMENDED THIRD PARTY COMPLAINT.

II. WHETHER THE THIRD PARTY DEFENDANT, L.M. DUNCAN & SONS IS IMMUNED FORM SUIT FOR INDEMNIFICATION UNDER SECTION 440.11(1), FLORIDA STATUTES (1983) WHERE THE THIRD PARTY IS AN ACTIVELY NEGLIGENT TORTFEASOR.

SUMMARY OF ARGUMENT

I. Indemnity is only allowed when the indemnitee is without fault. The right of indemnity depends on the principle that everyone is responsible for the consequences of his own wrong. The City, an active tortfeasor, is trying to be indemnified for its own wrongful acts in reopening the job site. An active tortfeasor is not allowed to recover on a theory of indemnity by virtue of a breach of contractual duty. Therefore, the Second District Court of Appeal was in error in reversing the trial court's dismissal of the City's Third Party Complaint.

II. Section 440.11(1) provides that an employer's liability shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor. The City's claim for indemnity was a cause of action expressly contrary to the precise and emphatic language of Section 440.11(1). The City, an actively negligent tortfeasor, should not be allowed to recover over and against Duncan for injury to Duncan's employee since it would permit the City to recover indirectly what is prohibited to directly in the Statute.

STATEMENT OF THE CASE

This case reaches this honorable Court upon the decision of the Second District Court of Appeals reversing the trial court's dismissal of the City's[1] Third Party Complaint.[2]

On July 5, 1983, a Complaint was filed against City for negligence when a portion of the street caved upon the Plaintiff while working at a construction site. (R1-5) Count I alleged negligence on the part of the City in allowing the job site to be reopened when it was not safe. (R1-2) Count II alleged that the City was negligent in its failure to inspect the job site in violation of Chapters 50, 53 and/or 135 of the Municipal Ordinances; Count II further alleged negligence in the City's allowing the job site to be reopened at a time when it was in an unsafe conditions; and alleged negligence in allowing employees of Duncan to resume working at said site when it was in an unsafe condition. (R3,4) Count III of the complaint alleged loss of consortium by Plaintiff's wife. (R4,5)

The City filed its Answers and Affirmative Defenses on July 27, 1983 and on January 13, 1984. (R-103) On August 15, 1983, the City filed a Third Party Complaint against Duncan for contractual indemnification. (R11-90)

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[1] In the trial court, Plaintiffs were Eugene Burney and Constance Burney, his wife. They are referred to as "Plaintiffs" herein. They sued City of Clearwater, Florida, who is Respondent and will be referred to as "City" herein. The City filed a Third Party Complaint in the trial court against L.M. Duncan & Sons, Inc., who is Petitioner and will be referred to as "Duncan" herein.

[2] References to the record on appeal will be noted in the text by an (R-____).

A Stipulation dated January 10, 1984, permitted the filing of the operant amended Third Party Complaint, against Duncan of that same date. (R100-102) Having failed to attach the exhibits to its Amended Third Party Complaint, the City filed a Supplemental Amended Third Party Complaint with exhibits attached on January 16, 1984 (R104-109)

The Amended Third Party Complaint alleged liability on the part of Duncan in violating the terms of its contract with the City. The City alleged, among other things, that Duncan 1) failed to shore up trenches 2) failed to have supervisors on the job site, 3) failed to work at a reasonable pace, all in violation of the terms of the contract with the City. (R104-109)

On February 6, 1984, Duncan filed a Motion to Dismiss the Amended Third Party Complaint. (R191) Duncan asserted two grounds for dismissal; 1) it was immune from suit for indemnification pursuant to Section 440.11(1) Florida Statutes (1983) and 2) because the City was an actively negligent tortfeasor. (R191) On May 1, 1985, the trial court granted Duncan's Motion to Dismiss with Prejudice. (R192)

A timely Notice of Appeal was filed with the Second District Court of Appeal, (R193), which reversed the trial court's Order of Dismissal on February 20, 1985. On March 7, 1985, Duncan filed its Motion for Rehearing. Thereafter, on April 10, 1985, Duncan filed its Motion for Rehearing. Thereafter, on April 10, 1985, the Second District Court of Appeals rendered an opinion substituting the original one filed on February 20, 1985. In reversing dismissal fo the Third Party Complaint, the substituted opinion 1) adopted the City's

position that the contract indemnity does not extend to damages attributable to the City's independant or active negligence and 2) held Section 440.11(1) unconstitutional as applied to an alleged third party tortfeasor's claim against the Plaintiff's employer for contractual indemnity.

On April 25, 1985, Duncan filed its Notice to Invoke the Mandatory Jurisdiction of the Florida Supreme Court. The basis for the Florida Supreme Court's jurisdiction is that the Second District Court of Appeals held the Section 440.11(1) unconstitutional.

STATEMENT OF FACTS

On September 17, 1979, City and Duncan entered into a contract whereby Duncan was to perform the construction of the Myrtle Avenue Sanitary Sewer Placement Project in Clearwater, Florida. (R13-90) On October 11, 1979, Eugene Burney, an employee of Duncan, in the course and scope of his employment, sustained injuries when a portion of the street caved in upon him. Burney was a pipe layer for Duncan and,, at the time of the accident, was replacing sanitary sewer pipes along Myrtle Avenue. (R1-2)

Burney thereafter filed suit against City alleging negligence of the City in allowing a dangerous job site to be reopened. (R1-5) City in turn filed a third party action against Duncan. (R11) The basis of their third party action was a provision in the project contract providing for indemnification of damages assessed due to the contractor's negligence. (R30)

Duncan moved to dismiss the City's third party action on two bases; 1) that the City is an active tortfeasor and 2) Duncan, as Plaintiff's employer is immune from indemnification as a result of Duncan's payment of workmen's compensation to Plaintiff as a result of his injuries which were the subject of the litigation, (R-191), further, under the terms and provisions of Section 440.11 Florida Statutes (1983). (R191) The trial court granted Duncan's Motion to Dismiss and the Second District Court of Appeal reversed. This appeal timely follows.

ARGUMENT

I. REVERSAL OF THE DISMISSAL OF THE THIRD PARTY COMPLAINT

The original Complaint filed by the Plaintiffs against the City alleged that the City, as owner of Myrtle Avenue, undertook to supervise and to insure the safety of the job site. It further alleged that the City breached its duty to the Plaintiff by reopening the job site and allowing employees of Duncan to resume working there when the site itself was not safe.[3] The Complaint further alleged violations of Chapters 50, 53 and 135 in the reopening of the job site when the City had knowledge of the avenue's unsafe condition.

The dismissed Third Party Complaint asserted that the City as entitled to contractual indemnification from Plaintiff's employer. The contract provision provides for indemnity as follows:

> The contractor shall indemnify and save harmless the CITY and all of its officers and employees from all suits, actions and claims of any character, name or description, brought for, or on account of any injuries or damages received or sustained by an persons or proprety, by or from the said Contractor or by or in consequence of any neglect in safeguarding the work, or through the sue of unacceptable materials in the construction of the project, or by or on account of any act or ommission, neglect or misconduct of the Contractor. General Conditions, p.3.8 (R-30)

[3]The Complaint alleged that on or before the date of the accident, the City required the job site to be closed because of its unsafe condition.

The City allged that Duncan negligently breached its contract by failing to shore up the sides of the trenches, failing to have foremen on the job site and failing to work at a reasonable pace which breach or negligence caused or contributed to Plaintiff's injuries. (R104-109)

It is apparent from the Complaint that the City was sued for its own sole negligence in reopening the job site when it had knowledge that the site was unsafe. The City cannot seek indemnification form Duncan under their contractual provision because Duncan's alleged acts do not come within the negligent acts alleged in the Complaint by atempting to seek reimbursement for acts that Duncan cannot possibly be liable for, namely negligently reopening an unsafe construction site.

The right of indemnity depends on the principle that everyone is responsible for the consequences of his own wrong. Houdaille Industries v. Edwards, 374 So.2d 490(Fla.1979)

Indemnity is only allowed when the indemnitee is not at fault at all. There is no right of indemnity when the indemnitee is even 1% negligent. An active tortfeasor is not allowed to recover on a theory of indemnity by virtue of breach of a contractual duty. Florida Power Corporation v. Taylor, 332 So.2d 687(Fla.2d DCA 1976) In the instant case, the City was a negligent tortfeasor; it is being sued because of its affirmative act in reopening the job site when the site was unsafe. Even admitting for the purposes of argument that Duncan was negligent, at least a portion of Plaintiff's injuries were caused by the City's reopening a negligent job site. The City there-

fore cannot seek indemnity from Duncan on a breach of contractual duty because of its status as an active tortfeasor. Taylor.

II. THE IMMUNITY PROVISION OF SECTION 440.11(1) FLORIDA STATUTES (1983) PRECLUDES A THIRD PARTY TORTFEASOR FROM BRINGING AN ACTION FOR INDEMNIFICATION AGAINST AN EMPLOYER

Section 440.11(1) Florida Statutes (1983) provides:

> 440.11(1) Exclusiveness of Liability -(1) The liability of an employer prescribed in §440.11.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover, damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. . .

This section is entitled "Exclusiveness of Liability." The Second District's decision impermissably and incorrectly voids that title and the legislators intent. The statute states that an employer's liability to pay compensation to injured employees shall be the employee's exclusive remedy and shall be in place of all other liability to <u>any third party tortfeasor</u>. TheCity contends, and the DCA's opinion states, that the precise, clear and unambiguous language of the above statute be altered to permit a third party tortfeasor to bring an action for indemnification against an employer upon a contractual theory of liability. The decision and the City's contention is without merit.

It should be noted at the outset that, in mattters requiring statutory construction, courts always seek to effectuate the legis-

lative intent. Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983); Heredia v. Allstate Insurance Company, 358 So.2d 353 (Fla.1978). The legislative intent is the polestar by which courts must be guided in interpreting the statutory provision. Parker v. State, 406 So2d 1089 (Fla. 1981). In the instant case, the words selected by the legislature are clear and unambiguous. There is nothing in the statute which expressly provides for abrogation of an employer's immunity because of the existence of an express contract of indemnification.

Under the clear language of the Florida Worker's Compensation Act, an employer is not liable to any third party tortfeasor on account of injury or death to his employees. Seaboard Coastline Railroad Company v. Smith, 359 So.2d 427 (Fla.1978). The sole and total liability of such employer is defined in the act itself. Id. at 428. In Seaboard Coastline, several employees of the West Robinson Fruit Company were riding in their employer's bus and were injured when the bus collided with a train operated by Seaboard Coastline. The employees sued Seaboard Coastline as a third party tortfeasor. A third party claim was filed by Seaboard Coastline against West Robinson seeking contribution and implied indemnity. The Florida Supreme Court, in upholding the constitutionality of Section 440.11 Florida Statutes (1975) stated that:

> "[A]n active tortfeasor does not have a right to indemnification for lawful damages he has paid to an injured third-party from joint tortfeasor guilty of wanton or willful misconduct which contributed to the injuries, where the third party tortfeasor was an 'employer' under the Florida Worker's Compensation Act." Id at 430.

To allow a third party tortfeasor to sue an employer based on a contractual indemnity provision, as the City suggests this Honorable Court do, would make the employer liable beyond the payment of the compensation benefits in contravention of the express language of the Worker's Compensation Act subjecting it to payment under both the worker's compensation and liability portions of the insurance policy. This would be contrary to the exclusivity provision of Section 440.11(1) and would amount to holding the employer liable to the employees on account of the employer's negligence contrary to Seaboard Coastline.

The contractual indemnity provision makes Duncan liable for his own negligent acts. Duncan has already paid for his negligence by payment of Worker's Compensation benefits to Burney. To allow the City a third-party tortfeasor, to recover against the employer for injury to an employee would be to allow indirectly what is prohibited directly in the statute. The precise and emphatic of Section 440.11(1) provides that Duncan shall not be subject to any liability whatsoever other than under the Act. Duncan's liability shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor. In allowing theCity to sue Duncan, the employer, would have the effect of imposing additional liability on the employer. The City seeks to engraft an exception to this language which would write into the legislation an exception which is not there. This is clearly improper.

Sun Span Engineering and Construction Company v. Springlock Scaffold Company, 310 So.2d 4(Fla. 1975) is distinguishable from the

instant case. Sun Span did not involve a third-party action by an actively negligent tortfeasor. An active tortfeasor's right to a third party action was addressed by this Court in Seaboard. In Seaboard, the Florida Supreme Court specifically 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. Tracking the language of the Florida Supreme Court, the City, an active tortfeasor, does not have a right to indemnification even if Duncan is guilty of willful or wanton misconduct. The fact that Seaboard only dealt with implied indemnification should make no difference herein. Common law right of indemnity generally arises out of the contract, either express or implied. City of Clearwater v. L.M. Duncan, Case No. 84-1016, Opinion filed April 10, 1985. Because one seeking indemnity must be without fault, the City, being an active negligent tortfeasor, should be estopped from filing its third-party action under Section 440.11(1) on the authority of Seaboard.

Furthermore, contrary to the Second District's opinion, the City is not deprived of its access to court. If the City is negligent then Duncan does not indemnify, if it is not then the Plaintiff recovers nothing. If the City proves in court that Plaintiff's injuries were caused totally by Duncan's alleged negligence then the City does not pay and the question is moot. See United Gas Pipeline Company v. Gulf Power Company, 334 So.2d 310(Fla. 1st DCA 1976)

Alternatively, Duncan recognizes that the Second District Court's opinion was procedurally premature; this Court should at the very least set aside the Second District's opinion and remand this

case in order for Duncan to file its answer and plead the immunity provision as an affirmative defense.

CONCLUSION

The exclusive remedy provision of the Florida Worker's Compensation Act precludes City from seeking to impose additional liability on Duncan, the employer herein. The City's claim for indemnity was a cause of action expressly contrary to the precise and emphatic language of Section 440.11(1) providing that the employer shall not be subject to any liability whatsoever other than under the Act. In addition, the right of indemnity is only allowed when the indemnitor is solely at fault. In the instant case, the City being an active tortfeasor is not allowed to recover on a theory of indemnity by virtue of a breach of a contractual duty.

Therefore, Duncan would respectfully request that this Court reverse the Second District Court of Appeals opinion and affirm the trial court's dismissal of the City's third-party action against Duncan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial brief has been furnished by United States Mail to THOMAS A. BUSTIN, City Attorney, City of Clearwaterd, Post Office Box 4748, Clearwater, Florida 33518 and ENRIQUE ESCARAZ, III, Esq., Post Office Box 360, St. Petersburg FL 33731 this 14 day of May, 1985.

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