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

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

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STATUTES AND OTHER RELATED AUTHORITIES:

§440.11(1) Fla. Stat. (1983).

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 FROM SUIT FOR INDEMNIFICATION UNDER SECTION 440.11(1), FLORIDA STATTUES (1983) WHERE THE THIRD PARTY IS AN ACTIVELY NEGLIGENT TORTFEASOR.

SUMMARY OF ARGUMENT

1. 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 dangerous construction site. An active tortfeasor is not allowed to recover on a theory of indemnity by virtue of a breach of a contratual duty.

II. Section 440.11(1) precludes the City, a third party tortfeasor, from bringing an action for indemnification against Duncan, an employer. 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 it prohibited to directly in the statute.

STATEMENT OF THE CASE

The Petitioner would rely on its Statement of the Case as it appears in its Initial Brief and adopts the same herein as if fully incorporated below.

STATEMENT OF THE FACTS

The Petitioner would rely on its Statement of Facts as it appears in its Initial Brief and adopts the same herein as if fully incorporated below.

ARGUMENT

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

The Complaint filed against the City sought damages for the City's negligence in the reopening of a dangerous job site. 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 condition; and alleged negligence in allowing employees of Duncan to resume working at said site when it was in an unsafe condition.(R3,4) The City thereafter sought to be indemnified against Duncan under the following contractual provision:

> 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 any persons or property, by or from the said Contractor or by or in consequence of any neglect in safeguarding the work, or through the use 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)

The above-mentioned contractual provision does not come within the negligent acts alleged in the complaint. It is clear that the City was sued for its own sole negligence in reopening the construction

site when it had knowledge that it was unsafe. The City is seeking indemnification from Duncan for acts that Duncan cannot possibly be liable for; negligently reopening an unsafe construction site.

An active tortfeasor is not allowed to recover on theory of indemnity by virtue of a breach of a contractual duty. Florida Power Corporation v. Taylor, 332 So.2d 687 (Fla. 2d DCA 1976). The right of indemnity is only allowed when the indemnitee is not at fault. Id. There is no right of indemnity where the indemnitee is even one percent negligent. Houdaille Industries v. Edwards, 374 So.2d. 490 (Fla. 1979) In the case sub judice, at least a portion of Plaintiff's injuries were caused by the City's affirmative act in reopening the job site when the site was unsafe. The City's action in reopening the job site created the unsafe condition. The City was a negligent tortfeasor and cannot seek indemnity from Duncan on a breach of contractual duty because of its status as an active tortfeasor. Seaboard Coastline Railroad Company v. Smith, 359 So.2d 427 (Fla. 1978).

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

The Second District's decision impermissably voids the clear legislative intent. Section 440.11(1) is entitled "Exclusiveness of Liability". The statute unquestionably requires that an employer's liability to pay compensation to injured employees shall be the employees exclusive remedy and shall be in place of all other liability to any third party tortfeasor. (emphasis added) This exclusive remedy provision of Section 440.11(1) prohibits the City from seeking to impose additional liability on Duncan. The City's claim for indemnity is a cause of action expressly contrary to the precise and emphatic language of §440.11(1); the indemnity claim is an act done in violation of the statutory prohibition and should be deemed void. See Gulf Oil Corporation v. Roto-cone Field Operating Company, 84 NM 483,505P 2d 78 (1972).

The City mistakenly contends that there are no valid public policy arguments in support of the exclusivity provision of §440.11. The state Worker's Compensation Act provides immunity of an employer from suits on account of injury to employees. To allow the City, a third party tortfeasor to recover over and against the employer Duncan, would be to allow indirectly what is prohibited directly by the statute. It would write into the legislation an exception which was not there.

Duncan has already paid for its negligence by payment of worker's compensation benefits to Burney. To allow the City to recover against

Duncan would penalize Duncan twice for the very type of damages it has already paid to its employee. Such an interpretation would defeat the whole policy behind the worker's compensation law.

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

CONCLUSION

In light of the aforementioned, 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 Reply Brief has been furnished by United States Mail to THOMAS A. BUSTIN, ESQ., City Attorney, City of Clearwater, Post Office Box 4748, Clearwater, Florida 33518 and ENRIQUE ESCARRAZ, III, ESQ., Post Office Box 360, St. Petersburg FL 33731 this 25 day of June, 1985.

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