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IN THE
SUPREME COURT OF FLORIDA

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D. L. CULLIFER AND SON,
INC. and LIBERTY MUTUAL
INSURANCE COMPANY,

Employer/Carrier/Petitioners,

vs.

PABLO MARTINEZ,

Employee/Respondent.

Consolidated Case
No. 75,663

D. L. CULLIFER AND SON,
INC. and LIBERTY MUTUAL
INSURANCE COMPANY,

Employer/Carrier/Petitioners,

vs.

MARIO NAVARRO,

Employee/Respondent.

INITIAL BRIEF OF PETITIONERS

ON PETITION FOR REVIEW DIRECTED TO
THE FIRST DISTRICT COURT OF APPEAL

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PREFACE

In this Initial Brief, the Petitioners, D. L. CULLIFER AND SON, INC. and LIBERTY MUTUAL INSURANCE COMPANY, will be referred to as the "Petitioners" or as "Employer/Carrier." The Respondents, PABLO MARTINEZ and MARIO NAVARRO, will be referred to by name or as the "Respondents," "Claimants," or "Employees."

The Employees filed separate claims for workers' compensation benefits for injuries arising out of an accident that occurred to both of them simultaneously. The separate appeals by these two employees were consolidated by order of the First District Court of Appeal and remain consolidated for purposes of review by this Court. Since the records on appeal in each case contain basically the same information and evidence, all references to the record as **"R"** in this case will refer to the record in the Martinez' case. When specific reference is necessary to the record produced in the claim by Mario Navarro, reference to that record will be referred to as the "Navarro Record."

The then Deputy Commissioner, now Judge of Compensation Claims, will be referred to as **"JCC."**

CITATIONS OF AUTHORITY

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STATEMENT OF THE CASE AND OF THE FACTS

This case is to be reviewed under the express and direct conflict provision of article V, section 3(b (3) of the Florida Constitution and is based on the employer/carrier's contention that the First District Court of Appeal's decision expressly and directly conflicts with this Court's decision in Murphy v. Peninsular Life Insurance Co., 299 So.2d 3 (Fla. 1974).

During the initial appeal of these cases, the parties agreed that the record supported the findings of fact contained in the JCC's order (with the single exception of the JCC's finding that the paramount reason Navarro helped to push the car was to be friendly and courteous rather than because he was responding to a command from his supervisor (Navarro Record 546)). Accordingly, the employer/carrier offer the following statement of facts from the JCC's order found at R 311 through 316:

> The employer, D. L. Cullifer & Son, Inc., is in the business of harvesting citrus fruit and transporting citrus fruit from groves where it was picked to processing or packing plants. The employer's customers are persons or businesses who have an interest in a crop of citrus fruit and wish the fruit to be picked and transported to a packing house or processing plant. The employer's customers are limited to this relatively small group and the employer in no way deals with the general public.
>
> In order to perform its work, the employer hires persons to pick fruit and to operate the mechanical equipment associated with the harvesting of the fruit. Customarily and in this case, a picking crew is supervised by a person called a crew leader. The picking crew was furnished with equipment such as a bus or van to transport the pickers to or from the groves to be picked, picking ladders, fruit tubs, and a vehicle equipped with a hydraulic lift to move fruit tubs, which is commonly known as a "goat." The

employee, Pablo Martinez, was employed by the employer as a crew leader. It was his job to see that pickers were transported to and from the grove to be picked and that the picking of the fruit was accomplished. Mr. Martinez also kept records as to the fruit that was picked, drove the bus, operated the goat, and had some responsibility to the employer to see to it that the equipment, including fruit tubs, was maintained and not lost or destroyed.

Pickers, after picking fruit, would dump their fruit into fruit tubs which are round tubs made of plastic with a metal rim around the top which can be lifted by the hydraulic equipment of the goat and dumped into another vehicle so that the fruit can be transported from the grove to the packing house or processing plant.

On June **18, 1988,** the picking crew supervised by the employee [Martinez] was picking fruit in a grove located in Polk County which was known as the "Fiel Grove." On that day, the crew finished picking fruit in the Fiel Grove so that on the following day, June **19, 1988,** the crew supervised by the employee picked fruit in another grove which was located in Osceola County.

On the evening of June **18, 1988,** one of the pickers in the employee's crew, Felix Trejo-Munoz, went back to the Fiel Grove to find a picking hook which belonged to him which he had inadvertently left in the grove. Felix was transported to the Fiel Grove by Esteban Trejo-Olguin in Esteban's pickup truck. While in the grove searching for the fruit hook, Felix noticed a fruit tub which had apparently been left in the grove by the employee's crew.

On the following day, June **19, 1988,** Felix told the employee of the fruit tub that had been left in the grove. At the end of the day's work at the grove in Osceola County, the employee drove the bus used to transport pickers to and from the grove back to the community of Wahneta in Polk County. He parked the bus there and then went to the Fiel Grove to search for the fruit tub. The trip to the Fiel Grove was made in Esteban's pickup truck and the employee was accompanied by Esteban, Felix, and Mario Navarro, another picker in the employee's crew.

Upon arriving at the Fiel Grove, the four men commenced to search for the fruit tub. Esteban drove the pickup truck back into the grove some distance, but

was unable to go further into the grove due to the sandy soil. Esteban then drove the truck back to the highway in front of the grove and waited for the other three men who were searching for the fruit tub to look through the grove and come back to the road.

The employee, Mario and Felix, could not find the tub. They then returned to the outer edge of the grove adjacent to the highway and commenced walking on the outer edge of the grove to Esteban's pickup truck, which was some distance from them. At this time, the three men observed an automobile that was on the opposite side of the road from them and was apparently disabled. There were two men at this automobile who are only able to be described by any of the witnesses as "Americans." One or both of the Americans" called to the employee, Felix and Mario, and requested assistance in pushing their car along the highway. The employee, Felix and Mario, then left the grove, crossed the road, and commenced to help push the disabled vehicle. At this time, the driver of an automobile traveling on the highway apparently saw the vehicle that the three men were pushing along with the two "Americans," swerved to avoid striking the disabled vehicle and instead, struck the employee and Mario.

Neither the employee, Mario, or Felix had ever seen the two '"Americans" before the accident occurred and there is no evidence that the two "Americans" had anything at all to do with the business of the employer or even were known to the employer.

When asked why they chose to assist in the pushing of the disabled vehicle, both the employee and Mario testified that they did so simply because they were asked to by the "Americans."

There is no evidence at all that the employer had any interest in its employees assisting motorists with disabled vehicles. There was no significant public relations or good will benefit to be derived from such activities which would be of any benefit to the employer. The employer neither condoned nor encouraged its employees to assist motorists with disabled vehicles. The disabled vehicle was not blocking the roadway nor did it in any way impair access to and from the Fiel Grove.

By assisting in the pushing of the disabled vehicle, neither the employee nor the employer derived any benefit, either personal or business. The employee certainly did not fulfill any personal need by pushing

> the disabled vehicle and there is no evidence that pushing the vehicle was of any benefit at all to the employer.
>
> In order to push the disabled vehicle, the employee had to leave the relative safety of the grove where he was not exposed to the danger of being struck by an automobile on the highway and cross the highway and put himself in a position of danger while pushing a disabled vehicle on the highway. This was not a hazard of his employment which was customarily performed in citrus groves. The only time that the employee was on a highway as part of his employment would be when he was either operating the bus or the goat traveling to or from a grove. The risk involved in these activities is significantly different and substantially less than the risk involved in pushing a disabled vehicle on a highway.
>
> The injury suffered by the employee would not have occurred while he was performing the usual duties of his employment with the employer. The injury suffered by the employee in the accident which I have described was in no way a reasonably foreseeable consequence of his fulfilling the duties of his employment. There simply is no evidence at all that by helping to move the disabled vehicle, the employer's business was in any way furthered or that it was customary for the employee's workers to assist disabled motorists or that the employer encouraged its employees to assist disabled motorists or condoned such activity.

In the accident, Navarro suffered a comminuted fracture of the right tibia-fibula (Navarro Record 85) and Martinez was rendered a C-4 quadriplegic (R 10-11, 192). The employer/carrier raised as a defense to the compensability of both claims that the employees had deviated from the course and scope of their employment at the time of the accident on the grounds that the efforts on the part of the employees to help the third persons with the stalled car were in no way an attempt to generate good will or in any other way of benefit to their employer and such an act had never been encouraged or condoned by the employer

(R 19-21). The employees contended on the other hand that the employees were traveling employees who were entitled to be covered by compensation at all times, home to home, but in this particular instance they were on a special mission to retrieve the tub which would entitle them to compensation even if they were engaged in some other small activity, and that, if there was any deviation from employment, it was minimal and not substantial (R 18, 19). In his final order denying the compensability of both claims, the JCC reasoned that:

> Under the circumstances which I have found to be the facts of this claim, I am compelled to find that the employee had deviated from the course and scope of his employment when he was injured while assisting a motorist pushing a disabled car on the evening of June 19, 1988 and that for this reason, the employer and carrier are not required to pay workers' compensation benefits to the employee, Turcotte v. Fowler & Torrance Concrete & Masonry, 507 So.2d 784, and Murphy v. Peninsular Life Insurance Company, 299 So.2d 3.
>
> The decision to deny the claim of the employee is difficult as the employee suffered very severe injuries as a result of the accident described above. It is certainly not my intention to be in any way critical of the employee going to the assistance of the "Americans" with the disabled motor vehicle. I am compelled by the facts of this claim and the applicable law to find that the employee's deviation from his employment was a significant and substantial deviation which was not foreseeable by the employer and which took him from a place of relative safety in a grove onto a highway where he, as a pedestrian, exposed himself to the dangers of a highway as a pedestrian which was not a risk of his employment or in any way associated with the duties of his employment. (R 314-316)

The separate appeals that were timely filed by Martinez (R 67) and Navarro (Navarro Record 50), were consolidated by an order entered by the First District Court of Appeal on August 18, 1989.

On February 13, 1990, the First District issued the opinion contained in Appendix A reversing the decision of the JCC in this case on the basis that Rockhaulers, Inc. v. Davis, 554 So.2d 654 (Fla. 1st DCA 1989), was dispositive of the compensability issue here. The First District based its decision on its determination that these employees, like the employee in Rockhaulers, were the first to arrive at the scene of a true emergency, that these employees had assisted in removing a disabled vehicle which posed a hazard to other travelers, that the very nature of the employees' employment brought them to a place where a rescue attempt was required by ordinary standards of humanity and that the employees' actions were reasonable and expected behavior under the circumstances. In its decision reversing the JCC's decision in this case, the First District entered a footnote stating that it had considered this Court's decision in Murphy v. Peninsular Life Insurance Co. and found it "factually dissimilar" without discussing what, in the court's view, the factual dissimilarities were.

On March 8, 1989, the employer/carrier timely filed their notice invoking the discretionary jurisdiction of this Court on the basis of the express and direct conflict provision of article V, section 3(b)(3) of the Florida Constitution since the employer/carrier believed that the First District's decision in this case expressly and directly conflicted with this Court's earlier decision in Murphy. On the July 5, 1990, this Court entered an order accepting jurisdiction in this case.

SUMMARY OF ARGUMENT

The First District Court of Appeal's decision under consideration here reached the opposite result from that reached by this Court in Murphy v. Peninsular Life Insurance Co., 299 So.2d 3 (Fla. 1974), on facts which were substantially on all fours with the facts in Murphy. If the First District Court of Appeal had been the court which initially decided Murphy, the First District's opinion in this case would have had the effect of overruling its prior decision in Murphy. There is no question, therefore, that the First District's decision in this case expressly and directly conflicts with this Court's earlier decision in Murphy. To allow such a conflict to stand uncorrected will only serve to create confusion in the Florida Worker's Compensation Law.

Not only does the First District's opinion in this case conflict with this Court's decision in Murphy, the material facts in this case are easily distinguishable from those in the decision of Rockhaulers, Inc. v. Davis, 554 so.2d 654 (Fla. 1st DCA 1989), which the First District found controlling in this case. In Rockhaulers, the employee was the first to arrive at the scene of a head-on collision and he was injured when he was attempting to assist the accident victims. Here, on the other hand, when the employees went to assist in pushing the disabled vehicle, no accident had yet occurred, no one had been injured, and there was no other indication that the situation encountered

involved serious risk of personal injury or loss of life to anyone. Consequently, there was no "true emergency" here and the First District's earlier decision in Rockhaulers did not compel a finding of compensability on the facts of this case.

Not only are the facts in this case clearly distinguishable from the facts in Rockhaulers, the record here is devoid of any evidence to support the First District's determination that two stranded motorists with a disabled vehicle constituted a "true emergency" or that the situation posed a hazard to other travelers. In fact, the employees never contended at trial or during the initial appeal that the injuries were suffered during an emergency rescue. The first time the term "emergency" is applied by anyone to the facts of this case was when the First District issued its opinion on February 13, 1990.

At trial and in the initial appeal, the employees argued that the injuries should be found compensable under several different doctrines including the special errand rule, the dual purpose doctrine and the traveling employee doctrine, and they contended that the deviation was insubstantial under the holdings of the personal comfort doctrine cases. The employer/carrier can only assume that the First District was not convinced that any of the above doctrines or arguments had any application here since the court seems to have labeled the situation a "true emergency" in order to support its finding that the employees' actions were reasonable and expected behavior in this case. Be that as it may, the fact remains that the JCC's findings of fact contained

in the order under consideration were supported by competent, substantial evidence in the record and should have been affirmed by the First District Court of Appeal. To allow the decision in this case to stand will have the practical effect of making every employer the insurer of any employee simply by virtue of the employment relationship regardless of the employee's activities or his reason for engaging in those activities at the time of his injury. That has never been the purpose or design of the Florida Workers' Compensation Act. Since the Workers' Compensation Act requires that for an injury to be compensable, injuries must arise out of and in the course of an employee's employment, the legislature obviously intended that industry would bear the burden of paying for injuries caused by industry, but would not be financially responsible for those that were not. The "arising out of and in the course of employment" requirement has never been removed from the act by the legislature and it should not now be removed by the court regardless of the sympathy evoked by this tragic situation.

The First District Court of Appeal's opinion reversing the JCC in this case should be reversed because it expressly and directly conflicts with this Court's earlier decision in Murphy, the decision is not compelled by the First District's earlier decision in Rockhaulers, and the record contains absolutely no support for the First District's labeling this situation a true emergency. The JCC's order finding these claims not compensable should be reinstated.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL ERRED IN REVERSING THE JUDGE OF COMPENSATION CLAIMS' RULING THAT THE INJURIES SUFFERED IN THE SUBJECT ACCIDENT WERE NOT COMPENSABLE WHEN: (1) THE JUDGE OF COMPENSATION CLAIMS' FINDING THAT AT THE TIME OF THE ACCIDENT THE EMPLOYEES HAD DEVIATED FROM THEIR EMPLOYMENT WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE; (2) THE FIRST DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN MURPHY V. PENINSULAR LIFE INSURANCE CO., 299 SO.2D 3 (FLA. 1974); AND (3) THE RECORD CONTAINS NO EVIDENCE TO SUPPORT THE FIRST DISTRICT COURT OF APPEAL'S DETERMINATION THAT THE INJURIES IN THIS CASE WERE RECEIVED DURING A RESCUE ATTEMPT OCCASIONED BY A "TRUE EMERGENCY."

The employer/carrier are convinced that a review of the record along with consideration of the applicable statutes and current case law will convince this Court that the First District erred in finding that its recent decision in Rockhaulers, Inc. v. Davis, 554 So.2d 654 (Fla. 1st DCA 1989), controlled its decision here and accordingly required reversal of the decision of the JCC. The facts in this case are clearly distinguishable from the facts reflected in the Rockhaulers' decision because it is clear that the employee in Rockhaulers encountered a true emergency to which he was attempting to respond at the time he suffered his fatal injuries. In this case, on the other hand, there is absolutely no record evidence which can logically support the First District's decision that the injuries suffered by these employees were incurred during an accident arising out of an attempted rescue in an emergency situation. More importantly for

purposes of this review, however, is the fact that the First District's opinion in this case expressly and directly conflicts with this Court's decision in Murphy v. Peninsular Life Insurance Co., 299 So.2d 3 (Fla. 1974), because on substantially the same controlling facts the First District reached the opposite results from that reached by this Court in Murphy. This should not be since district courts of appeal have a duty to follow prior decisions of this Court which have not been overruled by this Court. See e.g, McPhee v. Dade County, 362 So.2d 74 (Fla. 3d DCA 1978). Any departure from principles of law decided by the Supreme Court should be at the hand of the Supreme Court. **See** Reaves v. L. W. Rozzo, Inc., 286 So.2d 221 (Fla. 4th DCA 1973). By reversing the JCC in this case, it appears that the First District also has ignored the well-known principle of law that the decision of a JCC to award or not award benefits should not be disturbed if the decision is supported by competent, substantial evidence which accords with logic and reason. **See** Yates v. Gabrio Electric Co., 167 So.2d 565 (Fla. 1964); **see also**, Gomez v. Neckwear, 424 So.2d 106 (Fla. 1st DCA 1982). It is axiomatic that whether the reviewing court would have come to the same conclusion as the JCC on the record is irrelevant. **See** Richardson v. **City** of Tampa, 175 So.2d 43 (Fla. 1965). Here, with one minor exception, the parties agree that the JCC's findings of fact are supported by competent, substantial evidence in the record. A review of the JCC's findings of fact and his application of case law to those facts demonstrates that the

JCC's decision that the injuries did not arise out of and in the course of the employees' employment accords with logic and reason. The JCC's decision is entirely consistent with the applicable statutory and current case law of this state, even the case law enunciated in the Rockhaulers' decision. The JCC's decision, therefore, should have been affirmed by the First District Court of Appeal.

The real issue here, as it was in Murphy and Rockhaulers, is under what circumstances an employee's assistance to a stranger is a reasonably foreseeable consequence of his fulfilling the duties of his employment so that an injury suffered during such assistance may properly be determined to have arisen out of and in the course of the employment. In the decision under consideration as well as in Murphy and Rockhaulers, the courts considered the positional risk doctrine enunciated in O'Leary v. Brown-Pacific-Maxon, Inc, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951), where the court held that for an injury occurring during the "rescue of a stranger" to be compensable it must be a reasonably foreseeable consequence of the employee's fulfilling the duties of his employment. In O'Leary and in Rockhaulers, the employee's employment brought him to the place where he observed a situation involving imminent danger of serious injury or loss of life so that it was reasonable for the courts to hold that the attempted rescue of the strangers in peril was a reasonably foreseeable consequence of the employee's fulfilling the duties of his employment. The same cannot be said of the situation

encountered by the employees in this case.

The First District's decision here turns on its unsupported finding that the employees' employment brought them upon the scene of a "true emergency" where a rescue attempt was required for ordinary standards of humanity so that the employees' actions in assisting the two motorists with the disabled vehicle were altogether reasonable and expected behavior under the circumstances. The material facts in this case, however, are very similar to the material facts revealed in the Murphy opinion except that when the facts here are compared with the facts in Murphy, it appears that the situation in Murphy could be more appropriately described as a "true emergency" requiring a rescue attempt by ordinary standards of humanity than was true here.

Here, as in Murphy, the employees' employment brought them to the place where they observed the occasion for assisting a stranger. Here, as in Murphy, the employees were apparently the first to encounter the motorists with an impaired vehicle. Here, as in Murphy, the motorists requested the employees' assistance. Here, as in Murphy, no accident had occurred and no one had been injured at the time the employees went to assist the motorists. Here, as in Murphy, the employees were injured while attempting to render assistance to the motorists.

In Murphy, specifically, the employee encountered a heavy duty truck with its brakes failing, standing motionless, facing up an incline portion of the road. The truck driver called to the employee for help. The employee climbed atop the truck to

throw down blocks which the driver of the truck planned to place under the tires of the truck in an apparent effort to keep the truck from rolling down the incline. The employee was injured while attempting to assist the truck driver as requested. Under the above described circumstances, this Court held that the injury to the employee was not a reasonably foreseeable consequence of his fulfilling the duties of his employment. In spite of the above described factual similarities between this case and Murphy, the First District in a footnote, stated that it had considered the decision in Murphy but found it factually dissimilar. The employer/carrier contend, however, that if any factual dissimilarity exists between the cases on appeal and Murphy, it is that the unaccompanied driver in Murphy was in greater need of assistance than were the two motorists with the disabled vehicle particularly since the record and the First District's opinion both reflect that the two motorists in this case were already in the process of pushing the vehicle from the road. While the assistance the employees attempted to render in this case certainly would have enabled the motorists to move the vehicle off the road more quickly, there is no indication in the opinion, in the record, nor in common sense why the two motorists alone would have been unable to quickly push the vehicle out of the roadway thus quickly removing any potential danger posed to other travelers without any assistance from the employees in this case. There is no information in the opinion nor in the record that either the disabled vehicle or the two motorists or any

travelers, for that matter, were in danger at the time the employees decided to leave the safety of the grove and to cross over into the highway to assist the two motorists. Rather, the assistance rendered by the employees here was not only unnecessary in order to remove any potential hazard to other travelers, it was not required by "ordinary standards of humanity."

Moreover, it seems indisputable that a heavy duty truck with failed brakes precariously poised on an incline with no means by which the driver could control the speed of the truck should it begin, as it did, to roll down the incline posed a much greater danger to other travelers as well as to the truck driver who was faced with possible injury to himself with no other person to assist him. If the situation in this case constituted a "true emergency" which made the actions of the employees reasonable and expected behavior under the circumstances, it is impossible to understand how the actions of the employee in Murphy were unreasonable or unforeseeable in the situation facing him. It is also impossible to discern why a "rescue" attempt was required by "ordinary standards of humanity" here so as to make the actions of these employees reasonable and expected behavior but did not require a rescue attempt by ordinary standards of humanity so as to make the actions of the employee in Murphy reasonable and expected behavior. There is obvious conflict between the opinions, and certainly the results, when this Court in Murphy found the injury suffered by that employee not compensable, but

the First District found the injuries suffered by the employees here to be compensable. To allow the First District Court's decision in this case to stand in direct conflict with this Court's decision in Murphy will create confusion in the workers' compensation law of this state regarding the circumstances under which injuries received during an attempt to render assistance to a total stranger are compensable. This should not be.

Not only does the First District's decision in this case conflict with this Court's decision in Murphy on substantially the same set of facts, the facts in Rockhaulers on which the First DCA relied and which it found controlling in this case are clearly distinguishable. In Rockhaulers, the employee was the first person to arrive at the scene of a head-on collision between a truck and an automobile. That employee was struck and killed by another motor vehicle as he was walking to aid the accident victims. Under those circumstance, it is not difficult to understand how the First District found that that employee's injuries were suffered while responding to a "true emergency."

As defined in The American Heritage Dictionary 448 (2d college ed. 1982), an emergency is "[a]n unexpected situation or sudden occurrence of a serious and ursent nature that demands immediate action." (emphasis added) Emergency has also been defined as "[a] sudden unexpected happening; an unforeseen occurrence or condition, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen

combination of circumstances that calls for immediate action." Black's Law Dictionary **469** (5th ed. 1979). By either definition, the employee in Rockhaulers was confronted with an emergency situation where a rescue attempt was required by "ordinary standards of humanity." On the other hand, encountering two motorists with a stranded vehicle where no accident had yet occurred and where no one had been injured does not fit within the definition of an emergency situation which, by "ordinary standards of humanity," required the employees to assist the stranded motorists. The record simply contains no evidence which can support the First District's labeling of this situation, at the time of the deviation, as a "true emergency," even on the basis that the stranded vehicle was a danger to the traveling public. There is no evidence the county road was heavily traveled. Both Martinez and Navarro testified that it was still daylight when they went to assist the motorists (R 151, 177). There is no evidence that the car was on a curve or a hill, or in some other situation where it could not be easily seen in time to allow other travelers to either stop or safely pass. [The employees indicated in the statement of the case and facts of their Jurisdictional Brief that the disabled vehicle was broken down on the crest of a hill and was being pushed on an upgrade incline. However, the undersigned counsel for the employer/carrier has once again reviewed both the Martinez record and the Navarro record and the records contain absolutely no evidence to support that assertion.]

Although the employees may contend that the fact that this accident occurred is in and of itself evidence that the stranded vehicle posed a hazard to the traveling public, the record is insufficient to support such a conclusion. The record is silent regarding what other factor or factors actually caused this accident to occur. There is no evidence regarding the speed at which the vehicle which hit the employees was traveling. There is no evidence regarding that driver's sobriety or lack of it. Without evidence on at least these two factors as well as information regarding any other possible contributing factor, the fact of the accident cannot be said to substantiate the court's conclusion that the stranded vehicle posed a hazard to the traveling public.

Moreover, a review of the record reveals that the reason consistently given for going to the aid of the motorists was simply that the motorists asked (R 30, 73, 121-123, 154, 158; R 178-180; Navarro Record 11, 23-25). The only indication that the employees felt there was any need to act quickly was because Martinez needed to return to the bus quickly and drive the three remaining pickers to their homes (R 30; Navarro Record 11). There is not one iota of evidence in the testimony of Martinez and Navarro at their depositions or at their respective hearings which would suggest that they were assisting the motorists out of any sense of emergency or impending or potential danger to anyone. In fact, at the Navarro hearing, Martinez was asked, "And isn't it true that you all went to help move the car because

the Americans asked you to?" and he responded, "Yes, because they asked a <u>favor</u> of us" (Navarro Record 25). (emphasis added) If the employees had, in fact, considered that their assistance was needed in an emergency situation, it is unlikely that Martinez would have couched his response in terms of the Americans asking a "favor" of them. The employer/carrier do not contend that a disabled vehicle on a highway is never a potential hazard to the traveling public, but the evidence in the record of these cases does not support the determination reached by the First District that the disabled vehicle posed a hazard to other travelers to the point of constituting a true emergency.

Since the First District in <u>Rockhaulers</u> and in this decision relied heavily on A. Larson's treatise on <u>The Law of Workmen's Compensation</u> (hereinafter cited as Larson) for support of its decision to find an injury compensable when an employee was injured rescuing a stranger, it is important to note that Larson states that the "'rescue' rule when applied to strangers is normally limited to cases involving serious risk of personal injury or loss of life." Larson, § 28.32. Larson also states that for the rescue to be compensable, it must be occasioned by a "true emergency as distinguished from a mere benefit to the employer through assistance to someone in trouble." Larson, § 28.13. A review of the records in these cases simply will not substantiate a conclusion that there was any serious risk of personal injury or loss of life here. Had there been, it would be reasonable to expect that those facts would have been

vigorously argued by the employees at trial as well as in their briefs to the First District. While in the employees' appellate briefs, they did sometimes refer to the assistance rendered as a **"rescue,"** there is nothing in the facts in the record nor was it ever argued that the assistance was rendered in an emergency situation. In fact, the first time the situation encountered by these employees was labeled an **"emergency"** was in the First District Court of Appeal's opinion issued in this case. If, by any stretch of the imagination, the facts would have supported a finding of an emergency situation, why did counsel for the employees not rely on the emergency rescue doctrine to support their claim of compensability rather than the various doctrines actually relied on? The only conceivable answer is that the facts reflected in the records would not support such an argument.

The statutory provision applicable to this case is § 440.09(1), Florida Statutes (1987) which provides: "Compensation shall be payable under this chapter in respect of disability or death of an employee if the disability or death results from an injury arising out of and in the course of the employment." Each element of this statutory section must be proven before a claim can be found compensable. **See** Southern Bell Telephone & Telegraph Co. v. McCook, 355 So.2d 1166 (Fla. 1977).

As the Florida Supreme Court observed in Fidelity & Casualty Co. v. Moore, 143 Fla. 103, 196 So. 495 (1940):

> The cases generally hold that for an injury to arise out of and in the course of one's employment, there must be some causal connection between the injury and the employment or it must have had its origin in some risk incident to or connected with the employment or that it flowed from it as a natural consequence. Another definition widely approved is that the injury must occur within the period of employment, at a place where the employee may reasonably be, **and** while he is reasonably fulfilling the duties of his employment or engaged in doing something incident to it. (emphasis added)

The Court's holding in Fidelity & Casualty demonstrates that even though the courts are always mindful of the general rule that workers' compensation laws are to be construed liberally in favor of claimants and that all doubts are to be resolved in their favor, the courts nevertheless will find an injury not compensable if it occurs during a time that the claimant has abandoned his employment to go on a personal mission that is wholly apart from his employment.

As the Industrial Relations Commission observed in Florsheim Shoe Company v. Asbury, IRC 2-3234 (1977), the point of deviation may be fixed at the point where the employee physically deviates, not from the time the employee simply decides to deviate. Clearly, therefore, when the employees took their first step toward the car and into the road, they had at least at that point deviated from their employment since they were not doing anything at that time in which they were reasonably fulfilling the duties of their employment or anything incidental to it. Once a deviation occurs, an employee is not within the scope of his employment until he returns to his employment by doing something that is meaningfully beneficial to his employer's interest. Kane

Furniture Co. v. Miranda, 506 So.2d 1061 (Fla. 2d DCA), rev. denied, 515 So.2d 230 (1987). If the accident occurs before the employee returns to the course he was pursuing in the interest of his employer, the accident or injury is not within the scope of employment. Drinnenberg v. State Dept. of Transportation, 481 So.2d 51 (Fla. 2d DCA 1985).

The employees contended at trial and in the initial appeal that if there was a deviation it was so minimal both from the standpoint of time and distance that it was insubstantial. Clearly, however, time and distance are not the only two factors to be considered in determining whether a deviation is substantial or insubstantial. Of even greater importance is consideration of whether the deviation substantially increases the risk of injury to the employee. One of the factors affecting deviation is whether the risk of deviation is causally related to the accident. "If incidents of the deviation itself are operative to producing the accident, this in itself will weigh heavily on the side of non-compensability." Larson, § 19.61. It is entirely possible that had there not been such a crowd of pedestrians around the stranded vehicle the oncoming car may have been successful in swerving and missing the stranded vehicle and those pushing it. Thus, it is conceivable that the employees' being in the road was an operative in producing the accident.

The employer/carrier realize that the distance traveled by the employees in the deviation at issue was not great and that the time involved from the point that the deviation began until

the accident occurred was only a few minutes. However, when the employees went out into the road to assist the motorists to push their car, just being in the road as a pedestrian greatly enhanced the employees' risk of injury, as the JCC appropriately found in his order. What may have been an insubstantial deviation in terms of time and distance clearly became a substantial and significant deviation due to the greatly enhanced risk, not only of being injured, but also of suffering more severe injuries than the risks of injury to which the employees were exposed by their employment. Even though the employees' employment required that they travel to and from work in a company bus, the risk of severe injury as a passenger in a vehicle is different and not as great as the risks to which one is exposed as a pedestrian in a roadway. The employees' employment never required them to be in the roadway as a pedestrian.

In the employees' Initial Brief, they also relied upon several cases from other jurisdictions in which they contended injuries had been found compensable under circumstances nearly identical to the present situation. In addition to distinguishing each of those cases on its facts from the case here, the employer/carrier brought to the court's attention cases from many jurisdictions that had found injuries not compensable on facts more compelling than the facts here. The employer/carrier still contend that it was not necessary for the parties to look to the rulings of other jurisdictions as if the

Florida courts had never ruled on this issue. Not only had this Court ruled in Murphy on facts very similar to the facts here that an injury suffered while assisting a stranger was not compensable, the IRC had held injuries not compensable in Walareen Company v. Lemelin, IRC 2-2819 (July 22, 1975), cert. denied 336 So.2d 601 (Fla. 1976), under circumstances which can only be described as a true emergency. Although the JCC did not rely on the holding in Lemelin to reach the decision in this case, the IRC's ruling in Lemelin was additional case law support for the holding in this case at the time the JCC ruled. In Lemelin, the claimant, a security guard at Walgreen's, heard a shot and observed two individuals, one of which was holding a pistol on a wounded policeman across the street from the claimant's place of employment. The claimant drew his weapon and went to the aid of the policeman. The claimant managed to save the police officer from further injury, but the claimant was shot in the back and rendered permanently and totally disabled. Even under these circumstances in which the claimant exhibited unusual courage by going to the aid of the police officer, the IRC determined that the injuries did not arise out of and in the course of the security guard's employment and denied compensability. The Florida Supreme Court denied certiorari.

In Lemelin, as here, the distance traveled by the employee to go to the aid of another was deminimus--across the street in Lemelin and across the road here. It also appears that the amount of time elapsing from the point that the Walgreen

employee's deviation began to the time the employee was injured was probably just minutes, as was the case here. The circumstances under which the security guard in Lemelin went to the aid of the wounded police officer could be properly classified as a true emergency and the IRC ruling in Lemelin would appear to have been overruled sub silentio by the First District's ruling in Rockhaulers. Although there is no question that the First District Court of Appeal was well within the scope of its authority to overrule Lemelin expressly or sub silentio, the First District Court of Appeal was not free to overrule this Court's holding in Murphy.

During the pendency of the employer/carrier's petition seeking to invoke the discretionary jurisdiction of this Court, the employees filed a notice of supplemental authority to which they attached a copy of the Comprehensive Economic Development Act of **1990,** section **11,** which amended section **440.092** of the Florida Statutes by creating a subsection dealing with deviation from employment. A copy of this portion of that act is attached to this brief as Appendix B. Since that act was passed well after the date of the accident in these cases, the employer/carrier believe that it is not relevant and has no application here. However, the employer/carrier call the Court's attention to the fact that in order for a deviation under the statute as amended to be found compensable, the deviation must be either expressly approved by the employer or it must be in response to an emergency and designed to save life or property.

Even under the new act, the deviation in this case would not be covered since there was no true emergency nor did it appear at the time the employees decided to render the assistance that the deviation was designed to necessarily save life or property as required by the act.

The only explanation that the employer/carrier can find for the result reached by the First District in this case is the overwhelming sympathy one experiences upon considering even momentarily the reality of the plight now faced by Pablo Martinez. The injuries suffered by this employee constitute a tragedy the likes of which none of us like to contemplate much less deal with. In contending that the injuries suffered by these employees is not compensable, the employer/carrier are not unsympathetic to Mr. Martinez's circumstances. The employer and carrier are not suggesting that the judges or justices who are faced with the daily task of making legal decisions in difficult cases such as this should be individuals without compassion. It is the employer/carrier's position, however, that regardless of the sympathy evoked by the facts in a particular case, the people of this state, including employers and carriers in workers' compensation cases, should be able to depend on the courts to render decisions which produce just results under the applicable statutory and decisional law of this state. The First District's decision in this case, for all practical purposes, would effectively remove the requirement that an injury must arise out of and in the course of an employee's employment in order to be

compensable under the Florida Workers' Compensation Act. As this Court recently observed in Leon County School Board v. Grimes, 548 So.2d 205 (Fla. 1989), the Workers' Compensation Act provides "no relief for ailment(s) not produced by industry," nor is it "designed to take the place of general health and accident insurance." Clearly, it was not the intent of the legislature that the employers who come within the provisions of the Workers' Compensation Act should be the insurers of the safety of their employees at all times regardless of the nature of the employees' activities nor their reasons for engaging in those activities.

To the extent that an employee suffers an injury which did not arise out of and in the course of his employment and for which he also has no general health or accident insurance, there are other agencies provided by the state to cover such circumstances. That fact is clearly shown in this case since it was revealed at the hearing that the Florida Department of Rehabilitation had been providing and paying for employee Martinez' medical care (R 12-13). This situation is the type that the legislature has apparently determined should be the responsibility of the taxpayers in general, not the responsibility of the employer and carrier.

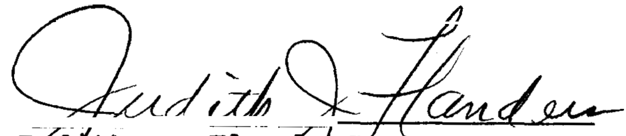
In conclusion, the JCC was entirely correct in determining that the Supreme Court's holding in Murphy compelled his denial of the claims for benefits under the circumstance of this case. Even if the JCC had had the benefit of the First District's opinion in Rockhaulers there is no reason to believe he would

have ruled differently since Rockhaulers does **not** compel a finding of compensability under the circumstances of this case since there is no evidence of a true emergency here requiring a rescue attempt under "ordinary standards of humanity" as there was in Rockhaulers. The employees here had deviated from their employment and were injured during the time of the deviation--a deviation which was not occasioned by an emergency rescue, was not for the benefit of their employer, was not customary in their employment, was not condoned by their employer, was not for the benefit of a customer of the employer, was not in the assistance of a co-employee, and simply in no way benefited this employer. Consequently, the JCC's finding that the injuries were suffered during a deviation from the employment and, therefore, are not compensable accords with reason and logic, is supported by competent, substantial evidence in the record, is consistent with the case law in this state and should have been affirmed. If this Court agrees that all the courts of this state have a duty to render just decisions according to the law of this state without being unduly influenced by compassion and sympathy, the First District's finding of compensability on the basis that the injuries here were suffered during a true emergency should be reversed and the ruling by the JCC that the injuries are not compensable under the Florida Worker's Compensation Law should be reinstated.

CONCLUSION

This Court should reverse the First District's decision and should reinstate the decision of the JCC because: (1) the JCC's decision is supported by competent, substantial evidence in the record and accords with logic and reason: (2) the decision by the First District: (a) directly and expressly conflicts with this Court's decision in Murphy; (b) is distinguishable from its earlier decision in Rockhaulers; and (c) is not supported by any evidence in the record.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 30th day of July, 1990 to Richard A. Kupfer, Esquire, P. O. Box 3466, West Palm Beach, FL 33402, and Howell & Thornhill, P.A., P. O. Box 897, Winter Haven, FL 33882.

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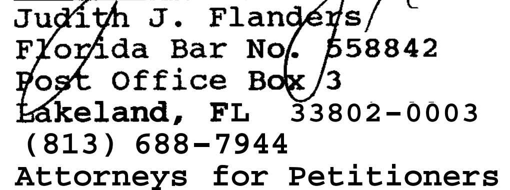
BY: 

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