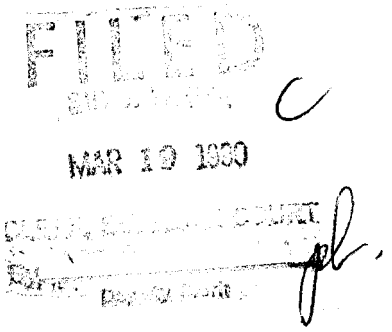
IN THE
SUPREME COURT OF FLORIDA




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

Employer/Carrier/Petitioner,

vs.

PABLO MARTINEZ,

Employee/Respondent.

Consolidated Case No. 75,663

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

Employer/Carrier/Petitioner,

vs.

MARIO NAVARRO,

Employee/Respondent.

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**BRIEF ON JURISDICTION OF PETITIONERS AND APPENDIX**

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

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## PREFACE

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

## CITATIONS OF AUTHORITY

## STATEMENT OF THE CASE AND FACTS

The employees were injured while pushing a disabled automobile off the road and claimed workers' compensation benefits. On basically undisputed facts, the Judge of Compensation Claims considered the principles of law in Murphy v. Peninsular Life Insurance Co., 299 So.2d 3 (Fla. 1974) and Turcotte v. Fowler & Torrance Concrete & Masonry, 507 So.2d 784 (Fla. 1st DCA 1987), and determined that he was compelled under the facts to find that at the time of the employees' injuries they had deviated from the course and *scope* of their employment and, therefore, denied the employees claim for workers' compensation benefits.

The employees appealed and the DCA found in the opinion in the Appendix that Rockhaulers, Inc. v. Davis, 554 So.2d 654 (Fla. 1st DCA 1989), a *case* decided by the DCA after the briefs of the parties were submitted, was dispositive of the compensability issue and reversed the decision of the JCC. The E/C had no opportunity to point out to the DCA that the circumstances in Rockhaulers were clearly distinguishable from the facts here in that when the employees here went to help the motorists no accident had yet occurred, no one had been injured, and no "true emergency" had arisen as it had in Rockhaulers. In a footnote, the DCA summarily dismissed this court's holding in Murphy as being factually dissimilar.

The E/C timely filed on March 8, 1990 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.

## SUMMARY OF ARGUMENT

This Court should exercise its discretion to accept jurisdiction of this *case* under the provisions of article V, section 3(b)(3) of the Florida Constitution because the DCA'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 the DCA applied a rule of law to substantially the same controlling facts and produced a different result from that reached by this Court in Murphy.

In both cases the employees' employment brought them to the place of observing a motorist experiencing difficulty with his vehicle. In both *cases* the motorists requested assistance from the employees. In both cases there had been no accident nor had anyone been injured at the time the employees went to the assistance of the motorists. In both *cases* the employees were injured in the process of attempting to render assistance to the motorists. In Murphy, this Court determined that the injuries sustained by that employee were not a reasonably foreseeable consequence of fulfill — the duties of his employment whereas in this case, under essentially the same controlling facts, the DCA held that the employees' actions were required by ordinary standards of humanity and were altogether reasonable and expected under the circumstances.

To decline to review the decision in this case and to resolve the express and direct conflict in these cases will create confusion and instability in Florida law which the provisions in article V, section 3(b)(3) are designed to prevent or, at least, to keep to an absolute minimum.

## ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SUPREME COURT'S DECISION IN MURPHY V. PENINSULAR LIFE INSURANCE CO., 299 SO.2D 3 (FLA. 1974) SO AS TO INVOKE THE DISCRETIONARY JURISDICTION OF THE SUPREME COURT IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE V, SECTION 3(b) (3) OF THE FLORIDA CONSTITUTION.

The Florida Supreme Court "[m]ay review any decision of a district court of appeal that . . . expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law." Art. V, § 3(b)(3), Fla. Const. See also, Fla. R. App. P. 9.030(a)(2)(A)(iv).

The principal situations in which direct conflict jurisdiction of this Court has been found is where there was alleged conflict in (1) announcement of a rule of law which conflicted with the rule previously announced by the Supreme court or (2) the district court of appeal has applied a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by the Supreme Court. See, e.g., Nielsen V. City of Sarasota, 117 So.2d 731 (Fla. 1960). The E/C recognize that since the 1980 revision of the Florida Constitution a conflict must be express as well as direct and that "express" means the conflict must be evidenced from within the four corners of the opinions alleged to be in conflict. See Reaves V. State, 485 So.2d 829 (Fla. 1986). The E/C believe that when the facts contained in this DCA opinion are compared with the facts given in the Murphy decision it will become abundantly clear that the opinion in this case expressly and directly conflicts with this Court's decision in Murphy since the DCA has clearly applied a rule of law to

produce a different result in this *case* from that reached by the Supreme court in Murphy even though the cases involved substantially the *same* controlling facts.

The real issue in the cases on appeal, as it was in Murphy, 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 by the employee during such assistance may properly be determined to have arisen out of and in the *course* of his employment. In the Murphy decision and in the opinion under consideration, 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 his fulfilling the duties of the employment.

The DCA's decision here turns on its 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 stranded motorists were altogether reasonable and expected behavior under the circumstances. It is clear, however, when the facts in the DCA opinion are compared with the facts in Murphy that the situation in Murphy could be more appropriately described as a true emergency requiring a rescue attempt by ordinary human standards than was true in the situation here. Thus, in comparing these two cases it will be unclear to a casual reader, much less to someone attempting to study these cases in an effort to determine

what the law in Florida is regarding the compensability of injuries suffered during assistance to a stranger and will have the effect of creating confusion and instability in the workers' compensation law of this state.

It is clear that 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 asking the employee to place blocks under the tires of the truck in an apparent effort to keep the truck from rolling back 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 DCA 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 DCA opinion both reflect the two motorists in this case were already in the process of removing the vehicle from the highway. 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 the 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 who were already in the process of pushing the disabled vehicle off the mad. Rather, it is clear that the assistance rendered by the employees here was not only unnecessary in order to remove the hazard the stalled vehicle may have posed to other travelers, it certainly was not required by ordinary standards of human behavior.

Moreover, by any standard of common sense, it seems indisputable that a heavy duty truck with failed brakes rolling down an incline with no means by which the driver could control the speed of the truck posed a much greater danger, not only to other travelers, but also to the driver himself who was faced with immediate danger to his life and person with no other person to assist him. If the situation in the case on appeal

constituted a "true emergency" which made the actions of the employees in the case on appeal reasonable and expected behavior under the circumstances, it is impossible to understand how the actions of the employee in Murphy were 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 under the circumstances described in Murphy. If, as the DCA contends, the Murphy case is factually dissimilar from the *case* here, it is only to the extent that the vehicle in the situation described in Murphy posed a greater hazard to travelers than did the stalled vehicle in this case and the additional fact that the driver in Murphy was himself facing danger to his life or person whereas there was no indication that the two motorists in this *case* faced any ***danger*** to themselves. Thus, the attempted assistance in Murphy was a much more foreseeable consequence of his fulfilling the duties of his employment than was true of the actions of the employees in this *case*. There is clearly conflict between the opinions, and certainly the results, when this Court in Murphy found the injury suffered by that employee as being an unforeseeable consequence of his fulfilling his duties of employment and the DCA's opinion in this case finding the employees' actions were altogether reasonable and expected behavior under the circumstances.

Except for the fact *that* the circumstances encountered by the employee in Murphy obviously came much closer to constituting a "true

emergency" requiring an attempted rescue by ordinary human standards, the facts in Murphy are very similar, if not on all fours, with the situation here so that it is clear that the DCA here has considered the positional risk doctrine, as did this Court in Murphy, applied it to very similar facts and reached exactly the opposite result from that reached by this Court. This should not be. District courts of appeal have a duty to follow prior decisions of this Court which have not been overruled. See, e.g., McPhee V. Dade County, 362 So.2d 74 (Fla. 3d DCA 1978). District courts of appeal have no authority to overrule a decision of the Supreme Court and any departure from principles decided by the Supreme Court should be at the hand of the Supreme Court. Reaves V. L. W. Rozzo, Inc., 286 So.2d 221 (Fla. 4th DCA 1973). The decision of the appellate court in this *case* on its face improperly collides with this Court's prior decision in Murphy in such a way that if Murphy had originally been decided by the First District Court of Appeal, the District Court's decision in this *case* on the same point of law would be tantamount to the First District's overruling its prior decision in Murphy. *Such* conflict is the type of direct conflict which justifies this Court's review of a district court's decision to avoid a situation which will only generate confusion and conflict among precedent. See Kyle V. Kyle, 139 So.2d 885 (Fla. 1962).

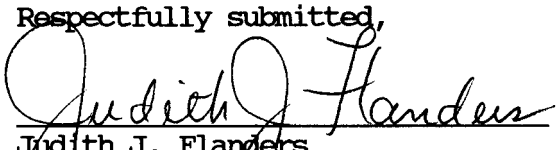
As this court recently observed in Leon County School Board V. Grimes, 548 So.2d 205 (Fla. 1989), the Workers' Compensation Act provides no relief from injuries not produced by industry nor is it designed to take the place of general health and accident insurance. Clearly it was not the intent of the legislature that employers who come within the

provisions of the Workers' Compensation Act should be insurers of the safety of their employees at all times regardless of the nature of the employee's activities nor their reason for engaging in those activities. Rather, it is clear that by inserting the "arising out of and in the course of employment" provision in the act, the Florida Legislature intended that industry would pay for injuries that were caused by industry, but not be responsible for those that were not. Should this Court decline to accept jurisdiction to review the decision in this *case* this will only encourage the courts of appeal to ignore Supreme Court precedent on the *same* legal issue by simply adding a footnote to its opinion that it has considered the Supreme Court precedent and found it factually dissimilar when it clearly is not, and will leave unclear the issue of under what circumstances in Florida workers' compensation *cases* injuries suffered during assistance to a stranger *are* a foreseeable consequence of an employee's fulfilling the duties of his employment *so* as to justify a finding that the injuries arose out of and in the *course* of that employee's employment. It will also have the effect of once again saddling industry, which is already reeling under the spiraling costs of the workers' compensation program, with the burden of paying for an injury which is unquestionably a very tragic injury which quite properly evokes sympathy from everyone but which really is not the result of industry because the injuries in this case were not a reasonably foreseeable consequence of the employees fulfilling the duties of their employment.

## CONCLUSION

This Court should exercise its discretion to accept jurisdiction in this *case* because the First District Court of Appeal's decision in this case not only directly, but expressly conflicts with this Court's decision in Murphy V. peninsular Life Insurance Co. It is clear that both the First District in this case and this Court in Murphy considered the positional risk doctrine with its criteria for determining when injuries suffered during the rescue of or assistance to a ***stranger*** is a reasonably foreseeable *consequence* of an employee's fulfilling the duties of his employment and that the First District applied that doctrine to virtually the same set of fads present in Murphy and reached an opposite result by choosing to ignore this Court's holding in Murphy while at the same time relying on a recent decision of its own (Rockhaulers) which in itself is clearly distinguishable on its facts from the situation here. To allow such a situation to go unreviewed and uncorrected will only create additional confusion in the workers' compensation law and invite the district courts of appeal to disregard the rule of stare decisis which in turn will contribute to undermining the stability not only desired but necessary to the proper and orderly functioning of this state's legal system.

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 16th day of March, 1990 to: HOWELL & THORNHILL, P.A., P. O. Box 897, Winter Haven, FL 33882; and Richard A. Kupfer, Esquire, P. O. Box 3466, West Palm Beach, FL 33402.

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