IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

PABLO MARTINEZ,

Respondent.

Consolidated Case
No. 75,663

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

Petitioner,

v.

MARIO NAVARRO,

Respondent.

RESPONDENTS' BRIEF ON JURISDICTION

On Notice to Invoke Discretionary (Conflict) Jurisdiction to Review Decision of the First District Court of Appeal

RICHARD A. KUPFER, ESQ.

WAGNER, NUGENT, JOHNSON, ROTH, ROMANO, ERIKSEN & KUPFER, P.A.
Flagler Center Tower, Suite 300
505 South Flagler Drive
P. O. Box 3466
West Palm Beach, FL 33402
(407) 655-5200
Counsel for Respondents

-and-

HOWELL & THORNHILL, P.A.
P. O. Box 897
Winter Haven, FL 33882
Co-Counsel for Respondents

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PREFACE

We adopt the Preface in Petitioner's Brief and will use the same designations to refer to the parties.

ISSUE

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)?

STATEMENT OF THE CASE AND FACTS

The Statement of Facts in Petitioner's brief needs to be supplemented.

To begin with, the Petitioner states on the first page of its brief that it had no opportunity to explain to the First DCA why the Rockhaulers, Inc. case is distinguishable from this one. That is not correct. After the briefs were filed and the Rockhaulers case was later cited by the employees as a supplemental authority supporting their position, the Petitioner/Employer filed a response with the First DCA explaining why it believed the Rockhaulers case is distinguishable. A copy of that response (under the title of a Motion to Strike) is attached as an Appendix to this brief.

The employees did not "leave the safety of the grove" (as stated in Petitioner's brief at p. 6) in order to assist in pushing the disabled vehicle off the roadway. When they came upon the disabled vehicle they were already walking along the other side of the same roadway toward a truck that was waiting for them. It was during the early evening (at about 8:00 p.m.). The employees were on a special errand (after normal working hours) trying to find one of the employer's fruit tubs that had been left in the grove on the previous day. They were unable to find it and they were then returning to the truck waiting for them on the side of the road. One of the injured employees, Martinez (the crew leader), still had to drive some of the other workers home in the company bus where they were waiting for him to return. In order to help push the disabled car off the road they deviated no more than about 20 feet

from their path back to the truck. From the time they walked across the road to offer assistance until the moment of impact was estimated to be about two minutes.

Petitioner states in its brief (at p. 6) that both the **DCA** opinion and the record reflect that the two stranded motorists were already in the process of removing their vehicle from the highway when the employees came across them. That is not correct. What the record and the **DCA** opinion reflect is that the motorists had broken down in a dangerous spot, it was beginning to get dark, and they needed and asked for help to remove the car from the road. One of the employees (Navarro) testified that the two motorists "were trying to push their car." One of them was inside the car steering it as the others joined them and began pushing it. Although the **DCA** opinion does not mention it, the disabled car broke down on the crest of a hill and was being pushed on an upgrade incline.

As a result of the accident Martinez has become a **C-4** quadriplegic and Navarro suffered a comminuted displaced fracture of the tibia and fibula in his right leg.

SUMMARY OF ARGUMENT

For the various reasons discussed infra, the district court below was justified in expressly finding material differences between the facts of this case and the facts in the Murphy case. Since the facts are different the result is not inconsistent and there is no express and direct conflict with Murphy.

ARGUMENT

The Petitioner's brief concludes with the statement that the district court below reached its decision "by choosing to ignore this court's holding in Murphy." To the contrary, the district court's opinion expressly states (in the footnote at the end of the opinion): "We have considered Murphy v Peninsular Life Ins. Co., 299 So.2d 3 (Fla. 1974), and find it factually dissimilar."

There is no express and direct conflict with Murphy and no jurisdiction to review this case unless it can be said that, in finding the facts distinguishable, the district court clearly abused its discretion since no reasonable person could arrive at such a conclusion. See Kyle v Kyle, infra.

The district court below was justified in finding the facts of this case to be dissimilar to those in Murphy, and the Murphy case does not stand for the proposition that an injury suffered by an employee during a rescue attempt is never compensable.

There is no question in this case that the employees were on a special errand for the employer, they were definitely within the course and scope of employment while they were walking along the side of the road to return to the truck waiting for them, and the only issue is whether they substantially deviated from their employment by walking twenty feet out of their way to push the disabled vehicle (a potential menace to traffic) off the road.

The Murphy case, supra, did not involve a claimant who was on a special errand for the employer. Before Murphy got out of his car to help a truck driver he was on his way home in his own car

with a co-employee, on a public highway nowhere near his usual jobsite. There is no indication that he was within the scope of his employment even before he exited his vehicle (due to the "going and coming rule"). Unlike Murphy, the employees in the present case did not stop their vehicle and get out to render non-emergency assistance. They were literally walking right by the scene of a potentially dangerous situation and they were merely asked to take two minutes to help push a car off the highway.

Petitioners overstate the emergency nature of the Murphy case and understate the emergency nature of the facts in the present case. In Murphy a heavy duty truck was "standing motionless, facing up an inclined portion of the road." Murphy, supra at 4. It was not rolling down a hill as Petitioner's suggest, nor was the truck driver "faced with immediate danger to his life" as Petitioners suggest. It was simply motionless and there is nothing in the opinion to imply it could not be easily seen by other motorists. Moreover, what Murphy did in that case (climbing up on top of the truck to throw blocks down to the truck driver and then jumping off the top of the truck) was much different and far less foreseeable to the employer than what the employees did here when they merely acquiesced to help push a stalled car off the road (with the help of other men). In Murphy this court simply stated that the injury in that case "was not a reasonably foreseeable consequence of fulfilling the duties of employment." Id. at 4. That does not mean the same is true in every other case involving a rescue attempt.

The Murphy opinion does not indicate there was any emergency or danger to anyone. Moreover, one of the considerations stated in Murphy was whether the courts should "make every street over which a workman might ride a zone of special danger." Id. at 4. However in the present case the injury did not just happen anywhere on the street. It happened on the highway immediately in front of the employees' job site (the grove in which they were working).

If these employees were not on a special errand for the employer and walking along the highway in front of their worksite, these devastating injuries would not have befallen them. The nexus to the actual worksite is much closer here than it was in Murphy. Moreover, there is more of a deviation in a case like Murphy where a motorist stops his car, gets out and climbs on top of a truck, than in the present case where an employee is simply walking past a disabled car blocking a highway and takes a few steps out of his way to help push it off the road.

Petitioner argues that the facts of this case did not present a true emergency because no accident had yet happened when the employees came across the stalled vehicle. However, that does not mean it did not constitute a traffic hazard two minutes before the accident actually happened. The reason the employees were helping was because they were asked to and it was obviously a dangerous situation, and unfortunately the potential danger became a reality before the vehicle could be completely removed from the highway. The fact that this was indeed an emergency and a dangerous situation is best illustrated by the collision that actually

occurred while the employees were trying to remove the hazard.

There is no conflict here with the Murphy case because this case involves an emergency situation and not just gratuitous assistance offered to a stranger in a non-exigent setting. This is a unique situation that will not frequently occur, but when it does an employee should certainly have the benevolent protection of the workers' compensation laws in doing the natural and humane thing when confronted with a true emergency involving a third person in distress who calls out for help.

The evidence here was uncontradicted that the employer had never instructed his employees to suppress their natural instincts if they come across someone who needs and asks for their help in an emergency situation. This type of conduct was never discouraged in any way by the employer. Unless an employer has expressly prohibited such conduct, an employee should not have to pause to reflect on whether he may be jeopardizing his employee status by offering the kind of emergency assistance that the employees offered in this case. This should in no way be construed as an abandonment of the special errand the employees were pursuing on behalf of the employer, and the Murphy case does not require such a finding of an abandonment in this case. Otherwise it would certainly be contrary to the remedial purpose of the Workers' Compensation Act. See Great American Ind. Co. v Williams, 85 So.2d 619 (Fla. 1956). The employees in this case were doing nothing that they had any reason to believe their employer would not condone and, from their perspective, maintaining good public

relations and good will is usually in an employer's interest.

If the Murphy case stood for the inflexible proposition argued by the Petitioners, then the Murphy case would be in conflict with several other previous and subsequent decisions entered by this court including one that was entered in the same year as Murphy.

In Taylor v Dixie Plywood Co. of Miami, Inc., 297 So.2d 553 (Fla. 1974), this court held that when a claimant is on the highway and engaged in a special mission for the employer, a slight deviation does not preclude an accident from being compensable unless the deviation is "unreasonable and unjustifiable under the circumstances." In the Taylor case the claimant deviated several blocks from the most direct route to his destination in order to drive by his house for personal reasons. This court found that the deviation in that case was not so substantial and unreasonable as to amount to an abandonment and preclude workers' compensation benefits. (In the present case the deviation was only about twenty feet and lasted for two minutes.) For other similar holdings from this court, see Zipperer v Peninsular Life Ins. Co., 235 So.2d 473 (Fla. 1970); Evans v Food Fair Stores, Inc., 313 So.2d 663 (Fla. 1975) and Julian v Port Everslades Terminal, 135 So.2d 423 (Fla. 1961). Moreover, in civil tort cases the common law has long recognized the doctrine that "danger invites rescue."

Simply because the deviation in the Murphy case (even if he was within the scope of employment to begin with while he was driving home) was found to be an unforeseeable consequence of employment under the circumstances of that case does not mean the

present case is in conflict. What the employees did in the present case is something that could reasonably be expected by the employer in the absence of giving contrary instructions to his employees. These type of expressions of human nature are incidents that are inherent whenever people work together, and they are entirely foreseeable. As the First DCA stated in a recent case similar to this one:

> The type of action taken by claimant was reasonable and expected behavior. . . . In Murphy on the other hand, the kind of action taken by the claimant could not have been expected.
>
> Rockhaulers, Inc. v Davis, 554 So.2d 654, 656 (Fla. 1st DCA 1989).

In the present case, as in Rockhaulers, supra, the district court considered the factual setting to create a sufficient emergency, and considered the employees' actions to be "altogether reasonable and expected behavior under the circumstances" so as to permit the claimants to recover workers' compensation benefits. That does not expressly conflict with Murphy. It applies the same rule to a different set of facts and reaches a result that is not inconsistent with Murphy. It does not create any confusion or instability in the law that would call for the exercise of this court's discretionary review. As this court stated in Kvle v Kvle, 139 So.2d 885 (Fla. 1962):

> The test of our [conflict] jurisdiction in such situations is not measured simply by our view regarding the correctness of the court of appeal decision. . . . We have said that conflict must be such that if the latter decision and the earlier decision were rendered by the same court the former would have the effect of overruling the latter.

> [citation omitted]. If the two cases are distinguishable in controlling factual elements. . . then no conflict can arise. Id. at 887.

The district court below expressly found the controlling facts of this case to be distinguishable from Murphy. Although Petitioner disagrees with that conclusion, that does not mean it creates uncertainty in the decisional law of this state. This case does not present a proper occasion for this court's exercise of discretionary jurisdiction and the Petition for Review should be denied.

CONCLUSION

In view of the foregoing it is respectfully submitted that this court is without jurisdiction to review the decision of the First District Court of Appeal for lack of an "express and direct conflict" as that phrase has been applied by this court in the past. The Petition for Review should be denied.

Moreover, this court should grant the Respondents' separately filed motion for appellate attorney's fees pursuant to Sections 440.34 (3)(c) and (5), Florida Statutes (1987), as the First DCA did in the appeal from which the Petitioner now seeks further review.

Respectfully submitted,

WAGNER, NUGENT, JOHNSON, ROTH,
ROMANO, ERIKSEN & KUPFER, P.A.
Flagler Center Tower, Suite 300
505 South Flagler Drive
P. O. Box 3466
West Palm Beach, FL 33402
(407) 655-5200
Counsel for Respondents

By _____
RICHARD A. KUPFER
Fla. Bar No. 238600

-and-

HOWELL & THORNHILL, P.A.
P. O. Box 897
Winter Haven, FL 33882
Co-Counsel for Respondents

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 5th day of April, 1990, to: JUDITH FLANDERS, ESQ., P. O. Box 3, Lakeland, FL 33802-0003; HOWELL & THORNHILL, P.A., P. O. Box 897, Winter Haven, FL 33882; and DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, Division of Workers' Compensation, 1321 Executive Center Drive, East, Tallahassee, FL 32399-0687.

By _____
RICHARD A. KUPFER
Fla. Bar No. 238600