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 THE MERITS

On Petition for (Conflict) Review
Directed to the First District Court of Appeal

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PREFACE

We adopt the Petitioner's Preface and will use the same symbols and designations to refer to the parties ("Claimants" and the "Employer/Carrier"), the Judge of Compensation Claims ("JCC") and to the Record on Appeal (R.) which, unless otherwise indicated, refers to the Record in the Martinez case.

ISSUE

WHETHER THE DISTRICT COURT OF APPEAL'S DECISION 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)?

STATEMENT OF THE CASE AND FACTS

The Employer/Carrier's Statement of Facts (including some of the quoted portions of the JCC's final order) needs to be supplemented or clarified in a few respects.

First, there is no question that the claimants were on a "special errand" when they interrupted their usual routine to drive to a grove they had worked in another county on the previous day in order to retrieve one of the Employer's fruit tubs which, they believed, had been inadvertently left behind. The reason they drove to the grove in one of the employee's pick-up trucks, rather than in the company bus, was because a fruit tub is too large to fit inside the company bus. (R. 29). A fruit tub is about the size of a child's wading pool (R. 39-40) and weighs close to 50 pounds (R. 47). The Employer's representative at the final hearing (Mr. Landtroop, the Employer's "field supervisor") admitted that Martinez was acting within the scope of his duties as a crew foreman by making a side trip out to the "Fiel" grove to retrieve a fruit tub. (R. 53, 100).

It was after the Claimants had exited the grove and were proceeding along the side of the highway back to the truck that they came upon the vehicle that had broken down on the highway. In this regard we respectfully disagree with the Employer/Carrier's statement that the Claimants "decided to leave the safety of the grove" in order to assist the stranded motorists. At the time they observed the disabled vehicle the Claimants had already exited the grove and were walking along the other side of the same road toward

the pick-up truck. (R. 29, 31-32, 154, 178). It was at that time that the two "Americans" called out for help. The intention of the Claimants was to walk across the street to the car, help push it off the highway and return quickly to the truck because Martinez still had to drive back to where the bus was parked and take some of his workers home in the company bus. (R. 30, 86-87, 124, 165). The time lapse from the moment the "Americans" called out for help until the accident was no more than two minutes. (R. 30). The accident happened in the early evening shortly after 8:00 p.m. (R. 151, 176).

The Claimants' position before the JCC (see R. 263-265) and before the DCA was that they had not substantially deviated from (nor abandoned) the special errand they were on for the Employer by merely walking to the other side of the street to help push the disabled vehicle off the highway, and the Employer never prohibited or discouraged them from doing what they did. (R. 18). The Employer/Carrier's position (see p. 21 of their brief) is that, with the first step the Employees took to walk across the road to the disabled vehicle, they abandoned their employment and substantially deviated from the special errand they were engaged in up until that moment.

The JCC stated in the final order that, since the Employer had no interest in having its employees assist stranded motorists, the JCC believed he was "compelled to find that the Employee[s] deviated from the course and scope of [their] **employment."** (R. 314-316; Navarro Record R. 547-548). The JCC also noted in the

final order that "the decision to deny the claim of the employee[s] is difficult." (R. 316). The First DCA found, however, that the JCC was not compelled to deny the compensability of the accident and that, in fact, the circumstances of this case lead to the opposite conclusion. Essentially, the First DCA agreed with the Claimants' position that the JCC had misconceived the legal effect of the evidence.

SUMMARY OF ARGUMENT

A.
(Argument As to Both Claimants)

The Murphy case is distinguishable from this one in several respects and it does not stand for the general proposition that an injury suffered while assisting a stranger is never compensable. This court simply held in Murphy that the Claimant's activity in that case was not reasonably foreseeable to the Employer.

Murphy did not involve an employee who was on a special errand for the employer, or who was apparently even within the course of employment before he deviated to assist a third person. The accident in Murphy occurred nowhere near the Claimant's jobsite (unlike the present case where it happened just in front of the jobsite). What the claimant did in the Murphy case (climbing up on top of a truck to toss down blocks and then jumping off) was not nearly as foreseeable to the employer as what the Employees here did when they merely acquiesced to take a few steps out of their way to help push a disabled car (that was blocking traffic) off the roadway. In Murphy the claimant temporarily became an implied

worker for the company that employed the truck driver who needed help and, for that reason, left the scope of his employment with his own employer. That factor does not exist in the present case to take these Claimants out of the scope of their employment

The governing caselaw from this court (in the Taylor case, discussed infra) provides that when a claimant is on the highway 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 Taylor, a claimant who deviated several blocks to stop by his own house for personal reasons was held **not** to have deviated so substantially as to constitute an abandonment of the special mission. In the present case the deviation was no more than about twenty feet and lasted about two minutes.

The position advocated by the Employer/Carrier would contravene the public policy (embodied in several other statutes) of encouraging altruistic behavior. That policy is now even expressly embodied in the 1990 amendments to Florida's Workers' Compensation Act, which now expressly provides that an employee who responds to an emergency to save life or property does not thereby abandon the course of his employment.

There are also numerous cases from other jurisdictions that recognize the same principle and allow recovery of workers' compensation benefits when: (1) the employee's act is required by ordinary standards of humanity, (2) when it does not significantly interfere with the employee's job duties, (3) when it does not

place the employee in obvious peril, and (4) when it has not been expressly prohibited by the employer. Each of these four factors is satisfied in the present case. Certainly what the employees did in this case, in coming to the aid of the stranded motorists, is something that can reasonably be expected by an employer in the absence of giving contrary instructions to his employees.

The Murphy case does not compel a finding of an abandonment in this case and there is no express and direct conflict created by this case. If, however, this court believes that these two cases, when read in conjunction with eachother, will create confusion in the law, then this court should clarify and limit the Murphy case to its precise facts in order to avoid having it interpreted in ways that would lead to unjustifiable results and would contravene public policy by encouraging human apathy rather than human concern and involvement.

B.

(Argument As to Navarro Individually)

The First DCA did not address Navarro's separate argument for compensability (since it was not necessary) but it provides an additional basis to uphold the award of benefits to Navarro. According to the uncontroverted testimony of both Navarro and Martinez, Navarro had just been "told" by his superior (Martinez) to help push the car off the road and it was Navarro's duty to obey Martinez's instructions. There is no conflict in the record on this point and no reason cited by the JCC, or apparent from the record, to discredit the testimony of both claimants on this point.

It is well-settled that a JCC cannot reject a claimant's uncontrovertedtestimony without any explanation or apparent reason for doing so.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL'S DECISION 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)?

A.
(Argument as to Both Claimants)

Since the vote to accept conflict jurisdiction over this case was 4 to 3, which suggests that the issue is perceived to be a close call, we will devote the first section of this brief to a more complete explanation why we believe the First DCA's decision does not expressly and directly conflict with this court's decision in Murphy v Peninsular Life Ins. Co., 299 So.2d 3 (Fla. 1974). If the majority still believe the result in this case, standing next to the Murphy case, will tend to create confusion and instability in the law, then the second section of this brief presents the reasons we believe this court should clarify and limit the Murphy case to its precise facts (if not overrule it as the Legislature has arguably done in its 1990 session), in order to avoid an interpretation that would lead to unjustifiable results and contravene public policy.

The Employer/Carrier first argue that the JCC's order should be affirmed because his findings of fact are supported by competent substantial evidence. That argument only diverts attention from

the real issue. The Claimants have not challenged the JCC's findings of fact (with one exception relating to Mr. Navarro, discussed in the final section of this brief) and the First DCA did not reverse any findings of fact but only the JCC's conclusion of law that he was compelled to find the accident to be noncompensable. The issue before the First DCA was whether the JCC misconceived the legal effect of the evidence, based on his own fact findings. This is not a "competent substantial evidence" case. It is purely a question of law.

The Employer/Carrier next argue that the First DCA erred by determining that this case should be controlled by its own recent decision in Rockhaulers, Inc. v Davis, 554 So.2d 654 (Fla. 1st DCA 1989). Once again, that is not the issue for this court, but rather, whether this case expressly and directly conflicts with this court's opinion in Murphy, supra.

The Employer/Carrier interpret the Murphy case to stand for the proposition that "an injury suffered while assisting a stranger is not compensable." (Petitioner's Brief, p. 24). That is not what the Murphy case stands for. This court simply held in Murphy that the Claimant's activity in that case was not reasonably foreseeable to the employer. However, there are important factual dissimilarities between this case and the Murphy case, which is the reason the First DCA's opinion here concludes by stating that the court considered the Murphy case but found it factually distinguishable.

The Murphy case, first of all, did not involve a claimant who

was on a special errand for the employer. It involved an employee of an insurance company who was driving in his own car, with another insurance agent, and was on his way to his own home. The accident in Murphy occurred on a highway nowhere near the employee's usual jobsite. Since the claimant in Murphy was just on his way to his home it is not clear why he would be within the scope of his employment even before he stopped his car and got out to help the truck driver. This court, in the Murphv case, did not speak in terms of a **"deviation"** from what would have otherwise been within the course and scope of employment. One thing for certain is that Murphy was not on a special errand.

In the present case 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 occurred. The nexus to the actual worksite is much closer here than it was in Murphv. 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. That consideration does not apply to a case like this one that happens right in front of the grove where the employees were working, after hours, for their employer.

Additionally, what the claimant did in the Murphy 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 certainly not as foreseeable to his employer as what the employees did here when they merely acquiesced to take a few steps out of their way to help

push off the highway a car that had stalled and was blocking traffic. 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 when an employee is injured while attempting to assist a third person in what may be considered a more reasonable and foreseeable fashion. Taking a moment to help push a vehicle a few feet off the roadway does not seem like an inherently dangerous thing to do. The same cannot be said of climbing on top of a truck to throw down blocks and jumping off.

The Murphy case is also distinguishable in another significant respect. In Murphy, this court noted that the truck driver who needed help was working for a company and was within the scope of his own employment such that, when the claimant went to his aid, it could be said the claimant acted under an implied contract with the truck driver's employer which would "thus take the claimant out of the course of his employment with his employer." Id. at 4. There is some logic to the point that, if the Claimant is impliedly working for the employer of the person he is assisting, he could not simultaneously be working for his own employer as well. However, that rationale does not apply to the present case since there is no evidence that the "Americans" were working for anyone at the time Claimants came to their assistance. Having no other "substitute employer" available to pay workers' compensation benefits distinguishes this case from Murphy, supra, as well as

from another case relied on by the Employer/Carrier; Walgreen Co. v Lemelin, IRC Order **2-2819 (1974)**.[1]

The Employer/Carrier do not seem to take issue with the "emergency rescue" doctrine per se, but they argue that this case does not fall into the "emergency" category because no accident had yet occurred when the claimants came across the stalled vehicle. However, the fact that the accident had not yet happened does not mean the stalled vehicle did not constitute a traffic hazard two minutes before the accident actually occurred. The potential danger existed as soon as the Claimants came upon the vehicle and, unfortunately, it became a reality before the car could be completely removed from the highway.

To argue that an "emergency" does not exist until an accident happens would lead to the conclusion that preventative action is

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[1] In Walgreen Co. v Lemelin, IRC Order **2-2819 (1974)**, there was a "substitute employer" who would be responsible for paying workers' compensation benefits to the injured claimant, and the IRC held that "the implied contract of employment with the company whose employee was in need of assistance thus [took] the claimant out of the course of his employment with his employer." Moreover, the risk of personal injury to the security guard in the Lemelin case when he attemptedto physically overcome two armed individuals who had already shot one police officer cannot be compared to the apparently innocuous act of helping to push a stalled car off the highway. The risk undertaken by an employee is a factor bearing on the foreseeability of the act to the employer.

Lemelin does not stand for the proposition that all attempts to assist or rescue third parties are not compensable unless it benefits the claimant's own employer. If it did stand for that proposition then the IRC overruled itself four years later in Gill Plumbing, Inc. v Stover, IRC Order **2-3582 (1978)** when it ordered compensation benefits to a claimant who was injured while aiding a stranded bus, even though that emergency act had no direct connection to his employment.

not sufficiently important to fall within the emergency rescue doctrine. That does not make sense. An ounce of prevention is worth a pound of post-facto rescue efforts. Moreover, to argue that Claimants never testified about their perception of the potential danger overlooks the obvious. Certainly there was a reason why everyone was pushing the stalled vehicle off the roadway and it does not take a genius to figure out why. The First DCA noted that the stalled vehicle posed a hazard to other travelers. (Employer/Carrier's Appendix, A-3). When a vehicle becomes disabled on a highway, as nightfall is approaching, the act of pushing it off to the side of the road becomes practically instinctive.

The Employer/Carrier cite the testimony of the Claimants that there was still daylight at the time of the accident. (R. 151, 177). The accident happened a little after 8:00 p.m. (R. 151, 176). Obviously there was still enough light for the claimants to be looking for a fruit tub in a grove, but it is just as obvious that by that time of the evening in Florida, even in the summer, it begins to get dark.

The Employer/Carrier assert that the Claimants never before relied on the emergency rescue doctrine until the First DCA discussed it in its opinion. That is not correct. In fact, the rescue doctrine was the main focus of the Claimants' brief filed with the First DCA and it cited numerous "rescue" cases from around the country (some of which are also cited in this brief, at pp. 16-17, infra.) If this court wishes, the Claimants could file copies

of their DCA briefs or, presumably, this court could acquire them directly from the First DCA.

The Employer/Carrier are now, for the first time, raising an alternative reason for denying workers' compensation benefits which they have not articulated up to this point. The Employer/Carrier argue (at p. 14 of their brief) that there is nothing in the record to indicate why the two Americans could not have quickly pushed their own vehicle off the road, or why they needed any assistance from the claimants. If the Employer/Carrier had said anything like that when this case was before the JCC, the Claimants would have rebutted it with testimony from the accident investigation officer who, on his accident report, noted that the disabled car broke down on the crest of a hill and was being pushed on an upgrade incline. One of the Claimants (Navarro) testified that when the Claimants first came upon the vehicle the two motorists "were trying to push their car." (R. 178). The Claimants' co-employee witness (Felix Trejo) testified that one of the Americans was inside the car to steer and the three employees then joined the other American to help push the car off the road. (R. 123).

The Employer/Carrier also now argue for the first time in this case (at p. 18 of their brief), that there is no evidence of the speed of the vehicle that hit the Claimants or the sobriety of the driver, and either one of those could have been the cause of the accident rather than any other inherent danger or emergency. If that had been raised previously, it too would have been rebutted with testimonial evidence. The traffic accident report indicates

that the vehicle that hit the Claimants was traveling 40 MPH in a 55 MPH speed zone, that the driver was not drinking or using drugs, that there was no improper driving involved, and that the broken-down vehicle was obstructing traffic.

The traffic accident report is not contained in the record on appeal and we are not unmindful of the rule that evidence cannot generally be relied upon before an appellate court when it was not introduced in the lower court. However we believe this to be a classic example of the rare exception to that rule. The Employer/Carrier never argued to the JCC that the Americans, by themselves, should have been able to push the car quickly off the road (thus implying the road was level); nor did the Employer/Carrier ever before suggest that the driver of the car that hit the claimants may have been drunk or may have been speeding. If any of those suggestions had been raised before the JCC the Claimants would have certainly rebutted it with testimonial evidence from the accident investigation officer. But there was no reason for the Claimants to do so when the Employer/Carrier never took that posture at trial (nor before the First DCA).

It would be a gross injustice to allow the Employer/Carrier to raise implications that are known to be untrue, for the first time in the supreme court, and not allow the Claimants to rebut those new implications. It has been recognized that there are unusual occasions when an appellate court will exercise its discretion to consider evidence outside the record in order to prevent a gross injustice. Oakdell, Inc. V Gallardo, 505 So.2d

672, 674 (Fla. 1st DCA 1987). We believe the exception to the general rule exists for an occasion such as this one. If the court desires to see the accident report we can provide it. We hesitate to file it unilaterally, without the court's permission, since it is currently outside the record on appeal.

If the Murphy case, supra, stood for the inflexible proposition argued by the Employer/Carrier, it would be in conflict with several other previous and subsequent decisions from 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 an employee is on the highway and engaged in a special mission for the employer, an insubstantial deviation does not preclude an accident from being compensable unless the deviation is "unreasonable and unjustifiable under the circumstances." In Taylor, the employee deviated several blocks from the most direct route to his destination in order to drive by his house for personal reasons. That was found by this court not to be such a substantial and unreasonable deviation as to amount to an abandonment of the special mission for the employer. (In comparison, the deviation in the present case was only from one side of the road to the other and it lasted for two minutes.) The Taylor opinion stated, "technical excuses for denying workmens' compensation are not favored by the law." Id. at 555. For other similar decisions 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); Julian v Port Everglades Terminal,

135 So.2d 423 (Fla. 1961).

The "technical excuses" relied on by the Employer/Carrier for denying workers' compensation benefits in this case are not well-grounded in public policy. In fact, they contravene the benevolent policy, embodied in other areas of law, to encourage altruism and human involvement. These social goals are embodied in Good Samaritan Acts (see 5768.13, Fla. Stat.); and legislation protecting persons who volunteer to serve on boards of charitable organizations (see 5617.0285, Fla. Stat.); and tort doctrines such as the "rescue doctrine" that allows an injured rescuer to recover from the original tortfeasor who put the **"rescuee"** in peril and in need of rescue. See Zwinger v Hettinger, 530 So.2d 318 (Fla. 2d DCA 1988).

The policy of encouraging such altruistic behavior is now also expressly embodied in the Workers' Compensation Act. The 1990 Florida legislature created a new statute, Section 440.092 (3) entitled "Deviation From **Employment"** which provides that an employee who is injured while deviating from the course of employment is not eligible for benefits unless the deviation is an act **"in** response to an emergency and designed to save life or property." (See Employer/Carrier's Appendix B). This new statute is not really a new concept: it merely codifies prior caselaw. See the discussion of law in Rockhaulers. Inc. v Davis, 554 So.2d 654 (Fla. 1st DCA 1989). As stated in Professor Larsen's treatise on Workmen's Compensation Law:

> Injury incurred in the rescue of a stranger is compensable if the conditions of employment place claimant in a position which requires him by ordinary standards of humanity to undertake the rescue. 1A Larsen, Workmen's Compensation Law §28.00 (1978).

Although the Employer/Carrier contend in their brief (at p. 23) that it is not necessary to consider cases from other jurisdictions involving similar facts, we believe that public policy should not be (and usually is not) decided in a vacuum. We will not burden the court with an exhaustive nationwide analysis but we do believe the court would benefit from a sampling of several other jurisdictions' approach to this type of case. See, eg. O'Leary v Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470 (1951) (drowning of employee while attempting to rescue unknown man was not excluded from coverage under Federal Longshoremen's Compensation Act as being a personal frolic)[2]; Mobile Liners v McConnell, 220 Ala. 562, 126 So. 626 (1930) (Laborer employed to check boats in port drowned while trying to assist a captain get on board a vessel); Food Products Corp. v Industrial Comm'n. of Arizona, 630 P.2d 31 (Ariz. 1981) (Delivery truck driver who encountered woman struggling to push her stalled car from fast lane of six-lane highway and sustained injuries when he was hit by a vehicle after parking his truck to assist the woman; Held to be acting within course of employment despite lack of express

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[2] This Court recently noted that Federal social and labor acts should be viewed as a guide to the interpretation of Chapter 440. Dep't. of Public Health v Wilcox, 543 So.2d 1253, 1255, n. 6 (Fla. 1989). See also 9440.44 (1), Fla. Stat. (1987).

permission from employer); Puttkammer v Industrial Comm'n., 371 I11 497, 21 N.E.2d 575 (1939) (Coal truck driver tried to carry child injured in auto accident back to his truck and was struck by another vehicle); Edwards v Louisiana Forestry Comm'n, 60 So.2d 449 (La. 1952) (Employee injured while attempting to assist child being attacked by a dog): D'Angeli's Case, 369 Mass. 812, 343 N.E.2d 368 (1976) (Employee injured after getting out of his car, while returning from work assignment, to remove obstruction on road that he thought to be a danger to traffic); Gross v Dairy Tree Expert Co., 248 App. Div. 830, 290 NY Supp. 168 (1936) (Telephone company employee injured while helping a woman start her car): Herman v Follmer Trucking Co., 129 Pa. Super. 447, 195 A. 632 (1937) (Employee injured while rendering assistance in traffic accident).

The common thread running through these cases is the policy of encouraging altruistic behavior by allowing recovery of workers' compensation benefits when four conditions are met:

1. When the act is required by ordinary standards of humanity,
2. When it does not significantly interfere with the employee's job duties,
3. When it does not place the employee in obvious peril, and
4. When it has not been expressly prohibited by the employer.

Men and women do not discard their personal humane qualities when they go to work, and the law should not encourage them to do so. Expressions of human nature are incidents of employment

because they are inherent whenever people work together, and they are entirely foreseeable. If a tortfeasor who places a person in danger or distress can reasonably foresee that some benevolent third person may be hurt while trying to assist, cannot an employer reasonably foresee that his employee might be that benevolent third person?

What the claimants here did in coming to the aid of the stranded motorists was something that could reasonably be expected by the employer in the absence of giving contrary instructions to his employees. In this regard, the Employer/Carrier's brief states (at p. 28) that this act of assistance was not condoned by the employer; however there was no way for the Claimants to know that because the Employer never did anything to discourage them from doing what they did. There is no evidence that the Employees were ever specifically prohibited, or otherwise discouraged, from doing this. Several of the cases from this court cited previously noted the importance of the fact that the employer never communicated his desire that his employees should not pursue the activity involved at the time of the accident. Eg. Evans v Food Fair Stores, Inc., supra; Julian v Port Everglades Terminal, supra.

We are not saying an employer should not have the right to direct his workers to mind their own business if they come across a situation like this.[3] We are just saying that, as a matter of

[3] Under the 1990 statute (8440.092 (3)), however, it is arguable that a rescue attempt would be compensable even if an employer orders his employees never to rescue anyone. That is not an issue in this case.

public policy, the law should presume the employer's implied consent for his employees to help people who are in need of immediate assistance unless the employer instructs his employees to suppress their natural instincts if they come across someone who needs and asks for help.

There is no sound reason why an employee should lose the benevolent protection of the workmens' compensation laws simply because he does the natural and humane thing when confronted with a third person in distress who calls out for help. 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 assistance that the Claimants offered in this case.

This was just a momentary deviation, without involving an obvious danger, and it should in no way be construed to be an abandonment of the special errand the Claimants were pursuing on behalf of the Employer. The Murphy case, supra, does not compel a finding of an abandonment in this case. When it can be said that acts Of rescue or similar assistance are no longer inherently foreseeable, we will have reached a sad state of social priorities. These employees did not do anything that they had any reason to think their employer would not condone. If the inquiry is to be whether a technical deviation was "unreasonable and unjustifiable under the circumstances;" see Taylor v Dixie Plywood Co. of Miami, Inc., 297 So.2d 553 (Fla. 1974); then the circumstances should be viewed from the vantage point of the employee whose conduct is

being judged.

If the car that hit the Claimants had swerved two minutes earlier to avoid the stalled vehicle and had hit the Claimants as they were walking along the roadside back toward their truck (i.e., before they detoured to assist the disabled motorists), there would be no question that the accident is compensable. See Povia V Velez, 74 So.2d 103 (Fla. 1954) (Held: When company truck stopped and parked off side of highway to pick up employee, injuries sustained by employee when struck by another vehicle as he was crossing highway to walk to truck are compensable.) The fact that the Claimants, while walking back to the truck, detoured perhaps twenty feet (R. 264) to walk to the other lane of the same road to help move a disabled vehicle that was blocking traffic should certainly not be a reason to penalize them by depriving them of workers' compensation benefits.

Suppose, instead of walking over to help push the car, the employees simply walked over to tell the **"Americans"** they would place a call on their way into town to let the police know where the car broke down, and the employees were hit by another vehicle while doing that. Would that also constitute an abandonment of their special mission for the employer? The Employer/Carrier here assert that the abandonment occurred immediately with the first step the employees took toward the stalled vehicle. (See Petitioner's Initial Brief, p. 21). However, the doctrine of "substantial deviation from employment" is not nearly that inflexible.

To disallow all benefits in the case would hardly comport with the rationale of an Act that is supposed to be remedial and benevolent, and liberally construed for the benefit of injured workmen. See Great American Ind. Co. v Williams, 85 So.2d 619 (Fla. 1956). Technical excuses for denying benefits are disfavored. Taylor, supra. It has been noted, for example, that the "arising out of employment" language is a broader concept under workers' compensation law (due to the remedial nature of Chapter 440) than it is in a tort case when the issue is whether an employer is vicariously liable for torts committed by an employee. Sussman v Florida East Coast Properties, Inc., 557 So.2d 74 (Fla. 3d DCA 1990).

The Employer/Carrier argue that the Claimants' actions, although well-intended, did not benefit the Employer in any way since this Employer's business clientele are limited and the Employer is not dependent on general public relations or good will. While that may be one of many relevant factors to consider, it is not the ultimate litmus test of compensability. Otherwise an injury suffered during the exact same act of rescue engaged in by two different employees could result in inconsistent rulings. The injured employee working for Walt Disney World would be protected by the workers' compensation system but the employee of D. L. Cullifer and Son, Inc., would not. The scope of the employer's business is a relevant factor in the equation but, in a rescue case like this one, it does not have the overriding significance that the JCC seemed to attach to it.

For the reasons stated above, this court's decision in Murphy v Peninsular Life Ins. Co., supra, does not compel a finding of an unforeseeable and substantial deviation from employment in this case. The District Court below applied the rule discussed in Murphy to a different set of facts and reached a result that is not inconsistent with Murphy. The district court expressly found Murphy distinguishable and stated that, in the present case, the Claimants' actions in assisting the two stranded motorists were "altogether reasonable and expected behavior under the circumstances."[4]

As this court stated in Kyle v Kyle, 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 rise.
> Id. at 887.

If, by finding the facts distinguishable, the district court below committed an abuse of discretion (since no reasonable person could

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[4] Whether the employees' behavior was "reasonable and foreseeable under the circumstances" is ultimately the proper inquiry in a case such as this (see Taylor v Dixie Plywood Co., supra.); rather than just the narrower inquiry concerning the meaning of the term "true emergency." The Employer/Carrier's brief focuses only on the narrower issue and fails to address the ultimate issue.

agree with that conclusion) then it would admittedly conflict with Murphy. Judged by these standards we do not believe there is an express and direct conflict to support this court's jurisdiction in this case.

If, however, this court believes the district court's decision in this case does conflict to the extent that it would tend to create confusion and instability in the law when read in conjunction with the Murphy case, then for the reasons previously stated this court should clarify and limit the Murphy case to its precise facts (if not overrule it) in order to avoid having it interpreted in a way that would lead to unjustifiable results and contravene public policy.

The reasons for limiting Murphy to its own facts have already been stated, but it bears repeating that when this court decided Murphy in **1974** it did not have the benefit of any legislative expression of public policy such as it does now with the recent enactment of section **440.092** (3), Florida Statutes, by the **1990** legislature. In this recent statute the legislature has clearly expressed that, when a claimant is confronted with an emergency that threatens life or property it is **not** a deviation from employment for the employee to take action designed to decrease or eliminate that threat. Although the sweeping changes to workers' compensation law brought about by the **1990** amendments do not purport to apply retroactivelyto prior accidents, this new statute nevertheless reflects the view of our legislature on the public policy of encouraging benevolent rescue attempts, which certainly

seems to be a highly relevant factor for this court to consider when deciding a case that addresses the same public policy issue. Cf. Hendeles v Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978) (Held: The disposition of an appeal should be made in accordance with the law in effect at the time of the appellate court's decision.)

The Employer/Carrier mention in their brief that Claimant Martinez is now receiving charitable medical care from the Florida Department of Rehabilitation. It is not clear how that is relevant to the issue at hand. (It also fails to mention that Martinez is not receiving wage loss benefits and Navarro is not receiving any type of charitable benefits.) The Employer/Carrier seem to suggest that it is more appropriate in this case for the taxpayers of the State of Florida to pay for Martinez's medical care (assuming the State continues to do so) than it is for the workers' compensation carrier. We have difficulty agreeing with that when the injury to these Claimants has such a close nexus to their employment and would not have been suffered but for their employment.

Finally, the Employer/Carrier state (at p. 26 of their brief) that they are not asking the Justices on this court to be individuals without compassion. However, they are advocating a compassionless approach to the concept of compensability, and one that encourages human apathy to another's plight rather than one that fosters public policy by encouraging human concern and involvement. We advocate a policy-oriented interpretation of the "arising out of employment" language in Chapter 440, and one that

the Legislature has now expressly embraced. We do not ask or expect the Court to rule out of compassion for these two individual Claimants, but we do submit that the Court should consider the intended remedial purpose of the Act as a whole when it interprets the "arising out of employment" language in the Act. Approaching this case from that perspective leads to the conclusion that the First District Court's opinion in this case should be approved.

B.
(Argument as to Navarro Individually)

Since the First DCA below found the accident to be compensable with respect to both Claimants, it did not address our separate argument to the effect that the accident is certainly compensable with respect to Navarro even if it is not compensable with respect to Martinez.

Navarro testified live at the merits hearing that he assisted in pushing the disabled vehicle because he was asked to do so by Martinez, his crew leader. (Navarro Record, R. 34). However, in the final order the JCC alluded to Navarro's earlier deposition testimony when Navarro testified he helped push the car because the Americans asked for help. (R. 180). The JCC then apparently concluded that this created a conflict in Navarro's testimony so the JCC found that the paramount reason Navarro helped to push the car was simply to be "friendly and courteous" rather than because he had just been commanded to do so by his supervisor. (Navarro Record, R. 546).

This is our only challenge to the JCC's findings of fact and

we believe reversible error was committed on this point because there is no conflict whatsoever between Navarro's live testimony and his deposition testimony. Obviously, the Americans first requested help and Martinez then said, "Let's go help them." See Navarro Record, R. **34:**

> Q. Okay. As you were coming out of the grove and the disabled vehicle was there with the two Americans who asked for help, what, if anything, did Pablo [Martinez] tell you or ask you?
>
> A. He only said, 'Let's go help them.'
>
> Q. In your mind at that time what authority did Pablo have to say 'Let's go help them'?
>
> A. Well, I always obeyed him as he was my crew leader.

That is not at all inconsistent with the deposition testimony of Navarro cited by the JCC:

> Q. **Why** were you pushing the car?
>
> A. Well, they asked us for help, and we helped them. (R. **180).**

Navarro also testified at the merits hearing that nobody had instructed him how to testify and that he was only relating what truthfully happened. (R. **41-42).** Nobody asked Navarro at his deposition whether Martinez said anything before the three of them walked over to help push the car off the road. The JCC not only erred by perceiving a conflict between Navarro's live testimony and his deposition testimony when there is no such conflict, but the JCC also apparently overlooked the testimony of Martinez which corroborates Navarro's testimony on this point. Martinez testified no less than four times that when the Americans asked for help he **"told"** Navarro and another subordinate worker (Felix Trejo) to help

the Americans and to do so quickly because other workers were waiting back in the company bus to be driven home. (R. 29-30; Navarro Record R. 11, 23, 24).

This testimony from both Navarro and Martinez was completely uncontroverted and there was no reason for the JCC to reject it. The JCC gave no explanation for doing so. Even the Employer's representative at the hearing (the Claimants' supervisor) testified he has never known Martinez to be untruthful. (R. 94). It is well settled that a JCC cannot just reject a claimant's uncontroverted testimony without any explanation or apparent reason for doing so. Philpot v City of Miami, 541 So.2d 680 (Fla. 1st DCA 1989); Calleyro v Mt. Sinai Hospital, 504 So.2d 1336 (Fla. 1st DCA 1987).

According to the uncontroverted evidence, Navarro was injured while performing a task assigned to him by his crew leader, who he was being paid to obey. This was brought out to the JCC and to the First DCA. Although the First DCA did not need to address this separate point in light of its disposition of the appeal, this serves as an additional reason to approve the decision of the First DCA with respect to the claim for benefits filed by Navarro.

CONCLUSION

Since there is no express and direct conflict with Murphy, supra, the Petition for Discretionary Review should be discharged or denied.

If, however, the District Court's decision below is seen to create confusion in view of the Murphy opinion then Murphy should be clarified and limited to its facts (if not overruled) and the decision of the district court below should be approved. Alternatively the award of workers' compensation benefits should at least be approved for Claimant Navarro based on the independent reasons that were not addressed by the First DCA.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 23rd day of August, 1990, to: JUDITH FLANDERS, ESQ., P. O. Box 3, Lakeland, FL 33802-0003; and DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, Division of Workers' Compensation, 1321 Executive Center Drive, East, Tallahassee, FL 32399-0687.

By: _____
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