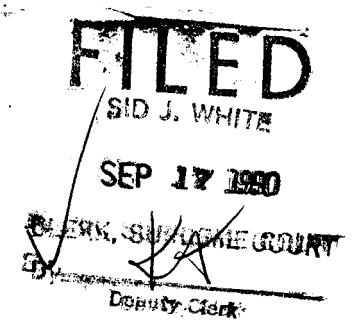
IN THE
SUPREME COURT OF FLORIDA



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.

REPLY BRIEF OF PETITIONERS

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

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PREFACE

In this Reply Brief, reference to the parties and participants in this case, and to the Record, will be made as stated in the Preface to the Initial Brief of Petitioners.

CITATIONS OF AUTHORITY

OTHER AUTHORITIES:

ARGUMENT

THE FIR T DISTRICT COURT OF APPEAL ERRED IN REVERSING THE JCC'S RULING THAT THE INJURIES SUFFERED IN THE SUBJECT ACCIDENT WERE NOT COMPENSABLE WHEN: (1) THE JCC'S 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."

A.
(Argument as to Both Employees)

To support their contention that the First DCA's decision in this case does not expressly and directly conflict with this Court's decision in Murphy V. Peninsular Life Insurance Co., 299 So. 2d 3 (Fla. 1974), the employees set forth a number of so called factual dissimilarities which are not supported by a comparison of the facts in this case with the facts which can be gleaned from consideration of the Murphy opinion.

Initially, the employees inappropriately argue in the Statement of the Case and Facts that, "there is no question that the claimants were on a 'special errand'" when they made the trip to the grove to look for the missing fruit tub. By suggesting that they were on a special errand, the employees attempt to come within the provision which they suggest is set forth in Taylor V. Dixie Plywood Co. of Miami, Inc., 297 So. 2d 553 (Fla. 1974), that when an employee is on the highway 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. The employees then attempt to distinguish this case from Murphy by stating that these employees were on a special errand, but Murphy was not. The employer/carrier agree that Murphy was not on a special errand at the time of his injuries, but clearly neither were these employees. In fact, the special errand rule has no application to the facts of this case because the special errand rule is simply an exception to the going and coming rule. The trip to the grove to look for the fruit tub was not on the employees' route from their home to the grove in which they had picked fruit on the day of the accident. Moreover, an employee with irregular hours cannot be considered to be on a special errand when he is simply instructed to perform his usual duties at an irregular time. Eddy v. Medical Personnel Pool, 377 So. 2d 693 (Fla. 1979). (emphasis added) In determining whether the special errand rule applies, courts have found that irregularity and suddenness of the employer's request are essential elements. (emphasis added) See New Dade Apparel, Inc. v. DeLorenzo, 512 So. 2d 1016 (Fla. 1st DCA 1987); see, also, Susan Lovering's Figure Salon v. McRorie, 498 So. 2d 1033 (Fla. 1st DCA 1986). Here, there was no request made by the employer, sudden or otherwise. In this case, Martinez testified that keeping up with the tubs and accounting for them was part of his regular job duties (R 27). In this instance, neither the field man who supervised the employees nor the owner of the business knew that

the tub had been left in the grove or that the employees were going to look for it. Since the employer did not know that the tub had been left in the grove, it is clear that there was no request made of those employees by their employer. Clearly, therefore, the special errand rule has no application to the facts of this case because the essential element of a request by the employer is missing and Martinez was performing a part of his regular job. The employees contention that this case can be distinguished from Murphy on the basis that these employees were on a special errand at the time they were injured is not supported by the facts in this case.

The employees attempt to distinguish this case from Murphy by suggesting that Murphy was not within the course and scope of his employment at the time he happened upon the truck driver needing assistance. The opinion in Murphy indicates that the employee was "injured while accompanying an agent on his rounds in the claimant's private car." It would appear, therefore, that the employee in Murphy would have come under the provisions of the traveling employee doctrine which provides that an employee whose work entails travel away from the employer's premises is within the course and scope of his employment at all times during the trip other than when there is a distinct departure for a non-essential errand. N & L Auto Parts Co. V. Doman, 111 So. 2d 270 (Fla. 1st DCA 1959), cert. discharged, 117 So. 2d 410 (Fla. 1960). Therefore, the employees' contention that the employee in Murphy was already outside the course and scope of his employment

at the time he went to render assistance is not borne out by the facts reflected in the Murphy opinion.

The employees also contend that Murphy's act of climbing on top of the truck to throw down blocks and then jumping off the truck was not as foreseeable as the employees' activity here in taking a few steps to push a vehicle off the highway that was blocking traffic. First of all, there is no record evidence to show that the vehicle here was in fact blocking traffic. It would seem apparent, however, that the nature of an employee's activities in attempting to render assistance to someone is dictated by the circumstances surrounding the needed assistance. It would also seem that the reasonableness and foreseeableness of an employee's activities goes to whether it is reasonable and foreseeable to an employer that the employee's employment would put him in a position of deciding to render assistance at all. Clearly, it would have been just as foreseeable to the employer in Murphy that his employee may stop and attempt to assist a trucker whose brakes had failed on an incline as it would that these employees would go to assist two motorists push a stalled vehicle. The fact that the vehicle here needed only to be pushed whereas the vehicle in Murphy needed some objects placed behind the wheels which in turn apparently required the employee to get on top of the truck to throw the blocks down is not a material distinguishing fact.

The employees' further contend that the cases are distinguishable in that the trucker in Murphy was the employee of

a company and that an implied contract of employment arose with that company whereas there was no indication that the Americans here were working for anyone so there was no substitute employer available. That argument makes no sense. First of all, the Court's decision in Murphy did not turn on the possibility of an implied contract of employment having arisen with the driver's employer. Moreover, there is no logical reason why an implied contract of employment could not just as easily arise between individuals such as the Americans and employees here as it could between a company and an individual.

The employer and carrier do not contend that the Murphy decision stands for the proposition that injuries suffered while attempting to render assistance to a total stranger can never be compensable. Rather, as was adequately demonstrated in the Petitioners' Initial Brief, the circumstances surrounding the rendering of assistance in Murphy is for all material and practical purposes on all fours with the circumstances surrounding the rendering of assistance by the employees here. Consequently, for the First DCA to find the injuries suffered by the employees in this case compensable creates an express and direct conflict with this Court's earlier decision in Murphv. The conflict is such that if the Murphy decision had been rendered by the First DCA rather than by this Court, the First DCA's decision in this case would have had the effect of overruling Murphy. **See Kyle V. Kyle, 139** So. 2d **885** (Fla. **1962).** Although there are always some minor factual distinguishing

circumstances between any two cases, this case and Murphy are not distinguishable on controlling factual elements so that the First DCA's decision creates a clear conflict with Murphy which should be resolved by this Court.

To resolve the conflict between the decision in this case and Murphy, it is not necessary, as the employees suggest, for the Court to limit Murphy to its own facts or to find that the legislature's recent enactment of section 440.092(3) has overruled Murphy. While the enactment of section 440.092 (3) may reflect a legislative policy to encourage rescue attempts in an emergency situation, section 440.092(3) has no application to this case. The provisions in section 440.092(3) reflect a substantive change in the Florida Workers' Compensation Law which have no application to accidents occurring before its effective date. More importantly, even under the provisions of section 440.092(3) the deviation in this case would not have been covered by the act since there was no true emergency and at the time the employees decided to render assistance, assistance was not apparently needed to save life or property as required by the provisions. The JCC's decision in this case and this Court's decision in Murphy are not in conflict with the provisions of section 440.092(3) nor with the First DCA's decision in Rockhaulers. Inc. v. Davis, 554 So. 2d 654 (Fla. 1st DCA 1989). The employees in Rockhaulers faced the type of emergency covered by section 440.092(3) while the employee in Murphy apparently did not and the employees in this case clearly did not.

As pointed out in the Petitioners' Initial Brief, the decision of the JCC was supported by competent, substantial evidence which comported with reason and logic and was consistent with the statutory and decisional law in effect at the time of the decision. That decision remains entirely consistent with the current statutory and decisional law including section **440.092(3)**. There was and is no basis in law or reason for the First DCA to disregard this Court's decision in Murphy and reverse the decision of the JCC in this case.

In the briefing process involved in the current petition to this Court, counsel for the employees has habitually and deliberately ignored the rules of appellate procedure and the decisional law which holds that the scope of the appellate court's review is limited to matters contained within the record. The first instance of what has apparently become practice is found on page **2** of the employees' jurisdictional brief where they state that "Although the DCA opinion does not mention it, the disabled car broke down on the crest of the hill and was being pushed on an upgrade incline." Obviously, that information was not mentioned by the DCA because there was no evidence in the record from which the DCA could have gleaned such information.

A more extensive and flagrant violation by employees' counsel is contained in the respondents' brief on the merits pages **12-14** where the employees accuse the employer/carrier of raising an alternative reason for denying workers' compensation benefits when the employer/carrier pointed out that there was

nothing in the record to indicate why the motorists could not have quickly pushed their own vehicle off the road without assistance from the employees. It is clear in the employer/carrier's brief that the employer/carrier were simply demonstrating that there was no evidence in the record to support the First DCA's finding that the situation confronted by these employees constituted a true emergency. In making that point, the employer/carrier correctly noted there was no evidence in the record of the speed at which the vehicle was traveling or of the sobriety or lack of it of the driver or that the car was stalled on a hill or curve. Counsel for the employees seized upon that point as an excuse to deliberately disregard the very elementary appellate principle of limiting the appellate review to matters in the record by providing in their brief extensive information from the accident report. If, as the employees now contend, they were basing their claim of compensability on their being confronted with a true emergency situation which required their assistance, it is incomprehensible that they would have failed to have produced the accident report or, for that matter, any other evidence of an emergency situation at trial. A review of the records on appeal leaves no doubt that consideration of the emergency rescue doctrine as a possible basis for finding these injuries compensable was an after thought. The case was tried and defended on the basis of a simple case of deviation from employment. At any rate, the situation here is clearly distinguishable from that in Oakdell, Inc. v. Gallarado, 505 So.

2d 672 (Fla. 1st DCA 1987), cited by the employees, where the court was considering consolidated appeals and found the records so intertwined that it could not disregard the information contained in the subsequent record in reaching its decision on the earlier case. Oakdell, Inc. was not a case where the court allowed the parties to introduce additional documentary evidence into the record at the appellate level. There was no excuse for counsel's bringing the information from the accident report to this Court's attention and there certainly are no grounds for allowing the employees to introduce that document into the record at this point. While the employer/carrier realize that the members of this Court cannot now erase the information provided by employees' counsel from their minds, the employer/carrier respectfully request that the Court disregard that material in reaching their decision in this case. To discourage further flagrant disregard of basic rules of appellate procedure, the employer/carrier suggest that the Court may find it appropriate to impose some sanction or reprimand for this action by employees' counsel.

As to the decisions that the employees recite from other jurisdictions, several of these cases, i.e., O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951); Food Products Corp. v. Industrial Commission of Arizona, 129 Ariz. 208, 630 P.2d 31 (1981); In re D'Angeli's Case, 369 Mass. 812, 343 N.E.2d 368 (1976); Edwards v. Louisiana Forestry Commission, 221 La. 818, 60 So. 2d 449 (1952);

Puttkammer v. Industrial Commission, 371 Ill. 497, 21 N.E.2d 575 (1939); Herman v. Follmer Trucking Co., 129 Pa. Super. 447, 195 A. 632 (1937); involved situations where an accident had already occurred, where the public was exposed to imminent danger or where there was imminent danger of loss of life or injury to some individual. In the other cases cited by the employees, i.e., Gross v. Dairy Tree Expert Co., 248 A.D. 838, 290 N.Y.S. 168 (1936), and Mobile Liners v. McConnell, 220 Ala. 562, 126 So. 626 (1930), the injured employee was attempting to assist someone who apparently had some business connection with the employer or was rendering assistance in an effort to engender goodwill toward the employer. None of these circumstances exist in this case.

At any rate, just as some jurisdictions have held injuries incurred during the rescue of third parties compensable the following jurisdictions have not: Roberts v. Burlington Industries, Inc., 321 N.C. 350, 364 S.E.2d 417 (1988) (injuries suffered by employee returning home from business trip when he was struck by car when he stopped to assist injured pedestrian who had no connection with his duties or employer's business, not compensable); Hall v. Mason Dixon Lines, Inc., 743 S.W.2d 148 (Tenn. 1987) (compensation denied for injuries suffered by truck driver, who observing girl apparently trapped in stalled vehicle blocking left lane of interstate, stopped to extricate girl, as rescue of stranger when employer had no pecuniary interest in rescue and was not responsible for creating danger out of which rescue attempt arose); Abercrombie v. Hunter's R & O Cafe, Inc.,

414 So. 2d 124 (Ala. Civ. App. 1982) (employee of cafe injured while assisting customer push car, not compensable); Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596, (1955) (purely altruistic actions with no actual benefit to employer do not arise out of employment); Priglise v. Fonda, 192 A.D. 776, 183 N.Y.S 414 (1920) (injury suffered by employee working at railroad yard going to assistance of child fallen across tracks of another railroad in front of oncoming train not compensable as being not within course and scope of his employment). It is clear, therefore, that injuries suffered during rescue attempts, even to avoid potential loss of life, are not universally held compensable.

As the employer/carrier indicated in their Initial Brief, there is no need to look to other jurisdictions for guidance in deciding the merits of this case when this Court's decision in Murphy provided sufficient legal parameters within which the JCC weighed the facts in this case and determined under the law of Florida that the injuries were not compensable. While the employer/carrier agree that public policy should not be decided in a vacuum, current Florida decisional law on the issue of under what circumstances injuries suffered while rendering assistance to strangers is compensable is not out of the mainstream of the decisions dealing with this issue from other jurisdictions. Neither the decisions from other jurisdictions, the current provisions of section 440.092(3), nor the other policy arguments for encouraging altruistic behavior made by the employees

individually or collectively are sufficient to warrant the First DCA's reversal of the JCC's decision in this case. For this Court to find, as did the JCC, that the injuries suffered by these employees did not arise out of their employment, the Court is not required to disregard the intended remedial purpose of the workers' compensation act as a whole. Rather, the employer/carrier believe that the Court should once again recognize as it did in Leon County School Board v. Grimes, 548 So. 2d 205 (Fla. 1989), that the Workers' Compensation Act was never intended to provide relief for injuries not produced by industry nor was it designed to take the place of general health and accident insurance. Regardless of how emotionally appealing the circumstances of this particularly case are, it is without question that industry in Florida is currently, and has been for some time, reeling under the spiraling cost of the workers' compensation program partially due to the court's continuing liberal interpretation of various statutory provision which the legislature has announced in its effort to keep the act within the parameters which were originally intended. The judiciary as well as the legislature plays an integral part in determining whether the workers' compensation program of this state will ultimately be able to survive and continue to provide the needed benefits to workers whose injuries are truly the responsibility of industry without burdening industry to the breaking point by imposing upon it responsibility for injuries not incurred as a result of industry and which should not be the responsibility of

industry. The legislature by enacting section 440.092(3) has delineated the circumstances under which injuries sustained while rendering assistance to strangers should be found compensable in Florida. That provision is consistent with this Court's decision in Murphy, the First District Court of Appeal's decision in Rockhaulers and the JCC's decision in this case. This Court should reverse the First DCA's decision here on the basis that it expressly and directly conflicts with this Court's decision in Murphy and is contrary to the statutory and decisional law on this issue.

B.
(Argument as to Navarro individually)

When Navarro, Martinez and their co-worker, Felix Trejo, were deposed on 12/19/88, each one gave only one reason for assisting the Americans--that the Americans asked for help (R 130, 170; Navarro Record 170). Not one indicated in any way that any of them said anything in response to the motorists' request, much less that Martinez' said, "Let's go help them."

It was not until Martinez' hearing on January 30, 1989, that there was ever any suggestion that Martinez had said to Navarro and Felix that the three of them should go help the Americans. It was not until Navarro's hearing held March 7, 1989 that Navarro testified on direct examination as follows:

> Q. As you were coming out of the grove and the disabled vehicle was there with the two Americans who asked you 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 [Martinez] have to say, "Let's go help them"?

A. Well, I always obeyed him as he was my crew leader.

(Navarro Record, R **34-35**).

On cross-examination, Mr. Navarro was asked:

Q. Mr. Navarro, you remember that I took your deposition back in December over at your lawyer's office?

A. Yes.

Q. Since I took your deposition, has it been explained to you that it's important to your claim that you tell us that Pablo Martinez asked you to go help push the car.

A. Yes.

Q. Okay. And was that also explained to Mr. Martinez in your presence?

A. I think so.

(Navarro Record, R **40-41**).

From the above excerpts of the witnesses' testimony, it is apparent that Navarro had changed his story from the time of his deposition to the time of his hearing regarding his reason for helping the Americans. Thus, it was entirely within the JCC's discretion to choose to believe Navarro's deposition testimony over his testimony at the hearing as to his reason for helping the Americans, especially in view of the sequence of the differing testimonies and in view of Navarro's responses on cross-examination at his hearing.

CONCLUSION

This Court should reverse the First DCA's decision in this case and reinstate the decision of the JCC because the First DCA's decision in this case expressly and directly conflicts with the Court's decision in Murphy whereas the JCC's decision is consistent with the Murphy decision as well as with the statutory and decisional law of this state.

The JCC's decision that Navarro helped the Americans because he was asked rather than because he was instructed to by his crew leader should be affirmed.

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 14th day of September, 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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