IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY MANDICO,

Petitioner,

v.

TAOS CONSTRUCTION INC., et al.,

Respondents.

No. 76,766

* * *

ON CERTIFIED QUESTIONS
OF GREAT PUBLIC IMPORTANCE
FROM THE FOURTH DISTRICT COURT OF APPEAL

* * *

PETITIONER'S INITIAL BRIEF

* * *

Gary M. Farmer
Counsel for Petitioner
888 South Andrews Avenue
Suite 301
Fort Lauderdale, FL 33316
(305) 523-2022
Fla. Bar No. 177611

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2. "MAY TRIAL COURT ORDERS, DENYING IMMUNITY FROM CIVIL SUIT UNDER THE WORKER'S COMPENSATION STATUTE, BE REVIEWED BY A WRIT OF PROHIBITION?"

SUMMARY OF ARGUMENT

Worker's comp immunity is undeniably an affirmative defense, as defendant plainly recognized in its first pleading, thus placing on defendant the burden of pleading and proof, like any other affirmative defense. Yet no one would suggest that orders denying summary judgment on, e.g., res judicata or the statute of limitations are reviewable by common law certiorari or implicate any question of circuit court subject matter jurisdiction. As this court said in Martin-Johnson Inc. v. Savage routine review of such orders "would result in unwarranted harm to our system of procedure".

Moreover, prohibition cannot be used to review decisions of an inferior court; it may instead be used only to prevent a future exercise in excess of clear jurisdictional limits. If the jurisdictional question depends, as here, on controverted jurisdictional facts, then there is an obvious remedy by final appeal and prohibition is perforce improper. Plaintiff's allegation that his uncompensated personal injury claim exceeds $5,000 placed the action within the circuit court's exclusive province. The mere fact that the court has denied a judgment without a trial on an alleged defense to that claim does nothing to destroy the jurisdiction that attached with plaintiff's well-pleaded complaint.

This court's 1954 Murphree decision is no longer well-taken because its essential premise is no longer true. Workers comp claims are no longer heard by a quasi-judicial agency with no right of review in any conventional court. It can no longer be

reasonably contended, therefore, that the circuit court lacks jurisdiction because another judicial forum is exclusive. Hence the defense of worker's comp immunity is indistinguishable from any other affirmative defense, the invocation of which does not affect jurisdiction which has already attached.

Because this case does not involve the kind of great and immediate loss of clear rights which only prohibition could redress, this court should answer the second certified question NO.

Among the most fundamental rights secured by our constitution are the rights to trial by jury and access to the courts. Statutes, like the worker's compensation scheme, which interfere with fundamental constitutional rights must be subjected to heightened judicial scrutiny.

The legislature cannot abolish a right of action for damages from personal injury unless it provides an adequate alternative. The principal ingredient of the worker's compensation statute that led this court to find "an adequate alternative" to the former right to sue a tortfeasor for money damages in a trial by jury was undoubtedly the requirement that the tortfeasor (usually the "employer" or someone in that position) supply or provide, without cost to the employee, the protection of the statute for the "employee".

For this court now to approve immunity in favor of an "employer" who did not himself pay for the compliance is rather to sanction the utter destruction of a fundamental right, the right to sue a tortfeasor for money damages for full compensation

in a trial by jury, and to make the victim pay for the privilege! The workers of Florida could not endure any more "privileges" of that kind.

Whatever other characterizations of such an "alternative" may be made, it can hardly be called "adequate" and cannot be justified on any rational basis. Nor can it possibly be squared with "heightened judicial scrutiny" of legislative enactments which impair fundamental rights unreasonably.

Plaintiff's acceptance of benefits under the "worker's Compensation" policy that he, himself, paid for is no more than obtaining collateral source benefits which do not fully compensate the victim, a fact that has never been viewed as extinguishing the right to full compensation from the one who caused the injury. Having paid for the insurance, he can hardly be faulted for using it when he needed it most.

The certified question on immunity must be answered with an unmistakable NO.

USAGE NOTE

Petitioner Mandico was the plaintiff in the trial court, and for the sake of continuity he will be referred to in this brief as "plaintiff", unless the context otherwise requires. In the same way, respondent Taos Construction will be referred to as "defendant".

References are to an appendix, "A", followed by a page number: thus: "A 3". The term "workers comp" means "worker's compensation".

STATEMENT OF CASE AND FACTS

The Fourth District has certified two questions -- one procedural and one substantive -- arising from a denial of summary judgment in a personal injury action in which a defendant claimed the immunity of worker's compensation exclusivity. The background for these questions is neither complex nor extensive.

Plaintiff was an independent contractor on a construction project in Broward County where he agreed to supply certain "framing" services to defendant, a sub-contractor on the job, at a specific price. A 2-3. Over plaintiff's protest, defendant unilaterally deducted from its payments to plaintiff the sum of 7 percent for worker's compensation insurance, so that in effect plaintiff paid the cost of the premiums for such insurance. A 3.

Later plaintiff was seriously injured when an employee of defendant negligently dismantled some scaffolding so that part of it fell on plaintiff and caused him to suffer substantial injuries. A 2. Plaintiff applied for and received benefits under the policy obtained with his own money. A 24.

Because the policy benefits did not fully compensate him for his injuries, plaintiff sued defendant for negligence in dismantling the scaffolding and for allowing dangerous conditions to exist on the job site which defendant failed to warn plaintiff about. A 1-4. In his complaint, plaintiff expressly alleged that defendant had no worker's compensation immunity because he was an independent contractor from whose pay defendant had "unilaterally extracted"[1] the cost of the premium for the subject

[1] There is apparently a dispute as to whether plaintiff voluntarily acquiesced in the 7 percent deductions or not.

insurance. A 11.

Defendant denied negligence and alleged the following (along with comparative negligence):

> "That as an affirmative defense, the Defendant would state that the Plaintiff, ANTHONY MANDICO, has received workman's [sic] compensation benefits for this accident and therefore, the Defendants, TAOS CONSTRUCTION, INC. [and its employee] would be immune from any further liability based upon Section 440.11, Florida Statutes."

A 9.

Shortly before the scheduled trial, defendant moved for summary judgment on this affirmative defense, arguing that plaintiff had received benefits under the policy and that defendant thus had §440.11(1) immunity. A 12-13. The trial court denied the motion, A 14, and defendant filed a petition for common law certiorari in the district court. A 15-23. That court ordered plaintiff to respond and directed the parties to address whether prohibition was proper.

Plaintiff responded to the direction by acknowledging this court's decision in Winn-Lovett Tampa Inc. v. Murphree, 73 So.2d 287 (Fla.1954), A 25-26, to which defendant argued that the trial court clearly had no subject matter jurisdiction and thus prohibition was proper. A 34-35. On the substantive question, defendant based its petition for extraordinary review on plaintiff's acceptance of benefits from the "worker's-comp" policy, A 18, 35-36, to which plaintiff responded that there could be no immunity where plaintiff had paid the cost of the premium. A 28.

The district court initially granted a writ of prohibition

upon an express holding that defendant was immune from plaintiff's suit and that the circuit court consequently lacked jurisdiction to proceed further. A 45-46. Judge Dell dissented, however, saying that unresolved factual questions clouded the immunity claim and thus precluded issuance of the writ. A 46. Plaintiff moved for rehearing and certification of both the procedural question on prohibition and the substantive question of immunity. A 47-51. The district court granted rehearing and maintained its previous decision but certified the following questions to this court as being of great public importance:

> "MAY A GENERAL CONTRACTOR, WHO PROVIDES WORKER'S COMPENSATION COVERAGE FOR AN INDEPENDENT CONTRACTOR BY DEDUCTING THE COVERAGE PREMIUMS FROM PAYMENTS DUE THAT INDEPENDENT CONTRACTOR, CLAIM IMMUNITY FROM THE INDEPENDENT CONTRACTOR'S CIVIL SUIT FOR PERSONAL INJURY UNDER THE WORKER'S COMPENSATION STATUTE WHERE THE INDEPENDENT CONTRACTOR CLAIMED AND RECOVERED WORKER'S COMPENSATION BENEFITS?
>
> "MAY TRIAL COURT ORDERS, DENYING IMMUNITY FROM CIVIL SUIT UNDER THE WORKER'S COMPENSATION STATUTE, BE REVIEWED BY A WRIT OF PROHIBITION?"

Taos Construction Inc. v. Mandico, 566 So.2d 910 (Fla. 4th DCA 1990). Plaintiff timely invoked this court's discretionary jurisdiction.

ARGUMENT

I.

> A DISTRICT COURT HAS NO JURISDICTION, WHETHER BY PROHIBITION OR BY CERTIORARI, TO REVIEW TRIAL COURT ORDERS DENYING SUMMARY JUDGMENT ON AN AFFIRMATIVE DEFENSE OF THE BAR OF WORKER'S COMPENSATION IMMUNITY.

As the jurisdictional question is a threshold issue, it seems appropriate to begin with consideration of whether the

trial court's denial of summary judgment on worker's comp immunity was then reviewable. Within that inquiry also lurks the question whether the affirmative defense of worker's comp immunity implicates any lack of subject matter jurisdiction in the circuit court, an indispensable ingredient to a writ of prohibition.

The district court implicitly relied on Winn-Lovett Tampa Inc. v. Murphree, 73 So.2d 287 (Fla. 1954), for its holding that the trial court lacked subject matter jurisdiction because of defendant's worker's comp immunity defense. But the state of the law in 1954 when Murphree was decided has changed so considerably that prohibition is no longer available to take up a non-final order denying summary judgment on an affirmative defense of worker's comp immunity. At that time, worker's comp claims were heard solely in the old Industrial Relations Commission, a quasi-judicial agency, but with absolutely no right of judicial review in any Art. V court. See Scholastic Systems Inc. v. LeLoup, 307 So.2d 166 (Fla. 1975).

In contrast, worker's comp claims are no longer heard in a quasi-judicial forum but are now instead heard by judges of compensation claims in the Division of Worker's Compensation of the Department of Labor and Employment Security. See § 440.44, Fla.Stat.(1989). Review of an order of a judge of compensation claims may be had as a matter of right in the Florida District Court of Appeal, First District. See § 440.271, Fla.Stat.(1989). Therefore, the essential premise of Murphree -- that the IRC was in effect the judicial tribunal to hear such claims -- has been

entirely undone by legislature.

Equally important, worker's comp immunity is undeniably an affirmative defense, as defendant itself plainly recognized in its first pleading, thus placing on defendant the burden of pleading and proof. In this regard it is no different than, say, res judicata or the statute of limitations with which it has a logical affinity. All are "threshold" defenses in the sense that they destroy or extinguish what might be an otherwise meritorious claim. Yet no one would suggest that orders denying summary judgment on res judicata or the statute of limitations are reviewable by common law certiorari or implicate any question of circuit court subject matter jurisdiction.

Nor, conspicuously, are such orders found in rule 9.130's exclusive listing of orders which may be reviewed before final judgment. The essence of a worker's comp immunity defense is that a prior claim bars the current action. That is precisely what a res judicata defense does, but no one would argue that such orders are so urgent that they require extraordinary review before trial and the consequent disruption of the proceedings below -- not to mention the lack of an available developed factual record on the issue that a trial would bring. As this court said in Martin-Johnson Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), routine review of such orders "would result in unwarranted harm to our system of procedure".

Two more recent decisions of this court show the infelicity of applying Murphree to permit review of the kind of order reviewed by the fourth district in this case. In English v.

McCrary, 348 So.2d 293 (Fla. 1977), this court newly emphasized that prohibition cannot be used to review decisions of an inferior court; it may instead be used only to prevent a future exercise in excess of clear jurisdictional limits. If the jurisdictional question depends, as here, on disputed or controverted jurisdictional facts, then there is an obvious remedy by final appeal and prohibition is perforce improper.

Even more recently, in Southern Records & Tape Service v. Goldman, 502 So.2d 413 (Fla. 1987), this court held that prohibition could not be used to overturn a circuit court order declining to dismiss an action upon an alleged assertion of administrative agency exclusivity. This court expressly observed that the allegation that the amount in controversy was $11,000 plainly placed the action within the circuit court's jurisdiction. Worker's comp exclusivity and administrative agency exclusivity are not capable of being distinguished for jurisdictional purposes on any principled basis. Hence plaintiff's allegation here that his uncompensated personal injury damages exceed $5,000 placed his claim within the circuit court's exclusive province, just like the functionally identical allegation in Southern Records.

The mere fact that the court has denied a judgment without a trial on an alleged defense to that claim does nothing to destroy the jurisdiction that attached with plaintiff's well-pleaded complaint. Defendant still has the right to offer evidence on the worker's comp defense, and it is possible that the jury could find that plaintiff has already been fully compensated for the

injuries he sustained from the incident in suit.

All of these considerations demonstrate irrefutably that there is not involved here the kind of great and immediate loss of clear rights which only prohibition could redress. For these reasons, this court should answer the second question NO, reversing the fourth district's issuance of prohibition and remanding for a return to the circuit court for trial on the merits.

II.

THERE CAN BE NO IMMUNITY BASED ON WORKER'S COMPENSATION IMMUNITY FROM A CIVIL DAMAGES ACTION FOR PERSONAL INJURIES WHERE THE INJURED PERSON EITHER DIRECTLY PAID FOR THE PREMIUM COST OF THE WORKER'S COMPENSATION INSURANCE OR REIMBURSED THE "EMPLOYER" FOR THE PREMIUM.

Among the most fundamental rights secured by our constitution are the rights to trial by jury and access to the courts. See Art. I, §§ 21 and 22, Fla. Const. Statutes like the worker's compensation scheme, which interfere with fundamental constitutional rights, must be subjected to heightened judicial scrutiny. De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (Fla. 1989).

This court has recently reaffirmed that Art. I, § 22, Fla. Const., secures the right to trial by jury in all cases that traditionally afforded a jury trial at common law. Broward County v. LaRosa, 505 So.2d 422 (Fla. 1987). Moreover, the legislature cannot set up non-judicial tribunals to make awards of unliquidated damages for pain and suffering, as an alternative

to trial by jury. LaRosa, 505 So.2d at 424. But this court apparently has not had occasion previously to consider whether Art. I, § 22, governs worker's compensation claims for personal injury damages, especially where the victim picks up the cost of making worker's compensation available.

The legislature cannot abolish a right of action for damages from personal injury unless it provides an adequate alternative. Kluger v. White, 281 So.2d 1 (Fla. 1973). That principle also applies to worker's comp, and any part of that statutory scheme which denies access to the courts without an adequate substitute is unconstitutional. Sunspan Engineering and Construction Co. v. Spring-Lock Scaffolding Co., 310 So.2d 4 (Fla. 1975); Walker & LaBerge Inc. v. Halligan, 344 So.2d 239 (Fla. 1977). Cf. Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983); Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983); and Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984).

The principal element of the worker's comp statutes that led this court to find "an adequate alternative" to the former right to sue an employer/tortfeasor for money damages in a trial by jury was undoubtedly the requirement that the employer (or someone in that position) supply or provide the protection of the statute for the "employee". As this court said in Carter v. Sims Crane Service Inc., 198 So.2d 25, 27 (Fla. 1967), it is both liability under the statute and compliance with the statute that gives the "employer" his immunity.

For this court now to approve immunity in favor of an "employer" who did not himself pay for the compliance, i.e.

furnish worker's comp insurance with his own funds, and who instead charged or extracted the cost of such coverage from money due the "employee" to be covered, is to abandon entirely any notion of "adequate alternative". It is rather to sanction the utter destruction of a fundamental right, the right to sue a tortfeasor for money damages for full compensation in a trial by jury, and to substitute in its place the burden of paying for the loss of the right!

Whatever other characterizations of such an "alternative" may be made, it can hardly be called "adequate". On no rational basis can such a reversal of constitutional policy be justified, much less can it be squared with "heightened judicial scrutiny" of legislative enactments which substantially impair fundamental rights. Indeed it is to make the most fundamental of our organic adversarial rights a mere legislative grace.

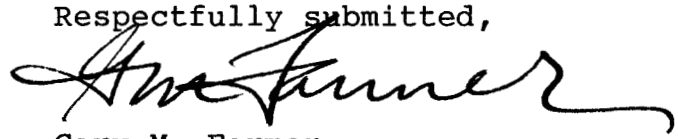
The court should not be detained for a moment by plaintiff's acceptance of benefits under the "worker's compensation" policy that he, himself, paid for. That is no more than obtaining collateral source benefits which do not fully compensate the victim, a fact that has never been viewed as extinguishing the right to full compensation from the one who caused the injury. This is especially true where it was the victim's own funds which, as here, procured the collateral source in the first place. No one has ever had the temerity to suggest that a victim's resort to available health insurance coverage which he himself paid for immunizes his tortfeasor from all liability for uncompensated damages.

Unquestionably the first certified question should be answered resoundingly NO.

CONCLUSION

Both certified questions should be answered in the negative. The case should be remanded to the district court with instructions to return it to the trial court for trial. More specifically the trial court should be instructed that if the evidence shows that the funds for the worker's compensation insurance came from the victim, or that the victim reimbursed the defendant for the cost of such premiums, then there can be no worker's compensation immunity for defendant.

Respectfully submitted,



Gary M. Farmer
Fla. Bar No. 177611

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 7th, 1990, a true and correct copy of the foregoing Petitioner's Initial Brief and request for oral argument was placed in the U. S. mails, first class postage prepaid and addressed to all counsel of record on the attached list.

Gary M. Farmer
Counsel for Petitioner
888 South Andrews Avenue
Suite 301
Fort Lauderdale, FL 33316
(305) 523-2022
Fla. Bar No. 177611

List of Counsel

Mandico v. Taos Construction, Inc., et al.
no. 76,766 (Fla. S. Ct.)

Joel S. Schecter, Esq.
Counsel for Mandico
600 Corporate Drive
Suite 514
Fort Lauderdale, Florida 33334
(305) 772-7788

L. Barry Keyfetz, Esq.
44 West Flagler Street
Suite 2400
Miami, Florida 33130-1856
(305) 358-1740

Neil Rose, Esq.
Steven J. Chackman, Esq.
Conroy, Simberg & Lewis, P. A.
Counsel for Respondents
2620 Hollywood Boulevard
Hollywood, Florida 33020
(305) 921-1101