IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,897

3 DCA Case No. 93-2055

Fla. Bar No. 137172

JOSEPH E. RAMOS; LAURA RAMOS, his wife; and KATRINA RAMOS, a minor, by and through JOSEPH E. RAMOS, her parent and next friend,

Petitioners,

vs.

UNIVISION HOLDINGS, INC., CROWN CENTER REDEVELOPMENT CORPORATION; AND HALLMARK CARDS, INCORPORATED,

Respondents.
_____/

FILED
SID J. WHITE
JUN 29 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

BRIEF AND APPENDIX OF PETITIONERS IN SUPPORT OF JURISDICTION

(CONFLICT CERTIORARI)

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CITATIONS

I.

INTRODUCTION

The petitioners, Joseph E. Ramos; Laura Ramos, his wife; and Katrina Ramos, a minor, by and through Joseph E. Ramos, her parent and next friend, were the plaintiffs in the trial court and were the appellees in the Third District Court of Appeal. The respondents were the defendants/appellants. In this brief of petitioner on jurisdiction the parties will be referred to as the plaintiffs and the defendant and, where necessary for clarification or emphasis, by name. The symbol "A" will refer to the rule-required appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

JURISDICTIONAL STATEMENT

The instant cause is in direct and irreconcilable conflict with the opinion rendered by the Fourth District in HOGAN v. DEERFIELD 21 CORPORATION, 605 So. 2d 979 (Fla. App. 4th 1992) as to the following:

A. In the instant cause the Third District, citing as authority its prior opinion in CROON v. QUAYSIDE ASSOCIATES, LTD., 464 So. 2d 178 (Fla. App. 3d 1985) stated directly:

> "...A property owner who hires a general contractor is considered a statutory employer and is generally entitled to workers' compensation immunity pursuant to Section 440.11 (citation omitted)." (A. 2)

B. The Fourth District in HOGAN, set out the above, see: HOGAN, 605 So. 2d at page 982:

> "An owner hiring a general contractor is considered a statutory employer under the terms of the statute..."

and specifically stated:

> "We respectfully disagree with this latter conclusion because we find it inconsistent with the law discussed above." 605 So. 2d at page 982.

If the HOGAN court (the Fourth District) is correct in its analysis of the law, then, of course, the instant cause conflicts additionally with this Court's opinions in JONES v. FLORIDA POWER CORP., 72 So. 2d 285 (Fla. 1954) and CONKLIN v. COHEN, 287 So. 2d 56 (Fla. 1973). If the HOGAN court (the Fourth District) is incorrect, then, perforce, the conflict between it and the subject opinion must be reconciled. The instant cause and HOGAN cannot peacefully coexist. Conflict exists.

III.

STATEMENT OF THE CASE AND FACTS

The facts pertinent to the jurisdictional issues must be learned from the opinion herein sought to be reviewed:

* * *

> "Univision owns television studios in Miami. It executed a general contract with The Austin Company (Austin) to remodel an existing structure and construct new television studios. Univision, having little experience in the construction field, employed Crown to serve as a consultant on the job site as the 'owner's representative.' During the construction phase of the new studios, Zion Steel Erectors (Zion)

was called on to erect the structural steel as a subcontractor for Austin. Joseph Ramos, an employee of Zion, was injured while working for Zion at the job site. Ramos sued Univision, Crown, and Hallmark (the parent corporation of both Univision and Crown), alleging negligence in failing to provide a safe work place. The three defendants raised the affirmative defense of immunity from tort liability pursuant to section 440.11, Florida Statutes (1989), and moved for final summary judgment based on workers' compensation immunity. The trial court denied the motion.

"The trial court erred in finding that defendants are not entitled to workers' compensation immunity, as a property owner who hires a general contractor is considered a statutory employer and is generally entitled to workers' compensation immunity pursuant to section 440.11. See Croon v. Quayside Assocs., Ltd., 464 So. 2d 178, 180 (Fla. 3d DCA), rev. denied, 476 So. 2d 673 (Fla. 1985). There are two exceptions to this general rule. First, 'an owner may be held liable if he interferes or meddles with the job to the extent of assuming the detailed direction of it, and thus becomes the master of the independent contractor's employee.' City of Miami v. Perez, 509 So. 2d 343, 345 (Fla. 3d DCA)(citing Conklin v. Cohen, 287 So. 2d 56 (Fla. 1973), rev. denied, 519 So. 2d 987 (Fla. 1987). 'Second, if the owner has been a passive nonparticipant, in order to impose liability one or more specific identifiable acts, i.e., acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the contractor's employee, must be established.' City of Miami, 509 So. 2d at 346; Conklin, 287 So. 2d at 60. As Ramos has not established either of these two exceptions, Univision is immune from suit as a matter of law.

"Furthermore, the presence of Crown as an on-site inspector hired by Univision to observe the progress of the work and enforce contractual provisions concerning work place safety does not render either Crown or Univision subject to suit. See Skow v. Department of Transp., 468 So .2d 422 (Fla. 1st DCA 1985); City of Miami, 509 So. 2d at 347.*

"The trial court erred in denying defendant's motion for final summary judgment. We reverse the order and remand this case with directions to enter final summary judgment for defendants.

"Reversed and remanded with directions.

"* As Hallmark could only be vicariously liable, it too was entitled to final summary judgment." (A. 2,3)

* * *

This proceeding followed.

IV.

SUMMARY OF ARGUMENT

The law in the Third District holds:

> "An owner hiring a general contractor is considered a statutory employer under the terms of the (workers' compensation) statute."

The above was stated by the court in CROON v. QUAYSIDE ASSOCIATES, LTD., supra, and stated again in the instant cause.

The law in the Fourth District holds directly contrary, see: HOGAN, supra, wherein a panel of that court speaking directly to the language utilized by the Third District cited, supra, held:

> "We respectfully disagree with this latter conclusion because we find it inconsistent with the law discussed above." HOGAN, supra, 605 So. 2d at page 982.

The Fourth District in HOGAN disagreed with the Third District because:

A. The injured employee of a sub-contractor is not an "employee" of the owner; and

B. The "owner" is not a "contractor" or "employer" in the ordinary sense that the words are used.

The Third District's interpretation of the term "statutory employer" sets dangerous precedent. For purposes of this

portion of the brief suffice it to say conflict exists between the instant cause, CROON, supra, and HOGAN, supra.

V.

ARGUMENT

THE OPINION RENDERED IN THIS CASE IS IN DIRECT CONFLICT WITH THE FOURTH DISTRICT'S OPINION IN HOGAN, SUPRA.

A.

In HOGAN the Fourth District specifically and unequivocally disapproved of the Third District's holding that:

> "An owner hiring a general contractor is considered a statutory employer under the terms of the (workers' compensation) statute." HOGAN, 605 So. 2d at page 982.

The Fourth District correctly noted that the Third District's reasoning cannot logically reach the conclusion it did because:

1. The injured employee of a sub-contractor is not an "employee" of the owner (given the obvious existence of a valid and bona fide general contractor, as here); and

2. The "owner" is not a "contractor" or "employer" in the ordinary sense that the words are used.

In the HOGAN opinion, Hogan was the injured employee of a sub-contractor (Miller), Deerfield 21 was the owner and "Visions" was the general contractor. See: HOGAN, supra, 605 So. 2d at page 980. The court stated:

> "Obviously, Deerfield was not a 'contractor' or 'employer,' and Hogan was not an 'employee' of Deerfield, in the ordinary sense that these words are

> used. More importantly, because Deerfield 21 was not a contractor or the employer of Hogan, and did not otherwise have any statutory duty to provide workers' compensation coverage, Deerfield was not the statutory employer of Hogan, and does not enjoy the immunity provided by Section 440.11 from Hogan's tort suit." 605 So. 2d at page 982.

Since HOGAN is consistent with Florida law, as it arguably is, this case must also conflict with JONES v. FLORIDA POWER CORP., supra, and CONKLIN v. COHEN, supra, both cases recognizing that:

> "...An owner who had no liability under the law to secure compensation for a contractor's employee did not qualify as a 'contractor' or 'statutory employer.'" HOGAN, 605 So. 2d at page 901 citing to CONKLIN v. COHEN, supra.

Conflict exists.

B.

When the Third District decided CROON v. QUAYSIDE, supra, it had to be with the understanding that it was deciding that case <u>on its facts</u>, a reasonable and fair decision given that in CROON the owner [QUAYSIDE ASSOCIATES, LTD.] became a general contractor:

> "...When the general contractor was discharged from the job."

Given the unique occurrences, to wit: the owner had to step in and act in order to "save" its project, the legal fiction of "statutory employer" became a necessity to overcome the liability which would otherwise have obtained against Quayside who had become a prohibited "owner/general." See: CONKLIN v. COHEN, supra.

It is apparent that CROON was never intended to apply past its own facts. It is certainly clear that <u>the only place</u>

wherein an "owner" who is not obligated to provide workers' compensation can ever be a "statutory employer" is in the Third District. The Fourth District has called the Third District to task on this "holding." This case conflicts with HOGAN. This Court should take jurisdiction of the instant cause and resolve this embarrassing conflict.

C.

The plaintiffs cannot state to this Court any facts outside of the four corners of the subject opinion. The plaintiffs can argue to this Court from what facts exist within the four corners the legal merits of their position as to conflict!

In this case Univision (the owner) contracted with Austin (the general). Austin sub-contracted out a part of its contract to Zion Steel, the plaintiff's employer. The owner (Univision) contracted with Crown Center Redevelopment Corporation, a consulting engineering firm. The Third District's opinion making Univision (the owner) a statutory employer also served (in the Third District) to insulate Crown from suit by the plaintiffs. This obtuse result creates conflict with the holdings in CONKLIN v. COHEN, supra; GEER v. BENNETT, 237 So. 2d 311 (Fla. App. 4th 1970); and MOORE v. PRC ENGINEERING, INC., 565 So. 2d 817 (Fla. App. 4th 1990), all recognizing and holding that an architect/consulting engineering firm which contracts with the owner (as opposed to contracting with the general contractor and employer, etc.) is not possessed of compensation immunity and is susceptible to a third party tort suit. CONKLIN

v. COHEN, 287 So. 2d at page 60. Stated another way (as applicable here), Crown (the consulting firm) is either negligent or is not negligent. Likewise, Univision (the owner) is either negligent or not negligent. Neither one was entitled to assert the defense of workers' compensation immunity. In this case the trial court denied the defendant's motion for summary final judgment. The defense was not available to either. The Third District reversed, holding:

> "...a property owner who hires a general contractor is considered a statutory employer and is generally entitled to workers' compensation immunity pursuant to section 440.11."

This is not the law in Florida. HOGAN, supra, CONKLIN v. COHEN, supra.

This Court should exercise its discretionary authority and resolve the confusion and uncertainty that now exists between the Fourth District (HOGAN) and the Third District (RAMOS) expanding and extending the term "statutory employer" to areas, fact situations and legal principles far beyond any the term was ever intended to encompass.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiffs respectfully urge this Honorable Court to accept jurisdiction and to review the merits of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioners on Jurisdiction was mailed to the following counsel of record this 27th day of June, 1994.

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_____
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A P P E N D I X

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1994

UNIVISION HOLDINGS, INC., et al.,

Appellants,

vs.

JOSEPH E. RAMOS, et al.,

Appellees.

** CASE NO. 93-2055

Opinion filed June 7, 1994.

An Appeal from a nonfinal order of the Circuit Court for Dade County, Herbert M. Klein, Judge.

Clark Sparkman Robb & Nelson and James K. Clark, for appellants.

Perse & Ginsberg and Arnold R. Ginsberg; Goldberg & Vova, for appellees.

Before SCHWARTZ, C.J., JORGENSON, and LEVY, JJ.

PER CURIAM.

Univision Holdings, Inc. (Univision), Crown Center Redevelopment Corporation (Crown), and Hallmark Cards, Inc. (Hallmark) appeal from an order denying their motion for final summary judgment based on workers' compensation immunity. We

A.1

have jurisdiction pursuant to Rule 9.130(a)(3)(C)(vi), Florida Rules of Appellate Procedure. For the following reasons, we reverse.

Univision owns television studios in Miami. It executed a general contract with The Austin Company (Austin) to remodel an existing structure and construct new television studios. Univision, having little experience in the construction field, employed Crown to serve as a consultant on the job site as the "owner's representative." During the construction phase of the new studios, Zion Steel Erectors (Zion) was called on to erect the structural steel as a subcontractor for Austin. Joseph Ramos, an employee of Zion, was injured while working for Zion at the job site. Ramos sued Univision, Crown, and Hallmark (the parent corporation of both Univision and Crown), alleging negligence in failing to provide a safe workplace. The three defendants raised the affirmative defense of immunity from tort liability pursuant to section 440.11, Florida Statutes (1989), and moved for final summary judgment based on workers' compensation immunity. The trial court denied the motion.

The trial court erred in finding that defendants are not entitled to workers' compensation immunity, as a property owner who hires a general contractor is considered a statutory employer and is generally entitled to workers' compensation immunity pursuant to section 440.11. See Croon v. Quayside Assocs., Ltd., 464 So. 2d 178, 180 (Fla. 3d DCA), rev. denied, 476 So. 2d 673 (Fla. 1985). There are two exceptions to this general rule. First, "an owner may be held liable if he interferes or meddles

with the job to the extent of assuming the detailed direction of it, and thus becomes the master of the independent contractor's employee." City of Miami v. Perez, 509 So. 2d 343, 345 (Fla. 3d DCA)(citing Conklin v. Cohen, 287 So. 2d 56 (Fla. 1973)), rev. denied, 519 So. 2d 987 (Fla. 1987). "Second, if the owner has been a passive nonparticipant, in order to impose liability one or more specific identifiable acts, i.e., acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the contractor's employee, must be established." City of Miami, 509 So. 2d at 346; Conklin, 287 So. 2d at 60. As Ramos has not established either of these two exceptions, Univision is immune from suit as a matter of law.

Furthermore, the presence of Crown as an on-site inspector hired by Univision to observe the progress of the work and enforce contractual provisions concerning workplace safety does not render either Crown or Univision subject to suit. See Skow v. Department of Transp., 468 So. 2d 422 (Fla. 1st DCA 1985); City of Miami, 509 So. 2d at 347.[1]

The trial court erred in denying defendant's motion for final summary judgment. We reverse the order and remand this case with directions to enter final summary judgment for defendants.

Reversed and remanded with directions.

---

[1] As Hallmark could only be vicariously liable, it too was entitled to final summary judgment.