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JUL 28 1994
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,897

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.

Third District Court of Appeals, Case No. 93-2055

JURISDICTIONAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Respondents adopt the Petitioner's Statement of the Case and Facts herein.

POINT ON APPEAL

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN HOGAN V. DEERFIELD 21 CORPORATION?

SUMMARY OF ARGUMENT

The Florida Supreme Court's power to invoke its discretionary jurisdiction is limited and strictly circumscribed. That is, a decision must expressly and directly conflict with another District Court of Appeal or of the Supreme Court for jurisdiction to be invoked. Moreover, the terms "expressly and directly" applies only to decisions. It is conflict of decisions, not a conflict of opinions or reasons that supplies jurisdiction for review. See, Gibson v. Maloney, 231 So.2d 823 (Fla. 1970). The Supreme Court cannot exercise its conflict jurisdiction when the cases in "alleged" conflict do not involve substantially the same facts as the decision being reviewed.

Petitioner's contention that Hogan v. Deerfield 21 Corporation, 605 So.2d 979 (Fla. 4th DCA 1992), creates decisional conflict is incorrect. The case is factually dissimilar to the instant case. In Hogan, the employee was hurt while working an area open to the public. It was based on this fact that the Fourth District refused to grant immunity from suit. In the case at bar, RAMOS was injured in an exclusive work site not open to the public. This is a critical distinguishing factor.

The Supreme Court's jurisdiction is strictly limited to conflicts in decisions. The Hogan court's "disagreement" with Croon v. Quayside, 464 So.2d 178 (Fla. 3rd DCA), rev. denied, 476 So.2d 673 (Fla. 1985), was not decisional but rather dicta. As decisional conflict cannot be on the basis of "dicta", no conflict exists.

Contrary to Petitioner's argument, the Third District here did not find that owners who do not secure worker's compensation are "statutory employers". Rather, it held that owners who hire general contractors are generally precluded from suit under Florida Statute §440.11.

In conclusion, Petitioners have failed to demonstrate a basis for conflict jurisdiction. The Hogan case is both factually distinguishable and does not expressly conflict with the decision rendered here. Likewise, it follows that

the holdings in Jones and Conklin remain viable and are not in conflict with the case sub judice.

ARGUMENT

Article V Section 3(b)(3) of the Florida Constitution enables the Supreme Court to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. This 1980 Constitutional revision strictly limits the types of decisions that can be reviewed based upon conflict.

In Jenkins vs. State, 385 So.2d 1356 (Fla. 1980), this Court re-affirmed that the language of Section 3(b)(3) applies only to decisions that expressly and directly conflict with another District Court of Appeal decision. The Court defined the term "expressly" as:

> "The discretionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to'. 'Expressly' is defined: 'in an express manner'".
>
> Jenkins, at 1359.

Furthermore, this limiting language applies solely to decisional conflicts. The Court explained that the "...language and expressions found in a dissenting or

concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal". Jenkins, at 1359. It is conflict of decisions rather than the opinions or reasons expressed therein that supply jurisdiction. Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970).

Petitioner advances the proposition that since the Fourth District Court of Appeal, in its Hogan v. Deerfield, 605 So.2d 979 (Fla. 4th DCA 1992) decision, "disagrees" with a conclusion of the Third District Court of Appeals in another case, express conflict jurisdiction is created. This statement is incorrect.

This Court does not acquire conflict jurisdiction when the cited decisions in apparent conflict are factually distinguishable with the decision being reviewed. Florida Power & Light Co. v. Bell, 113 So.2d 687 (Fla. 1959); and, Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983)(case which is distinguishable on its facts from those cited in conflict requires discharging jurisdiction). Moreover, this Court is limited to the facts which appear on the face of the opinion. See, Hardee vs. State, 534 So.2d 706 (Fla. 1988).

The case at bar is materially distinguishable from the Hogan case. In the instant cause, the employee (RAMOS) was

injured while working on the construction job site for Zion Steel Erectors. This injury took place while Zion was erecting structural steel beams. The construction area was not open to the public and was exclusively a job site. In Hogan, the employee was injured while working in a "service entryway to the main lobby that was regularly used by hotel employees and service employees, and...hotel guests". Hogan, at 980. It was based on this fact that the Fourth District held:

> "Deerfield 21 (owner) owed its patrons, as well as others like Hogan, who were legitimately on the premises, an independent duty of care to maintain the premises, in a reasonably safe condition."
>
> Id., at 983.

Contrary to Petitioner's argument, the Fourth District Court of Appeal in Hogan did not conclude that an injured employee of a subcontractor is not an "employee" of the owner and an owner is not a "contractor" or "employer". Rather, it decided, on the facts of that case, that Deerfield did not qualify for statutory immunity under the worker's compensation immunity statute. It does not stand for a general rule of law that owners can never be "contractors" or "employers" as contended by Petitioners. The Hogan Court clearly pointed out that because the area in which the injury occurred was open to the public (not a construction site), the owner owed a independent duty of care to all its patrons

and to workers who might be utilizing the passageway. This is the factor making Hogan distinguishable from the case here. The holding herein remains consistent with Jones v. Florida Power Corp., 72 So.2d 285 (Fla. 1954); and, Conklin v. Cohen, 287 So.2d 56 (Fla. 1973).

In order for this Court to invoke its discretionary jurisdiction, the "conflict" must be patent and obvious and reflected in the decisions cited for conflict. That is, it is invoked by either 1) the announcement or a rule of law which conflicts with a law previously announced by another District Court of Appeal, or 2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). Neither one of these instances is present in this cause. As stated before, Hogan is factually distinguishable from the case herein; thus, the alleged conflict does not exist.

Additionally, the Hogan court did not disagree with the general rule of law announced by Croon, but rather disagreed in dicta, to extend the rule to instances where an owner has not assumed the general contractor's duties.[1] The Fourth

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[1] In Croon, the owner (Quayside) discharged its general contractor and all of its contracts and subcontracts were assigned to Quayside who took over as general contractor.

District disagreed with the Third District's view that even if Quayside had not assumed the duties of general contractor the immunity doctrine of worker's compensation would have precluded suit.

This Court's jurisdiction is carefully circumscribed to instances of express and direct conflict with decisions of prior District Courts. Clearly, opinions and reasons do not form the basis for the conflict jurisdiction. Moreover, dicta does not represent decisional conflict.[2] A plain reading of the language of Article V Section 3(b)(3) establishes jurisdiction on the basis of conflicting decisions. Thus, in a literal sense "dicta conflict" cannot exist. The Fourth District's "disagreement" with one of the conclusions of the Third District in Croon does not supply the type of express conflict to justify jurisdiction in this court.

Petitioners have failed to demonstrate express and direct conflict with the instant case and Hogan. Hogan is factually dissimilar and the District Court's dicta "disagreement" with Croon does not supply a basis for conflict jurisdiction.

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[2] It should be noted that since the enactment of Article V Section 3(b)(3), this Court has not directly ruled on the existence of "dicta" conflict. See, State v. Speights, 417 So.2d 1168 (Fla. 1st DCA 1982).

Finally, Petitioners cite Conklin v. Cohen, 287 So.2d 56 (Fla. 1973) and Jones v. Florida Power Corp., 72 So.2d 285 (Fla. 1954), as being in conflict with the case at bar. This is wholly unsupported by the cases and/or decisions rendered therein. The Third District noted that "generally" property owners who hire a general contractor are immune from tort liability pursuant to Florida Statute §440.11. This general rule of law is subject to two exceptions as announced in Conklin[3]; neither which apply in the instant case. The Third District Court specifically found that the Respondents did not fall under either of these two exceptions.

Simply put, the instant holding does not create conflict with any of Petitioner's cited decisions. At best, Hogan disagrees in "dicta" with Croon, however, it is decided on a different factual background and the "decision" is not in literal conflict. Likewise, neither Conklin, Jones, Greer v. Bennet, 237 So.2d 311 (Fla. 4th DCA 1970); nor, Moore v. PRC Engineering, Inc., 565 So.2d 817 (Fla. 4th DCA 1990), create

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3 "...owner may be held liable if he has been actively participating in the construction..." or the owner "...acts either negligently creating or negligently approving the dangerous condition...".

Conklin, at 60.

an express conflict requiring this Court to invoke its jurisdiction.

CONCLUSION

Therefore, based on Article V, Section 3(b)(3) of the Florida Constitution and the authorities cited above the Respondent respectfully requests this Court dismiss Petitioner's petitioner for discretionary jurisdiction and remand to the lower court in accordance with the Third District Court of Appeal's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 27th day of July, 1994, to: PHILIP S. VOVA, ESQUIRE, Attorney for Plaintiffs, Goldberg and Vova, P.A., 1101 Brickell Avenue, Suite 900, BIV Tower, Miami, Florida 33131. Telephone: (305) 374-4200; CAROL FOWLER, ESQUIRE, P.O. Box 419126, #339, Kansas City, Missouri 64141-6126. Telephone: (816) 274-5540; BRIAN S. KIEF, ESQUIRE, Attorney for Univision, 30 West Mashta Drive, Suite 500, Key Biscayne, Florida 33149. Telephone: (305) 361-0825; ARNOLD R. GINSBERG, ESQUIRE, 410 Concord Building, 66 West Flagler

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