OA 2-9-95

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,897

3 DCA Case No. 93-2055

Fla. Bar No. 137172

JOSEPH E. RAMOS, et ux, et al,

Petitioners,

vs.

UNIVISION HOLDINGS, INC., et al,

Respondents.
_____/

BRIEF AND APPENDIX OF PETITIONERS ON THE MERITS

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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 petitioners on the merits the parties will be referred to as the plaintiffs and the defendants and, where necessary for clarification or emphasis, by name. The symbols "R" and "A" will refer to the record on appeal and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

A.

On or about June 27, 1989 UNIVISION HOLDINGS, INC. [a subsidiary of defendant, HALLMARK] ("OWNER" hereinafter) contracted with the Austin Company ("CONTRACTOR" or "AUSTIN" hereinafter) to perform construction on certain property it owned in Dade County for the purposes of building (Channel 23) television studios (R. 264-303).

Especially pertinent to this proceeding are Articles 3, 20 and 21 of that contract. They provide:

* * *

ARTICLE 3: OWNER'S REPRESENTATIVE

Owner shall provide a Representative authorized to act for him under this contract. Representative, unless otherwise stipulated by Owner in writing, shall be Mr. Thomas Patterson Crown Center Redevelopment Corporation. He shall be available by telephone or in person during working hours as often as may be necessary to approve changes in design or construction.

* * *

ARTICLE 20: SAFETY AND SECURITY

All activities of contracting firms on the premises of the Owner are to be conducted in accordance with all applicable laws governing building codes and regulations. Austin will be required to, but is not necessarily limited to, furnishing and installing all materials, equipment and devices and taking all necessary protective measures for the safety of public and private property, workmen and the general public. All Work included in this Contract shall comply with the requirements of all applicable local, state and federal health and safety regulations.

Whenever unsafe working conditions are discovered, the Owner may notify Austin of such, and Austin shall promptly alleviate the unsafe condition. The Owner reserves the right to stop any or all Work affected by those conditions until such time as those conditions are eliminated. Failure of the Owner or his representative to so notify Austin shall not relieve Austin of his sole responsibility to alleviate unsafe conditions. No increase in time or money shall be due Austin due to a suspension of Work under these circumstances.

Austin has the affirmative duty to seek out and identify actual and potential safety hazards, abate them and instruct all personnel on the site accordingly.

The Owner will notify Austin in writing of the presence of any of the Owner's materials in the work area that might reasonably represent a hazard to Austin or the Subcontractor's personnel. It is Austin's responsibility to take whatever precautions may be necessary to alert and protect its personnel and his subcontractors.

Austin will submit to the Owner a "Material Safety Data Sheet" provided by the material manufacturer for any hazardous material that Austin or

its subcontractors bring onto the site. "Hazardous Material" is defined by O.S.H.A. regulation 29 CFR 1910.1200.

* * *

ARTICLE 21: SUSPENSION OF WORK AND TERMINATION

The Owner may suspend the Work or any portion thereof for a period of not more than fourteen (14) calendar days or such further time as agreed upon by Austin by written notice to Austin, which notice shall fix the date on which Work shall be resumed. Austin will resume the Work on the date so fixed. Austin will be allowed an extension of the Interim or Final Contract Time (as the case may be) directly attributable to any suspension, and such extension of Contract Time shall be the only compensation to which Austin shall be entitled.

If Owner elects to suspend all or a portion of the Work because of Austin's failure to correct defective Work, or because of Austin's refusal to supply equipment or materials or adequate labor in accordance with the Contract Documents, no increase in Interim or Final Contract Time or Guaranteed Maximum Amount will be allowed. (R. 264-266, 281, 282).

* * *

B.

On or about September 1, 1989 UNIVISION (OWNER), by contract separate from that which it entered into with AUSTIN ("general"), contracted with CROWN CENTER REDEVELOPMENT CORPORATION (also a subsidiary of defendant, HALLMARK, R. 121 ["CONSULTANT" or "CROWN" hereinafter] to provide consulting services on the Channel 23 job site.

Especially pertinent to this proceeding are Articles 1.1.2 and 1.1.3 which, as relevant, provide:

* * *

1.1.2 The Consultant shall provide Design Review Services to include the following:

a. Review all architectural, mechanical, electrical structural and interiors design for

conformance with owner's requirements, code, and sound design practice.

b. Coordinate structural peer review being performed by others.

c. Conduct periodic site reviews to monitor quality of the work, proper installation of major equipment and utilities, and proper start-up of selected building systems.

1.1.3 The Consultant shall provide Construction Management Services to include the following:

a. Provide full-time on-site review of major construction activities for conformance with approved drawings and specifications.

b. Review progress of the work for conformance with approved schedule requirements.

c. Review and verify contractor requests for payment.

d. Coordinate all site and special inspections, and all materials testing.

e. Review contractor's safety procedures.

f. Coordinate project close-out and start-up procedures. (R. 259, 260).

* * *

C.

Pursuant to the above contracts the following persons became involved:

1. Thomas Patterson: The CROWN employee selected to serve as the OWNER's representative (R. 86-91). His office is in Kansas City.

2. Robert Fortier: The CROWN employee/construction engineer assigned (by Patterson) to the job site (R. 94, 95). It was the first time Fortier was an on-site supervisor for such a large job (R. 250).

3. Robert McCutcheon: An employee of Zion Steel Erectors (R. 41). McCutcheon is an iron worker and was on the job in January of 1990 when the first column collapsed (R. 44). In point of fact he was on the column when it fell. He was not injured (R. 44).

4. Daniel Summa (R. 334-425, 426-428): He is also an iron worker and was employed by Zion Steel during the entire time that Zion did the erection and remodeling. He was the foreman on the job at the time of the second collapse--the collapse in which the plaintiff was injured.

D.

In January of 1990, during the first phase of the subject project, a steel column fell and/or partially collapsed. McCutcheon was on the column when it fell. No one was hurt (R. 48).

Summa is an experienced iron worker. He observed the manner in which the steel columns were being placed--they were using two anchor bolts instead of four--he knew the problem and knew of the dangerous condition (R. 361-366). Summa and others told Fortier, CROWN's employee--the OWNER's representative. Summa (and others) informed Fortier (as opposed to others) because Fortier was pulling inspections. He was checking bolts and matters of that nature (R. 378-380).

According to Summa, Fortier knew they were going to attempt the second phase of the project in the same manner as they attempted phase one--when the collapse occurred (R. 380-382).

Summa specifically, post first collapse, complained to Fortier about the two bolts and told him "they" would hurt someone (R. 412). No action was taken and no changes were made.

On February 22, 1990, almost two months after the first collapse, plaintiff, JOSEPH RAMOS, while employed as an iron worker for Zion, was rendered paraplegic when a steel column collapsed and he fell to the ground (R. 26).

E.

Plaintiffs sued defendants (R. 19) and discovery adduced the following:

1. Although normal procedure would have been for all to look to CROWN CENTER (the consultant) for changes, corrections and matters of safety, in this case the owner (UNIVISION/HALLMARK) desired (and retained) full control of all the changes (R. 113).

2. The first incident (January, 1990) was reported to Patterson (CROWN'S employee--the OWNER'S representative) immediately after it occurred (R. 117). Patterson claimed he told the persons in charge to investigate and correct BUT he did not recall at all if he followed up (R. 118, 119). Patterson claimed it was Fortier's obligation to follow up and make sure the problem was corrected and to report the problem if it was not corrected (R. 118, 119). Fortier worked for Patterson. Both worked for CROWN!

3. CROWN CENTER is a subsidiary of HALLMARK and always becomes involved in the construction end of projects on which HALLMARK has an interest (R. 92, 93).

4. Patterson had authority to oversee and resolve issues within the contract but not to authorize change orders. (This was reserved to the owner, UNIVISION, R. 113).

5. Patterson was required to, and did, oversee the safety procedures being used by the contractor (The AUSTIN Company) (R. 122).

6. Patterson admitted Fortier's duties included walking around and viewing--on a day to day basis--what was going on (R. 127; See also: R. 429-432), Job Description for Robert Fortier:

"Position Purpose:

Coordinate construction activities on assigned projects including construction of new facilities and alteration of existing facilities for Hallmark, including all subsidiary corporations." (R. 431).

Patterson also admitted:

a. Fortier was no expert in safety procedures; and,

b. He did not know of a job of this nature that Fortier had in the past (R. 130, 131).

7. According to Fortier, he was "the eyes and ears" for Patterson and CROWN CENTER (R. 170-172). It was up to him--the (preceding) work had to be right--before any (further) work proceeded (R. 175). If something needed an immediate fix he made sure it was done (R. 176). He had the authority to stop the job for an obvious safety violation (R. 222, 223).

8. Plaintiffs filed the Affidavit of Daniel Summa (R. 426-428). It reflects:

* * *

1. That he is a member of Local 272 Iron Workers Union and was such at all times material hereto.

2. That during the course of his membership he was employed by and began working for Zion Steel, Inc. on the job known as the Univision Addition, located at 94th Avenue and N.W. 41st Street.

3. That he was employed by Zion Steel during the entire time that said company did erection of the addition and the remodeling of the existing facilities.

4. That from the time that the erection began on the addition to the facilities, he held the position of foreman on said job.

5. That prior to holding the position of foreman on the job, he was a member of the erection crew, and he is familiar with all erection that was done on the premises for the entire scope of Zion Steel's contract, as a subcontractor with Adelman Steel.

6. That sometime during the month of January, 1990, an incident occurred whereby a steel column began to collapse, though it was held up by the horizontal piece of steel that was being placed in the structure at that time that the column began to fall.

7. That as a result of the falling column, a base bolt on the column was broken and said incident could have been prevented, had proper safety precautions been taken and in particular, had there been a lateral support of the column, such as bracing and/or guide wires.

8. That Robert Fortier was the owner's agent on the job, he was well aware of the incident and after said incident there was no investigation by said owner's agent, nor were there any changes in the procedure as directed by the owner's agent and in particular, there were no additional lateral supports on columns after said incident of January, 1990.

9. That at the time that your affiant became foreman of the job and through the entire remainder of

the job, your affiant had constant contact with the owner's agent, Robert Fortier.

10. That Robert Fortier participated directly with the undersigned and influenced the manner in which the work was performed and in particular, reviewed all work as it was being performed, made comments upon the procedure for the work performance, directed and reviewed the procedures that were being used by the erection crews and otherwise acted in the same capacity and with the same control as if he were employed by the general contractor, Austin Company.

11. That at the time that the Plaintiff's accident occurred on February 22, 1990, no guide wires or other lateral support were being used to brace the columns when horizontal steel trusses and/or other steel supports were being erected from column to column.

12. That as a result of failure to have adequate lateral supports on the columns, the column upon which the Plaintiff, JOSEPH RAMOS and ROBERT McCUTCHEON were working upon collapsed causing injuries to JOSEPH RAMOS." (R. 426-428)

* * *

F.

The defendants moved for summary judgment and argued, in essence and pertinent part:

* * *

"4. In the case at bar, it is uncontradicted that neither the owner, nor the owner's representative, directly influenced the manner in which the general contractor performed the work. The owner's representative at the job site was present only for the purposes of assuring that the general contractor complied with the plans and specifications of the contract. At no time, did the owner or the owner's representative influence the manner in which the actual construction project was performed. Further, there is no testimony that the owner, or the owner's representative, either created the condition which led to the injuries sustained by the Plaintiff in this case or approved the existence of that condition prior to the time that the injury occurred.

WHEREFORE, in light of the exclusivity of liability provided for in the Florida Worker's

Compensation Statute, the above named Defendants are entitled to Final Summary Judgment in their favor herein." (R. 253)

* * *

The defendants' motion drew no distinctions between any of the three and provided no argument at all as to why HALLMARK would be entitled to summary judgment. In truth, given the nature of the plaintiffs' pleadings and the defendants' acknowledgment concerning the status of UNIVISION and CROWN as being subsidiaries of HALLMARK, there existed no factual basis for HALLMARK to premise an argument (much less prevail on such motion). The trial court denied defendants' motion for summary judgment.

On appeal the District Court reversed as to all three defendants. This proceeding followed.

The plaintiffs reserve the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTION PRESENTED

WHETHER THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE DEFENDANTS WERE NOT ENTITLED TO WORKERS' COMPENSATION IMMUNITY AS A MATTER OF LAW.

IV.

SUMMARY OF ARGUMENT

The plaintiffs would suggest to this Court that the trial court was correct in determining that the defendants were not entitled to workers' compensation immunity as a matter of law. For the reasons to be advanced herein, the opinion of the Third

District should be quashed, the order denying the defendants' motion for summary final judgment should be affirmed and this case should be remanded for a jury trial on all factual issues.

Florida Supreme Court precedent is both well settled and long standing. Where an engineer/consultant is employed by a construction project's owner and is an independent contractor, said consultant will be held liable for damages [sustained by persons lawfully on the premises] as a result of its negligence as defined by the standards analogous to architects. There is, of course, no contention here (nor can there be) that CROWN was anything else but an independent contractor performing services for the OWNER, UNIVISION/HALLMARK.

In this case CROWN contracted directly with UNIVISION for purposes of providing on site supervision of the project. CROWN, an independent contractor, did not "sub" out any part of the job, CROWN assumed its own control over the project and in no wise can be either "an owner" or a "contractor" privileged to claim the defense of workers' compensation immunity. It must be concluded therefrom that the trial court was correct in denying the defendants' motion for summary judgment.

Likewise, the trial court was correct in denying the motion for summary judgment of defendant, UNIVISION. The facts before this Court reflect that 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 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 created conflict with several opinions all of which recognize and hold that an architect/consulting engineering firm which contracts with the owner (as opposed to contracting with the general contractor and/or employer, etc.) is not possessed of compensation immunity and is amenable to a third party tort suit. Stated another way (as applicable under the facts and circumstances of this case), CROWN (the consulting firm) was either negligent or was not negligent. Likewise, UNIVISION (the OWNER) was either negligent or not negligent. Neither one was entitled to assert, under the present facts, the defense of workers' compensation immunity! In this case the trial court correctly denied the defendants' motion for summary final judgment. Reversal by the Third District Court of Appeal was legally erroneous. UNIVISION was neither a "contractor" nor an "employer," and RAMOS was not an "employee" of UNIVISION in the ordinary sense that these words are used. Because UNIVISION was not a contractor or the employer of RAMOS and did not otherwise have any statutory duty to provide workers' compensation coverage, UNIVISION was not the statutory employer of RAMOS and did not enjoy the immunity provided by Section 440.11 from RAMOS' tort suit. Because this is obviously the law in the State of Florida and further because the same analysis can be made with respect to CROWN (the consulting engineer), it must

again be concluded that the trial court was correct in its ruling.

Even if one were to ignore the fact that there are legal distinctions between the three defendants, it is clear that under the facts of this case, properly viewed, neither UNIVISION nor CROWN were entitled to workers' compensation immunity as a matter of law.

First, and foremost, it must be emphasized that the record before this Court contains testimony that although normal procedures would have been for all to look to the consultant for purposes of "change," in this case the OWNER desired (and retained) full control of all the changes (R. 113). The incident with the January 19, 1990, collapse (the first collapse) was reported to Patterson (the OWNER'S agent) immediately after it occurrred (R. 117). Patterson claimed he told the persons in charge to investigate and to correct! The record further reflects, however, that he did not recall at all if he followed up (R. 118, 119). Patterson stated it was Fortier's obligation (the on-site "eyes and ears" of the owner) to follow up and make sure the problem was corrected and to report the problem if it was not corrected (R. 118, 119). Fortier worked for Patterson. Both worked for CROWN! CROWN was the OWNER'S agent!

Under the contract between the OWNER and the CONTRACTOR, the OWNER reserved the right not only to stop any and all work but additionally retained the right to suspend the work (R. 281,

282). Patterson had the authority to oversee and resolve issues within the contract but not to authorize change orders (this was reserved to the OWNER). (R. 113) Fortier testified it was up to him to make sure that the preceding work was done correctly before any further work proceeded (R. 175). If something needed an immediate fix, Fortier made sure it was done. Fortier had the right to make any obvious immediate safety changes necessary. The plaintiffs would suggest to this Court genuine issues of material fact abound throughout the subject record concerning the OWNER'S participation and direction on this project. Indeed, one need look no further than the affidavit of Daniel Summa to establish the correctness of this assertion.

The facts and circumstances of this case properly viewed bring this case within well settled principles of Florida jurisprudence.

UNIVISION is responsible for the conduct of its agents, servants and/or employees especially where, as here, it specifically reserved control over changes and safety. Because the matters of control, direction, negligence and credibility are all matters of fact for the trier of fact, it must be concluded that the trial court was correct in denying the defendants' motion for summary judgment. Because the Third District reversed the trial court utilizing as justification therefor both inapplicable and legally incorrect principles of Florida jurisprudence, the opinion should be quashed and harmony restored to the District Courts.

V.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE DEFENDANTS WERE NOT ENTITLED TO WORKERS' COMPENSATION IMMUNITY AS A MATTER OF LAW.

The plaintiffs would suggest to this Court that the trial court was correct in determining that the defendants were not entitled to workers' compensation immunity as a matter of law. As a result, the opinion of the Third District should be quashed, the order denying defendants' motion for summary final judgment should be affirmed and this case should be remanded for a jury trial on all factual issues.

A.

THE OBVIOUS (AND WELL SETTLED) CONTRACTUAL DUTY [THE CONTRACT BETWEEN UNIVISION (OWNER) AND CROWN (CONSULTANT)]

This Court, in the case of CONKLIN v. COHEN, 287 So. 2d 56 (Fla. 1973), held that where an engineer/consultant is employed by the project's owner and is an independent contractor, said consultant will be held liable for damages [sustained by persons lawfully on the premises] as a result of its negligence as defined by the standards analogous to architects:

> "Assuming the engineers are found to be working as independent contractors they will be held liable for damages suffered as a result of their negligence, as defined by standards analogous to those applied to architects in Geer v. Bennett. . ." 287 So. 2d at p. 62.

There is, of course, no contention here (nor can there be) that CROWN was anything else but an independent contractor performing services for the owner, UNIVISION/HALLMARK.

This Court's (approval of and) reference to "GEER v. BENNETT" was, of course, to the opinion in GEER v. BENNETT, 237 So. 2d 311 (Fla.App.4th 1970), wherein the Court stated the rules of law as follows:

* * *

> "[An engineer/consultant--See: CONKLIN v. COHEN, supra]. . .may be liable for negligence in failing to exercise the ordinary skill of his profession, which results in the erection of an unsafe structure whereby anybody lawfully on the premises is injured. Possible liability for negligence resulting in personal injuries may be based upon <u>their supervisory activities</u>, or upon defects in the plans <u>or both</u>. <u>Their possible liability is not limited to the owner who employed them</u>. Privity of contract is not a prerequisite to liability. <u>They are under a duty to exercise such reasonable care, technical skill and ability, and diligence, as are ordinarily required</u> (of architects) <u>in the course of</u> their plans, inspections and SUPERVISIONS DURING CONSTRUCTION <u>for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so</u>." 237 So. 2d at p. 316.

* * *

After discussing the general rules of law applicable to architects, contractors, engineers, etc., the Court "zeroed in" on those rules of law relevant to the facts and circumstances (both here and) there pertinent:

* * *

> "An. . .engineer has also been defined as one whose special business it is to design buildings, fix the thickness of their walls, the supports necessary for the maintenance of them in their proper position, and do all other things in the line of this profession for the guidance of <u>builders</u> in the erection of buildings. . .
>
> * * *
>
> "Decisions of other states make it clear that an architect is not under a <u>duty</u> to supervise construction (Citations omitted). However, architects do supervise as a matter of common practice (Citations omitted) and such supervision is properly within the scope of their professional activities. <u>When</u>

architects do undertake supervision of construction in addition to the preparation of plans, they generally are compensated separately or additionally, and if they perform their supervisory duties in a negligent fashion, their liability therefrom IS SEPARATE AND DISTINCT FROM THE LIABILITY OF THE PARTY WHO NEGLIGENTLY PERFORMS THE ACTUAL BUILDING PROCESS (Citations omitted)." 237 So. 2d at pp. 316 and 317.

* * *

In accord: MOORE v. PRC ENGINEERING, INC., 565 So. 2d 817 (Fla.App.4th 1990):

* * *

"PRC and its agent, as consulting engineer, may be liable for negligence in supervising construction resulting in personal injuries notwithstanding the absence of privity between the engineer and the injured person (Citations omitted). The trial court, therefore, erred in finding that the appellees were present at the job site merely to insure that the owner received what was contracted for and consequently owed no legal duty to the appellants. Consequently, there certainly are material issues of fact as to whether PRC. . .breached the duties imposed upon them under the terms of the contract. . ." 565 So. 2d at p. 820.

* * *

B.

THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment the defendants urged that each was entitled to workers' compensation immunity under the same analysis, to-wit:

* * *

". . .An owner of a piece of property who hires a general contractor is considered a statutory employer under the provisions of Section 440.10 and 440.11, Florida Statutes, and is hence immune from tort liability as a result of any injuries sustained by an employee of a subcontractor working on the construction project (Citations omitted). The owner of land which enters into a general contract for construction purposes is entitled to immunity from tort liability for injuries to employees of subcontractors unless exceptional circumstances can be

established (Citation omitted). One of these exceptional circumstances is where the owner of the property so meddles with the job being performed that it is said that he assumes the responsibility for directing the work (citations omitted). The second exception is where the owner negligently creates a dangerous condition, or negligently approves the existence of a dangerous condition causing the employee's injury. (Citations omitted)." (R. 254, 255).

* * *

1. CROWN (THE CONSULTANT) AND HALLMARK

Assuming the legal correctness of the language underscored above, it is still clear from the undisputed facts of this case that neither CROWN nor HALLMARK fall within the above. Plaintiffs reach this conclusion without ever touching upon the "exceptions" to the above. CROWN contracted directly with UNIVISION for purposes of providing on-site supervision of the project. CROWN, an independent contractor, did not "sub" out any part of the job, CROWN assumed its own control over the project and in no wise can be either "an owner" or a "contractor" privileged to claim the defense of workers compensation immunity--much less receive judgment on the defense as a matter of law! As noted by this Court in CONKLIN v. COHEN, 287 So. 2d at p. 62:

* * *

". . .If the engineers' contract is with the employer, and the engineers perform services more properly described as being for the employer than for the owner, then the engineers come under the employer's umbrella of immunity from third party tort suit. CONVERSELY, IF THE ENGINEERS WORK AS INDEPENDENT CONTRACTORS, THEY ARE ENTITLED TO NO SUCH IMMUNITY. Assuming the engineers are found to be working as independent contractors, they will be held liable for damages suffered as a result of their negligence, as defined by standards analogous to those

applied to architects in GEER v. BENNETT. . ." 287 So. 2d at p. 62.

* * *

In the instant cause CROWN independently contracted with the owner. Under the rules cited above there is no compensation immunity available to CROWN at all! Because there is no immunity available to CROWN at all, the Third District should not have held that the trial court erred in denying CROWN's motion for summary judgment.

2. UNIVISION (THE OWNER) AND CROWN-- NO "VICARIOUS" COMPENSATION IMMUNITY

In the instant cause 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 created conflict with the holdings in CONKLIN v. COHEN, supra; GEER v. BENNETT, supra; and MOORE v. PRC ENGINEERING, INC., supra, 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 amenable to a third party tort suit. See: CONKLIN v. COHEN, supra, 287 So. 2d at page 60. Stated another way (as applicable under the facts and circumstances of this case), CROWN (the consulting firm) was

either negligent or was not negligent. Likewise, UNIVISION (the owner) was either negligent or not negligent. Neither one was entitled to assert, under the present facts, the defense of workers' compensation immunity! In this case the trial court correctly denied the defendants' motion for summary final judgment. The Court recognized that the defense was not available to either defendant. Yet, 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."

The above stated Third District statement cited as authority the Third District's prior decision in CROON v. QUAYSIDE ASSOCIATES, LTD., 464 So. 2d 178 (Fla. App. 3d 1985). However, when the Third District decided CROON, it had to be with the understanding that it was deciding that case on its facts, 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 which developed under the facts and circumstances of that case, to wit: the owner was forced to step in and act in order to "save" its project, the legal fiction of "statutory employer" became a necessity (or, perhaps, more accurately a "reality") to overcome the liability which would otherwise have obtained against QUAYSIDE which had become a

prohibited "owner/general" under the unique circumstances presented therein. See: CONKLIN v. COHEN, supra.

C.

"CROON'--AN EQUITABLE EXCEPTION TO A WELL SETTLED RULE

It should have become readily apparent that CROON was never intended to apply past its own facts. Yet, somehow, it has drifted into the realm of "general application." It is certainly clear that the only place 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." In HOGAN v. DEERFIELD 21 CORPORATION, 605 So. 2d 979 (Fla. App. 4th 1992), the Court reversed a summary judgment entered in favor of DEERFIELD 21 CORPORATION, a property owner whom the plaintiff sued in negligence for injuries he sustained while working on a remodeling project on the property. The trial court held that the property owner was HOGAN'S statutory employer and entitled to immunity from suit pursuant to Section 440.11 of the Workers' Compensation Act. The Fourth District, in reviewing Florida law on the subject matter, held:

> "The Florida Supreme Court has long held that in ordinary circumstances an employee of a contractor hired to work on the owner's premises may sue the owner for negligence (citations omitted).
>
> "In Jones v. Florida Power Corp., 72 So. 2d 285 (Fla. 1954), the Court held that Florida Power Corporation was not entitled to immunity as an 'employer' or 'contractor' from suit by an employee of a contractor hired by the corporation to construct improvements at the corporation's plant. The Court explained that it was only in a situation where the

owner assumed the role of 'contractor' and 'employer' and the concomitant duty to provide workers' compensation benefits, that it would be entitled to immunity..." 605 So. 2d at page 981.

The Fourth District in HOGAN rejected DEERFIELD 21'S reliance on CROON v. QUAYSIDE and in so doing explained:

"In Croon, an injured employee of a sub-contractor who fell into a hole at a construction site brought an action against Quayside Associates, Ltd., who originally was the owner and developer, and subsequently assumed the duties of general contractor. Quayside had originally contracted with the general contractor who, in turn, had contracted with the sub-contractor who employed the plaintiff, Croon. When the general contractor was discharged from the job, all of its contracts and sub-contracts were assigned to QUAYSIDE who took over as general contractor. Id. at 179. Croon was injured after this assignment, and brought suit against Quayside.

"On appeal, the Third District found that Quayside enjoyed immunity from suit since it had assumed the general contractor's statutory liability for securing compensation coverage by virtue of the assignments. This is a clear example of how an owner can assume the status of statutory employer of another company's employee. However, the Court went on to express the view that Quayside had been a statutory employer even before assuming the duties of general contractor:

> "'If the original general contractor, Apgar and Markham, remained on the job through the date on which Croon was injured, January 23, 1981, the suit against Quayside Associates would have been precluded by the immunity doctrine of the workers' compensation law. An owner hiring a general contractor is considered a statutory employer under the terms of the statute (citations omitted). Croon, 464 So. 2d at 180'

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

The Fourth District recognized that DEERFIELD 21 was not a "contractor" or "employer" and HOGAN was not an "employee" of DEERFIELD 21, in the ordinary sense that these words are used. The Fourth District emphasized "more importantly," because DEERFIELD 21 was neither a contractor nor the employer of HOGAN, and did not otherwise have any statutory duty to provide workers' compensation coverage. Hence, DEERFIELD 21 was not the statutory employer of HOGAN and did not enjoy the immunity provided by Section 440.11, Florida Statutes (1988) from HOGAN'S tort suit. Such is the instant cause.

D.

FACTS AND LAW REVIEWED

In this case UNIVISION (the owner) was neither a "contractor" nor "employer," and RAMOS was not an "employee" of UNIVISION in the ordinary sense that these words are used. More importantly, because UNIVISION was not a contractor or the employer of RAMOS and did not otherwise have any statutory duty to provide workers' compensation coverage, UNIVISION was not the statutory employer of RAMOS and did not enjoy the immunity provided by Section 440.11 from RAMOS' tort suit. Because this is obviously the law in the State of Florida and further because the same analysis can be made with respect to Crown Center Redevelopment Corporation (the consulting engineer), it is clear that the trial court was correct in its ruling. The Third District's "expansion" of the "holding" in CROON is simply wrong.

Likewise, the opinion rendered by the Third District cannot be justified upon authority of either CITY OF MIAMI v. PEREZ, 509 So. 2d 343 (Fla. App. 3d 1987) or SKOW v. DEPARTMENT OF TRANSPORTATION, 468 So. 2d 422 (Fla. App. 1st 1985).

In CITY OF MIAMI v. PEREZ, supra, the CITY (the owner) utilized an on-site inspector (Poms) to observe the progress of the work. This on-site inspector testified that he did not have any responsibility for supervising or inspecting any safety activities of the contractor. He also testified that he had no authority on the job to direct or influence any workers. He also testified that he did not believe his contract gave him the power to stop the job in that he would have to get in touch with the architect/consultant and then get his authorization before he could take such an extreme action. This was because the contract stated that he was working under the supervision of the architect/consultant. The facts of CITY OF MIAMI v. PEREZ are not found here. Here, Fortier was the owner's "agent" and was directly responsible to the owner because he was an employee of the consultant hired specifically to do that which the Third District found in CITY OF MIAMI v. PEREZ that Poms was not hired to do!

Lastly, comment should be made concerning SKOW v. DEPARTMENT OF TRANSPORTATION, supra. In that case an employee of the general contractor constructing a bridge for the DOT was injured when he was working without a safety belt and fell. He sued the DOT claiming that it had assumed the detailed control

over the work and failed to enforce safety regulations. The First District affirmed a summary judgment for the DOT because the undisputed facts reflected that the DOT only participated to the extent necessary to ascertain the results of the work, and not to control the method of performance. The facts and circumstances of the instant cause are neither undisputed nor consistent with the facts and circumstances found in SKOW, supra.

The plaintiffs have come full circle. The plaintiffs do not quarrel with CROON v. QUAYSIDE under the circumstances presented therein. However, where, as here, the Third District has placed the proverbial square peg in a round hole and has misapplied precedent, its decision should be quashed.

E.

FACTUAL CONFLICTS--ASSUMING NO DISTINCTIONS

Assuming, however, that one chooses to ignore the obvious mandates of COHEN v. CONKLIN, supra, and/or chooses to ignore the obvious distinctions that exist between the three defendants (or, perhaps, it would be more appropriate to suggest that if one chooses to ignore there are distinctions between the three defendants), it is clear that under the facts [properly viewed, See: HOLL v. TALCOTT, 191 So. 2d 40 (Fla. 1966)], neither UNIVISION (the owner) nor CROWN (the consultant) were entitled to workers' compensation immunity as a matter of law.

First, and foremost, it should be emphasized that the record before this Court contains testimony that although normal

procedures would have been for all to look to the consultant for purposes of "change", in this case the owner desired (and retained) full control of all the changes (R. 113). The incident with the January 1990 collapse was reported to Patterson (owner's agent) immediately after it occurred (R. 117). Patterson claimed he told the persons in charge to investigate and to correct. The record further reflects, however, that he did not recall at all if he followed up (R. 118, 119). Patterson stated it was Fortier's obligation (the on-site "eyes and ears" of the owner) to follow up and make sure the problem was corrected and to report the problem if it was not corrected (R. 118, 119). Fortier worked for Patterson. Both worked for CROWN! CROWN was the owner's agent!

In this regard it should be remembered that Patterson had the authority to oversee and resolve issues within the contract but not to authorize change orders (this was reserved to the owner). (R. 113). Under the contract between the owner and the contractor (Austin), the owner reserved the right not only to stop any and all work but additionally retained the right to suspend the work (R. 281, 282). In point of fact, Fortier testified it was up to him--the (preceding) work had to be done correctly--before any (further) work proceeded (R. 175). If something needed an immediate fix Fortier made sure it was done (R. 176). He had the right to make any obvious immediate safety changes necessary (R. 222). That genuine issues of material fact abound throughout the subject record concerning the owner's

participation and direction on this project cannot be disputed. One need look no further than the affidavit of Daniel Summa to establish this fact:

> "10. That Robert Fortier participated directly with the undersigned and influenced the manner in which the work was performed and in particular, reviewed all work as it was being performed, made comments upon the procedure for the work performance, directed and reviewed the procedures that were being used by the erection crews and otherwise acted in the same capacity and with the same control as if he were employed by the general contractor, Austin Company." (R. 427, 428).

The facts and circumstances of this case properly viewed, See: HOLL v. TALCOTT, supra, bring this case within the rules of law enunciated by this Court in CONKLIN v. COHEN, supra. Here CROWN contracted directly with the owner. CROWN is entitled to no workers compensation immunity at all! UNIVISION, as owner, is responsible for the conduct of its agents, servants and/or employees especially where, as here, it specifically reserved control over changes and safety. Because the matters of control, direction, negligence and credibility are all matters of fact for the trier of fact it must be concluded that the trial court was correct in denying the defendants' motion for summary judgment. Because the Third District reversed the trial court utilizing as justification therefor both inapplicable and legally incorrect principles of Florida jurisprudence, the opinion should be quashed and harmony restored to the District Courts.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiffs would respectfully urge this Honorable Court to quash the decision of the District Court of Appeal, Third District, affirm the trial court's order which denied the defendants' motion for summary final judgment and remand this cause for a jury trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief and Appendix of Petitioners on the Merits was mailed to the following counsel of record this 12th day of December, 1994.

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APPENDIX

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claims which are alleged. 573 So.2d at 837. This not only avoids unfair surprise, but also may influence the parties' decisions regarding the handling of the litigation and the desirability of settlement. *Id.* For those reasons, the supreme court held "that a claim for attorney's fees, whether based on statute or contract, must be pled." *Id.* This necessarily means that the requesting party must plead the statutory or contractual basis on which that party seeks attorney's fees. Two other districts have already so held. *See Carman v. Gilbert*, 615 So.2d 701, 704 (Fla. 2d DCA 1992), *review granted*, 626 So.2d 203 (Fla.1993);[3] *United Pacific Ins. Co. v. Berryhill*, 620 So.2d 1077, 1079 (Fla. 5th DCA 1993).

Although the general claim for attorney's fees in this case was insufficiently pled, the general principles governing amendments to pleadings would of course be applicable here. Consequently, if plaintiff on remand requests leave to amend to correct this pleading deficiency, the question of leave to amend is addressed to the sound discretion of the trial court.[4]

The summary judgment is reversed and the cause remanded for further proceedings consistent herewith.

1

Leonardo MORALES, Appellant,

v.

The STATE of Florida, Appellee.

No. 93–1520.

District Court of Appeal of Florida, Third District.

June 7, 1994.

Rehearing Denied July 12, 1994.

An appeal from the Circuit Court for Dade County; Martin Greenbaum, Judge.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Daisy Y. Guell, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and HUBBART and NESBITT, JJ.

PER CURIAM.

Affirmed. *Morales v. State*, 613 So.2d 922 (Fla. 3d DCA), *review denied*, 623 So.2d 494 (Fla.1993).

2

UNIVISION HOLDINGS, INC., et al., Appellants,

v.

Joseph E. RAMOS, et al., Appellees.

No. 93–2055.

District Court of Appeal of Florida, Third District.

June 7, 1994.

Employee of subcontractor, injured on job, brought suit against owner of building and owner's representative. The Circuit Court, Dade County, Herbert M. Klein, J., denied owner's motion for summary judgment and appeal was taken. The District Court of Appeal held that: (1) owner was

3. The *Carman* decision certified conflict with this district on a different point of law than the point involved here.

4. Although not raised by the parties, the better pleading practice would be for plaintiff to assert the claim against the surety company in a separate count setting forth the plaintiff's claim under the bond, instead of its treatment as an element within the "Wherefore" clause.

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statutory employer of suing employee, entitled to benefits of workers' compensation exclusivity provision, and (2) owner's hiring of representative, to enforce workplace safety rules, did not alter result as to owner or representative.

Reversed and remanded with directions.

1. Workers' Compensation ⇐126, 2084

Property owner who hires general contractor is considered statutory employer and is generally entitled to workers' compensation immunity from suit by injured worker. West's F.S.A. § 440.11.

2. Workers' Compensation ⇐2084

Owner who would otherwise be deemed statutory employer of injured employee of independent contractor, entitled to benefits of workers compensation exclusivity, may be held liable to employee if owner interferes with job to extent of assuming detailed direction of it, becoming master of independent contractor's employees, or if owner has acted in creating or approving dangerous condition resulting in injury or death to employee. West's F.S.A. § 440.11.

3. Workers' Compensation ⇐126

Owner of building under construction was statutory employer of subcontractor's employee, who was injured on job, and workers compensation exclusivity barred suit by employee against owner; there was no evidence that owner had been involved in construction activities, so as to alter general rule that owner was entitled to benefits of workers compensation exclusivity. West's F.S.A. § 440.11.

4. Workers' Compensation ⇐126, 2084

Presence of owner's representative, on construction site to observe progress of work and enforce contractual provisions concerning workplace safety, did not render representative or owner liable to suit brought by injured subcontractors by subcontractors injured employee; workers' compensation remained exclusive remedy. West's F.S.A. § 440.11.

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

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

Before SCHWARTZ, C.J., and 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 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.

[1–3] 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

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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.

[4] 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

James WINKELMAN, Appellant,

v.

ZURICH AMERICAN INSURANCE COMPANY, Domino's Pizza, Inc., and Domino's Pizza of Florida, Inc., Appellees.

Nos. 93–42, 94–373.

District Court of Appeal of Florida, Third District.

June 7, 1994.

Appeals from the Circuit Court for Dade County; Edward S. Klein and Sam Silver, Judges.

Perse & Ginsberg and Todd Schwartz; Dunn & Johnson, Miami, for appellant.

Waldman, Feluren & Ferrer and Alex Ferrer, North Miami Beach, Wiederhold, Moses, Bulfin & Rubin, Lawrence I. Bass and John Wiederhold, West Palm Beach, for appellees.

Before BASKIN, JORGENSON and GREEN, JJ.

PER CURIAM.

Affirmed. *Florida Farm Bureau Casualty Co. v. Hurtado*, 587 So.2d 1314 (Fla.1991).

2

Lydell C. ROGERS, Appellant,

v.

STATE of Florida, Appellee.

No. 93–2696.

District Court of Appeal of Florida, First District.

June 8, 1994.

Defendant appealed from order of the Circuit Court, Alachua County, Nath C. Doughtie, J., which denied post-convictions relief. The District Court of Appeal held that where record on appeal contained no attachments to support recitations in order, remand was required.

Affirmed in part and reversed and remanded in part.

Criminal Law ⇐1181.5(2)

Although order denying post-conviction relief recited that documents were attached,

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

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