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.
_____/

REPLY BRIEF OF PETITIONERS

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and
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TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

In this reply brief of petitioners, 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 which accompanied the petitioners' main brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

REPLY ARGUMENT

A.

At pages 27 and 28 of their brief, the defendants have distilled the issues herein involved, agreeing (in essence) with the plaintiffs that the Third District has gone too far in blindly adhering to the "CROON doctrine" [see: CROON v. QUAYSIDE ASSOCIATES, LTD., 464 So. 2d 178 (Fla. App. 3d 1985)] irrespective of the facts of any given case. The defendants conclude:

> "While the District Court of Appeal in the case sub judice may have misapprehended earlier decisions from this Court as to the appropriateness of extending workers' compensation immunity to an owner who has hired a general contractor, the court was correct in its application of general premises liability law to the facts at Bar and in determining that summary judgment was appropriate in favor of the defendants. While this Court may wish to correct the misapprehended statement of law on the application of the workers' compensation immunity in the District Court's opinion, it is urged that the decision of the District Court is correct and should be affirmed

(citations omitted)." See: brief of defendants at pages 27 and 28.

To the extent that the defendants suggest this Court correct the Third District's long-standing misconception, the plaintiffs agree. What occurred in CROON was, as the District Court of Appeal, Fourth District, noted in HOGAN v. DEERFIELD 21 CORPORATION, 605 So. 2d 979 (Fla. App. 4th 1992):

> "...A clear example of how an owner can assume the status of statutory employer of another company's employee..." 605 So. 2d at page 982.

No such circumstance exists here. The plaintiffs would urge this Court to quash the opinion herein sought to be reviewed and, as to this issue, return uniformity, stability and consistency to the District Courts of Appeal. The trial court was correct in denying the defendants' motion for summary judgment on the issue of workers' compensation immunity. Simply stated, the defendants were not (and are not) privileged to assert the defense. Because the defendants were not privileged to assert the defense, the District Court of Appeal, Third District, should not have gone into any review of "exceptions" to a non-existent rule. For this reason alone, the trial court should be affirmed.

B.

Although the defendants now agree with the plaintiffs that the Third District "misapprehended" its "statement of law on the application of the workers' compensation immunity" (see: brief of defendants at page 28), the parties part company as to the ultimate appellate resolution of this matter. The defendants, after admitting the District Court analyzed the case

incorrectly, seek to have this Court affirm the District Court "on the facts" as to the result reached.

The plaintiffs on the other hand urge this Court to quash the District Court and remand the cause for further proceedings. Plaintiffs' request is two-fold.

1.

In the trial court the defendants moved for summary final judgment asserting, in essence, that they were "statutory employers." The trial court correctly denied the defendants' motion. The defendants were not "statutory employers." The defendants were not privileged to assert the defense. This case should return to the trial court for further development of the record pursuant to this Court's holding in CONKLIN v. COHEN, 287 So. 2d 56 (Fla. 1973):

> "To impose liability upon an owner who is not an employer as defined by the statute, one or more specific identifiable acts of negligence, i.e., acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee, must be established." 287 So. 2d at page 60.

In the District Court there was no "record development." The case was appealed to the District Court pursuant to the relatively recent amendment to the Florida Rules of Appellate Procedure which authorized non-final appeal from an order of the trial court that determined:

> "...that a party is not entitled to workers' compensation immunity as a matter of law..." See: Florida Rules of Appellate Procedure, Rule 9.130(a)(3)(C)(vi).

The defendants were not entitled to workers' compensation immunity as a matter of law. They were not entitled to raise the defense in the first place. Merits review at this juncture would be unfair to all concerned.

2.

Assuming merits review, the District Court was still incorrect as genuine issues of material fact existed.

First, and foremost, the applicable rule is as stated by this Court in CONKLIN v. COHEN, supra:

> "To impose liability upon an owner who is not an employer as defined by the statute, one or more specific identifiable acts of negligence, i.e., acts either negligently creating or negligently approving the dangerous condition resulting in the injury or death to the employee, must be established." 287 So. 2d at page 60.

In the instant cause there is, of record, the affidavit of Daniel Summa which establishes:

* * *

> "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."

* * *

The record further reflects that the incident with the January, 1990, collapse was reported (by Fortier) to Patterson (the 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-sight "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 a light most favorable to the plaintiffs, the parties moved against below, genuine issues of

material fact existed regarding the owner's negligence in approving the dangerous condition or in failing to correct a dangerous condition. The deposition of Summa (as well as the affidavit of Summa) establishes the existence of a dangerous situation. See: deposition of Summa at page 28.

In this case the record reflects that Fortier (an employee of defendant Crown, the consultant) was overseeing construction and was pulling inspections (see: deposition of Summa, at page 45). Fortier knew, because he was told by Summa, that the utilization of two bolts without lateral support constituted a dangerous condition (see: deposition of Summa at pages 27 and 28). Fortier advised Patterson of the situation. Nothing was done. "Fortier/Patterson/Crown" was the owner's agent. In a non-statutory employer situation, as here, (a) the owner can be liable for negligently approving a dangerous condition under the authority of CONKLIN v. COHEN, supra, and its progeny; (b) the consultant can be liable for negligence in failing to correct a dangerous condition under CONKLIN v. COHEN, supra, and GEER v. BENNETT, 237 So. 2d 311 (Fla. App. 4th 1970).

The plaintiffs need not plumb all possibilities. Examination of the defendants' brief reflects a statement of the case and facts which addresses solely the alleged non-existence of any evidence to establish that the owner (or the owner's agent) "meddled" in the day to day operations. Suffice it to say at this juncture that the defendants are merely drawing inferences favorable to them from some of the non-disputed

facts. However, in Florida, the movant for summary judgment must give to the non-moving party the benefit of all inferences and intendments of testimony. See: HOLL v. TALCOTT, 191 So. 2d 40 (Fla. 1966). Where, as here, the evidence can support a determination that the owner (Univision) by and through its agent (Crown) was overseeing construction and was pulling inspections, it cannot be said as a matter of fact either that the owner was not actively participating in the construction to the extent that it directly influenced the manner in which the work was performed or that the owner did not negligently approve the existence of a dangerous condition resulting in the injury complained of. The opinion of the District Court of Appeal, Third District, should be quashed and the order appealed affirmed in all respects.

III.

CONCLUSION

Based upon the foregoing reasons and citations of authority, as well as the defendants' admission that the District Court of Appeal has misapprehended precedent, 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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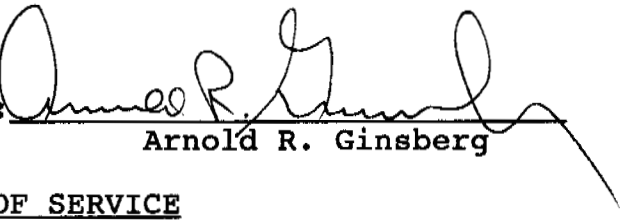
By: 
Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners was served upon the following counsel of record this 6th day of February:

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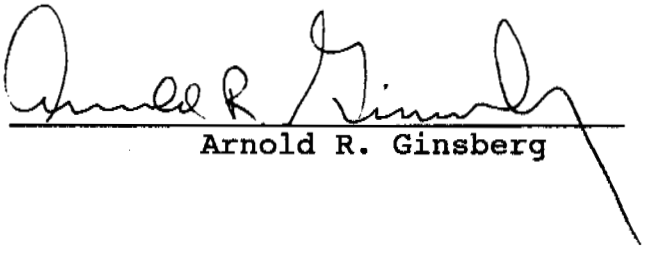
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