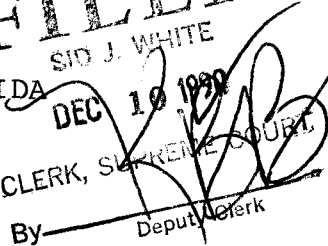


FILED

SID J. WHITE

DEC 10 1992

CLERK, SUPREME COURT

By  Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ANTHONY MANDICO,

Petitioner,

v.

TAOS CONSTRUCTION, INC.,

Respondent.

CASE #: 76,766

BRIEF AMICUS ON BEHALF OF
ACADEMY OF FLORIDA TRIAL LAWYERS
IN SUPPORT OF PETITIONER
REGARDING CERTIFIED QUESTION

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CERTIFIED QUESTION PRESENTED

MAY A GENERAL CONTRACTOR WHO PROVIDES WORKERS' COMPENSATION COVERAGE FOR AN INDEPENDENT CONTRACTOR BY DEDUCTING THE COVERAGE PREMIUMS FROM PAYMENTS DUE THAT INDEPENDENT CONTRACTOR, CLAIM IMMUNITY FROM THE INDEPENDENT CONTRACTOR'S CIVIL SUIT FOR PERSONAL INJURY UNDER THE WORKERS' COMPENSATION STATUTE WHERE THE INDEPENDENT CONTRACTOR CLAIMED AND RECOVERED WORKERS' COMPENSATION BENEFITS?

ARGUMENT

It is first suggested that the certified question in lieu of the word "provides" should more appropriately use terminology "arranges for," which terminology better reflects all that occurred.

Plaintiff is permitted to proceed with third party tort action, except as prohibited by statute. The liability for compensation is applicable to:

Every employer coming within the provisions of this chapter, including any brought within the chapter by waiver of exclusion or of exemption... S.440.10 F.S.

Exclusiveness of liability for said employer and any brought within the chapter by waiver of exclusion or of exemption is allowed unless that:

employer fails to secure payment of compensation, as required by this chapter... 440.11 (1) F.S.

It is not simply the obligation for workers' compensation benefits that immunizes the employer from third party suit. Rather, it is specifically provided that even where the employer has the obligation, but does not satisfy it by securing "payment of com-

compensation as required by this chapter" then a third party suit may be instituted against said employer. S.440.11 F.S.

The obligation of any employer coming within the provisions of this chapter, including any brought within the chapter by waiver of exclusion or of exemption is not satisfied under the workers' compensation law by requiring the injured worker to pay in whole or even in part for his own workers' compensation coverage. S.440.21 F.S. In fact, the provision further notes any employer making the deduction from pay for such purpose is guilty of a misdemeanor. S.440.21 F.S.

Rather, it is both the obligation and the meeting of that obligation under the workers' compensation law that triggers the employer's immunity. Employers Insurance of Wausau v. Abernathy, 442 So.2d 953 (Fla. 1983). It is parenthetically noted in the reverse situation where there is no obligation (nor permitted obligation by waiver), but a workers' compensation policy is secured and paid for by a third party that nevertheless said third party is not immunized from tort liability. Florida Power & Light Company v. Huwer, 508 So.2d 489 (Fla. 3rd DCA 1987).

Where the workers' compensation law is subject to divergent interpretation, then it is established that interpretation most favorable to the injured worker should be adopted in effectuating the purposes of the workers' compensation law. Florida Game & Fresh Water Fish Commission v. Driggers, 65 So.2d 723 (Fla. 1953). It is suggested the statutory terminology securing payment of compensation under this chapter in view of S.440.21

F.S. must be read as requiring payment by the employer as defined before said employer obtains the quid pro quo of immunity. At the least, that statutory terminology is subject to divergent interpretation and the interpretation most favorable to the injured worker should be adopted. Respondent contractor does not secure the payment of compensation under this chapter where the premiums are paid in whole or in part by Petitioner and Respondent accordingly is not entitled to immunity.

If claimant went out and bought a medical and disability income policy, no one would be confused that his doing so would then immunize the employer from a third party suit, simply because he had a separate policy for which he paid. So too, if that separate policy happened to be identical to a workers' compensation policy. However, what apparently confused the majority of the District Court is when the foregoing type transaction is arranged (not paid for) through the contractor.

Assuming the correctness of Respondents' assertion labelling Mandico as an independent contractor, there then is no dispute Respondent contractor had no obligation to him for workers' compensation benefits and he may maintain a common law suit against Respondent. Stevens v. International Builders of Florida, Inc., 207 So.2d 287 (Fla. 3rd DCA 1968), Cert. Den. International Builders of Florida, Inc. v. Stevens, 217 So.2d 101 (Fla. 1968). The facts therein do not reflect whether or not Stevens had secured for himself any outside insurance policies, maybe even including a workers' compensation policy, but whether he had or

had not would not preclude a third party suit. That is only precluded against an employer who (1) is obligated to secure and does secure, or (2) is permitted to waive exemption and does secure - a policy of workers' compensation for an employee. The key element of "securing" is hardly satisfied by "arranging for", but requires paying.

In proceedings below, Respondents refer to the case of Strickland v. Al Landers Dump Trucks, Inc., 170 So.2d 445 (Fla. 1964). This practitioner was involved, in the early days of his practice, with that case which involved the issue as to obligation by the insurance carrier to pay workers' compensation benefits where a premium had been paid therefore. The case simply held where one paid premiums and the insurance carrier accepted said premiums that there is coverage for that for which the premiums were paid. In other words, the insurance carrier cannot accept a premium, but when the event occurs, say sorry, we do not have to cover you, but will be good boys and give you back your premiums. The Strickland case involved in no way, shape, or form any question as to immunity from third party suit.

Respondents also discuss in the proceedings below the case of Allen v. Estate of Carman, 281 So.2d 317 (Fla. 1973). That case did involve an immunity issue. However, Respondents did not suggest in that case that Allen paid for his own workers' compensation premiums. Rather, his employer of less than three employees obtained a workers' compensation policy for the various individuals. The Court held where the employer secured (at the

employer's expense) workers' compensation policy to his employees, even though not required, this fell within provision allowing the employer to waive exemption and place himself within the purview of the act insofar as said employees were involved. It was accordingly held the employer, having secured compensation coverage to his employee, has the immunity benefits as well.

Unlike the Allen case, Respondent herein did not secure the payment of compensation under this chapter.

It is accordingly submitted the District Court erred in reversing the decision of the trial Judge.

CONCLUSION

Respondent contractor does not secure payment of compensation as required by this chapter where Petitioner is required to pay in whole or part therefore and Respondent contractor is accordingly not entitled to the concomitant immunity. Accordingly, the District Court erred in reversing the Order of the trial judge.

Respectfully submitted:

BY:


L. BARRY KEYFETZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of December, 1990 to: GARY M. FARMER, ESQUIRE, 888 South Andrews Avenue, Suite 801, Ft. Lauderdale, Florida 33316; CONROY, SIMBER & LEWIS, 2620 Hollywood Boulevard, Hollywood, Florida 33020.

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