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Workers' Compensation Immunity

Ernesto Vallejos v. Lan Cargo S.A., and Infinity Cargo Services, Inc., 38 Fla. L. Weekly D1360 (Fla. 3rd DCA June 19, 2013).

Ernesto Vallejos worked for Professional Aviation Management Inc. They were a subcontractor that supplied personnel to Lan Cargo. Infinity Cargo Services, Inc., was another subcontractor that supplied personnel. On the date of the accident, Mr. Vallejos was asked by an Infinity employee to take hoppers outside to a large dumpster which was not usually part of his job. While taking the hoppers out, he injured his shoulder, back and had four fingers amputated. He also suffered psychological injuries and was unable to return to work. He treated through workers' compensation and eventually settled his case with Professional and its carrier and signed a broad release.

Two years later, he filed against Lan and Infinity alleging negligence and gross negligence against each and an intentional tort against Lan. The trial court granted summary judgment in favor of the defendants. The reasoning was that the plaintiff elected the remedy afforded by workers' compensation and had not

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shown that a genuine issue of material fact existed to support a case against the defendants.

I. Workers' Compensation as a remedy.

The plaintiff argued that he did not express a conscious intent to elect workers' compensation as a remedy and his case did not reach a conclusion on its merits. Therefore, he argued that he did not choose workers' compensation as his remedy. The Court noted that these sorts of cases were divided into two groups. The first group of cases dealt with compensability where the injured party's status as an employee was at issue. The second is when the defendant claims that liability under an exception of the statute was either waived or resolved in a workers' compensation case. The Court noted that neither of those applied to the case at hand.

a. Compensability

The Court noted the claimant elected his remedy when he filed a Petition for Benefits, received payments and negotiated a settlement. Moreover, there was no question that he was injured during the scope of his employment. He signed a release that stated that the injury occurred while employed with the employer. He also admitted that his entitlement to workers' compensation benefits was not an issue in the workers' compensation case. His workers' compensation benefits were never denied. He received a total of \$267,279.84 including the lump sum settlement. The Court indicated that the defendants should not be held liable in a negligence action for the same injury already full compensated by Professional. The Court also stated that his release did not contain a clause stating that the release should not be construed as an election of remedies.

b. Right to sue under exceptions to the statute

The plaintiff attempted to argue that workers' compensation immunity does not apply at all if the workers' compensation case was not litigated to a conclusion on the merits or the plaintiff did not show a conscious intent to waive his remedies. He relied on the Jones v. Martin Electrics, Inc., 932 So.2d 1100, 1104 (Fla. 2006), decision, however, the Court noted that he misinterpreted the decision. The Court noted that Jones dealt

with waiving the right to pursue an action under an intentional tort theory. That decision only allowed him to pursue a civil action based upon an exception to the exclusivity of the workers' compensation statute because none of the claims were litigated in the workers' compensation case.

II. Gross negligence & Unrelated Works exceptions.

The Court then went on to find the trial court correctly granted summary judgment in favor of the defendants as to gross negligence and unrelated works because the gross negligence and unrelated works exceptions did not apply as a matter of law even if taken in the light most favorable to the plaintiff.

The Court stated that the plaintiff would have had to sue Robaina, the Infinity employee, to allege gross negligence as a matter of law. The Court also stated that even if he did, any negligence on his part was not imputed to Lan or Infinity because §440.11(1)(b)(2) expressly states that the exceptions apply only to fellow employees. Nothing in the statute indicated that his negligence was imputed to the employers.

III. No evidence Infinity was grossly negligent.

The Court then discussed that even if the facts were held in a light most favorable to the plaintiff, he could not prove that Infinity was grossly negligent under §440.10(1)(e)(2). A subcontractor that does not employ the plaintiff but is employed by the general contractor also enjoys immunity under the workers' compensation statute unless "the subcontractor's own gross negligence was...the major contributing cause of the injury." Gross negligence requires: 1) Circumstances constituting eminent or clear and present danger amounting to a more than normal or usual peril, 2) knowledge or awareness of the imminent danger on the part of the tortfeasor, and 3) an act or admission that evinces a conscious disregard of the consequences. Kline v. Rubio, 652 So.2d 964, 965-966 (Fla. 3rd DCA 1995). The Court stated summary judgment was appropriate because he did not present any evidence that a genuine issue of material fact existed as to either of the three elements.

IV. Lan's conduct did not rise to the level of an intentional tort.

There was no clear and convincing evidence that Lan was engaged in conduct that was virtually certain to result in injury. The Court stated the intentional tort standard was "very hard to meet because liability under §440.11 was intended to be the rarest of exceptions to the immunity granted to the employer." (Citing List Indus. v. Dalian, 107 So.3d 470, 473 (Fla. 4th DCA 2013)). The only evidence submitted by the plaintiff was an affidavit from an employee of the hopper manufacturer stating that safety parts and warning labels for the hopper were available for purchase. The Plaintiff's expert's only testimony was that Lan failed to maintain a safe workplace. The Court noted the possibility of injury does not satisfy the virtually certain standard. According to the List Indus. case, virtually certain meant that "a plaintiff must show that a given danger will result in an accident every - or almost every - time." 107 So.3d at 471.

WORKERS' COMPENSATION IMMUNITY

Terry Tsafatinos & Sigma TAF Management, Inc., v. Family Dollar Stores of Florida, Inc., 38 Fla. L. Weekly D1383 (Fla. 2nd DCA June 21, 2013).

I. Background

Family Dollar Stores of Florida (Family Dollar) leased its business from Terry Tsafatinos. On December 26, 2008, an employee of Family Dollar allegedly stepped on an uneven concrete floor in the backroom of the store and fell injuring his knee. Family Dollar then began providing workers' compensation benefits to the claimant. The claimant and his wife then filed a three count amended complaint against Mr. Tsafatinos and Sigma TAF Management, Inc., (Sigma) alleging an accident occurred during the course and scope of his employment, Mr. Tsafatinos owned the property and both he and Sigma negligently maintained the property by failing to adequately repair the floor in the backroom. Mr. Tsafatinos filed a third party complaint against Family Dollar for common law indemnification and for breach of contract arguing that he was

only the property owner and Family Dollar was supposed to maintain the premises.

The workers' compensation claimant and his wife objected to the filing of a third party complaint, arguing that the workers' compensation benefits paid by Family Dollar to the claimant acted as the exclusive remedy against Family Dollar, including any liability of Family Dollar to third parties. Moreover, because the plaintiff's claim did not fall under Family Dollar's insurance policy but under workers' compensation, it was the exclusive remedy against, and likewise was the exclusive liability of Family Dollar.

II. Workers' Compensation Immunity Discussion

The Court discussed whether Mr. Tsafatinos' third party complaint was barred by workers' compensation immunity. The Court looked at Sunspan Engineering & Construction Co., v. Spring-Lock Scaffolding C/o., 310 So.2d 4 (Fla. 1975). In Sunspan, the Florida Supreme Court held that the exclusive remedy provision of the workers' compensation law held it was unconstitutional as applied to a third party common law action for indemnification. They also noted it was unconstitutional to the extent it functions to immunize an employer from liability to a third party where the employer contracted to indemnify the third party for losses resulting from its negligence. City of Clearwater v. L.M. Duncan & Sons, Inc., 466 So.2d 116, 118 (Fla. 2nd DCA), affirmed 478 So.2d 816 (Fla. 1985).

DISCOVERY

Lacaretta Restaurant v. Engelds Zepeda, 38 Fla. L. Weekly D1385 (Fla. 1st DCA, June 24, 2013).

The employer/carrier petitioned for a writ of certiorari from a discovery Order entered by the JCC. The employer/carrier challenged the discoverability of Note A and Note B. They both were entries in the employer/carrier's internal communication/documentation system. The first note was made by the adjuster to memorialize a meeting with in-house counsel and the second note was made by in-house counsel herself. The employer/carrier asserted that both notes were protected by the attorney/client privilege and the work product privilege.

The Court noted, to obtain a writ of certiorari, a petition must show that (1) a departure from the essential requirements of the law was made, (2) resulting in material injury for the remainder of the case, (3) that cannot be corrected on post-judgment appeal. Citing Reeves v. Fleetwood Homes of Fla., Inc., 889 So.2d 812, 822 (Fla. 2004).

The Court found there was a legal error in the disclosure of both notes because both clearly constituted or memorialized communications from the attorney to the employer/carrier made in the rendition of legal services. Further, the error rose to the level of inherent illegality, which would result in a gross miscarriage of justice were the Order to stand, because it would have a chilling effect on communications between attorneys and clients. The Court sustained the claim of attorney/client privilege and did not reach or discuss the work product privilege.