IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY MANDICO,

Petitioner,

vs.

TAOS CONSTRUCTION, INC., a Florida corporation; WILLIE PHILMORE; and UNIVERSAL DRYWALL, INC. a Florida corporation,

Respondents,

_____/

NO. 76,766

FLORIDA BAR NO. 378755
376851

ON CERTIFIED QUESTIONS
OF GREAT PUBLIC IMPORTANCE
FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' ANSWER BRIEF

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PREFACE

Petitioner, Anthony Mandico, will be referred to as Petitioner or Mandico in this brief. Respondents, Taos Construction, Inc., and Willie Philmore, will be referred to as Respondents or by name. This brief shall respond to the arguments contained in Petitioner's Initial Brief as well as those in the Amicus Brief.

SPECIFIC AREAS OF DISAGREEMENT WITH PETITIONER'S STATEMENT OF THE CASE AND THE FACTS

On June 7, 1984, Anthony Mandico was working at the Deer Point construction project as an independent contractor for Taos Construction, Inc. Contrary to Petitioner's contention that "there is apparently a dispute as to whether plaintiff voluntarily acquiesced in the 7 percent deductions or not" (Petitioner's Initial Brief, p. 1), Respondents' position is that Mandico, as an independent contractor, entered into an written **agreement** that he would pay seven percent (7%) of his salary to Taos as a premium for the procurement of Worker's Compensation insurance. (A copy of this written agreement, dated March 16, 1984, is contained in Exhibit 1 of the Appendix hereto.) **According to the express terms of this contract, Mandico agreed that "[I]f I do not have a Workman's Compensation Insurance policy of my own, Seven percent (7%) of my gross weekly wages will be deducted for Workman's Compensation Insurance."**

In addition to this written agreement, Mandico testified that even after he knew that the premiums were deducted from his pay, he continued to work for Taos; although he thought it was unfair, "[w]hether they took it or not, I was going to work anyway." (Deposition of Anthony Mandico dated December 6, 1988, pp. 65-66) (Exhibit 2 of the Appendix hereto). Mandico had a **mutual agreement** with his employer, and in his own words, "the only thing I am saying, what he charged me for, I felt, maybe, he felt it was right, and maybe I felt it was wrong. I don't know. I don't know." (Deposition of

Anthony Mandico dated December 6, 1988, p. 112). Mandico further testified:

> Q At the time of this accident, you knew you were being charged for Worker's Comp they were getting for you?
>
> A I knew that from the first day I started working for them, that they were going to do that. (Deposition of Anthony Mandico dated December 6, 1988, p. 113).

Moreover, no one ever threatened that Mandico would have forfeited earned pay if he refused to sign the written agreement concerning the premium deduction. (Deposition of Anthony Mandico dated December 6, 1988, p. 123). Finally, Mandico had the option of electing not to work for Taos if he did not like this agreement. (Deposition of Anthony Mandico dated December 6, 1988, p. 135).

All and all, the undisputed evidence demonstrates that no one held a gun to Mandico's head and compelled him to sign the agreement allowing Taos to deduct seven percent (7%) of his pay for worker's compensation premiums. In any case, Taos procured a Workmen's Compensation and Employer's Liability Policy through Aetna Casualty & Surety Company, which provided coverage to Mandico.

In his Complaint, Mandico alleged that he sustained injuries while working at the construction site, due to the negligent and careless manner in which Taos, by and through its employee, Willie Philmore, disassembled scaffolding planks. Mandico further alleged that the Worker's Compensation Statute did not provide immunity to

Taos from this civil action because Mandico was an independent contractor from whose paycheck a premium for Workers' Compensation insurance was unilaterally extracted. The most crucial fact in this case, however, and one that Petitioner concedes, is that Mandico **"applied for and received benefits under the policy."** (Petitioner's Initial Brief, p. 1).

SUMMARY OF ARGUMENT

A general contractor, who provides worker's compensation coverage for an independent contractor by deducting the coverage premiums from payments due that independent contractor, is immune from the independent contractor's civil suit for personal injury under the worker's compensation statute where the independent contractor claimed and recovered worker's compensation benefits. Thus, the first question certified by the Fourth District Court of Appeal must be answered in the affirmative.

In voluntarily causing and accepting a worker's compensation insurance policy to be issued and written by the carrier covering Mandico, Taos' actions constituted a waiver of the exclusion of Mandico from the Act and operated to bring Mandico within its coverage and immunity provisions. Florida Statutes Section 440.11(1) provides that an employer's liability under the Act "shall be exclusive and in place of all other liability of such employer ... to the employee." Since Taos secured a worker's compensation policy covering Mandico at the time of his accident, Respondents have immunity as a matter of law from civil actions.

This Court has ruled that the Worker's Compensation Act permits an otherwise exempt employer such as Taos to waive its exemption and bring itself within protection of the Worker's Compensation Act to the same extent as if it had not been initially exempt. Hence, a person not otherwise considered a covered "employee", such as Mandico, but for whose benefit a contract of Worker's Compensation insurance has been secured, is subject to the

provisions of the Act by virtue of the acceptance of the policy by his employer and the writing of the same by the compensation carrier. In fact, the purpose of Section 440.04, Florida Statutes, is to empower an exempt employer who voluntarily assumed the obligations and privileges of the Act to thereby insulate itself from common law liability.

Petitioner's failure to even address the statutory immunity issue involved in the first certified question appears to be a concession that Respondents' analysis is correct. Further, Petitioner's sole argument that the Act is unconstitutional as applied to him is not properly before this Court since it is brought up for the first time herein, and in any case, this Court has previously rejected similar arguments.

Additionally, where an independent contractor, such as Mandico, has claimed and recovered worker's compensation benefits, the principles of estoppel provide immunity from a subsequent action at law against an employer, such as Taos, when that action is based on a theory that Mandico would not be entitled to worker's compensation. Florida courts have consistently held that an employee cannot take one position in order to take advantage of the benefits of worker's compensation, and then take a contradictory position in order to maintain a civil action against the employer outside of the Act. To permit Mandico to maintain an action at law against his employer (based on his status as an independent contractor), totally contradicting his earlier claim for compensation benefits, brings into question the integrity of the judicial system and would obliterate the

entire concept of the exclusiveness of remedy embodied in the Worker's Compensation Act. As a matter of public policy, such "double dipping" into the worker's compensation **and** liability coffers must be stopped.

Trial court orders, denying immunity from civil suit under the worker's compensation statute, may be reviewed by a writ of prohibition. Thus, the second question by the Fourth District must also be answered in the affirmative. Since Respondents are entitled to worker's compensation immunity, there is no subject matter jurisdiction in the trial court. Consequently, the remedy of prohibition is not only appropriate, but is essential.

In Winn-Lovett v. Murphree, 73 So.2d 287, 292 (Fla. 1954), this Court specifically determined that where a party, such as Mandico, is limited to his remedy under the Worker's Compensation Act, "the circuit court was without jurisdiction of the cause so the writ of prohibition must be ... granted." Petitioner's effort to distinguish Murphree fails, as does his effort to lump worker's compensation immunity with all other affirmative defenses. Succinctly put, the circuit court has no jurisdiction over Mandico's claim, which seeks to evade the exclusivity of the worker's compensation law, and only a writ of prohibition will preclude the circuit court from acting in excess of its jurisdiction.

ARGUMENT I

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

A. IN VOLUNTARILY CAUSING AND ACCEPTING A WORKER'S COMPENSATION INSURANCE POLICY TO BE ISSUED AND WRITTEN BY THE CARRIER COVERING MANDICO, TAOS' ACTIONS CONSTITUTED A WAIVER OF THE EXCLUSION OF MANDICO FROM THE ACT AND OPERATED TO BRING MANDICO WITHIN ITS COVERAGE AND IMMUNITY PROVISIONS.

Petitioner, Mandico, sued the Respondents, Taos Construction, Inc. and Willie Philmore, for injuries sustained while working at the Deer Point construction site, due to the alleged negligence of Respondents, in failing to properly disassemble a scaffolding on the construction site. However, the uncontroverted facts in the record demonstrate that Mandico was a covered person under the Workers' Compensation insurance policy procured by Taos. Therefore, the Respondents are entitled to the Workers' Compensation immunity provided for by Section 440.11(1), Florida Statutes, which precludes Mandico from maintaining this action. That statute provides:

> 1. **The liability of an employer... shall be exclusive and in place of all other liability of such employer** to any third party tortfeasor and **to the employee**...and anyone else otherwise entitled to recover damages from such employer at law..., except that if an employer fails to secure payment of compensation as required by this

> Chapter, an injured employee,...,may elect to claim compensation under this Chapter or to maintain an action at law...for damages on account of such injury. The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employee's business and the injured employee is entitled to receive benefits under this Chapter. (emphasis added.)

In accordance with Section 440.11(1), Florida Statutes, Taos secured a Workmen's Compensation and Employer's Liability policy, which was in full force and effect from January 28, 1984 to January 28, 1985, the period which covers Mandico's June 7, 1984 accident. Moreover, Mandico **claimed and received** Workers' Compensation benefits under this policy for his injuries. Therefore, as a matter of law, Respondents have entitlement to Workers' Compensation immunity from suits at law. In addition, Respondent Philmore, an employee of Taos, was acting in the furtherance of his employer's business at the time of the accident on June 7, 1984. Therefore, pursuant to Section 440.11(1), the same immunities from liability enjoyed by Taos also extend to Philmore.

Moreover, even though Mandico was an independent contractor, Taos and Philmore are entitled to the Workmen's Compensation immunity provided by Section 440.11, Florida Statutes, since Taos voluntarily issued and accepted a Workmen's Compensation insurance policy which covered Mandico, which was written by the insurance carrier. This constitutes a waiver of the exclusion of Mandico as an independent contractor from the Workmen's Compensation Act and operates so as to bring him within the coverage of the Act.

In Strickland v. Al Landers Dump Trucks, Inc., 170 So.2d 445 (Fla. 1964), this Court held that an **independent contractor** (like Mandico) who would ordinarily be excluded from coverage of the Workmen's Compensation Act was entitled to coverage where the employer voluntarily caused the policy covering the claim to be issued covering the claimant. Under the statutory waiver provision, the employer's acceptance of a carrier's writing of the policy constituted a waiver of the claimant's exclusion from the Act, and the immunity applies. Id. at 447. In Strickland, the claimant, the owner-driver of a dump truck, was a hauler with Al Landers Dump Trucks, Inc. at the time of his injury. Al Landers Dump Trucks, Inc. was an association of truckers in which the members paid an entrance fee and monthly dues presumably for the right to get on the working line. From the trucker's weekly gross earnings, Al Landers Dump Trucks deducted its commission, a percentage for automobile liability, and a **percentage for Workmen's Compensation insurance.**

The claimant filed a claim for compensation benefits which was denied by the Deputy Commissioner on the finding that the claimant was an independent contractor. This Court held that ordinarily the claimant's status as an independent contractor would exclude him from the provisions of the Workmen's Compensation Act, but since Al Landers Dump Trucks voluntarily caused a policy of Workmen's Compensation insurance to be issued covering the claimant, under the provisions of Section 440.04(3) [now Sec. 440.04(2)], Florida Statutes, the acceptance of the policy by Al Landers and the writing of it by the

carrier constituted a **waiver of the exclusion** of the claimant from the Act and operated to bring the claimant under its coverage.[1]

Mandico, like the claimant in Strickland, was an independent contractor who had a percentage of his salary deducted by his employer so that Workers' Compensation insurance could be procured for him. In both cases, a policy written by the insurance carrier was voluntarily secured and accepted by the employer, constituting a waiver of the independent contractor's exclusion from the Workers' Compensation Act, and operating to bring the independent contractor under coverage of the Act. The acceptance of the policy by Taos, and the writing of the policy by Aetna, waived any exclusion or exemption Mandico may have had as an independent contractor. This brought his claim under Chapter 440 through Sec. 440.10(1). Therefore, Taos is immune from civil action under Sec. 440.11. Rainwater v. Vikings Men's Hairstyling, 382 So.2d 1313 (Fla. 1st DCA 1980).[2]

In Allen v. Estate of Carman, 281 So.2d 317 (Fla. 1973), this Court cited the Strickland case to support its determination that Section 440.04(2), Florida Statutes, permitted an **otherwise exempt**

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[1]Despite the personal recollections about the meaning of the Strickland case by Amicus counsel (Amicus Brief p. 4), Respondents rely on the clear language and holding in the actual decision of this Court.

[2]The existence of the **statutory** immunity provisions is what distinguishes the instant case from the attempted analogies in Petitioner's Initial Brief at p. 9 and the Amicus Brief at p. 3 concerning a medical or disability income policy as a collateral source. Falling within the worker's compensation system actually creates immunity from suit and consequently cannot be lumped in the same category with other sources of recovery for which the legislature has not created similar immunity.

employer to waive his exemption and bring himself within protection of the Workmen's Compensation Act to the same extent as if he had not been initially exempt. This Court ruled that a person not otherwise considered a covered "employee", or whose services are not included in their definition of "employment", but for whose benefit a contract of Workmen's Compensation insurance has been secured, is subject to the provisions of the Chapter by virtue of the acceptance of the policy by his employer and the writing of the same by the compensation carrier. Id. at 322.

In Allen, this Court specifically determined that the purpose and effect of Section 440.04, Florida Statutes, was to empower an exempt employer who voluntarily assumed the obligations and privileges of the Workmen's Compensation Act to thereby **insulate himself** from common law liability pursuant to Section 440.11, Florida Statutes. Id. at 322. As in Strickland, Mandico signed a written agreement which reflected that Taos would deduct seven percent (7%) of his gross weekly wages for Workmen's Compensation insurance[3] and money was deducted from his weekly wages. Taos voluntarily caused a policy of Worker's Compensation insurance to be issued covering Mandico, and the acceptance of the policy by Taos and the writing of it by the carrier constituted a waiver of the exclusion of Mandico from the Act and operated to bring Mandico under the umbrella of the Act. Perhaps most significantly, Mandico actually **claimed and received** benefits

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[3]In the written March, 15, 1984 contract, Mandico agreed that "[I]f I do not have a "Workman's Compensation Insurance policy of my own, Seven percent (7%) of my gross weekly wages will be deducted for Workman's Compensation Insurance." (See Exhibit 1 of the Appendix hereto.)

from this policy of insurance. Therefore, Taos Construction, Inc. and its employee, Willie Philmore, are immune from the lawsuit brought by Mandico.

In his brief, Mandico argues Taos unilaterally sought to apply the Workers' Compensation act to Mandico, who was an independent contractor and was responsible for paying the premiums on the workers' compensation insurance, and thus Taos is not entitled to immunity under 440.11, Florida Statutes. However, Mandico has missed the point, because the Act specifically provides for the creation of such immunity. Sec. 440.04(2), Florida Statutes (1983) states:

> When any policy or contract of insurance specifically secures the benefits of this chapter to any person not included in the definition of "employee" or whose services are not included in the definition of "employment" or who is otherwise excluded or exempted from the operation of this chapter, **the acceptance of such policy or contract of insurance by the insured and the writing of same by the carrier shall constitute a waiver of such exclusion or exemption and an acceptance of the provisions of this chapter with respect to such person**, notwithstanding the provision of s. 440.05 with respect to notice. (emphasis added.)

In regard to the first question certified by the Fourth District Court of Appeals, concerning the substantive immunity issue, it appears that Petitioner has abandoned or ignored any argument concerning the statutory immunity provided in the Worker's Compensation Act (Petitioner's Initial Brief at pp. 7-10). Instead, Petitioner seems to be relying on the argument that the Worker's Compensation Act is unconstitutional as applied to him because he paid

the premium for the policy. (Petitioner's Initial Brief at 7-10).[4] However, as this Court explained in De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (Fla. 1989),

> **in harmony with article I, section 21 of the Florida Constitution [guaranteeing access to the courts]**, the legislature abolished the old tort system and replaced it with a state-mandated no-fault insurance system that achieved both of these goals. The needs of the workers and of industry simultaneously were met and balanced.

Thus, the Worker's Compensation Act and its exclusivity provisions are not violative of the constitutional guarantee of access to courts.

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[4]Petitioner never raised this issue before, and consequently is barred from making the argument for the first time herein.

B. WHERE AN INDEPENDENT CONTRACTOR HAS RETAINED AN ATTORNEY, FILED A WORKERS' COMPENSATION CLAIM, AND ACCEPTED WORKERS' COMPENSATION BENEFITS, THE PRINCIPLES OF ESTOPPEL PROVIDE IMMUNITY FROM A SUBSEQUENT ACTION AT LAW AGAINST AN EMPLOYER UNDER A THEORY THAT THE CLAIMANT WOULD NOT BE ENTITLED TO WORKER'S COMPENSATION.

Mandico filed a claim for workers' compensation and actually received and accepted benefits as an employee of Taos, retaining an attorney as early as 1985 or 1986 to pursue his claim for workers' compensation. Contradicting this position, Mandico subsequently claimed in this action at law that he was not an employee, but instead was an independent contractor. This reversal of positions cannot be permitted. When Mandico traded his tort remedies for a system of compensation without contest, he spared himself the cost, delay and uncertainty of a claim in litigation. Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363 (Fla. 1972). He elected his remedy and cannot now contradict his earlier claim by alleging that he is an independent contractor for the purposes of a civil action against his employer.

Florida courts have consistently held that an employee cannot take one position in order to take advantage of the benefits of workers' compensation, and then take a contradictory position in order to maintain a civil action against the employer outside of the Workers' Compensation Act. In Pearson v. Harris, 449 So.2d 339 (Fla. 1st DCA 1984), Pearson filed a claim for workers' compensation benefits, claiming the status of an employee in order to obtain benefits under the Workers' Compensation Act. Pearson later brought

an action against his employer claiming to be an independent contractor. The court held that the ordinary principles of estoppel would bar Pearson from first claiming to be an employee in order to receive workers' compensation benefits, and then later taking the contradictory position that he was an independent contractor in order to maintain a civil action against his employer. Id. at 343.

Like Pearson, Mandico has made a claim and has accepted benefits under the Workers' Compensation Act. Also, like Pearson, Mandico claimed to be an employee to receive these benefits, and then claimed to be an independent contractor in order to pursue a civil claim against his employer. Mandico has chosen his remedy by filing a claim, retaining an attorney to pursue that claim, and accepting benefits obtained by his attorney under workers' compensation, and is now estopped from maintaining a position in the civil action which is contradictory to the position which he took in order to receive benefits under Workers' Compensation Act. Matthews v. G. S. P. Corp., 354 So.2d 1243 (Fla. 1st DCA 1978); Chorak v. Naughton, 409 So.2d 35 (Fla. 2d DCA 1981); Ferguson v. Elna Electric, Inc., 421 So.2d 805 (Fla. 3d DCA 1982).

In Ferraro v. Marr, 490 50.2d 188 (Fla. 2d DCA 1986), the court stated:

> In any event, we think it is safe to say that under Florida law when an employee receives benefits as a result of consciously prosecuting a workers' compensation claim, he cannot later sue his employer upon a theory under which he would not be entitled to workers' compensation.

Id. at 812. Mandico would not have been entitled to workers' compensation benefits as an independent contractor. Therefore, he consciously sought benefits under the workers' compensation act as an **employee** of Taos, and then pursued a civil suit against Taos claiming to be an **independent contractor**, the very theory under which he would not have been entitled to the benefits under workers' compensation.

In Federated Mutual Implement and Hardware Insurance Co. v. Griffin, 237 So.2d 38 (Fla. 1st DCA 1970), the wife of the deceased first obtained a judgment against a co-employee by claiming that her husband was an employee. She then sought recovery against the insurance company claiming her husband was not an employee in an attempt to avoid a cross-employee exception in the policy. The defenses of the insurance company included the fact that the plaintiff received and accepted workers' compensation payments from the insurance company, and that she recovered judgment in the action against the co-employee based on the allegation that her husband died in the course of employment. In holding that the plaintiff was estopped from recovering from the insurance company, the court noted that

> [i]n the final analysis, the forgoing rule of estoppel is founded upon legal and equitable concepts of justice under the law, or perhaps on such popular expressions as "you can't blow both hot and cold at the same time" or "you can't have your cake and eat it, too." The quintessence, however of this estoppel rule is probably the integrity of our system of justice. Griffin at 38.

It is fully within the power of the legislature to provide for a workers' compensation system where "protracted litigation is superceded by an expeditious system of recovery." Mullarkey v. Florida Feed Mills, 268 So.2d 363, 366 (Fla. 1972). Mandico has chosen this system, thereby receiving compensation without cost, delay, or uncertainty. Id. at 366. To allow him to now sue his employer as an independent contractor, contradicting his earlier claim, would not only bring into question the integrity of the judicial system, but would defeat the entire concept of the exclusiveness of remedy embodied in the Workers' Compensation Act.

Mandico further claimed that Taos "unilaterally extracted" funds from him to make the insurance payments. (Petitioner's Initial Brief, p. 1). However, the uncontroverted evidence demonstrated that Mandico entered into an written **agreement** that he would pay seven percent (7%) of his pay to Taos as a premium for the procurement of Worker's Compensation insurance. In fact, Mandico testified that he knew about this agreement from the time he started working for Taos, and that no one threatened that he would have forfeited earned pay if he refused to sign the agreement concerning the premium deduction. Moreover, Mandico knew that he had the option of electing not to work for Taos if he did not like this agreement. Thus, in a word, Mandico **agreed** to the deal.

As a matter of law and logic, it does not matter whether Taos and Mandico agreed that 7% of his wages would be deducted for worker's compensation premiums, or whether Taos paid these funds out of other sources. Since dollars are fungible, Taos could have agreed

to pay Mandico less wages (93% of what was paid), with the remainder (7%) allocated for the premiums. The fact that Taos offered Mandico an opportunity to receive 7% more funds if he already had compensation coverage should not be used to punish Taos. Consequently, Petitioner's use of the term "unilaterally extracted" to describe his contract with Taos denigrates the entire concept of an independent **contractor**, who by definition must be able to **contract** to do work for someone.

ARGUMENT II

TRIAL COURT ORDERS, DENYING IMMUNITY FROM CIVIL SUIT UNDER THE WORKER'S COMPENSATION STATUTE, MAY BE REVIEWED BY A WRIT OF PROHIBITION.

The remedy of prohibition lies where a lower court is without jurisdiction or is attempting to act in excess of jurisdiction. English v. McCrary, 348 So.2d 293, 296 (Fla. 1977). In the case at bar there is a total absence of subject matter jurisdiction in the lower court as Taos is entitled to Workers' Compensation Immunity as provided by Sec. 440.11(1), Florida Statutes. Taos has no other appropriate and adequate legal remedy, with the only alternative being for the parties to proceed with a trial where the trial court has no jurisdiction over the subject matter.

In Winn-Lovett v. Murphree, 73 So.2d 287 (Fla. 1954), this Court specifically determined that where a party was limited to his remedy under the Worker's Compensation Act, **"THE CIRCUIT COURT WAS WITHOUT JURISDICTION OF THE CAUSE SO THE WRIT OF PROHIBITION MUST BE ... GRANTED".** Id. at 292. Initially, this Court considered the question whether or not the Workmen's Compensation Act, Fla. Stat. Sec. 440.01 et seq. provided the exclusive remedy for the injured minor to recover damages for his injury. Id. at 288. Relying on Section 440.11 of the Act, which provided that "[t]he liability of an employer prescribed in Sec. 440.10 shall be exclusive and in place of all other liability of such employer to the employee," this Court was forced to the conclusion that the remedy was limited to recovery under the Act. Id. at 289-290.

Since Mandico similarly is limited to his remedy under the Worker's Compensation Act, **the circuit court herein is without jurisdiction of the cause so that the writ of prohibition must be granted.** "The purpose of the Workmen's Compensation Act as defined by this and other courts supports the thesis of **exclusive coverage.**" Id. at 290. This Court explained that it

> cannot in the teeth of the express language of F.S. 440.01, F.S.A., hold that [an individual] is entitled to bring a suit a common law and also hold that [the individual] is entitled to the protection of the Workmen's Compensation Act. Such optional remedies are inconsistent with the express command of the statute. Such ambiguity as does exist must be resolved as the cases cited herein so hold in favor of the coverage of the Workmen's Compensation Act. Id. at 291.

Petitioner's attempt in the Initial Brief to distinguish Murphree is mere flummery. Petitioner states that "worker's comp claims are no longer heard in a quasi-judicial forum but are now instead heard by judges of compensation claims in the Division of Worker's Compensation of the Department of Labor and Employment Security." (Petitioner's Initial Brief, p. 4). "Therefore", according to Petitioner, "the essential premise of Murphree -- that the IRC was in effect the judicial tribunal to hear such claims -- has been entirely undone by the legislature." (Petitioner's Initial Brief at 4-5).[5]

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[5]Petitioner's statement regarding what he perceives to be the essential premise of Murphree is puzzling in light of the complete absence in the decision of any comment of the sort.

Unfortunately for Petitioner, however, any change in the judicial nature of the compensation courts is absolutely irrelevant to the effect of the Murphree decision. In no fashion was Murphree concerned with or based upon the nature of the **compensation** court. Rather, in Murphree this Court was concerned with the precise question in the case at bar: **whether the circuit court had jurisdiction to entertain an action at law when the claimant's exclusive remedy was limited by Florida Statutes to the Worker's Compensation Act?** The question in both cases is, of course, answerable only in the negative. Consequently, the only appropriate option herein, as in Murphree, is the issuance of a writ of prohibition.

Petitioner's contention that the worker's compensation immunity is no different than other affirmative defenses and "does not implicate any question of circuit court subject matter jurisdiction" (Petitioner's Initial Brief, p. 5), misses the entire point of the exclusivity of the Worker's Compensation Act and flies in the face of this Court's decision in Murphree. It is precisely because worker's compensation **immunity** is the very heart of the Act that it calls into play the jurisdiction of the circuit court. Again, "[t]he purpose of the Workmen's Compensation Act as defined by this and other courts supports the thesis of **exclusive coverage.**" Id. at 290.[6]

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[6]As this Court explained in De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (Fla. 1989),

> Florida's worker's compensation program was established for a twofold reason: (1) to see that workers in fact were rewarded for their industry by not being deprived of reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it

Petitioner's reliance on this Court's decision in Martin-Johnson Inc. v. Savage, 509 So.2d 1097 (Fla. 1987), is equally misplaced. In Savage, this Court concluded that appellate courts may not review by **certiorari** an interlocutory order denying a motion to dismiss or strike a claim for punitive damages. Id. at 1098. The decision did not involve an issue of the trial court's jurisdiction and had nothing to do with **prohibition**, and is therefore inapposite.

In Old Republic Insurance Company v. Whitworth, 442 So.2d 1078 (Fla. 3d DCA 1983), a workers' compensation insurance carrier petitioned for a writ prohibiting the circuit court judge from exercising jurisdiction over a suit brought against it by a workers' compensation claimant. The Third District Court of Appeal granted the writ of prohibition and held that the circuit court was without jurisdiction. Citing Murphree, the district court stated:

> It is well established that because the Workers' Compensation Act provides a comprehensive, exclusive and adequate administrative remedy for employees' work-related claims, the **circuit court is without jurisdiction** over an employee's action for...injuries covered by the Act. (emphasis added). Whitworth at 1079.

> virtually impossible for businesses to predict or insure for the cost of industrial accidents. See McLean v. Mundy, 81 So. 2d 501, 503 (Fla. 1955).
>
> Thus, in harmony with article I, section 21 of the Florida Constitution [guaranteeing access to the courts], the legislature abolished the old tort system and replaced it with a state-mandated no-fault insurance system that achieved both of these goals. The needs of the workers and of industry simultaneously were met and balanced.

Since, as explained above, the circuit has no jurisdiction over a claim, such as Mandico's, which seeks to evade the exclusivity of the worker's compensation law, only a writ of prohibition will adequately prevent the circuit court from acting in excess of its jurisdiction.

More recently, relying on Whitworth, the Eleventh Circuit in Connolly v. Maryland Casualty Company, 849 F.2d 525 (11th Cir. 1988), affirmed a dismissal of a complaint for lack of subject jurisdiction on the ground that the exclusive remedy for a Florida employee covered by worker's compensation insurance is found in the Florida Workers' Compensation Act. Consistent with Whitworth, the Eleventh Circuit found that the Act provided an exclusive remedy for work related claims, and that a court is **without jurisdiction** over a claim for additional damages for injuries covered by the Act.

Another very recent decision concerning a similar jurisdictional issue is Southeast Administrators, Inc. v. Moriarty, 16 FLW 116 (Fla. 4th DCA January 11, 1991). In that case, petitioners sought a writ of prohibition to prevent the circuit court from entertaining a lawsuit arising out of a failure to pay a worker's compensation claim. Based on Section 440.11(4), Florida Statutes (1989), which provided that "the liability of a carrier to an employee or to anyone entitled to bring suit in the name of the employee shall be as provided in this chapter, which shall be exclusive and in place of all other liability," the Fourth District ruled that "[a] circuit court is **without jurisdiction** over an action against a compensation carrier for injuries covered by the Worker's Compensation Act." Id. at 116. (Emphasis added). Since the claimant's exclusive remedy was

under the Act and the circuit court lacked subject matter jurisdiction, the writ of prohibition was granted.

Petitioner relies upon English v. McCrary, 348 So.2d 293 (Fla. 1977) and Southern Records & Tape Service v. Goldman, 502 So.2d 413 (Fla. 1987) in support of the proposition that Murphree does not apply to the case sub judice. On the contrary, neither English nor Goldman even involves worker's compensation immunity, yet both of these decisions do state, as does Murphree, that prohibition may be granted when a lower court is without jurisdiction to act.[7] That is precisely the scenario in the instant case, because the Workers' Compensation Act is Petitioner's exclusive remedy. Thus, a writ of prohibition is the only appropriate remedy to prevent the circuit court from acting without jurisdiction.

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[7]Petitioner's implication that the issue of the trial court's jurisdiction is closed once the initial pleading properly shows a basis for jurisdiction (Initial Brief, p. 6)is wrong, as it ignores the right of a defendant to demonstrate through the vehicle of summary judgment the trial judge's clear lack of jurisdiction in the matter.

CONCLUSION

Based on the argument and authorities contained herein, this Court should answer both questions certified by the Fourth District Court of Appeal in the affirmative.

Respectfully submitted,

NEIL ROSE, ESQUIRE

STEVEN J. CHACKMAN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of January, 1991, to: GARY M. FARMER, ESQUIRE, Counsel for Petitioner, 888 South Andrews Avenue, Suite 301, Fort Lauderdale, Florida 33316; and to L. BARRY KEYFETZ, ESQUIRE, 44 West Flagler Street, Suite 2400, Miami, Florida 33130.

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