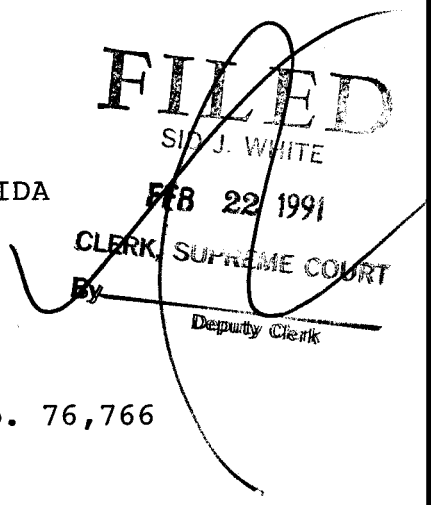

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY MANDICO,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 76,766
	)	
TAOS CONSTRUCTION INC., et al.,	)	
	)	
Respondents.	)	

* * *

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

* * *

PETITIONER'S REPLY BRIEF

* * *

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I.

Substituting ridicule ("Petitioner's attempt * * * to distinguish [Murphree] is mere flummery.") for rational analysis, respondent argues that institutional changes in the compensation mechanism are irrelevant to the use of prohibition to vindicate an assertion of workers comp exclusivity/immunity. Respondent could not be more mistaken.

As pointed out in our initial brief, when Murphree was decided, the old IRC was the only judicial forum clothed with jurisdiction to hear workers comp claims. Hence there was a sense in which the Murphree court could use prohibition to stop a circuit court from hearing a claim within workers comp exclusivity: the circuit court lacked subject matter jurisdiction because only the IRC had judicial subject matter jurisdiction to do so.

Today, as the lack of a meaningful response in respondent's brief implies, there is not even a pretense of a basis for that rationale.[1] These claims are now heard and considered by a single administrative agency, not even in a judicial forum --

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[1] The statutory basis for workers comp immunity/exclusivity is now § 440.11(1), Fla.Stat. (Supp.1990), which does not make any substantial change in this regard to the earlier versions of the same statute. The court should note that the statutory immunity/exclusivity is framed in terms of liability, not in terms of immunity from being sued. The statute thus does not say that the employer (or other person entitled to assert the immunity) cannot be sued in any other forum, or that no court has any jurisdiction to hear a claim to which the statutory immunity applies. Hence there is no textual base whatever in the statute for the idea that an affirmative defense of workers comp immunity takes a plaintiff's personal injury claim outside the general subject matter jurisdiction of the circuit court.

quasi or real. Administrative agencies are not the same thing as quasi-judicial tribunals. Compare Scholastic Systems Inc. v. LeLoup, 307 So.2d 166 (Fla.1975) (Industrial Relations Commission was judicial tribunal performing judicial functions for due process purposes; no right to appeal to District Court of Appeal from decision of IRC); with Broward County v. LaRosa, 505 So.2d 422 (Fla.1987) (legislature cannot authorize administrative agencies to exercise powers fundamentally judicial in nature).

As argued earlier, workers comp immunity is really just another affirmative defense. Like all affirmative defenses, this one merely asserts that some other fact or circumstance relieves or absolves defendant from liability. Just as with res judicata with which it bears an undeniable similarity, a prior decision (this time from a final decision of an administrative agency) is said to bar any judgment against defendant.

No one has ever suggested that res judicata defenses operate to destroy subject matter jurisdiction when they are asserted. Yet, if prohibition is proper to bar circuit court consideration of claims where workers comp immunity is asserted, why not also for res judicata? Certainly the policies behind the two have their logical counterparts: if one has already been sued in F-1, there are equally strong reasons to stop the same suit later in F-2. Why should a litigant be forced to defend himself in F-2 against a claim already adjudicated in F-1?

No one has ever suggested that any other affirmative defense has such importance that it destroys judicial jurisdiction to hear the claim against which it has been asserted. No one has

ever suggested, say, that statute of limitations defenses (really immunities) strip a court of the power to hear the claim. Or governmental immunities. Or even administrative agency exclusivity. Cf. Southern Records & Tape Service v. Goldman, 502 So.2d 413 (Fla.1987) (prohibition properly denied to bar court from enforcing administrative agency decision). Why is workers comp immunity/exclusivity so different?

Or to put it another way, in the absence of any express statutory direction, why does workers comp immunity go to the jurisdiction of the circuit court, rather than simply to the issue whether defendant can be held liable for plaintiff's claim? Instead of grappling with those questions, respondent has answered with illogical, if cute, derision. That tactic strongly suggests that the answer to these queries is that there is absolutely nothing about an affirmative defense of workers comp immunity that touches jurisdiction.[2]

Thus there is no basis for prohibition when the trial court denies summary judgment on such a defense. This court should hold that Murphree is no longer valid in view of the substantial changes in the tribunal for hearing workers comp claims, and that workers comp immunity/exclusivity is more properly an affirmative defense rather than a negation of subject matter jurisdiction.

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[2] Even if there were some foundation for questioning jurisdiction, prohibition here would still be improper because there are factual issues about the basis for workers comp immunity. See L. M. Duncan & Sons Inc. v. City of Clearwater, 478 So.2d 816 (Fla.1985) (factual issues precluded dismissal of claim under exclusive remedy provision of Workers Compensation Act). The fourth district's decision conflicts, as suggested by Judge Dell in his dissent, with that principle.

The district court's grant of prohibition should thus be disapproved and reversed.

II.

Petitioner readily acknowledges the line of cases which hold that an exempt employer can bring himself within the workers comp laws by voluntarily obtaining workers comp insurance and benefits for his employees, and when he does he can claim the immunity of § 440.11. In that situation the employer obtains the coverage and benefits for his workers, i.e. he pays for it. It would be quite another matter, however, if he paid for the coverage and then deducted the cost from his employees' pay checks over their protest.[3]

In that event, where is the quid pro quo that constitutes the reasonable alternative that is at the heart of the basis for workers comp immunity/exclusivity? When the employer pays, there is at least that much to justify his resulting immunity from ordinary negligence claims by his employees. Correspondingly, there is at least that much of benefit to the worker -- insurance furnished by the employer which is designed to provide prompt settlement of employee job-related personal injury claims.

Take away the requirement that the employer pay for that coverage, and instead allow an exempt "employer" to gain the

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[3] See § 440.21, Fla.Stat.(1989) (agreement for employee to pay any part of workers compensation coverage is invalid; employer who deducts all or part of cost of workers compensation coverage from employees' pay is guilty of misdemeanor). Allowing an "employer" who deducts the cost of such coverage from money due his "employee" to claim workers comp immunity in the the personal injury action amounts to the legal use of a criminal act to avoid civil liability.

immunity from ordinary tort liability after he extracts the cost of it from the putative employee, and there is no longer any alternative, reasonable or otherwise, to the employee's common law right to sue someone for tort damages. He has entirely lost that right, and in return he gets to pay for it!

Hence the district court's decision creates constitutional defects in the statute which the legislature has struggled mightily to avoid.[4] Can anyone confidently say that the results in Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla.1983), and Sasso v. Ram Property Management, 452 So.2d 932 (Fla.1984), would be the same if the employers in those cases could have deducted the premium cost from each employee's wages and still claimed the immunity? Would the scheme have survived constitutional attack if employees paid for their employers' immunity? The answer is obvious.

Respondent has offered not a single reason why it should be

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[4] Respondent quite incorrectly argues that the failure to raise the constitutional question in the lower courts operates as a waiver of this position. In Cantor v. Davis, 489 So.2d 18 (Fla.1986), however, this court held that once this court has jurisdiction it may consider any issue affecting the case, even though prudence dictates that the issue of the constitutionality of a statute's application to the specific facts be normally raised first in the trial court.

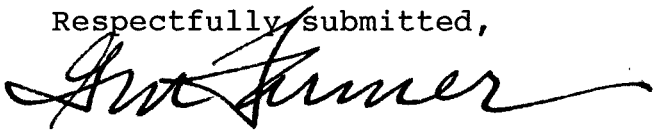
Petitioner had no occasion to raise the constitutional question in the trial court because that court denied respondent's motion for summary judgment. It wasn't raised in the district court because (frankly) petitioner never dreamed that the court would approve a claim of workers comp immunity by one who recouped the cost from the person sought to be covered in the face of § 440.21 (which was argued). It is hard to imagine an issue more central to this case than the constitutionality of allowing someone to claim workers comp immunity after extracting the cost of the coverage from pay due the person to be covered. It would be a miscarriage of justice under these circumstances to apply the old waiver rule.

any different in the "volunteer" cases where an exempt employer gets the coverage but recoups the cost from those covered. That omission bares its own explanation. If they make the person covered pay for it, then it should be treated like any other health insurance coverage; if proper, it may be deducted from the verdict as a collateral source. But, constitutionally and as a matter of statutory construction, it cannot lead to any immunity.

CONCLUSION

Both certified questions should be answered in the negative. The case should be remanded to the district court with instructions to return it to the trial court for trial. The trial court should be instructed that if the evidence shows that the funds for the worker's comp insurance came from the victim, or that the victim reimbursed the defendant for the cost of such premiums, then there can be no immunity for respondent under section 440.11.

Respectfully submitted,



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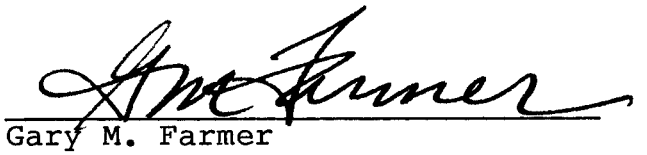
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 20th, 1991, a true and correct copy of the foregoing Petitioner's Reply Brief was placed in the U. S. Mail first class postage prepaid addressed to all counsel of record on the attached list.



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