IN THE SUPREME COURT OF FLORIDA

Case No. 77,179

BOB MARTINEZ, et al.,

Appellants/Cross Appellees,

vs.

MARK SCANLAN, et al.,

Appellees/Cross Appellants.

BRIEF OF CROSS APPELLANT, DARRYL DAVIS

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THE TRIAL JUDGE ERRED IN HOLDING THAT DARRYL DAVIS DID NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONAL VALIDITY OF THE OFFSET IN §440.09(7), FLA. STAT. WHEN:

(A) THE MIAMI DOLPHINS OPERATED FROM 1985 TO THE PRESENT UNDER THE "IMPLEMENTATION AGREEMENT" IN WHICH THEY AGREED TO PROVIDE FOOTBALL PLAYERS WITH BENEFITS EQUIVALENT TO THOSE CONTAINED IN THE FLORIDA WORKERS' COMPENSATION LAW;

(B) THE MIAMI DOLPHINS ASSERTED THAT THEY INVOKED THIS OFFSET AGAINST ALL FOOTBALL PLAYERS WHO WERE INJURED AFTER OCTOBER 1, 1989;

(C) DARRYL DAVIS WAS A FOOTBALL PLAYER EMPLOYED BY THE MIAMI DOLPHINS WHO WAS INJURED ON APRIL 29, 1990;

(D) THE "IMPLEMENTATION AGREEMENT" PROVIDED FOR APPEAL TO ARBITRATOR, SAM KAGEL;

(E) SAM KAGEL DECIDED ON THE SAME DAY THAT THE CIRCUIT COURT ANNOUNCED ITS RULING THAT §440.09(7), FLA. STAT. DID APPLY TO THE MIAMI DOLPHINS.

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STATEMENT OF THE CASE AND FACTS

The Cross Appellant, Darryl Davis, was a plaintiff below. He is 23 years old and after attending Florida A&M University, he was employed by the Intervener/Defendant, Miami Dolphins, as a football player. (R. 177). His formal written contract was executed on April 28, 1990. (Exhibit No. 32). He injured his back in training camp on April 29, 1990, while weightlifting. (R. 180, 959-60). The Dolphins acknowledged his injury, provided him with medical care, and he had been hospitalized. (R. 177-78, 961). He was brought back into training camp on July 16, 1990, and cut on July 20, 1990. (R. 959). Following his injury he was paid his salary for 3 weeks--his pro rata share through the date of termination amounting to approximately $1,500.00. (R. 177, 959-60). He suffered a career-ending injury for which they paid him $1,500.00. (R. 181).

The Miami Dolphins stated at the hearing that they would continue to provide Darryl Davis with medical care. (R. 961). They have not paid him any workers' compensation nor have they told him why. (R. 178). He has not filed a claim as he did not have to under this self-executing system. (R. 179-180).

The Intervener/Defendant, Tampa Bay Buccaneers, waived into the Florida Workers' Compensation Law by buying insurance. (R. 345, 968).

William Duffy, who administers the Miami Dolphins' workers' compensation benefits stated that the Miami Dolphins have not waived into the Florida Workers' Compensation Law. (R. 969). (Exhibit No. 38).

However, the Miami Dolphins are parties to an "Implementation Agreement" entered into on December 20, 1985, in which they promised to pay the equivalent of the benefits required by the Florida Workers' Compensation Law to their football players. (Exhibit No. 31, R. 971). Mr.

Duffy testified that the Miami Dolphins operate under this agreement and have done so from that time to the present. (R. 971). Richard Burlson of the National Football League Players' Association also stated that the Miami Dolphins continue to apply the "Implementation Agreement" (R. 330).

In 1989 the Florida Legislature adopted §440.09(7), Fla. Stat., providing an offset for payments due under any professional athlete's contract against any workers' compensation owed to any player. Mr. Duffy testified that the Miami Dolphins claim that that offset is retroactive, (R. 970) but they also claim that it applies to any player who was injured after the October 1, 1989, effective date. (R. 971).

Darryl Davis is such a player since he was injured on April 29, 1990. (R. 959-961).

Two other plaintiffs, Ralph Ortega and Bill Stanfill, were football players employed by the Miami Dolphins who were injured prior to October 1, 1989. (Exhibits Nos. 34 and 36). They claimed benefits under the "Implementation Agreement" which were subject to local arbitration. In Ortega's case, the local arbitrator, Seth Abrams, decided that he did not have authority to decide whether the offset statute applied to the Miami Dolphins, and therefore could decide no issues concerning the case, including whether it applied retroactively or not. In Stanfill's case, local arbitrator, Mark Zientz, decided that he did not have authority to decide whether the offset statute applied to the Miami Dolphins or not, but that it did not apply retroactively and that Stanfill was entitled to benefits. (Exhibits Nos. 34 and 36). The Miami Dolphins appealed to the National Arbitrator, Mr. Kagel; this was an arbitration appeal procedure provided for in the "Implementation Agreement". (Exhibit No. 31, pp. 3-4; Exhibit No. 29, page 11).

On the same day, November 6, 1989, that Judge Hall handed down his decision in the present case, the National Arbitrator, Mr. Kagel, decided the arbitration case involving Ortega and Stanfill and others. (R. 2669-2691). The plaintiff, Darryl Davis, was not a party to that arbitration. (R. 2669-2691).

Under the appeal arbitration decision, Mr. Kagel decided that although the Miami Dolphins had not waived into the compensation act by buying insurance, the "Implementation Agreement" was the equivalent of that, as it was the equivalent of an insurance policy [even though there was no insurance company that was a party to the "Implementation Agreement"]. (R. 2669-2691). He further decided that the offset statute did not apply retroactively. (R. 2669-2691). Therefore, Stanfill and Ortega would be entitled to benefits as they were injured before its effective date. (R. 2669-2691).

Judge Hall announced his ruling at the hearing on November 6, 1989, as follows:

> "THE COURT: All right. With respect to the (sic) AFL issues, after review of those, and considering the totality of all the evidence that's been presented, and in light of the admonition that we are not to reach constitutional issues or challenges if that can be avoided, and recognizing that the controversy between the parties in this case with respect to (sic) AFL issues are still pending in arbitration -- there have been prior favorable rulings and findings in respect to those challenges, including that the Act itself does not apply, I am going and dismiss those issues." (R. 2654-55). (emphasis added).

Mr. Kagel's decision was sent to Judge Hall after the oral ruling. (R. 2669-2691).

In his written order, Judge Hall found:

> "With respect to the claim that section 440.09(7), F. S. (1989) (Section 6, Ch. 89-289, Laws of Florida), is unconstitutional, based upon the evidence presented and in light of the principle of judicial restraint requiring courts to avoid constitutional issues where a case can be decided on other grounds, the Court finds that Plaintiffs Bill Stanfill, Ralph Ortega and Albert Darryl Davis lack standing to bring a constitutional challenge to the statute and all claims relating to the challenge of that statutory section are thus dismissed." (R. 2698-99).

The defendants, Bob Martinez, et al., filed their notice of appeal immediately after Judge Hall's order was entered, thereby depriving the Circuit Court of jurisdiction. The plaintiff, Darryl Davis, had no opportunity to be heard on rehearing to point out: (1) the appeal arbitration had been handed down in San Francisco subsequent to the trial in Florida but on the same day as the trial court's oral ruling, but before the entry of the written Final Judgment; (2) that he was not a party to that arbitration; (3) that the National Arbitrator had, however, decided that the 1989 offset provision did apply to the Miami Dolphins by virtue of the "Implementation Agreement", notwithstanding that they did not waive into the Workers' Compensation Law by buying insurance; (4) that although the plaintiffs, Ortega and Stanfill had won their cases by this arbitration, the decision was adverse to Davis. Therefore it was ripe for Judge Hall to decide (1) whether the offset statute applied to the Miami Dolphins and (2) if it did, whether it was constitutionally valid.

SUMMARY OF ARGUMENT

The plaintiff, Darryl Davis, is exempt from the Florida Workers' Compensation Law as a professional football player. However, the Miami Dolphins provided to their football players, pursuant to contract, the benefits equivalent to those contained in the Florida Workers' Compensation Law. Effective October 1, 1989, the Florida Legislature enacted §440.09(7), Fla. Stat., providing that any payment to a professional athlete under his contract, after his injury, was a dollar-for-dollar offset against any workers' compensation that was owed to him when the employer had waived into the Workers' Compensation Law in the manner provided in §440.04, Fla. Stat.

The Miami Dolphins, admit that they never purchased the insurance or gave notice as provided in §440.04, Fla. Stat. However, they invoked the offset against all players who were injured both before and after October 1, 1989, like the plaintiff, Davis.

As he was injured after October 1, 1989, Davis did have standing to challenge whether this offset applied to him, and if it did, as to whether it was unconstitutional. The other football players who were plaintiffs, Ortega and Stanfill, were injured prior to October 1, 1989. They were parties to an arbitration that was pending at the time of the trial before Judge Hall. They won their cases by arbitration when the arbitrator, Mr. Kagel, decided that although the offset statute did apply to the Miami Dolphins, it did not apply retroactive of October 1, 1989. Davis, however, was not a party to that arbitration. Yet part of that arbitration decision (that the offset statute did apply to the Miami Dolphins, notwithstanding that they had not purchased workers' compensation insurance) was adverse to him, and Mr. Kagel was the exclusive appeal arbitrator. The arbitration

decision was handed down on the same day as Judge Hall's oral ruling. This was submitted by letter to Judge Hall after his oral ruling but before he entered his written order on December 5, 1989, which was in conformity with his oral ruling. The State appealed immediately, thereby depriving Judge Hall of jurisdiction. Davis was not afforded the opportunity of presenting rehearing before Judge Hall to point out that the issue of the applicability of the offset statute to the Miami Dolphins had been resolved by arbitration against his interest. The question was ripe for Judge Hall to decide whether the Circuit Court would hold that the statute did apply to the Miami Dolphins notwithstanding that they had not purchased insurance, and if the court did so hold, that the statute then was unconstitutional on the grounds that had been urged by Davis at the trial.

The reason for this is that an arbitrator does not have the power or jurisdiction to decide constitutional questions.

On that basis this Court should remand Davis' claim to Judge Hall in order to afford Davis the opportunity to argue on rehearing that in light of Mr. Kagel's arbitration decision that was adverse to Davis' interest, that Judge Hall should then decide whether the offset statute does apply to the Miami Dolphins, and if so, that it is constitutionally valid or invalid.

Alternatively, as this Court has entered its order holding that it has jurisdiction, the Court should then go forward on the merits to consider the following arguments that are presented here: (1) the offset statute does not apply to the Miami Dolphins because they did not waive the exemption of professional athletes in the manner required by §440.04, Fla. Stat., the condition precedent to the assertion of the offset contained in §440.09(7), Fla. Stat. In other words, the Miami Dolphins are not entitled to invoke the offset statute when they admit that they never waived into the Workers'

Compensation Law in the manner allowed by law. The "Implementation Agreement" which is a contract by which an employer agreed to pay to an employee who is engaged in an exempt employment the benefits equivalent to that contained in the Florida Workers' Compensation Law, is not a waiver described in §440.04, Fla. Stat. which would entitle the employer to the offset contained in §440.09(7), Fla. Stat.

On that basis the court would not have to reach the constitutional question, as the plaintiff would prevail without reaching such issue.

On the other hand, if this Court reaches the same conclusion as the National Arbitrator did that the Miami Dolphins did qualify to invoke the offset provision, then this Court should decide the constitutional question presented by Davis, which is: this state statute providing for a dollar-for-dollar offset for payments made under a contract against future workers' compensation owed is unconstitutional under both the federal and the state constitutional guarantees that no law may impair the obligation of contracts. The Court should further consider his arguments in regard to federal preemption, due process of law and equal protection of the laws, all of which he argues are offended by this statutory provision.

ARGUMENT

POINT I

THE TRIAL JUDGE ERRED IN HOLDING THAT DARRYL DAVIS DID NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONAL VALIDITY OF THE OFFSET IN §440.09(7), FLA. STAT. WHEN:

(A) THE MIAMI DOLPHINS OPERATED FROM 1985 TO THE PRESENT UNDER THE "IMPLEMENTATION AGREEMENT" IN WHICH THEY AGREED TO PROVIDE FOOTBALL PLAYERS WITH BENEFITS EQUIVALENT TO THOSE CONTAINED IN THE FLORIDA WORKERS' COMPENSATION LAW;

(B) THE MIAMI DOLPHINS ASSERTED THAT THEY INVOKED THIS OFFSET AGAINST ALL FOOTBALL PLAYERS WHO WERE INJURED AFTER OCTOBER 1, 1989;

(C) DARRYL DAVIS WAS A FOOTBALL PLAYER EMPLOYED BY THE MIAMI DOLPHINS WHO WAS INJURED ON APRIL 29, 1990;

(D) THE "IMPLEMENTATION AGREEMENT" PROVIDED FOR APPEAL TO ARBITRATOR, SAM KAGEL;

(E) SAM KAGEL DECIDED ON THE SAME DAY THAT THE CIRCUIT COURT ANNOUNCED ITS RULING THAT §440.09(7), FLA. STAT. DID APPLY TO THE MIAMI DOLPHINS.

Chapter 86 of the Florida Statutes known as the "Declaratory Judgments Act" provides in §86.021, Fla. Stat.,that any person who may be claiming to be interested in, or to be in doubt about, or whose legal relations are affected by, any statute or contract "may have determined any question of construction or validity". (emphasis added).

The Declaratory Judgments Act has been historically and particularly used to determine constitutional questions, just as it was used in the main part of the present case. The problem, however, is that it is

true that courts try to avoid constitutional questions when possible under the doctrine of judicial economy. In this particular case, the question whether the offset statute applied to the Miami Dolphins was pending an arbitration decision at the time of the hearing before the Circuit Court. The Implementation Agreement provided that the arbitration appeal procedure was to the notice arbitrator under the Collective Bargaining Agreement. (Exhibit No. 31, page 3, ¶8; page 4, ¶11). The 1982 CBA provided that this was Mr. Sam Kagel. (Exhibit No. 29, Art. VII, §8, Page 11)

Mr. Kagel handed down his arbitration appeal decision on the same day that Judge Hall announced his ruling in the present case. (R. 2669-2691). That arbitration decision was that the offset statute did apply to the Miami Dolphins, notwithstanding that they had not purchased a policy of insurance or given notice to the state in the manner required by the statute. It held that the "Implementation Agreement" was the equivalent of an insurance policy and therefore qualified as such, even though there was no insurance carrier involved. (R. 2669-2691). Mr. Kagel also decided that the offset statute, §440.09(7), Fla. Stat. did not apply retroactive of its effective date, October 1, 1989. (R. 2669-2691). The co-plaintiffs, Ortega and Stanfill, who were injured before the effective date of the offset statute, therefore, were entitled to benefits under Mr. Kagel's arbitration decision. Davis, however, was not. He was injured after the effective date of the offset statute. As Mr. Kagel decided that the offset statute did apply to the Miami Dolphins, the Miami Dolphins would be able to assert it against him as they did.

At the hearing before Judge Hall, the Miami Dolphins asserted that they did invoke the offset statute against any player injured after October 1,

1989, (R. 971) and they admitted that the plaintiff, Davis, was injured on April 29, 1990. (R. 959-961).

Obviously, Mr. Kagel, as an arbitrator, did not have jurisdiction to decide a constitutional question such as whether §440.09(7), Fla. Stat. was constitutionally valid. This was the question presented to Judge Hall.

However, once the arbitration decision was rendered, the doctrine of judicial economy no longer applied, if it ever did. Although Davis was not a party to the arbitration before Mr. Kagel, under the arbitration agreement, Mr. Kagel was the sole arbitrator and he decided that the Miami Dolphins were entitled to invoke this offset provision.

After the oral ruling, Davis submitted the arbitration decision to Judge Hall. (R. 2669-2691). However, the written order of the Circuit Judge was in conformity to the oral ruling announced from the bench and was entered on December 5, 1990. The defendants filed a Notice of Appeal immediately, thereby depriving the Circuit Judge of jurisdiction. The case was then certified by the District Court of Appeal to the Florida Supreme Court, which by its order accepted jurisdiction.

Under this circumstance, Davis never had procedural due process of law because there was no opportunity for rehearing with respect to the arbitration decision.

Therefore, this Court should reverse that portion of Judge Hall's order relating to the claim of Davis and remand the cause to him for the purpose of considering the arbitration decision on rehearing. He should thereby (1) consider the threshold question, whether the offset statute, §440.09(7) does apply to the Miami Dolphins (in other words whether he agrees or disagrees with arbitrator Kagel in this regard) and (2) in the event that he holds that the offset statute does apply to the Miami Dolphins, then

consider whether it is constitutionally invalid on the grounds presented by Davis, namely that it impaired the obligation of contracts, violated federal preemption, due process of law, and equal protection of the laws.

Alternatively, as this Court has already entered its order taking jurisdiction, Davis argues that the Court may go to the merits, and for that purpose he presents under Point II and Point III the argument that the offset statute does not apply to the Miami Dolphins, or if it does, that it is constitutionally invalid.

POINT II

SECTION 440.09(7), FLA. STAT., DOES NOT APPLY TO THE MIAMI DOLPHINS

§440.09(7), Fla. Stat. provides:

> "If by operation of s. 440.04, benefits become payable to a professional athlete under this chapter, such benefits shall be reduced or setoff in the total amount of injury benefits or wages payable during the period of disability by the employer under a collective bargaining agreement or contract for hire."

The introductory phrase "if by operation of s. 440.04, benefits become payable to a professional athlete under this chapter..." is a condition precedent which the employer must satisfy in order to invoke the reduction or setoff allowed by this sub-section.

It is necessary to examine whether benefits payable by the Miami Dolphins to their football players are "...by operation of s. 440.04".

The definitions section of the Workers' Compensation Law is §440.02. It provides that employment does not include service performed by or as professional athletes, such as professional boxers and wrestlers and baseball, football, basketball, hockey, polo, tennis, jai alai, and similar players. §440.02(13)(c)(3), Fla. Stat.

§440.03, Fla. Stat., describes the application of the Workers' Compensation Law. It provides:

> "Every employer and employee as defined in s. 440.02 shall be bound by the provisions of this chapter."

Therefore, since the professional football players employed by the Miami Dolphins are not included in the definition of employment under §440.02, Fla. Stat., the Florida Workers' Compensation Law does not apply to them. However, the very next section is entitled "Waiver of Exemption".

It is §440.04, Fla. Stat. This is the section referred to in the 1989 amendment which the Miami Dolphins invoke.

§440.04, Fla. Stat., provides for three methods by which an exemption of §440.02 may be waived. The third provision refers to corporate officers which is not applicable here. The first method of waiving the exemption is contained in §440.04(1), Fla. Stat., which provides:

> "Every employer having in his employment any employee not included in the definition 'employee' or excluded or exempted from the operation of this chapter may at any time waive such exclusion or exemption and accept the provisions of this chapter by giving notice thereof as provided in s. 440.05, and by so doing be as fully protected and covered by the provisions of this chapter as if such exclusion or exemption had not been contained herein."

§440.05, Fla. Stat., provides the method by which a sole proprietor, or a partner, or a corporate officer, who had previously rejected the act, may nonetheless come under the provisions of the Florida Workers' Compensation Law. It requires giving notice on a specific form to be prescribed by the Division, which must be filed with the Division in Tallahassee and shall not become effective until thirty days from the date of mailing.

The Miami Dolphins have never filed such notice with the Division in Tallahassee waiving the exemption with respect to their employees who are professional football players. (Exhibit No. 38). The first method of waiver of exemption contained in §440.04(1), Fla. Stat., does not apply to the Miami Dolphins.

§440.04(2), Fla. Stat., provides for the other method by which an exemption may be waived. It provides:

> "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."

The Miami Dolphins have not obtained a policy or contract of insurance specifically securing the benefits of the Workers' Compensation Law to any of the professional football players involved.

The second method of waiver of exemption contained in §440.04(2), Fla. Stat., does not apply to the Miami Dolphins.

As already pointed out, the third method of waiver of exemption contained in §440.04, Fla. Stat., only applies to corporate officers who had previously rejected the Workers' Compensation Law.

Florida follows the maxim expressio unius est exclusio alterius and it applies to workers' compensation. *Dobbs v. Sea Isle Hotel,* 56 So. 2d 341 (Fla. 1952). In English this means that the law having provided that something must be done in a certain way, it cannot be done any other way.

Specifically the Miami Dolphins have not given notice in the manner required by §440.04(1), Fla. Stat., nor have they had written a policy of workers' compensation insurance as provided in §440.04(2), Fla. Stat. That being the case, they have not complied with §440.04, Fla. Stat. Any benefits which they would pay to their employees who are professional football players would not be "...by operation of s. 440.04...", which is the condition precedent to the invoking of the reduction or setoff contained in the 1989 amendment to §440.09(7), Fla. Stat.

There is another reference to §440.04, Fla. Stat., contained in the Workers' Compensation Law. It is significant in regard to the Miami Dolphins. §440.11(1), Fla. Stat., provides that the liability of an employer prescribed in §440.10, Fla. Stat., shall be exclusive and in place of all other common law liability. This is the provision for the employer's immunity from suit. The liability prescribed in §440.10, Fla. Stat., described in the immunity from suit provision of §440.11, Fla. Stat., requires the employer to provide workers' compensation by securing the payment, that is, by buying workers' compensation insurance or qualifying as a self insurer. It contains a reference to the waiver coverage of §440.04, Fla. Stat., by providing:

> "Every employer coming within the provisions of this chapter, including any brought within the chapter by waiver of exclusion or of exemption, shall be liable for, and shall secure, the payment to his employees or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16."
>
> §440.10(1), Fla. Stat.

What this means is that employers as defined in the chapter, as well as those who come under waiver as provided by §440.04, are required to maintain workers' compensation insurance coverage and in exchange are immune from suit.

In the 1977 and 1982 Collective Bargaining Agreements, the National Football League Management Council, acting on behalf of all of the teams, including the Miami Dolphins, promised to secure the payment of compensation in those states which require it. In those states which do not, a promise was made to pay benefits equivalent to those required by the

workers' compensation law of the state where the employer club was located.

Florida is the only state which does not require coverage.

The 1977 clause read as follows:

"ARTICLE XXXIII

WORKMEN'S COMPENSATION

Section 1. **Benefits:** In any states where Workmen's Compensation coverage is not compulsory, a club will either voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players. In the event that a player qualifies for benefits under this section, such benefits will be equivalent to those benefits paid under the workmen's compensation law of the state in which his club is located.

Section 2. **Rejection of Coverage:** Nothing herein stated is to be interpreted as preventing a club, which has the legal right to do so, from rejecting coverage under the workmen's compensation law of its state. However, if a club elects to reject coverage under the workmen's compensation law of its state, it must nevertheless guarantee benefits to its players in the manner previously prescribed in Section 1 above. Moreover, any club may be excluded from those laws if it elects to do so. However, such a club will be obligated to guarantee benefits to its players in the manner previously prescribed in Section 1 above."

The 1982 clause read as follows:

"ARTICLE XXXVI

Workers' Compensation

Section 1. **Benefits:** In any states where Workers' Compensation coverage is not compulsory, a club will either voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players. In the event that a player qualifies for benefits under this section, such benefits will be equivalent to those benefits paid under the compensation law of the state in which his club is located.

Section 2. **Rejection of Coverage:** Nothing herein stated is to be interpreted as preventing a club, which has the legal right to do so, from rejecting coverage under the workers' compensation law of its state. However, if a club elects to reject coverage under the compensation law of its state, it must nevertheless guarantee benefits to its players in the manner previously prescribed in Section 1 above. Moreover, any club may be excluded from those laws if it elects to do so. However, such a club will be obligated to guarantee benefits to its players in the same manner previously prescribed in Section 1 above.

Section 3. **Arbitration:** In any state where a club (i.e. Miami Dolphins/Florida) has legally elected not to be covered by the workers' compensation laws of that state, the equivalent benefit, if any, to which a player may be entitled under this Article will be determined under the grievance procedure of Article VII of this Agreement."

What this means is that the Miami Dolphins promised in the Collective Bargaining Agreement (CBA) (union contract), to provide equivalent benefits, that is, benefits which were equivalent to those provided for in the Florida Workers' Compensation Law.

The question then becomes whether such a promise in the union contract is a waiver of exemption equivalent to that contained in §440.04, Fla. Stat. The answer is that it is not. One reason is again the maxim expressio unius est exclusio alterius. The Legislature wrote only two ways

for waiver of exemption with respect to employees who were professional athletes: (1) giving notice to the Workers' Compensation Division in Tallahassee in the manner provided by law or (2) buying a workers' compensation insurance policy which specifically secured the payment of benefits to the otherwise exempted employee. As the Legislature provided for these two methods of waiver, it cannot be done any other way. The Legislature could have written that waiver could be accomplished in some other way, including a promise in a contract which could include a promise in a union contract, but it did not write the statute that way.

The Legislature did not provide in §440.04, Fla. Stat., that the promise in a contract to pay equivalent benefits is a waiver of exemption under §440.04, Fla. Stat.

In the case of *Rudolph v. Miami Dolphins, Ltd.*, 447 So. 2d. 284 (Fla. 1st DCA 1984), a number of professional football players employed by the Miami Dolphins argued that the promise to provide equivalent benefits contained in the 1977 and 1982 Collective Bargaining Agreements was a waiver into the Workers' Compensation Law. The Deputy Commissioners disagreed and held that they did not have jurisdiction to hear the players' claims. On appeal, among other things, the players argued:

> "On appeal, appellants seek reversal of the order, urging the following points that
>
> * * * * * * * * * * * * * * *
>
> (3) The Dolphins waived the exclusion from coverage for professional athletes; ..." Id at 288.

The Court of Appeal held, beginning on page 289 of the decision and continuing on page 290, that the promise to provide equivalent benefits in the union contracts was not a promise to waive into the Florida Workers'

Compensation Law, nor a promise to provide workers' compensation coverage.

> "Article XXXIII did not create an enforceable right in every player to receive statutory workers' compensation benefits and, thus, did not give rise to coverage of appellants at the time of their injuries. Rather, given the most liberal construction, that Article only contractually obligated the Dolphins to otherwise provide its players with benefits equivalent to statutory workers' compensation benefits if the Dolphins elected not to waive the statutory exclusion of professional players." *Rudolph v. Miami Dolphins, Ltd., supra,* at 290.

The Court held that the Miami Dolphins had not waived into the Workers' Compensation Law. Consistent with this holding, at the end of the decision the Court pointed out that as the promise by the Miami Dolphins to pay benefits equivalent to the Workers' Compensation Law was not a waiver under §440.04, Fla. Stat., the immunity from suit provisions of §440.11, Fla. Stat., did not apply to the Miami Dolphins.

> "The provisions of §440.11 granting employers immunity from suit are not applicable to bar suit by these players against the Miami Dolphins." *Id.,* at 292

It should be concluded as a matter of law that the benefits equivalent to the Workers' Compensation Law which would be payable by virtue of the Collective Bargaining Agreement are not "by operation of s. 440.04...". Therefore, the condition precedent for invoking the reduction or setoff contained in the 1989 amendment to §440.09(7), Fla. Stat., is not available to the Miami Dolphins.

Exempted employers who waive into the Workers' Compensation Law are required to do all those things which covered employers have to do. They have to contribute to the Administrative Trust Fund, and to the Special Disability Trust Fund, and to the Guaranty Fund. They have to post

reserves. They are subject to the imposition of penalties by the Division of Workers' Compensation for the failure to file timely reports or the failure to pay on time. They are subject to safety inspections. In other words, they are regulated by the State in many ways.

An exempt employer like the Miami Dolphins is not regulated by the State in any of these ways. The Florida Workers' Compensation Law simply does not apply to them.

Instead, we have a contractual obligation on the part of the Dolphins to pay certain benefits to the football players who are injured, the measure of which is "equivalent benefits" of the Florida Workers' Compensation Law. *Rudolph,* supra. This does not mean that all of the Florida Workers' Compensation Law applies and indeed it does not. Most especially the office of the Judge of Compensation Claims has no power over the Miami Dolphins in this regard. The exempt employer who has not waived into the Workers' Compensation Law in the manner provided for in §440.04 is not subject to all of these conditions and restrictions. That aptly describes the Miami Dolphins.

The 1985 Implementation Agreement is not a waiver into the Workers' Compensation Law under §440.04, Fla. Stat. either.

Its introductory paragraph and paragraph 3 both clearly state that it is only a substituted procedure for the grievance/arbitration procedure of the Collective Bargaining Agreements.

It further provides in paragraph 2 (Exhibit No. 31, page 1):

> "The workers' compensation rights and benefits to which Miami Dolphin players are entitled are the same as those set forth for other employees in the Florida Workers' Compensation Law, as amended, and as interpreted in the Florida Courts except as modified by

this Agreement and the 1977 and 1982 CBAs." (emphasis added) .

Again, the Implementation Agreement of 1985 is not "...by operation of s. 440.04...". It, too, does not give rise to the offset contained in the 1989 amendment.

Obviously the union did not agree to the offset contained in §440.09(7), Fla. Stat. (1989). Yet the employer seeks to invoke it unilaterally while the CBA was in force. Such offset was never part of the agreement of the parties.

There are a number of reasons why the 1989 offset does not apply to the Miami Dolphins.

First, the union did not agree to such offset during the life of either the 1977 CBA or the 1982 CBA. (R. 331).

Secondly, the local arbitrators already decided and the Dolphins accepted their decision that neither the CBA's nor the "NFL Player Contract" did not provide a dollar-for-dollar offset against future years workers' compensation payments such as the Dolphins now claim under the offset statute. It only provides an offset for the year in which the injury protection benefit was paid against workers' compensation owed for that year. It does not provide an offset for future years.

Thirdly, a player's contract provides an agreed-upon consideration for his exclusive services for the season in question. The parties have agreed what the salary and benefits should be for the year whether the player plays well, plays poorly, or doesn't play at all, whether injured or not. He cannot get more under that contract and they cannot pay less under that contract for that year. A deal's a deal. What the Dolphins now seek is a deduction for what the player is owed in future years for worker's

compensation equivalent benefits under the CBA for what he is paid under his contract after he is injured.

Without a standard workers' compensation insurance policy or complete self insurance to cover the players, there is no compliance with §440.04, Fla. Stat. *Rudolph,* supra.

Davis contends that the 1989 offset statute may apply to the Tampa Bay Buccaneers who have purchased workers' compensation insurance and have therefore waived into the Workers' Compensation Law by which they are subject to the jurisdiction and supervision of the State of Florida, Department of Labor and Employment Security. Davis contends that the 1989 offset statute does not apply to the Miami Dolphins, who have not done so.

The statute does not apply to the Miami Dolphins because it only applies to an employer (such as the Tampa Bay Buccaneers) who has waived the exemption of professional athletes from the Florida Workers' Compensation Law. The Miami Dolphins have not waived that exemption. Indeed, the First District Court of Appeal in *Rudolph v. Miami Dolphins, Ltd.,* 447 So. 2d 284 (Fla. 1st DCA 1984) has already decided that the Miami Dolphins have not waived into the Florida Workers' Compensation Law.

Therefore, the benefits paid by the Miami Dolphins to their professional football players pursuant to a CBA are not by operation of §440.04, Fla. Stat. They are pursuant to the CBA's. It should likewise be concluded that the promise to pay benefits equivalent to the Florida Workers' Compensation Law contained in the Collective Bargaining Agreement and the Implementation Agreement is not a waiver of the exemption as a matter of law, since that is the specific holding of *Rudolph v. Miami Dolphins, Ltd.,* 447 So. 2d 284 (Fla. 1st DCA 1984).

The Miami Dolphins are just as bound by the court's decision in Council Rudolph's case as Darryl Davis is.

POINT III

SECTION 440.09(7) FLA. STAT. IS CONSTITUTIONALLY INVALID WHEN:

(A) IT VIOLATES IMPAIRMENT OF CONTRACTS;

(B) IT VIOLATES DUE PROCESS OF LAW;

(C) IT VIOLATES EQUAL PROTECTION OF THE LAWS;

(D) IT VIOLATES FEDERAL PREEMPTION OF COLLECTIVE BARGAINING AGREEMENTS.

§440.09(7), Fla. Stat. violates constitutional prohibitions against the impairment of contracts by purporting to establish a total setoff for wages and other employee benefits payable during the period of disability by the employer under a contract for hire.

The United States Constitution, Art. I, §10, provides:

> "No State shall...pass any...Law impairing the Obligation of Contracts..."

Art. I, §10, Fla. Const. provides:

> "No...law impairing the obligation of contracts shall be passed."

The Florida Supreme Court clearly expressed its intolerance to legislation that results in the impairment of contracts. *Yamaha Parts Distributors, Inc. v. Ehrman,* 316 So. 2d 557 (Fla. 1975). This Court acknowledged the state's broad police power. See *Yamaha,* at 559. However, in addressing the collision between the state's police power and the constitutional prohibition on laws impairing contracts, the Florida Supreme Court applied a very strict interpretation of Art. I, §10, Fla. Const. Ibid. In no uncertain terms, the court stated that "virtually no degree of contract impairment has been tolerated in this state." Ibid. Based upon

this narrow construction, this Court concluded that the state's justification for its exercise of police power must be great enough to override the sanctity of the contract.

In 1979, the Florida Supreme Court set forth the test for determining when state action involves the unconstitutional impairment of a contractual relationship. *Pomponio v. Claridge of Pomponio Condominium,* 378 So. 2d 774 (Fla. 1979). In *Pomponio,* the Florida Supreme Court explicitly adopted the analysis of the United States Supreme Court in *Allied Structural Steel Co. v. Spannaus,* 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). In *Spannaus,* the United States Supreme Court relied upon the federal constitutional prohibition against impairment of contract, Art. I, §10, U. S. Const., to overturn a Minnesota law that altered the pension agreement between an employer and employees. Justice Stewart, writing for the majority, concluded that the Act imposed conditions that were neither reasonable nor limited in duration but instead worked a severe and permanent change in the contractual relationship of employer and employee. The *Spannaus* contractual infirmity is similar to that found in this Act. This Court stated that the proper analysis required weigh[ing] the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. *Pomponio,* at 780. Thus, this Court reasoned that the contract clause analysis must balance the nature and extent of the impairment against the state's interest. Id., at 781.

The Florida Supreme Court listed three factors that the *Spannaus* court identified when weighing these two adverse interest. Id., at 779: (1) the court will evaluate whether the legislature enacted the impairing-law to

address a broad social or economic problem. Ibid.; (2) the court will question whether the legislation resulting in the impairment affected an area that states traditionally regulate. Ibid.; (3) the court will take into account whether the change was temporary or irrevocable. Ibid. (citing *Spannaus,* supra). Finally, the Florida Supreme Court indicated that even if the court resolved all of these factors against impairment, it would still consider whether the action taken was the least restrictive alternative possible to accomplish the state's purpose. Id., at 780.

Under these tests, §440.09(7), Fla. Stat. fails to pass constitutional muster.

§440.09(7), Fla. Stat. impairs the obligation of contracts because it provides that whatever the parties have agreed in the past in an individual contract for a professional athlete's exclusive services for the period of the duration of the contract, becomes a dollar-for-dollar credit for workers' compensation payable in future years. Under this statute, no matter how much the parties bargain for, in the event of injury, the payment under the contract for the employee's exclusive services for the year of the contract becomes transformed into a workers' compensation payment, dollar-for-dollar, for future years. As a practical matter, given the level of salaries, if the employee were injured early in the season, the payment under the contract would obliterate any right to receive workers' compensation for the remainder of his lifetime. Apparently this is precisely what it was designed to do.

Under the NFL player contract, paragraph 10, (Exhibits Nos. 30 and 32) the parties agreed that any salary continuation would only be a credit against workers' compensation for the year of the contract and not for future years. This was the decision of the three member arbitration panel,

which decision the Miami Dolphins accepted. (Exhibit No. 37). This decision is consistent with the federal case of *Stuart N. Anderson v. Pro Football, Inc.* which is cited in the arbitration decision. (Exhibit No. 37, pp. 5-6)

In the present case, there is an inherent conflict between the NFL player contract which provides that there is only an offset by time for the year of the contract. However, the statute provides, contrary to the contract, that the offset is not by time, but is a dollar-for-dollar offset for years beyond the period of the contract.

For example, under paragraph 10 of the player contract (Exhibits Nos. 30 and 32) and the three member arbitration decision (Exhibit No. 37), the offset under the contract would be calculated as follows: a player has a contract for $200,000.00 for the year. If he were injured in the beginning of the season, he would be entitled to the payment of his contract for the year because he is under contract to the club for that year and is not a free agent. His services belong to them exclusively. He not only cannot play for another club, he cannot sign to play with another club during that year. (R. 335). Under the current year, the maximum workers' compensation rate would be $382.00 per week, which for 52 weeks would be $19,864.00. Under paragraph 10 of the player contract, that $19,864.00 would be included within the continuation of salary payment of $200,000.00 and no additional payment would be owed for that year. However, at the conclusion of the contract year (February 2 of the following year), the employer could owe workers' compensation.

By contrast, under §440.09(7), Fla. Stat. (1989) the payment of the $200,000.00 under the contract for the employee's services, whether injured or uninjured, becomes a dollar-for-dollar offset against all future workers'

compensation owed, which would be 523-1/2 weeks ($200,000.00 ÷ $382.00 per week). Under that provision, the employer would not owe the employee workers' compensation until 10-1/2 years later. This would virtually obliterate any right on his part to receive workers' compensation at all.

Consequently, there is an impairment of contracts because whatever the employee would obtain by way of salary in his contract as the price for his services if he were not injured, (his contract for his exclusive services for the year) would under the statute be transformed in the event of his injury to a prepayment of workers' compensation for not only that year, but all future years until it was burned off or amortized at workers' compensation rates. The more he bargains for if he were not injured, the less he gets if he is. Since the contract for his services is always entered into before any injury occurs, the statute operates retroactively to convert his agreement into something else. It is an impermissible hindrance upon his ability to contract.

It is one of the curiosities of the Florida Workers' Compensation Law that an employer may waive into the Workers' Compensation Law, an otherwise excluded worker without that workers' consent, and in so doing, acquire immunity from suit under §440.11, Fla. Stat. without the employee's consent. In the present case, professional athletes are not covered by the Workers' Compensation Law. Therefore, there is a very serious due process problem, equal protection problem, and even single subject matter problem concerning a provision in the Florida Workers' Compensation Law which provides that a salary continuation payment for a professional athlete under his contract is an offset of future workers' compensation payments, when the professional athlete is not covered by the Florida Workers' Compensation Law in the first place. In other words,

how can the Legislature pass a statute affecting the contracts of professional athletes by placing it in a statute from which they are specifically exempt?

§440.09(7), Fla. Stat. (1989) lacks due process of law because it, in essence, makes paragraph 10 of the NFL player contract unlawful. It provides for an offset only by time for the year of the contract and the statute provides for a dollar-for-dollar offset.

Since the union ceased to exist on November 6, 1989, (R. 329) and the collective bargaining agreements between the NFL Management Council and the NFL Players' Association have expired, the only contracts between the players and the clubs are the NFL player contracts. This sets up an impossible due process scenario. The club and the player agree to an offset by time only for the year of the contract. The club and the player are exempt from the Workers' Compensation Law. An employer waives into the Compensation Law without the employee's consent and then seeks to invoke the offset statute against the employee in the event he becomes injured, even though the payment under the contract is for his exclusive services regardless of injury. In this regard it is important to note that the payment for injured reserve status for the duration of the contract year is the same as the payment for the performance of the contract without being injured. (Exhibits No. 30 and 32). Whether the employee is injured or not, his services are exclusive to the football club during that contract year, whether he is injured or uninjured, whether he plays or doesn't play, whether he is a star or sits on the bench. (R. 335).

§440.09(7), Fla. Stat. also violates equal protection of the law by unreasonably discriminating in favor of a handful of who are not in need of any financial aid at the expense of their employees who have been injured

at work. It has no rational basis on the one hand, and it unreasonably discriminates against the physically handicapped on the other. The employer enjoys the same immunity from suit as other employers while providing a lesser benefit (in many instances no compensation benefit at all) to its injured employees. This seems particularly out of balance since the employees are not covered by the Workers' Compensation Law in the first place.

The offset statute also denies the professional athlete access to courts because the employer's unilateral action of waiving into the compensation act without his consent deprives him of workers' compensation. They get immunity from suit. He gets nothing more than his contract. It also does not take a great deal of imagination to understand that this is really a special act for the benefit of an individual, although it was passed under the guise of a general law.

This section violates federal preemption in the field of labor relations and collective bargaining in the private sector by purporting to establish a total setoff for wages and other employee benefits "payable during the period of disability by the employer under a collective bargaining agreement."

The United States Constitution, Art. VI contains the "Supremacy Clause" which provides:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added).

Under the Supremacy Clause, if the federal government has preempted a field of legislation, a state legislature may not enact contrary legislation unless specifically authorized by the U. S. Congress. In the field

of labor relations, the federal government has preempted the field of collective bargain under the National Labor Relations Act, 29 U.S.C. §151, et seq. *San Diego Building Trades v. Garmon,* 359 U. S. 236 (1959) indicates that states may not pass legislation affecting collective bargaining in the private sector.

In the present case the court may note that state statutes which affect collective bargaining in the private sector are unheard of. They are found in the public sector because employment by local government is not covered by the NLRA.

§440.09(7), Fla. Stat. purports to provide that any payment under a collective bargaining agreement is a dollar-for-dollar offset against any workers' compensation owed to a professional athlete for industrial injury covered by the Florida Workers' Compensation Law. Plainly this is an impermissible restriction upon the ability of the parties to engage in collective bargaining under federal law. It would turn whatever they had bargained for in the way of salary benefits or other contract benefits which are to be paid after an accident into a dollar for dollar equivalent pre-payment of workers' compensation under the state's Workers' Compensation Law. Under this provision, the more they bargain for in the way of consideration under the collective bargaining agreement becomes transformed into a workers' compensation payment under the statute in the event of injury. This affects and limits their ability to bargain collectively.

Insofar as collective bargaining agreements are concerned, that provision in the Florida Statute is impermissible under the Supremacy Clause of the U. S. Constitution.

CONCLUSION

The Court should either remand the cause to Judge Hall to decide: (1) whether the offset in §440.09(7), Fla. Stat. applies to the Miami Dolphins, that is, whether they qualified to invoke it; and (2) if they did, whether it is constitutionally valid.

Alternatively this Court should go to the merits to decide that the statutory offset does not apply to the Miami Dolphins or that it is constitutionally invalid.

Respectfully submitted,

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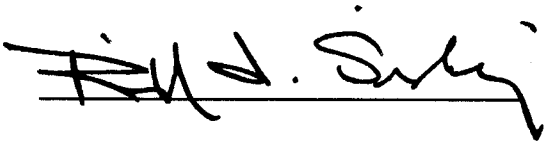

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