FILED
SID J. WHITE
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CLEW, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

HOWARD WEBER,

Petitioner,

v.

HERBERT DOBBINS, ET UX.,

Respondents.

CASE NO. 78,762

DISTRICT COURT OF APPEAL
4TH DISTRICT NO. 90-0263

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Howard Weber, president of Preferred Enterprise Signs, hired Dobbins Signs Services, Inc. to remove a sign from a freestanding pole at a commercial fast food restaurant. (R. 49) Because of concerns about interference by the restaurant owner who had failed to pay for the sign, Weber was present when the sign was removed. (R. 51) Herbert Dobbins, the Dobbins Sign employee on the job, was working from a boom of a truck mounted crane. Dobbins was injured when the crane came into contact with a power line. Dobbins alleged that Weber was acting as his supervisor and had negligently placed the crane too close to the power line.

When Weber had first approached Dobbins to assist in repossessing the sign, Dobbins hesitated to perform the work because of the poor neighborhood where the sign was located and because he was also concerned about taking the property. (R. 50-51) After further conversations with Weber, Dobbins agreed to the employment on the condition that Weber would be on the site during the repossession. (R. 51) Weber told Dobbins that he wanted the job done early in the day before the restaurant owners arrived and that he wanted the job completed quickly. (R. 51)

The symbol "R" refers to the Index to the Record on Appeal.
The symbol "A" refers to the Petitioner's Appendix, attached.

Dobbins testified that at the job site Weber gave specific instructions in the removal of the sign. (R. 51) In particular, Weber wanted the sign cut away in such a manner that the pole would be saved. Weber also instructed Dobbins not to cut the wires, but rather to leave them hanging over the side of the pole. There were also conversations between Dobbins and Weber concerning where the crane mounted truck should be parked while removing the sign so as to avoid interrupting morning business in the drive through area of the restaurant. Weber also instructed Dobbins to take the repossessed sign back to Preferred Enterprises' offices.

Dobbins filed a claim for workers' compensation benefits against Preferred Enterprises. (R. 49-57) This claim was disputed. After presentation of evidence, the deputy commissioner specifically found that Dobbins was an employee of Preferred Enterprises and was entitled to benefits. The deputy commissioner specifically ruled that at the time of the incident there was an "agreed to employment arrangement whereby the employer, through its shareholder and president, Weber, would be in control of the repossession of the sign." (R. 52-53) Several alternative grounds for establishing an employer/employee relationship were also identified in the deputy commissioner's opinion.

The deputy commissioner alternatively found that an employer/employee relationship existed on several alternative grounds. The deputy commissioner found that this employment

relationship existed "notwithstanding the fact that the claimant was a shareholder/employee of Dobbins Signs and Service, Inc. [He found] that at the time of the accident herein, the claimant was working in the capacity of 'borrowed servant' of the employer in this case. [Citations omitted] [He further found] that the evidence and testimony introduced . . . overcame any presumption of continuance in general employment with Dobbins Signs and Services, Inc. and supports a finding that the employer herein was a special employer controlling the details in repossession of its own sign." (R. 53) Alternatively, the deputy commissioner determined that Dobbins was a covered employee under the theory that he was a sub-servant of a corporation which was in turn a servant of the employer. (R. 54) Finally, the deputy commissioner ruled that as a further alternative, Dobbins was a statutory employee under Section 440.10. His order stated that he found "the employer sublet part of his contract work to an uninsured subcontractor, and that the employer herein is obligated to secure payment of compensation to the claimant." (R. 55)

The determination that workers compensation coverage existed was affirmed on appeal. Dobbins has received and accepted significant workers compensation benefits. The workers compensation claim was washed out in a structured settlement which paid 100% of all past and future medical bills plus a minimum of $135,000.00 in wages.

After receiving .workers compensation benefits from his employer, Preferred Enterprises, Dobbins filed suit against his fellow employee (Weber), Florida Power and Light, and truck owner, P.A. Radocy & Sons, Inc.[1] (R. 15-20) Dobbins' initial complaint alleged gross negligence by Weber in an attempt to avoid workers compensation immunity. The trial court granted summary judgment in favor of Weber, finding no gross negligence.[2] (R. 108) Dobbins was permitted, however, to file an amended complaint alleging simple negligence by Weber. (R. 115-116). The amended complaint asserted that Weber was not entitled to workers compensation immunity because he had personally elected not to be covered for workers compensation benefits which were available to the employees of Preferred Enterprises. Dobbins argued that by opting out of coverage, Weber was not a co-employee under the terms of S440.11, Florida Statutes (1983).

The trial court again granted summary judgment for Weber finding that workers compensation was Dobbins' exclusive remedy. (R. 132, 139-140). The trial court agreed that Weber's election not to personally enjoy coverage for workers compensation benefits was of no moment and did not affect Weber's entitlement to immunity. Dobbins appealed. The Fourth District Court of

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1 The claims against FPL and Radocy have been settled for $310,000.00.

2 Dobbins did not challenge the propriety of this summary judgment and the trial court's determination that Weber was not grossly negligent.

Appeal agreed with .Dobbins' position and reversed the summary judgment. In issuing its opinion, the appellate court stated that it believed an issue of great public importance was raised and the following question was certified to the Florida Supreme Court:

> DO THE IMMUNITIES PROVIDED BY §440.11, FLORIDA STATUTES (1983) EXTEND TO A CORPORATE OFFICER WHO ELECTS, PURSUANT TO $440.05, TO EXEMPT HIMSELF FROM COVERAGE UNDER THE PROVISIONS OF CHAPTER 440?

ISSUE

WHETHER A CORPORATE OFFICER OF A SMALL BUSINESS WHO ELECTS, PURSUANT TO S440.05, TO EXEMPT HIMSELF FROM WORKERS COMPENSATION BENEFITS UNDER THE PROVISIONS OF CHAPTER 440 IS ENTITLED TO THE IMMUNITIES PROVIDED BY S440.11, FLORIDA STATUTES (1983), FROM A SUIT BY A CO-EMPLOYEE.

ARGUMENT SUMMARY

Weber was the president of the small company which was Dobbins' employer on the day of this accident. Weber is entitled to workers' compensation immunity for any claim of simple negligence which allegedly caused injury to his employee in the course and scope of the employment. The fact that Weber, as the president and sole shareholder of a small corporation, elected not to be covered by workers' compensation benefits which are available to all his employees is irrelevant to his entitlement to immunity.

The Fourth District's ruling undermines the purpose and policy of workers' compensation and allows Dobbins to seek a double recovery from Weber. Weber has not only paid the premium for the workers' compensation benefits which Dobbins has enjoyed, but Weber is now subject to tort liability as well.

The district court used flawed logic in suggesting that this result was necessitated by the workers' compensation statutes. The purpose of the opt out provision for small business employers is at adds with the district court's interpretation of the statute. Many small employers cannot afford to pay significant workers' compensation premiums and delete workers' compensation coverage for themselves as a cost saving measure. The proprietor of a small business is not likely to need workers' compensation benefits because he will either carry personal disability coverage or, if injured on the

job, will not "sue himself" and therefore does not need tort immunity from his own injuries. This fact has been acknowledged by the legislature in promulgating a statute in which only the employer is permitted to opt out of workers' compensation benefits.

ARGUMENT

A CORPORATE OFFICER OF A SMALL BUSINESS WHO ELECTS, PURSUANT TO $440.05, TO EXEMPT HIMSELF FROM WORKERS COMPENSATION BENEFITS UNDER THE PROVISIONS OF CHAPTER 440 IS ENTITLED TO THE IMMUNITIES PROVIDED BY §440.11, FLORIDA STATUTES (1983), FROM A SUIT BY A CO-EMPLOYEE.

Under the Fourth District's interpretation of Chapter 440, a supervisor/owner of a small business who makes an economic election to personally forego any right to workers' compensation benefits leaves himself open to tort liability to all employees. By attempting to cut overhead and lessen expenses by declining workers' compensation benefits, such small businessmen are unwittingly exposing themselves to far greater expenses, risks, and liabilities through the tort claims that the appellate court now **says** are proper. While a supervisor/owner who elects to purchase workers' compensation benefits for himself is fully insulated from all liability for employees' injury due to his negligence, and employer who cannot afford workers' compensation benefits, or who indeed may perceive such coverage for himself as unnecessary, now finds himself also subject to additional, unlimited exposure for tort liability claims of injured employees. This situation was neither intended nor foreseen by the legislature when the opt out provision3 was enacted.

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3 Section 440.02(11)(b), F.S. 1983, provides "'Employee' includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous. (footnote continued)

As support for his contention that Weber should be exposed to tort liability because Weber did not elect the privilege of workers' compensation benefits, Dobbins has argued that if the tables had been turned, Weber's rejection of workers' compensation benefits would have permitted him to sue Dobbins. This argument is without merit. Section 440.075 merely provides that a corporate officer who has rejected workers' compensation benefits may bring a common law claim against the corporate employer.4 No provision is included in this statute for a corporate officer to bring a negligence claim against a fellow employee. Permitting a corporate officer to sue an employee for negligence would be inconsistent with the purpose of workers' compensation and would also be contrary to the tort immunity which is enjoyed by individuals who are entitled to workers' compensation benefits. Fla. Stat. §440.11.

Even if one assumes, arguendo, that a supervisor/owner who rejects workers' compensation can sue a negligent employee, this result is not at odds with the provisions or spirit of the workers' compensation laws. The provisions of Sections 440.05,

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(footnote continued from previous page)
However, any officer of a corporation may elect to be exempt from coverage under this chapter by filing written certification of the election as provided in S. 440.05 . . ."

4 Section 440.075, F.S. 1983, provides "When corporate officer rejects chapter; effect. -- every corporate officer who elects to reject this chapter shall, in any action to recover damages for injury or death brought against the corporate employer, proceed as at common law, and the employer in such suit may avail itself of all defenses that exist at common law."

440.075, and 440.11 do not contemplate that a corporate officer and an employee are to be treated identically. It is obvious from the plain wording of the statutes themselves that only the corporate officer has the ability to reject workers' compensation benefits; other employees are not given that option.

The appellate court's interpretation of the workers' compensation statutes creates a gross inequity. An injured supervisor/corporate officer who has opted out of workers' compensation is permitted to preserve only one claim (a negligence claim against the tortfeasor/employer); in contrast, an employee who is injured by the negligence of the employer may pursue both a claim for workers' compensation benefits under the coverage provided by the corporate officer/employer as well as a tort liability claim against the supervisor/owner himself. Nothing in the statutes indicates a legislative intent for an employee to enjoy a privilege to pursue both workers' compensation and tort claims against his employer.

The law as enunciated establishes that a corporate officer's decision to reject workers' compensation benefits, particularly where the officer is the majority or sole shareholder of a small business, is simply an economic one to reduce his premium obligations for the workers' compensation benefits he must provide to his employees. In a large corporation, the cost of the premium for workers' compensation coverage is unlikely to be affected by the inclusion of officers

as well as employees. Because any officer/owner who is injured on the job in a small company would be "suing himself" if he brought an action against his corporation, there is no need to be concerned with tort liability if the officer/owner is hurt, therefore the immunity afforded by workers' compensation is not a significant consideration. The owner/officer can reduce the workers' compensation premium he owes if less employees will be subject to the benefits, and therefore the officer/owner of a small business is permitted to take that risk. The supervisor/owner's personal rejection of workers' compensation benefits does not lessen the obligation to provide such benefits for all other employees:

> The fact that employees may reject the workman's compensation law does not relieve an employer under the act from the duty of securing the payment of compensation. A 1957 opinion attorney general 057-06 (Fla. March 2, 1957).

It is plain that a corporation continues to maintain workers' compensation benefits for all employees other than the officer who may choose an exemption. The maintenance of such benefits creates immunity from suit for the corporation and all its employees. An officer's election to decline workers' compensation benefits for himself does not expose him to a tort liability by his corporate fellow employees. Fla. Stat. §440.11.[5]

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5 §440.11(1) (1988) provides, in pertinent part: "The same (footnote continued)

The rights and burdens stemming from a supervisor/owner's decision to reject workers' compensation benefits concern only the corporation and that particular officer. Other employees or third parties are wholly unaffected by such an election. The statutes clearly establish that all other corporate employees neither gain nor lose by such a decision and they continue to enjoy the right to workers' compensation benefits and all related limitations of liability.

The facts of this case irrefutably establish that Dobbins and Weber were co-employees working in concert to remove this sign. As co-employees, Weber is entitled to immunity from suit under the workers' compensation statutes.

If Weber is not considered as an employee of Preferred Enterprises, then he must hold the status of an independent contractor. Even if one assumes, arguendo, that Weber's exemption from workers' compensation coverage gives him the status of an independent contractor of Preferred Enterprises, he is still not subject to liability. Both Dobbins and Weber were working in furtherance of the business of Preferred Enterprises at the time of this accident and both men remain as statutory co-employees or fellow servants. Grice v. Suwannee Lumber Manufacturing Co., 113 So.2d 742 (Fla. 1st DCA 1959); Williams

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(footnote continued from previous page)
immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor or other person who in the course and scope of his duties acts in a managerial or policy making capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policy making duties . . ."

V. Corbett Cranes, Inc., 396 So.2d 811 (Fla. 5th DCA 1981). As a statutory co-employee or fellow servant, Weber is entitled to workers' compensation immunity from suit.

The changes to the workers' compensation statutes that became effective in 1991 do not limit the scope of the appellate court's opinion nor do they lead to a change in result under the new law. Section 440.02(b)(1) contains the same definition of "employee" that existed in 1983.[6] Section 440.075 remains in full force and is not affected by the promulgation of 5440.077.[7]

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6 Section 440.02, Florida Statutes (1991) provides:

(b) "'Employee' includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous.

(1) Any officer of a corporation may elect to be exempt from the provisions of this chapter by filing written notice of the election with the division as provided in S. 440.05."

7 Section 440.077 provides: "When a sole proprietor, partner, or officer rejects this chapter; effect. -- a sole proprietor, partner or officer of a corporation who is actively engaged in the construction industry and who elects to be exempt from the provisions of this chapter may not recover benefits under this chapter."

CONCLUSION

Neither Dobbins nor the district court cited a single case standing for the proposition that an employee who has sought and received workers' compensation benefits can pursue a negligence claim against a corporate officer of a small company merely because that officer has made a personal, financial choice not to elect personal entitlement to workers' compensation benefits from his own corporation. The reason for this omission of any case law is simple: there are no cases directly on point to support this theory. Dobbins has voluntarily sought and received the workers' compensation benefits which are his exclusive remedy. He should not be permitted to sue Weber. The interpretation of Chapter 440 by the Fourth District results in an inconsistent and inequitable rule of law.

It is respectfully requested that this Honorable Court answer the certified question in the affirmative and reverse and remand this case with instructions to affirm the summary judgment entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE **HEREBY CERTIFY** that a true copy *of* the foregoing was mailed this 6th day of November, 1991, to: **PHILIP** M. **BURLINGTON**, ESQ., **Edna L. Caruso, P.A., Suite 4-B, Barristers Building, 1615 Forum Place, West** Palm **Beach, FL 33401 and** to **ROBERT GEISLER**, ESQ., **Peterson & Bernard, P. O. Drawer 15700, West Palm Beach, FL 33416.**

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