IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 78,762

HOWARD WEBER,

Petitioner,

-vs-

HERBERT DOBBINS, et ux.,

Respondents.

BRIEF OF RESPONDENTS ON THE MERITS

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CITATIONS OF AUTHORITY

PREFACE

This case is before the Court on a certified question from the Fourth District Court of Appeal. The parties will be referred to by their proper names or as they appeared in the trial court. The following designations will be used:

(R) - Record-on-Appeal

(A) - Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Dobbins does not take issue with any of the facts contained in the Statement of the Case and Facts in Weber's Initial Brief. However, as detailed in the Motion to Strike filed contemporaneously with this Brief, certain facts contained therein are not supported by the record and are not appropriately before this Court.

SUMMARY OF *ARGUMENT*

The Fourth District properly construed the unambiguous provisions of the relevant statute, which provides that an "employee" for purposes of the Workers' Compensation Act does not include an officer of a corporation who elects to be exempt from coverage under the Act, Fla. Stat. §440.02(11)(d)(4) (1983). It is undisputed that Weber was an officer of the employer corporation who elected to be exempt from coverage under the Act. As a result, Weber is not entitled to immunity because Fla. Stat. §440.11(1) (1983) limits immunity to the employer and "each employee of the employer...." Since Weber is not considered an employee for purposes of the Act, he is not entitled to immunity under that provision (~~Fla~~. ~~Stat~~. §440.11(1) was amended, effective October 1, 1988, in such a manner as to alter the scope of immunity, See CH. 88-284 §1, LAWS OF FLA.), and thus, the Fourth District's decision is limited in scope.)

Weber's various arguments regarding policy considerations and practical aspects of the decision are unpersuasive because the statutes involved are unambiguous and, therefore, there is no reason to look beyond the clear language utilized by the legislature. Moreover, there is nothing in the Fourth District's decision as inconsistent with any policy of the legislature, nor is the result inequitable. Since the Fourth District's decision consists of the proper interpretation of unambiguous statutory provisions, it should be affirmed and the certified question should be answered in the negative.

QUESTION PRESENTED

UNDER FLA. STAT. §440.02(11)(d)(4) (1983) A CORPORATE OFFICER WHO ELECTS TO BE EXEMPT FROM THE WORKERS' COMPENSATION ACT IS NOT AN "EMPLOYEE" FOR PURPOSES OF THE ACT AND, THEREFORE, IS NOT ENTITLED TO IMMUNITY UNDER FLA. STAT. §440.11(11) (1983).

ARGUMENT

Weber fails to address the basis for the Fourth District's ruling and, instead, engages in a discussion regarding his perception of the practical considerations and equities of the court's interpretation of the workers' compensation provisions at issue. An analysis of the relevant statutory provisions compels the conclusion that the Fourth District properly construed the unambiguous provisions of the Act and reached the proper result. Because Weber chose to be exempt from the provisions of the Act, he was not an "employee" for purposes of the Act and, thus, could not assert the immunity provided in Fla. Stat. §440.11(1). This conclusion is mandated by the unambiguous provisions of the Act and, contrary to Weber's contentions, is neither inequitable nor inconsistent with legislative intent.

~~Fla~~. ~~Stat~~. §440.11(1) (1983)' dictates the scope of immunity granted under the Workers' Compensation Act:

> The liability of an employer [to obtain workers' compensation coverage] prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee... 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 employer's business and the injured employee is entitled to receive benefits under this chapter. [Emphasis supplied.]

The term "employee" is defined in ~~Fla~~. ~~Stat~~. §440.02(11) (1983). That statute provides in subsection (11)(d)(4) that, "'an employee' does not include: ...any officer of a corporation who elects to be exempt from coverage under this chapter." It is undisputed that Weber was an officer of Preferred Enterprise Signs, and that he

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1/The accident in this case occurred on July 24, 1984 (A9), and there **has** never been any dispute that the applicable immunity provision is that provided in the 1983 version of **Fla.** Stat. S440.11. That statute was amended, effective October 1, 1988, to add the following sentence, CH. 88-284 §1, LAWS OF FLORIDA:

> The same 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 policymaking capacity and the conduct which cuased the alleged injury arose within the course and scope of said managerial or policymaking duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in s. 775.082.

Therefore, the scope of the Fourth District's decision is limited to the 1983 version of Fla. Stat. §440.11(1).

chose to be exempt from the Workers' Compensation Act, pursuant to ~~Fla~~. ~~Stat~~. 5440.04.

Weber fails to even mention Fla. Stat. §440.11(d)(4) in his Initial Brief, even though that was the crucial provision in the Fourth District's decision. The Fourth District properly concluded that Weber was not a statutory "employee" for purposes of the Act and, therefore, since the immunity provided in §440.11 was limited to the employer and "each employee of the employer," Weber was not entitled to that immunity (A3-5). The court concluded (A5):

> We find nothing in the Act that extends the immunity of section 440.11 to a person outside the statutory definition of "employee."

The court also quoted from HOLLY v. AULD, 450 So.2d 217 (Fla. 1984), where this Court held that the courts are without authority to construe an unambiguous statute in any way which extends, modifies, or limits its express terms.

Weber does not address the reasoning of the Fourth District's decision, and does not even cite §440.02(11)(d)(4) (1983) in his Initial Brief. Instead, he raises various policy considerations and subsidiary arguments which simply have no merit.

Weber only makes one argument which attempts to place him within the scope of the immunity provided in Fla. Stat. 8440.11. He argues that if he is not considered an employee of Preferred Enterprises, then he must hold the status of an independent contractor (Petitioners Brief p.13). That is simply inaccurate. As noted previously, the Workers' Compensation Act provides its own specific definition of the term "employee" and excludes from that

definition any officer of a corporation who elects to be exempt from coverage. Therefore, it is clear that Weber is not an employee for purposes of the Act, but that does not compel the conclusion that he is an independent contractor under the common law definition of that term. Quite simply, he is a corporate officer who elected to be exempt from coverage, and while he might be an employee under common law principles or for purposes of other statutory provisions, he is not an employee for purposes of workers' compensation immunity. The First District has so held on numerous occasions, CASEY KEY INVESTMENT CORP. v. ARBUCKLE, 378 So.2d 841 (Fla. 1st DCA 1979) (corporate officer who elected to be exempt from Workers' Compensation Act cannot be considered employee for purposes of the Act); VALLINA v. VICTOR FUEGO CONSTRUCTION CO., 443 So.2d 320 (Fla. 1st DCA 1983) (corporate officer of subcontractor who elected to be exempt from coverage could not obtain workers' compensation benefits from general contractor because he was not an "employee" for purposes of the Act, citing Fla. Stat. §440.02(11)(d)(4) (1983)); VAN VOORST v. RUBLE TRUCKING CO., 456 So.2d 1289 (Fla. 1st DCA 1984) (corporate officer who elected to be exempt from coverage was not an "employee" for purposes of determining the number of employees sufficient to compel application of the Act, citing Fla. Stat. §440.02(11)(d)(4) (1983)).

Weber cites GRICE v. SUWANEE LUMBER MANUFACTURING CO., 113 So.2d 742 (Fla. 1st DCA 1959), and WILLIAMS v. CORBETT CRANES, INC., 396 So.2d 811 (Fla. 5th DCA 1981), for the proposition that

Dobbins and Weber were statutory co-employees or fellow servants. Those cases do not support that conclusion. GRICE does not address in any way statutory co-employees or fellow servants and, therefore, is simply irrelevant. WILLIAMS addresses only the statutory co-employee situation in which a contractor sublets part of his contract work to a subcontractor and, thereby, becomes obligated to obtain workers' compensation benefits for the subcontractor's employees, pursuant to Fla. Stat. §440.10(1). However, that statute only requires a contractor to provide coverage for the subcontractor's "employees," which simply means that in the case sub judice, Preferred Enterprises was obliged to provide workers' compensation coverage for Dobbins, because he was a statutory "employee." However, because Weber was a corporate officer that elected to be exempt from the Act, he was not an "employee." Thus, WILLIAMS does not provide any support for Weber's position. Moreover, as clearly held in VALINA, supra, an employer is not required to provide coverage for a corporate officer of a subcontractor who elects to be exempt from the Act. Of course, in this case, Weber was not a corporate officer or employee of a subcontractor, but rather was a corporate officer of the contractor and, thus, Fla. Stat. §440.10(1) cannot in any way be applied to him.

The argument addressed above is the only attempt by Weber to bring himself within the provisions of Fla. Stat. §440.11, which would entitle him to immunity under the Workers' Compensation Act. The rest of Weber's arguments are simply his subjective contentions

regarding the practical and policy considerations involved in this case. Even assuming arguendo that they have any merit, those arguments are not properly considered in the context of a case involving the interpretation of unambiguous statutory provisions. This Court has held that the primary consideration of statutory construction is the plain meaning of the language utilized by the legislature, SHELBY MUTUAL **INSURANCE CO.** v. SMITH, 556 So.2d 393 (Fla. 1990). In that case, this Court also stated that it is only when the language utilized is of doubtful meaning should matters extrinsic to the language be considered. The Fourth District found no ambiguity in the relevant statutory provisions, and Weber has not suggested any. Therefore, the literal application of the statutes, which clearly supports affirmance of the Fourth District, should **end** the inquiry. However, in an abundance of caution, Dobbins will address the other arguments raised by Weber.

There is nothing inequitable in this construction of the statute. In **PERKINS v.** SCOTT, **554** So.2d 1220 (Fla. 2d DCA 1990), the Second District held that an individual who owned a corporation and was an officer thereof, could not claim unconditionally the workers' compensation immunity of the corporation as a result of its providing workers' compensation coverage. The Second District stated (554 So.2d at 1222):

> An individual receives numerous legal advantages by creating a corporation. One advantage permits the corporation, rather than the individual, to be liable to secure workers' compensation benefits under section 440.10. Since the obligation to secure workers' compensation benefits is the quid pro quo for the immunity, it follows that the

> individual who is not obligated to secure workers' compensation benefits is not entitled to workers' compensation immunity.

That is consistent with this Court's holdings that immunity under the Act follows the liability for providing the workers' compensation benefits, JONES v. FLORIDA POWER CORP., 72 So.2d 285 (Fla. 1954); CONKLIN v. COHEN, 287 So.2d 56 (Fla. 1973). Since the obligation to pay the workers' compensation benefits is that of the corporation and not the corporate officer, the argument that a corporate officer who elects to be exempt from the Act is entitled on some equitable basis to the immunity lacks merit.

Weber argues that corporate officers who elect to be exempt from the Act are simply attempting to cut overhead and lessen expenses and that is unfair to impose on them common law liability. However, the legislature specifically provided that when a corporate officer elected to be exempt from the Act, he or she may proceed at common law against the employer and the employer was entitled to assert all defenses that exist at common law, Fla. Stat. §440.075 (1983). Thus, a corporate officer's decision to reject coverage under the Act results in the common law being applicable to any tortious conduct occurring in the context of employment. Therefore, the exemption is not simply a matter of limiting overhead or expenses, but rather reflects a decision to preserve common law remedies and defenses. The suggestion that a corporate employee would simply be suing himself is not persuasive because the exemption does not apply only to sole proprietors, but

to any corporate officers. That argument also fails to consider the possibility that there would be liability insurance.

Weber argues that there is nothing in the Act which indicates a legislative intent for an employee to be entitled to pursue both "both workers' compensation and tort claims against his employer'' (Petitioner's Brief p.11). That is not what the Fourth District held in this case. The court held that where a corporate officer elects to be exempt from the Act, the employee is entitled to obtain workers' compensation benefits from the employer and, if the facts warrant it, the employee can also pursue common law remedy for negligence against the corporate officer. There is nothing inequitable in that result, especially since the corporate officer elected to be exempt from the provisions of the Act and, thereby, retain his common law remedies. In fact, it is the Petitioner's position which would create an inequity, that is, a corporate officer could elect to be exempt from the Workers' Compensation Act, yet protect himself from the results of his own negligence by asserting the immunity provided by that Act. In essence, the corporate officer would be allowed to have his cake and eat it, too.

Weber also challenges Dobbins' argument that because he elected to be exempt from the Act he would be able to sue Dobbins at common law. The Fourth District specifically declined to address the merits of that argument (A5). Thus, it is clearly not necessary to a logical resolution of this issue, but is rather only a subsidiary argument. Nonetheless, Dobbins will stand by his

original assertion. Weber claims that there is no provision in the Act for a corporate officer to bring a negligence claim against a fellow employee (Petitioner's Brief p.10). However, as noted previously, ~~Fla~~. ~~Stat~~. 5440.075 provides that a corporate officer who elects to be exempt from this Act can proceed as at common law against the employer. This necessarily means that the immunity provided in Fla. Stat. 5440.11 does not **apply.** Since that statute is the sole basis for an employee being able to assert immunity under the Act, it would appear that a corporate officer who elects to be exempt could also sue a co-employee to the extent provided at common law. However, as noted previously, this was simply a subsidiary argument which the Fourth District found unnecessary to address in order to resolve the issue in this case. Similarly here, there is no necessity of addressing it.

Despite making numerous assertions regarding the legislature's intent, the Petitioner has failed to cite any legislative history, nor any authority supporting the conclusion that the legislature did not mean what it said in utilizing the unambiguous language contained in the provisions at issue. Weber cites Fla. Stat. §440.11(1) (1988), which altered the scope of workers' compensation immunity, but does not argue that that amendment can be applied retroactively, nor that it had any relevance to the case sub judice. He states in his conclusion that neither Dobbins, nor the District Court cited a single case on point. However, neither has Weber. Quite simply, this is a case of first impression, a posture which provides no particular benefit to either side. The

conclusion is governed by the unambiguous language of the statutory provisions at issue, which clearly compel the result reached by the Fourth District. Therefore, this Court should answer the certified question in the negative, and affirm the decision of the Fourth District.

CONCLUSION

For the reasons stated above, this Court should answer the certified question in the negative, and affirm the decision of the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to SHELLEY H. LEINICKE, ESQ., P.O. Drawer **14460,** Ft. Lauderdale, **FL 33302; PATRICK** M. BRYAN, ESQ., 700 Universe Blvd., Juno Beach, FL 33408; and JEFFREY W. JOHNSON, ESQ., 2424 N. Federal Hwy., Ste. **205,** Boca Raton, FL **33431,** by mail, this 10th day of December, **1991.**

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