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SUPREME	COURT (OF FLORIDA	DEC 23 1991
HOWARD WEBER ,	*		CLERK, SUPREME COURT
Petitioner,	*	CASE NO.	Child Deputy Clerk
v.	*	DISTRICT	COURT OF APPEAL
HERBERT DOBBINS, ET UX.,	*	4TH DIST	RICT NO. 90-0263
Respondents.	*		
	*		

PETITIONER'S REPLY BRIEF ON THE MERITS

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Other Authority

Larson, Workmen's Compensation Law, Vol. 1C, 554.21

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REPLY ARGUMENT

The ights and burdens stemming from a corporate officer's decision to reject worker's Compensation benefits concern only the corporation and that particular officer. Other employees such as Dobbins are unaffected by such election and should not be able to use it as a stepping stone to a double recovery.

Dobbins ignores the dual capacity doctrine in arguing that because Weber opted out of coverage for himself that Weber cannot be an employee for purposes of the worker's Compensation act. <u>Larson, Workmen's Commensation Law</u>, Vol. 1C, 554.21. The law recognizes employee status for corporate officers who are performing labor under certain 'circumstances. The case of <u>Perkins v. Scott</u>, 554 So.2d 1220 (Fla. 2nd DCA 1990) acknowledges that a particular individual may simultaneously maintain both employee and non-employee capacities.

The cases of <u>Vallina v. Victor Fueqo Construction Co.</u>, 443 So.2d 320 (Fla. 1st DCA 1983) and <u>Casey Key Investment Corp. v.</u> <u>Arbuckle</u>, 378 So.2d 841 (Fla. 1st DCA 1979) are not instructive. Both decisions involve situations where the corporate officer was seeking worker's compensation benefits after he had elected an exemption from coverage. In contrast, the instant case concerns a claim against a corporate office by an employee who has already recovered worker's compensation benefits from the employer.

WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, MCCOY, GRAHAM & LANE, P.A. BARNETT BANK PLAZA, ONE EAST BROWARD BOULEVARD, FORT LAUDERDALE. FLORIDA 33301 Weber does not dispute those **cases** cited by Dobbins which set forth the long-standing law that immunity under the worker's compensation law is commensurate with the liability to provide worker's compensation benefits. <u>Conklin v. Cohen</u>, 287 So.2d 56 (Fla. 1973); <u>Jones v. Florida Power Corp.</u>, 72 So.2d 285 (Fla. 1954) While this is a well settled rule of law, it does not address the factual scenario raised here. It is wholly inequitable, and not within the intention or plain wording of the worker's compensation statutes, to saddle an employer such **as** Weber with both worker's compensation and tort liability.

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CONCLUSION

The provisions of the worker's compensation law should not be interpreted in such a way that an employee who has voluntarily sought and received worker's compensation benefits can then pursue a tort 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 worker's cornpensation benefits from his own corporation. Dobbins' position, as adopted 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 <u>20th</u> day of December, 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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