OA 10-3-94

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HOLMES COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 83,283
(L.C. Case No. 93-917)

TERRY DUFFELL and
LINDA DUFFELL,

Respondents.

_____/

ANSWER BRIEF OF AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS

THOMAS M. ERVIN, JR.
Fla. Bar No. 107788
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
305 S. Gadsden St.
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL
LAWYERS

TABLE OF CONTENTS

	Page(s)
Table of Cases	ii
Statement of the Case and Facts	1
Summary of Argument	2
Argument:	
Answer Point I	
THE DISTRICT COURT PROPERLY AFFIRMED DENIAL OF SUMMARY JUDGMENT FOR PETITIONER WHERE THE "UNRELATED WORKS" EXCEPTION TO WORKERS' COMPENSATION EXCLUSIVENESS OF REMEDY UNDER SECTION 440.11(1), FLORIDA STATUTES, EXPRESSLY PRESERVES THE INDEPENDENT RIGHT OF ACTION AGAINST PETITIONER AS THE SUBSTITUTE DEFENDANT FOR ITS NEGLIGENT EMPLOYEE UNDER SECTION 768.28(9), FLORIDA STATUTES.	5
A. CO-EMPLOYEE LIABILITY UNDER WORKERS' COMPENSATION LAW - BACKGROUND.	7
B. PUBLIC EMPLOYEE LIABILITY AND SOVEREIGN IMMUNITY - BACKGROUND.	9
C. THE 1980 AMENDMENT OF SECTION 768.28, FLORIDA STATUTES.	11
D. PETITIONER'S STATUTORY INTERPRETATION WOULD VIOLATE ACCESS TO COURTS, ARTICLE I, SECTION 21, FLORIDA CONSTITUTION.	20
Answer Point II	
THE RECEIPT OF WORKERS' COMPENSATION REMEDIES FROM AN EMPLOYER FOR THE EMPLOYER'S LIABILITY FOR INJURY DOES NOT CONSTITUTE ELECTION OF EXCLUSIVE REMEDY, OR ESTOPPEL, FOR A SEPARATE ACTION FOR AN "UNRELATED WORKS" CO-EMPLOYEE'S LIABILITY FOR NEGLIGENCE (§440.11(1), FLA STAT.)	28
Conclusion	34
Certificate of Service	35

TABLE OF CASES

Cases Cited:	Page(s)
City of Miami v. Albro, 120 So.2d 23 (Fla. 3d DCA 1960)	9
Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991); *rev. den.* 592 So.2d 679 (Fla. 1991)	3,15,16,17,18,20
District School Bd. of Lake County v. Talmadge, 381 So.2d 698, 700 (Fla. 1980)	2,9,10,13,21
Eller v. Shova, 630 So.2d 537 (Fla. 1993)	4,7,21,22,23,26,27
Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955)	2,7,21
Holmes County School Board v. Duffell, 630 So.2d 639, 640 (Fla. 1st DCA 1994)	17,18
Iglesia v. Florian, 394 So.2d 994 (Fla. 1981)	8
Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938)	9,21
Kluger v. White, 281 So.2d 1 (Fla. 1973)	4,7,22,27
Mandico v. Taos Const. Co., 605 So.2d 850 (Fla. 1992)	4,28,29,30,31,32,33
Psychiatric Associates v. Siegel, 610 So.2d 419 (Fla. 1992)	4,22
Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987)	4,7,22
State Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981)	13,14
Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987)	22
White v. Hillsborough County Hospital Auth., 448 So.2d 2 (Fla. 2d DCA 1983)	14

	Page(s)
Cases Cited Continued:	
Wright v. Douglas N. Higgens, Inc., 617 So.2d 460 (Fla. 3d DCA 1993)	29
Other Authorities Cited:	
Constitution of the State of Florida:	
Article I, Section 21	*Passim*
Laws of Florida:	
Chapter 78-300	7
Chapter 78-300, Section 2	2,8
Chapter 80-271	3,4,11,12,23,24,25,26
Chapter 80.271, Section 1	24
Chapter 80.271, Section 3	12,25
Florida Statutes:	
Section 111.071	12,25
Chapter 440	2,3,7
Section 440.11	6,7,15,33
Section 440.11(1)	*Passim*
Section 768.28	3,10,11,25
Section 768.28(5)	6,12,15,20,25
Section 768.28(9)	*Passim*

STATEMENT OF THE CASE AND FACTS

Amicus curiae, **The Academy of Florida Trial Lawyers**, accepts and defers to the statements of case and facts presented by the parties' initial and answer briefs, and no supplemental statement is presented herein.

In this brief amicus curiae will restrict its presentation to the proper interpretation and application of Sections 440.11(1) and 768.28(9), Florida Statutes, when construed in *pari materia* and in light of Article I, Section 21, Florida Constitution, and to the issues of election of remedies or estoppel.

SUMMARY OF ARGUMENT

The right of an injured employee to maintain a tort action and remedy against a negligent co-employee was a separate and independent right of action existing in 1968 when Article I, Section 21, Florida Constitution, was adopted, as was the right of an employee to also recover workers' compensation benefits from his employer for the same injury. Said right extended to both private and public employees. See, Franz v. McBee Company, 77 So.2d 796 (Fla. 1955); District School Bd. of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980).

Chapter 440, Florida Statutes, was revised in 1978 to extend the "exclusive remedy" protections afforded to employers under workers' compensation to employees as well, but expressly excluded from said exclusive remedy protection and immunity the liability in tort of an employee to a co-employee when the employees

> are assigned primarily to unrelated works within private or public employment.

§440.11(1), Fla. Stat.; Section 2, Chapter 78-300, Laws of Florida.

Thus, the 1968 right of action against an unrelated works co-employee (public or private) continued in full force and effect under the last, pertinent amendment to workers' compensation law.

Suit directly against a public employee for negligence was also authorized, and not barred by sovereign immunity in 1968, and through 1980. District School Bd. of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980). In 1980, by amendment to

Section 768.28(9), Florida Statutes, the legislature prohibited naming of a public employee as defendant in such a suit and commanded that such action under Section 768.28, Florida Statutes, be maintained only against the public employer as substitute defendant for the employee. See, Chapter 80-271, Laws of Florida (appendix hereto).

In Chapter 80-271, Laws of Florida, the legislature did not even mention or reference workers' compensation law or any provision of Chapter 440, Florida Statutes. The legislature did not express any intent to amend Section 440.11(1), Florida Statutes, or repeal the right of action in tort for negligent injury by a public co-employee assigned to "unrelated works. To the contrary, the legislature provided for "action against" the public employer, and use of public funds for payment of "judgments" for "damages" in "tort claims" brought pursuant to Section 768.28(9), Florida Statutes, as revised.

Under these circumstances, the district court in Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991); *rev. den.* 592 So.2d 679 (Fla. 1991), and in these proceedings [630 So.2d 639 (Fla. 1st DCA 1994)], properly held that Sections 440.11(1) and 768.28(9), Florida Statutes, authorized a public employee to recover workers' compensation benefits from the public employer and maintain a tort action against that employer as substitute statutory defendant for the tort liability of its "unrelated works" employee.

Not only is this the correct and only available interpretation of law when the terms of Chapter 80-271, Laws of Florida, are reviewed in *pari materia* with existing Section 440.11(1), Florida Statutes, relating to "unrelated works" co-employees, it is also the only interpretation which will preserve access to courts of public employees pursuant to Article I, Section 21, Florida Constitution, where the legislature neither provided any new reasonable alternative for the right of action for the "unrelated works" co-employee's tort liability nor made any finding of overwhelming public necessity. See, Kluger v. White, 281 So.2d 1 (Fla. 1973); Smith v. Dept. of Ins., 507 So.2d 1080, 1087-1089 (Fla. 1987); Psychiatric Associates v. Siegel, 610 So.2d 419 (Fla. 1992); Eller v. Shova, 630 So.2d 537, 542 (Fla. 1993).

The foregoing analysis also establishes that receipt of workers' compensation benefits from petitioner did not constitute election of remedies or estoppel as to the independent right of action against petitioner as the substitute defendant for the tort liability of its negligent employee. Mandico v. Taos Const. Co., 605 So.2d 850 (Fla. 1992), did not consider the statutory provisions herein, and presents no conflict, or authority for reversal.

The decision of the lower court, therefore, properly interpreted and applied applicable law in affirming denial of petitioner's motion for summary judgment. The decision should be affirmed.

ARGUMENT

Answer Point I

THE DISTRICT COURT PROPERLY AFFIRMED DENIAL OF SUMMARY JUDGMENT FOR PETITIONER WHERE THE "UNRELATED WORKS" EXCEPTION TO WORKERS' COMPENSATION EXCLUSIVENESS OF REMEDY UNDER SECTION 440.11(1), FLORIDA STATUTES, EXPRESSLY PRESERVES THE INDEPENDENT RIGHT OF ACTION AGAINST PETITIONER AS THE SUBSTITUTE DEFENDANT FOR ITS NEGLIGENT EMPLOYEE UNDER SECTION 768.28(9), FLORIDA STATUTES.

This answer brief is submitted on behalf of amicus curiae, The Academy of Florida Trial Lawyers.

The issue presented herein is an important one. Petitioner Holmes County County School Board seeks to achieve a misconstruction of applicable law which will remove from public employees (injured by negligence of fellow employees assigned to unrelated works) an independent right of action currently and fully possessed by injured private and public employees.

In effect, petitioner Holmes County School Board (joined by amicus curiae) seek to achieve an end never expressed or intended by the Florida Legislature in its 1980 amendment of Section 768.28(9), Florida Statutes, and thereby impliedly repeal as to public employees the "unrelated works" exception to workers' compensation exclusive remedy which expressly was retained to public and private employees by Section 440.11(1), Florida Statutes.

In short, and contrary to Article I, Section 21, Florida Constitution, petitioner and supporting amicus curiae seek to deprive public employees of an established and protected right of

action and access to court. They effectively seek to render public employees second class citizens, deprived of the rights afforded identically situated private employees injured by private co-employees assigned to unrelated works.

In this case an employee of petitioner Holmes County School Board was injured by the negligence of a co-employee who was assigned to unrelated works. Petitioner, the School Board, contends that it is the exclusive tort defendant under the 1980 amendment to Section 768.28(9), Florida Statutes, but that it cannot be sued for its employee's negligence because of the "exclusive remedy" provisions of Section 440.11, Florida Statutes.

The trial court and district court rejected this erroneous view of the law, and denied summary judgment. Proper reading of applicable law establishes that under Section 440.11, Florida Statutes, an injured public employee continues to be entitled to tort remedy and recovery based upon the negligence of an "unrelated works" public co-employee (as is a private employee), though the action must be brought against the public employer as substitute defendant (§768.28(9), Fla. Stat.), and the amount of recovery will be limited by sovereign immunity limitations (§768.28(5), Fla. Stat.).

In order to provide full analysis of the issue presented, and proper statutory construction, a review of historic employee liability for that employee's own negligence is first required, considering both the liability of public employees and of co-employees under workers' compensation law.

A. CO-EMPLOYEE LIABILITY UNDER WORKERS' COMPENSATION LAW - BACKGROUND.

First, as to workers' compensation law and remedies, while Florida law has provided for over fifty years that workers' compensation remedies are "exclusive" and supplant tort remedies as to employers, this is not true as to co-employees. Until 1978, Chapter 440, Florida Statutes, did not purport to immunize employees from their tort liability to co-employees. Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955).

Thus, the right of an employee to sue a co-employee for injury caused by that co-employee's negligence was in existence as part of the law of Florida in 1968, and was one of the rights of access and remedy encompassed by Article I, Section 21, of the Florida Constitution. See Kluger v. White, 281 So.2d 1 (Fla. 1973); Smith v. Department of Ins., 507 So.2d 1080, 1087-1089 (Fla. 1987). In a somewhat different context (managerial employees and degree of culpability), this Court expressly recognized that 1968 was the determinative time for "access to courts" analysis. Eller v. Shova, 630 So.2d 537, 542 (Fla. 1993).

In 1978, the Florida Legislature enacted Chapter 78-300, Laws of Florida, and by amendment of Section 440.11, Florida Statutes, extended the workers' compensation immunities of employers to co-employees under certain circumstances. Specifically, the 1978 amendment added the following language to Section 440.11(1) and its preexisting workers' compensation "exclusive remedy" immunity of employers, to wit:

> 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. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death, or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

Section 2, Chapter 78-300, Laws of Florida; Section 440.11(1), Fla. Stat. (1978 Supp.). (Emphasis supplied.)

Thus, the "exclusive remedy" immunity of employers was extended in 1978 to employees who negligently injure co-employees, but only in limited circumstances. That portion of the statute which did expand co-employee immunity was upheld as against Article I, Section 21, challenge in Iglesia v. Florian, 394 So.2d 994 (Fla. 1981).

Equally clearly, however, the employer "exclusive remedy" immunity was not extended to a negligent co-employee where the two employees were assigned to unrelated works "within private or public employment." §440.11(1), Fla. Stat. (1978 Supp.). That the legislature intended this additional, historic tort remedy to continue in existence as to public co-employees is made crystal clear by the concluding phrase "within private or public employment."

There can be no serious question that the legislature, in extending workers' compensation employer immunity to employees in 1978, was also possessed of the authority and power to restrict that extended immunity to exclude employees assigned to unrelated works. Workers' compensation protections and immunities are not a common law right of employers, but matters of legislative creation. Sixteen years have passed since adoption of the "unrelated works" limitation on co-employee immunity, and the legislature has not seen a need for change of its clear command. The legislative determination must be given its clear and intended operation.

B. PUBLIC EMPLOYEE LIABILITY AND SOVEREIGN IMMUNITY - BACKGROUND.

It is next necessary to review the liability of public employees for their own negligent acts under Florida law, and the interplay of sovereign immunity and its scope of operation. Historically, sovereign immunity in Florida extended only to the "sovereign," and did not extend to or immunize a public employee from liability for the employee's own negligent acts. See District School Bd. of Lake County v. Talmadge, 381 So.2d 698, 700 (Fla. 1980); City of Miami v. Albro, 120 So.2d 23 (Fla. 3d DCA 1960); Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938). Thus, the right of action against a public employee for that employee's own negligent acts was also a right of access and redress existing in 1968 and protected by Article I, Section 21, of the Florida Constitution.

In 1973 and 1974 the legislature twice amended Section 768.28(9), Florida Statutes, in a manner that on its face appeared

to immunize public employees from tort liability on the basis of sovereign immunity, but also required the State to pay judgments for such tort liability of public employees up to sovereign immunity limits. In District School Bd. of Lake County v. Talmadge, 381 So.2d 698 (Fla. 1980), however, the Supreme Court construed these amendments not to extend sovereign immunity to the negligent public employee (who could still be sued), but to waive sovereign immunity of the State and require State payment up to sovereign immunity limits where the claim was asserted against the State alone, or the public employee and the State.

In Talmadge, supra, the Supreme Court described the status of pre-1980 actions against a public co-employee under Section 768.28, Florida Statutes, as follows at page 703:

> *Liability under section 768.28.* For those actions which fall within the purview of section 768.28, plaintiffs have a range of litigation options:
>
> (1) The plaintiff can invoke the provisions of section 768.28 and sue both the state and employee jointly. The state then becomes obligated, under the second sentence of subsection (9), to pay any judgments to the extent of the monetary limitations set forth in subsection (5). The negligent employee remains personally liable for that portion of a judgment rendered against him which exceeds the state's liability limits.
>
> (2) The plaintiff can invoke the provisions of section 768.28 and sue the state alone. The state's liability, of course, would be limited by subsection (5).
>
> (3) The plaintiff can sue the employee alone, without invoking section 768.28, under traditional legal principles regarding tort actions against public employees.

> The foregoing interpretation of subsection 9 is the one most consistent not only with the language of section 768.28, but also with its purpose. We have noted that 'section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis' in order to provide more adequate compensation for victims of governmental torts. By allowing suits against negligent employees as well as the state, this objective is enhanced.

Thus, the Court recognized that under the law then existing, suit in tort could be maintained against the employee and public employer jointly (option 1), or against the public employer alone (option 2), and in either event, the public employer would be liable for its negligent employee's tort liability, up to sovereign immunity limitations of recovery. Likewise, the preexisting right of action against the employee alone (option 3) continued to be recognized.

C. THE 1980 AMENDMENT OF SECTION 768.28, FLORIDA STATUTES.

In 1980, by Chapter 80-271, Laws of Florida, the legislature amended Section 768.28(9), Florida Statutes, as follows:

> 768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--
>
> (9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action ~~for a final judgment which has been rendered against him~~ for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner

> exhibiting wanton and willful disregard of human rights, safety, or property. The exclusive remedy for injury or damages suffered as a result of any act, event or omission of any officer, employee, or agent of the state, or its subdivisions or constitutional officers, shall be by action against the governmental entity, or the head of such entity in his official capacity, or constitutional officer of which the officer, employee or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.
>
> As used in this subsection, the term 'employee' includes any volunteer firefighter.

Thus, the right to directly name and sue a negligent public employee was removed and, in the stead or substitute for that right, the right to sue the public employer in tort for the negligence of the employee was expressly authorized and provided. Recovery against the public employer was limited by the amounts provided under sovereign immunity waiver. See, §768.28(5), Fla. Stat.; §111.071, Fla. Stat., as amended by §3, Ch. 80-271, Laws of Florida. See, appendix hereto for Chapter 80-271, Laws of Florida.

That the amendments of Section 768.28(9), Florida Statutes, merely effected a "substitution" of defendant parties for suit and recovery for the public employee's existing tort liability is clear. The independent tort claim and liability continued, and

the public employer was merely made the exclusive, substitute defendant in such a claim and recovery.

In effect, the foregoing 1980 amendment merely removed the first and third litigation options recognized in District School Bd. of Lake County v. Talmadge, 381 So.2d 698, 703 (Fla. 1980), wherein the public employee was subject to direct suit, and left intact the recognized second option, to wit:

> (2) The plaintiff can invoke the provisions of section 768.28 and sue the state alone. The state's liability, of course, would be limited by subsection (5).

That the effect of the 1980 amendment was merely a substitution of the public agency as party defendant for the preexisting individual liability of the negligent employee is established by prior decisions.

In State Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981), certain retroactive operation of Section 768.28(9), Florida Statutes, was challenged and held invalid by the Court. While the argument of the State in that case was not sufficient to save the amendments from invalidity as to retroactive application (not an issue herein), the interpretation of government officials in that case of the 1980 amendments is helpful in these proceedings. At page 1156 the Supreme Court summarized the governmental parties' position as follows:

> The department [of Transportation] and Gregg, joined by the attorney general as friend of the Court, contend here that the legislature could validly apply its grant of immunity for public employees to lawsuits then pending in the courts of Florida. Their principal argument is that there exists no

> 'vested right' which is adversely affected by the immunization of public employees, since section 768.28 has merely substituted the state as the financially responsible party. The theme underlying this argument is that the 1980 statute has merely clarified what the legislature always intended with respect to the liability of public employees.

(Emphasis supplied.) (Bracketed information provided.)

That the 1980 amendments merely substituted the public employer as the financially liable party for the independent, preexisting tort liability of the public employee was again addressed in White v. Hillsborough County Hospital Auth., 448 So.2d 2 (Fla. 2d DCA 1983), where the grant of public employee immunity was challenged as violative of Article I, Section 21, Florida Constitution (Access to Courts).

The district court rejected the challenge and held the public employee immunity valid, reasoning and holding at page 3:

> We are not persuaded by appellant's argument. Strong policy reasons support the legislative immunization of state employees from personal liability. *State, Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981). Here, the right of an injured party to seek redress has not been abolished. Rather, the legislature has merely substituted the state and its agencies, which previously could not be sued because of sovereign immunity, for the individuals who could have been sued. *Knowles*. Thus, appellant's cause of action has not been destroyed but has been converted to an action against a state agency.

It is clear, therefore, that the right of recovery in tort for injuries caused by the negligence of a public employee was not removed or changed in nature by the 1980 amendments to Section 768.28(9), Florida Statutes. Rather, the public employer was

merely substituted, statutorily, as the financially responsible party for the individual liability of the immunized public employee, and sovereign immunity was waived as to such liability, up to the limits of waiver in Section 768.28(5), Florida Statutes.

The issue was again addressed in Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991); *rev. den.* 592 So.2d 679 (Fla. 1991). In that case, as here, the public employer contended that it was immune from suit for its employee's negligent, fatal injury to an "unrelated works" co-employee because of the exclusive remedy provision of Section 440.11, Florida Statutes, and the provisions of Section 768.28(9), Florida Statutes, requiring that such action be maintained against the public employer in the stead of the negligent public employee. The public employer's position was summarized by the court as follows at page 7:

> The DOC argues that the unrelated works exception was abolished by §768.28(9)(a), Florida Statutes, the sovereign immunity provision.

The district court rejected this reasoning, holding in pertinent part at page 7:

> We find the sovereign immunity statute does not abolish the common law right of recovery upon which the unrelated works exception to the workers' compensation act is based. Section 768.28(9), Florida Statutes, transferred the employee's liability to the state.

(Emphasis supplied.)

The district court expressly recognized that the right of an employee to sue a co-employee for negligent injury existed in

1968 and was a right of access and remedy encompassed by Article I, Section 21, of the Florida Constitution, and concluded its decision as follows:

> Although the instant appellant contends that section 768.28(9), Florida Statutes has completely abolished the right of recovery for the negligence of a coemployee engaged in unrelated work, the legislature could not have intended to abolish that right of recovery without providing an adequate alternative remedy.
>
> Moreover, several courts have examined the constitutionality and scope of § 768.28(9), Florida Statutes, and have found that § 768.28(9) did not abolish the right of an injured person to sue and recover based on the liability of a negligent employee; it merely required that the action be maintained against the public employer as the sole, substitute defendant. *White v. Hillsborough County Hospital Authority*, 448 So.2d 2, 3 (Fla. 2d DCA 1983); *Bryant v. Duval County Hospital Authority*, 459 So.2d 1154, 1155 (Fla. 1st DCA 1984). In *White v. Hillsborough County Hospital Authority*, *supra* at 3, the court specifically stated that with regard to a state employee's simple negligence, the injured person's 'cause of action has not been destroyed but has been converted to an action against a state agency.' The court found the legislature merely substituted the state and its agencies, which previously could not be sued because of sovereign immunity, for the individual who could be sued. *Id.* *See also Campbell v. City of Coral Springs*, 538 So.2d 1373, 1374 (Fla. 4th DCA 1989) ('section 768.28(9)(a) does not abolish causes of action. Rather, the statute reasonably arranges and restricts the classes of potential defendants based on the nature of the claims as part of an overall statutory scheme').
>
> In the instant case, the trial court's order granting plaintiff's motion for partial summary judgment held DOC liable for the negligence of its employee. Appellees had a cause of action based on the unrelated works

> exception to the workers' compensation exclusivity provision, and the court properly transferred liability from the employee to the state in accordance with § 768.28, Florida Statutes. accordingly, we affirm the trial court's order granting plaintiff's motion for partial summary judgment.

Department of Corrections v. Koch, 582 So.2d 5, 8 (Fla. 1st DCA 1991); *rev. den.* 592 So.2d 679 (Fla. 1991).

Thus, the court in Koch, supra, clearly and properly recognized the right of action under Section 440.11(1), Florida Statutes, against an "unrelated works" co-employee remained in full force and effect, with the public employer as statutory substitute defendant under Section 768.28(9), Florida Statutes, merely stepping into the shoes of its negligent employee. This Court may note that in three full, intervening years of legislative sessions since the clear 1991 pronouncements of Department of Corrections v. Koch, supra, the legislature has not found necessary or enacted any pertinent revisions of the statutes therein considered, construed and applied.

The decision of the district court in the instant case is entirely correct and consistent under a proper reading of existing law. In these proceedings the district court held, in pertinent part:

> Section 440.11(1), Florida Statutes (1991), provides that workers' compensation is not a claimant's exclusive remedy as to liability of a fellow employee 'when each is operating in the furtherance of the employer's business but they are assigned primarily to *unrelated works* within private or public employment' (emphasis added). Thus, any claimant may bring a civil action against a fellow employee where it is shown that the two were engaged in unrelated works.

> The effect of section 440.11(1) when the claimant is a public employee is to open the governmental employer to civil liability in addition to its workers' compensation obligations. That is because, in the case of a public employee, the government employer steps into the shoes of the liable fellow employee. § 768.28, Fla.Stat. (1991). Thus, it is not inconsistent for Duffell, a public employee, both to accept workers' compensation benefits, and to seek relief in a civil suit. By taking the latter action, he is simply asserting a right afforded to all employees by the Legislature, pursuant to section 440.11(1). *See, e.g., Department of Corrections v. Koch*, 582 So.2d 5 (Fla. 1st DCA), *rev. denied* 592 So.2d 679 (Fla. 1991) (an injured employee of a governmental entity may sue the governmental entity in a civil action, despite the occurrence of the injury in the workplace, so long as the injured employee does not work in a job related to the tortfeasor's job).
>
> Based on the foregoing, the order of the trial court denying the Board's motion for summary judgment is affirmed.

Holmes County School Board v. Duffell, 630 So.2d 639, 640 (Fla. 1st DCA 1994). (Emphasis supplied.)

Thus, properly viewed, neither Department of Corrections v. Koch, supra, nor Holmes County School Board v. Duffell, supra, represent some strange or legally unjustified "loophole" as characterized by petitioner and supporting amicus curiae.

They represent, rather, proper recognition that as to private and public employees the legislature expressly and intentionally excluded from workers' compensation limitations and left intact an employee's separate and independent common law right of cause of action and tort remedy for negligent injury by a co-employee assigned to unrelated works. That is what the legislature

intended when it clearly provided in Section 440.11(1), in pertinent part, that:

> Such fellow-employee immunities shall not be applicable . . . to employees of the same employer when each is operating in furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

(Emphasis supplied.)

The decisions represent, also, proper recognition that the legislature did not in 1980 surreptitiously abolish this separate and independent cause of action against negligent "unrelated works" public co-employees, by providing in pertinent part in Section 768.28(9), Florida Statutes, that:

> The exclusive remedy for injury or damages suffered as a result of any act, event or omission of any . . . employee . . . of the state, or its subdivisions . . . shall be by action against the governmental entity. . . .

(Emphasis supplied.)

The decisions complained of by petitioner are entirely correct in recognizing and holding that under Section 768.28(9), Florida Statutes, the separate, independent cause of action and right of tort remedy continues in existence. The legislature merely chose to restrict the action and right of remedy to "an action against the governmental entity" as a substitute defendant and obligor for the tort liability of the "unrelated works" co-employee.

What petitioners and supporting amicus curiae overlook, or attempt to obscure, is the public employer's own liability to its injured employee which arises from the "employer-injured employee" employment relationship is fully encompassed, protected

and limited by the worker's compensation "exclusive remedy." In this respect, public employers and employees are on exactly the same footing as are private employers and employees.

The above-cited decisions accomplish the same equal footing for public and private employees as to the separate, non-workers' compensation right of redress for injury by public or private "unrelated works" co-employees. Public and private employees retain the same separate and independent right of action, redress and remedy. The state has merely chosen by Section 768.28(9), Florida Statutes, to command that the public employee's independent action be maintained against the governmental entity (as substitute defendant), and limited in amount of recovery by Section 768.28(5), Florida Statutes.

From the foregoing it is clear that under a proper statutory interpretation of Sections 440.11(1) and 768.28(9), Florida Statutes, the decision below is entirely correct and must be affirmed. The applicable statutes were properly construed and interpreted in Department of Corrections v. Koch, 582 So.2d 5 (Fla. 1st DCA 1991); *rev. den.* 592 So.2d 679 (Fla. 1991), and were properly applied below by the district court.

D. PETITIONER'S STATUTORY INTERPRETATION WOULD VIOLATE ACCESS TO COURTS, ARTICLE I, SECTION 21, FLORIDA CONSTITUTION.

There is no question whatsoever that the right of an injured employee, public or private, to receive workers' compensation benefits from the employer existed in 1968 at the time of adoption of Article I, Section 21, Florida Constitution.

It is equally without question that prior to and in 1968 the employee, public or private, had the separate, independent right, outside of and in addition to workers' compensation remedies, to sue a fellow employee for negligently caused injury. District School Bd, of Lake County v. Talmadge, 381 So.2d 698, 700 (Fla. 1980); Frantz v. McBee Co., 77 So.2d 796 (Fla. 1955); Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938).

It is equally clear that, as to co-employees engaged in "unrelated works within private or public employment," the legislature has not provided or intended that workers' compensation remedies are or shall be a reasonable alternative to the pre-existing right of access, suit and tort remedy. §440.11(1), Fla. Stat. Indeed, the legislature has expressly exempted the preexisting common law right of action and liability between "unrelated works" co-employees from the workers' compensation system and its command of "exclusive remedy" for injury suffered.

This express legislative exclusion clearly distinguishes the instant "unrelated works" circumstance from that considered in Eller v. Shova, 630 So.2d 537 (Fla. 1993), wherein the legislature in 1988 expressly provided in Section 440.11(1), Florida Statutes, that employer immunity would apply to managerial employees unless the conduct was a violation of law for which the employee could be imprisoned for more than 60 days. For access to courts analysis, Eller v. Shova, 630 So.2d 537 (Fla. 1993), is further distinguished by the fact that the 1988 amendment to Section 440.11(1) therein approved was legislatively intended to address (and revise) this

Court's 1987 interpretation in Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987), of a 1981 amendment to Section 440.11(1), Florida Statutes, which for the first time expanded managerial employee liability outside workers' compensation remedies.

Thus, in Eller v. Shova, supra, the right of action against managerial co-employees (in addition to workers' compensation remedies) was not clearly recognized until 1987 (Streeter v. Sullivan); was a product of 1981 legislation; and was clearly intended by the 1988 amendment of Section 440.11(1), Florida Statutes, to be supplanted or replaced by workers' compensation "exclusive" remedies. No such circumstances exist herein. The right of action against an "unrelated works" co-employee existed prior to 1968, and by Section 440.11(1), Florida Statutes, the legislature has expressly provided that said right of action is not supplanted or replaced by workers' compensation remedies or immunities.

This Court, in Eller v. Shova, supra, revisited the "access to courts" requirements of Article I, Section 21, Florida Constitution, as announced in Kluger v. White, 281 So.2d 1 (Fla. 1973); Smith v. Department of Insurance, 507 So.2d 1080, 1087-1089 (Fla. 1987); and Psychiatric Associates v. Siegel, 610 So.2d 419 (Fla. 1992).

In Eller v. Shova, supra, this Court summarized the access to courts requirements of Article I, Section 21, as follows at page 542:

> As indicated previously, under Kluger the legislature may not abolish a pre-1968 common law right or statutory cause of action unless a reasonable alternative to that action is provided or unless an overwhelming public necessity exists for abolishing the right or action.

Since the right of an employee to sue an "unrelated works" co-employee for negligence (separate from and in addition to workers' compensation remedies from the employer) existed in 1968, the next issue or question under Eller, supra, is whether, upon alleged abolishment, the legislature provided a reasonable alternative to the action, and if so, just what the "reasonable alternative" was.

In this respect, it is first apparent that workers' compensation benefits from the employer could not conceivably constitute a "reasonable alternative" for abolishment of a right of action against "unrelated works" co-employee in 1980. In 1968, and at all times prior to 1980, the employee injured by negligence of an "unrelated works" co-employee already had both the right to receive workers' compensation benefits from the employer and the separate and independent right to sue and recover in tort from the "unrelated works" co-employee. Thus, prior to and in 1980, the employee already possessed the full entitlement to workers' compensation benefits, and such pre-existing benefits were not provided or added as a 1980 "alternative" to the right of action against the "unrelated works" co-employee.

In this evaluation this Court may also take notice of the terms of Chapter 80-271, Laws of Florida, wherein was adopted the

amendment to Section 768.28(9), Florida Statutes, requiring the public employer to be substituted as defendant in any action for negligence of its public employee. It is this provision that petitioner contends removed or abolished the "separate works" right of action for public employees under Section 440.11(1), Florida Statutes. For the convenience of the Court, a copy of Chapter 80-271, Laws of Florida, is included as appendix to this brief.

In review of Chapter 80-271, Laws of Florida, this Court will first note that nowhere in either the title or text is the subject of workers' compensation or workers' compensation remedies even mentioned. Nowhere is there any notice or suggestion of legislative intention to revise or amend Section 440.11(1), Florida Statutes, or the intention to revise, limit or abolish the statutory preservation therein of the independent right of action against a co-employee assigned to "unrelated works within private or public employment."

This Court may further notice that Section 1 of Chapter 80-271, amending Section 768.28(9), Florida Statutes, to require that the public employer be sued in the stead of the employee, the legislature did provide an alternative to an action against the public employee for his negligence, but the alternative expressly provided was "by action against the governmental entity" for said public employee's negligence. Again, there is no suggestion that pre-existing workers' compensation remedies were legislatively intended as an alternative, but rather a right of "action" against

the public employer for such negligence of its employee was provided.

Finally, this Court may note the express authorization in Section 3 of Chapter 80-271, amending Section 111.071, Florida Statutes, to provide for use of public funds to pay any "judgment," including damages, costs and attorney's fees arising from a complaint based upon the public employee's act or omission of action. The section expressly contemplates actions filed under Section 768.28, Florida Statutes, "as a tort claim."

Thus, it is clear that the legislative alternative provided for an action directly filed against a negligent "unrelated works" public employee was a tort action under Section 768.28(9) against the public employer as substitute defendant for said negligence, with "judgments" for "damages" to be paid from public funds, limited by Section 768.28(5), Florida Statutes. Chapter 80-271, Laws of Florida (see appendix hereto). The express waiver of sovereign immunity for such claims could not possibly be more clear.

From the foregoing it is clear that petitioner's contentions and interpretations respecting the 1980 amendment to Section 768.28(9), Florida Statutes, are without merit. Review of Chapter 80-271, Laws of Florida, directly refutes the interpretation and effect championed by petitioner and supporting amicus curiae.

Equally important, however, is the inescapable truth that petitioner's interpretation would fail both legs of the Article I,

Section 21, "access to courts" test set forth by this Court in Eller v. Shova, 630 So.2d 537, 542 (Fla. 1993).

As to the requirement that, in abolishing a 1968 existing cause of action the legislature must provide a reasonable alternative for the abolished action, workers' compensation benefits from the employer cannot be viewed as a legislatively provided alternative because (1) in 1980 employees such as respondent already fully possessed the entitlement to such benefits, so their availability represents absolutely nothing in replacement or alternative for the 1980 "abolishment" and (2) nowhere in Chapter 80-271, Laws of Florida, did the legislature even suggest an intent to provide pre-existing workers' compensation benefits from the public employer as an alternative to the right of direct action against a public employee assigned to "unrelated works."

Finally, as to the possibility of "overwhelming public necessity" existing to authorize the abolishment petitioner urges, this Court will note the complete absence in Chapter 80-271 of any finding of such "overwhelming public necessity" therein, as well as complete absence of any suggestion that such was the basis or predicate for the legislative act.

Amicus curiae The Academy of Florida Trial Lawyers, therefore, respectfully submits that not only is petitioner's interpretation and effect of the 1980 amendment to Section 768.28(9), Florida Statutes, without merit and erroneous, said interpretation would render the statute directly violative of

Article I, Section 21, Florida Constitution, as interpreted and applied in Kluger v. White, supra; Eller v. Shova, supra, and numerous other decisions of this Court.

For the foregoing reasons, the decision of the district court should be affirmed as to the interpretation, application and operation of Sections 440.11(1) and 768.28(9), Florida Statutes, where a public employee is injured by the negligence of a public co-employee who is assigned to unrelated works. By this means, the obvious intent and language of the legislature will be effectuated; the commands of Article I, Section 21, Florida Constitution, will be observed and adhered to; and public employees will be accorded and possessed of equal rights of action as employees in the private sector, rather than relegated to inferior or second-class rights and status.

Answer Point II

THE RECEIPT OF WORKERS' COMPENSATION REMEDIES FROM AN EMPLOYER FOR THE EMPLOYER'S LIABILITY FOR INJURY DOES NOT CONSTITUTE ELECTION OF EXCLUSIVE REMEDY, OR ESTOPPEL, FOR A SEPARATE ACTION FOR AN "UNRELATED WORKS" CO-EMPLOYEE'S LIABILITY FOR NEGLIGENCE (§440.11(1), FLA STAT.).

Amicus curiae will not reiterate, in this point, all the preceding analysis and authorities establishing that, for negligence of an "unrelated works" co-employee, the workers' compensation remedies from an employer are not exclusive, and the injured employee may maintain a separate suit arising from, and asserting tort liability for, the "unrelated works" co-employee's negligence (§440.11(1), Fla. Stat.).

In the private sector, such a separate action may be maintained directly against the "unrelated works" co-employee (§440.11(1), Fla. Stat.), while in the public sector such a separate action is required to be maintained against the public employer as a statutory substitute defendant, which stands in the shoes of the negligent "unrelated works" employee (§768.28(9), Fla. Stat.).

Petitioner and supporting amicus curiae, while not conceding the foregoing, further contend that under the dictates of Mandico v. Taos Const. Co., 605 So.2d 850 (Fla. 1992), the mere receipt of workers' compensation benefits from a public employer for its employer liability constitutes an election of exclusive remedy and estoppel as to the right of action for the separate

liability of the "unrelated works" co-employee. But see, Wright v. Douglas N. Higgens, Inc., 617 So.2d 460 (Fla. 3d DCA 1993).

Indeed, this Court's decision in Mandico v. Taos Const. Co., supra, was the sole authority cited and offered by petitioner as conflicting with the lower court's decision herein [630 So.2d 639 (Fla. 1st DCA 1994)], and preliminary determination of the existence of express and direct conflict with Mandico, supra, was presumably the jurisdictional basis for exercise of discretionary jurisdiction. No other basis was presented or urged by petitioner.

This Court's decision in Mandico v. Taos Const. Co., supra, clearly addressed and was based upon different statutory provisions of Section 440.11(1), Florida Statutes. In footnote 1 at page 851 this Court quoted the statutory provisions under review which led to the Court's holding that pursuit and acceptance of workers' compensation remedies from the employer constituted an election of exclusive remedies which immunized the employer and negligent employee from separate suit. The statutory provision was as follows:

> 1. Section 440.11, Florida Statutes (1983), provides in pertinent part:
>
> **440.11 Exclusiveness of liability.--**
>
> (1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to . . . the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this

> chapter, an injured employee . . . may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. . . . 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. . . .

Thus, in Mandico v. Taos Const. Co., supra, the case involved statutory provisions under which the negligent co-employee did enjoy the same immunities, and exclusive remedy protections as the employer. The only remedy available to appellant Mandico under those workers' compensation statutory provisions from either was the exclusive remedy of workers' compensation benefits.

This Court, therefore, properly held that when Mandico, an independent contractor, elected to seek and secure workers' compensation benefits for his injury from the employer, he had elected to forgo or waived any right to then also sue on an assertion that since he was an independent contractor his injury was not covered by workers' compensation. Whether viewed as election of remedies or estoppel, this Court properly held that Mandico could not assert against the employer that his injury was covered by workers' compensation and secure workers' compensation recovery for the employer's liability, and then claim his injury was not covered by workers' compensation to secure tort recovery for the same employer's liability.

In Mandico v. Taos Const. Co., supra, however, there was no allegation or suggestion of non-workers' compensation liability of the negligent co-employee as an employee assigned to unrelated works. The additional provision of Section 440.11(1), Florida Statutes, dealing with, and expressly preserving right of action as to co-employees assigned to "unrelated works," was neither advanced, nor considered by this Court, in Mandico v. Taos Const. Co., supra.

The additional provision of Section 440.11(1), Florida Statutes, which was inapplicable in Mandico, supra, and, therefore, neither quoted nor considered by this Court, commands in pertinent part:

> Such fellow-employee immunities shall not be applicable . . . to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

Thus, in the instant circumstance where the negligent co-employee was assigned to "unrelated works," the injured worker has two separate rights of recovery where his injury is covered by workers' compensation. The employee may seek and secure workers' compensation remedies from the employer and may also, and in addition, under Section 440.11(1), seek and recover tort remedies from his "unrelated works" co-employee. The legislature in Section 440.11(1), Florida Statutes, has expressly recognized and provided that the two liabilities (of employer and negligent "unrelated works" co-employee) are independent and coexistent. The enjoyment of recovery and remedy for one does not exclude the other!

As treated fully in preceding Point I, that the legislature in 1980, by Section 768.28(9), Florida Statutes, chose to substitute the public employer as statutory defendant in tort actions for its employee's negligence, does not alter the fact that under Section 440.11(1), Florida Statutes, tort liability arising from the negligence of the "unrelated works" co-employee does not come within the "exclusive remedy" immunity, and continues to exist as a separate, independent cause of action in tort even if the injured employee is entitled to workers' compensation benefits from the employer.

From the foregoing it is apparent and clear that in Mandico v. Taos Const. Co., 605 So.2d 850 (Fla. 1992), this Court did not consider or address the provision of Section 440.11(1), Florida Statutes, which is applicable and determinative in these proceedings. This Court did not consider or address either election of remedies or estoppel in the context of the "unrelated works" exception to "exclusive remedies," where separate, independent rights to seek and secure workers' compensation remedies (from the employer) and tort recovery for liability of the "unrelated works" co-employee co-exist.

Amicus curiae respectfully submits that for the foregoing reasons Mandico v. Taos Const. Co., supra, neither conflicts with the decision of the district court below, nor provides authority for reversal of same.

Mandico, supra, in its election of exclusive remedy and estoppel holdings, turned on the proper view that the injured

employee could not claim that his injury was within workers' compensation for purpose of those benefits and outside it for tort suit on the same employer liability.

Here, however, by Section 440.11(1), Florida Statutes, in the limited but expressly excluded circumstance of co-employees assigned to "unrelated works," the legislature has excluded from exclusive remedy, and recognized, separate liabilities and rights of action and remedy as to the employer and the unrelated works co-employee. The remedies are not exclusive. Acceptance of one remedy (workers' compensation benefits) does not constitute election or estoppel as to the other (tort remedy as to co-employee's liability for negligence).

Amicus curiae, therefore, respectfully submits that under a proper extension of the analysis by this Court in Mandico v. Taos Const. Co., supra, to include consideration of the "unrelated works" provisions of Section 440.11(1), Florida Statutes, the decision of the lower court is entirely correct and should be affirmed. Amicus curiae further respectfully submits that since Mandico v. Taos Const. Co., supra, neither considered nor addressed the controlling "unrelated works" provision of Section 440.11, Florida Statutes, or the statutorily commanded substitution of defendant's under Section 768.28(9), Florida Statutes, said decision does not present the required express and direct conflict on the same issue of law with the decision below, and jurisdiction for review was improvidently granted.

CONCLUSION

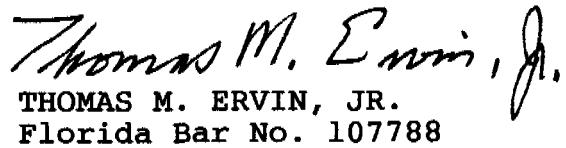
Amicus curiae, The Academy of Florida Trial Lawyers, respectfully submits that the decision of the lower court is entirely correct and must be affirmed.

The right of a public employee to collect workers' compensation benefits from his employer and seek and secure tort recovery from a negligent co-employee existed in 1968 and was expressly preserved, as to co-employees assigned to unrelated works in the 1978 amendment to Section 440.11(1), Florida Statutes.

The 1980 amendment to Section 768.28(9), Florida Statutes, did not abolish this separate right and cause of action, but merely required that the public employer be made the substitute defendant for the negligent public employee. That amendment did not even mention or reference workers' compensation law; provided no alternative remedy for the right of tort action against co-employees except tort action against the substitute defendant public employer; and would be violative of Article I, Section 21, Florida Constitution, if read to abolish the public employee's right of action with only, as alternative, the right to workers' compensation remedies the employee already fully enjoyed prior to abolition.

This Court should affirm the decision below.

Respectfully submitted,



THOMAS M. ERVIN, JR.
Florida Bar No. 107788
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
Post Office Drawer 1170
Tallahassee, FL 32301
(904)224-9135

ATTORNEY FOR AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL
LAWYERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to the following counsel this 15TH day of August, 1994:

BARRY GULKER, ESQ.
Caminez, Walker & Brown
1637-B Metropolitan
Tallahassee, FL 32308

ATTORNEYS FOR RESPONDENTS

MICHAEL S. DAVIS, ESQ.
Assistant County Attorney
111 N.W. 1st Street
Suite 2810, Metro-Dade Center
Miami, FL 33128

ATTORNEY FOR AMICUS CURIAE
METROPOLITAN DADE COUNTY

CRAIG B. WILLIS, ESQ.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

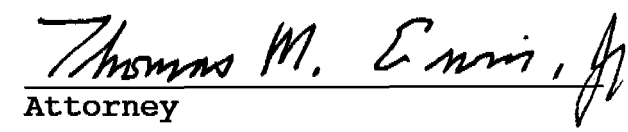
ATTORNEY FOR AMICUS CURIAE
FLORIDA DEPARTMENT OF INSURANCE

MICHAEL W. KEHOE, ESQ.
Fuller, Johnson & Farrell
P. O. Box 12219
Pensacola, FL 32581

ATTORNEYS FOR PETITIONER

J. RILEY DAVIS, ESQ.
Katz, Kutter, Haigler, Alderman,
Marks & Bryant, P.A.
Highpoint Center, Suite 1200
106 E. College Av.
Tallahassee, FL 32301

ATTORNEYS FOR AMICUS CURIAE
AMERICAN INSURANCE ASSOCIATION



Attorney

APPENDIX TO
ANSWER BRIEF OF AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS

INDEX TO APPENDIX

	Page
Chapter 80-270, Laws of Florida	App. 1-3

550.24 Conniving to prearrange result of race; using medication or drugs on ~~stimulating or depressing~~ horse or dog; penalty.--

(1) Any person who shall influence or have any understanding or connivance with any owner, jockey, groom or other person associated with or interested in any stable, kennel, horse or dog or race in which any horse or dog participates, to prearrange or predetermine the results of any such race, is ~~or any person who shall stimulate or depress a dog or horse for the purpose of affecting the results of a race, shall be~~ guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any person who attempts to affect the outcome of a horse or dograce through administration of medication or drugs to a race animal as prohibited by law, who administers any medication or drugs prohibited by law to a race animal for the purpose of affecting the outcome of a horse or dograce, or who conspires to administer or to attempt to administer such medication or drugs, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 4. This act shall take effect October 1, 1980.

Approved by the Governor June 30, 1980.

Filed in Office Secretary of State July 1, 1980.

CHAPTER 80-271

House Bill No. 1705

An act relating to claims against an officer, employee, or agent of the state or its subdivisions; amending s. 768.28(9), Florida Statutes; providing that an officer, employee, or agent of the state shall not be personally liable or named in any action for injuries or omissions which arise as a result of any act, event, or omission of action within the scope of his employment; providing that complaints shall be presented as a claim against the state and in any litigation on such claim the state shall be joined as a party defendant; amending s. 111.07, Florida Statutes; providing for defense of civil actions arising from claims against an officer, employee, or agent of the state or its subdivisions; amending s. 111.071(1)(a), Florida Statutes; authorizing payment of final judgments in such actions; providing for pending actions; providing severability; amending s. 768.28, Florida Statutes; raising the limits of recovery for certain tort claims or judgments against the state or its political subdivisions or agencies; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (9) of section 768.28, Florida Statutes, is amended to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.--

(9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action ~~for a final judgment which has been rendered against him~~ for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The exclusive remedy for injury or damages suffered as a result of any act, event or omission of any officer, employee, or agent of the state, or its subdivisions or constitutional officers, shall be by action against the governmental entity, or the head of such entity in his official capacity, or constitutional officer of which the officer, employee or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

As used in this subsection, the term "employee" includes any volunteer firefighter.

Section 2. Section 111.07, Florida Statutes, is amended to read:

111.07 Defense of civil actions against public officers, employees, or agents.--Any agency of the state, or any county, municipality, or political subdivision of the state is authorized to provide an attorney to defend any civil actions arising from a complaint for damages or injury, suffered as a result of any act or omission of ~~brought against~~ any of its officers, employees, or agents for acts or omissions arising out of and in the scope of their employment or function, unless, in the case of a tort action, such officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Defense of such civil actions shall include, but not be limited to, any civil rights lawsuit seeking relief personally against such officers, employees, or agents for acts or omissions under color of state law, custom, or usage, wherein it is alleged that such officer, employee, or agent has deprived another person of his rights secured under the federal constitution or laws. Legal representation of an officer, employee, or agent of a state agency may be provided by the Department of Legal Affairs. If any agency of the state or any county, municipality, or political subdivision of the state is authorized pursuant to this section to provide an attorney to defend a civil action arising from a complaint for damages or injury suffered as a result of any act, or omission of action of any of ~~brought against~~ its officers, employees, or agents and fails to provide such attorney, then said agency, county, municipality, or political subdivision shall reimburse any such defendant who prevails in the action for court costs and reasonable attorney's fees. "Agency of the state" or "state agency" as used in s. 111.071 shall include the executive departments, constitutional officers, the Legislature, and the judicial branch.

Section 3. Para
Florida Statutes, i

111.071 Payment
employees, or age
subdivision, or cer

(1) Any county,
the state which has
Risk Management Tru
pay:

(a) Any final
attorney's fees, ar
suffered as a resu
officer, employee,
or civil rights la
arises under s.
provisions of s. 76
is a civil rights a
federal statutes, p
made unless the off
the final judgment

Section 4. This
trial or appellate
to all actions ther

Section 5. Shou
phrase, or other pa
jurisdiction to b
not affect the vali
act not declared in

Section 6. This

Approved by the

Filed in Office

An act relating
s. 629.401
of one o
periods
constitutio
Insurance
Legislature
initial boa
Governor
House of
Senate an
one appoin
Senate and
applicatio
of the

Section 3. Paragraph (a) of subsection (1) of section 111.071, Florida Statutes, is amended to read:

111.071 Payment of judgments or settlements against officers, employees, or agents of any county, municipality, political subdivision, or certain agencies of the state.--

(1) Any county, municipality, political subdivision, or agency of the state which has been excluded from participation in the Insurance Risk Management Trust Fund is authorized to expend available funds to pay:

(a) Any final ~~personal~~ judgment, including damages, costs, and attorney's fees, arising from a complaint for damages or injury suffered as a result of any act or omission of action of ~~against~~ any officer, employee, or agent ~~held to be personally liable~~ in a civil or civil rights lawsuit described in s. 111.07. If the civil action arises under s. 768.28 as a tort claim, the limitations and provisions of s. 768.28 governing payment shall apply. If the action is a civil rights action arising under 42 U.S.C. s. 1983, or similar federal statutes, payments for the full amount of the judgment may be made unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally.

Section 4. This act shall apply to all actions pending in the trial or appellate courts on the date this act shall take effect and to all actions thereafter initiated.

Section 5. Should any section, paragraph, sentence, clause, phrase, or other part of this act be declared by a court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect the validity of this act as a whole or the parts of this act not declared invalid or unconstitutional.

Section 6. This act shall take effect upon becoming a law.

Approved by the Governor June 30, 1980.

Filed in Office Secretary of State July 1, 1980.

CHAPTER 80-272

House Bill No. 1745

An act relating to the Florida Insurance Exchange; amending s. 629.401, Florida Statutes, authorizing the creation of one or more insurance exchanges; modifying time periods regarding transmitting the proposed constitution and bylaws of the exchange to the Insurance Commissioner and Treasurer and to the Legislature; increasing the size and composition of the initial board of governors of any exchange, giving the Governor three appointments and the Speaker of the House of Representatives and the President of the Senate an additional appointment each; providing for one appointment each by the minority leaders of the Senate and House of Representatives; providing for application of certain laws; providing for regulation of the exchange by the Department of Insurance;